

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy
("Eversource") for a Certificate of Site and Facility for the Construction of a New 115 kV
Transmission Line from Madbury Substation to Portsmouth Substation

**COUNSEL FOR THE PUBLIC'S MOTION TO STRIKE
NHDES'S OCTOBER 29, 2018 REVISED FINAL DECISION**

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this Motion to Strike the October 29, 2018 Revised Final Decision submitted by the New Hampshire Department of Environmental Services ("NHDES"). In support of this motion, Counsel for the Public states as follows:

1. Pursuant to RSA 162-H:7, VI-c, and within the statutory timeframe as extended by the Subcommittee, NHDES issued a "final decision on the parts of the application that relate to its permitting and other regulatory authority" on February 28, 2018 (the "Final Decision").
2. As set forth in more detail in Counsel for the Public's ("CFP") contemporaneously filed Response to the Joint Motion to Strike, incorporated herein by reference, NHDES had no authority to revise the Final Decision.
3. Allowing state agencies to revise "final decisions" would be contrary to the express language of the statute and render the legislature's use of the word "final" in RSA 162-H:7, VI-c meaningless. Moreover, unilateral revision of a state agency's "final decision" infringes on the SEC's express statutory authority to decide whether to grant a Certificate of Site

and Facility (a "Certificate") and to determine what reasonable conditions to impose on the grant of any Certificate.

4. The interplay between state agencies with permitting or regulatory authority and the SEC within the SEC process is carefully prescribed by the statute. The statute contemplates that state agencies with permitting or regulatory authority will have the first opportunity to set out the terms and conditions of approval "on the parts of the application that relate to [the agency's] permitting and other regulatory authority." RSA 162:H:7, VI-c.

5. The statute further requires that the SEC "shall incorporate in any certificate such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility." And, unless the SEC follows the procedures set out in RSA 162-H:7-a, I(e) to deviate from the conditions proposed in a state agency's "final decision," the SEC is required to include the "final decision" conditions in any Certificate that is issued.

6. At the same time, the statute places the ultimate authority to decide whether or not to issue a Certificate, and what conditions to impose on any Certificate, with the SEC. Pursuant to RSA 162-H:4, I, the SEC shall: "(a) Evaluate and issue any certificate under this chapter for an energy facility;" and "(b) Determine the terms and conditions of any certificate issued under this chapter." *See also* RSA 162-H:16, VI (authorizing the SEC to impose "such reasonable terms and conditions . . . as the committee deems necessary . . .").

7. Reading these provisions together, the statute clearly contemplates a procedure whereby state agencies with permitting or regulatory authority make a "final decision," the Applicant and intervenors have the opportunity to present evidence and make arguments

regarding the appropriateness and scope of the conditions proposed by each agency “final decision,” and the Subcommittee then deliberates on the entirety of the evidence and makes the ultimate decision to either deny or grant a Certificate and to impose necessary conditions.

8. NHDES’s Revised Final Decision contravenes the statutory scheme in three ways. First, NHDES has no statutory authority to revise its “final decision,” and any action purporting to do so is *ultra vires*. See *Formula Dev. Corp. v. Town of Chester*, 156 N.H. 177, 182 (2007) (noting that administrative rules that added to, detracted from, or modified the Court’s interpretation of a statute were *ultra vires*).

9. Second, permitting a state agency to revise a “final decision” would improperly elevate the new provisions to the status of “terms and conditions specified” by a state agency that must be incorporated into a Certificate unless the Subcommittee follows the RSA 162-H:7-a, I(e) procedure. This infringes on the SEC’s authority to make the ultimate decision of whether to grant a Certificate and what conditions to include by taking the decision away from the SEC with regard to the new agency conditions.

10. Third, revising a state agency “final decision” after the parties have submitted final testimony interferes with the parties rights “to respond and present evidence and argument on all issues involved.” RSA 541-A:31, VI. This is especially the case where, as here, the “Revised Final Decision” is issued after the conclusion of the adjudicatory hearings and after the close of the record.

11. While the parties have had an opportunity to present evidence and argument on the Applicant’s proposed amendments to the “Final Decision” and on NHDES’s August 31, 2018 response setting out its position on the Applicant’s proposals, that opportunity was in the context of the Subcommittee making the final decision on whether to deviate from the original “Final

Decision” conditions. Converting those proposed amendments into a “Revised Final Decision” by NHDES fundamentally alters the status of the conditions and changes the Subcommittee’s review thereof.

12. Accordingly, Counsel for the Public submits that the October 29, 2018 Revised Final Decision, submitted to the Subcommittee as Committee Exhibit 12c and 12d, are *ultra vires*, contrary to RSA ch. 162-H, and should be stricken from the record.

13. As set out in Counsel for the Public’s contemporaneous Response to the Joint Motion to Strike, the substance of the “Revised Final Decision” conditions is not objectionable so long as it is presented as merely an expression of NHDES’s willingness to accept some of the Applicant’s proposed amendments to the “Final Decision.” In that instance, the SEC would retain its authority and responsibility to make the ultimate decision on a Certificate and conditions. However, characterizing the document as a “Revised Final Decision” exceeds the statutory authority of NHDES and contravenes the statutory process and authority of the SEC.

14. The Durham Residents and the Durham Historic Association have indicated their concurrence with the relief requested in this Motion.

15. The Conservation Law Foundation (“CLF”), Durham/UNH and the Town of Newington have indicated that they do not agree with all arguments presented in CFP’s motion but concur with CFP’s primary request for relief, i.e., striking the Revised Final Decision. In providing this limited concurrence, CLF, Durham/UNH and the Town of Newington fully reserve their rights with respect to, and do not waive, the arguments and request for relief in the pending Joint Motion to Strike NHDES’s Post-Final Decision Recommendations and Related Testimony.

16. The Applicant objects to the requested relief.

17. At the time of filing, CFP had not received a response from the Darius Frink Farm; Keith Frizzell, Fat Dog Shellfish Co, LLC, or the Nature Conservancy.

WHEREFORE, Counsel for the Public respectfully requests that the Subcommittee strike NHDES' Revised Final Decision from the record or, in the alternative, clarify that the documents titled "Revised Final Decision" is not the "final decision" of a state agency with permitting or regulatory authority pursuant to RSA 162-H:7, VI-c, and grant such additional relief as may be just.

Respectfully submitted,

COUNCIL FOR THE PUBLIC

By his attorneys



Dated: November 2, 2018

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Certificate of Service

I, Christopher G. Aslin, certify that on this day a true copy of the foregoing has been forwarded to the persons named on the Distribution List in this docket.

Dated: November 2, 2018



Christopher G. Aslin, Esq.