

November 8, 2018

VIA EMAIL ONLY (Pamela.Monroe@sec.nh.gov)
Pamela G. Munroe, Administrator
NH Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**RE: New Hampshire Site Evaluation Committee Docket No. 2015-04
Application of Public Service Company of New Hampshire d/b/a Eversource
Energy for a Certificate of Site and Facility**

Dear Ms. Monroe:

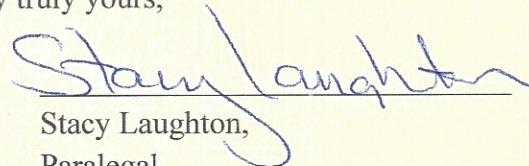
Enclosed for filing in the above-referenced docket is the following:

**TOWN OF NEWINGTON'S OBJECTION
TO MOTION TO REOPEN RECORD**

Copies of this letter and the enclosure have this date been forwarded via email to all parties on the Distribution List.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,



Stacy Laughton,
Paralegal

/sl

Encl (1)

cc: Distribution List (rev. 10/23/18) via email



**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

**Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for Certificate of Site and Facility**

November 08, 2018

OBJECTION TO MOTION TO REOPEN RECORD

NOW COMES the Town of Newington, New Hampshire ("Newington") by and through its undersigned attorneys, and objects to the Motion filed by Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") to reopen the record. Newington states as follows in support of its Objection.

Procedural History

1. On April 12, 2016, Applicant filed an Application for a Certificate of Site and Facility ("Application") which was accepted by the Subcommittee by Order dated June 13, 2016.
2. On October 17, 2016 the Subcommittee issued a Procedural Schedule which was subsequently modified several times.
3. On January 20, 2017 the Applicant filed an Uncontested Motion to Stay the Procedural Schedule. Soon thereafter, DES and DHR requested additional time to complete their respective review of the proposed project.
4. On April 26, 2017, one year after the Applicant filed its Application, the Subcommittee convened a public hearing and voted to extend the deadlines for state agencies to submit final reports to August 1, 2017, and for the final written decision to December 29, 2017. The new deadlines were set forth in an Order dated May 22, 2017.

5. The June 20, 2017 Revised Procedural Schedule established an adjudicative hearing and deliberations schedule beginning in mid-October and ending in early November, 2017.

6. On August 10, 2017, the Applicant again requested a delay in the proceeding by Motion to Postpone Final Adjudicative Hearings in order to address DES concerns over potential impacts of the project on water quality of Little Bay.

7. The Subcommittee granted Applicant's Motion by Order dated August 21, 2017.

8. After convening another public hearing on March 14, 2018, the Subcommittee voted to further extend the December 29, 2017 deadline to reach a final decision stating in its Order dated April 6, 2018: "The procedural schedule in this docket has been extended many times due to no fault of the Subcommittee." The Subcommittee found the reasonable and prudent course was to once again extend the deadline for a final written decision until April 1, 2019.

9. Adjudicative hearings began on August 29, 2018 and continued through October 26, 2018 during which time the Subcommittee heard testimony of Applicant's 21 witnesses and considered approximately 270 exhibits for the Applicant.

10. Upon the completion of the adjudicative hearings on October 26, 2018, the record was closed and the Subcommittee issued an Order on Exhibits and Schedule for Final Briefs on October 31, 2018.

11. Two days later, on November 2, 2018, the Applicant filed a Motion to Reopen the record. Attached to the Motion was an addendum to Applicant's Visual Assessment, APP Ex 051 seeking to supplement the existing record related to scenic resources within the area of potential impact which had been overlooked in the original VA. This is Applicant's third supplement or

amendment to its visual impact assessment. (*See* APP Ex 075, Amended Pre-Filed Testimony of David Raphael dated March 29, 2017, APP Ex 142, Supplemental Pre-Filed Testimony of David Raphael dated July 27, 2018).

12. Throughout the more than two and a half years between the time the Applicant filed its application in April 2016 and the close of the record on October 26, 2018, Applicant continued to supplement its application through responses to state agencies, responses to CFP and Intervenor questions, and responses to Subcommittee requests.

13. Applicant now seeks to reopen the record to submit additional information it has characterized as supplemental to the existing record on, “a very narrow and discrete issue,” concerning “scenic resources known as Determined Eligible Sites.” *See* Applicant’s Motion to Re-open Record, at 2 (Nov. 2, 2018).

Standard of Review

14. Site 202.27(a) provides that “[a] party may request by written motion that the record in any proceeding be re-opened.”

15. In determining whether to reopen the record, it is within the discretion of the presiding officer to first determine whether the proffered “testimony, evidence or argument” is “relevant, material and non-duplicative,” and second, whether it is “necessary for a full consideration of the issues.” Site 202.27 (a), (b).

Argument

16. Applicant admits in its Motion that “sufficient evidence exists in the record” related to “aesthetics including, giving consideration to the subset of scenic resources known as Determined Eligible Sites.” *See* Applicant’s Motion to Re-open Record, at 2.

17. If in fact Applicant has provided sufficient evidence, then the testimony and evidence it seeks to admit through reopening the record must be irrelevant, immaterial or duplicative. Otherwise, presumably, the proffered evidence is necessary in order for the Applicant to meet its burden.

18. Alternatively, if the proffered supplemental materials are relevant and necessary, that begs the question as to why the Applicant failed to conduct the additional Visual Assessment during the two plus years before the close of the record when it clearly did so with other supplemental testimony and evidence up to and through the final day of the adjudicatory hearing.

19. Applicant's attempt to reopen at this stage to ensure "any lingering questions" are "addressed unequivocally" is not the standard that the presiding officer should consider and if it were, then the finality of the record would be meaningless.

20. Moreover, prior SEC proceedings are not precedential nor determinative of whether the Subcommittee should reopen the record in this instance. SEC rulings as required by statute, are decided on a case by case basis; as the New Hampshire Supreme Court said, "an administrative agency is not disqualified from changing its mind."¹

21. Even if prior SEC proceedings were determinative, Applicant's reliance on those cited in its Motion are clearly distinguishable. For example, in *Application of Granite Reliable Power, LLC*, Docket 2008-04, the Subcommittee's basis for reopening the record is grounded in its own request for additional information from the Applicant in connection with both a mitigation settlement agreement and assessment of the relevancy of a turbine failure in another project location. See *Order Granting Motion to Re-Open, in Part, Temporarily Suspending*

¹ 22 *Appeal of Pub. Serv. Co. of N.H.*, 141 N.H. 13, 22 (1993) (citing and quoting *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)) (holding that historic interpretations of issues do not bind agency from adopting a new interpretation when facts warrant).

Deliberations, Enlarging Time Frames and Setting Procedural Schedule, Docket 2008-04 (May 8, 2009).

22. While the Applicant is correct in summarizing why the Subcommittee declined to grant an intervenor's motion to re-open, the Subcommittee's speculation on what might have been sufficient grounds in that instance on that set of facts and with those parties is hardly applicable here.

23. Similarly, in *Application of Antrim Wind Energy, LLC, Order on Pending Motions*, Docket 2012-01 (Sept. 10, 2013), Applicant points to rationale that the Subcommittee in that proceeding *might* have found acceptable for reopening the record in order to distinguish it from what had been presented as a basis for the request to reopen. Distinguishing between what might have been acceptable there is simply not a basis on which to decide the relevancy and necessity of reopening the record here. Each and every case is and should be fact and circumstance specific as the New Hampshire Supreme Court has made clear. *Appeal of Pub. Serv. Co. of N.H.*, 141 N.H. 13, 22 (1993).

24. In sum, Applicant's request to reopen the record should be denied.

Alternative

25. In the event that the Subcommittee decides to reopen the record, then Newington requests the subcommittee set the maximum time allowable pursuant to Site 202.27 (c), as the deadline by which other parties must respond to or rebut the new information, and further, requests that the other parties be accorded due process for such response and rebuttal, including discovery, cross examination, and the right to present witnesses.

26. Newington is cognizant that the Subcommittee is diligently working to maintain an efficient and orderly proceeding at the tail end of this lengthy proceeding. However, rushing

to complete the acceptance of new evidence and submitting post-hearing legal memorandum in the timeframe the Applicant suggests in its Reply to Newington's Motion for Extension of Deadline to File Briefs, is neither fair nor efficient. Especially when, as the Subcommittee has already observed, so many of the delays were brought on by the Applicant itself.

Conclusion

27. The Applicant has not shown that the proffered materials are relevant, material and non-duplicative, and necessary for a full consideration of the issues.

28. If the Subcommittee nevertheless decides to reopen the record, then the parties must be given an opportunity to review, cross-examine and rebut in a timeframe that provides for full and complete review of the proffered new materials and a new timeframe in which to file post-hearing legal memorandum.²

29. Intervenors take the following positions on this request:

CLF:	Did not respond to a request for their position.
Durham Residents:	Concur
Durham/UNH:	Concur
Durham Historic Association:	Concur
Helen Frink:	Concur
Fat Dog Shellfish:	Did not respond to a request for their position.
Keith Frizzell:	Did not respond to a request for their position.

30. CFP takes no position on the Objection. However, CFP does concur with Newington's requested alternate relief.

WHEREFORE, Newington respectfully requests that the Committee:

A. Deny Eversource's Motion or in the alternative, if granted, set forth a hearing and new briefing deadlines; and

² A suggested timeframe could be as follows: November 27, hearing on new evidence and testimony. All Parties briefs due 14 days following the re-closure of the record.

B. Grant such further relief as the Committee deems appropriate.

Respectfully submitted,

Town of Newington
By Its Attorneys
BCM Environmental & Land Law, PLLC

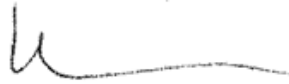


Dated: November 8, 2018

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Certificate of Service

I hereby certify that on this 8th day of November, 2018, a copy of the within Objection was sent to the Service List via electronic mail.



Elizabeth A. Boepple, Esq.