STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-06

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility

COUNSEL FOR THE PUBLIC'S RESPONSE TO APPLICANTS' MOTION FOR REHEARING AND REQUEST TO VACATE

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby responds to the Applicants' Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations (the "Motion").

INTRODUCTION

The Applicants' Motion faults the Subcommittee's oral vote to end deliberations and deny a site certificate because Applicants claim the Subcommittee was required to deliberate on each statutory requirement under RSA 162-H:16, IV prior to voting on the application. The Applicants' Motion is premature because the Subcommittee has not yet issued its official written decision on this matter. Accordingly, the Subcommittee should deny it without consideration of its merits but also without prejudice to the Applicants right to refile or to file with changes *after* the Subcommittee has rendered its written decision.

While Counsel for the Public reserves his right to respond to the substantive issues raised by Applicants' Motion,[1] the arguments submitted by Applicants on procedural issues warrant a response expressing the position of Counsel for the Public. The issues addressed below are in no

[1] If Applicants' Motion is not denied as premature and the Subcommittee decides to consider the merits of Applicants' Motion, the Subcommittee should provide Counsel for the Public and Intervenors ten (10) days to file any additional responses and provide Applicants ten (10) days to file any reply.

way comprehensive of the issues raised by Applicants, but are offered to assist the Subcommittee if it considers Applicants' Motion.

ARGUMENT

I. The Applicants' Motion for Rehearing of a Decision That Has Not yet Been Fully Rendered Is Premature and Should Be Denied Without Prejudice.

Site 202.29(c) provides that "[a] motion for rehearing shall be filed within 30 days of the date of a committee decision or order." Site 202.29(d) further requires the motion for rehearing to:

> (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;
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> (2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable;
>
> (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and
>
> (4) Include any argument or memorandum of law the moving party wishes to file.

Site 202.29(b). Site 202.29 specifically directs that "[t]he rules in this section are intended to supplement RSA 541, which requires or allows a person to request rehearing of an order or decision of the committee prior to appealing the order or decision." RSA 162-H:11 likewise directs that "[d]ecisions made pursuant to this chapter shall be reviewable in accordance with RSA 541." RSA 541 in turn permits a party to apply for rehearing by "specifying in the motion all grounds for rehearing," RSA 541:3, and "set[ting] forth fully every ground upon which it is claimed that the decision or order complained of is unlawful and unreasonable." RSA 541:4.

On their face the comprehensiveness required by these rules and statutory provisions contemplate a motion for rehearing only after a full and final decision has been issued by the Subcommittee. As the wide-ranging approach of Applicants' Motion seeking rehearing on the oral deliberations itself demonstrates, without a final written order setting forth the reasoning of

the Subcommittee the Applicants and other parties are forced to speculate as to all of the Subcommittee's reasoning and the substance of its actual decision based on snippets of conversations during the course of extended discussions of various topics. Moreover, the Motion faults the Subcommittee for failing to consider evidence before the parties know everything that the Subcommittee did consider and what aspects of the record the Subcommittee will rely on in rendering its decision.[2]

As anticipated by the relevant rules and statutes, any motion for rehearing of an order or decision of the Subcommittee must first await the actual final order or decision of the Subcommittee. The comprehensiveness called for by the rules and statutory provisions would be defeated by a premature motion such as Applicants' Motion that does not address the ultimate final order or decision not yet rendered, but instead addresses the oral deliberations and oral vote of the Subcommittee.[3]

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[2] One of the faults Applicants levy against the Subcommittee is that it "failed to provide on the record an adequate basis upon which the Supreme Court could review the Subcommittee's decision." Motion at 19. Leaving aside whether or not the Subcommittee's deliberations provide an adequate basis for review, oral minutes alone are not the sole basis for review by the Supreme Court, which is why the Subcommittee ultimately issues a *written* final decision on the merits in due course – as it has promised to do in this docket. *See* Tr. Day 30 AM at pp. 143-44, 148-49 (amending the schedule to include an oral decision by February 28 and "a final written decision issued by March 31, 2018"). Applicants also claim that the Subcommittee has violated their right to due process under both the New Hampshire and United States Constitutions by allegedly being unconstitutionally vague in their oral deliberations, but again Applicants' impatience is no justification for treating the Subcommittee's oral deliberations as its final order and denying the Subcommittee the right to fully explain its decision in its ultimate written order.

[3] Based upon selective quotes from Day 3 of deliberations, where each Subcommittee member summarized their views of the Subcommittee's lengthy discussion on orderly development during the prior day and a half, Applicants argue that the Subcommittee employed an incorrect legal standard. Without a written order signed by each Subcommittee member, Applicants' must speculate as to the Subcommittee's reasoning, by focusing only on selective portions of the Subcommittee members' summarization of their views which demonstrates why Applicants' Motion is premature. The Subcommittee's final written order will be the Subcommittee's "final words on the matter," setting forth the Subcommittee's collective rationale and basis for its members' individual votes. *See New Hampshire Banker's Assoc. v. Nelson*, 113 N.H. 127, 130 (1973). Until that final written order issues, Applicants and any reviewing court cannot determine whether the Subcommittee applied the correct legal standards or whether the Subcommittee committed an error of fact, reasoning or law.

RSA 541:3 provides that a party can only seek rehearing within 30 days of any "order or decision" made by the Subcommittee. The New Hampshire Supreme Court has provided guidance as to what constitutes an "order or decision" under RSA 541. In *In re Countrywide Home Loans, Inc.*, 163 N.H. 139, 142 (2011), the Court considered whether a letter denying the borrower's consumer protection complaint was an "order or decision" denying her complaint or rather a merely informal status letter. The Court determined it was an "order or decision," relying on a prior decision - *New Hampshire Bankers Assoc. v. Nelson*, 113 N.H. 127 (1973). The Court explained that a letter is appealable when it "constitute[s] a final administrative disposition of the issue," and determined that "[t]he crux of the matter is the practical impact of ... the [action]." *In re Countrywide Home Loans, Inc.*, 163 N.H. at 143 (quoting *Nelson*, 113 N.H. at 129). The Court held that the letter at issue in the case before it qualified as an "order or decision" subject to appeal because it "finally foreclosed any further administrative proceeding on a motion for rehearing." *Id.*

While the language suggesting the crux of the matter is the "practical impact of the action" could be read in isolation to permit the Subcommittee's oral vote to constitute an "order or decision," the *Nelson* decision itself provided more clarity on this point by explaining that "[i]nformal letters have been considered appealable agency decisions *when they have constituted a final administrative disposition of the issue*." *Nelson*, 113 N.H. at 130 (emphasis added). Critically, the opinion continued:

> The crux of the matter is the practical impact of the commissioner's letter. The letter denied plaintiff a hearing, not as a mere procedural or interlocutory action, but finally foreclosed any further administrative proceeding on a motion for rehearing under RSA 541:3. *The letter indicated that it was the agency's final words on the matter, thereby making it useless for the plaintiff to continue before the commissioner and leaving the courts as his only recourse.*

Id. (emphasis added).

Here, in stark contrast, the Subcommittee has expressly informed the parties that an official written order will be forthcoming. *See* Tr. Day 30 AM at pp. 143-44, 148-49 (amending the adjudicatory schedule to include an oral decision by February 28 and "a final written decision issued by March 31, 2018"). The Subcommittee has *itself* unequivocally stated that the oral vote made during public deliberations is not the "final words on the matter."

Although this appears to be the first time this issue has arisen before the Site Evaluation Committee (the "SEC"), there is analogous precedent from the Public Utilities Commission (the "PUC"). In *In re New England Elec. Sys.*, 84 N.H. P.U.C. 502 (1999) the PUC denied a motion for rehearing "as premature, without prejudice to its reassertion" with respect to the eventual actual final order. *Id.* at *12. The PUC explained that "[o]ral deliberations, even when recorded in the minutes of the Commission's meetings, are not final orders. Rather they constitute the Commission's public discussion of the matter in question prior to the issuance of a final order." *Id.* While that decision relied specifically on RSA 363:17-b, which states in the Public Utilities Commission context that "[t]he transcript or minutes of oral deliberations shall not constitute a final order," the rationale for that rule of law applies equally here. It is simply nonsensical for a motion for rehearing to be heard before the order sought to be reheard has been issued and the Subcommittee as a whole has the opportunity to issue its collective rationale and basis for its members' individual votes, and thus provide a complete record upon which a party can determine whether the Subcommittee committed an error of fact, reasoning or law, and the Supreme Court can have a complete record to review in any appeal. The Applicants' Motion must be denied as premature without prejudice to its refiling (or more likely filing with modifications) following the Subcommittee's full and final written order.

II. The Subcommittee Was Not Legally Required to Deliberate on All Of Applicants' Required Statutory Burdens When Denying a Certificate, but Good Practice Generally Counsels For Deliberation On All Four Findings.

The Subcommittee's oral vote to suspend deliberations was legally permissible and therefore defensible as a matter of law. Nothing in RSA 162-H or in the SEC's regulations requires the Subcommittee to deliberate on and to vote on each of the findings the Subcommittee must make "[i]n order to issue a certificate" when the Subcommittee denies a Certificate. RSA 162-H:16, IV. The statute and regulations require that the Subcommittee find that Applicants have met their burden of proof on each of the required findings, and unless Applicants do so, the Subcommittee cannot issue a certificate. Counsel for the Public respectfully submits that as a matter of policy and good practice SEC committees and subcommittees should generally deliberate on all four RSA 162-H:16, IV statutory criteria to provide applicants who are denied site certificates with full and complete information concerning all of the deficiencies of their application. Such an approach would permit applicants the opportunity to seek to remedy noted deficiencies (to the extent they can be remedied) if those applicants subsequently submit new applications following a site certificate denial.

A. The Subcommittee Was Not Legally Required To Deliberate on All Four of the Required RSA 162-H:16, IV Statutory Criteria When Denying a Certificate.

The controlling statutory provision, RSA 162-H:16, IV, directs that "[a]fter due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter." RSA 162-H:16, IV further specifically directs that "*[i]n order to issue a certificate*, the committee shall find that:

(a) The applicant has adequate financial, technical and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest."

RSA 162-H:16, IV (emphasis added).

In crafting this statutory directive, the General Court expressly limited the Subcommittee's power to *grant* a Certificate by mandating that a Certificate can issue *only if* the Subcommittee can make the four required findings set out in RSA 162-H:16, IV(a)-(e). Accordingly, "in order to issue a certificate," the Subcommittee is statutorily required to deliberate and make an express finding on each of the four required criteria (the "Findings Requirement"). By its plain language, however, no such statutory requirement applies in order to *deny* a certificate. Rather, the Subcommittee is *required* to deny a certificate, if the Subcommittee is unable to make any one or more of the four required findings.

For each of the four required findings, the burden is on the Applicants to make the necessary showings for a certificate to issue. *See* Site 202.19(b) ("An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16."); *see also* Site 202.19(a) ("The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence."). The determination of whether the Applicants have met their burden with respect to the general standard and the specific findings required by RSA 162-H:16,

IV rests with the Subcommittee. Moreover, the Subcommittee's findings of fact and credibility determinations are entitled to significant deference on review by the Supreme Court. [4]

Where, as here, the Subcommittee determines that an applicant has not met its burden on any one of the required findings of RSA 162-H:16, IV, consideration of the remaining criteria is legally unnecessary because the certificate cannot issue in the absence of any one of the required findings. Nothing in RSA 162-H requires the Subcommittee to deliberate and make findings on all of the specific criteria in RSA 162-H:16, IV where the Subcommittee finds that a certificate cannot legally issue.[5]

Applicants focus on the requirement of RSA 162-H:16, IV that "the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter" "[a]fter due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits" (the "Due Consideration Requirement"). Applicants assert that the requirement of "due consideration of all relevant information" required the Subcommittee to deliberate on all four of the statutory findings of RSA 162-H:16, IV. Applicants are mistaken.

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[4] RSA 541:13 (establishing that on a request for rehearing "all findings of the commission upon all questions of fact properly before it shall be deemed prima facie lawful and reasonable"); *State v. Exxon Mobil Corp.*, 168 N.H. 211, 235 (2015) ("The trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses," and "[f]actual findings will not be disturbed unless … erroneous as a matter of law or unsupported by the evidence.") (internal citations and quotations omitted).

[5] Applicants reference the SEC's rulemaking authority in RSA 162-H:10, VII as somehow compelling deliberation on all four criteria for issuance of a site certificate. Motion at 20. However, the requirement to adopt rules carries no substantive requirements for the issuance or denial of a site certificate. Rather, it requires the adoption of rules, which the SEC has done, and those rules clarify and fill in the details of how the SEC interprets the statutory criteria for issuance of a site certificate. RSA 162-H:10, VII cannot be the basis for a finding that the Subcommittee was required to deliberate on all four criteria for issuance of a certificate set forth in RSA 162-H:16, IV when denying a certificate.

The requirement for the Subcommittee to give "due consideration of all relevant information" in determining whether issuance of the certificate will serve the objectives of RSA 162-H does not include consideration of irrelevant information. The Subcommittee heard and considered all relevant information on the orderly development finding. Where the Subcommittee determines that the evidence in the record is insufficient to support one of the required findings, the Due Consideration directive is satisfied without need for further consideration of remaining issues. Information concerning other criteria is not relevant to whether issuance of the certificate will serve the objectives of RSA 162-H because a certificate cannot legally issue without all four of the required findings set forth in RSA 162-H:16, IV. Once the Subcommittee determined that Applicants had failed to meet their burden on one of the four findings, issuance of the certificate could not possibly serve the objectives of RSA 162-H and consideration of any additional information or criteria was no longer relevant.

The General Court specifically constrained the Subcommittee's general review of whether issuance of a certificate will "serve the objectives of" RSA 162-H by requiring that the Subcommittee make the four delineated findings set forth in RSA 162-H:16, IV "in order to issue a certificate." In the absence of any one or more of the required findings, the issuance of a certificate is prohibited. Had the General Court desired to require deliberation on all four of the required findings prior to the Subcommittee *denying* a certificate, the General Court would not have separated the Findings Requirement from the Due Consideration Requirement, nor would it have expressly tied the Findings Requirement to issuance of a certificate.

The Applicants also argue that the SEC's rules require deliberation on all four criteria set forth in RSA 162-H:16, IV. Specifically, the Applicants point to Site 202.28(a), which provides that the subcommittee:

> Shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

Site 202.28(a). Contrary to the Applicants' assertion, Site 202.28(a) does not require deliberation on all four statutory findings when the subcommittee denies a certificate. Site 202.28(a) requires "a finding," in the singular. While the rule references numerous criteria, by use of the preposition "a" and the singular form of "finding," it expressly requires only a single finding—namely a finding on whether or not the project satisfies the statutory and regulatory requirements for issuance of a certificate. Indeed, the rule goes on to reference issuance of "an order pursuant to RSA 541-A:35 issuing or denying a certificate." By its plain language, Site 202.28(a) requires only the ultimate finding on issuance or denial of a certificate based on the criteria set forth in statute and administrative rule. Applicants' interpretation of the rule would require altering the text of Site 202.28(a) to read "shall make *findings* regarding *each of* the criteria stated in ..." Administrative rules, like statutes, must be read as enacted, and words cannot be substituted or added to conform the rule to the Applicants' desired interpretation. *See Bovaird v. N.H. Dept. of Adm. Services, 166 N.H. 755 (2014).*

Finally, Applicants cite *Antrim Wind I* as precedent for the requirement that the Subcommittee deliberate through all four of the RSA 162-H:16, IV findings notwithstanding their early recognition that the application would fail on one of the findings. *See, e.g.,* Motion at 19 n. 30. However, the decision in *Antrim Wind I* actually supports the opposite proposition.[6] In

[6] Prior SEC decisions are not binding on subsequent SEC decisions, but a prior committee's view of RSA 162-H is instructive. RSA 162-H:10, III ("The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby." *See also Re: Gas Service, Inc.*, 70 NH PUC 339 (1985) ("The Commission is not bound to prior decisions if provided with persuasive arguments and actual results which demonstrate that benefits can be gained by not reaffirming said decisions."); *Re: Manchester Gas Company*, 70 NH PUC 334 (1985) (same).

Antrim Wind I, the SEC denied the applicant's request for a site certificate based upon the failure of a required finding. While the Committee in *Antrim Wind I* did elect to continue deliberations after finding that the project would have an unreasonably adverse effect on aesthetics, Chairman Ignatius specifically noted that the Committee "could have stopped a couple of days" before and that "there was no requirement that [the Committee] keep on going" after it rendered its decision on one of the statutory findings. *Antrim Wind I* Day 3, PM, p. 73-74. Moreover, when the Committee subsequently issued its decision in *Antrim Wind I* it specifically held that "if the Subcommittee finds that the proposed Project will have an unreasonable adverse effect on any one of the statutory criteria, the Subcommittee must deny a Certificate of Site and Facility." *Antrim Wind I* Order at 45.

The fact that a prior committee elected to spend an additional two days deliberating after making a dispositive finding on one of the criteria under RSA 162-H:16, IV is neither binding precedent nor particularly relevant here. At most, the *Antrim Wind I* decision establishes that a subcommittee has discretion to continue deliberations after a dispositive finding.[7] A prior committee's exercise of its discretion does not compel this Subcommittee to expend significant additional time and resources deliberating on criteria that could not legally alter the outcome of denial of a site certificate.

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[7] It is worth noting that the Committee in *Antrim Wind I* did not make a final finding on one of the required findings under RSA 162-H:16, IV—namely whether the applicant had adequate financial capability. *Antrim Wind I* Order at 39-40. Indeed, when this was raised by the applicant as grounds for rehearing, the Committee ruled that:

> The Subcommittee complied with the requirements of the legislature in this docket by finding that the Project would have unreasonable adverse effect on the aesthetics of the region and denying the Application based on this determination. A ruling on the financial capability of the Applicant was not required for the resolution of the Application. The findings of fact and rulings of law leading to the denial of the Application for a Certificate of Site and Facility are clearly stated in the Decision and in the record. The fact that the Subcommittee did not rule on the issue of financial capability is not good cause requiring rehearing or reconsideration.

Antrim Wind I, Order on Pending Motions (Sept. 10, 2013) at 6.

B. Good Practice Counsels for Deliberation On All Four Statutory Criteria in Most Cases.

While not legally required, Counsel for the Public respectfully submits that as a general matter "good practice" supports SEC committees or subcommittees deliberating on all four of the required statutory criteria in RSA 162-H:16, IV unless it would place an unreasonable burden on the subcommittee or the subcommittee determines that it would be futile to do so under the circumstances. The primary reason would be to provide applicants with direction on what aspects of their applications are deficient and why they are deficient. While an applicant may fail to meet its burden on any individual requirement in RSA 162-H:16, IV, requiring no further deliberation by the Subcommittee to deny issuance of a site certificate, the application could also fail its burden on other requirements of RSA 162-H:16, IV for entirely different reasons.

Deliberating on all four statutory criteria under RSA 162-H:16, IV provides an applicant with guidance on each deficiency of the application. That guidance could enable an applicant to consider whether a new application is justified or even feasible if the deficiencies noted can be remedied in a subsequent application. Denial based on one finding may be sufficient as a legal matter to end consideration of the application, but denial on a single finding, without deliberation on the other criteria, may fail to provide applicants with notice of the full scope of deficiencies.

To be clear, the suggested "good practice" notwithstanding, Counsel for the Public believes that the Subcommittee had full legal authority to conclude deliberations and deny the certificate on this record. Counsel for the Public notes that the absence of further deliberation here is mitigated by the scrutiny in this proceeding because the issues with each of the other statutory criteria were extensively addressed by the parties in this docket.

C. The Subcommittee Could Deliberate on the Findings in RSA 162-H:16, IV(c) and (d).

As indicated, the Subcommittee was not legally obligated to deliberate on all four of the statutory findings under RSA 162-H:16. Nevertheless, the Applicants could file a motion asking the Subcommittee to reconsider their vote to end deliberations and to request that the Subcommittee reconvene to deliberate on the findings under RSA 162-H:16, IV(c) (No Unreasonable Adverse Imports) and (d) (Public Interest), without vacating their vote on RSA-H:16, IV (b) or the Subcommittee's vote to deny the Application for a site certificate. Such a request would be a timely procedural request and not a premature motion for rehearing based upon an error of fact, reasoning or law. The purpose of such a request could be to inform Applicants on any deficiency on these issues in order to provide guidance should Applicants seek to amend the Application or file a new Application. It would be within the Subcommittee's discretion whether or not to grant such a limited motion to resume deliberations.

D. The Subcommittee Was Not Legally Required To Consider Mitigating Conditions When Finding the Applicants Failed to Sustain Their Burden to Prove One or More of the Statutory Findings Under RSA 162-H:16, IV.

Throughout the Motion, Applicants assert that the Subcommittee was required to consider possible mitigating conditions. More specifically, the Applicants assert that "Site 202.28 (a) and Site 301.17 require that the Subcommittee consider whether the imposition of conditions could have addressed issues associated with each of the statutory findings including ODR." Motion at 7. A review of the referenced rules, and of the controlling statute, demonstrate no such requirement.

Site 202.28(a) is silent on consideration of conditions. Site 202.28(a), as discussed above, relates to a subcommittee finding in relation to the various criteria set forth in statute and administrative rule. While the word "condition" is not included in the rule, one of the rules

referenced in Site 202.28(a) is Site 301.17, which does address conditions of a certificate. Site 301.17, however, does not require the Subcommittee to consider or impose conditions when denying a certificate for the applicant's failure to sustain it burden of proof.

Site 301.17 states:

> In determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether *the following* conditions should be included in the certificate in order to meet the objectives of RSA 162-H . . . ."

Site 301.17 (emphasis added).[8] Site 301.17 then goes on to list nine specific conditions or categories of conditions that must be considered for inclusion in a certificate if issued by the Subcommittee. Of the nine enumerated conditions, seven are specific procedural conditions dealing with notice, consultation, and delegations. The eighth category deals with conditions for "construction and operation" compliance "with the specifications of the application." None of these enumerated conditions relate to mitigating impacts of the proposed Project.

The final enumerated category in Site 301.17 states:

> Any other condition necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

Site 301.17(i). While this language gives the Subcommittee broad discretion to consider potential conditions "to support findings made pursuant to RSA 162-H:16,"[9] it falls well short of requiring the Subcommittee to craft mitigating conditions to fill in gaps in the Applicants'

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[8] CFP notes that the Applicants' quotation of Site 301.17 on page 20 of the Motion is incomplete. The Applicants omitted the key words "the following" and omitted reference to the nine enumerated conditions from Site 301.17 providing the incorrect impression that Site 301.17 mandates general consideration of conditions rather than the specific conditions enumerated in the rule.

[9] The Subcommittee's discretion is further codified in RSA 162-H:16, VI, which states that a "certificate of site and facility *may* contain such reasonable terms and conditions . . . as the committee deems necessary . . ." (emphasis added). Use of the permissive "may" indicates the decision is left to the sound discretion of the Subcommittee. *See In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) ("It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.") (quoting *Appeal of Rowan*, 142 N.H. 67, 71 (1997)).

evidence. Critically, the Subcommittee's finding here was that the Applicants failed to carry their burden of proof to demonstrate the project would not unduly interfere with the orderly development of the region as required by RSA 162-H:16, IV(b). Unlike a finding, a failure of proof cannot be mitigated through the imposition of conditions. Nor are there conditions that could "support" a failure of proof finding. In the context of the Subcommittee's finding here, there were no "other conditions" for the Subcommittee to consider under Site 301.17(i). Accordingly the Subcommittee committed no error.

III. The Relief Requested by Applicants Is Greater Than Simply Requesting Deliberation on the Remaining Statutory Findings.

The purpose of a motion for rehearing is to "direct attention to matters that have been overlooked or mistakenly conceived in the original decision ..." *Dumais v. State*, 118 N.H. 309, 311 (1978) (quotations omitted); Motion at 5. Applicants' Motion does more than direct the Subcommittee's attention to Applicants' view of matters overlooked or mistakenly conceived in the Subcommittee's oral vote during deliberations. Moreover, there is a fundamental difference between requesting that the Subcommittee deliberate on the remaining statutory findings set out in RSA 162-H:16, IV, and asking the Subcommittee to vacate its oral vote, consider newly suggested "Potential Additional Conditions" in order to address evidentiary gaps in Applicants' case so as to satisfy its burden of proof, and requesting that the Subcommittee reach a different conclusion.[10]

Now that the Subcommittee has found that Applicants have not met their burden of proof on orderly development, the Applicants seek to use "Additional Potential Conditions" that were not before the Subcommittee in order to mitigate newly acknowledged adverse impacts from the

[10] *See, e.g.*, Motion at 4 ("it should reach a different decision."); *id.* at 7 ("the Applicants request that the Subcommittee vacate its decision to deny the Application and resume deliberations.").

Project and ostensibly to meet their burden of proof. Applicants are careful to note that they do not seek to reopen the record, but instead seek to use evidence, some of which Applicants previously discredited, in order to provide evidentiary support for the "Additional Potential Conditions". Applicants argue that the Subcommittee was required to consider potential conditions, which were not presented to the Subcommittee and which were not in the record, and impose such conditions to address the Subcommittee's concerns. Applicants further argue that consideration of conditions to mitigate adverse impacts "is an integral element of [Applicants'] burden of proof and the Subcommittee's failure to even address potential conditions is contrary to RSA 162-H and the SEC regulations." Motion at 4-5.

Applicants' request that the Subcommittee consider new Potential Additional Conditions without reopening the record, and their further request that the Subcommittee deliberate on all of the statutory findings and vacate and reverse its prior oral vote raises several procedural issues. First, the Subcommittee could not have overlooked or mistakenly conceived potential conditions that were never submitted to it on the record. Whether or not the Subcommittee should have deliberated on the remaining statutory factors notwithstanding its determination on RSA 162-H:16, IV(b), the Subcommittee could not have been expected to weigh conditions not proposed to it and not addressed in the evidentiary record, much less to reach a different decision based on those conditions. Although RSA 162-H:16,VI permits the Subcommittee to include reasonable conditions in a site certificate, there is no statutory or regulatory requirement that the Subcommittee do so, or that require the Subcommittee to develop its own conditions to fill gaps in an applicant's case and allow an applicant to meet its burden of proof.

Second, there is no statutory or regulatory authority to allow an applicant to propose new conditions, as well as alter its positions on proposed conditions that were in the record, after the Subcommittee has voted to deny a site application. Third, although there is evidence in the

record that lends some support to the newly suggested "Potential Additional Conditions," the Potential Additional Conditions themselves raise factual issues for which there is no evidence in the record. The Subcommittee would need to reopen the record and take evidence on these factual issues in order to find that the Potential Additional Conditions adequately mitigate adverse impacts from the Project.[11]

IV. The Subcommittee Should Not Consider Newly Proposed Conditions Submitted On a Motion for Rehearing Where Those Conditions Were Not Submitted Prior to the Closing of the Record.

Various parties, including Applicants and Counsel for the Public, proposed potential conditions for any issuance of a site certificate. Most of those conditions were objected to by Applicants. *See* Applicants' Br. at 399-424. After the Subcommittee voted to deny the issuance of the certificate, Applicants have elected to agree to most of those conditions[12] and have suggested additional conditions in their Motion in an after-the-fact attempt to meet their burden on the statutory findings required by RSA 162-H:16, IV.

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[11] Importantly, the Subcommittee did not deny the application based on a finding of adverse impacts that resulted in an undue interference with the orderly development of the region. Rather, the Subcommittee denied the application based on a finding that the Applicants' failed to sustain their burden of proof. *See* Tr. Deliberations Day 3 PM at 25-26. Before the Subcommittee could conceivably even consider the potential efficacy of the Potential Additional Conditions to mitigate adverse impacts, the Subcommittee would require a complete record quantifying the adverse impacts of the Project.

[12] After Counsel for the Public filed his post-hearing brief, Counsel for the Public and Applicants began discussing Counsel for the Public's proposed conditions. Counsel for the Public and Applicants continued those discussions after Applicants filed their brief, with Counsel for the Public considering and eventually agreeing to some modifications to some of Counsel for the Public's proposed conditions as reflected in Attachment A to Applicants' Motion. Counsel for the Public proposed conditions for the Subcommittee to consider only if the Subcommittee were to grant a site certificate, and agreed to some modifications of the proposed conditions for the same reason. The Subcommittee should not assume or infer that by agreeing to these modifications Counsel for the Public supports the Applicants' Motion or that Counsel for the Public supports granting a site certificate if Counsel for the Public's modified conditions are accepted. Counsel for the Public's position on the Application remains the same as set forth in his post-hearing brief.

With respect to Applicants' examples of new "Potential Additional Conditions," those suggested conditions should not be considered by the Subcommittee without a motion to reopen the record. RSA 162-H:10, III limits the Subcommittee's consideration to only the "evidence presented at public hearings and ... written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding." The evidentiary record closed on December 22, 2017, and the Subcommittee set deadlines for the parties' post-hearing briefs, including proposed conditions. *See* Order dated December 19, 2017. Accordingly, the Subcommittee is statutorily barred from considering any new evidence or information submitted to it after the close of the record.

That requirement is not a procedural technicality; it is a fundamental safeguard of the process to ensure that all evidence or information provided to the Subcommittee is subjected to the same rigorous scrutiny as what was considered in the record of the proceeding. Of concern here is Applicants' attempt to overcome its failure to meet its burden with respect to the finding required by RSA 162-H:16, IV(b) by proposing new conditions for which no evidentiary support was offered in the record prior to the Subcommittee's deliberations and after the Subcommittee's vote. *See* Motion, Attachment B at 2 ¶¶ 7-8. For instance, there is no evidence in the record to support the assertion that the proposed spending on tourism and community betterment set forth in the new Potential Additional Conditions would overcome any undue burden caused by the Project. No witness testified that the allocation of money to these issues would have the effects suggested by the Applicants. The Subcommittee cannot be found to have made an error of fact, reasoning or law for failure to consider proposed conditions that were not in the record and that were not before the Subcommittee during deliberations.

If Applicants wish to have the new Potential Additional Conditions considered by the Subcommittee, they must first prevail on a motion for rehearing filed *after* the Subcommittee

renders its final written decision. If they prevailed on such a motion, Applicants could move pursuant to Site 202.27(a) to request that the record "be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument." Pursuant to Site 202.27, the presiding officer would need to determine that "additional testimony, evidence or argument is necessary for a full consideration of the issues presented in the proceeding" in order to reopen the record to accept the offered testimony, evidence or argument. Site 202.27(b). Pursuant to Site 202.27(c), other parties would have an opportunity to "respond to or rebut the newly submitted testimony, evidence or argument." There is no reason why Applicants' newly proposed Potential Additional Conditions and their evidentiary support should not be subjected to scrutiny. Simply permitting proposed conditions and any new evidence without proper scrutiny runs the risk of allowing the Subcommittee's decision to be based on incorrect assertions and assumptions.

Finally, there is a difference between the Subcommittee considering conditions proposed by parties and evidence submitted to support them to mitigate impacts of a project or impose appropriate procedural safeguards, and requiring the Subcommittee to develop conditions without evidentiary support to essentially fix problems inherent in an application where the record is insufficient due to an applicant's failure to meet their burden of proof. The Subcommittee unquestionably has the authority to impose conditions on the Project for any site certificate to issue, but that authority does not obligate the Subcommittee to do Applicants' work for them. It would not be good practice or good public policy to require the Subcommittee to develop conditions to allow the Subcommittee to make the necessary findings required by RSA 162-H:16 where the Subcommittee finds that an applicant has failed to satisfy their burden of proof. There is no statutory requirement that the Subcommittee do so. As with the finality and record issues noted above, such a practice could encourage applicants to propose the minimum in their initial applications and proposed conditions, knowing they could supplement on rehearing

to fix any issues. Alternatively, the essentially unbridled authority to impose conditions now espoused by Applicants could lead to the issuance of potentially significant conditions beyond what would be expected. This is not the process envisioned by the General Court.

V. Applicants' Proposed Expanded Conditions and Potential Additional Conditions Lack Evidence In the Record To Inform the Subcommittee As To Their Potential Mitigation of Impacts.

Applicants stress that the record supports their proposed expanded and newly proposed "Potential Additional Conditions" and that there is no need to reopen the record to consider them. There are substantial questions as to whether the record provides a sufficient basis for the Subcommittee to consider the Applicants' proposed expanded conditions and the suggested new Potential Additional Conditions to find that Applicants have met their burden of proof, or whether the Subcommittee requires additional evidence. The following are some examples.

A. The Lack of Evidence in the Record Regarding the Proposed Expanded Property Guaranty Program.

During the hearings and in their post-hearing brief the Applicants argued that the Project will have no discernible effect on property values, and that none of the other testimony effectively challenged this conclusion. Applicants also argued that the opinions of Counsel for the Public's expert witnesses (Kavet and Rockler Associates) had no relevance to the property value implications of the Project and that their analysis cannot be considered determinative on the issue. Applicants' Br. at 116-117. Applicants proposed a Property Guarantee Program for property that met the following criteria: (1) single family homes encumbered by the ROW easement, (2) some portion of the home located within 100 feet of the ROW boundary, and (3) with increased visibility of structures. *See* CFP Exh. 40. Applicants' expert testified that property meeting those criteria might experience a decrease in value from the Project.

In their Motion Applicants argue that the Subcommittee should have considered an expanded Property Guaranty Program to address the Subcommittee's concern that Applicants' expert was not credible and that the Project will negatively impact property values. In their "Potential Additional Conditions" the Applicants now propose expanding their Property Guaranty Program to include "detached residence or condominium unit located within 200 feet of the Project right-of-way," and Applicants earmark $25 million from the Forward NH Fund to address property value impacts along the overhead portion of the Project. Motion at 10.

Apart from whether it is appropriate to expand Applicants' Property Guaranty Program through a motion for rehearing after the record has closed, there is no evidence in the record upon which the Subcommittee could find that (1) the new criteria will cover all properties that will suffer loss of value from the Project; (2) that money from the Forward NH Fund can be used to compensate property owners for their loss of use; or (3) that providing $1,250,000 per year ($25 million over 20 years) is a sufficient amount to compensate all property owners whose property lost value from the Project and to provide an offset for municipal property tax abatements attributable to the Project.

B. The Lack of Evidence in the Record With Respect to the Tourism-Related Conditions.

Applicants propose a new Potential Additional Condition to earmark $25 million from the Forward NH Fund for "projects or initiatives promoting tourism and recreation in affected areas and … requiring the FNH Fund to consult with NH tourism leaders to identify, design and fund programs that will promote tourism and recreation in affected areas." Motion, Attachment C at 5 ¶ 21. In order to mitigate the unquantified impacts to tourism during construction and during operation of the Project from the existence of new and relocated towers, Applicants

propose to advertise more, or something of that nature.[13] There was no evidence in the record to allow the Subcommittee to find that spending $25 million over 20 years would adequately mitigate the unquantified negative impact on tourism.

RSA 162-H:16, II requires that "[a]ny certificate issued by the site evaluation committee shall be based on the record." Without supporting evidence the Subcommittee would have to determine the expected negative impacts of the Project to tourism and assume that an injection of $25 million dollars over 20 years (*i.e.,* $1,250,000 per year) could adequately mitigate those impacts. The Subcommittee cannot legally make that assumption without evidence in the record to support it. In addition to quantifying the amount of impact and determining if increased spending would effectively mitigate that impact, the Subcommittee needs evidence on how, when and where funds will be spent, by whom they will be spent, and who would benefit from such spending, before considering evidence on whether those efforts would be effective mitigation measures. The answer to these and other questions is unknown because this new condition was not proposed by Applicants on the record, and no witness provided evidence on spending money to mitigate impacts to tourism, with the witness and their opinions being subjected to scrutiny such as that which led to the Subcommittee's conclusion that the Applicants' tourism witness was not credible. Without evidence in the record the Subcommittee cannot find that such a condition would adequately mitigate impacts to tourism, particularly where the Subcommittee found that Applicants failed to meet their burden of proof.

[13] It is not clear precisely what is meant by "projects or initiatives promoting tourism and recreation in affected areas" because this condition was and is not part of the record in this docket, and no witness provided testimony to explain it.

C. The Lack of Evidence in the Record With Respect to Horizontal Directional Drilling.

Applicants propose using horizontal directional drilling ("HDD") "in order to avoid and limit construction impacts to businesses" in Plymouth and Franconia. *See* Motion, Attachment Bat ¶¶ 5-6. There was no evidence in the record regarding HDD in downtown Plymouth or Franconia, such as the number of HDD drills; the size and location of entry work areas and exit work areas; how long this HDD work would take; whether this HDD work would require a lane closure or a road closure with a detour route; how long traffic would be impacted; how much parking would be impacted and for how long, *etc.* Although the record contains much evidence about HDD work, the evidence indicated that to some extent each HDD site involves its own unique circumstances and challenges. There was no evidence of HDD work in downtown Plymouth and how that HDD would deal with the town's utilities and infrastructure. Without evidence addressing the above issues and others the Subcommittee has no factual basis to determine whether HDD in downtown Plymouth and Franconia would avoid or mitigate construction impacts.

D. The Lack of Evidence in the Record With Respect to the Land Use Related Conditions.

Applicants propose a new Potential Additional Condition to earmark $25 million from the Forward NH Fund "for economic development as follows: (i) to provide a one-time payment of $100,000 to each of the thirty-one host municipalities for the purpose of developing and implementing Master Plans for development; and (ii) to promote community betterment in host communities." Motion, Attachment C at 4 ¶ 17. There is no evidence in the record regarding these one-time payments of $100,000, including how they would be used. There also is no evidence in the record regarding the expenditure of $25 million over 20 years (*i.e.,* $1,250,000 per year) to promote community betterment, such as how it would be determined which of the 31

host communities would receive funds over the 20 years, how much funding a community could receive at any given time, the types of things the funds could be used for, and whether or not any such expenditures would adequately mitigate the Project's impact on existing land uses. Without this evidence in the record, and subject to scrutiny, the Subcommittee has no basis to find whether or not such a proposed condition would "address potential localized impacts of the Project in host communities" as asserted by the Applicants.

VI. The Applicants' Proposed New Added Uses for the Forward NH Fund Have Changed the Funds' Role.

Applicants' proposed Potential Additional Conditions include a change to the Forward NH Fund ("FNH Fund") from what is contained in the record and could affect testimony and opinions based upon the record. For example, Julia Frayer testified that New Hampshire would see an estimated increase in State GDP of $162 million per year during the first 11 years of the Project's operations, based in part on the $200 million FNH Fund as proposed in the application. If the Subcommittee imposed conditions that included the new earmarks for the FNH Fund, there is no evidence in the record as to how that would affect opinions such as Ms. Frayer's. *See* Applicants' Br. at 67, Ex. 28 at 11-12. RSA 162-H:16, II requires that "[a]ny certificate issued by the site evaluation committee shall be based on the record." Here there is no record as to what effect the newly proposed changes to the FNH Fund would have on the calculations and opinions of Applicants' experts and other witnesses' testimony.

Moreover, the Potential Additional Conditions would change the independence of the FNH Fund that was stressed by Applicants as part of their application and testimony, and such changes may not be possible to implement. The Supplemental Pre-filed Testimony of William Quinlan stated that "[p]ursuant to [its] bylaws, the Forward NH Fund will be administered as a standalone 501(c)(3) organization, fully independent of Eversource and NPT." Applicants' Ex. 6

at 3. Following its establishment, the FNH Fund was designed to "consider proposals or requests for funding from New Hampshire residents, businesses, municipalities, communities and non-profit groups." *Id.* at 3-4. The FNH Fund's Articles of Incorporation permit financial assistance to any area in New Hampshire. *See* CFP Exh. 34.

When certain communities requested that the Subcommittee "[i]mpose a condition of approval that the Applicants establish guidelines and by-laws for the Forward NH Fund that emphasize[] the distribution of monies from the Forward NH Fund to businesses and municipalities in Coos County" the Applicants objected and called the proposed condition "inappropriate." Applicants' Br. at 417. In their brief Applicants stated that "the FNHFund is an independent entity that is unrelated to the Applicants. *Certificate conditions cannot bind such a Third Party. It is solely within the purview of the FNHFund to make decisions about the disbursement of funds.*" *Id.* (emphasis added). The Potential Additional Conditions, which seek to bind the FNH Fund and eliminate the FNH Fund's independence, may not be possible given the separate and independent existence of the FNH Fund. *See id.*[14]

In addition, the Potential Additional Conditions for the FNH Fund allocate the $200 million into many parts. Originally, the vast majority of the fund was not expressly allocated to any item, although with an emphasis on North County Development, Economics and Community Development, Clean Energy Innovation, and Tourism. See CFP Exh. 35. Mr. Quinlan acknowledged in his supplemental testimony that "Northern Pass has already allocated approximately $5.5 million to time sensitive projects" and "agreed to allocate to the New

[14] Applicants fault the Subcommittee for not considering conditions that "could have included the use of resources from the Forward NH Fund, dedicated to specific communities and placed under their control," Motion at 16, when Applicants specifically rejected such potential conditions proposed by communities impacted by the proposed Project. Applicants' Br. at 417. The Subcommittee deliberated on the record presented to it as required by RSA 162-H:16, II, and not on the record as Applicants may now wish it to be without seeking to reopen it.

Hampshire Public Utilities Commission the right to make funding allocation decisions concerning $20 million of the Fund over a ten (10) year period." Applicants' Ex. 6 at 4. Applicants' Potential Additional Conditions propose allocating an additional $75 million of the fund, which combined with the $25.5 million allocated previously consume more than half of the proposed $200 million for the FNH Fund.

Without evidence in the record, the Subcommittee cannot find with any certainty sufficient for RSA 162-H:16, II whether Applicants' newly suggested conditions would address the issues noted by the Subcommittee in its deliberations. The fund is to pay out approximately $10 million per year for a period of 20 years. *See* Applicants' Ex. 28 at 11-12. Of that $10 million yearly amount, for the first 10 years $2 million has already been allocated to the Public Utilities Commission, leaving only $8 million per year for the first ten years. *See* Applicants' Ex. 6 at 4, 6. Additionally, $5.5 million has already been allocated primarily to the Balsams, presumably out of the first year of the 20-year plan. *Id.* at 4. Accordingly, based on the record, only $8 million will be available from the FNH Fund for the first 10 years of its existence and likely only $2.5 million in the first year.

With that rate of yearly funding there is no evidentiary connection between the potential impacts on tourism, land use, and property values and the funds that will be available to address the potential impacts at the time they are suffered. If it is assumed that the impact on each category is $25 million,[15] the issue of timing would likely have a significant effect on the ability

[15] As recognized by the Subcommittee, that burden would have to be an assumed burden on this record because Applicants failed to provide credible evidence of the impacts to be expected.

of the suggested conditions to achieve the results for which they are proposed.[16] Whether the Potential Additional Conditions would mitigate the impacts they were crafted to address can only be determined from an evidentiary record which does not exist here. The Subcommittee cannot speculate as to projected impacts and whether proposed conditions will mitigate those impacts.[17] The Subcommittee must make factual findings based upon evidence in the record. *See* RSA 162-H:16, II.

WHEREFORE, Counsel for the Public respectfully requests that the Site Evaluation Sub-Committee:

A. Deny Applicants' Motion without prejudice; and

B. Grant such other relief as the Court deems just.

[16] There is also no evidence in the record on how long the Forward NH Fund approval process would take, how long it would take to fund any initiative or how long investments contemplated by the Potential Additional Conditions would take to mitigate negative impacts from the Project.

[17] For example, Applicants assert that the $25 million condition for tourism could address the potential impact to tourism from the Project because the amount is "almost four times New Hampshire's total annual tourism budget" but no evidence was submitted on the record concerning this assertion. Applicants' Br. at 11 n. 18. This and other similar assertions made by Applicants are speculative. (Of course, the $25 million total would be $1,250,000 per year over 20 years, which is approximately 15% additional spending per year in current dollars.)

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,

Dated: March 9, 2018 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE TO APPLICANTS' MOTION FOR REHEARING AND REQUEST TO VACATE has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: March 9, 2018 By: _____ for
Thomas J. Pappas, Esq. (N.H. Bar No. 4111)