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November 15, 2018

**Via Hand Delivery and Email**

Pamela Monroe, Administrator  
New Hampshire Site Evaluation Committee  
c/o New Hampshire Public Utilities Commission  
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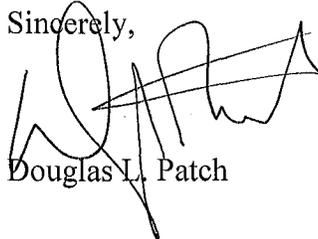
***Re: SEC Docket No. 15-04, Application of Public Service Company of New Hampshire  
d/b/a Eversource Energy for a Certificate of Site And Facility for the Construction of a  
New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation –  
Town of Durham/University of New Hampshire Post-hearing Brief***

Dear Ms. Monroe:

Enclosed, on behalf of the Town of Durham and the University of New Hampshire in the above-captioned docket, is a post-hearing brief. Copies are being provided electronically to the Site Evaluation Committee and the Service List.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,



Douglas L. Patch

DLP/eac  
Enclosure

cc (via email): Service List in SEC Docket 15-04

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STATE OF NEW HAMPSHIRE  
BEFORE THE  
NEW HAMPSHIRE SITE EVALUATION COMMITTEE  
SEC Docket No. 2015-04

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

Post-Hearing Brief on Behalf of  
The Town of Durham and  
the University of New Hampshire

Respectfully submitted,

Town of Durham and University of New  
Hampshire

By Their Attorneys



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Dated: November 15, 2018

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## Executive Summary

Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”, “Eversource” or the “Applicant”) has not met its burden of showing by a preponderance of the evidence that the Seacoast Reliability Project (“SRP) meets the criteria in RSA 162-H:16, IV. The evidence on the record in the docket shows that the proposed 12.9 mile 115kv transmission line that would run from the Madbury Substation, through Durham, under tidal waters of the state in Little Bay, through Newington, to the Substation in Portsmouth (“the Project”) would have unreasonable adverse effects on the water quality and the environment of Little Bay, a treasured body of water in our state. The evidence also shows that the Project would unduly interfere with the orderly development of the region for a number of reasons, including that it would be contrary to the views of municipal planning and governing bodies expressed in local zoning ordinances and master plans. The Project would also have unreasonable adverse effects on aesthetics, historic sites and archaeological resources and would be contrary to the public interest. The Applicant has not obtained all other necessary approvals, including the approval of the Governor and Council for an easement in tidal waters. The license it obtained from the Public Utilities Commission (“PUC” or “Commission”) for the crossing of Little Bay was flawed because Eversource failed to provide the Commission with any information about its intention to use concrete mattresses.

It was contrary to the law and to principles of due process for the Applicant to contact the New Hampshire Department of Environmental Services (“DES”) after the DES permit condition recommendation was issued on February 28, 2018 (“Final Decision”). The New Hampshire Site Evaluation Committee (“Committee” or “SEC”) should not have allowed into the record the results of any further discussions between the Applicant and DES about the Final Decision, including the revised permit conditions submitted by DES on August 31, 2018, over a month after the deadline for Public Counsel and intervenor supplemental testimony and six months after the statutory deadline for agency final decisions. It would be contrary to the law and an abdication of its responsibility for the Committee to approve the latest DES conditions which call for the submission of numerous plans for review and approval by DES, not the SEC.

In the event that the Committee disagrees and decides to grant a certificate there are certain conditions the Committee should include and certain prerequisites they should impose before issuing the certificate.

### **Legal Standard**

The Applicant bears the burden of proving facts sufficient for the Committee to make the findings required by RSA 162-H:16. Admin. Rule Site 202.19(b). This means that the Applicant must show by a preponderance of the evidence that it meets the criteria required before a certificate can be issued. Admin. Rule Site 202.19(a).

RSA 162-H:16, IV says “after due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits,” the Committee shall “determine if issuance of a certificate will serve the objectives of this chapter.” Under RSA 162-H:1, those objectives are:

maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

In order to issue a certificate, the Committee must find that an applicant meets the criteria laid out in RSA 162-H:16, IV:

- (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.

## Background

On April 7, 2015 Eversource sent a letter to the Chair of the Site Evaluation Committee indicating that it was their intent to file an application for a certificate of site and facility for a 12.9 mile 115kv transmission line that would run from the Madbury Substation, through Durham, under Little Bay, through Newington, to the Substation in Portsmouth. They enclosed copies of notices of public information sessions to be held later that month. Over one year later, on April 12, 2016, Eversource filed the Application for a Certificate of Site and Facility for the SRP (“the Application”), which consisted of over 5,000 pages of materials.

The Application said that the transmission line would include a combination of overhead, underground and underwater components and run along existing electric utility corridors. The Application said that “the electric system in the Seacoast Region has been utilized to its fullest potential and is in immediate need of expansion in order to meet the Region’s current and future electric demands.” The Application also said that Eversource initially identified three potential route alternatives, a northern alternative, middle alternative, and a southern alternative, but that the northern route and the southern route alternatives were “considered unavailable due to significant constructability, permitting, land rights, and costs issues. PSNH determined that the Middle Route Alternative was the only available route.” App. Exh. 1, electronic (“E”) pp. 23-24.

In the Application Eversource said that during the submarine cable installation process, they may be required to use protective cover, such as concrete mattresses, which may result in permanent impacts. App. Exh. 1, E-p. 28. They also said that the construction and operation of the Project would have little impact on local land use because the Project would be located along the existing established utility corridor. They then noted that the SEC had previously recognized that siting a new transmission line along an already developed corridor is a sound planning and environmental principle because it reinforces local patterns of development and is consistent with local and regional land use planning. They also said that the Project was consistent with the goals of local and regional plans, and would not interfere with their implementation and that they had considered information from local and regional planners, planning commissions and municipal governing bodies as

expressed in local and regional master plans and in other long range planning documents and local ordinances. App. Exh. 1, E-pp. 146-148. The Application then went on to say that the Project is “consistent with the goals of local master plans and zoning ordinances because it will be located within and along already existing corridors that pre-date much of the development in the communities.” App. Exh. 1, E-p. 148. The Application did not include copies of the local master plans and ordinances as required by Admin. Rule Site 301.09.

On June 13, 2016 the Committee deemed the Application complete and proceeded to schedule public information sessions and a prehearing conference. The Committee granted petitions to intervene to the Town of Durham (“Durham”) and the University of New Hampshire (“UNH”) (together “Durham/UNH”), the Town of Newington, the Conservation Law Foundation (“CLF”), Helen Frink, Fat Dog Shellfish Co., LLC, the Nature Conservancy, and a number of residents of Durham, who were grouped together for purposes of intervention. The Durham Historic Association (“DHA”) petitioned to intervene later in the proceeding and was granted intervention, as were some other residents. The first request to postpone the procedural schedule came in December of 2016 and was concurred in by virtually all of the parties. The revised schedule called for hearings in May of 2017. In January of 2017 the Applicant requested a stay in the procedural schedule so that they could obtain all necessary approvals to amend a conservation easement in Newington. On February 6, 2017 DES requested an extension saying it had learned that Eversource would be seeking to amend its Application to include additional work regulated by DES, which was not available for review by DES at that time. On February 28, 2017 the Durham submitted a letter to DES, with copies to the SEC service list, as a follow up to a meeting they had with DES and Public Counsel to express concerns about impacts on Little Bay. Public Counsel submitted a similar letter on March 15, 2017, with copies to the SEC and the service list.

On March 29, 2017, the Applicant submitted the amendment to the Application that modified the proposed Project in four ways. On May 22, 2017 the Presiding Officer issued an order creating a new procedural schedule that called for hearings in October of 2017. In June of 2017 the Applicant submitted a revised sediment modeling report and extensive new information and plans related to the Project. On August 1, 2017 DES sent a letter to the SEC indicating that it needed a significant amount of additional information from Eversource in order to complete its review. On August 3, 2017 TD/UNH submitted a letter to DES and the

SEC Administrator requesting copies of any and all correspondence and information the Applicant submitted to DES. Counsel to the SEC responded on August 4, 2017 saying that traditionally such documents have been provided to all parties and he did not see any reasons why the Applicant would not provide copies of the documents and information filed with DES. On August 10, 2017 the Applicant filed a motion to postpone the hearings saying they would be submitting additional information relating to Little Bay. On September 19, 2017 the Applicant submitted 223 pages of new information in response to the August 1, 2017 DES letter.

On October 30, 2017 Durham/UNH submitted a letter to DES with copies to the SEC service list expressing concerns about the additional information the Applicant had submitted. Eversource responded in a letter in which they said that the Town was obligated to litigate any issues they had directly before the SEC, not through individual agencies, and if the Town wanted the SEC to consider additional potential permitting conditions as part of the Committee's review, the Town should make that request to the Committee and the SEC has the authority to consider such additional permit conditions. They cited RSA 162-H:7-a,I(e). They also said that DES had in its possession all relevant information that was required to review the Project's permit applications. They went on to say that the filing by the Town included information that was solely before the Site Evaluation Committee and should not be litigated outside of the SEC process.

DES conducted a review of the new information submitted by the Applicant and comments submitted by the Town; it provided monthly status reports to the SEC. That review culminated in the Final Decision that was issued on February 28, 2018 which included the following language: "Water Division staff have completed their technical review of the application and have made a final decision on the parts of the application that relate to NHDES permitting or regulatory authority..." The SEC issued an Order on April 6, 2018 in which it suspended the statutory time frame for making a decision until April 1, 2019.

On April 27, 2018 Eversource sent a letter to DES expressing concerns about the DES Final Decision. This letter was not provided to the SEC nor was it provided to any parties to the SEC proceeding. It was not discovered until Eversource provided it in response

to a technical session record request on July 16, 2018, a few days before Public Counsel and intervenor supplemental testimony was due.

On April 20 and May 31, 2018 the SEC issued a new procedural schedule that called for hearings beginning in August of 2018 and culminating in October of 2018, a schedule which for the most part coincided with what occurred. On August 10, 2018 the Presiding Officer issued a letter in which she cited Supplemental Testimony from the Applicant which informed the Site Evaluation Committee that the Applicant had concerns regarding certain conditions contained in the recommendations provided by DES. She also said that due to the pending request from the Applicant that the SEC consider imposing different conditions or refrain from imposing some of DES's recommended conditions, she believed that it was prudent to request DES's response at that time, rather than waiting until deliberative hearings. She asked for a response within 10 days and invited DES to participate in the prehearing conference scheduled for August 22, 2018 and in the hearings which were to begin on August 29, 2018. DES did not attend either. DES submitted a letter on August 31, 2018 in which it made modifications to the February 28, 2018 Final Decision.

### **Argument**

#### **I. The SRP Project Would Have Unreasonable Adverse Effects on Water Quality and the Natural Environment**

A. Durham/UNH submit that it is critical for the Committee to remember the legal standard cited above, and that the Applicant bears the burden of showing by a preponderance of the evidence that this Project would not have an unreasonable adverse effect on water quality and the natural environment. The Applicant has not met that burden with regard to this criteria; the weight of the evidence clearly shows that if the Project is approved as submitted it would have adverse effects on the environment and would put the health of Little Bay and organisms that live there in jeopardy.

B. Little Bay is a precious resource that must be protected. It is a national treasure that has been designated by the Environmental Protection Agency ("EPA") as an estuary of national significance under Section 320 of the Clean Water Act, one of only 28 in the United States. Exh. TD/UNH 12, p. 4. It deserves special recognition, protection, and our appreciation for all it provides to our state and to the local communities that work hard to

protect it. The estuary is an impaired, at risk water body, the health of which is in decline. Transcript Day 10PM, pp. 121-122 (hereinafter transcripts will be cited by the day and page). Significant resources have been devoted to reversing degradation of Little Bay and trying to improve the ecology of Little Bay. TD/UNH Exh. 23; Day 15PM, p. 236. This Project would be a significant step backwards from those efforts and should not be viewed as an insignificant or temporary disruption to the recent record of continuous improvement to the Little Bay water quality and ecosystem. As the State of Our Estuaries Reports make clear, the estuary is threatened and much more needs to be done to improve its health. TD/UNH Exh. 1, E-p. 17; CLF Exh. 22; TD/UNH Exh. 23. The risks to Little Bay from this Project are too great, the uncertainties too significant.

C. The Applicant has not provided sufficient sampling or models to show that the ecology of Little Bay would be protected if the Project is allowed to proceed. It is questionable whether sampling from 12 cores located across the nearly one-mile crossing are adequate to characterize contaminants that will be encountered and potentially jettisoned into the water column during jet plowing and diver burial activities. Neither the original sediment model or the revised sediment model is representative of anticipated jet plow activities. The revised model anticipated an uninterrupted crossing for each of the three crossings and a crossing time of approximately seven hours, most of which would occur on an ebbing tide. The reality is that the crossing is anticipated to include starts and stops to reset anchors and may take as long as 15 hours over a two-day period during both ebb and flood tides. These operational changes impact how the sediment will be dispersed during and following jet plow activities. Because the modeled sediment distribution served as the basis for delineating the boundaries of the mixing zone and the location of monitoring stations, the lack of a representative model leaves no basis for establishing either mixing zone or monitor locations.

D. The evidence in the docket shows that there are substantial risks that this Project would harm the ecology of Little Bay, as well as aquatic and wildlife. The use of concrete mattresses would create significant permanent impacts to wetlands. Public Counsel's witness Whitney admitted that Little Bay is different than other estuaries, that it is not as developed as other estuaries. Day 12PM, pp. 83-84. It is critical that the Committee recognize this and do all that it can to protect this important state and national resource. Many biologists consider estuaries among the most productive environments on earth. Day

5AM, p. 56. The reality is that there is a significant degree of uncertainty about the impacts this Project would have until it is built and it has been monitored. Day 5PM, p. 32. That is just too big a risk to take with such a valuable resource. Other, less intrusive alternatives are available. Why Eversource chose this route alternative is puzzling given the common sense reactions from their own people over the years to the effect that once the cable under Little Bay was abandoned it would never be reactivated because there are too many environmental problems associated with doing so. Day 11AM, pp. 15, 101-104; Day 15PM, p. 152. You have to ask why they did not keep the line active, why did they abandon it? The most plausible explanation is the one offered by former PSNH employees, that it created too many environmental issues, which is exactly what the record shows. This Project, which would involve the removal of existing cable by the use of a grapnel hook run, the excavation and jet plowing of three separate five foot deep trenches under Little Bay, and the installation of as much as 8600 square feet of concrete mattresses,<sup>1</sup> is far different and more intrusive than the distribution cables that were laid under Little Bay years ago and then abandoned.

E. Eutrophication is one of the significant threats to Little Bay. The Great Bay Estuary has all the classic signs of eutrophication. Exh. TD/UNH 12, p. 4. Nitrogen is in many ways the premier issue in the Bay. Day 13PM, p. 129. Nitrogen stimulates plant and algal growth which disrupts the natural ecosystem, and when those plants die they decompose, taking up oxygen in the process and depleting the oxygen for aerobic organisms, fish and other organisms that need oxygen. The amount of nitrogen that it is estimated would be released by jet plowing would be 300 times what Durham releases in a day. Day 13AM, p. 26. Durham already spends \$500,000 a year on improving effluent in the Bay. Day 10PM, p. 127. The towns have to come up with plans to reduce nonpoint source pollution of nitrogen in the Bay; the nitrogen release from this Project would be significantly more than what the town could reduce and would represent a step backward in the efforts to reduce nitrogen loading in the Bay. *See* TD/UNH Exh. 18. Nitrogen also stimulates phytoplankton (small plants in water columns or on sediment surface) which impair light. Suspended sediments also impair light. Day 13PM, p. 60. Counsel for the

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<sup>1</sup> One of the Committee members seemed to be under the impression that the amount of concrete mattresses needed for the Project didn't grow, but that DES asked for an additional amount to be permitted. Day 13PM, p. 158. Testimony submitted by the Applicant makes it clear that it was design changes in the Project that led to the increase in square footage of the concrete mattresses. App. Exh. 145, page 3 of 13, lines 18-22.

Public's witness Ladewig expressed concern about nitrogen. He said there is a large amount of uncertainty about the total amount of nitrogen that would be released as well as what the consequences of that would be. While dispersion models could help a little bit, he was not sure they would be helpful in terms of what happens afterwards. He went on to note that something that is not a problem today could be a problem tomorrow. Day 12PM, pp. 125-130.

F. The impairment of light penetration hurts eelgrass, which is the cornerstone of the policy to reduce nitrogen. Day 13PM, pp. 28-29. Little Bay historically had abundant eelgrass. About half of the length of the cable would cross historic eelgrass habitats. Day 13AM, pp. 32-33. Eelgrass cannot grow on concrete mattresses. Day 13PM, p. 33. Public Counsel witness Payson Whitney reinforced the importance of eelgrass when he said he would recommend horizontal directional drilling ("HDD") if there were eelgrass beds where the cable is to be laid. Day 12PM, pp. 87-88. This is what was done for a transmission cable that was installed from Cape Cod to Martha's Vineyard to avoid negative impacts to eelgrass. Day 4PM, p. 27. There may be the beginnings of eelgrass beds in the area of the jet plow. Day 13AM, p. 146. Eelgrass habitat is quite extensively protected in the estuary. Day 13PM, p. 148.

G. If the Project is allowed to proceed as proposed, the numerous and varied environmental plans (including, but not limited to, the following revised plans: Eelgrass Survey Plan, Benthic Habitat Monitoring Plan, Benthic Infaunal Community Plan, Mixing Zone Plan, Water Quality Monitoring and Adaptive Monitoring Plan, and Plan to assess shellfish tissue before and after the Little Bay Cable Crossing) will be the most critical part of this whole Project. These plans would provide the guidelines and standards designed to be protective of the Bay and by which the Project would be monitored and to which the Project would be held accountable. As now proposed, however, the plans will not be available for review prior to the SEC making a decision. Day 13AM, p. 10.

H. The Durham/UNH environmental panel testified as to the need for an elutriate test. Day 13AM, pp. 11-12. Based on the Applicant's data there is the potential for water quality violations, so the next step, as outlined in the Regional Implementation Manual

(“RIM”),<sup>2</sup> would be to conduct elutriate testing, which would use sediment samples collected from Little Bay that are agitated in water to measure the concentration of contaminants in the water that has partitioned from the sediment into the dissolved phase of the water, and then that concentration can be compared to water quality criteria. Day 13AM, p. 188. The panel also pointed out that seaweed thrives on nitrogen and that it competes with eelgrass for the same habitat space, and that suspended solids are a highest priority indicator for the estuary. Day 13AM, pp. 29-34. They said that copper, mercury and arsenic are still of concern, as are elevated levels of all trace metals and toxic organic compounds. Some contaminants were analyzed, but not all, so there is incomplete information. Day 13AM, pp. 50–58. The Applicant’s environmental panel admitted that there is not as complete a data set as you would like to see and that there is no certainty that there won’t be more contaminants. Day 6AM, pp. 37-41. They also admitted to having concerns about whether the modeling would predict what happens in the mixing zone, and that they fully expect variations to the model out in the field. Day 6AM, pp. 41-43.

I. The sediment in Little Bay acts as a resting place for contaminants, including bacteria, viruses, and parasitic pathogens of humans and oysters. Despite this the Applicant has done no analysis of pathogens. Day 13AM, pp. 14-16. There has to be an accurate model to look at how long it takes for pathogens to settle out. Day 13AM, p. 59. Another of the concerns is copper in sediments based on the modeling that was done. Day 13AM, p. 54. Mercury is also present in the estuary at elevated levels. Day 13AM, p. 58.

J. The estimate by the Applicant’s and Durham/UNH’s experts is that about 1000 cubic yards of sediments would be released by jet plowing; this would be 150 times the overall sediment yield per year in 2006 to 2008. Day 13AM, p. 37. The Durham/UNH panel expressed concern that the modeling done by the Applicant relies upon a crossing time that is shorter, and possibly significantly shorter, than what is likely to be required by the crossing plan. A longer crossing time would be impacted by the changing tides and would distribute sediments in a manner that was not predicted by the model. Day 13AM, p. 39. This would also impact the mixing zone and placement of the monitors to accurately document conditions as the crossing occurs. Day 13PM, pp. 40-41. The

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<sup>2</sup> Regional Implementation Manual for the Evaluation of Dredged Material Proposed for Disposal in New England Waters prepared by EPA Region 1.

Applicant's model assumes a steady advance of jet plowing across Little Bay. Day 6AM, pp. 50-52. The testimony was clear that this would not be the case.

K. A significant part of the concern about sediments is that once they are suspended they can be more easily re-suspended. Day 13PM, pp. 60-61. There is very little understanding on many of these issues and about what the long term fate of the sediments would be. There are also different sized sediments; the smaller the particle the longer it takes for the sediment to settle out. The estimate is that it would be three days for sediments to fall out of suspension, not hours. Day 13AM, p. 61. Some very fine particles may be suspended longer. During storm events there is turbulence in the water but there are no numbers to indicate how much disturbance of sediments occurs during storms and presumably this could vary depending on the severity of the storm. Storm events stir up sediment and bring new sediment into the Bay. Day 13AM, p. 109. Common sense suggests, however, that jet plowing to create three trenches that are at least five feet deep is quite different than a storm that disturbs the surface of the Bay. The Durham/UNH panel did not agree that storm events stir up more sediment than jet plowing. Day 13PM, p. 110. The jet plowing and diver burial operations will create a very highly concentrated sediment plume within a limited area of the Bay compared to a storm that produces a less concentrated sediment plume over a much larger area. Moreover, as Jason Baker, the principal owner of Fat Dog Shellfish Co., LLC, who has extensive education and training in marine biology and coastal environmental management,<sup>3</sup> pointed out, this Project would mean the dispersal of many tons of sediment into the water column over a very short period of time. Day 14AM, p. 58. The deeper the jet plowing goes the higher the nitrogen levels. Day 13PM, p. 67. By stirring up nitrogen it can be converted from nitrogen to nitrite to nitrogen gas and then be taken up by organisms. Day 13AM, p. 70. The jet plowing is a significant nitrogen loading event. Day 13AM, p. 156.

L. At this point based on the recommendation from Eversource and DES we have no idea what the final resolution of the issues with DES would be. Day 13AM, pp. 88-89. We are not sure what would be in the monitoring plans. Day 13AM, pp. 92, 95, 99, 119. The Durham/UNH panel have concerns and are not sure that DES can fully address those concerns. Day 13AM, p. 93. While the jet plow trial run would enable additional data to be collected and to verify some of the modeling outputs, it would be a second best

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<sup>3</sup> FDS Exh. 1.

approach to doing additional modeling. Day 13AM, p. 106. The Durham/UNH environmental panel wanted to see more alternatives for sedimentation reduction measures. Day 13AM, p. 114. The panel is also not sure of the value of doing a trial run so close to the cable run. Day 13AM, p. 141. They are not confident that the Applicant can prepare a meaningful post-trial run report in just seven days and that DES can adequately critique the information from the trial run and make meaningful changes to the cable crossing operation and monitoring plan in just 14 days. Day 13AM, p. 122. Part of the concern is that this is would be the first time DES has evaluated a jet plow project in New Hampshire. Day 13AM, p. 139. The panel is also not sure of the value of doing a trial run so close to the cable run. Day 13AM, p. 141. The revised sediment characterization report collected samples to two feet but there were only six core samples that were analyzed for lead and arsenic, and no analysis was done for copper. The Tier II Evaluation demonstrated that copper in the predicted sediment plume could exceed the New Hampshire Marine Acute Water Quality Criterion for the Protection of Aquatic Life that has been established for copper. TD/UNH Exh. 3, p. 5. There are gaps in the studies the Applicant has done and those studies are not comprehensive. Day 13AM, p. 132.

M. It was also clear from the record that the Project would have impacts on organisms and wildlife. Oysters are good for the Bay; they restore a balance to the nutrient cycling in the water column. They are filter feeders that draw nourishment from naturally-occurring plankton. Day 14AM, pp. 7-8. Raising them in the Bay has become an aquaculture industry (there are 15 different companies or individuals growing oysters in Great Bay). Day 14AM, p. 84. It takes about three to four years to go from a seed oyster to a market-sized oyster. Day 14AM, p. 87. This Project would adversely affect that industry. Day 14AM, pp. 21-22. Oysters are susceptible to sedimentation. Day 14AM, p. 10. Sediment accumulation from this Project could suspend sales of oysters. Day 14AM, p. 30. If there is an interruption in supply because of having to shut down operations, oyster farmers may lose the customers they have accumulated over the years. Day 14AM, pp. 57, 74-76. This Project creates significant mortality and suspension of harvesting risks. Day 14AM, p. 77. Also, the potential for an excess sediment load while the oysters are dormant could be too much for them to recover from. Day 14AM, p. 31. The oyster population in the Bay declined from over 25 million in 1993 to 1.2 million in 2000. Day 13AM, p. 23. Oyster

populations are in severe decline. Day 14AM, p. 12. While the oyster population has partially come back, sedimentation is a stress on oysters. Day 13AM, p. 25. Oysters are also threatened by pathogens and by Dermo and MSX, which may be stirred up by the jet plowing. Day 14AM, p. 14. There is also a concern about contamination from legacy pollutants like arsenic and copper and a whole suite of contaminants associated with past industrial practices. These could be stirred up by the jet plowing. Day 14AM, p. 33. The modeling does not address the impacts of the plume on oysters. They have never seen this type of plume before from a concentrated sediment dispersal event. Day 14AM, p. 59. In addition, the turbidity levels that are monitored during the jet plowing are national water quality standards that are not based around how they impact oysters. Day 14AM, pp. 72-73. Closure of other sections of the Bay by DES and Fish & Game will push oyster farmers closer to where cable is proposed to be laid for this Project. Day 13AM, p. 20; Day 14AM, pp. 16-17.

N. The fact that they are putting the cable in an existing cable corridor under Little Bay does not reduce the environmental impacts, in fact in many ways it increases those impacts. Day 5AM, pp. 88-89. The existing, abandoned cable contains lead. Day 5PM, p. 18. Removing the old cable requires a grapnel run to clear the route of debris. Day 5AM, p. 67. This process in and of itself could have many of the same negative impacts on Little Bay that jet plowing would have.

O. The Benthic community and habitat would likely be negatively and permanently impacted. Day 6AM, p. 76. In terms of essential fish habitat ("EFH"), the level of magnetic field in the underwater crossing would be significantly higher than the overhead sections, because the three phases of the power line are spaced widely. Day 7PM, p. 95. This could create stress on habitats in Little Bay. Day 7PM, p. 143. Some organisms would not be able to withstand the amount of burial from the jet plow. Day 6AM, p. 153. It could also impact exemplary natural communities of organisms. Day 5AM, pp. 60-61. Sturgeon would suffer a permanent loss of habitat from the concrete mattresses. Day 5AM, p. 7; Day 6AM, pp. 125-126. Nesting bald eagles in close proximity to the cable, less than 1000 feet away, are likely to be significantly disturbed by the installation of the cable, which may involve the use of a helicopter. Day 5AM, p. 8; Day 15PM, pp. 136-140; TD/UNH Exh. 13; Durham Residents Exh. 16. The Applicant does not yet have a federal permit for this activity

so close to the nest. Day 5AM, p. 8. Bald eagles have nested on both sides of Little Bay. Day 6AM, p. 29. By not following through on the RIM process (elutriate testing and/or elutriate toxicity testing) the Applicant has not demonstrated that the Project would “not result in the mortality of any plants, animals, humans, or aquatic life within the mixing zone.” This is required by DES rules, Env Wq 1707.02. Overall, the Project would impose significant stress on habitats in Little Bay. Day 7PM, p. 143; Day 15PM, pp. 179-181.

P. The HDD alternative is one which Durham/UNH still believes should be evaluated by an independent expert hired by the Committee. It is a technique that the Site Evaluation Committee found in another docket, SEC Docket No. 2012-02, would “not have a major or unreasonable impact on the natural environment, the air or water quality, marine life or habitat or historical resources.” TD/UNH Exh. 29, p. 5. Public Counsel witness Whitney seemed to concur. He testified that the Committee should “look at all the options and engage engineers.” As he noted, “there a lot of HDD engineers who are a lot smarter than I am.” Day 12PM, p. 117. When the Presiding Officer denied Durham’s Motion to hire its own HDD expert she specifically said that after hearing all the evidence the Committee is free to hire its own expert. Order on Pending Motions, issued on July 31, 2018, p. 7. Durham’s position is still that this is something the Committee should do. Day 10PM, p. 132. The fact that the cost of doing HDD is higher than the current cost for the Project does not change Durham’s position on this. Day 10PM, p. 146. In fact it is Durham’s position that if this Project is to proceed on this route and Durham, UNH and Newington have to accept all of the negative consequences of the Project in order to improve electric reliability in the region, and HDD has to be done to protect Little Bay, then it is only fair that the costs be shared by as large a group of ratepayers as possible. In addition, the Durham residents who would be most affected by HDD testified that they would prefer this alternative. Day 15PM, p. 153.

## **II. The SRP Project Would Unduly Interfere with the Orderly Development of the Region**

A. The Applicant did not meet its burden on this issue. It is insufficient to argue that this Project, a high voltage transmission line, would utilize an existing right-of-way (“ROW”) for a partially abandoned distribution line to justify the Project being

consistent with the orderly development of the region.<sup>4</sup> This is the primary argument relied upon by the Applicant's witness on this issue, Mr. Varney. App. Exh. 13, p. 7 of 10. Portions of the distribution line in the ROW have been abandoned for years, including the portion under Little Bay. Day 15PM, pp. 133, 233-234, 259. This Project would also result in a new use for the ROW, transmission as compared with distribution, and thus much taller and broader steel transmission structures than are currently in the ROW. Existing structures in the ROW are distribution lines with wooden poles approximately 40 feet tall. The proposal is for new steel structures 65-100 feet tall. Day 8AM, p. 90; *see* also CFP Exh. 7, E-p. 4. The differences in the height of the structures proposed for the ROW as compared with what is there now are in the range of 45-60 feet. Day 8AM, p. 116. Transmission and distribution lines are very different. Day 10AM, pp. 50-51. This Project would also result in 1.7 million square feet of disturbance from an alteration of terrain perspective. Day 8AM, p. 62.

B. This Project would be contrary to the views of local planning and governing bodies, as expressed in the Master Plan and Zoning Ordinances of the Town of Durham, because it would install high voltage transmission lines through residential and rural districts. The Applicant failed to meet its obligation to provide copies of the Master Plan and Zoning Ordinances with its Application, as required by Admin. Rule Site 301.09. That rule is there for a reason; the Committee must give due consideration to the views of municipal and regional planning commissions and municipal governing bodies, and master plans and zoning ordinances are one of the ways in which they typically make those views known. Thus the Applicant's failure to provide these documents should not be overlooked or minimized.

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<sup>4</sup> The cases which the Applicant cited in the Application to support putting this Project in an existing electric utility corridor both involved an existing transmission, not distribution, corridor. App. Exh. 1, E-p. 25. One was an existing gas transmission corridor; the other was an existing electric transmission corridor. The SEC found that "the use of [an] existing right of way is much more consistent with the orderly development of the region and has less impact on the environment." Decision in Portland Natural Gas Transmission System Maritimes ("PNGTS") & Northeast Pipeline Company, SEC, Docket No. 96-01 and Docket No. 96-03, 1, 17 (July 16th, 1997). In addition, the SEC found that, in the context of sighting transmission projects, "the single most important fact bearing on this finding [that the facility will not unduly interfere with the orderly development of the region] is that the proposed transmission line occupies or follows existing utility transmission rights-of-way." Findings of the Bulk Power Facility Site Evaluation Committee, SEC DSF 850-155, 1, 11 (Sept. 16th, 1986) [Emphasis added].

C. Both the Application and the Applicant's witness on this issue provided inaccurate statements and information about the Durham zoning ordinances. Mr. Varney stated that the Project is consistent with zoning ordinances in Durham. Day 8AM, p. 136. He also said that transmission infrastructure is not a prohibited use in any of the four communities and that it was an existing use, and that local ordinances do not speak to transmission lines as permitted or not. Day 8AM, p. 138. The Application echoed these statements. App. Exh. 1, E-pp. 146-148. Durham zoning ordinances directly contradict these statements. Under Durham Zoning Ordinances, TD-UNH Exh. 31, E-p. 48, section 175-11, any use not specifically permitted or permitted by conditional use permit is prohibited. Transmission lines are only permitted as conditional uses and only in the Wetland Conservation Overlay District (TD-UNH Exh. 31, E-p. 101, section 175-61) and in the Shoreland Protection Overlay District (TD-UNH Exh. 31, E-p. 106, section 175-72), not in any other districts or zones in Durham through which the Project as proposed would run. Under town ordinances if something is allowed by conditional use it requires a several part test to be met and a super majority vote of the Planning Board. The Durham residents confirmed that transmission lines are a prohibited use in Durham and that this was a factor in their locating there. Day 15PM, pp. 96, 113, 118, 119. Mr. Selig confirmed that Durham would not have approved this Project. Day 10PM, p. 184. This means that the Project is very clearly contrary to the views of local planning boards and governing bodies, which have approved these ordinances. The Committee must give due consideration to these facts. Thus approving this Project, which as proposed would run through zones in Durham where transmission lines are prohibited uses and in which they could not be approved even if they met the extremely high threshold for a conditional use, would be contrary to ordinances in Durham and would unduly interfere with orderly development of the region. The Town of Newington has testified to similar restrictions, thus it is not just an issue for Durham it is also one for Newington, making the views on this issue of a regional nature. *See, e.g.* Day 11AM, pp. 152-153.

D. The Project is also inconsistent with the Durham Master Plan. Day 10PM, p. 149. A town master plan is indicative of planning board views. Day 8AM, p. 28. The purpose of a master plan is to "set down as clearly and practically as possible the best and most appropriate future development of the area under the jurisdiction of the planning

board, to aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire, and to guide the board in the performance of its other duties in a manner that achieves the principles of smart growth, sound planning, and wise resource protection.” RSA 674:2, I. For the reasons related to aesthetics and scenic resources articulated in section III.E below it is clear that the Project violates the Durham Master Plan.

E. Mr. Varney in his prefiled testimony tried to equate the SRP Project with the Merrimack Valley Project (“MVP”). App. Exh. 146, pp. 15-16. As became apparent on cross examination by Public Counsel, the two projects are very different, with one of the major differences being that the MVP is installing high transmission lines in ROWs where three existing transmission lines already exist, and in a ROW that is between 216 and 635 feet wide, far wider than the 100 foot ROW in this case. Day 8AM, pp. 111-112. In addition, towns through which that project was proposed did not oppose the MVP. Day 8AM, p. 123; *see also* Day 7PM, pp. 136-139. The reality is that the MVP is much more like either one of the alternative routes around Little Bay that PSNH could have chosen. Newington Exh. 7; App. Exh. 41, E-p. 21. Mr. Andrew testified that both the northern and southern alternatives contain high voltage transmission lines, unlike the SRP route that Eversource chose. Day 4AM, pp. 61-62. Committee Member Elizabeth Muzzey asked Eversource to provide more information about the environmental impacts of those alternate routes but to the best of our knowledge Eversource never did so. Day 6AM, p. 163; *see* Committee Exhibits 1-12. The Committee is required by RSA 162-H:16, IV to give due consideration to those alternatives, or as the statute refers to them: “potential... routes.” The Applicant provided no help to the Committee to fulfill that responsibility in that it provided very little information about those potential routes other than a broad conclusion. One or more of the other routes could provide the reliability relief the ISO believes to be necessary with much less environmental, aesthetic and regional impact. We believe this is information which the Committee is entitled to request and required by law to consider.

F. One of the sub-criteria the Committee must evaluate under this overall criteria is economic impact on the region. Admin. Rule Site 301.09. While the Project would provide some tax revenue to Durham, as Mr. Selig testified it is unclear for a number of reasons what that might be. Day 10PM, pp. 177-178. More importantly, when it comes to

this criteria Durham values protection of historic, scenic and cultural resources over any positive tax revenue impact that might result from the Project. To the extent that economic growth in the region requires a project to complete the suite of projects, as noted below there are alternatives that appear to have far less impact. Furthermore, as the Applicant's witness Lisa Shapiro admitted, of the \$19.1 million she estimated would be spent in New Hampshire on this Project she could not tell how much would be spent locally as compared with in the state as a whole, Day 6PM, p. 67, thus putting in doubt the economic impact on the region. She also only modelled property tax payment estimates for the first year of the Project and it is likely that estimate will decline over time. Day 6PM, pp. 69-71.

G. In terms of the Project interfering with a prevailing use and recreation, Durham residents testified that the Project would interfere with swimming, kayaking, paddle boarding and the overall enjoyment of Little Bay. Day 15PM, pp. 131-132, 144, 165; *see* also the Comments of Peter Sawtell, Owner and Lead Instructor of Seven Rivers Paddling, dated October 26, 2016; Transcript of October 11, 2018 Public Statement Hearing at DES Pease Field Office.

### **III. The SRP Project Would Have Unreasonable Adverse Effects on Aesthetics, Historic Sites and Archaeological Resources**

A. The Applicant did not meet its burden of showing that the Project would have no unreasonable adverse effects on aesthetics and historic sites and archaeological resources. The testimony from a number of witnesses indicates that the Project would have unreasonable adverse effects on aesthetics, including placing poles and structures more than twice the height of current distribution structures through neighborhoods and residential districts, as well as the negative aesthetic effect of the concrete mattresses in Little Bay. Day 15PM, pp. 143-148. The process the Applicant used for identifying aesthetic impacts was overly complicated and insufficient, and the one used to identify historic sites was not broad enough to comply with state law and therefore overlooked many valuable historic sites. The Applicant's historic consultants never consulted with the Durham organization that maintains archives, maps, manuscripts and genealogies, that is essentially the storehouse of local knowledge, the Durham Historic

Association (“DHA”).<sup>5</sup> The Project would have unreasonable adverse effects on historic sites and the community character of Durham. DHA noted, after careful and extensive analysis of primary historical documents and historic sites in Durham, that it had no confidence in Eversource’s ability to protect historic resources in Durham, and that it remained concerned about monitoring and mapping of historic sites. DHA Exh. 1 and 4; Day 11PM, pp. 132, 150-151. The DHA is very concerned about artifacts in the path of the transmission line “getting crushed” and about the 100 foot easement not being big enough to accommodate construction equipment. Day 11PM, p. 153.

B. Even with the planting plans included in the Stipulations between Public Counsel and the Applicant the Project would still always be highly visible compared to what is there now. Day 14AM, p. 99; Day 15PM, p. 135. Public Counsel witness Lawrence said the Project would “dramatically change the visual character and decrease the aesthetic quality” of the ROW. It would double or triple the height of existing structures and result in substantial tree removal to the full width of the ROW. Day 14AM, p. 100. Mr. Lawrence disagreed with Mr. Raphael’s conclusion that the overall visual sensitivity to change for Little Bay was moderate. Day 14AM, p. 109. Mr. Lawrence said the concrete mattresses would change the character of the spot right at the shoreline. Day 14AM, p. 110. Vivian Miller’s testimony confirmed this. Day 15PM, p. 95, 127-130. Mr. Lawrence still believes that Mr. Raphael’s visual assessment used an overly complicated methodology that under-represented scenic resources and minimized visual impacts and that Mr. Raphael failed to identify key observation points where the Project would be prominently visible. Day 14AM, pp. 110-111. Mr. Lawrence disagreed with Mr. Raphael’s rather astounding assertion that a transmission line has the same visual impact as a distribution line. Day 14AM, p. 118. Mr. Lawrence said that a distribution line is much more soft, much more organic, much easier on the eyes than a transmission line. Day 14AM, p. 118. Mr. Lawrence also testified that the Project would make a dramatic and material change to the Durham Point crossing in Durham and that 85-90 foot transmission poles would not be a visual complement to the rural

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<sup>5</sup> As noted in its Petition to Intervene: “DHA is a non-profit, member supported educational research organization and museum dedicated to the preservation of memory and artifacts connected with the history of Oyster River Plantation and the Town of Durham. As guardian of Durham’s past, DHA informs and educates residents and others of the history of the town and how contemporary Durham developed over nearly 400 years of recorded history.”

area. Day 14AM, pp. 129-130. He agreed that one of the reasons a town prohibits transmission towers through zoning ordinances is because of the visual impact on the area. Day 14AM, p. 131. He also testified that if he had done the visual assessment from square one that he would have included national historic sites, national register listed buildings, state register listed buildings and sites, and public trails, many of which were not included in the Applicant's assessment. Day 14AM, pp. 134-135. It became clear that the Applicant's methodology for determining whether something is scenic is a very narrow standard. Day 9PM, p. 36. The fact that some sites "rise to the level of a scenic asset" and some don't, for reasons that do not seem to involve specific ratings, indicates that his methodology is somewhat arbitrary and not consistently scientific or analytic. Day 9PM, p. 147. To Durham/UNH the narrowness of this standard becomes particularly obvious when considering Mr. Raphael's assessment of the moderate visual sensitivity of Little Bay noted above, which Mr. Selig directly contradicted. Day 10PM, pp. 110, 201. As noted in section III.E below, Durham's Master Plan also directly contradicts this assessment.

C. One flawed aspect of the methodology that Mr. Raphael used was to measure the impact on aesthetics by assessing whether a disinterested person believes a particular aesthetic impact is unreasonable, i.e. would it be something that would change your life untowardly. Day 9PM, p. 161. This seems to give license to totally disregard the views of abutters or people who are the most impacted by a project. He essentially discounts people who come to testify at public hearings because they have already made up their minds. Day 9AM, pp. 159-160. This seems contrary to the Committee's statutory responsibility to hold public hearings and under RSA 162-H:10, III to "consider and weigh all evidence presented at public hearings..." Moreover, to the extent that the rules or law require application of the reasonable person standard, it seems reasonable for a person who lives next to a proposed project, or public officials representing the views of the municipality, to be able to express concerns about impacts to their property or their town from their perspective and have those concerns taken into account. Day 9PM, p. 152. Another example of Mr. Raphael's flawed analysis was his testimony that because there has been an underwater cable in Little Bay for years, though it has not been used for years and though there were never any concrete mattresses used to cover that cable, that this means that the concrete mattresses would not rise to a level of unreasonableness from an aesthetic

perspective. He said that the upgrade in the cable would not dramatically change people's understanding and knowledge of that. Day 9AM, p. 78. He also said, somewhat remarkably, that while the concrete mattresses would be read as a change when they appear at low tide, this is not a time when people are out and about on the shoreline. Day 9AM, pp. 78-79; see the Comments of Peter Sawtell, Owner and Lead Instructor of Seven Rivers Paddling, dated October 26, 2016; Transcript of October 11, 2018 Public Statement Hearing at DES Pease Field Office.

D. Public Counsel's witness Patricia O'Donnell, who testified regarding the Applicant's analysis of historic sites, said there is a broader definition of historic sites expressed in New Hampshire law that the Applicant's consultant ignored. She agreed that part of any analysis of historic sites should involve talking with people in the community, particularly those who value historic sites, which the Applicant did not do. Day 15AM, pp. 8-9.<sup>6</sup> Ms. O'Donnell also said that the Applicant failed to adequately analyze the impact on stone walls, which contribute to the rural character. Day 15AM, pp. 10-12; Day 15PM, p. 20. She noted that Durham, Madbury and Newington maintain community character, that the Durham Master Plan indicates its importance to the Town, and that the Project creates a level of change that would have a negative impact that would be unreasonably adverse. Day 15AM, pp. 13-16. She also said that the introduction of transmission poles would be contrary to the preservation of community character. Day 15AM, p. 26. Testifying that the shorelines of Great Bay and Little Bay should be protected, she said that the scenic and natural resources in the bays are "unparalleled in New Hampshire," that they provide habitat to a wide range of wildlife, and it is "one of the richest estuaries in North America." Day 15AM, p. 27. This directly rebuts Mr. Raphael's surprising assertion that Little Bay is only moderately scenic. Ms. O'Donnell noted that the Memorandum of Understanding ("MOU") and Memorandum of Agreement ("MOA") with the Division of Historic Resources and the United States Army Corp. of Engineers did not include a comprehensive list of historic resources that might be affected by the Project and was not a full resolution of all of the

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<sup>6</sup> Applicant's witness Widell didn't communicate with people in the community about historic resources despite what the SEC rule defining historic sites, Site 102.23, says: "**any building, structure, object, district, area or site that is significant in the history, architecture, archeology or culture of this state, its communities...**" She even went so far as to say that it would have been inappropriate to reach out to people in community. Day 10PM, p. 63.

adverse impacts the Project may have on historic resources. Day 15AM, p. 36; Day 15PM, p.19. She also said that it would have been important to assess visual impact from public trails, conservation lands, public waters, small graveyards, essentially a whole series of resources that were not considered. Day 15AM, pp. 39, 42; Day 15PM, pp. 44-52. She agreed that it is an adverse effect to have two thirds of the proposed transmission line go through historic districts. Day 15AM, p. 49. Her conclusion was that the Project would have unreasonable adverse effects on three towns. Day 15PM, p. 56. As Ms. O'Donnell said, the voices of the community were limited by the analysis done by the Applicant. Day 15PM, p. 71. Durham and UNH's signing of an MOU with the Applicant which includes additional protections for stone walls and historic resources does not mean they have acquiesced that the Project is not an issue. They are simply working to protect local resources to the extent they can in the event the SEC approves this Project that is so clearly inconsistent with the statutory approval threshold.

E. While UNH may not be a scenic resource under some restrictive state and federal definitions, it has very high cultural value and is an important asset to the region and the state of New Hampshire. Mr. Lawrence said that the campus is considered to qualify under some definitions of scenic resources. Day 14PM, p. 15. The decision by Eversource to drill under Main Street in Durham reflects its, and Durham and UNH's, concern about the impact the Project would have on UNH and the Town as a whole along Main Street in Durham. Day 9PM, pp. 25-26. The Project would also be contrary to the Durham Master Plan which places a high value on scenic resources. This section of the Durham Master Plan highlights the estuary, its scenic value and how it has shaped the Town's history: "Durham is fortunate to be located next to the Great Bay Estuary, a distinctively ecological and cultural resource in the Seacoast area that has been celebrated by Durham residents over time for its scenic beauty, and has been a key element in shaping the Town's history." Another section of the Master Plan highlights the value of preserving the beautiful resources that are located in the Town: "Durham is home to beautiful forests, open spaces, and waterfront shorelines, wetlands, and other natural communities thanks in large part to a long tradition of preserving its natural resources. Residents noted scenic views along the Oyster and Lamprey Rivers,

College Woods, Mill Pond, Adams Point, Wagon Hill and more.”<sup>7</sup> This section focuses on defining features: “Durham’s location on the Great Bay estuary, its proximity to the seacoast, and its diverse natural resources are defining features of the community.” This section highlights how important scenic views are to the Town’s identity: “Scenic views of Little Bay, the Oyster and Lamprey rivers, and numerous farms, forests, wetlands, and conserved properties contribute to Durham’s special identity. These assets provide opportunities for a variety of outdoor activities and serve to protect habitat and water and air quality.” TD/UNH Exh. 24, E-pp. 3,5,6. Because this Project would have significant negative impacts on the UNH campus and resources that the Town values in its Master Plan we believe it will have unreasonable adverse effects.

#### IV. Issuance of the Certificate Would Not Serve the Public Interest

A. Before it can issue a certificate the Committee must also make a finding that a proposed project would serve the public interest. RSA 162-H:16, IV(e). Under Admin. Rule Site 301.16, when making this finding the Committee must consider a number of factors that are the same ones listed in the declaration of purpose provision contained in RSA 162-H:1.<sup>8</sup> These factors include many of the issues raised under the other criteria in RSA 162-H:16, IV (the environment of the state, historic sites, aesthetics, air and water quality, public health and safety) and some other factors not specifically mentioned in the other criteria (the welfare of the population, private property, the location and growth of

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<sup>7</sup> Adams Point is on Little Bay immediately adjacent to the proposed crossing of Little Bay on the Durham side; Wagon Hill overlooks Little Bay.

<sup>8</sup> **162-H:1 Declaration of Purpose.** – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: **the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety.** Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities. [Emphasis added.]

industry, the overall economic growth of the state, the use of natural resources). Subsection (e) does not contain a reference to the same standards as the other three criteria in RSA 162-H:16 (“adequate”, “unduly interfere with”, or “unreasonable adverse effect”). Based on a reading of the rule and the two statutes cited above we believe that in considering this required, independent, public interest finding the Committee should take a separate look at the Project’s benefits and impacts and balance those in an overview of the Project. *See* RSA 162-H:1 (“the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire”).

B. In addition, we believe the Committee should read this required public interest finding in connection with its other responsibilities under RSA 162-H to hold public hearings and consider and weigh all of the evidence presented to the Committee through those hearings and comments submitted by the public before, during, and after public hearings. RSA 162-H:10, III. The public is overwhelmingly against this Project as evidenced by the public hearing held on October 11, 2018, public comments submitted directly to the SEC, and by the participation and testimony provided by residents of Durham and Newington in this proceeding who oppose the Project.

C. At the public hearing in Newington on October 11, 2018, all speakers except for one (from Rochester) were adamantly against the Project, citing various reasons. Transcript of October 11, 2018 Public Statement Hearing at DES Pease Field Office. The comments of people who testified during the public hearing echo concerns that have been raised in the adjudicative portion of this proceeding. These concerns include the impact this Project would have on uses of Little Bay like kayaking, swimming, paddle boarding, fishing, boating and observing wildlife; the visual and environmental impact of concrete mattresses; the fact that the Bay is a fragile resource and its organisms (oysters, eelgrass, horseshoe crabs, to name a few) and wildlife (eagles and herons, to name a few) are under great stress already; that a project like this is likely to jeopardize the slow healing process underway; as well as the concern about industrial pollutants, persistent organic pollutants, present in sediments in the Bay because of military and industrial activity on lands adjacent to the Bay and rivers that feed into the Bay and their ability to get into the food chain. The comments also noted that there are other, far less impactful, avenues to get power to Portsmouth; that

the Project would violate master plans and zoning ordinances; the negative impacts to historic sites; impacts from electro magnetic fields; the disfigurement of the landscape that would result from much taller transmission structures; that the region's economic and environmental health are tied to the Bay; that Durham has invested millions of dollars in preserving its rural character; negative impacts on property values; and destruction of the rural and historic character of the community. One speaker said that it was a lot of risk for a project that has been found unnecessary by UNH's Carsey School of Public Policy.<sup>9</sup> Other concerns included that the Project would release toxic materials encapsulated in mud; that it would only cost pennies more to ratepayers, who will pay for this Project, to be done right (a more expensive option would be well worth it); that the reports prepared by the Applicant's consultants were superficial and incomplete; the negative impacts to trails, Class IV roads, and conservation lands that were not assessed; potential noise from high voltage transmission lines and transformers; and that homeowners who live on Little Bay have to meet many strict requirements to make improvements to their property in order to protect the Bay. Other concerns and comments included that people chose to live in these communities for their charm, historic resources, hiking and walking trails, and community preservation values and these are all threatened by this Project; that Little Bay is also treasured by those who do not live on it; that the introduction of transmission lines into Durham's rural areas would be against all land use principles planned and implemented for decades; and that the Project would run contrary to the commitment to preserving the natural beauty and environment and the uniqueness of the region. Comments also indicated that the Project fails to recognize all of the time, effort and resources that people and organizations have put into improving the health of Little Bay, and the many organizations that have worked to protect the Bay: TNC, Waterkeepers, CLF, Jackson Estuarine Lab. the Society for the Protection of NH Forests, the Oyster River Watershed Association, the Bellamy and Oyster River Watershed Protection

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<sup>9</sup> This appears to be a reference to the May 2017 report, Carsey Perspectives: New Hampshire's Electricity Future, which included the following quote: "Several studies conducted between 2012 and 2015 have examined the reliability of the New England power grid, and none of the eight reviewed for this study found that grid reliability is an immediate risk to New England's energy security.<sup>13</sup> Furthermore, while some studies have suggested that grid reliability may be an issue after 2021, the potential challenges are primarily associated with extreme operating conditions. The region's power grid system operator has demonstrated success in managing these extreme conditions and has been proactive in adapting the rules and procedures under which power generators operate to further increase grid reliability."

Partnership, Great Bay Stewards, the Town of Newington Conservation Commission, the Great Bay National Estuarine Research Reserve, the Lamprey River Watershed Association, and the Piscataqua Region Estuary Partnership. Comments submitted directly to the Committee independent of the public hearings are also overwhelmingly against this Project. All of these comments are certainly an important factor for the Committee to weigh in deciding whether this Project will serve the public interest.

D. We submit that for reasons outlined above the impact on the environment, water quality, historic sites, aesthetics, and natural resources are on balance negative ones, especially as compared to using an alternative route. While the Applicant has argued that the Project is necessary to meet demand in the Seacoast region, and that this would presumably be a benefit to the growth of industry and the overall economic growth of the state, as we have pointed out we believe that there are far less impactful alternatives that would accomplish the same thing. As we have also pointed out demand growth is not the same as it was when the ISO first considered the demand in the Seacoast region, for a number of reasons. In addition, the steps the Applicant has already taken to improve reliability in the region, the other projects in the suite that have already been built, have presumably had an impact in that there are no apparent problems with reliability.

E. We also want to note that one of the factors which the Committee must consider is the welfare of the population. This is a Project that would have a significant negative impact on towns that put a premium on their natural and historic resources and the people who live in those towns, and on the campus of our premier state public university. We believe this would be contrary to the welfare of the population and weighs against the Project. One of the other factors the Committee must weigh is private property. There was significant testimony from residents that the Project would negatively impact their ability to enjoy their property and that it would impact property values. Day 15PM, pp. 159, 183; Transcript of October 11, 2018 Public Statement Hearing at DES Pease Field Office. The Applicant's witness on property values, James Chalmers, admitted that he had never done or read a study of the impact that replacing a distribution line with a transmission line would have on property values. Day 7AM, pp. 25-26. Nor did he study whether the concrete mattresses would affect property values on the shoreline of Little Bay. Day 7AM, p. 35. He

also testified that the market value of a property that has a view of the Project could be affected by the Project. Day 7PM, p. 27.

F. We therefore submit that when the factors pertaining to the public interest that are listed in Admin. Rule Site 301.16 are considered and the potential significant adverse impacts of the Project along with the extensive negative public comments are weighed against the benefits, that this Committee must find that the Project will not serve the public interest.

## V. The Applicant has not Obtained All Other Necessary Approvals

A. The Applicant here failed to comply with the requirement that they identify in their Application all other state agencies having permitting or other regulatory authority. Admin. Rule Site 301.03(d). Little Bay is part of the tidal waters of the state and the land under the tidal waters of the state, lands subject to the ebb and flow of the tide, are held in trust for the public. RSA 1:14; *Opinion of the Justices*, 139 N.H. 82, 91 (1988). As CLF Exhibit 23 indicates, a construction license under RSA 371:17-23 is not enough because it does not by itself convey a real property interest. During the proceeding the Applicant suggested that by obtaining an order from the PUC it met this requirement. Day 3PM, pp. 171-173.<sup>10</sup> This, however is not sufficient. Eversource must obtain a grant of easement from the Governor and Council and the Long Range Capital and Utilization Committee, with advice from the Council on Resources and Economic Development, to obtain an easement to install a high voltage transmission cable, fiber optic cable, and concrete mattresses in the tidal waters of the state. The proposed transmission cable is significantly different than the lower voltage distribution cables that were installed years ago and later abandoned. Transcript, Day 3PM, p. 167. This proposed new cable involves three separate trenches where much higher voltage cable would be buried at least five feet deep and it involves a grapnel run to remove much of the existing cable. Fiber optic cable has never been installed

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<sup>10</sup> Mr. Bowes testified that the deed requirement for state-owned land was rescinded in 2013. What he failed to note, however, was that this was the deed requirement that was specific to the PUC process, it had nothing to do with the RSA 1:14 process. Chapter 82, Laws of 2013. The 2013 legislation repealed RSA 371:22, which had referred to “any such license”, clearly a reference to the license required by RSA 371:17. These are two very different and distinct processes with different standards, conducted by different state bodies. Chapter 82 did not in any way amend or repeal RSA 1:14.

in Little Bay previously and therefore constitutes an entirely new use, as does the installation of transmission as compared with distribution lines. Concrete mattresses have never been installed in Little Bay, or anywhere else in New Hampshire. Excavating and jet plowing three new trenches in the tidal waters of the state, placing over 8600 square feet of concrete mattresses that would permanently affect the ecology of Little Bay, and installing a new fiber optic cable all require a grant of easement from the state through the process described above. The Applicant failed to identify this in its Application as required and has failed to obtain the necessary approvals. This is a fatal flaw in the Application.

B. When the Applicant obtained PUC approval to install high voltage transmission cable and fiber optic cable under Little Bay in NHPUC Docket DE 16-441, it did not inform the PUC of the fact that it would be using concrete mattresses, making the PUC approval facially inadequate and insufficient to provide another one of the approvals necessary to proceed with the Project. Committee Member David Shulock asked the Applicant about this and they said they could check on it, but there is no evidence in the record that they ever did. Day 3PM, p. 143; *see* Committee Exhibits 1-12. A search of the record in DE 16-441 reveals that the Applicant never informed the PUC that concrete mattresses would be required for the crossing of Little Bay. This happened despite the fact that the SEC Application clearly discussed concrete mattresses and the PUC petition was filed on the same day as the Application. In order to make the required finding that the license may be exercised without substantially affecting the public rights in the affected public waters pursuant to RSA 371:20 the PUC would have had to consider the concrete mattresses. Although the Applicant informed the PUC of the change in the depth of the trenches in Little Bay, they never informed the PUC of the concrete mattresses. The PUC order granting the license to install cable under Little Bay makes no reference to concrete mattresses and there is no reference anywhere in the materials in the docket. This is another, separate flaw in the SEC record. The PUC order granting the license, Order No. 25,998 issued on March 10, 2017, also makes it clear that Eversource is responsible for obtaining any and all other permits for the crossing. Approval of Governor and Council as noted above is one of those other approvals.

**VI. The Proposed DES Permit Conditions Would Unlawfully and Inappropriately Delegate the SEC's Statutory Functions and Role**

A. The DES permit conditions give far too much discretion to DES to review and approve plans that would be submitted after an SEC decision. It is one thing to give deference to agency decisions and recommendations made to the SEC during the course of a proceeding, it is quite another thing to abdicate responsibility for overseeing critical environmental plans that have not yet been developed, explained or reviewed. *See* RSA 162-H:4, III, III-a, and III-b. Public Counsel's witness Whitney does not know what would be in the jet plow report, and it is unclear to them whether DES has the authority based on the results of that report to prevent the jet plowing from proceeding. Day 12PM, pp. 16-17. He stressed the importance of writing conditions in permits and holding people to them. Day 12PM, p. 21. He has no idea what would be in the magnetic field testing plan. Day 12PM, pp. 44-45. It is also unclear whether DES has the time and resources to meaningfully review the many plans that it would be required to review given the time it took them to review the information pertaining to Little Bay provided in this docket and the number of extensions they requested. Day 13AM, p. 202.

B. The SEC cannot delegate to DES what is proposed here; the statute, RSA 162-H:1, requires that in this process "full and timely consideration of environmental consequences be provided." The SEC will not know the real consequences of this Project until the jet plow trial run is completed; if the Committee intends to approve the Project it should stick with what the DES February 28, 2018 Final Decision said about doing the trial run and reporting back to the SEC before making a final decision on the certificate. The SEC itself, not DES, needs to exercise its statutory responsibility and make a decision about environmental consequences, not defer such critical decision making to DES. Public Counsel witness Whitney said the SEC should be involved in the Jet plow trial decision, that they are the ultimate decision maker. Day 12PM, pp. 49-50. The jet plow trial run would be the first actual information generating data about the use of jet plowing in Little Bay. Day 12PM, p. 50. Even the Applicant's witness seemed to have an understanding that DES would make a recommendation to the SEC with regard to the evaluation of nitrogen levels and the jet plow trial run. Day 4PM, pp. 105-106. Despite this the August 31 revised DES conditions do not indicate that the SEC would be provided with the results of the trial run.

App. Exh. 183, p. 3; Day 13AM, p. 42. Although Committee Members seem to be under the impression that members of the public would be able to comment on the plans, e.g. Day 13AM, pp. 173, 181-183, Durham/UNH's witnesses were not aware of a comment process and there is nothing in the DES August 31 letter that indicates this. What Durham/UNH is asking for amounts to a real world checking of the limited theoretical calculation that the Applicant has done. Day 13PM, p. 188. This should be done by the Site Evaluation Committee with input from intervenors and the public.

**VII. The Committee is not Required to Approve this Project Because of ISO's Findings**

A. The ISO process is very limited in its scope and its ability to notify important stakeholders. It does not replace or obviate the need for careful and thorough review of the issues which this Committee is required to review under RSA 162-H. It is clear that critical stakeholders like the communities affected by this Project had no knowledge of or input into the ISO process. Neither Eversource nor the ISO gave Newington or Durham notice of their consideration of possible solutions. Day 11AM, p. 16; Day 10PM, p. 134. While the cost of a project is an important factor in developing a transmission project, the estimates which are used in the ISO process are preliminary and that process does not seriously consider modifications to the project that may be required to obtain local or state approval. The ISO did not consider the cost of the Project to Little Bay, and negative impacts to the host communities of a completely new use of the corridor, a transmission versus a distribution line, nor did the ISO consider that the proposed Project was contrary to both local zoning ordinances and the host community master plans in Durham and Newington. The cost estimate that the ISO comes up with when they first make a decision only has to have a confidence range of 25/plus 50. Day 4AM, p. 80. The cost does not include consideration of environmental impacts. This was brought home by the evidence in the record that ISO NE did not assign any value to the fact that the Gosling Road alternative would have avoided crossing Little Bay. Day 4AM, p. 59. It would be an abdication of responsibility for the SEC to defer to the ISO since that body's limited function was to come up with reliability solutions that would be subject to further review by states through entities like this Committee. It is also important to keep in mind that the ISO did not care which of the three alternative routes Eversource and the state chose.

B. Eversource had three alternative 115kv routes which were presented to the ISO as part of the overall SRP transmission suite or projects. Day 4AM, pp. 72, 85; Day 6AM, pp. 105-107. Eversource thus has other, less intrusive, options available. The ISO in fact approved the concept of connecting Madbury to Portsmouth but left to Eversource, and ultimately this Committee, the route selection. Day 4PM, p. 7. The ISO decisions are never absolutely final, in fact projects that are on the list are sometimes cancelled. Day 4AM, p. 120.

C. The cost of the Gosling Road alternative as originally estimated was about the same as what the suite of projects including SRP is now estimated to cost. It scored higher than the SRP alternative. It had a built in contingency that would create more cushion for growth in the future: 100MW margin vs. 400 MW margin. Day 4PM, p. 22. Eversource put its own parameters on the Gosling Road alternative, like having to have two 400 MW transformers. This is what made this choice “gold plated.” Day 4AM, p. 67. Gosling Road is still a viable solution. Day 4AM, p. 73. So the Committee should not feel that it has no choice but to accept a route that goes through the towns of Durham and Newington, both of which do not want the Project as proposed, and going under Little Bay. The Committee should not feel that the die is cast; it is not. Day 4PM, p. 5. The Gosling Road Alternative is still an option, as are the other routes. The Committee should look closely at Mr. Hebert’s testimony about alternatives. Day 13PM, pp. 6-15.

D. Eversource has already completed other projects in the suite designed to address reliability issues on the Seacoast which have helped the situation. The other projects in the suite that have been completed have improved reliability. Eversource has no way of quantifying it and while they have done some analysis, they have not done a complete analysis of this. As Eversource witness Andrew said, any improvement to the system always has a benefit, no matter what. Day 4PM, p. 23. Cost recovery of the seven other projects included in the suite that have already been built does not depend on getting this remaining part of the suite done. Day 4PM, p. 51. So far there have been no outages caused by the failure to build the remaining projects in the suite. Just because Eversource made the decision to build the other projects in the suite for \$50 million without first obtaining the approval for the “linchpin” in the suite<sup>11</sup> doesn’t mean that the SEC should feel that it has no

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<sup>11</sup> Day 1AM, p. 34, lines 11-12.

choice but to approve the final projects in the suite. Moreover, as noted above, the SEC can and should require a deeper look at alternatives that do not require going under Little Bay and using what is a distribution ROW. Because the transmission line under Little Bay would take up to six months to fix if it fails it is difficult to understand how this Project would meaningfully improve reliability. Day 4AM, pp. 54-55.

E. The new load forecasts have been lower. Day 4AM, p. 120. The “immediate need” Eversource and the ISO identified in 2012 has not been a problem; the demand growth has been reduced by energy efficiency and distributed generation. It took more than four years after identifying that need for Eversource to file the Application with this Committee in April of 2016. Due largely to delays caused by Eversource’s continuing need to modify its Application this process has been further extended by over two and one-half years.<sup>12</sup> It is clear that the immediacy of the need was either overstated or that it has been addressed by other projects in the suite that Eversource has already completed. The \$50 million they have already spent has helped to reduce that immediate need. Times have changed from when the study was done in 2010-2012; the increase in and effect of energy efficiency programs and distributed generation projects has been much more significant than expected. Demand growth in the Seacoast region has been 1-2 percent. Tellingly, witness Andrew said that when you look into the future most of the crystal balls say load is going to at best stay flat, as an argument as to why not to build Gosling Road transformer. Day 4PM, p. 22. On the one hand Eversource says that increased demand on the Seacoast is driving the need for this Project, but on the other that because the load is going to stay flat there is no need for a project like Gosling Road to create more margin for future development. This Committee should make them take the time to more thoroughly analyze and present a route that will not jeopardize Little Bay and severely negatively impact the Towns of Durham and Newington and be contrary to local land use determinations as evidenced in local zoning ordinances and in the adopted master plans.

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<sup>12</sup> During the course of the proceeding Eversource continually emphasized the number of meetings it had with intervenors. It should be noted that although Durham, UNH, Newington, and many others, at considerable local official time and expense, met numerous times with Eversource officials, the Project still does not meet local approval. The host communities have clearly gone above and beyond what was required to work with Eversource, but to no avail.

**VIII. The Applicant's Communications with DES after the Final Decision and the DES Modifications to the Final Decision were Contrary to the Law, Due Process and Established Procedure**

The Applicant's communications with DES after it issued the Final Decision and the subsequent DES modifications to recommended permit conditions were contrary to the law and established procedures, and a violation of due process for all of the reasons outlined in prior motions filed with the Committee. *See* the Durham/UNH Partially Assented-to Motion Requesting a Suspension of the Proceedings and that Parties be Included in DES/Applicant Discussions dated August 21, 2018; Joint Motion to Strike NHDES's Post-Final Decision Recommendations and Related Testimony dated October 24, 2018. It is also a dangerous precedent to set for future SEC proceedings if there are no bounds on when a final decision on permit conditions by an agency can be submitted and/or modified. In response to an objection about how he characterized the DES conditions as not being subject to change, Eversource Counsel Needleman said the August DES letter indicates the conditions themselves are final. Day 13AM, p. 120. That is exactly what DES said about the February 28 conditions, which of course proved not to be true: "Water Division staff have completed their technical review of the application and have made a final decision on the parts of the application that relate to NDES permitting or regulatory authority..." App. Exh. 166, p. 1. The result of the actions of Eversource and DES and the Committee's determination on this issue has created substantial procedural, substantive and due process issues that could have been avoided if all parties had just followed what the statute says and established procedure.

**IX. Proposed Conditions if the Committee Decides to Approve the Project**

In the event that the Committee decides to grant a certificate to this Project it should incorporate the following conditions:

A. Make the Durham and UNH memoranda of understanding (MOU) conditions of the approval. App. Exh. 267 and 270;

B. Require that the Applicant obtain the approval of Governor and Council and the Long Range Capital and Utilization Committee for an easement to install the

transmission cable, fiber optic cable and concrete mattresses under Little Bay before issuing a certificate;

C. Require that the Applicant refile with the Public Utilities Commission for approval to cross Little Bay and that they include information about the concrete mattresses and obtain their approval before issuing a certificate;

D. Require that the Applicant and DES make available to the public all plans that are required to be filed with DES, including the results of the jet plow trial run;

E. Establish a process for the submission of public comment and a hearing before the SEC on all plans pertaining to Little Bay (including, but not limited to the following revised plans: Eelgrass Survey Plan, Benthic Habitat Monitoring Plan, Benthic Infaunal Community Plan, Mixing Zone Plan, Water Quality Monitoring and Adaptive Monitoring Plan, and Plan to assess shellfish tissue before and after the Little Bay Cable Crossing);

F. Establish a process for making the results of the jet plow trial run available for review, comment, and a hearing before the SEC, making sure there is a reasonable/practical timeframe for thorough review, comments, and consideration, before jet plowing is allowed to proceed; and

G. Before issuing an order, hire an independent expert to look into HDD, and establish a process for a hearing and comments on the results of this review.

### **Conclusion**

Durham/UNH and other intervenors have invested significant time and resources in participating in this proceeding, one which has lasted a number of years and 15 days of hearings. This process places a significant, unreasonable and impractical burden on publicly funded entities, like towns and public universities, with limited staff and resources. It is extremely difficult to counter all of the information put forth by an entity with seemingly unlimited resources that can recover all of its costs from ratepayers.

Eversource may have met with intervenors on a number of occasions to discuss the Project, but this does not mean that those intervenors accept the Project and that it should be approved. In fact despite devoting significant time and resources to these meetings

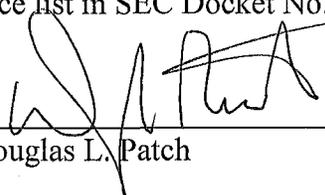
the Project is still not acceptable to town officials. Many of those meetings led to push back from Eversource that items being requested were too expensive, impractical, infeasible or just unacceptable. The Committee should therefore give little or no weight or consideration to the number of meetings that Eversource had with intervenors, an issue which the Applicant made much of during the course of the hearings. Nor should the Committee construe the fact that Durham and UNH entered into MOUs with Eversource as support for the Project; this was done to protect their interests as much as possible in the event that the Project is approved. The MOUs themselves intentionally and explicitly say that entering into the MOU did not in any way limit their ability to take a position on the Project.

For all or the reasons noted above, Durham and UNH believe that the Committee should reject the Project because of the numerous negative impacts that would result from it traversing our community, the campus, public and Class V and VI roads, impacting viewscapes, marring scenic and private views, impacting historic resources, diminishing local property values, and doing damage to Little Bay.

We appreciate the time and effort the Committee has put into this process. We urge you to give serious consideration to the arguments expressed in this brief and deny the issuance of the certificate that has been requested.

### **Certificate of Service**

I hereby certify that a copy of the foregoing post-hearing brief has on this 15<sup>th</sup> day of November 2018 been sent by email to the service list in SEC Docket No. 2015-04.

By:   
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Douglas L. Patch