

Orr&Reno

Douglas L. Patch
dpatch@orr-reno.com
Direct Dial 603.223.9161
Direct Fax 603.223.9061
Admitted in NH and MA

November 8, 2017

Via Hand Delivery and Email

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

Rene Pelletier, PG – Assistant Director
Water Division
New Hampshire Department of Environmental Services
29 Hazen Drive
PO Box 95
Concord, NH 03302-0095

***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 –
Department of Environmental Services Permits – Response to Eversource letter dated
November 2, 2017***

Dear Ms. Monroe and Mr. Pelletier:

On behalf of the Town of Durham and the University of New Hampshire (“Durham/UNH”) I am providing this response to the letter which Eversource’s Counsel sent to you both and to the service list in the SEC docket on November 2, 2017.

In his letter Eversource’s Counsel states that “the Town’s letter is procedurally improper and contrary to the practice of the New Hampshire Site Evaluation Committee.” Durham/UNH hereby submits that this and many other arguments in the November 2nd letter are legally and factually incorrect. Unfortunately, the Eversource letter ignores many aspects of the law and the rules, as well as fundamental principles of the requirement to take public input on issues pending before state agencies, including the Site Evaluation Committee (“SEC”) and the New Hampshire Department of Environmental Services (“DES”).

RSA 162-H:1 says that it is the Legislature's intent in enacting this law that "full and timely consideration of environmental consequences be provided" and that "all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans." Furthermore, RSA 162-H:7, IV provides that "[e]ach application shall contain sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, and shall include each agency's completed application forms." An applicant to the SEC for a certificate must include in its application all permits which it is required to obtain from various state agencies. RSA 162-H:7, IV; Admin. Rule Site 301.03(d)(3). The Committee then must forward a copy of each permit application to the state agencies having permitting or other regulatory authority. RSA 162-H:7, VI and VI-c further provide that all state agencies having permitting or other regulatory authority must report their progress to the committee and outline draft permit conditions and specify additional data that is necessary to make a "final decision" on the parts of the application that relate to their permitting or other regulatory authority and they must make and submit to the committee a final decision on the parts of the application that relate to their permitting and other regulatory authority.

Another provision of the law, RSA 162-H:7-a, I, specifies the role of state agencies having permitting or regulatory authority and allows them to participate in the proceedings as follows: to receive permit requests, determine completeness, report on issues for the SEC, "submit recommended draft permit terms and conditions", identify issues of concern, and designate one or more witnesses to appear before the Committee to provide input and answer questions.

When it filed the application on April 12, 2016, Eversource included four applications to DES: Wetlands; Alteration of Terrain; Water Quality; and Shoreland Protection. On June 13, 2016 the Committee determined that the application was complete for the purposes of review. On November 10, 2016 DES sent a progress report to the SEC outlining draft conditions and data requirements, as did other agencies. On December 1, 2016 Eversource filed an amendment to the Application and to the Normandeau Report titled: Characterization of Sediment Quality Along Little Bay Crossing. This required a change in the procedural schedule. On July 1, 2017 the Applicant submitted yet another updated sedimentation report. DES asked for more information; the procedural schedule was then suspended pending DES obtaining and reviewing the additional information it requested from Eversource before submitting its final recommendations. Eversource submitted the last round of information in response to DES's questions on September 19, 2017.

The bottom line on what Eversource appears to be suggesting is that any intervenor in the SEC process, or for that matter any member of the public, cannot provide comments to any of the agencies reviewing permits submitted as part of the SEC application process. To recognize and give credence to Eversource's argument would clearly be contrary to the language in the purpose clause cited above about full and complete disclosure. It would also run contrary to the established procedures and rules which the agencies have in place for the purpose of obtaining public input. In this case, DES has rules, for example Admin. Rule Env. Wq 1708.11(a), which clearly require significant public participation: "The department shall provide the opportunity for public comment and an opportunity to request a public hearing on preliminary decisions to allow

any significant lowering of water quality determined in accordance with Env-Wq 1708.09(b) or (e).” The SEC process is not intended to replace the agency permitting process, but rather to “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.” RSA 162-H:1.

The SEC process outlined in the statutes and underscored in the Committee rules not only encourages input from municipalities, but mandates that the Committee take this into account: RSA 162-H:16, IV(b) says that the Committee “shall find” that 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.” What Eversource is arguing clearly runs contrary to this critical requirement in the SEC law that it give due consideration to the views of municipal governing bodies.

Contrary to Eversource’s contention, Durham/UNH has done nothing that violates SEC procedures. Eversource argues that the Town of Durham has “submitted additional pleadings outside of the adjudicative process and addressed directly to the NH Department of Environmental Services.” This is a totally unjustified argument which Eversource is making for the first time here. It is interesting that Eversource is now raising an objection since they did not object earlier in the procedural schedule when Durham/UNH, Public Counsel and CLF met with DES in February and provided written comments to DES, with copies to Eversource and the SEC docket service list. Durham/UNH have followed all procedures of the Committee. It is Eversource that has caused numerous delays in the process by virtue of not doing in the first or even second instance complete and thorough studies and analyses of the impacts of the Project on Little Bay.

In the letter Eversource’s counsel says that Durham is “obligated to litigate these issues directly before the SEC – not through individual agencies that fall under the SEC’s overall jurisdictional permitting authority.” There is nothing in the law or rules that support this statement – and in fact Durham/UNH are not “litigating these issues” before DES, we are merely providing comments on what Eversource has provided to DES. If the Committee were to agree with this argument by Eversource then it would severely limit any intervenor’s meaningful opportunity to be heard, a fundamental principle of due process. Under RSA 162-H:16, I the SEC “shall” incorporate into any certificate which it grants “such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility.” This same statute prohibits the SEC from issuing any certificate “if any of the state agencies denies authorization for the proposed activity over which it has permitting or other regulatory authority.” Given the SEC’s arguably limited authority to change or not adopt agency recommendations, if intervenors were, as Eversource suggests they should be, prohibited from providing comments to individual state agencies those intervenors could lose any chance they have to impact an agency recommendation and thereby impact what the Committee ultimately puts into a certificate. This would render intervention meaningless, or severely limit the due process rights of those intervenors. This is clearly not what the law envisioned. Eversource’s argument strains credibility as it is in essence an argument that it, as the Applicant,

is the only one who can provide input to the state agencies that make recommendations to the Committee, recommendations which arguably then bind the Committee.

Another argument that Eversource makes must be addressed. In the letter they argue that the Gosling Road Transformer is “not actually an alternative at all” and that it was “long ago dismissed as a viable option.” They also argue that because “the Applicant concluded that horizontal direction drilling is not feasible” this alternative “is not properly before the SEC for consideration.” The second argument is absurd because it is essentially saying if the Applicant thinks something is not a viable alternative then the SEC cannot consider it. This is in essence putting the Applicant in the position of being able to dictate what the SEC can and can’t review and what the intervenors can and can’t raise as issues.

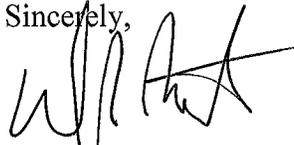
First of all, Durham, and Newington, raised these alternatives in their prefiled testimony filed with the Committee in accordance with SEC approved processes and schedules. Secondly, although ISO New England did not choose the Gosling Road Transformer alternative, it was one of the alternatives that the ISO considered and that consideration took place between 2010-2013; circumstances may very well have changed significantly from when that decision was made. That review did not seek or consider input from any of the affected parties involved in this docket. Moreover, the ISO review is “limited to a review of the reliability impacts of a proposed project as submitted by Participants and does not constitute an approval of a proposed project under any other provisions of an ISO tariff.” Appendix 22 to the Application, p. 99.

Durham/UNH believe that the Committee has far greater authority than what Eversource suggests. This is an issue which may need to be addressed in more detail before the SEC. At this point we would merely point out that under RSA 162-H:16, IV “[a]fter due consideration of ***all relevant information regarding the potential siting or routes of a proposed energy facility***, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.” [Emphasis added.] RSA 162-H:7, V(b) provides that the Applicant identify alternatives in the application. Moreover, Admin. Rule Site 301.03 (c) provides: “Each application shall contain the following information with respect to the site of the proposed energy facility and ***alternative locations*** the applicant considers available for the proposed facility.” [Emphasis added.] Paragraph (h) of that section of the rules also provides that each application shall include: “[i]dentification of the applicant’s preferred choice and ***other alternatives*** it considers available for the site and configuration of each major part of the proposed facility and the reasons for the preferred choice.” [Emphasis added.] Admin. Rules Site 301.07 Effects on Environment and 301.08 Effects on Public Health and Safety also require consideration of “alternative measures.” We submit that the Committee should consider alternatives as part of its review pursuant to the authority noted above and its general authority under RSA 162-H:16, IV to “determine if issuance of a certificate will serve the objectives of this chapter” and to determine whether the “[i]ssuance of a certificate will serve the public interest.” See Order Denying Applicant’s Motion to Strike, SEC Docket No. 2015-06 (April 24, 2017); Order on Motion for Rehearing (Alternative Routes), SEC Docket No. 2015-06 (July 12, 2017).

Finally, when Mr. Needleman makes the argument that the discussion of alternatives is not only “not subject to review by the SEC” but that it is “not within the Department’s permitting or other regulatory authority” he ignores DES rules. In those rules DES is clearly required to consider alternatives. See, for example, Admin. Rules Env. Wq 1702.07 (alternative practices and considerations part of the definition of “best management practices”); 1708.10 (for any activity determined to result in significant impact to existing water quality, the applicant must complete a detailed alternatives analysis); and 1708.11(d) (the written notice to the public must include a summary of the alternatives analysis). We submit that DES must also consider alternatives as part of its review.

We appreciate both DES and the SEC considering these comments. For the reasons explained above, we believe DES should reject Eversource’s request that they not consider Durham/UNH’s October 30, 2017 letter and they should give the comments included in that letter full and fair consideration, and that the SEC should give full and fair consideration to alternatives that are presented to the SEC in the docket. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Patch', written over the word 'Sincerely,'.

Douglas L. Patch

DLP/eac

cc (via email): Service List in SEC Docket 2015-04

1952057_1