

September 2, 2016

VIA FEDERAL EXPRESS OVERNIGHT

Pamela G. Munroe, Administrator  
NH Site Evaluation Committee  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

Re: Application of Public Service Company of New Hampshire D/B/A  
Eversource Energy for a Certificate of Site and Facility  
Docket No. 2015-04

Dear Ms. Munroe:

Enclosed for filing in the above referenced matter, please find the original and one copy of the Motion for Review or Reconsideration of Order on Intervention on behalf of the DeCapo Family.

Sincerely,

  
Kayla Costa  
Paralegal

Enclosure

cc: SEC Distribution List (via e-mail)

THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE  
DOCKET NO. 2015-04

**Seacoast Reliability Project – Application of Public Service Company of New Hampshire  
d/b/a Eversource Energy (“Eversource”) for a Certificate of Site and Facility for the  
Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth  
Substation**

**MOTION FOR REVIEW OR  
RECONSIDERATION OF ORDER ON INTERVENTION**

NOW COMES movants Thomas A. DeCapo and Yael D. DeCapo (together, the "DeCapo Family"), who own 313 and 315 Durham Point Road, Durham, New Hampshire, and hold interests in another adjacent parcel (together, the "DeCapo Property"), by and through their representatives, BLA Schwartz, PC, and submit this motion for review or reconsideration pursuant to RSA 162-H:4, V, RSA 541-A:32, and Site 202.11(f), stating as follows:

**I. BACKGROUND**

1. On **July 21, 2016**, pursuant to RSA 541-A:32 and Site 202:11, the DeCapo Family filed a Motion to Intervene in this matter because a portion of the Seacoast Reliability Project will pass through a purported easement on the DeCapo Property, will enter Little Bay adjacent to the DeCapo Property, and the Seacoast Reliability Project will cross Little Bay adjacent to and in front of the DeCapo Property.
2. On **August 1, 2016**, Eversource responded to the DeCapo Family's motion to intervene in combination with several other motions to intervene. Eversource argued that the DeCapo Family should be forced to intervene jointly with other property owners, collectively designate a single spokesperson, and combine their respective presentations of evidence and argument, cross-examination and other participation in this proceeding.

3. On **August 4, 2016**, the DeCapo Family moved for leave to file a reply in support of its motion to intervene and attached as Exhibit A to that motion the proposed reply brief. In the proposed reply brief, the DeCapo Family explained that the DeCapos' interests were different than the other intervenors because "the DeCapo Family has direct waterfront ownership interests that will be impaired by the project in a substantially different way from the impairment of interests asserted by the other putative intervenors that the Applicant proposes to lump together." Motion For Leave To File Reply In Support Of Motion To Intervene at 2.

4. On **August 24, 2016**, the presiding officer of the Site Evaluation Committee (SEC) – without ruling on the DeCapo Family's motion for leave to reply filed 20 days earlier or addressing any of the reasons set forth in the proposed reply – issued an Order that consolidates the DeCapo Family's intervention with other Durham property owners and thereby limits the DeCapo Family's intervention in this matter. Order on Petitions to Intervene at 11 (the "Order"). Specifically, the Order consolidates the DeCapo Family with other property owners in Durham, New Hampshire – that is, the "Durham Point/Little Bay Abutters" and Donna Heald McCosker. As set forth more fully below, the DeCapo Family has interests in the Little Bay waterfront that are materially and substantially different from – and some in direct conflict with – the Durham Point/Little Bay Abutters and Donna Heald McCosker, which have claimed interests in the overland aspects of the proposed project that are irrelevant to the DeCapo Family's primary interests.

5. Despite the DeCapo Family's waterfront-based substantial interests in the Seacoast Reliability Project, the Order requires the DeCapo Family to join with the other Durham residents and "designate a spokesperson and notify the Administrator of the designee . . . [who] will be responsible for communicating with the Subcommittee, the

Applicant, and the other parties in this docket with respect to conducting discovery and filing pleadings." Order at 11-12. The only reasoning contained in the Order for so limiting the DeCapo Family's intervention is that the DeCapo Family, the Durham Point/Little Bay Abutters and Ms. McCosker "reside in close proximity to each other and expressed substantially similar interests in the proceeding. . . . The Group will be referred to as the Durham Residents." Order at 10.

6. While the Order grouped the Durham Residents together as a single intervenor based on geographic proximity, as set forth more fully below, individual issues and conflicts between the Durham Residents-intervenors outweigh any false procedural efficiencies obtained by limiting the DeCapo Family to exercise their intervention rights in common with the other intervenors in close geographical proximity. The DeCapo Family therefore requests that the SEC review and modify the decision of the presiding officer which unworkably groups the DeCapo Family with other Durham Residents and the DeCapo Family respectfully requests that the Order be reviewed and modified to allow the DeCapo Family to independently protect and defend their interests.

## **II. ARGUMENT**

7. While the Order grouped the Durham Residents together as a single intervenor, under Site 202.11(e), limitations on interventions "shall not be so extensive as to prevent such an intervenor from protecting the interest that formed the basis of the intervention." But that is precisely what the Order does. Under RSA 162-H:4, V, and Site 202.11(f) a party "aggrieved by a decision on a petition to intervene may within 10 days request that the decision be reviewed by the committee or subcommittee." Under RSA 541:13, an order or decision appealed may be set aside or vacated if there are errors of law or if there is a preponderance of

evidence that the order is unjust or unreasonable. As set forth below, the Order consolidating the DeCapo Family with the other Durham Residents as joint intervenors is unreasonable and should be amended to permit the DeCapo Family full rights as an intervenor without being limited by the interests of their neighbors.

**A. The Seacoast Reliability Project Impacts The DeCapo Family Differently From The Other Durham Residents**

8. The DeCapo Property has direct shoreline on Little Bay and the DeCapo Family is the only property-owner intervenor with dock and motor boat access to Little Bay. This is important because the proposed and unprecedented jet plowing across Little Bay will likely deposit large quantities of resulting sediment onto the DeCapo Property's shoreline and tidal flats. The likely impact from this soil will be to redefine the DeCapo Family's boat ingress and egress and reduce the tidal boating window as well as submerge and otherwise destroy the DeCapo Property's oyster and clam beds along the DeCapo Property's waterfront. Unlike the other Durham Residents-intervenors, the DeCapo Family's substantial interests are preventing the Seacoast Reliability Project from disturbing and disrupting the Little Bay shore on the DeCapo Property, sea floor and existing tidal flows and depths, likely forever altering or destroying significant shoreline on the DeCapo Property and adjacent oyster and clam beds, thereby having a direct and profound impact on the DeCapo Family's shoreline, access to and enjoyment of Little Bay.

9. By contrast, the other Durham Residents-intervenors stated interests focus on the placement of above-ground poles in relation to a 12 foot dug well (McCosker Motion to Intervene at 1-2) and transmission lines running overhead through property (Durham Point/Little Bay Abutters Motion to Intervene at 1). Thus, while the DeCapo Family's primary interests are the underwater and environmental effects of the Seacoast Reliability Project on the DeCapo

Property on Little Bay, the other Durham Residents-intervenors' primary interests are aesthetic and other effects of the Project on their land in Durham.

10. By way of example, Mr. DeCapo stated at public hearing his substantial interest in the environmental impact of the Seacoast Reliability Project and how the *jet plowing* proposal is penny-wise but pound-foolish with respect to its impact on the Bay:

21                   The other comment was, there's been  
22   virtually no discussion, in this meeting or last night's  
23   meeting, about the environmental impact on the bay of the  
24   proposed jet dredging, which, just to make clear, would

[ . . . ]

1   involve 3 miles of up to 8-foot deep, and I believe I  
2   heard -- now I forget, the width of these dredges, that  
3   would put that quantity of sediment up into flotation,  
4   only to come back down somewhere, likely right back there  
5   on the ground in Little Bay and Great Bay, and potentially  
6   covering enormous amounts of base level sea life, which  
7   will have then domino effects on the ecology of the bay,  
8   which no one is really talking about. And, the  
9   alternatives to doing that type of dredging that would not  
10  have any impacts on the bay, of either doing the  
11  horizontal drilling, which again would be more expensive  
12  in the short run, but would not have the ecological  
13  impacts, or other proposals that don't seem to have been  
14  explored, such as surface laying of the cables in  
15  encasement that would protect them from the dangers that  
16  lead them to want to bury the cables.  
17                   So, I'm very worried that we have this  
18  fabulous ecological resource of the only estuary in New  
19  Hampshire that is being taken for granted and putting it  
20  at enormous risk with virtually no discussion about it.

Public Statement Of Thomas DeCapo, Site Evaluation Committee Hearing (April 22, 2015), 27-28. Indeed, perhaps because the DeCapo Family is unique among the Durham Residents-intervenors in having dock and motor boat access to Little Bay and thereby deriving enjoyment

from the waterfront and Little Bay, the DeCapo Family has been the only of the Durham Residents-intervenors to regularly express concerns about the environmental and ecological impacts of the Project on the Bay and their due process rights to be heard should not be limited to what the other over-land focused Durham Residents-intervenors agree to in a joint submission.

**B. The Concerns Of The DeCapo Family May Be Irreconcilable With The Other Durham Residents-Intervenors Making Joint Representation, Discovery And Pleadings Impracticable.**

11. Were the Order to require the Durham Residents to hire a single counsel to represent them, the New Hampshire Rules of Professional Conduct would bar that engagement. A lawyer "shall not represent a client if the representation involves a concurrent conflict of interest" which exists where "the representation of one client will be directly adverse to another client." N.H. R. Prof. Conduct 1.7(a). Moreover, it is reversible error for a court to consolidate a group of conflicted parties and require them to retain lead counsel. For example, in *Dupont v. South Pacific Company*, the Fifth Circuit reversed a trial court verdict because the court had improperly consolidated four separate plaintiffs into a single group despite their conflicts of interest with one another, noting that "if required to represent all plaintiffs" an appointed lead counsel "cannot properly and adequately represent either set of plaintiffs." 366 F.2d 193, 194 (5th Cir. 1966), *cert. denied*, 87 Sup. Ct. 1027 (1967); see also *Atkinson v. Roth*, 297 F.2d 570, 575–76 (3d Cir. 1961) (finding a trial court's consolidation of claims reversible error where certain plaintiffs were "at cross purposes" with other plaintiffs). The Dupont court concluded that "[t]he order of consolidation, together with the order requiring lead counsel for all plaintiffs, created an impossible situation which resulted in neither set of plaintiffs receiving the representation to which they [were] entitled." 366 F.2d 193, 194.

12. The Order in this matter would create the same impossible situation and must therefore be modified to allow the DeCapo Family to intervene separately. The Presiding Officer should not be empowered to impose such an unethical conflict where a court could not.

13. Indeed, the concerns of the DeCapo Family are markedly different from – and in direct conflict with – the expressed priorities of the other property owners and thus are not properly consolidated with the other Durham Residents-intervenors. Ms. McCosker, for example, in her motion to intervene, expressed no concerns with the effect of the project on Little Bay. Instead, among her most pressing concerns is where poles are being erected that could displace trees near her property and thereby impair her livelihood:

The growing portion of my design/gardening business is conducted on the easement. Currently this consists of three small greenhouses and a large area of benches with perennials, annuals, small trees and shrubs, some in pots and some planted directly in the ground. This is my livelihood. I cannot be put out of business. In addition, the removal of lower growing trees (specifically Cedar Trees, which have been topped rather than cut down during regularly scheduled maintenance) would leave my business exposed to the road and would be unacceptable. This growth under the power lines provides privacy and shields my business from the road. Without it my business will be vulnerable to theft.

McCosker Motion To Intervene at 2. Similarly, the Durham Point/Little Bay Abutters, consisting of several nearby property owners – Matthew and Amanda Fitch of 291 Durham Point Road, Durham, NH; Jeffrey and Vivian Miller of 297 Durham Point Road, Durham; Lawrence and Anne Gans of 289 Durham Point Road, Durham; and Deborah Moore of 305 Durham Point Road, Durham – have already self-grouped themselves into one party because they have identified their shared interests, namely the transmission lines running overhead through



property. Indeed, the DeCapo Family filed its own motion to intervene precisely because the DeCapo Family interests are substantially different from their neighbors.<sup>1</sup>

14. Mr. DeCapo, for example – as noted above – during the proceedings has expressed his concerns with the proposed routing and dredging methods. To the extent that Eversource continues to argue a cost-based justification for its proposed underwater routing and dredging methods, that may place the interests of the DeCapo Family at odds with the over-land interests of the other Durham Residents-intervenors. The Order's lumping of the DeCapo Family's interests with the other Durham Residents-intervenors unrealistically expects that the Durham Residents will subordinate their interests with one another and agree on a common set of goals and objectives in the process even though they have demonstrably very different interests, the resolution of which may place them in conflict. The DeCapo Family's interests should not be limited to what the other Durham Residents-intervenors agree to be the common interests of the group.

15. Indeed, the DeCapo Family already has a manifest conflict of interest with the other Durham Residents-intervenors. Through communications with Eversource, the other Durham Residents-intervenors have determined that many of their pressing concerns could be adequately addressed by having a portion of the power line go underground under a part of the DeCapo Property. The DeCapo Family, however, will not agree to having any part of the power line go under the DeCapo Property unless Eversource addresses the DeCapo Family's concerns

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<sup>1</sup> That is not to say, as Eversource noted, that the DeCapo Family disagrees with the other Durham Residents-intervenors' concerns, and incorporated by reference the grounds set forth in the Durham Point/Little Bay Abutters motion to intervene. Applicant's Response To Durham Point/Little Bay Abutters, Thomas A DeCapo and Yael D. DeCapo, and Donna Heald McCosker Petitions to Intervene at 5, n. 1. The DeCapo Family also opposes the over-ground poles for their environmental, ecological and scenic impact primarily from the Bay. In the Order, the presiding judge did not find the DeCapo Family's sympathy with their neighbors' concerns as persuasive and the SEC should give it no weight either.

regarding the Project's underwater environmental and ecological impact on Little Bay. Indeed, Eversource has approached the DeCapo Family for limited underground rights on the DeCapo Property, and the DeCapo Family has conditioned granting the rights on Eversource addressing the DeCapo Family's concerns regarding DeCapo Property on Little Bay. Eversource rejected that offer. The DeCapo Family has informed the other Durham Residents-intervenors regarding its unwillingness to grant Eversource underground rights on the DeCapo Property unless Eversource adequately addresses the DeCapo Family's waterfront interests. It would thus be impossible for a single spokesperson to simultaneously speak for the interests of the DeCapo Family and for the interests of the other Durham Residents-intervenors. Similarly, there can be no joint representation of all the Durham Residents-intervenors as a group because these intervenors have potentially conflicting interests.

16. Accordingly, limiting the DeCapo Family's intervention rights to whatever the other Durham Residents-intervenors agree to, would impair the DeCapo Family's due process rights and is unreasonable, arbitrary and capricious. Said another way, the DeCapo Family should not be limited in discovery, pleadings, and cross-examination by the interests of the other Durham Residents-intervenors. Because of the divergent priorities among the Durham Residents-intervenors, it is likely unworkable for the DeCapo Family to coordinate with the other Durham Residents-intervenors on the strategic decisions relating to propounding discovery requests, choosing witnesses to depose, formulating questions for those witnesses, and otherwise deciding upon strategic priorities to execute.

**C. Allowing The DeCapo Family To Intervene Separately  
Would Not Impair The Prompt Conduct Of The Proceedings.**

17. Further, if the DeCapo Family is allowed to intervene separately, it will not impair the interests of justice and the orderly and prompt conduct of the proceedings. The

DeCapo Family has its own representative at its own expense and has been cooperating with the Environmental Protection Bureau. The DeCapo Family will take all reasonable steps to coordinate discovery with other intervenors and Eversource to the fullest extent possible in order to reduce costs and prevent duplication of effort.

### **III. CONCLUSION**

18. For all of the foregoing reasons, the DeCapo Family respectfully requests that the SEC allow the DeCapo Family to intervene separately. The Seacoast Reliability Project has significant implications for the DeCapo Property – implications that, among the Durham Residents-intervenors are unique to the DeCapo Family – and the current intervention Order chills the DeCapo Family's statutory and procedural due process rights by denying them the ability to fully protect their interests that form the basis of their intervention. As far as the DeCapo Family is concerned, the joint intervenor arrangement set forth in the Order would function in substance to muffle if not silence their voice.

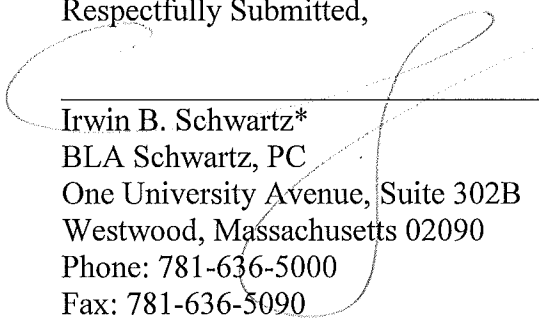
19. The DeCapo Family has made a good faith effort to obtain the position of other parties regarding this motion and has received the following responses: Christopher G. Aslin (New Hampshire Department of Justice) and the Conservation Law Foundation assent; Eversource objects.

WHEREFORE, the DeCapo Family respectfully requests that the Site Evaluation Committee:

- A. Allow the DeCapo Family to fully participate in the proceedings as an intervenor, with full rights of discovery, to file pleadings, and to cross examine witnesses; and
- B. Grant such other relief as the Site Evaluation Committee deems just and necessary.

Dated: September 2, 2016

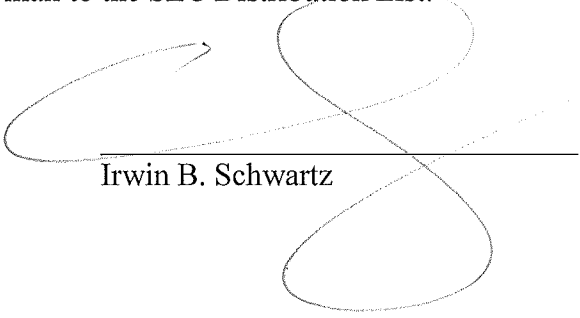
Respectfully Submitted,

  
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IKC

CERTIFICATE OF SERVICE

I, Irwin B. Schwartz, hereby certify that an original and one copy of the foregoing motion has this 2nd day of September, 2016 been sent Federal Express to the New Hampshire Site Evaluation Committee and via electronic mail to the SEC Distribution List.

  
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Irwin B. Schwartz

IKC

\*Not admitted in New Hampshire.