

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**

**OPPOSITION OF THOMAS A. DECAPO AND
Yael D. DECAPO TO APPLICANT'S MOTION TO STRIKE
IMPROPER FILING OF THOMAS A. DECAPO AND Yael D. DECAPO**

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 undersigned representative, hereby oppose Eversource's motion to strike the DeCapo Family's objection to Eversource's request for a partial waiver ("Motion To Strike"), stating as follows:

As a preliminary matter, the DeCapo Family notes that The Motion To Strike should not be considered by the Committee because Eversource did not attempt to meet and confer with the DeCapo Family regarding its motion as required by Committee rules to promote the good-faith resolution of disputes.¹

SUMMARY OF ARGUMENT

Eversource's Motion To Strike should be denied for at least three independently sufficient reasons.

¹ Site 202.14(e) provides that "[A] motion shall state whether it is assented to or contested, and shall identify within the body of the motion those parties that: (1) Concur in the motion; (2) Take no position on the motion; (3) Object to the motion; and (4) Could not be reached despite a good faith effort to do so."

First, it misreads the language of the Order on Intervention and overlooks an important caveat in the statutory authority undergirding the August 24, 2016 Order on Intervention ("Order on Intervention"). The Order on Intervention, by its words, did not require that intervenor groups designate a single spokesperson to always file their pleadings collectively. To require each intervenor group to always file their pleadings collectively would violate the Committee's rules. While it is true under RSA 541-A:32 (III) and Site 202.11(d) that a presiding judge may impose certain conditions on a party's intervention and require some intervenors to "combine their presentations of evidence and argument, cross-examination and other participation in the proceedings," those rules do not encompass limitations on a intervenor's pleadings. Indeed, any "other participation in the proceedings" contemplated by those rules, must not exceed the boundaries of RSA 541-A:32 (IV) and Site 202.11(e), which provide "limitations imposed in accordance with [RSA 541-A:32(III) and Site 202.11(d)] shall not be so extensive as to prevent such an intervenor from protecting the interest that formed the basis of the intervention." (Emphasis added.) The DeCapo Family's objection was expressly filed to protect the interest that formed the basis of their intervention. Thus, the Order on Intervention must not be read to bar the DeCapo Family's opposition to the Request. In prior filings before the Committee, Eversource has admitted that the Order on Intervention did not limit the ability of the DeCapo Family to file pleadings where the DeCapo Family has positions that differ from other Durham Residents. The other Durham Resident intervenors had the opportunity to join the DeCapo Family's motion but chose not to. The Durham Resident intervenors have not appointed a common spokesperson to respond regarding Eversource's requests for waivers because – as reflected by the different responses to Eversource's motions for partial waivers – their interests are divergent. If the Committee were to find that the Order on Intervention was intended to bar

the DeCapo Family from filing pleadings that protect the interests that formed the basis of their intervention, then the Order On Intervention is manifestly impermissibly restrictive under the Committee's statutory and regulatory authority. The Committee should decline Eversource's improper invitation to make such a reading.

Second, Eversource's Motion To Strike seeks to deprive the Committee of the DeCapo Family's unique point of view, which Eversource ardently does not want the Committee to consider. Eversource would have the DeCapo Family join with the Durham Point/Little Bay Abutters and Donna McCosker. But Ms. McCosker filed no objection, and the Little Bay Abutters merely filed a two-sentence letter in support of Newington's Objection, which failed to make many of the pertinent arguments that the DeCapo Family is uniquely positioned to make. For example, Newington's Objection focuses on data deficiencies in maps in Appendix 2 that concern the Newington side of the project (i.e. Maps 21 and 22). The DeCapo Family, on the other hand, focuses on data deficiencies on the Durham side of the project and specifically those deficiencies that affect the DeCapo Property and its particular interests in Little Bay. For example, Map 17 of Appendix 2 – a map not discussed in the Newington objection – does not include the entire DeCapo Property, and in fact at one stretch Eversource crops the map to show territory well less than 100 feet from the proposed Project's own border – a stretch that is encompassed by the DeCapo Property. The DeCapo Family specifically noted such deficiencies for the Committee's benefit, which Eversource transparently wants to deny the Committee.

Third, Eversource's Motion To Strike is premature, and granting it would not result in the efficient and orderly resolution of the dispute regarding Eversource's request for partial waivers. The DeCapo Family has specifically requested a review of the Order on Intervention, which, pursuant to the October 10, 2016 Order and Notice of Hearing (the "October

10 Order") is scheduled to be heard on November 2, 2016 along with Eversource's motions for partial waivers. The October 10 Order did not require the intervenors to appoint an interim spokesperson and/or to respond to those motions for partial waivers with pleadings as grouped by the August 24 Order, which is under appeal. The DeCapo Family is entitled to file its own objection to protect the interests that formed the basis of its intervention *especially* pending final resolution of the scope of the DeCapo Family's intervening role. As set forth more fully in the DeCapo Family's September 2, 2016 motion for review of the Order on Intervention (the "September 2 Motion for Review"), one of the DeCapo Family's important bases for seeking full intervention is to avoid ethical conflicts of interest where a representative must necessarily elevate the interests of his own clients over the interests of other members of the intervening group; the disagreement among the Durham residents regarding arguments against Eversource's request is evidence of such disagreement.

Eversource asserts that it objects to the DeCapo Family's objection to promote the "efficient and orderly process of the proceeding," but until the scope of the DeCapo Family's intervention is ultimately clarified, barring the DeCapo Family's objection would create substantial disorder, as, for example, the DeCapo Family's unique objections to Eversource's motions for partial waivers would not be before the Committee prior to the November 2, 2016 hearing. This would prevent the Committee from timely considering those objections.

Moreover, none of the other Durham residents filed substantive objections to Eversource's Request, so in considering the DeCapo Family's objection, the Committee is in fact considering only one substantive objection – and not three separate objections with overlapping or duplicative arguments – lodged on behalf of any of the Durham Residents. If Eversource truly sought procedural efficiency, Eversource would have separately moved to strike the Little Bay

Abutter's joinder (instead of summarily addressing their joinder in a footnote) and/or moved to require them and Ms. McCosker to join with the DeCapo Family's opposition. Similarly, for procedural efficiency, Eversource could have met and conferred with the parties' representatives to resolve the dispute without burdening the Committee with this motion practice – as it is required to do under Site 202.14(e) – prior to filing its Motion To Strike. But Eversource's Motion to Strike is not about procedural efficiency. Eversource is seeking to entirely silence the only of the Durham Residents who bothered to make any substantive objection to Eversource getting its way full stop. In its briefing and other representations before the Committee, Eversource has repeatedly asserted that it is committed to working with members of the Durham community in a cooperative spirit; the rash filing of its Motion to Strike shows otherwise.

I. PERTINENT PROCEDURAL 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 objected to the DeCapo Family's motion for intervention ("Eversource's August 1 Objection"), arguing that their intervention should be grouped with other Durham residents, requiring them "to designate a spokesperson and combine their presentations of evidence and argument, cross-examination and other participation in this proceeding." Eversource did not request that the Committee, in grouping the intervenors, require the intervenors to collectively file their pleadings.

3. On **August 24, 2016**, the presiding officer of the Site Evaluation Committee issued the Order on Intervention, granting in part, the DeCapo Family's motion to intervene but grouping its intervention with the Little Bay Abutters and with Donna McCosker, stating that, "The Group will be referred to as the Durham Residents." Order On Intervention at 10. The Order on Intervention required the intervening groups to designate a spokesperson 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 on Intervention at 11-12. The Order On Intervention does not expressly require that each group file only one set of pleadings, but only that the spokesperson be responsible for communicating with the Subcommittee, Eversource and the other parties.

4. On **September 2, 2016**, the DeCapo Family moved for a review of that order ("September 2 Motion For Review"), noting that the August 24, 2016 order on intervention is unworkable because "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." The DeCapo Family also noted that the requirement of a common representative potentially interferes with the attorney-client relationship as it would require the DeCapos to forego their entitlement to representation by counsel of their own choosing. Ms. McCosker and the Durham Point/Little Bay Abutters also each filed their own motions for review noting that their interests differ from those of the DeCapo Family.

5. On **September 12, 2016**, Eversource filed an objection to various intervenors' requests for review of the Order on Intervention ("Eversource's September 12 Objection"), arguing that the requests for review should be denied. In that objection, Eversource

admitted that the Order on Intervention did not require the DeCapo Family to file its pleadings collectively with the other Durham residents, stating instead that the "requirement instilled by the SEC on this abutter intervener group asks the parties to attempt, in good faith, to reach decisions on representation, discovery, pleadings and other issues raised in the docket. . . . [S]hould any individual intervenor certify to the SEC that they are unable to agree with the group, they have the right to file a motion stating its disagreement and asking for alternative relief." Eversource's September 12 Objection at 9 (emphasis added).

6. On **October 10, 2016**, the SEC issued a Notice of Hearing on Pending Motions and Deadline for Filing ("October 10 Order"), ordering that oppositions to Eversource's Motion To Partially Waive Site 301.03(c)(3)-(5) (the "Mapping Waiver Request") be filed by October 20, 2016, and providing notice that, on November 2, 2016, the Committee would hear, consider, and deliberate on, among other motions, the DeCapo Family's request for review of the Order on Intervention and Eversource's Mapping Waiver Request. The Notice of Hearing did not require the Durham Residents to appoint an interim spokesperson for the purposes of objecting to Eversource's requests for partial waivers.

7. On **October 20, 2016**, the DeCapo Family filed an objection to the Mapping Waiver Request ("October 20 Objection") expressly stating that the objection was being lodged "to protect the interests that formed the basis of the DeCapo Family's intervention." October 20 Objection at 3. In particular, the DeCapo Family noted that Eversource's proposed transmission line will traverse the DeCapo Property and its construction will disturb the ground soil in Little Bay contiguous to the DeCapo Family's waterfront property interests. Several other intervenors also filed objections to Eversource's Mapping Waiver Request. On behalf of the Little Bay Abutters, Matthew Fitch filed a letter joining the Town of Newington's objection. Ms.

McCosker filed no objection. None of the other intervenors addressed all of the specific concerns raised by the DeCapo Family.

8. On **October 26, 2016**, Eversource moved to strike only the DeCapo Family's opposition ("Motion To Strike"), claiming that the Order On Intervention required the DeCapo Family to group its pleadings with the Little Bay Abutters and Donna Heald McCosker. Eversource stated that to "the Applicant's knowledge the Durham Residents intervener group has not designated a spokesperson for this proceeding." Eversource noted that "Irwin B. Schwartz is not the designated spokesperson for this group." Without separately moving to strike the Little Bay Abutters' joinder of the Town of Newington's objection, Eversource stated in a footnote tacked on at the end of its brief that "[Eversource] would also request that the Committee strike Mr. Fitch's letter of support." Motion to Strike at 3, n. 2. Eversource did not meet and confer with the DeCapo Family prior to filing its Motion to Strike.

II. ARGUMENT

A. Eversource's Motion To Strike Should Be Denied Because The August 24, 2016 Order Does Not Purport To Require The DeCapo Family To File Its Pleadings With The Other Durham Residents And Such A Requirement Would Be Contrary To Committee Rules

9. The Order on Intervention did not purport to require the DeCapo Family to file pleadings jointly with the other Durham Residents. Instead, it required each group of intervenors to designate a spokesperson 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 (emphasis added). Accordingly, the Order On Intervention merely required that the individual members of the intervening groups would communicate and cooperate so as to avoid duplicative presentations of evidence, argument, and

cross examination. It does not purport to require that if one of the intervenors files a pleading, all other members of that intervenor group must agree and join that pleading.

10. Nor, under the Committee rules, could the Committee bar a member of an intervenor group from filing a pleading to protect the interests that formed the basis of that member's intervention. Under RSA 541-A:32 (III) and Site 202.11(d) a presiding judge may impose certain conditions on a party's intervention and require some intervenors to "combine their presentations of evidence and argument, cross-examination and other participation in the proceedings," but those rules do not encompass limitations on a intervenor's pleadings. The well-known canon of statutory construction *ejusdem generis* provides that when a list of two or more specific descriptors is followed by a catch-all phrase, the meaning of the catch-all must be restricted to the same class of the specific words that precede it. Here, "presentations of evidence and argument" and "cross-examination" specifically suggest formal judicial proceedings (e.g. presentation of witnesses, evidence, deposition or other testimony provided under oath, etc.) and not more generally a party's administrative filings regarding what an applicant must provide in order for their application to be deemed complete. Indeed, any "other participation in the proceedings" contemplated by those rules must not exceed the boundaries of RSA 541-A:32 (IV) and Site 202.11(e), which provide "limitations imposed in accordance with [RSA 541-A:32(III) and Site 202.11(d)] shall not be so extensive as to prevent such an intervenor from protecting the interest that formed the basis of the intervention." (Emphasis added.)

11. It is black-letter law that administrative orders may not exceed the scope of an agency's statutory authority. See, e.g., *Petition of Markievitz*, 135 N.H. 455, 458, 606 A.2d 800, 802 (1992), citing *Chambers v. Geiger*, 133 N.H. 149, 153, 573 A.2d 1356, 1358 (1990) (holding that an "administrative interpretation of a statute . . . is not controlling where, as here, it

is plainly incorrect"); see also Appeal of Levesque, 136 N.H. 211, 214, 612 A.2d 1333, 1334 (1992) (overturning agency decision because it conflicted with the plain language of the statute). Accordingly, the Order on Intervention must not be read to exceed the Committee's statutory authority. The DeCapo Family's objection was expressly and demonstrably filed to protect the interests that formed the basis of their intervention and RSA 541-A32(III) protects the DeCapo Family's right to lodge that objection.

12. Until its Motion To Strike, Eversource never suggested that the Committee could exceed its statutory authority and bar an intervenor from filing pleadings to protect their core interests, or even that the Order on Intervention so limited the intervention of the DeCapo Family. Indeed, in Eversource's August 1, 2016 objection to the DeCapo Family's motion for intervention, Eversource requested that the Committee group various intervenors, but did not suggest in so grouping the intervenors that the Committee could or should require the intervenors to collectively file their pleadings. Moreover, in Eversource's September 12, 2016 objection to the DeCapo Family's request for review, Eversource argued that the Order on Intervention was reasonable, in part, because it did not require the DeCapo Family to file its pleadings collectively with the other Durham residents, stating instead that the

requirement instilled by the SEC on this abutter intervener group asks the parties to attempt, in good faith, to reach decisions on representation, discovery, pleadings and other issues raised in the docket. . . . **[S]hould any individual intervenor certify to the SEC that they are unable to agree with the group, they have the right to file a motion stating its disagreement and asking for alternative relief.**

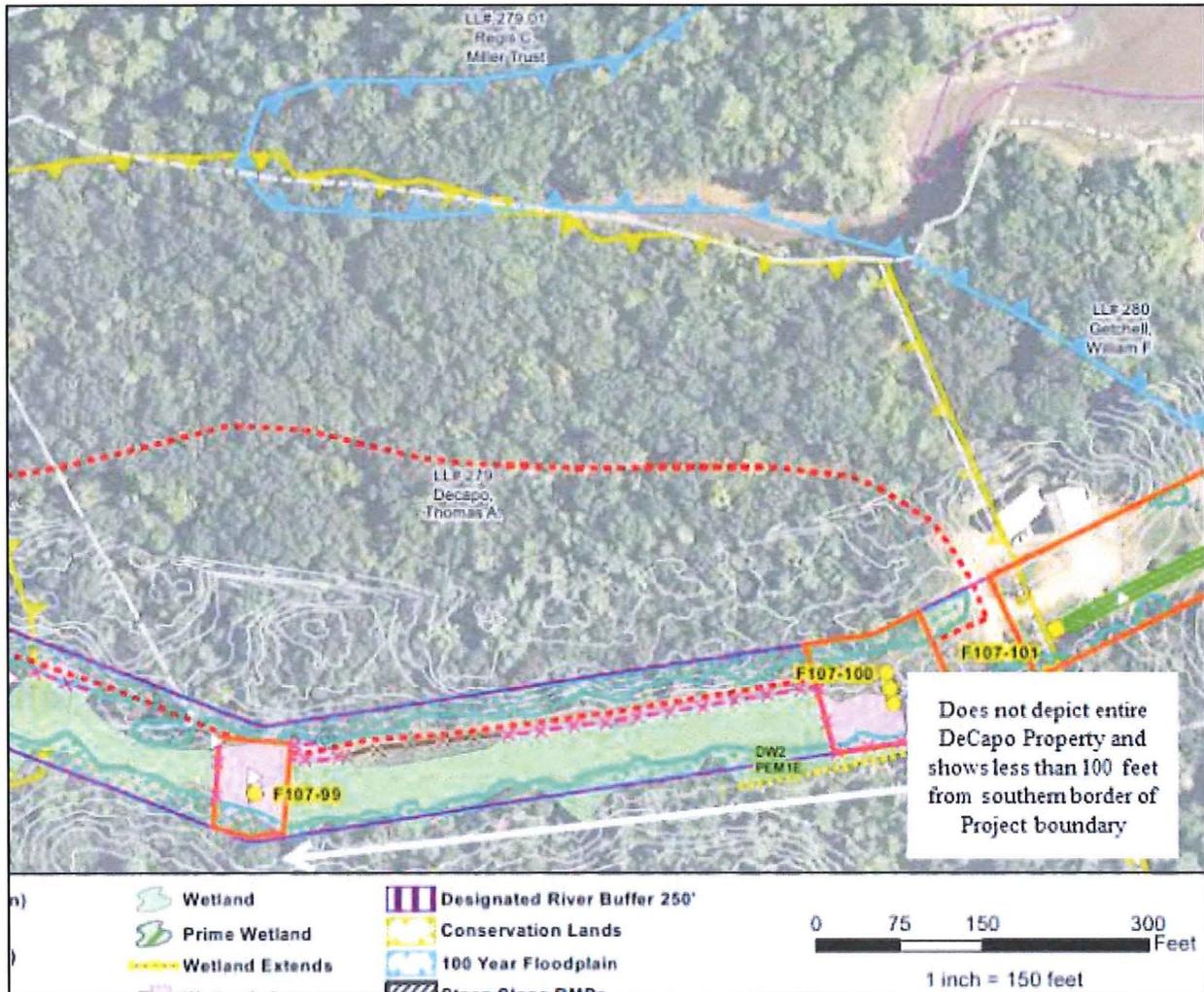
Eversource's September 12 Objection at 9 (emphasis added). Eversource's assertion in its Motion To Strike that the Committee can exceed its statutory authority and bar the DeCapo Family from filing a pleading to protect its interests is thus a novel argument that Eversource has not before proffered in this matter.

13. The DeCapo Family, in Paragraph 4 of their October 20 Objection, stated that it submitted the objection "to protect the interests that formed the basis of the DeCapo Family's intervention." As set forth in that objection and summarized in the next section, the DeCapo Family proffered evidence and arguments concerning some of the core reasons why the DeCapo Family moved to intervene in the first place. If the Committee were to grant Eversource's Motion To Strike it would be reading the Order on Intervention in a manner that exceeds the text and intent of the Order on Intervention and that exceeds the Committee's statutory authority. It would be a reading of the Order on Intervention that Eversource itself had not suggested that the Committee make prior to filing the Motion to Strike. The Committee should decline Eversource's improper invitation to make such a reading, and deny the Motion to Strike.

B. Eversource's Motion To Strike Seeks To Deprive The Committee Of Pertinent Information Uniquely Provided By The DeCapo Family

14. Consistent with Eversource's Mapping Waiver Request, Eversource seeks to strike the DeCapo Family's opposition in order to deprive the Committee of pertinent information to inform its decisions. None of the other Durham Resident intervenors filed any substantive objection to Eversource's Mapping Waiver Request. The Little Bay Abutters joined the objection filed by the Town of Newington, which primarily concerned the Newington side of the Little Bay. Thus, the DeCapo Family was the only of the Durham residents to proffer evidence and argument concerning the Durham side of Little Bay. For example, Newington's Objection focuses on data deficiencies in maps in Appendix 2 that concern the Newington side of the project (i.e. Maps 21 and 22). The DeCapo Family, on the other hand, focuses on data deficiencies on the Durham side of the project and specifically those deficiencies that affect the DeCapo Property and its particular interests in Little Bay. For example, Map 17 of Appendix 2 –

a map not discussed in the Newington objection – does not include the entire DeCapo Property, and in fact at one stretch Eversource crops the map to show territory well less than 100 feet from the proposed Project's own border – a stretch that is encompassed by the DeCapo Property:



DeCapo Family's October 20 Objection at 5-6. The DeCapo Family similarly noted that mapping deficiencies regarding the Durham side of the proposed project deprive the Committee from assessing the impact of the proposed project on historical sites (including, for example, archeological resources) and natural resources (including, for example, shellfish on the Durham side of Little Bay).

15. Similarly, none of the intervenors, Newington or otherwise, pointed out how the deficient mapping could impede the Committee's review of the proposed project's impact on shellfish. The DeCapo Family noted:

Notwithstanding Little Bay's unusually unpredictable currents, Eversource is planning to plow three trenches, each between 4.67 and 9.17 feet deep, to bury three individual cables, stretching more than a mile across Little Bay. This will disturb the sediment and release it into the Little Bay. Compliant mapping of Little Bay would enable the Committee to better assess the impact of the re-settled sediment and to more fully evaluate the opinions of Eversource's experts on this issue.

DeCapo Family's October 20 Objection at 7-8. In the DeCapo Family's briefing on the scope of its intervention, the DeCapo Family has repeatedly emphasized the importance of the proposed project's impact on Little Bay as a fundamental basis of the DeCapo Family's intervention. The DeCapo Family filed its objection to Eversource's Mapping Waiver Request to protect that core interest – which is not shared by the other Durham Resident intervenors. Not only would it be contrary to the Committee's statutory authority to strike the October 20 Objection, but it would be fundamentally unfair.

C. Eversource's Motion To Strike Is Premature And The Relief It Seeks Would Disrupt The Efficient And Orderly Resolution Of The Dispute Regarding Eversource's Mapping Waiver Request

16. Even if the Committee were to find that the Order on Intervention was intended to limit the pleading of the DeCapo Family – which it should not – Eversource's Motion to Strike should still be denied because it is premature and, especially under the circumstances, the relief it seeks would not obtain any procedural efficiencies. Because the DeCapo Family seeks full intervention, *i.e.* to be able to direct its own presentation of evidence and argument, cross-examination and other participation in the proceedings, the DeCapo Family has moved for review of the Order on Intervention. Indeed, in their September 2 Motion for Review, the

DeCapos noted that the requirement of a common representative potentially interferes with the attorney-client relationship as it would require the DeCapos to forego their entitlement to representation by counsel of their own choosing. The divergence of interests among the Durham Residents with respect to Eversource's Mapping Waiver Request is exemplary of the issues raised by the Order on Intervention.

17. That motion is scheduled to be heard on November 2, 2016 – the same day as Eversource's Mapping Waiver Request. The October 10, 2016 Notice and Order scheduling the motions for partial waiver and motions for review of the Orders on Intervention all to be heard on November 2, 2016, did not require the intervenors to appoint interim spokespersons for the purpose of objecting to Eversource's motion for partial waivers.

18. Pending resolution of the full scope of the DeCapo Family's intervention, no efficiency would be gained by requiring the DeCapo Family to file its pleadings with the other Durham Residents, and, in any event, as noted above, the DeCapo Family is entitled to file its own pleadings when necessary to protect its interests. Say, hypothetically, that the Order on Intervention did or even could require the DeCapo Family to always join with the pleading decisions of its fellow intervenors – which it did not and could not – that would be disruptive to the orderly and efficient conduct of the proceedings. Ms. McCosker has not taken a position on the motion for partial waivers and the Little Bay Abutters chose to join the arguments made by the Town of Newington. Had the DeCapo Family been circumscribed by the interests of the other Durham Residents so as not to file any opposition or also to join the arguments made by the Town of Newington, the DeCapo Family's unique arguments concerning their property interests would not timely be before the Committee. Were the Committee, following the upcoming hearing, ultimately to decide that the DeCapo Family has full intervention rights –

which it should so decide – or even if the Committee were simply to confirm that the DeCapo Family's intervention rights include the right not to be limited in its pleadings by the other Durham Residents, the DeCapo Family may then, with good cause, have sought to file late the very objections it has already filed. That certainly would not have promoted efficiency.

19. Clearly, Eversource's Motion to Strike is not intended to obtain any procedural efficiency, but to deprive the DeCapo Family their due process rights, and to hide pertinent information from the Committee. The DeCapo Family was the only of the Durham Residents to file any substantive objection, such that striking the DeCapo Family's objection would not avoid *duplicative* presentation of evidence, argument, or cross examination offered by the Durham Resident intervenors, but in fact, it would be tantamount to striking *any* substantive presentation of evidence or argument submitted by any of the Durham Resident intervenors. For procedural efficiency, Eversource could have met and conferred with the parties' representatives to resolve the dispute without burdening the Committee with this motion practice – as it is required to do under Site 202.14(e) – prior to filing the Motion To Strike. But instead Eversource seeks to entirely silence the only of the Durham Residents who bothered to make any substantive objection to Eversource getting its way full stop. In its briefing and other representations before the Committee, Eversource has repeatedly asserted that it is committed to working with members of the Durham community in a cooperative spirit; the rash filing of its Motion to Strike demonstrates otherwise.

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

- A. Deny Eversource's Motion to Strike;
- B. Alternatively file and consider the DeCapo Family's Objection to Eversource's Mapping Waiver Request as a comment; and

C. Grant such other relief as the Site Evaluation Committee deems just and necessary.

Dated: November 1, 2016

Respectfully Submitted,



Irwin B. Schwartz*

Nicholas Cassie*

BLA Schwartz, PC

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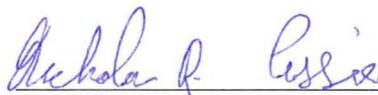
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CERTIFICATE OF SERVICE

I, Nicholas R. Cassie, hereby certify that an original and one copy of the foregoing motion has this 1st day of November, 2016 been sent Federal Express to the New Hampshire Site Evaluation Committee and via electronic mail to the SEC Distribution List.



Nicholas R. Cassie

* Not admitted in New Hampshire.