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**Please respond to the Portsmouth office**

August 28, 2018

Pamela Monroe, Administrator  
N.H. Site Evaluation Committee  
21 S. Fruit St., Suite 10  
Concord, NH 03301

Re: Eversource Docket No. 2015-04

Dear Administrator Monroe:

Enclosed for filing in the above-captioned matter please find a Memorandum in Support of Motion to Suspend on behalf of Mark Joyce and Karen Crowley, Trustees of the Crowley Joyce Revocable Trust.

If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson  
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(603) 436-7046

JCR  
Enclosure  
cc: Official Service List (via email)

159 Middle Street, Portsmouth, NH 03801  
Concord – Hillsborough – Jaffrey – Peterborough – Portsmouth

BEFORE THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

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 the Madbury Substation to the Portsmouth Substation

NHSEC Docket No.: 2015-04

**MEMORANDUM IN SUPPORT OF MOTION TO SUSPEND**

Mark Joyce and Karen Crowley, Trustees of the Crowley Joyce Revocable Trust reply to the Town of Durham’s August 21, 2018 *Motion Requesting a Suspension* as follows:

1. Mark Joyce and Karen Crowley concur with the Town of Durham’s Motion to Suspend. The Department of Environmental Services (“DES”) determinations are critical and relate directly to the unauthorized impacts to their property and property rights.

2. In addition to the points made by the Town, suspension is appropriate because it is now clear that DES failed to attend the joint hearing as required by RSA 162-H:10, I-c and has made significant errors in its findings outside of the required hearing process.

3. RSA 162-H:10, I-c requires that the initial hearings held by the Committee: “... shall be joint hearings, with representatives of the agencies that have permitting or other regulatory authority over the subject matter and shall be deemed to satisfy all initial requirements for public hearings under statutes requiring permits relative to environmental impact.

Notwithstanding any other provision of law, the hearing shall be a joint hearing with the other state agencies and shall be in lieu of all hearings otherwise required by any of the other state agencies” (emphasis added). This requirement has existed in the statute for decades.<sup>1</sup>

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<sup>1</sup> See e.g. Laws of 1991, Chapter 295, containing the same language in RSA 162-H:10, I-c (“Notwithstanding any other provision of law, the hearing shall be a joint hearing with the other state agencies...”).

4. Eversource's application to construct concrete mattresses is a major project which requires the DES to hold a public hearing.<sup>2</sup> The DES February 28, 2018 Final Decision, states that Eversource proposal "is classified as a Major Project per administrative rule Env-Wt 303.02 (c), as wetland impacts are greater than 20,000 square feet and Env-Wt 303.02 as work is proposed in tidal waters." Finding #2, Page 19 of 25. As a result, DES is required to hold a public hearing under RSA 482-A:8. RSA 482-A:9 requires that DES provide notice of the hearing that "shall be mailed to all known abutting landowners, supplemented by reasonable notice by newspaper publications to those unknown, as may be ordered by the department."

5. On August 5, 2016, this Committee issued an Order and Notice for a public hearing on August 31, 2016 in Newington and on September 1, 2016 in Durham, ordering that each of its hearings shall be a "joint hearing, with representatives of state agencies that have permitting or other regulatory authority over the subject matter".

6. DES did not notice the hearing based on Eversource's Wetlands Application which claimed that "[p]er Env-Wt 501.01(c) abutter notification is not required for projects in utility ROWs; therefore abutter notification has not been completed for the portions of the Project located in existing and/or proposed utility ROW areas." The DES Final Decision of February 28, 2018 copies Eversource's Wetlands Application stating: "Per Env-Wt 501.01 (c), abutter notification is not required for projects within ROW's." NHDES Final Decision, Page 21 of 25, Finding # 24. However, the correct rule is Env-Wt 501.01 (e) which states in full that: "The notification required by RSA 482-A:3, I(d) shall not be required for minimum impact forestry, minimum impact agricultural projects, projects in utility rights-of-way, or public

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<sup>2</sup> Env-Wt 202.01 (b)(1) ("The department shall conduct a hearing on a permit application: [...] (b) As required by RSA 482-A:8, for projects: (1) With a significant environmental impact on the resources protected by RSA 482-A, as defined by Env-Wt 101.[92]..."). The phrase "significant environmental impact means that a proposed project is classified as a major project in accordance with Env-Wt 303.02". Env-Wt 101.92.

highway construction.” (emphasis added). Env-Wt 501.01 (e) does not and cannot exempt DES from the statutory obligation to hold a public hearing and provide notice to abutters.

7. This Committee held a Joint Hearing in Newington on August 31, 2016 and in Durham on September 1, 2016. The Transcripts show that representatives of the DES Wetlands Program did not attend or participate in the Joint Hearing in the mistaken assumption that it was not required to do so. *See NHDES Final Decision*, Page 22, Finding #32 (“Public hearings will be held by the New Hampshire SEC to allow citizens the opportunity to comment on the overall project.”).

8. DES made its February 28, 2018 Final Decision without hearing or considering testimony during the Joint Hearing held in Newington on August 31, 2016 that the Project is not located in an existing right-of-way. For example, Eversource explained: “In Newington, a number of changes here. The right-of-way, as soon as we come out of Little Bay, ... working with the landowner [Beswick] there at the bay shore, we were able to secure some additional right-of-way width, swing the line around, which results in less ledge, less impacts, less impact on the abutter also, on the landowner.” Transcript, August 31, 2016, Page 21 (emphasis added).

9. As a result, the February 28, 2018 Final Decision by DES contains a number of findings that are factually and legally erroneous. For example, on Pages 19 to 20 DES proposes a finding that:

[...] 4. The project proposes all work to be within an existing powerline right-of-way (ROW).

[...]

10. The Applicant indicates their application and plan is the alternative with the least adverse impact to areas and environments under the department's jurisdiction per administrative rule Env-Wt 302.03 (a)(2), and with Conditions (“NHDES Permit Conditions”) and are listed in greater detail as follows:

[...]

e) Permanent impacts to estuarine wetlands (5,336 square feet) have been avoided or minimized where possible. The impacts associated with the placement of the concrete mattresses are limited to surficial protection measures that are required by the National Electrical Safety Code for submarine cables that cannot be buried to the required depth due to bedrock or other limiting material.

f) Impacts to estuarine wetlands are restricted to an existing cable crossing corridor which has been utilized in the past and contains de-energized cables that are obsolete.

(emphasis added). Finding #25 on Pages 21 to 22 repeats the same conclusion that: “All work is within the Applicant’s existing ROW which convey[s] the right to construct and replace transmission lines in support of the reliability of the transmission system.”

10. The DES findings are in error based on information provided outside of the public hearing process required by RSA 482-A:8 & 9 and RSA 162-H:10. The Project is not located in the existing right-of-way or the existing cable crossing shown in JCT Exhibit #1. JCT Exhibit #8 shows the right-of-way in 1974 as follows:



However, in 1997, PSNH released its existing right-of-way to allow Beswick to maintain a swimming pool (JCT Exhibit #5). Beswick and PSNH agreed to relocate the right-of-way based on an unrecorded plan, apparently adjacent to the Crowley Joyce property. This new location violated the Little Bay Covenants (JCT Exhibit 2) which prohibit non-residential structures and uses. It was not approved by this Committee. It was not approved by the Newington Planning Board under its site plan regulations (JCT Exhibit #12). Replacement lines were never constructed and residents paid PSNH to remove the lines based on statements by PSNH that they were no longer needed.

11. Eversource’s Application shows the proposed impacts of the Project on the shoreline are entirely outside the former right-of-way shown in JCT Exhibits #1 & #8:



The Project is a new structure and use in a new location. The limits of construction (above) appear to be on the Crowley – Joyce property. Work to “Restore Salt Marsh” appears to be

shown on their property. A higher resolution air photo (JCT Exhibit #11) taken at lower tides shows that the Project will require significantly greater construction in mud flats, over a longer distance, compared to the pre-1997 right-of-way that Eversource abandoned. It will destroy a natural forested area in front of the Crowley Joyce property instead of using the disturbed right of way directly adjacent deep water that Eversource abandoned:



12. Had DES attended the Joint Hearing as required by RSA 162-H:10, it would have realized that Eversource's proposal is in fact a new proposal to construct new structures in a new location. Under its rules, DES was required to evaluate whether the "alternative proposed by the applicant is the one with the least impact to wetlands or surface waters on site". Env-Wt 302.04 (a)(2). Unfortunately, DES did not attend the joint hearings as required by RSA 162-H:10 and its determinations are factually flawed because it failed to hear and consider testimony provided at the Joint Hearing and has instead relied on information provided by the Applicant outside of the hearing process required by RSA 162-H.

13. The Town of Durham has asked the Committee to suspend deliberations due to on-going changes to the DES conditions that Eversource is negotiating outside of the hearing

process even as the hearings are scheduled to occur. RSA 162-H:7 establish a timeline for agencies such as DES to finalize their decisions well in advance of the final adjudicatory hearings. RSA 162-H:7, VI-b provides that: “[a]ll state agencies ... shall report their progress to the committee within 150 days of the acceptance of the application, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.” Each agency is then required to “make and submit to the committee a final decision ... no later than 240 days after the application has been accepted.” RSA 162-H:7, VI-c. A decision by the Committee is not required until “365 days of the acceptance of an application” – a date which is 4 months after the final decision of each agency.

14. The statute’s Declaration of Purpose states that it is intended 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. This purpose is accomplished by requiring all agencies to hold Joint Hearings with the Committee and report their final decisions long before the final adversarial hearings. An agency such as DES cannot fail to participate in the mandatory hearings under RSA 162-H:10 and negotiate outside of the hearing process. The statutory process has not been followed and the rights of the parties are now at risk.

15. For these and other good reasons, Mark Joyce and Karen Crowley respectfully request that the Committee grant the Town of Durham’s motion for suspension.

Respectfully submitted,

Mark Joyce and Karen Crowley

By Their Counsel,

UPTON & HATFIELD, LLP

Date: August 28, 2018

By:  \_\_\_\_\_

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CERTIFICATION

I hereby certify that a copy of the foregoing was this day forwarded to all persons on the Committee's official service list in this proceeding.

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Justin C. Richardson