



ADAM M. DUMVILLE
Direct Dial: 603.230.4414
Email: adam.dumville@mclane.com
Admitted in NH and MA
11 South Main Street, Suite 500
Concord, NH 03301
T 603.226.0400
F 603.230.4448

VIA ELECTRONIC MAIL

November 2, 2018

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

**Re: SEC Docket No. 2015-04: Public Service Company of New Hampshire d/b/a
Eversource Energy for a New 115k Transmission Line from Madbury Substation to
Portsmouth Substation
Applicant's Objection to Joint Motion to Strike NHDES's Recommendations and
Related Testimony**

Dear Ms. Monroe:

Enclosed for filing in the above-referenced docket is the Applicant's Objection to Joint Motion to Strike NHDES's Recommendations and Related Testimony.

Please call me with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Adam Dumville".

Adam M. Dumville

AMD:slb
Enclosure

Cc: SEC Distribution List

STATE OF 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**

**APPLICANT'S OBJECTION TO JOINT MOTION TO STRIKE NHDES'S
RECOMMENDATIONS AND RELATED TESTIMONY**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") (the "Applicant"), by and through its attorneys, McLane Middleton, Professional Association, and objects to the Conservation Law Foundation, Town of Durham, the University of New Hampshire, and Town of Newington's (collectively the "Petitioners") Joint Motion to Strike NHDES's Final Decision Recommendations and Related Testimony ("Joint Motion"). The Joint Motion should be denied for five reasons: (1) the requested relief is contrary to RSA 162-H:7-a and RSA 162-H:16, I; (2) the Joint Motion is procedurally improper because it is essentially a motion for rehearing of the SEC's August 28, 2018 Order on Motion to Suspend; (3) the requested relief is contrary to the SEC's Order on Motion to Suspend and the permitting process; (4) the SEC is required to consider all relevant information; and (5) the Parties had a full and fair opportunity to address the information the Petitioners now seek to strike from the record.

I. Background

1. On February 28, 2018, the New Hampshire Department of Environmental Services ("DES or the "Department") issued its permitting decisions. Included in its final wetland permitting decision were two recommendations: (1) to complete a study of horizontal direction drilling, and (2) to conduct a jet plow trial run prior to construction.

2. As is customary in DES permitting matters, the permit applicant, in this case Eversource, has had ongoing discussions with the Department since the Project was first announced. Also, as is customary, following the issuance of the Department's permitting decision Eversource continued to work with DES to clarify permit conditions and request minor modifications.

3. On July 27, 2018, the Applicant submitted supplemental pre-filed testimony of Sarah Allen, Ann Pembroke, and Kurt Nelson. The supplemental pre-filed testimony stated that the Applicant was in "general agreement with the conditions imposed" by the Department but had identified certain permit conditions of concern. *Supplemental Testimony of Sarah Allen, Ann Pembroke, and Kurt Nelson*, App. Ex. 145, at 101; *see also* App. Ex. 182. As further stated in the testimony, the Applicant hoped to resolve the concerns with the Department. *Id.*

4. On August 10, 2018, the Presiding Officer sent a letter to DES asking the Department to identify, among other things, whether the concerns expressed by the Applicant have been satisfied from the Department's standpoint. *Letter from Presiding Officer Patricia Weathersby to DES Commissioner Robert R. Scott*, Docket 2015-04, at 2 (Aug. 10, 2018). The Petitioners did not object. *Id.*

5. On August 21, 2018, the Town of Durham and UNH filed a Motion Requesting a Suspension of the Proceedings and that the Parties be Included in DES/Applicant Discussions. The Applicant objected on August 27, 2018.

6. On August 28, 2018, the SEC issued an Order granting in part and denying in part Durham/UNH's Motion to Suspend. The Order denied Durham/UNH's request to suspend the hearings because Durham/UNH's request was not ripe and because the Subcommittee would be able to protect the interests of all parties to the proceeding. *See Order on Motion to Suspend*,

Docket 2015-04, at 7 (Aug. 28, 2018) (“Even if DES changes its conditions and/or recommendations, the Subcommittee will have the ability to reorder witnesses, add additional hearing dates, and make other orders that protect the interests of all parties to this proceeding.”) The Presiding Officer also concluded that the Subcommittee has no authority to order DES to allow anyone to attend nonpublic meetings, whether in person or by telephone. *Id.* at 6–7. The Order further stated that there is no reason or authority for the Subcommittee to prohibit the Applicant from discussions with DES in compliance with DES rules. *Id.* at 7. Durham/UNH did not file a motion for rehearing.

7. On August 31, 2018, the Department responded to the SEC’s August 10 letter. The Department’s response clarified many questions and made slight modifications to some of its recommendations and permit conditions.

8. Between August 29, 2018 and October 26, 2018 the Subcommittee held 15 days of evidentiary hearings. The Applicant’s construction panel and environmental panel were available for questioning by all parties following the issuance of the August 31, 2018 DES letter. Many parties asked questions of the Applicant’s witnesses regarding the August 31, 2018 DES letter, including each of the Petitioners. *See e.g.*, Transcript Day 5, AM at 9, 16, 18, 24, 27, 30 (Durham/UNH); Transcript Day 5, AM at 45–48 (Town of Newington); Transcript Day 5, PM at 32, 35, 40–42 (Conservation Law Foundation). There can be no doubt that all parties had a full and fair opportunity to question the Applicant’s witnesses on this topic.

9. On October 23, 2018, Durham/UNH witness Mr. Michael Dacey testified on direct exam that “my observation on the August 31st filing was that there wasn’t really a lot of new information over the February filing from the DES.” *See* Transcript Day 13 at 10; *see also id.* at 88 (confirming on cross-examination). In addition, Durham/UNH witnesses testified on

cross-examination that: they had extensive interactions with DES; the Town provided the Department with extensive substantive comments, as well as proposed conditions, on the Eversource's permit application, as well as their supplemental pre-filed testimony, which addressed the Town/UNH's concerns regarding the February 28, 2018 wetland permit and related conditions; that DES specifically listened patiently and respectfully to the Town's concerns; and that DES "did a good job." *See e.g.*, Transcript Day 13 at 74–90, 92, 121, 189.

II. Discussion

A. The Requested Relief is Contrary to RSA 162-H:7-a and RSA 162-H:16, I

10. RSA 162-H:7-a, V explicitly requires that "[a]ll communications between the committee and agencies regarding a pending committee matter shall be included in the official record and be publicly available." (emphasis added). Striking a communication between the Committee and the Department would be contrary to RSA 162-H, and therefore, as a matter of law, the motion should be denied.

11. In addition, RSA 162-H:16, I requires the "committee to incorporate in any certificate 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." Striking terms and conditions issued by a state agency having permitting authority would also be contrary to RSA 162-H:16.

12. Moreover, State agencies having permitting authority may "review proposals or permit requests and submit recommended draft permit terms and conditions to the committee" and "identify issues of concern on the proposal or permit request or notify the committee that the application raises no issues of concern." RSA 162-H:7-a, I (b)–(c). There is

nothing in RSA 162-H that prohibits discussions with state agencies during the siting process, nor is there anything that prohibits such agencies from amending recommended permit terms.

13. The Joint Motion implies that RSA 162-H:7, VI-c requires state agencies to issue a final permit decision that cannot be amended. The position is untenable and implies, for example that even if there are errors in the “final” permit, they cannot be fixed.

14. Specifically, in this case, the Applicant called the Department’s attention to various errors that were included in the February 28, 2018 recommendation. *See Applicant Correspondence with NHDES*, App. Ex. 182 at 6–17 (identifying various text corrections). For example, the Applicant had submitted revised permit applications on various occasions to address construction and Project updates. *See e.g., Updated NHDES Wetland Permit Application Form*, App. Ex. 128 (Sept. 15, 2017) (modifying permanent and temporary impacts in wetlands). The February 28, 2018 recommendation did not include the updated impacts numbers; however, DES’s review specifically stated that it had reviewed the revised permit materials and included them in the permit’s General Conditions. *See NHDES Recommended Permit Approval With Conditions*, App. Ex. 166 at 7, Wetland Condition 1 (Feb. 28, 2018) (referencing the supplemental information provided to the Department on September 15, 2017). It cannot be argued that the Department does not have the authority to correct its initial recommendation to respond to errors or other concerns raised by the permittee. Likewise, it cannot be argued that the Department is constrained in its continued and further review of technical requirements. Indeed, many of the DES permit conditions (i.e., water quality monitoring plan, eel grass survey, benthic habitat monitoring plan, etc.) are to be finalized at a later date. The Applicant’s efforts in this case comply with DES rules and regulations and are not contrary to RSA 162-H.

15. The Petitioners request is also contrary to the Subcommittee's August 29, 2018

Order on Motion to Suspend. In that Order, the Presiding Officer specifically ruled that:

Nothing in RSA 162-H prohibits the Applicant from continuing communications with DES following the issuance of DES's final recommendations. There is no reason or authority for the Subcommittee to prohibit the Applicant from discussions with DES conducted in compliance with DES rules.

Order on Motion to Suspend, at page 6–7. Ongoing discussions with the permitting agency and the permittee improve the permitting process; such discussions do not impede the process as the Petitioners argue in their Joint Motion.

B. The Joint Motion to Strike is Essentially an Improperly Filed Motion for Rehearing

16. The Joint Motion essentially requests that the Subcommittee reconsider the issuance of the August 10, 2018 letter and the August 28, 2018 Order on Motion to Suspend. First, contrary to the Petitioners' argument that RSA 162-H:7-a, I(e) was not lawfully invoked by the Presiding Officer, *see* Joint Motion at ¶ 7, the August 10, 2018 letter was in fact properly issued by the Presiding Officer and the Petitioners' request to strike the Department's response is unfounded.¹ Second, the Joint Motion makes numerous arguments that are contrary to the Presiding Officer's findings and rulings of the August 28, 2018 Order on Motion to Suspend. To the extent the Petitioners were unsatisfied with the Presiding Officer's findings and rulings in the August 28, 2018 Order on Motion to Suspend, Durham/UNH must have filed a Motion for Rehearing within 30 days. *See* Site 202.29(c). The current motion must be seen for what it is—a collateral attack and/or request for rehearing on the August 28, 2018 Order.

¹ The Petitioners argue that the Committee may invoke RSA 162-H:7-a, I(e) only after the Committee has decided to issue different conditions as a result of adjudicative hearings. However, RSA 162-H:7-a, I(e) does not establish any such requirement, nor does it set out a specific timeframe for invoking its statutory authority to alter permit conditions.

17. The August 10, 2018 letter from the Presiding Officer requested additional information from the Department pursuant to its authority under RSA 162-H:7-a. The August 10 letter was a specific request to the Department to identify whether “the concerns expressed by the Applicant have been satisfied from DES’s standpoint; advise the SEC whether the Applicant’s proposal for the items that remain unresolved conform with the laws and rules applicable to the project; and inform the SEC whether the Applicant’s proposals for resolution of its concerns are appropriate in light of DES’s statutory responsibilities.” Letter at 2. None of the parties objected to this request, nor did any party file any type of motion seeking rehearing.² Without filing an objection or motion in response to the August 10, 2018 letter, the Petitioners cannot now ask the SEC to exclude the Department’s response from the official record.

18. Moreover, the Joint Motion essentially re-states arguments that were previously made by Durham/UNH, namely, that the Petitioners were prejudiced in some way as a result of ongoing discussions with DES. The SEC’s Order Granting the Petitioners’ Motion to Intervene did not confer upon the Petitioners any right to be a full participant in all of the Applicant’s discussions with other permitting agencies. The SEC’s order simply provided that the Petitioners be afforded “a *reasonable* opportunity to submit data, views, or comments with respect to the issuance of any permit, license, or any other action within its boundaries.” *Order on Petitions to Intervene*, Docket 2015-04 at 5 (Aug. 24, 2016) (emphasis added). The Order on Petitions to Intervene does not confer upon the Petitioners a right to be involved in all permit discussions with constituent agencies, nor does the Order establish a special duty upon the Applicant to include the Petitioners in discussions with those agencies. The Petitioners mistakenly assert that the Applicant’s approach of having discussions is contrary to standard practice, when in fact, it is

² Site 202.14(f) requires objections to be filed within 10 days of the issuance of a motion and Site 202.29(c) requires a party to file a motion for rehearing within 30 days of a committee decision or order.

customary for an Applicant to engage in discussions with underlying regulators one-on-one—no matter the timing.

19. Indeed, the Petitioners request is directly contrary to the Subcommittee’s August 28, 2018 Order on Motion to Suspend and essentially asks the Presiding Officer to overrule a prior order. In the August 28, 2018 Order, the Presiding Officer specifically ruled that:

Nothing in RSA 162-H authorizes the Subcommittee to direct DES to conduct its hearings and/or meetings in any particular fashion. Durham/UNH is free to attend meetings that are conducted in public by DES. The Subcommittee has no authority to order DES to allow anyone to attend nonpublic meetings, whether in person or by telephone.

Order on Motion to Suspend, Docket 2015-04, at 7 (Aug. 28, 2018). Indeed, because the SEC cannot order the Department to conduct its hearings and/or meetings in any particular fashion, the Petitioners cannot demonstrate that they have been prejudiced in anyway.

20. The SEC previously ruled that there is no reason or authority for the Subcommittee to prohibit the Applicant from working with DES in accordance with DES rules. Similarly, there is no reason or authority for this Subcommittee to strike the Department’s final recommendations from the official record. In fact, subject to RSA 162:H-7-a, I(e), RSA 162-H:16, I expressly requires that these recommendations remain part of the official record.

C. The Subcommittee is Required to Consider All Relevant Information

21. To issue a Certificate of Site and Facility, the Subcommittee must find that the Applicant has satisfied the requirements of RSA 162-H:16, IV, including that the Project will not have an unreasonable adverse effect on air and water quality and the natural environment after “due consideration of all relevant information.”³ DES, the permitting agency that oversees the protection of the environment, is conferred with regulatory oversight to review proposals and

³ See also Site 202.24 (“All documents, materials and objects offered as exhibits shall be admitted into evidence, unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.”).

permit requests and submit proposed conditions to the Committee. Here, the Department issued a letter with certain revisions to its initial recommendations and permit conditions; certain witnesses at the final hearings testified about the conditions in the letter. The February 28 and August 31 recommendations from the Department contain relevant information about the potential impacts from the Project on water quality and the natural environment. Moreover, as discussed *supra* ¶¶10–11, and subject to the exception found in RSA 162:H-7-a, I(e), the Committee is required to incorporate terms and conditions specified to the Committee by a state agency having permitting authority. Testimony relating to the Department’s terms and conditions is clearly relevant to the proceedings.

22. The Petitioners have not argued, and they cannot demonstrate, that the letter and subsequent testimony from the witnesses is irrelevant. The DES letter modifies certain permit conditions, which help ensure that the Project will not have an unreasonable adverse effect on water quality or the natural environment.

D. The Parties Had a Full and Fair Opportunity to Address the August 31, 2018 Letter

23. As demonstrated *supra* ¶¶ 8–9, each of the Petitioners had a full and fair opportunity to question the Applicant’s witnesses about the August 31, 2018 letter and the minor changes to the Department’s permitting recommendations. No party has been prejudiced by the Departments August 31, 2018 letter.⁴ Moreover, Durham/UNH were allowed to conduct a direct examination of their own witnesses pertaining to the August 31, 2018 letter and other parties could have requested similar relief.

⁴ The Petitioners complain that they were not involved in ongoing discussions and did not know about them until a technical session data request was made on July 18, 2018. However, the Petitioners cannot cite to a specific statutory or regulatory requirement that the Applicant involve other parties in permitting discussions with a state agency. Indeed, the only requirement is for the Applicant to reasonably and promptly supplement its production of documents from data requests. Customarily with SEC practice, and in accordance with SEC Order on Motion to Suspend, the Applicant supplemented its discovery on numerous occasions prior to and during the hearings.

24. In fact, as demonstrated by the Applicant’s cross-examination of the Town of Durham/UNH’s witnesses, the changes to the permit conditions were relatively minor. *See supra* ¶ 9. The Joint Motion inaccurately conveys that the DES August 31, 2018 response letter “fundamentally change[d]” the Department’s February 28, 2018 decision. Indeed, the February 28, 2018 DES decision included *recommendations*—not permit conditions—relating to a jet plow trial run. *See Order on Pending Motions*, Docket 2015-04, at 7 (July 31, 2018) (“The CLF motion to consider the recommendations made by DES as part of the adjudicatory process is also denied.”). To the extent the Petitioners disagree with the conditions of the jet plow trial run, they are free to make their arguments in their final briefs.

25. Moreover, it is clear from the record that Durham/UNH specifically contacted DES on July 20, 2018 requesting additional information from the Department. *See Partially Assented-To Motion Requesting a Suspension of the Proceedings and that the Parties Be Included in DES/Applicant Discussions*, Docket 2015-04, Attachment B (Aug. 21, 2018) (email from Attorney Douglas Patch to Rene Pelletier). DES was, and is, fully capable of determining the appropriate level of engagement with parties who may have some interest in a permit proceeding, and DES has done so here.

III. Conclusion

The Petitioners requested relief is directly contrary to RSA-162, the SEC’s August 28, 2018 Order on Motion to Suspend and they have failed to show that the August 31, 2018 DES letter and subsequent testimony is irrelevant to the proceedings. Durham/UNH’s own witnesses testified to the extensive interaction they had with DES during the permitting process and noted that the Department took their recommendations seriously. Moreover, all parties, including the

Petitioners, had a full and fair opportunity inquire about the August 31, 2018 letter during the SEC's final hearings. Accordingly, Petitioners' request should be denied.

WHEREFORE, the Applicant respectfully asks that the Subcommittee:

- A. Deny the Petitioner's Joint Motion to Strike NHDES's Final Decision Recommendations and Related Testimony; and
- B. Grant such other further relief as is deemed just and appropriate.

Respectfully Submitted,

Public Service Company of New Hampshire d/b/a
Eversource Energy

By its attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: November 2, 2018

By: 
Barry Needleman, Esq. Bar No. 9446
Adam Dumville, Esq. Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on the 2nd day of November, 2018, an electronic copy of this objection was filed with the NH Site Evaluation Committee and an electronic copy was sent to the Distribution List.



Adam Dumville