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March 4, 2019

Pamela G. Monoe, Administrator  
N.H. Site Evaluation Committee  
21 South Fruit Street, Suite 10  
Concord, NH 03301

Re: Docket No. 2015-04 Seacoast Reliability Project  
Durham Residents Group Motion for Rehearing

Dear Administrator Monroe:

Enclosed please find for filing, the Durham Residents Group partially assented-to joint motion for rehearing of the Site Evaluation Committee's decision dated January 31, 2019.

This filing is also being distributed to the electronic service list for this proceeding. Thank you in advance for your assistance with this filing.

Very Truly Yours,

A handwritten signature in black ink that reads "Marcia A. Brown".

Marcia A. Brown

cc: Electronic Service List for Docket No. 2015-04.

**STATE OF NEW HAMPSHIRE**  
**BEFORE THE**  
**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 for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation**

**DURHAM RESIDENTS**  
**PARTIALLY ASSENTED-TO JOINT MOTION FOR REHEARING**

NOW COMES Matthew and Amanda Fitch, Jeffrey and Vivian Miller, Lawrence Gans and Anne Darragh, and Deborah Moore, (together, “Little Bay group”), Thomas and Yael DeCapo, Donna Heald, Dr. Regis Miller, and Nick Smith (all together, “Durham Residents”), pursuant to RSA 541:3 and N.H. Code Admin. Rules Site 202.29, respectfully move for rehearing of the New Hampshire Site Evaluation Committee’s (“SEC”) Decision and Order Granting Application for Certificate of Site and Facility with Conditions, dated January 31, 2019 (“Order”) in this docket wherein the SEC granted a certificate to Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) to construct a new high-voltage transmission line from Madbury Substation to Portsmouth Substation, also known as the Seacoast Reliability Project (“Project”). In support of this motion, the Durham Residents state as follows:

**A. Standard of Review**

Pursuant to RSA 162-H:11 decisions of the Subcommittee are reviewable under RSA Ch. 541. Under RSA 541:3 “any party to the action or proceeding before the commission, or any person directly affected thereby” may request rehearing. “The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original

decision, and thus invites reconsideration upon the record upon which that decision rested.” *Dumais v. State of New Hampshire Personnel Commission*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A motion for rehearing must “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4. A rehearing may be granted upon a finding of “good reason.” RSA 541:3. *See also, O’Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). The Durham Residents group are landowners directly affected by the Project and the SEC’s Order. The Durham Residents group respectfully argue that certain conclusions in the Order are unlawful or unreasonable for the reasons set forth below and that rehearing is warranted.

## **B. Arguments**

### **1. RSA 162-H Obligates the SEC to Balance the Adverse Impacts of the Project against the Benefits of the Project.**

The SEC has “the authority to consider and weigh both impacts and benefits of a project.” Order at 323, citing RSA 162-H:16, IV(e). This authority stems from RSA 162-H:1, which states the purpose of RSA Chapter 162-H is, among other things, “to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire.” Pursuant to RSA 162-H:16, IV(e) and Site 301.16(b), the SEC, “[a]fter due consideration of all relevant information...including potential significant impacts and benefits” the SEC shall find that the “[i]ssuance of a certificate will serve the public interest.” In determining whether a proposed Project will serve the public interest, the SEC is required to consider the impact of the Project on “private property.”

**2. SEC Findings on Private Property Are Not Supported by Basic Facts and with Sufficient Specificity.**

Findings by an administrative agency are necessary for the basic understanding of an agency's decision and to an understanding of "whether the facts and issues considered sustain the ultimate result reached." *Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115, N.H. 163, 172, (1975) citing K. Davis, *Administrative Law Text* § 16.04 (1972) (other citations omitted). Whether such findings are sufficient necessarily entails weighing the competing value of administrative efficiency against deliberate and considered decision making. *Society* at 172 citing, *Leventhal, Principled Fairness and Regulatory Urgency*, 25 Case W. Res.L.Rev. 66 (1974); *Leventhal, Environmental Decision Making and the Role of the Courts*, 122 U.Pa.L.Rev. 509, 510 (1974). Where the administrative agency is "required by statute to make... complex factual determinations of its effect on regional development, air and water quality, the natural environment and the public health and safety", however, "the law demands that findings be more specific than a mere recitation of conclusions." *Society* at 173-174. The Site Evaluation Committee must furnish basic findings of fact to support the conclusions that the statute requires it to make. *Society* at 174. Finally, in the process of making basic findings, the SEC is compelled to weigh with care the evidence before it and to delineate the basic facts supporting its conclusions, thereby rendering the process of public hearings more meaningful to the participants. *Id.*

The Durham Residents group respectfully aver that the "basic facts" to support private property-specific findings, which the SEC is required by statute to make, do not exist in the record. The facts supporting the SEC's finding relative to the Project's impact on private property and Public Interest are slim, however, the SEC's discussion on Orderly Development of the Region contains facts on the adverse impacts on private property. Order at 278-288. There, the SEC referenced testimony of Dr. James Chalmers. The SEC noted that Dr. Chalmers

evaluated case studies in New Hampshire, Massachusetts, and Connecticut.<sup>1</sup> Order at 279. The SEC noted that Dr. Chalmers stated that “[n]o comparable statistical studies were conducted in New Hampshire. Order at 281. The SEC noted that Dr. Chalmers “acknowledged that no case studies were conducted for the effect of transmission lines constructed in the right-of-way with previously existing distribution lines.” Order at 281. The SEC noted that he “did not independently assess the impact on individual properties.” Order at 283. Further, the SEC noted that “[h]e did not consider and evaluate specific features of the New Hampshire economy and real estate market.” As a result, the SEC is left with no evidence in the record concerning which New Hampshire properties would be adversely affected by the Project, and by how much.

Lacking this specific evidence, the SEC extrapolated the following conclusions: “[i]t is reasonable to conclude, depending on the extent of increase in visibility of the Project, that the Project will have some effect on values of some of these properties.” Order at 288. The SEC did not cite the degree of effect. “[I]t is reasonable to conclude that the Project will have some effect on values of additional properties.” *Id.* Again, the SEC did not cite the degree of adverse effect.

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<sup>1</sup> For Corridors #1 and #2 and Study Areas #3 and #4, Dr. Chalmers retained appraisers to conduct forensic appraisals to determine a property’s sale value absent a high-voltage transmission line. Then he compared the actual sale price to the hypothetical sale price. The case studies were not actual comparative sales data. Those case studies are as follows:

**Corridor #1 Case Studies** Single-family residences. ROW encumbering property was typically 350 feet wide and contained an existing 450 kV DC line and two 230 kV lines. The corridor starts in Littleton, skirts the western edge of the White Mountain National Forest, then proceeds south to the Massachusetts border roughly following I-93. None of these case studies are in the Seacoast.

**Corridor #2 Case Studies** (Subdivisions in Whitefield, Sugar Hill, Easton, Woodstock, Campton, Holderness, Franklin, Canterbury, Allenstown, and Deerfield). The ROW is usually 150 to 225 feet wide and contains one or more 115 kV lines. Existing structures are wooden, H-frame about 55 feet high or steel poles 75 feet high. The ROW originates in Dummer and runs to Northumberland, then south through Franconia Notch, generally following I-93 and terminating in Deerfield. None of the case studies are in the Seacoast.

**Study Area #3 Case Studies** (Subdivisions in Portsmouth, Newington, and Greenland) Case studies (6 total) are a composite of several existing high-voltage transmission line ROWs in and around Portsmouth.

**Study Area #4 Case Studies** (Dover (10 cases), Hooksett (6 cases), and Danville (4 cases)). Along Falcon Drive and Back Road (Dover): high-voltage transmission line (115 kV) laminated wood monopoles 65 to 84 feet high and 125-foot wide ROW. Gerrish Road and Toftree Lane (Dover): 115 kV line on steel monopoles 90 to 100 feet high. ROW is 150 feet wide. Hooksett ROW is 220 feet wide, with a 115 kV line on steel monopoles 70 to 79 feet high. Danville ROW is 280 feet wide and contains 345 kV line with structures 84 to 93 feet high, a 115 kV line with structures 61 to 66 feet high, and a second 115 kV line with structures 65 to 89 feet high.

As a result, it is evident that the SEC was aware of the lack of specific evidence upon which it could render a finding. Given that there was no evidence in the record on: 1) the impact of constructing a new 115 kV high-voltage transmission line in a 34 kV right-of-way on private properties; and 2) the degree of adverse impact on private property, the SEC's findings are based on conjecture.

The closest relevant evidence concerning the degree of adverse impact of the Project on private property are buried in the details of Dr. Chalmer's amended study. App. Ex. 147. The SEC did not make note of this data in its factual summary. Dr. Chalmers reviewed actual paired sales data of lots on Hannah Lane in Newington during 1989-1992. App. Ex. 147 at pages 109-112, Chapter 5, page 78-81. App. Ex. 147 at 17. The Hannah Lane subdivision is bisected by the same 100-foot wide right-of-way/34 kV distribution line right-of-way that will be used by the Project. In comparing lot sales data (encumbered vs. unencumbered), Dr. Chalmers found that the lots encumbered with the right-of-way had a 39% adverse price effect. This price effect is based on existing conditions, not on the additional price effect caused by the construction of a new 115 kV line in the 34 kV right-of-way and without taking into consideration that these lots now have homes. Therefore, the 39% price effect is likely higher. Dr. Chalmers did not pursue this analysis further. However incomplete, this paired sales data remains the only remotely relevant data on the potential effect of the Project on private property. It is important to note that the price effect was so substantial, even at the lot analysis level, that Eversource agreed to underground the Project, at great expense.

In conclusion, without knowing the extent of adverse impacts to private properties, the SEC is unable to quantify this adverse impact. If it cannot quantify the adverse impact, is it axiomatic that the SEC is unable to balance this impact against the benefits of the Project as required under RSA Chapter 162-H. Without these basic facts, the SEC is unable to support its

findings sufficiently, as required by law, which renders the SEC's findings relative to private property unlawful and unreasonable.

**3. The SEC Impermissibly Delegated its Statutory Obligation to Determine the Public Interest as to Private Property.**

Pursuant to RSA 162-H:4, the SEC's ability to delegate its authority is limited:

“to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate.” “The committee may not delegate its authority or duties, except as provided under this chapter.”

Notwithstanding the limits of RSA 162-H:4, the SEC relies on the Dispute Resolution Process Procedures (“Procedures”) to resolve damages and mitigate the impacts. Order at 256. The SEC concluded that the “property owners may mitigate such [adverse] impacts...through Dispute Resolution Procedure.” Order at 288. “[T]he Project will have some negative impacts on...private properties” but that “[t]hese impacts will be minimized and mitigated through implementation of the conditions of the Certificate, various Memorandums of Understanding, the Dispute Resolution Procedure, and administrative agency permit conditions.” Order at 325. This delegation essentially moves the public interest determination on private property to a black box. Eversource is left not knowing its exposure to damages associated with the adverse impacts to private property, it gets a second bite at the apple with respect to private property values, the public is unable to ascertain the SEC's conclusions on the value of the adverse impacts on private property, the delegation removes these determinations from the due process protections of RSA Ch. 541 and RSA Ch. 541-A, and threatens to cause an unconstitutional regulatory taking of private property.

Nowhere in the statute does the legislature authorize the SEC to delegate necessary findings under RSA 162-H:16 as to public interest. RSA 162-H:16, IV(e). By moving the resolution of these issues to the Procedures, the SEC is impermissibly avoiding its statutory obligation to: 1) identify sufficiently specific facts concerning the adverse impacts of the Project on private property, 2) balance those impacts with the benefits of the Project, and 3) render a determination on public interest. As such, the Durham Residents consider this an error of law.

**4. The SEC Impermissibly Modifies the Burden of Proof by Moving Eversource's Burden to Prove the Benefits Outweigh the Adverse Impact to the Dispute Resolution Process Procedures where Private Property Owners must now Carry the Burden of Proving Damages.**

Pursuant to N.H. Code Admin. Rule Site 202.19(b), *Burden and Standard of Proof*, “[a]n applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.” As noted above, Eversource failed to provide facts on the extent of adverse impacts of the Project on private property. In response, the SEC has created a dispute resolution process to resolve the unknown damages. In doing so, the SEC has impermissibly shifted the burden of proof to private property owners. Private property owners must now produce documents, including real estate appraisals, business records, and cost estimates by licensed professionals. Appendix XII at 2. Had Eversource provided adequate values for the adverse impacts to private property instead of prematurely stopping at the Hannah Lane lot analysis, the Durham Residents would not be subject to this shift in the burden of proof. The SEC’s statutes and rules do not require private property owners to produce such evidence, that burden rests with the applicant. RSA 162-H:7. Site 202.19(b). Nor do the rules allow for a substitute process for determining the adverse impacts. The SEC’s public interest balance of adverse impacts and benefits is, by statute, to be done in the hearing process. RSA 162-H:4, II. For this reason, the SEC’s decision

to defer resolution of the extent of adverse impacts on private property to the Procedures is unlawful and unreasonable.

**5. The Dispute Resolution Process Procedure is Contrary to RSA 91-A.**

The public has a constitutional right of access to governmental proceedings. See N.H. CONST. pt. I, art. 8. The public's statutory right to know is codified in RSA ch. 91-A. The preamble of the statute states: "openness in the conduct of public business is essential to a democratic society." RSA 91-A:1. The purpose of RSA Ch. 91-A is to ensure the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people. *Id.* Pursuant to RSA 91-A:4, "[e]very citizen...has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5." The Dispute Resolution Process is a substitute for the SEC's balancing of adverse impacts of the Project and is overseen by an SEC appointee. See Order Appendix XII at 3, 4. As such, it is an extension of a government function and is subject to RSA Ch. 91-A. See, generally, *Bradshaw v. Shaw*, 116 N.H. 388 (1976); *Prof'l Firefighter of N.H. v. Health Trust*, 151 N.H. 501, 504 (2004).

RSA 91-A:5, provides limited exceptions to the open government policy and makes confidential: 1) records of grand juries, 2) master jury lists, 3) records of parole and pardon boards, 4) personal school records of pupils, 5) records pertaining to internal personnel practices, etc., 6) teacher certification records, 7) records pertaining to emergency functions, 8) unique pupil identification information, 9) notes and other materials not made as part of an official purpose, 10) preliminary drafts and notes, and 11) videos and audio recordings of law enforcement. Unless information conveyed in the Procedures are covered by these exceptions,

the information cannot be excluded from public review. As noted in Appendix XII, at 1, paragraph A, the Dispute Resolution Process and any final decisions are to be held confidential: “Initiation of the Dispute Resolution Process constitutes...the Applicant’s agreement to hold the Dispute Resolution Process and any Final Decision confidential”. See also Order at 277. This confidentiality term violates RSA Ch. 91-A and prevents the public from inspecting government records and holding its government accountable. For these reasons, the SEC’s adoption of this confidentiality term is unlawful and unreasonable.

**6. The SEC’s Limits on Statute of Limitations and Waiver of Right to File Suit are unlawful and unreasonable.**

State agencies are creatures of the legislature and only possess the powers delegated to them by the legislature. This is rooted in the concept of the separation of powers which is “designed to protect the people from the tyranny of government which could result from the accumulation of unbridled power in any one branch of the government.” *Opinion of the Justices*, 121 N.H. 552, 556 (1981) citing *The Federalist No. 47* (Madison). The N.H. Supreme Court has acknowledged that although the complete separation of powers would interfere with the efficient operation of government, “an encroachment upon the powers of one branch by another branch violates the separation of powers requirement of the constitution”. *Opinion of the Justices*, 121 N.H. 552, 431 A.2d 783, (1981) citing *Opinion of the Justices*, 110 N.H. 359, 363 (1970); *Monier v. Gallen*, 120 N.H. 333, 339 (1980). In adopting a waiver of the right to file suit if a person pursues the dispute resolution process, the SEC is impermissibly encroaching on the judicial branch of government. The SEC’s waiver interferes with the right of a party to avail themselves of a judicial remedy, especially once they have exhausted administrative remedies. Further, in adopting a two-year limitation on filing claims, the SEC abridges a person’s right to file a suit within the time limits set forth in statute. See RSA Ch. 508, *Limitation of Actions*. For these reasons, the SEC’s waiver and time limitations encroach on another branch of government

and unconstitutionally interfere with a person's right to file suit, and, therefore, are unlawful and unreasonable.

**C. Concurrency with Motion**

Pursuant to Admin. Rule Site 202.14(e) the Durham Residents have made a good faith effort to obtain concurrence from the other parties. The following parties concur with the relief requested in this motion: Conservation Law Foundation, Town of Durham, Durham Historic Association, Helen Frink, and Keith Frizzell. Eversource objects to the motion. The remaining parties did not respond to a request for their position despite a good faith effort to reach them.

**WHEREFORE**, the Durham Residents respectfully requests that the Subcommittee:

- A. Grant this motion for rehearing;
- B. Reconsider the January 31, 2019 Order and Certificate of Site and Facility with Conditions; and
- C. Grant other relief that may be just and equitable.

Respectfully submitted,

DONNA HEALD

By Her Attorney,

Dated: March 4, 2019

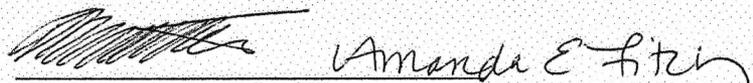


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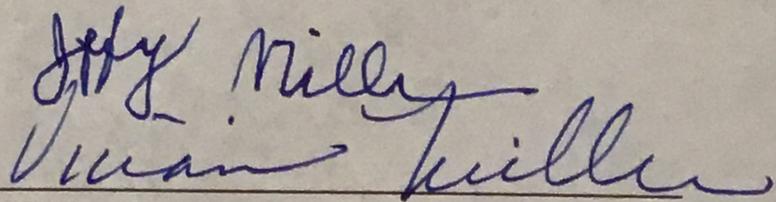
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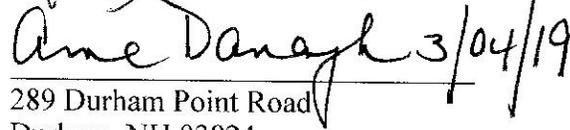


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing post-hearing brief has on this 4<sup>th</sup> day of March 2019 been sent by email to the electronic service list for Docket No. 2015-04.

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Marcia A. Brown

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NICK SMITH

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**Nick Smith**

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LAWRENCE GANS and ANNE DARRAGH

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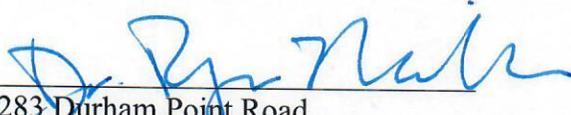
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