STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for Certificate of Site and Facility

November 20, 2018

ORDER ON MOTIONS TO STRIKE

This Order denies a "Joint Motion To Strike NHDES's Post-Final Decision Recommendations and Related Testimony" filed by the Conservation Law Foundation, the Town of Durham, the University of New Hampshire, and the Town of Newington (Intervenors). This Order denies, in part, and in part, reserves judgment on the "Motion to Strike NHDES's October 29, 2018 Revised Final Decision" filed by Counsel for the Public.

I. Background

On April 12, 2016, the Public Service Company of New Hampshire d/b/a Eversource Energy applied for a Certificate of Site and Facility (Application) with the Site Evaluation Committee (Committee). The Application seeks the issuance of a Certificate of Site and Facility approving the siting, construction, and operation of a new 115kV electric transmission line between existing substations in Madbury and Portsmouth (Project).

On April 15, 2016, the Administrator of the Committee notified the Department of Environmental Services (DES) that the Application had been filed.

On February 28, 2018, DES provided its final decision and recommendations pertaining to a Wetland Permit, Alteration of Terrain Permit, §401 Water Quality Certificate, and Shoreland Permit required to construct the Project. In addition to the permit conditions, DES recommended that the Subcommittee consider having the Applicant conduct: (i) a more thorough evaluation of

the horizontal directional drilling (HDD) method for installing cable under Little Bay; and (ii) a trial jet plow run (without cable) in Little Bay[1].

DES recommended that the Subcommittee consider requiring the Applicant to prepare a detailed evaluation of HDD, including a feasibility analysis. DES also recommended that the evaluation compare the potential impacts of the proposed jet plow method (including diver hand-jetting) to the HDD method. DES recommended that the evaluation consider two alternative HDD methods: (i) crossing all of Little Bay using HDD within the existing cable corridor; and (ii) using HDD within the existing corridor, but only in the areas where hand-jetting is currently proposed. DES recommended the Subcommittee require the Applicant to submit the evaluation to DES and the Subcommittee at least 90 days before constructing the Project in Little Bay. DES agreed to review the evaluation and provide the Applicant and the Subcommittee with comments regarding methods for installing cable across Little Bay.

In response to the DES recommendation, the Applicant evaluated the HDD method. On July 1, 2018, the Applicant filed a report and Supplemental Testimony regarding the findings in the report. *See* App. Ex. 133, App. Ex. 134 and App. Ex. 135.

DES also recommended that the Subcommittee consider requiring the Applicant to conduct a trial jet plow across a portion of Little Bay (approximately 1,000 feet) and to submit a report summarizing the trial run to DES and the Subcommittee at least 90 days prior to the proposed cable installation. DES offered to review the report and provide its recommendations to the Applicant and to the Subcommittee.

On July 27, 2018, the Applicant pre-filed a second Supplemental Testimony of Ann Pembroke, Sarah Allen, and Kurt Nelson (Supplemental Testimony). *See* App. Ex. 145. The

[1] Neither of the DES recommendations were contained as conditions in the DES final decision. The recommendations suggested only that the Subcommittee "consider" requiring the additional studies.

Applicant disagreed with a number of conditions and recommendations made by DES. In its Supplemental Testimony, the Applicant reported that it is negotiating with DES in an attempt to resolve some disagreements. The Supplemental Testimony included a letter dated April 27, 2018 from Kurt Nelson to Collis Adams identifying the disputed recommendations and the Applicant's requested amendments. *See* App. Ex. 145, Attachment C. The Applicant requested that the Subcommittee address any unresolved concerns with DES based on the record before the Subcommittee[2].

On August 10, 2018, the Presiding Officer sent a letter, requesting that DES: (i) identify the concerns expressed by the Applicant that have been satisfied from DES' standpoint; (ii) 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 (iii) inform the Subcommittee whether the Applicant's proposals for resolving its concerns are appropriate in light of DES's statutory responsibilities. The Presiding Officer invited DES to participate in the adjudicative hearing to inform the Subcommittee about any matter that remains in dispute.

On August 17, 2018, DES requested more time to respond to the Presiding Officer's request.

On August 30, 2018, the Applicant's construction witnesses were subject to cross-examination, but the cross-examination did not conclude on August 30, 2018.

On August 31, 2018, DES responded to the Subcommittee's request. *See* Comm. Ex. 12a. DES indicated that it was involved in discussions with the Applicant relative to some permit conditions and identified the conditions it agreed to modify. DES also amended its suggestion

[2] The Supplemental Testimony also contained a document entitled Requested Text Corrections. See App. Ex. 145, Attachment A and App. Ex. 182, Attachment A. DES, in preparing its final decision, misreported certain information that was eventually corrected in response to concerns expressed by the Applicant. The 'text corrections" are not the subject of either Motion to Strike.

regarding the jet plow trial run and proposed that the Applicant undertake the trial run 21 days before the cable installation. Under the DES proposal, the Applicant would provide a complete trial run summary report to DES at least 14 days before the scheduled start of the cable installation.

On September 17, 2018, cross-examination of the Applicant's construction witnesses resumed. The parties that cross-examined the construction witnesses at the hearing on August 30, 2018 did not request the opportunity for further cross-examination based on the correspondence received from DES on August 31, 2018. On September 20, 2018, the Applicant's environmental witnesses testified and were subject to cross-examination.

On October 29, 2018, DES filed a Revised Final Decision, Comm. Ex. 12c, and an Annotated Revised Final Decision, Comm. Ex. 12d, containing the permit terms and conditions as amended by the letter received from DES on August 31, 2018. The Revised Final Decision and the Annotated Revised Final Decision do not provide new information. Rather these documents incorporate the information that was previously provided by DES into one single document. These documents were filed at the request of the Subcommittee so that it would have a single reference document including all of the conditions and recommendations made by DES. The reports filed by DES were admitted as evidence and were marked: (i) Comm Ex. 12a - February 28, 2018 Final Decision; (ii) Comm Ex. 12b - August 31, 2018 Correspondence; (iii) Comm Ex. 12c - October 29, 2018, Revised Final Decision; and (iv) Comm Ex. 12d - October 29, 2018 Annotated Revised Final Decision.

On October 24, 2018, the Intervenors filed the Motion requesting to strike the correspondence submitted by DES on August 31, 2018, Comm. Ex. 12b, and any testimony

relevant to this communication[3]. The Applicant objected and Counsel for the Public filed a response.

On November 2, 2018, Counsel for the Public also filed a "Motion to Strike NHDES's October 29, 2018 Revised Final Decision" requesting to strike both Comm Ex. 12c and Comm Ex. 12d.

II. Positions of the Parties

The Intervenors argue that the Subcommittee should strike the DES correspondence dated August 31, 2018, and all testimony related to that correspondence. The Intervenors argue that the correspondence amends the final decision issued by DES on February 28, 2018. The Intervenors claim that DES had no authority or jurisdiction to amend its final decision and that negotiations between DES and the Applicant and the amendment of the final decision were not authorized by RSA 162-H. They further assert that RSA 162-H:7, VI-c states that "[a]ll state agencies having permitting or other regulatory authority shall make and submit to the Committee a final decision on the parts of the Application that relate to its permitting and other regulatory authority, no later than 240 days after the Application has been accepted." The Intervenors conclude that using the term "final decision" "strongly suggests" that the agency has no authority to modify such decision following its submittal to the Subcommittee.

The Intervenors also argue that RSA 162-H:7-a, I(e) did not allow DES to respond to the Presiding Officer's request. They acknowledge that RSA 162-H:7-a, I(e) allows agencies to communicate with the Subcommittee. They argue, however, that such communication: (i) can take place only after the Committee determines that it may impose certificate conditions that differ from those proposed by the agencies; and (ii) should be limited to "confirmation that such

[3] Presumably the Intervenors also seek to strike Comm. Exs. 12c and 12d.

conditions or rulings are in conformity with the laws and regulations applicable to the project." They conclude that the August 29, 2018 correspondence from DES was not authorized by RSA 162-H:7-a, I(e) because it was not provided in response to a determination by the Subcommittee that some different conditions may be warranted.

The Intervenors also claim that the Presiding Officer did not have the authority to ask in her letter of August 10, 2018, for DES to respond to the issues raised by the Applicant's supplemental pre-filed testimony. The Intervenors complain that such a request can only be made during the deliberation process and that the request must be made by the full Subcommittee. The Intervenors also suggest that RSA 162-H:7-a requires some additional adjudicative process including participation by the parties.

Counsel for the Public objects to the request to strike the August 31, 2018 correspondence received from DES from the record. However, Counsel for the Public does move to strike the Revised Final Decision, Comm. Ex. 12c, and Annotated Final Decision, Comm. Ex. 12d, from the record.

Counsel for the Public agrees with the Intervenors that an agency's final decision submitted pursuant to RSA 162-H:7, VI-c constitutes the agency's "final decision on the parts of the Application that relate to [their] permitting and other regulatory authority." Counsel for the Public also agrees that it is improper for a state agency to amend its final decision once it is issued. He argues that requests to deviate from an agency's final decision must be made to the Committee as opposed to the state agency. Counsel for the Public opines that the Subcommittee may request that the state agency provide additional relevant information required for its decision-making, but should not require and/or enable the state agency to modify a final decision. Counsel for the Public argues that the Subcommittee is required to "incorporate in any

certificate such terms and conditions as may be specified by any of the state agencies having permitting or other regulatory authority" under RSA 162-H:16, I, and must follow the process in RSA 162-H:7-a, I(e) if it wishes to deviate from these conditions. Counsel for the Public concludes that the Subcommittee should consider the DES decision dated February 28, 2018, as the DES "final decision" and should strike the "Revised Final Decision" and the "Annotated Final Decision" from the record. In the alternative, Counsel for the Public requests clarification that the "Revised Final Decision" and the "Annotated Final Decision" are not the "final decisions" of a state agency with permitting or regulatory authority.

The Applicant argues that there is nothing in RSA 162-H that prevents a state agency from communicating with the Subcommittee after it issues a final decision. There is also nothing that prohibits the agency from revising its decision. The Applicant submits that the Subcommittee should accept the August 31, 2018 correspondence from DES, the "Revised Final Decision," and the "Annotated Final Decision" as exhibits because the Subcommittee must include in the official record "all communications between the Committee and agencies regarding a pending Committee matter" under RSA 162-H:7-a. The Applicant also argues that documentation provided by DES contains conditions that the Committee is required to incorporate in the Certificate under RSA 162-H:16, I. The Applicant asserts that the revised conditions constitute relevant information that the Subcommittee should consider under RSA 162-H:16, IV. Finally, the Applicant argues that the Intervenors had an opportunity to request that the Subcommittee suspend the adjudicative hearing upon receipt of the correspondence from DES and that they failed to do so. Instead, the Intervenors participated in the adjudicative hearing, cross-examined witnesses on the correspondence from DES received on August 31, 2018, and sought opinions from their own witnesses with respect to the

correspondence. The Applicant argues that all the parties had an ample opportunity to, and did, address the August 31, 2018 correspondence from DES and that the motions to strike should be denied.

III. STANDARD OF REVIEW

The motions raise procedural claims and issues of statutory interpretation. When an adjudicative hearing is required, all parties are entitled to notice and an opportunity to be heard. *See* RSA 541-A: 31. The parties to an adjudicative hearing are entitled to conduct cross-examination as "required for a full and true disclosure of the facts." RSA 541-A:33, V.

Rules of statutory interpretation are well-settled in New Hampshire:

> When construing statutes and administrative regulations, we first examine the language used, and, where possible, we ascribe the plain and ordinary meanings to words used. Words and phrases in a statute are construed according to the common and approved usage of the language unless from the statute it appears that a different meaning was intended. Additionally, we interpret disputed language of a statute or regulation in the context of the overall statutory or regulatory scheme and not in isolation. We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result. We can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.

Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 758-759 (2014) (citations and quotations omitted).

When interpreting two or more statutes that deal with similar subject matter, the Courts construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes. *Maroun v. Deutsche Bank Nat'l Trust Co.*, 167 N.H. 220, 225 (2014) (citation omitted).

IV. ANALYSIS AND FINDINGS

The arguments made by the Intervenors and Counsel for the Public that a final decision

of a state agency must be filed with Subcommittee within 240 days or be struck from the record are unpersuasive. RSA 162-H:7, VI-c, states "[a]ll state agencies having permitting or other regulatory authority shall make and submit to the Committee a final decision on the parts of the Application that relate to its permitting and other regulatory authority, no later than 240 days after the Application has been accepted." However, RSA 162-H:14 specifically authorizes the Committee to suspend the time frame in RSA 162-H:7. In this case the Subcommittee did suspend the timeframe not once, but twice. In fact, the February 28, 2018 "final decision" that the Intervenors claim should be relied on was filed 625 days after the acceptance of the Application. In this case the 240-day deadline does not present a jurisdictional nor a procedural bar. All parties had ample opportunity to review the correspondence received from DES on August 31, 2018. All parties had an opportunity to cross-examine the Applicant's construction witnesses and the Applicant's environmental witnesses regarding the correspondence. The Intervenors and Counsel for the Public also had the opportunity to address the contents of the correspondence with their own expert witnesses and with witnesses presented by other parties[4]. None of the parties sought to suspend the proceedings after the correspondence was filed.

Likewise, the Intervenor's argument that the Presiding Officer misapplied RSA 162 H:7-a, I (e) is unavailing. The request for agency response dated August 10, 2018, specifically asked DES to provide the following:

> 1. That DES identify the concerns expressed by the Applicant that have been satisfied from DES's standpoint;

[4] The possibility that DES might change its conditions was previously addressed by the Subcommittee. At that time the parties were instructed that 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. If found to be in the public interest, the Subcommittee will have the option to suspend the proceedings." See Order on Motion to Suspend (August 28, 2018) p. 7. Neither the intervenors nor any other party sought such relief after the August 31, 2018 correspondence from DES.

2. That DES 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

3. That DES inform the SEC whether the Applicant's proposals for resolution of its concerns are appropriate in light of DES's statutory responsibilities.

Nothing within RSA 162-H prohibits the Subcommittee from requesting a state agency to respond to questions or concerns that arise during the course of a proceeding. The Subcommittee is permitted to "conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes" of RSA 162-H. *See* RSA 162-H:10, V. One important purpose of RSA 162-H is to provide "full and timely consideration of environmental consequences" presented by a proposed energy facility or transmission line. *See* RSA 162-H:1. The Applicant notified the Subcommittee that it would ask for conditions that differed from some in the final DES decision. Understanding the DES position on the differing conditions is both appropriate and necessary for a proper review of the Application. If the Legislature meant to limit the ability of the Subcommittee to request information from the state agencies it would have provided an explicit prohibition. The enabling statute does not contain such prohibition and, in fact, explicitly permits such communication.

The Intervenors also complain that the Presiding Officer did not have the statutory authority to request that DES respond to the Subcommittee. They claim that this prerogative sits solely with the Subcommittee as a whole. The Intervenors neglected to discuss RSA 162-H:4, V, which outlines the authority of the Presiding Officer, including the "identification of significant disputed issues for hearing and decision by the Committee." Here the Presiding Officer did nothing more than to identify issues that would come before the Subcommittee in an effort to determine whether they were disputed or not – an action that is well within the purview of the

Presiding Officer.

The Intervenors argument also suggests that they would have further participated if the Subcommittee made the request for information *after* deliberations. In fact, nothing in RSA 162-H: 7-a, I(e) requires further participation by the parties. Section 7-a anticipates a written request from the Subcommittee to the state agency and a response from the state agency within 10 days. Nothing in the statute requires or even contemplates additional participation by the Applicant, Counsel for the Public or any other party to the proceeding. The process undertaken in this docket actually provided all of the parties with *more* process as they were able to use DES' response during cross-examination, in the examination of their own witnesses and in their final written arguments.

The Intervenors claim that the correspondence from DES dated August 31, 2018, alters numerous conditions and its prior recommendation regarding the trial jet plow in a manner that deprives the Committee and Intervenors of important information. However, the Motion does not indicate what conditions or recommendations, other than the trial jet plow, have been altered or how the Committee has been deprived of important information with respect to those conditions.

With respect to the trial jet plow, the Intervenors fail to recognize that DES did not require the jet plow trial run as a condition in any of the permits. In fact, the February 28, 2018 filing by DES simply suggests that the Subcommittee "consider having the Applicant conduct" "a trial jet plow run (without cable) in Little Bay." *See* App. Exh. 166, p. 1. Neither DES' Final Decision of February 28, 2018 (Comm.Ex. 12a) or the August 31, 2018 DES Response to the Subcommittee (Comm. Ex. 12b) requires a jet plow trial run as a condition of an environmental permit or final decision issued by the state agency. Should the Subcommittee require a trial jet

plow run, the conditions of the trial will be determined by the Subcommittee during deliberations. The parties have sufficient opportunity to argue in their final briefs for conditions they believe are appropriate, based on the record.

Counsel for the Public takes a different position. He explains that the Subcommittee may consider the August 31, 2018 response from DES as part of the record, but should not treat it as a final decision under RSA 162-H:7, I (c)[5]. Counsel for the Public recognizes that nothing in RSA 162-H prohibits state agencies from communicating with the Committee before or following submittal of a final decision. In fact, RSA 162-H:7-a contemplates such communication stating, "all communications between the Committee and agencies regarding a pending Committee matter shall be included in the official record and be publicly available." RSA 162-H:16, IV further requires that the Committee consider "all relevant information regarding the potential siting or routes of a proposed energy facility." These sections should not be read in isolation. *Maroun v. Deutsche Bank Nat'l Trust Co.*, 167 N.H. 220, 225 (2014).

We agree that neither the Subcommittee nor the state agency are precluded from communicating with each other following the submittal of a "final decision." Such communication is contemplated by the statute and requires it to be a part of the record. RSA 162-H:7-a. The DES correspondence dated August 31, 2018 (Comm. Ex. 12b) and October 29, 2018 (Comm. Exs. 12c and 12d) are communications from an agency with permitting authority that will remain in the record. As indicated above, admitting this material does not violate the Intervenors' due process rights. All parties had an adequate opportunity to

[5] Counsel for the Public also argues that it was improper for the Applicant and DES to engage in further discussions after the issuance of a "final decision." The Site Evaluation Committee is not in a position to dictate rules to other state agencies about how they communicate with applicants. Similarly, the Subcommittee is not inclined to disregard the counsel and advice of the various state agencies because there may be disagreement about the process under which the applicant engaged with the state agency.

address the DES exhibits through cross-examination of the Applicant's witnesses and witnesses from other parties. All parties had the opportunity to address the DES materials through direct and re-direct examination of their own witnesses and in their final written arguments and briefs.

This leaves Counsel for the Public's argument that the August 31, 2018 and the October 29, 2018 submissions by DES should not be treated as a final decision. The logical extension of this argument is that if the Subcommittee agrees with any terms in the DES submissions and imposes conditions contained therein, the Subcommittee is required to utilize the process of RSA 162-H:7-a, I (e) and send another identical correspondence to DES as was sent on August 10, 2018. While this seems to be unreasonably duplicitous, I reserve judgment because the issue is either not subject to a DES condition or is not yet ripe for review.

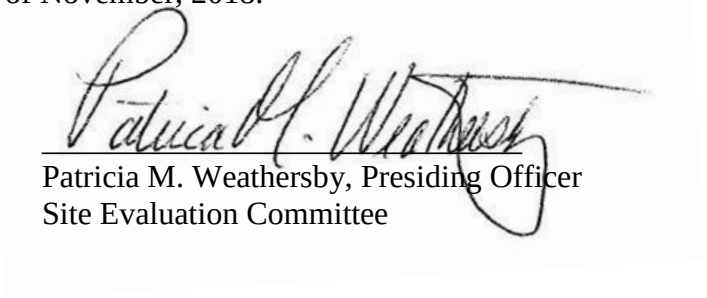
With respect to the jet plow trial run or the additional HDD study, the additional process is not necessary because neither the trial run nor the HDD study were conditions of permits issued by DES. To the extent the Subcommittee adopts other changes between the February 2018 "final decision" and the August 31, 2018 correspondence, the issue is not yet ripe. These determinations have not yet been made by the Subcommittee and should be reserved for consideration of the Subcommittee as a whole. The Subcommittee, as a whole, will determine whether to adopt conditions from the August 31, 2018 correspondence that are different than those in DES' February 2018 final decision. The Subcommittee will also determine whether this requires repeating the process contemplated by RSA 162-H: 7-a, I (e).

The Joint Motion To Strike filed by the Conservation Law Foundation, the Town of Durham, the University of New Hampshire, and the Town of Newington is denied.

Counsel For The Public's Motion To Strike is denied as to striking the October 29, 2018 Revised Final Decision from the record, but it is reserved for the full Subcommittee to determine

whether to adopt different conditions than those contained in the February 2018, final decision and if so, whether it is necessary to again employ the process contained in RSA 162-H:7-a, I (e).

SO ORDERED this twentieth day of November, 2018.



Patricia M. Weathersby, Presiding Officer
Site Evaluation Committee