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VIA E-MAIL

September 13, 2019

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
Eversource's Objection to Motion for Enforcement at 220 Longmarsh Road and Motion to Reopen Record

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket please find Eversource's Objection to Motion for Enforcement at 220 Longmarsh Road and Motion to Reopen Record.

Please contact my office with any questions.

Sincerely,

Adam Smith for

Barry Needleman

BN:slb
Enclosure

Cc: Service 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

EVERSOURCE'S OBJECTION TO MOTION FOR ENFORCEMENT AT 220 LONGMARSH ROAD AND MOTION TO REOPEN RECORD

Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") objects to Donna Heald's ("Ms. Heald") Motion for Enforcement at 220 Longmarsh Road and Motion to Reopen Record (the "Motion"). The Motion is factually inaccurate and legally flawed and should be denied for the following reasons: (1) Eversource has a valid easement to construct the Project and Ms. Heald does not have a joint use agreement; (2) Eversource has gone well beyond any mandated requirements to work in good faith with Ms. Heald to address her concerns; (3) Ms. Heald has consistently ignored or rejected Eversource's efforts to resolve her concerns; (4) despite Ms. Heald's lack of cooperation, Eversource conducted a voluntary survey of Ms. Heald's plant stock; (5) none of the representations Ms. Heald alleges Eversource made are included as conditions to the Certificate of Site and Facility; (6) the doctrines of equitable and judicial are inapplicable; and (7) all of Ms. Heald's claims could and should be brought pursuant to the dispute resolution process.

I. Introduction

The Motion contains numerous inaccuracies. From the outset, the record before the Subcommittee of the Site Evaluation Committee ("SEC") makes clear that Eversource has worked diligently and in good faith to assess and address the concerns raised by Ms. Heald.[1]

[1] *See* App. Ex. 228 (Eversource had approximately 50 separate contacts with Ms. Heald prior to the commencement of the adjudicatory hearings commenced).

Eversource sent Ms. Heald a proposed settlement agreement on August 3, 2018—over a year prior to Ms. Heald's present motion—which sought to resolve all issues. Ms. Heald did not sign, comment on, revise, or return the proposed agreement. Ms. Heald also did not respond to Eversource's request for a meeting to discuss the proposal on August 7, 2018. Ms. Heald remained in the proceeding as an intervener adverse to the Project. When the record closed, Ms. Heald had not responded to Eversource's proposed settlement agreement.

The purpose of Eversource's proposed settlement agreement was obvious: it was intended to formalize the commitments Ms. Heald now alleges Eversource has failed to perform. Nevertheless, despite Ms. Heald's lack of cooperation with Eversource, Eversource has continued—even after the close of the record and the issuance of the Certificate of Site and Facility—to work with Ms. Heald to address her concerns, frequently to no avail.

II. Eversource Has A Valid Easement to Construct the Project Across Ms. Heald's Property and Ms. Heald Does Not Have a Joint Use Agreement With Eversource

Eversource has an easement across Ms. Heald's property.[2] Among other things, the easement grants Eversource rights to:

> enter upon and to construct, reconstruct, extend, repair, replace, maintain, operate, inspect and patrol its lines; and also the perpetual right and easement at any time, and from time to time, and without further payment therefor, to clear by cutting or use of chemicals, and keep cleared said strip of trees, underbrush, buildings and other structures, to pass along said strip to and from the adjoining lands for all of the above purposes, . . . and to pass over the grantor's premises to and from said strip as reasonably required, together with the right to cut large trees adjacent to, but not within said strip.

Ms. Heald acquired and owns her property subject to Eversource's prior existing easement. To the extent Ms. Heald has used the Eversource right-of-way for plantings, that operation has been

[2] *See* Eversource's easement granted to its predecessor New Hampshire Electric Company, by Sydney J. Langley on December 6, 1949, recorded at the Rockingham County Registry of Deeds in Book 577, Page 468.

conducted without the express permission or sanction of Eversource. Ms. Heald does not have a joint use agreement with Eversource authorizing this use. Tr. Day 15 PM at 230.

Eversource has the legal right to "clear by cutting or use of chemicals, and keep cleared said strip of trees, underbrush, buildings and other structures," in the easement in order to construct the Project. Without a joint use agreement, Ms. Heald cannot interfere with Eversource's construction of the Project. Eversource will, however, continue to try to avoid unnecessary damage wherever possible during construction.

III. Eversource Has Worked In Good Faith To Address Ms. Heald's Concerns

For more than five years Eversource has worked to address Ms. Heald's concerns. Eversource offered multiple variations of potential settlement agreements to Ms. Heald before Eversource filed its application for a Certificate of Site and Facility, during the permitting process and adjudicative hearings, and after Eversource received its Certificate of Site and Facility ("Certificate"). Ms. Heald has consistently rejected or ignored Eversource's offers.[3]

a. Eversource's Good Faith Attempts to Address Ms. Heald's Gardening Concerns Prior to and During SEC Hearings

The record before the Subcommittee showed that Eversource had approximately 50 separate contacts with Ms. Heald prior to when the adjudicatory hearings commenced. App. Ex. 228. Those contacts began at the end of 2014 and continued in earnest from 2015 through 2018. *Id*. *See also* Tr. Day 15 PM at 215–16 (Ms. Heald stating that her list of contacts with Eversource was "much more extensive" and that Eversource has conducted multiple site visits with Ms. Heald). During this time, Eversource attempted on many occasions to reach agreement with Ms Heald, to no avail.

[3] Without waiving the argument that all of the settlement offers made by Eversource constitute settlement negotiations that were made solely for the purposes of settlement discussion and should not be before the SEC or its Administrator, *see e.g.* FED. R. EVID. 408, Eversource will respond to Ms. Heald's allegations.

On August 3, 2018, Eversource sent a letter to Donna Heald providing a "Summary of All Mitigation Proposals To-date." App. Ex. 229 (the "Summary Letter"). The Summary Letter outlined Eversource's proposals to avoid, minimize, and mitigate potential adverse effects to Ms. Heald's property, including her gardening business. The Summary Letter addressed topics such as communications, a potential relocation of structure F107-90 of up to 50 feet in either direction, a vegetation planting plan, gardening business accommodations, access to water from her well, wood from tree cutting, and construction of the project.

The Summary Letter specifically stated as follows:

> We would like to discuss the offer to purchase your property, or come to mutual agreement on each of the items outlined in this letter at a meeting on August 7, 2018 at our Portsmouth Area Work Center, at 9 am.

App. Ex. 229. Ms. Heald did not contact Eversource to confirm a meeting date and time, nor did Ms. Heald accept, agree to, sign, or suggest edits on the "Summary of All Mitigation Proposals To-Date".[4] Moreover, the Summary Letter stated that:

> We look forward to meeting with you on August 7, 2018 at 9 am, and working with you to finalize these remaining open items. We hope that the mitigation solutions we have proposed and the commitments that the Company has made within this letter addresses your concerns and that we are able to come to agreement on each of items outlined in this letter during our meeting.

App. Ex. 229 at 3 (emphasis added). The Summary Letter was plainly an offer and did not amount to an agreement or meeting of the minds.

Notwithstanding the fact that Ms. Heald never accepted Eversource's proposal, the Summary Letter also stated that Eversource will agree to comply with certain provisions during construction of the Project. Eversource has done so (or will do so regarding future commitments). As it relates specifically to Ms. Heald's gardening business, Eversource offered

[4] The Summary Letter had a signature block for Ms. Heald to accept Eversource's proposal. App. Ex. 229 at 3. However, Ms. Heald never signed the agreement indicating that Eversource's proposal was satisfactory.

to conduct a plant inventory, develop a relocation plan for Ms. Heald's plant stock, and to relocate the plant stock. However, if such efforts resulted in adverse impacts, the same letter specifically stated that:

> We will make our best effort to mitigate any adverse impacts to your plant stock, but should the construction of the Project Facilities cause irreparable harm to your plant stock, you may file a claim, by working with the Project Outreach Representative. Eversource will work to conduct an evaluation of the extent of damage and causes of damage.

Id. at 2.

Notwithstanding Ms. Heald's failure to accept Eversource's proposal, and as discussed further below in Section III.b., Eversource has voluntarily complied with its offer to conduct a survey of Ms. Heald's plant stock, develop a relocation plan for Ms. Heald's potted plant stock, and has agreed to relocate the existing plant stock that physically can be relocated. To the extent Ms. Heald remains unsatisfied, the SEC anticipated such situations and provided for the dispute resolution process[5] to address them.

b. Eversource's Good Faith Attempts to Address Ms. Heald's Gardening Concerns Post-Receipt of the Certificate

Even after receiving a Certificate for Site and Facility, Eversource has continued to work with Ms. Heald in good faith. On January 28, 2019, three days before the Subcommittee issued its *Decision and Order Granting a Certificate of Site and Facility*, Eversource offered to purchase Ms. Heald's property and her business for an amount that well exceeded the fair market value of her home, property and business. In response to Eversource's reasonable offer, Ms. Heald countered with alternative offers that were ten to twenty times higher than what Eversource offered. Ms. Heald also estimated that Eversource's proposal to move her plant

[5] The Dispute Resolution Process was jointly proposed by Eversource and Counsel for the Public. App. Ex. 193 PP 17–21; App. Ex. 268. The proposals were adopted by the Subcommittee. *Order and Certificate of Site and Facility with Conditions* at 14–15 (Jan. 31, 2019).

stock was estimated at close to nine times the amount that Eversource offered to purchase her home, property, and business.

On June 17, 2019, Eversource conducted another site visit accompanied by plant experts Patricia Laughlin, Manager & Head Gardener at Lorax Landscaping, LLC and Robert Goddard from Shady Hill Nursery. As noted by Ms. Heald's motion, the purpose of the site visit was to "walk the length and width of the easement to assess [Ms. Heald's] gardening business for the purpose of relocating the plants during construction." Motion at ¶ 11 (emphasis added). During the site visit, Ms. Heald specifically acknowledged that Eversource's representative was an acceptable "expert" for the purposes of assessing the plants for relocation.[6] *See* Attachment A to Heald Motion at 3.

During the site walk, it became evident that the plants on Ms. Heald's property did not have value from an ornamental horticulture perspective. *See* Attachment C to Heald Motion, Lorax Landscaping Memo at 1. The vegetation observed by these experts was typical and naturally occurring for transmission rights-of-way. *Id*. The vegetation found on Ms. Heald's property was "very similar" to the easement area across Longmarsh Road that is not maintained by Ms. Heald and that there was no evidence that the plants on Ms. Heald's property were intentionally planted or were being managed (weeded, pruned, watered). *Id*. The experts noted additional facts, such as (1) that if vegetation was intended to be harvested, the plants would have been arranged in rows with adequate labeling; (2) the plants roots were intertwined and cannot be easily transplanted or harvested; (3) Ms. Heald's list of "estimated quantity" of plants

[6] Ms. Heald's Motion argues that Ms. Laughlin is not credible. However, Ms. Heald's own representations specifically counter the arguments in the Motion. Moreover, Ms. Heald has not produced any credible evidence to refute the findings of Ms. Laughlin. To the extent there is a factual disagreement about the value of Ms. Heald's plants, such facts are not properly before the SEC—such arguments should be made before the dispute resolution administrator or before a court of competent jurisdiction.

in the ground is irrelevant because the plants are not containerized or managed for harvest and properly labeled; and (4) Ms. Heald's plant list indicates that there are almost 100,000 plants in containers, but there were only about 100 visible containers on site (if there were as many plants in containers as Heald alleged, the plants would take up approximately ¼ acre). *See id*. at 1–3.

Moreover, several plants in the easement are invasive species that cannot be moved. *Id*.; *see also* N.H. Code. Admin. R. 3802.01. Lastly, the experts specifically noted that the areas impacted from construction will naturally recover. *Id*. at 3.

Based upon the site walk, Eversource's experts concluded that the only viable option of addressing Ms. Heald's concerns is to relocate the potted plans within the right-of-way. Attempting to conduct a complete inventory within the easement and/or relocate any of the other native plants within the right-of-way would be futile due to poor site conditions. *Id*. at 1.

On July 29, 2019, Eversource again attempted to resolve Ms. Heald's concerns. In addition to working with Ms. Heald to avoid, minimize, and mitigate any issues, Eversource offered Ms. Heald $50,000. Such an offer was made in addition to the vegetation planting plan and relocating any potted plants identified within the existing right-of way. *See* Attachment A to Heald Motion at 3.

On August 20, 2019, Eversource again attempted to reach a resolution with Ms. Heald regarding the relocation of her potted plants within the right-of-way. *See* Attachment C to Heald Motion. To the extent Ms. Heald was unsatisfied with Eversource's proposal, Ms. Heald was reminded that she could avail herself of the dispute resolution process. *Id*.

In the most recent attempt to reach agreement with Ms. Heald, Eversource met with Ms. Heald on September 11, 2019. Again, Ms. Heald refused all of Eversource's proposals, and could not offer Eversource a viable location for the potted plants to be moved during

construction. In a further effort to accommodate Ms. Heald's concerns, Eversource will hand cut around Ms. Heald's potted plants to avoid potential disturbance during tree clearing efforts.

c. Eversource's Good Faith Attempts to Address Ms. Heald's Preferred Location of Structure F107-90

Eversource has a valid Certificate to construct the Project as described in the SEC Application, Amendments, and Supplements and as depicted on the Environmental and Engineering Drawings dated July 16, 2018 and July 27, 2018 respectfully. A 50 feet relocation of the pole was offered nearly 3 years ago, in June 2016, when the project was still in the design stage. Ms. Heald did not indicate her final preference on the location of the pole at any time. In addition, at five field meetings (June 2016 (2 meetings), July 2016, September 2016, and July 2017) Eversource marked the edge of tree removal and the pole location. Ms. Heald consistently failed to provide Eversource with feedback on her preferred location throughout the entire negotiation process.

Ms. Heald specifically confirmed that the proposed relocation of 50 feet was "not acceptable" at the SEC hearings. *See* Tr. Day 15 PM at 218 (Ms. Heald stating that Eversource's offer to move structure F107-90 50 feet in either direction is "not acceptable"). Moreover, when questioned by Subcommittee Member Attorney Shulock, Ms. Heald specifically stated that "none of th[e] locations" proposed would be satisfactory to Ms. Heald and that even a 50 foot move northwest would "make[ ] no difference in the distance from [her] house." Tr. Day 15 PM at 231–32. Given this record, Ms. Heald cannot credibly assert that she "accepted" Eversource's offer. *See* Motion at ¶ 3.

Without any feedback from Ms. Heald on her preferred location, the SEC issued a Certificate of Site and Facility to Eversource. Eversource is required, by the terms of the Certificate, to construct the Project as displayed on the Environmental and Engineering

Drawings dated July 16, 2018 and July 27, 2018 respectfully.[7] Since the issuance of the Certificate, a relocation of more than 25 feet would require an amendment to the wetlands permit and SEC Certificate. Specifically, based upon conditions today, a move of more than 25 feet in either direction would increase permanent impacts to wetlands, and therefore, require an amendment to the NH DES wetland permit and SEC Certificate.

As recently as July 29, 2019,[8] Eversource offered to relocate structure #F-107-90 25 feet in whichever direction Ms. Heald preferred, subject to receiving any and all necessary approvals. *See* Attachment A to Heald Motion at 2. Ms. Heald rejected Eversource's offer. *See* Attachment B to Heald Motion at 2. *See also* Attachment 1 hereto (May 3, 2019 Letter) (Ms. Heald "refused to consider proposals made by Eversource to adjust the location of the new pole to be placed on the Heald Property or to allow necessary Eversource work activities within the right-of-way" and due to Ms. Heald's conduct, no resolution could be reached regarding the pole location).

IV. Ms. Heald Has Consistently Rejected, Failed to Accept, or Failed to Respond to all of Eversource's Offers to Enter into a Settlement Agreement

Eversource's offers to enter into settlement agreements do not constitute SEC Certificate Conditions. The law is clear that in order for an offer to be accepted, the offeree must actually communicate acceptance to the offerer. *See e.g., Busher v. New York Life Ins. Co.*, 72 N.H. 551

[7] *See Decision* at 256 ("The Applicant shall construct the Project within five-years of the date of the Certificate and shall file as-built drawings of the Project with the Committee no later than the date of commercial operation of the Project. The Administrator is delegated with the authority to review these drawings and *to confirm their conformity with the proposed Project*.") (emphasis added); *Order*, at 13 ("Further Ordered that that the Administrator is authorized to review as-built drawings of the Project and *confirm their conformity with the proposed Project*") (emphasis added).

[8] Eversource also offered to move the structure #F-107-90 up to 25 feet in whichever direction Ms. Heald preferred on April 15, 2019 and requested a response from Ms. Heald on April 19, 2019 so that Eversource could make the necessary changes, seek approval from the SEC for the minor modification, and update its engineering drawings. Eversource again reiterated that a move of greater than 25 feet would impact wetlands. Ms. Heald refused Eversource's offer and after citing to an exchange between Ms. Heald and SEC member Shulock stated that "moving the structure 50-feet northwest is where the discussion left off." Such a discussion certainly could not have indicated to Eversource that an amendment to the Application was necessary and no such condition was imposed by the Subcommittee. On May 7, 2019, Eversource again offered to relocate the structure 25 feet. This offer was also rejected on May 17, 2019.

(1904) (for a contract to be formed, there must be an offer and an acceptance and in order for the acceptable to be complete, such acceptance "must be actually communicated to the offerer"). As discussed above in Section III, Ms. Heald never accepted any of Eversource's proposals.[9]

It is clear from the SEC record that no agreement was reached between the parties on avoidance, minimization and mitigation efforts even as late as the day Ms. Heald testified on October 26, 2018. In addition, Ms. Heald has not accepted any proposal since the SEC record closed. Based upon Ms. Heald's repeated failure to act, it cannot be argued that Eversource's unaccepted settlement proposals constituted conditions of the Certificate.

V. The Certificate Does Not Contain any Conditions Relative to Ms. Heald's Property

The Motion is titled a "Motion for Enforcement" and suggests that Eversource's offers to enter into settlement negotiations with Ms. Heald are "enforceable conditions." However, the Certificate[10] does not contain any specific condition that is enforceable as it relates to Ms. Heald's property or business.

The SEC only has those powers and duties delegated to it by the Legislature. RSA 162-H:4 states that the SEC shall "Enforce the terms and conditions of any certificate issued under this chapter." Here, there are no terms or conditions contained in the Certificate for the SEC to enforce.

The Motion incorrectly argues that Eversource's settlement offers represent conditions. Ms. Heald did not accept Eversource's proposals and therefore, the SEC could not have relied

[9] *See* Tr. Day 15 PM at 221 (Ms. Heald acknowledging that no agreement has been reached, that Eversource is "looking forward to reaching an agreement" with Ms. Heald and that she is "looking forward to reaching agreement also). *See also* Tr. Day 2 PM at 93 (David Plante testified that Eversource "offered" to conduct a plant inventory).
[10] RSA 162-H:2, II-a defines the "Certificate" as the "document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility." The Certificate issued to Eversource for the Project does not mention Ms. Heald's property or business once.

upon any specific agreement reached between Eversource and Ms. Heald. If the parties had agreed upon a settlement, such evidence would have been introduced in the record. Without the final terms of an agreement between Eversource and Ms. Heald, there is nothing for the SEC to enforce. *See Behrens v. S.P. Const. Co., Inc.*, 153 N.H. 498, 501 (stating that "[t]here must be a meeting of the minds on all essential terms in order to form a valid contract;" that "[a] meeting of the minds is present when the parties assent to the same terms; and that "the terms of a contract must be definite in order to be enforceable"). Without such a meeting of the minds and without definite terms of an agreement between Eversource and Ms. Heald, there can be no agreement and no enforceable Certificate conditions.

The Motion wrongly relies upon *Town of Rye v. Ciborowski*, 111. N.H. 77 (1971) and other related cases for the proposition that representations made before a zoning board in a variance hearing are conditions even when they are not expressly stated in the approval document. First and foremost, since *Ciborowksi* was decided, the New Hampshire legislature has adopted and amended NH RSA 676:3, II, which provides that:

> Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which such vote is taken, including the written decision containing the reasons therefor *and all conditions of approval*, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote.

Id. (emphasis added).[11] RSA 676:3, II specifically requires that *all* conditions of approval be explicitly written included in the decision. To the extent the Motion relies on *Ciborowski* for the proposition that "representations" can be included as "implied" conditions in variance proceedings, such a position is no longer the law of the State; therefore, the argument in the Motion is based upon a flawed premises or analogy and has no basis in the law.

[11] *See* N.H. Senate Bill, S.B. Bill 189 (June 10, 2009) (specifically adding the phrase "and all conditions of approval" to RSA 646:3, II).

In addition, the facts and law in *Ciborowski* are inapposite to the facts and law here. In *Ciborowski*, the Town of Rye sought to restrain a private landowner from expanding the use of a private airplane landing strip beyond that was permitted by special ruling or variance. The private landowner originally petitioned the Rye Zoning Board of Adjustment by letter for permission to "establish a private landing area of approximately 1800 feet in length in front of my home on Lafayette Road." 111. N.H. at 78. Based upon the landowner's application materials, "[f]our abutters, including [an] intervenor, signed separate but almost identical statements prepared by the defendant stating that, with reference to his application for variance 'for a private airport,' they had no objection." *Id*. Subsequently, the private landowner, without express approval from the zoning board, significantly expanded the use of the private landing area. The Town of Rye sought to enjoin the expansion.

Following a hearing, a judicial referee found that "the zoning board granted the variance relying on defendant's representation that 'he would have an 1800 foot runway for (his) own personal use and would not generate any traffic other than that.'" *Id*. at 79. The referee also noted that the assents from other abutters were obtained on similar representations and would not have been obtained otherwise. *Id*. The Supreme Court upheld the referee's findings and found that based upon the "defendant's own testimony and his application for a noncommercial license show that a private use was what he originally intended" and that the "variance approved was for defendant's own personal use." *Id.* at 81. Consequently, the variance for the landing area that was granted by the zoning board was limited to private use. *Id*. at 81–82.

Here, Eversource was issued a Certificate of Site and Facility with explicit conditions pursuant to RSA 162-H: I,(b); RSA 162-H:16, VI. The Project and Ms. Heald's Motion do not deal with the issuance of a variance, which is inherently different from the issuance of a

certificate of site and facility. A variance affords relief from the literal enforcement of a zoning ordinance; therefore, "variances are *strictly construed* to limit relief to the minimum variance that is sufficient to relieve the hardship." *See Anatra v. Zoning Bd. Of Appeals of Town of Madison*, 307 Conn. 728 (2013) (emphasis added). In order to be enforceable, conditions must provide explicit standards. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (stating that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them").

Even in the context of a zoning proceedings, the basic rule is that if conditions are to be imposed, they should be spelled out in the zoning board's decision with enough clarity and detail to inform interested parties of the nature and extent of those conditions. P. Loughlin, N.H. Practice, Land Use Planning and Zoning, Vol. 15 § 24.06 (4th Ed.); 2 Am. Law Zoning § 13:24 (5th Ed.). *See also North Country Envtl. Servs. v. Town of Bethlehem*, 146 N.H. 348, 353–54 (2001) (town was unable to enforce the size restriction on landfill operation in light of the fact that the variance contained no specific limitations on size); *In re Stowe Club Highlands*, 164 Vt. 272, 276 (1995) (holding that in the context of zoning permit requirements conditions that are not stated explicitly in the permit may not be imposed on the permittee); RSA 676:3, II. Here, there are no explicit standards or specific conditions in the SEC Certificate that relate directly to Ms. Heald.

At the SEC hearings, Eversource represented that it had been working in good faith to reach agreement with Ms. Heald on avoidance, minimization, and mitigation efforts. Eversource has continued to work with Ms. Heald to address her concerns, but Ms. Heald has not agreed to any of the proposed measures. Indeed, in direct contrast to *Ciborowski*, Ms. Heald did not assent to the proposed Project and has continued to challenge before the SEC and in an appeal before

the Supreme Court. Also, as discussed above, Eversource has followed through with any unilateral offers made to Ms. Heald, notwithstanding her failure to accept such offers.

Lastly, the *Ciborowski* case dealt with the "scope" of a variance and not the interpretation of conditions attached to the variance. In *Ciborowski*, the defendant sought to *expand* the use and extent of its permitted variance. Here, the scope of the Project is clearly delineated and described in the Application materials; the scope of the Project has not been expanded or altered. Even if the facts in the *Ciborowski* case were similar to the facts here, the Motion does not challenge the "scope" of the Project. If the SEC intended to include additional explicit conditions relevant to Ms. Heald's property or the scope of the Project it certainly could have and should have.[12]

As discussed in Section III–IV, supra, Ms. Heald did not accept any of the proposals offered by Eversource, and as such, they cannot be conditions of the Certificate. Therefore, the Motion should be dismissed.

[12] In addition to failing to account for the adoption of RSA 676:3, II, the Motion also misstates the holdings in *Dahar v. Dept. of Bldgs. for City of Manchester*, 116 N.H. 122 (1976) and *1808 Corp. v. Town of New Ipswich*, 161 N.H. 772 (2011). Both of those cases deal with the scope of variances, and not conditions of a permit. For conditions to be enforceable, they must be explicit or be inferred from the intent of an approval. *Cf. Grayned*, 408 U.S. at 109. Moreover, these cases hold that "the *scope* of a variance is dependent upon the representations of the applicant ***and*** *the intent of the language in the variance at the time it is issued*." *Dahar*, 116 N.H. at 123; *1808 Corp*., 161 N.H. 775. Not only does the Motion fail to address the scope of the Project, the Motion fails to discuss the second part of this test and completely overlooks the fact that neither the Certificate conditions, nor the intent of any conditions contained in the Certificate, require that the Applicant to undertake any actions at the Heald property. Moreover, these cases do not represent the current law are not relevant or persuasive. *See* N.H. Municipal Association, Doctrine of expansion of nonconforming use not applicable to use by special exception (April 26, 2011), *available at* https://www.nhmunicipal.org/court-updates/doctrine-expansion-nonconforming-use-not-applicable-use-special-exception (noting that the decisions by the ZBA and planning board in the *1808 Case* were made prior to the amendment of RSA 676:3, II, which now requires that all conditions of approval be included in the written decision).

VI. The doctrines of equitable and judicial estoppel are not applicable as a matter of law; Ms. Heald's estoppel arguments are premised on a flawed description of the record

The doctrines of equitable and judicial estoppel are not applicable. New Hampshire law establishes a three-part inquiry to determine whether judicial estoppel is appropriate. *See Eby v. State* 166 N.H. 321 (2014) citing *Pike v. Mullikin*, 158 N.H. 267, 270 (2009) (describing the three-part judicial estoppel inquiry as follows: (i) whether the party's later position is clearly inconsistent with the party's earlier position; (ii) whether the earlier position was accepted by the court or arbitrators; and (iii) whether the party seeking to assert a later inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped).

To maintain a claim for equitable estoppel, the party asserting estoppel must prove the following essential elements: (1) a knowingly false representation or concealment of material facts; (2) a recipient who was intentionally, or through culpable neglect, induced to rely upon the false representation or concealment, ignorant of the truth; and (3) a resultant injury. *The Cadle Co. v. Bourgeois*, 149 N.H. 410, 418 (2003).

Here, the record is clear that (1) Eversource's efforts to address Ms. Heald's requests and concerns following the SEC's issuance of the Certificate were entirely consistent with the representations Eversource made during the adjudicatory hearings, *see* Section III, *supra*; (2) Ms. Heald did not accept Eversource's voluntary proposals, *see* Section III–IV, *supra*; (3) the SEC did not impose a condition requiring that Eversource undertake any additional avoidance, minimization, or mitigation efforts on Ms. Heald's property,[13] *see* Section V, *supra*; (4)

[13] The Motion inaccurately cites to the *Decision and Order Granting Application for Certificate of Site and Facility* at 260–61 for the proposition that the Subcommittee relied on Eversource's representations and/or commitments to conduct a plant inventory and relocate plants. However, those pages make clear that Eversource only "proposed" certain mitigation measures. The *Decision and Order* does not state that the Committee's decision was based upon a

Eversource has already conducted a survey and committed to relocate potted plants, *see* Section III, *supra*; (5) Eversource will not derive an unfair advantage, nor will Ms. Heald suffer detriment, if Eversource is not estopped; (6) Ms. Heald cannot show that she "relied" upon Eversource's misrepresentations because she continues to oppose the Project; and (7) Ms. Heald cannot establish any resulting permanent injury.[14]

Eversource has made every effort to accommodate Ms. Heald's requests. The consultant retained by Eversource, and approved by Ms. Heald, concluded that the established plants growing in Eversource's right-of-way do not have value. *See* Attachment C to Heald Motion, Lorax Landscaping Memo. In addition, Eversource offered to relocate Ms. Heald's potted plants, which Eversource will complete prior to commencing construction. Simply stated, Eversource worked diligently and in good faith to act on its voluntary commitments to Ms. Heald. The record shows that Ms. Heald systematically ignored Eversource's offers. Ms. Heald is now unsatisfied with Eversource's herculean efforts and asks the Subcommittee to order Eversource to do more.[15] The Motion fails to establish that the doctrines of judicial or equitable estoppel should be applied in this case.

VII. Ms. Heald Has Not Been Prejudiced by the Construction Timeline

Ms. Heald claims that the construction of the Project will cause imminent damage to her property and that such damage will cause "destruction of evidence." Ms. Heald has known

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hypothetical unaccepted proposal. Indeed, the *Decision and Order* specifically notes that "The Applicant also advised Ms. [Heald] that she may file a claim for damages with the Applicant if the Project causes irreparable harm to her plant stock. App. 229 at 2." *Id*. at 262.

[14] The Motion also erroneously cites to *New Canaan Bank & Trust v. Pfeffer*, 147 N.H. 121, 126 (2001) for the position that Ms. Heald reasonably relied upon Eversource's statements at the hearing. However, Ms. Heald has not established any reasonable reliance on any statement that Eversource made.

[15] Ms. Heald's main argument that Eversource's recent position is inconsistent with prior representations is based upon inaccurate statements made after the close of the record and after the Subcommittee issued a Certificate. *See* Motion at ⁋⁋ 10–15. Assuming, arguendo, that Ms. Heald's statements are accurate (which they are not) it is implausible that the Subcommittee could have relied upon any of the statements raised in the Motion at ⁋⁋ 10–15 because they post-date the close of the record.

about this Project since at least 2014. App. Ex. 228. Ms. Heald was present for, and participated in many days of SEC hearings, and knew all of the details related to Eversource's Project proposal. Why has it taken over five years for Ms. Heald to document the plants within the right-of-way if she was concerned about irreparable harm?

On May 1, 2019—at the beginning of the growing season—Ms. Heald was on notice that construction of the Project in Durham, including tree clearing, would occur sometime during the months of May through October 2019.[16] Why has it taken over six months for Ms. Heald to file this motion? There is no immediacy here and Ms. Heald cannot credibly argue that the Project will destroy evidence. Ms. Heald's failure to undertake efforts to document plants within the right-of-way[17] cannot be blamed upon Eversource and the Project should not be delayed.

VIII. Ms. Heald May Avail Herself of the Dispute Resolution Process or Seek Alternative Relief in a Court of Competent Jurisdiction

Ms. Heald has not demonstrated that construction of the Project will cause irreparable harm to her property. To the extent her property is adversely and permanently impacted during construction, Ms. Heald may avail herself of the dispute resolution process or seek alternative relief in court. If a dispute remains between Ms. Heald and Eversource about the value of Ms. Heald's plant stock, an independent third party dispute resolution administration will surely be able to assess the positions of both sides and reach a fair conclusion as to the extent of potential impacts. Moreover, Ms. Heald's arguments are not yet ripe; there has been no irreparable damage to her plant stock. If there is such damage, Ms. Heald should bring her claims into the dispute resolution process or seek a claim in a New Hampshire Court.

[16] In addition, on June 5, 2019, Ms. Heald, through her attorney, was specifically informed that "The official start of tree clearing of the corridor is June 17, and subject to final approval by the US Army Corps of Engineers, crews are expected to be on Ms. Heald's property mid-late July."

[17] It appears that Ms. Heald has, in fact, conducted such an assessment. Attachments H – X to the Motion are photos and descriptions of various plants, weeds, native flowers, ferns, etc. that make up Ms. Heald's alleged gardening business.

IX. No Violation of the Certificate or a Condition Therein Has Occurred

As discussed above, Eversource has not committed any violation of its certificate nor has it made a material misrepresentation in its application pursuant to Site 302. Since Ms. Heald has not demonstrated that a specific condition of the Certificate has been violated, nor has she identified a specific misrepresentation made in the application or in supplemental or additional statements of facts or studies, *see* Site 302.02(a), the Motion should be denied.

X. The SEC Does Not Have Authority to Reopen the Record to Consider New Information

Once a Certificate of Site and Facility is issued to an applicant, the Certificate is final and subject only to judicial review. RSA 162-H:16, VI. Here, Ms. Heald, along with other interveners, already filed for a Motion to Rehearing, which was denied, and has since sought an appeal before the New Hampshire Supreme Court. Because a final valid Certificate exists, the SEC does not have statutory authority to re-open the record to receive new information.

XI. Conclusion

Based upon the foregoing, Eversource has followed through on its voluntary offer to conduct assess Ms. Heald's plant stock. The fact that Ms. Heald is now unhappy with the results is no basis to find that Eversource did not follow through on its voluntary commitment.

In addition, the Motion does not raise any basis, in law or fact, for the SEC to reopen the record. Reopening the record is both unnecessary and unduly prejudicial to Eversource.

WHEREFORE, Eversource respectfully asks that the SEC or the SEC Administrator:

a. Deny Ms. Heald's Request for so-called "enforcement";

b. Deny Ms. Heald's Request to Reopen the Record;

c. Deny Ms. Heald's Request to assess any costs against Eversource in this proceeding or order Eversource to pay Ms. Heald's attorney's fees;

d. Deny Ms. Heald's request for a waiver and/or request to delay the start of construction on Ms. Heald's property; and

e. 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: September 13, 2019 By: Adam Dumville

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Certificate of Service

I hereby certify that on this 13th day of September 2019, an electric copy of this Combined Objection was electronically sent to the New Hampshire Site Evaluation Committee and served upon the SEC Distribution List.

Adam Dumville For

Barry Needleman

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May 3, 2019

Marcia A. Brown, Esquire
P.O. Box 1623
Concord, NH 03302-1623

Re: Donna Heald Property, 220 Longmarsh Road, Durham, NH (the "Heald Property")

Dear Attorney Brown:

As you may know, on April 26, 2019, representatives of Eversource met with your client, Donna Heald, at her property, to review Eversource's plans for the construction of the Seacoast Reliability Project ("SRP") new 115 kV transmission line in Eversource's power line right-of-way corridor on the Heald Property. SRP was granted a Certificate of Site and Facility to construct and maintain the SRP line by the New Hampshire Site Evaluation Committee ("SEC") in its unanimous written Order and Decision dated January 31, 2019. Rehearing of that Order and Decision was unanimously denied by the SEC in its written Order on Motions for Rehearing dated April 11, 2019. On April 19, 2019, Eversource filed with the SEC its notice of intent to commence construction on portions of SRP on May 6, 2019, and that construction will include the Heald Property.

At the meeting held at the Heald Property on April 26, 2019 and at Eversource's Community Meeting on May 1, 2019, I understand your client was extremely confrontational. She refused to consider proposals made by Eversource to adjust the location of the new pole to be placed on the Heald Property or to allow necessary Eversource work activities within the right-of-way. As you may recall, this site visit was prompted by Ms. Heald to assist with clarifying access, environmental delineation, reviewing the pole location, and right of way boundary surveying. As a result, no resolution could be reached with your client regarding the pole location. We would like to commence construction with a plan that is acceptable to your client. It would be beneficial to both parties if we could resolve Ms. Heald's concerns and avoid these types of escalated situations as we move into construction. If we can't bring these issues to resolution immediately, we'll have to make arrangements for how to proceed with construction in a safe manner for our crews and Ms. Heald.

We are requesting a prompt face-to-face meeting with you and your client to attempt to review our construction plans and resolve your client's legitimate concerns. To enhance the potential for an amicable resolution, we ask that you remind your client in advance of our meeting that Eversource owns property rights on the Heald Property, as established by our easement granted to its predecessor New Hampshire Electric Company, by Sydney J. Langley on December 6,

1949, recorded at the Rockingham County Registry of Deeds in Book 577, Page 468. Among other things, the easement grants Eversource rights to "enter upon and to construct, reconstruct, extend, repair, replace, maintain, operate, inspect and patrol its lines; and also the perpetual right and easement at any time, and from time to time, and without further payment therefor, to clear by cutting or use of chemicals, and keep cleared said strip of trees, underbrush, buildings and other structures, to pass along said strip to and from the adjoining lands for all of the above purposes, … and to pass over the grantor's premises to and from said strip as reasonably required, together with the right to cut large trees adjacent to, but not within said strip;" Your client acquired and owns the Heald Property subject to Eversource's prior existing easement rights, and has no lawful right to interfere with or obstruct Eversource's exercise of those rights. Again, it is our preference to work through Ms. Heald's concerns that have been outstanding for quite some time by talking through the proposed mitigations that were provided to Ms. Heald on several occasions and remain unresolved.

As you know, Eversource has made multiple proposals since June 2016 to mitigate impact to plants, property, etc. but nothing has been acceptable to Ms. Heald. Furthermore, please also remind your client that, to the extent she has used the Eversource right-of-way to plant and maintain her nursery stock, that operation has been conducted without the express permission or sanction of Eversource. Therefore, your client's plantings within the right-of-way are at her sole risk. While we would certainly hope to avoid unnecessary damage wherever possible, Eversource cannot assure that the plantings will be unharmed and has proposed many mitigation measures to avoid and/or minimize impact.

Our goal is to move forward without further controversy or disruption. We look forward to meeting with you and your client as soon as possible to resolve this matter. Please call me at your earliest convenience.

Sincerely,

Adam M. Dumville

AMD:slb