

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2015-06**

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New  
Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility

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Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby submits this post-hearing brief pursuant to the September 12, 2017 Procedural Order and the December 19, 2017 Order on Counsel for the Public’s Motion to Amend Schedule.

**I. INTRODUCTION.**

On October 19, 2015, Northern Pass Transmission, LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource,” together with NPT, the “Applicants”), submitted a Joint Application for a Certificate of Site and Facility (the “Application”) to the New Hampshire Site Evaluation Committee (the “Subcommittee” or “SEC”) to construct a 192-mile transmission line to run through New Hampshire from the Canadian border in Pittsburg to Deerfield (the “Project”).

Pursuant to RSA 162-H:9, I, Counsel for the Public “shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.” Counsel for the Public’s role in this proceeding, consistent with its statutory authority, has been to investigate the Project and the information contained in the Application, pre-filed testimony and other evidence presented by the Applicants and intervenors in order to develop a full record and a complete understanding of the benefits and impacts of the Project for the Subcommittee’s review. Pursuant to the authority granted in RSA 162-H:10, V, Counsel for the Public retained expert consultants to “conduct such reasonable studies and investigations as [he] deem[ed] necessary or appropriate to carry out the purposes of this chapter ...,” and presented the findings of the expert witnesses to the Subcommittee through pre-filed and live testimony.

In this post-hearing brief, Counsel for the Public summarizes the key evidence presented in pre-field testimony and during the 70-day evidentiary hearings, and provides analysis of the legal issues the Subcommittee must decide in determining whether to issue a certificate of site and facility to the Applicants. The brief is organized to follow the statutory findings required under RSA 162-H:16, IV and the specific considerations set forth in the SEC rules. Section II sets forth the applicable standard of review and burdens of proof. Section III addresses each of the required substantive findings for issuance of a certificate and presents the evidence relevant to each issue. In Section IV, Counsel for the Public provides analysis of additional legal issues necessary to a decision being rendered by the Subcommittee.

## **II. THE STANDARD OF REVIEW FOR ISSUANCE OF A CERTIFICATE OF SITE AND FACILITY AND APPLICABLE BURDEN OF PROOF.**

The siting of energy facilities and the Subcommittee's review of the Applicants' request for a certificate of site and facility is governed by RSA Ch. 162-H. Through the statute the General Court has explicitly recognized that "the selection of sites for energy facilities may have significant impacts on and benefits to" (1) the welfare of the population, (2) private property, (3) the location and growth of industry, (4) the overall economic growth of the state, (5) the environment of the state, (6) historic sites, (7) aesthetics, (8) air and water quality, (9) the use of natural resources, and (10) public health and safety. RSA 162-H:1. In express recognition of the potential impacts on and benefits to those concerns, the General Court found that it is in the public interest 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;
- avoid undue delay in the construction of new energy facilities;
- provide full and timely consideration of environmental consequences;
- require all entities planning to construct facilities in the state to provide full and complete disclosure to the public of such plans; and
- ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

RSA 162-H:1. Accordingly, the Subcommittee's review of the Application occurs within the context of, and is guided by, the public interest findings and the statutory purpose set forth above.

RSA 162-H:16 establishes the findings that must be made for the Subcommittee to issue a certificate. RSA 162-H:16, IV specifically requires that "[a]fter due consideration of all

relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.” This general standard ties back to the statement of purpose and the enumerated areas of potential impacts and benefits set forth in RSA 162-H:1, requiring a consideration of those issues before a siting decision can be made.

In addition to the overarching general standard for issuance of the certificate, RSA 162-H:16, IV further sets forth four specific findings that the Subcommittee is required to make,<sup>1</sup> “[i]n order to issue a certificate.” Those four specific findings are:

- (1). That the applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
- (2). That the site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
- (3). That the site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
- (4). That issuance of a certificate will serve the public interest.

RSA 162-H:16, IV. Each of these four specific requirements has numerous subparts to them, with additional specific requirements that must be met and which will be discussed in further detail below. *See infra* Part III.

In addition to the statutory requirements, the Subcommittee’s review is governed and guided by the SEC’s administrative rules adopted pursuant to RSA 162-H:10, VI. The SEC rules

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<sup>1</sup> See RSA 162-H:16, IV (“In order to issue a certificate, the committee **shall** find that”); *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008).

provide additional detail to the statutory requirements and dictate what materials must be submitted with an application as well as what information and issues the Subcommittee must consider in making each of the required findings under RSA 162-H:16, IV. Following comprehensive amendments to RSA Ch. 162-H by the General Court in 2014, a significant revision to the Site rules was completed in December 2015. Only two energy facilities have been reviewed by the SEC under the amended rules—the Antrim Wind facility and the Merrimack Valley Reliability Project. Accordingly, many provisions of the amended rules have not been fully interpreted by a subcommittee of the SEC.

With respect to all of the requirements and findings that must be met under the statute or the Site rules, the burden is on the Applicants to make the necessary showings for a certificate to issue. *See* Site 202.19(b) (“An 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.”); *see also* Site 202.19(a) (“The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.”).

**A. PREVIOUS DECISIONS BY THE SEC ARE NOT BINDING.**

Although the decisions in the *Antrim Wind* case<sup>2</sup> and the *Merrimack Valley Reliability Project* case<sup>3</sup> were the first SEC decisions to apply the newly-adopted rules, pursuant to RSA

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<sup>2</sup> *Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No. 2015-02.

<sup>3</sup> *Re: Joint Application of New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility*, Docket No. 2015-05, October 4, 2016 Decision and Order Granting Application for Certificate of Site and Facility (“MVRP Order”).



162-H:10, III, prior SEC decisions are not binding on subsequent SEC decisions.<sup>4</sup> Indeed, each Subcommittee is comprised of different members considering the unique facts and circumstances of the proceeding before it – an inherently fact specific determination that does not lend itself to precedential effect. Even in the more constrained context of administrative agency law, while “a court may require that an agency acknowledge and explain its departure from precedent ... an agency will be permitted to ‘refuse to follow its earlier decision so long as its action is not palpably arbitrary or unreasonable, and does not obviously discriminate against a litigant.’”<sup>5</sup> In the federal context, the First Circuit Court of Appeals has explained that “[t]he agency’s actions are presumed to be valid,” and so the Secretary’s decision to depart from prior precedent need only be ‘supported by a rational basis.’”<sup>6</sup> That “rational basis” is met where the agency simply explains why the prior decision is distinguishable.<sup>7</sup>

Here there are numerous reasons to distinguish the SEC’s decision in *Antrim Wind* from the present matter. The Project in this case is vastly different from the wind project proposed in the *Antrim Wind* matter. The wind project consisted of nine (9) wind turbines covering 11.3

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<sup>4</sup> RSA 162-H:10, III (“The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.” See also *Re: Gas Service, Inc.*, 70 NH PUC 339 (1985) (“The Commission is not bound to prior decisions if provided with persuasive arguments and actual results which demonstrate that benefits can be gained by not reaffirming said decisions.”); *Re: Manchester Gas Company*, 70 NH PUC 334 (1985) (same).

<sup>5</sup> *Re: Application of Stare Decisis by Administrative Agency*, Opinion No. 84-172-I (N.H.A.G. 1984), available at 1984 WL 248883 (quoting 2 F.E. Cooper, *State Administrative Law*, 532 (1st ed. 1965)).

<sup>6</sup> *Int’l Jr. College of Bus. And Tech., Inc. v. Duncan*, 802 F.3d 99, 113 (1st Cir. 2015) (quoting *P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.*, 665 F.3d 309, 319 (1st Cir. 2011) and *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 117 (1st Cir. 2009)).

<sup>7</sup> *Int’l Jr. College of Bus. And Tech., Inc.*, 802 F.3d at 113 (“Even if we assume, however, that the Secretary owed International an explanation, International’s claim would still fail because the Secretary more than adequately explained why International’s case was distinguishable from Gibson’s.”).

acres and located in a mostly rural area.<sup>8</sup> On the other hand, the Project, a high-voltage transmission line with hundreds of towers that will mostly exceed 100 feet and the surrounding tree canopy, covers 192 miles of the State of New Hampshire, including wilderness, rural, suburban and urban areas. It also involves the rebuilding of an existing high-voltage transmission line with significantly larger towers.

Similarly, the SEC's decision in the *Merrimack Valley Reliability Project* ("MVRP") is also readily distinguishable from the current matter. While *MVRP* reviewed a high-voltage transmission line, the size, scale, and location of the proposed line were significantly different from the NPT Project. The MVRP was an approximately 18-mile long overhead transmission line sited entirely within an existing utility right-of-way ("ROW") and of a similar type as existing transmission lines in the ROW.<sup>9</sup> In addition, the MVRP was a reliability project selected by ISO-NE to meet grid reliability needs.<sup>10</sup> Only a single intervenor participated in the proceedings,<sup>11</sup> and none of the host municipalities appeared or objected to the project.<sup>12</sup> By contrast, the current Project is not a reliability project, over 100 intervenors have participated in the proceedings, and 22 of the 31 host municipalities have appeared and objected to the Project.

While the Subcommittee may consider, as appropriate, the findings and rulings in the *Antrim Wind* and *MVRP* decisions, these two prior projects are very different from the present Project and the Subcommittee in this docket should not be restricted to the decisions that the *Antrim Wind* or *MVRP* subcommittees made in the context of those projects.

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<sup>8</sup> *Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No. 2015-02, March 17, 2017, Order ("*Antrim Wind* Order") at 16.

<sup>9</sup> *MVRP* Order at 7.

<sup>10</sup> *MVRP* Order at 17, 18.

<sup>11</sup> *MVRP* Order at 5.

<sup>12</sup> *MVRP* Order at 58.

**B.     THE SUBCOMMITTEE’S REVIEW MUST CONSIDER AND WEIGH  
PUBLIC COMMENTS AND REPORTS SUBMITTED TO THE SEC.**

Pursuant to RSA 162-H:10, III, the Subcommittee “shall consider and weigh all evidence presented at public hearings and shall consider and weigh written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding.” In this case the quantity of public input is unprecedented. The Subcommittee must take the public comments into consideration as it reviews each of the specific required findings for issuance of a certificate. Counsel for the Public will discuss public comments in the section addressing the public interest finding.

### **III. SPECIFIC FINDINGS.**

#### **A. FINANCIAL, TECHNICAL AND MANAGERIAL CAPABILITY.**

“[I]n order to issue a certificate, the committee [must] find that ... [t]he applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.” RSA 162-H:16-IV(a). Site 301.04 lists a variety of documents and information that bear on this finding, each of which must be provided by Applicants as part of the Applicants’ application. Counsel for the Public has reviewed those submissions, as well as the relevant testimony and other records provided during the course of these proceedings. Counsel for the Public believes that there is sufficient evidence for the Subcommittee to find that Applicants have met their burden of demonstrating that they have “adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.” RSA 162-H:16, IV(a).

Although Applicants provided evidence of their ability to manage large, complex construction projects, including evidence that Applicants have contracted with experienced contractors and engineering consultants, there was evidence that Applicants have failed to implement or follow Best Management Practices in prior construction or maintenance work.<sup>13</sup> Indeed, when shown photographs depicting the results of such failures at several locations, Mr. Bowes acknowledged that the work and the condition in which the area was left in was unacceptable.<sup>14</sup> If the Subcommittee issues a certificate to Applicants, the Subcommittee should include conditions to ensure the implementation of appropriate Best Management Practices and

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<sup>13</sup> Tr. Day 65, PM at 189-193 (Berglund); Tr. Day 66, PM at 16-19 (Cote and Berglund).

<sup>14</sup> Tr. Day 11, PM at 117-120 (Bowes).

sufficient independent monitoring with strong enforcement powers to ensure compliance and to deter noncompliance.

### **[PART III-B]**

#### **B. EFFECTS ON THE ORDERLY DEVELOPMENT OF THE REGION.**

The Subcommittee must consider conflicting evidence and uncertainty to determine whether the Project unduly interferes with the orderly development of the different regions the Project would pass through. Mr. Varney's view on land use differed greatly from each municipal planner and planning board members, as did the level of their analysis. London Economics International LLC ("LEI") and The Brattle Group ("Brattle") were not significantly different on the potential energy market benefits under the most optimistic scenario, but that scenario has many uncertainties and is not the most likely scenario. The market benefits would be much less or very small under the other possible scenarios. Applicants and Counsel for the Public's experts agreed that construction of the Project would increase New Hampshire's Gross State Product ("GSP") and provide jobs during construction and for some period of operation, but they disagreed on the size of increased GSP and jobs. Applicants' experts opined that the Project would not impact property values or tourism, while Counsel for the Public's experts as well as several other witnesses testified that property values and tourism would be negatively impacted by the Project. Although there is not sufficient evidence to fully assess the impacts during the two to three years of construction because several unknowns remain, Applicants did not directly analyze these potential impacts, whereas Counsel for the Public and others testified that construction activity itself will cause traffic delays, which will adversely impact residences, town services, tourist visitors and will adversely impact local and regional events and local infrastructure. All host municipal bodies, except the City of Franklin, that testified indicated that the Project would unduly interfere with the orderly development of their respective towns or regions.

## **1. Statutory and Regulatory Requirements.**

“[I]n order to issue a certificate, the committee [must] find that ... [t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of (1) municipal and regional planning commissions and (2) municipal governing bodies.” RSA 162-H:16-IV(b).

To enable that determination to be made, Site 301.09 required Applicants to include in their Application “information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in zoning, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places, and the applicant’s estimate of the effects of the construction and operation of the facility on:

- (a) Land use in the region, including the following:
  - (1) A description of the prevailing land uses in the affected communities; and
  - (2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;
- (b) The economy of the region, including an assessment of:
  - (1) The economic effect of the facility on the affected communities;
  - (2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;
  - (3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;
  - (4) The effect of the proposed facility on real estate values in the affected communities;
  - (5) The effect of the proposed facility on tourism and recreation; and
  - (6) The effect of the proposed facility on community services and infrastructure;
- (c) Employment in the region, including an assessment of:
  - (1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the

- proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and
- (2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

Site 301.09. The Subcommittee is required to assess that information “[i]n determining whether a proposed energy facility will unduly interfere with the orderly development of the region.”

Specifically, the Subcommittee is tasked with considering:

- (a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;
- (b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and
- (c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

Site 301.15. These issues are discussed in further detail below in the same order they are set forth in Site 301.15.

**2. The Extent to Which the Siting, Construction, and Operation of the Proposed Facility Will Affect Land Use, Employment, and the Economy of the Region.**

To determine whether a proposed energy facility will unduly interfere with the orderly development of the region, the Subcommittee must consider numerous subparts in line with the application requirements of Site 301.09.

**a. Applicants’ Evidence of Effects to Land Use.**

The Applicants provided testimony from Robert Varney of Normandeau Associates to address whether the Project will interfere with orderly development of the regions through which



the Project passes.<sup>15</sup> Mr. Varney offered expert opinion testimony only on one subpart of orderly development – land use planning. Mr. Varney relied on other experts for the Applicants to analyze the other subparts: (1) the economic effect on affected communities, (2) in-state economics, (3) state and local taxes, (4) real estate values, (5) tourism and recreation, and (6) impacts to jobs.<sup>16</sup> He did not perform a separate analysis or provide an expert opinion on those subjects but instead accepted the conclusions from other experts.<sup>17</sup> Mr. Varney is not himself qualified to offer opinions on these issues. Counsel for the Public will first review Mr. Varney’s testimony and then discuss each of the separate subparts.

**b. The Testimony and Opinion of Robert Varney.**

Mr. Varney limited his review to analyzing prevailing land uses along the ROW for the overhead portion of the Project, whether the Project is consistent with those uses, and the views of municipal and regional planning commissions and municipal governing bodies that were expressed in writing.<sup>18</sup> Mr. Varney opined that there would be no undue interference with the orderly development of the region.<sup>19</sup> He reached this conclusion because most of the Project would be built in an existing electric transmission line corridor and thus there will be no change in the existing land use.<sup>20</sup> He also reached this conclusion because the master plans and zoning

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<sup>15</sup> App. Ex. 20, Pre-filed Testimony of Robert Varney (“Varney Testimony”); App. Ex. 1, Appendix 41, *Review of Land Use and Local, Regional and State Planning*, Normandeau Associates (“Land Use Report”).

<sup>16</sup> Tr. Day 35, PM at 20-21, 76 (Varney).

<sup>17</sup> Tr. Day 35, PM at 19-21 (Varney).

<sup>18</sup> Tr. Day 35, PM at 23-26 (Varney).

<sup>19</sup> App. Ex. 20, App. Ex. 20, Varney Testimony at 7 (APP00546).

<sup>20</sup> Tr. Day 35, PM at 42 (Varney) (“Now, as I understand it, the rationale for your opinion is that citing the Northern Pass Transmission line in an existing right-of-way reinforces existing development patterns, correct? A. Yes. Land use patterns. Yes.”); Tr. Day 41, AM at 51-52 (Varney) (“And so that’s essentially, the nub of your view about local land use is because it won’t change the existing use, it won’t have an adverse impact on local land use, correct? A: That’s Correct.”).

ordinances of host municipalities did not specifically prohibit the location of a transmission line. Where there is a new corridor Mr. Varney found there would be no undue interference with orderly development in that region because it is located in working forestland.<sup>21</sup> He reached this same conclusion with respect to the underground construction because it will be located in existing transportation corridors.<sup>22</sup> Mr. Varney acknowledged that his assessment was limited. He only looked at the Project “as a whole.”<sup>23</sup> He did not look at any specific location in relation to the Project.<sup>24</sup> Nor did he reach any opinions about specific municipalities<sup>25</sup> or any specific location.<sup>26</sup>

The focus of Mr. Varney’s analysis was his review of master plans and zoning ordinances, but his review of them was limited to references to transmission lines.<sup>27</sup> In researching these documents, he did not meet with any planning boards, zoning boards, selectmen or municipal economic development directors or committees to discuss their views.<sup>28</sup> Mr. Varney did meet with regional planning commissioners and some professional municipal planners to ensure that he had the most recent versions of planning documents, but he never asked for their opinion as to the Project’s impact on orderly development of the region.<sup>29</sup> At the

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<sup>21</sup> Tr. Day 35, PM at 55-56 (Varney).

<sup>22</sup> Tr. Day 35, PM at 48 (Varney).

<sup>23</sup> Tr. Day 36, AM at 5 (Varney).

<sup>24</sup> Tr. Day 35, PM at 8 (Varney) (“You didn’t take a specific location, a business, a farm, or a specific location and analyze any impact to that specific location, correct? A. No separate reports on specific locations.”).

<sup>25</sup> Tr. Day 36, AM at 5 (Varney).

<sup>26</sup> Tr. Day 35, PM at 8 (Varney).

<sup>27</sup> Tr. Day 38, AM at 46, 51 (Varney).

<sup>28</sup> Tr. Day 35, PM at 26-27, 29 (Varney); Tr. Day 37, PM at 127 (Varney).

<sup>29</sup> Tr. Day 35, PM at 36 (Varney); Tr. Day 37, PM at 34 (Varney).

time that Mr. Varney met with them, he had already reached a preliminary conclusion that the Project would not unduly interfere with orderly development.<sup>30</sup>

Mr. Varney also did not request that the municipalities or regional planning commissions provide any “writings” for him to consider in his review.<sup>31</sup> Because of this, Mr. Varney failed to address documents that expressed the views of municipalities and planning commissions on land uses in and around the Project corridor.<sup>32</sup> He also rejected municipal documents such as warrant articles because he did not consider them to be “definitive” statements about their views since the Project design was still being changed.<sup>33</sup> Additionally, Mr. Varney’s analysis did not evaluate uses at important resources such as Big Dummer and Little Dummer Ponds.<sup>34</sup>

Mr. Varney did not study impacts of construction generally<sup>35</sup> or impacts from traffic delays specifically.<sup>36</sup> Mr. Varney did not consider the impacts of laydown areas for which locations have not been determined.<sup>37</sup> In addition, he did not fully understand the design of the few laydown areas that were located.<sup>38</sup> Mr. Varney did not look at or study each of the 31 host towns to determine if any of them would be adversely impacted by construction, and only

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<sup>30</sup> Tr. Day 35, PM at 34 (Varney).

<sup>31</sup> Tr. Day 36, AM at 100 (Varney).

<sup>32</sup> Tr. Day 36, AM at 103-104 (Varney); Tr. Day 37, AM at 67-68 (Varney).

<sup>33</sup> Tr. Day 37, AM at 51, 68-69 (Varney) (“I want to go back to my question though that you deemed these warrant articles which were passed by a majority of town residents to be not a definitive action; isn't that true? A. Yes, and what I meant by that is that the Project was still under development.”).

<sup>34</sup> Tr. Day 36, AM at 59-60 (Varney).

<sup>35</sup> Tr. Day 35, PM at 10; Tr. Day 40, AM at 80-81 (Varney).

<sup>36</sup> Tr. Day 35, PM at 63-63 (Varney); Tr. Day 38, PM at 23 (Varney). Also, Applicants’ traffic engineer, Mr. (Farrington) Frazier, testified that she did no analysis of traffic delays. Tr. Day 6, AM at 150-151 (Farrington).

<sup>37</sup> Tr. Day 37, AM at 56 (Varney).

<sup>38</sup> Tr. Day 37, AM at 56 (Varney).

considered that construction would be short-term.<sup>39</sup> Mr. Varney considered three years to be short-term.<sup>40</sup> He did not review or consider plans for the location of underground facilities or construction activities for any portion of the Project such as micro tunneling in Franconia or HDD drilling in Plymouth.<sup>41</sup> Mr. Varney did not analyze any specific scenic area identified in any of the master plans to determine if the Project would adversely affect that scenic resource.<sup>42</sup> He did not look at or consider the impact from construction on businesses along the route or in downtown Bethlehem, Franconia, Woodstock or Plymouth.<sup>43</sup>

Mr. Varney also did not evaluate or consider the aesthetic impact of the Project on land uses<sup>44</sup> or environmental impacts on those land uses.<sup>45</sup> He did not know the extent of vegetative clearing along the underground route.<sup>46</sup> Mr. Varney did not consider any of these impacts on the orderly development of the regions surrounding the Project's proposed route.

Even though it was one of the three areas Mr. Varney considered, he performed no study or evaluation of the Project's construction impacts to any community services or infrastructure.<sup>47</sup>

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<sup>39</sup> Tr. Day 35, PM at 59 (Varney) ("Just that I considered construction and that there would be some short-term construction-related impacts, and that there would not be an adverse effect long-term.").

<sup>40</sup> Tr. Day 35, PM at 73 (Varney).

<sup>41</sup> Tr. Day 35, PM at 65-66 (Varney).

<sup>42</sup> Tr. Day 35, PM at 54 (Varney).

<sup>43</sup> Tr. Day 35, PM at 69-71 (Varney) ("Do you know what the traffic situation, in other words, do you know whether lanes will be closed in the intersection? A. No. Q. Have you considered or looked at the impact of the businesses in Franconia from the construction activity at that intersection? A. I didn't analyze that intersection specifically.").

<sup>44</sup> Tr. Day 37, AM at 88 (Varney); Tr. Day 37, PM at 20 (Varney).

<sup>45</sup> Tr. Day 37, PM at 40 (Varney).

<sup>46</sup> Tr. Day 35, PM at 75 (Varney).

<sup>47</sup> Tr. Day 35, PM at 73-74 (Varney) ("But sitting here today, you don't render any expert opinion on how the underground construction will impact any existing town infrastructure, correct? A: Correct."); Tr. Day 37, AM at 61 (Varney).

His justification for not doing this analysis was that it was “so obvious” there would not be an impact to services or infrastructure.<sup>48</sup>

Mr. Varney’s evaluation did not assess a number of relevant factors that should have been considered. Mr. Varney did not consider impacts to second homeowners and vacation properties.<sup>49</sup> He only looked at abutting land uses and not the areas and regions that were still impacted but not abutting the Project.<sup>50</sup>

In light of the above noted deficiencies, Mr. Varney’s overall conclusion that the Project will not unduly interfere with orderly development of the region is so narrowly tailored as to be of limited value in informing the Subcommittee’s decision. Moreover, large aspects of Mr. Varney’s ultimate opinion are merely a recapitulation of other expert opinions offered by the Applicants’ consultants, which are addressed elsewhere in this brief. As discussed below, municipal and regional planning commissions and municipal governing bodies almost universally testified that the Project would unduly interfere with orderly development of their respective regions.

**c. The Effects of the Project on the Economy of the Region.**

The Project may lower electric rates over several years, but there are a number of uncertainties. The Project’s impact on New Hampshire’s GSP, jobs and non-economic benefits, as well as impacts on property values, tourism and taxes will be reviewed below.

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<sup>48</sup> Tr. Day 37, AM at 61 (Varney).

<sup>49</sup> Tr. Day 36, AM at 34 (Varney) (“You don’t address the land uses of second homes and vacation properties in your report, do you? A. No.”).

<sup>50</sup> Tr. Day 36, AM at 79 (Varney).

**(1) The Economic Effect of the Project on Energy Markets.**

Of the economic benefits of the Project claimed by the Applicants' expert, Julia Frayer of LEI, the largest potential benefit from operation of the Project would be reductions in regional wholesale electricity market prices, which include both energy and capacity components.<sup>51</sup> By far the largest portion of these alleged wholesale market price reductions is based on impact to the regional capacity market operated by ISO New England ("ISO-NE").<sup>52</sup> Potential savings in the energy market are expected, but they are relatively small.<sup>53</sup> While there is agreement that the energy market benefits are likely to be realized, the much larger claimed capacity market benefits are more uncertain.<sup>54</sup>

**(a) Capacity Market Benefits are Uncertain.**

In order for the Project to deliver the capacity market benefits claimed by LEI, the Project must successfully qualify to bid its full 1,090 MW of capacity into ISO-NE's Forward Capacity Market ("FCM") and bid in its capacity below the FCM clearing price. Both outcomes include significant uncertainties. First, in order to qualify in the FCM, Hydro Quebec ("HQ") must demonstrate to ISO-NE that it would have sufficient excess capacity during winter peak periods available to sell into the FCM.<sup>55</sup> In its rebuttal report dated April 17, 2017 (App. Ex. 102), LEI estimated HQ's excess capacity available for export to be 1,527 MW (*see* Figure 18). However, as Jurgen Weiss of Brattle testified, LEI's estimate was not reliable, and that using the source

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<sup>51</sup> App. Ex. 5, Pre-filed Testimony of William Quinlin ("Quinlin Testimony") at 5 (APP00140).

<sup>52</sup> App. Ex. 1, Appendix 43, *Cost-Benefit and Local Economic Impact Analysis of the Northern Pass Transmission Project*, London Economics International ("LEI Report") at 14 (APP23588); Tr. Day 52, AM at 9 (Newell).

<sup>53</sup> App. Ex. 1, Appendix 43, LEI Report at 14 (APP23588).

<sup>54</sup> CFP Ex. 143, *Electricity Market Impacts of the Proposed Northern Pass Transmission Line Project, Revised*, The Brattle Group ("Brattle Revised Report") at 7 (CFP005921).

<sup>55</sup> CFP Ex. 143, Brattle Revised Report at 7 (CFP005921); Tr. Day 52, AM at 10-11 (Newell).

documents cited by LEI and other source documents, the amount of HQ's excess capacity available to sell into the FCM is likely substantially less than 1,090 MW.<sup>56</sup>

Second, if HQ can demonstrate some available excess capacity, it is uncertain how much of that capacity will qualify in the FCM.<sup>57</sup> If less than the Project's full capacity qualifies in the FCM, less than the full claimed capacity market benefits will be realized. There is significant uncertainty over whether the minimum price at which HQ is allowed to offer its capacity into the FCM would be greater than the FCM clearing price.<sup>58</sup> Specifically, it is unknown how ISO-NE's Internal Market Monitor ("IMM") will include certain cost items in its Minimum Offer Price Rule ("MOPR") calculation, which establishes the minimum offer price for bidding new capacity into the FCM. The uncertainties involved in the MOPR calculation include whether the IMM will consider HQ's capacity a new or existing resource,<sup>59</sup> and what amortization period the IMM would use for an "elective transmission upgrade" ("ETU").<sup>60</sup> What is not an uncertainty is that the IMM would include the cost of the Canadian portion of the Project (\$600 million Canadian) in the MOPR calculation.<sup>61</sup> For FCA No. 11 the auction price was \$5.30. If the IMM includes the cost of approximately \$500 million to build the Canadian transmission line to bring power to

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<sup>56</sup> Tr. Day 52, AM at 11-26 (Weiss); Tr. Day 52, AM at 26 (Weiss) ("So, in the year 2016-2017, how much capacity did HQP have that would be available to bid into the ISO-New England Forward Capacity Auction? A (Weiss) So, based on this exhibit, it would be 3,974 minus 3,285."); CFP Ex. 144, *Electricity Market Impacts of the Proposed Northern Pass Transmission Line Project, Revised*, The Brattle Group ("Brattle Supplemental Report") at 12 (CFP006011).

<sup>57</sup> CFP Ex. 143, Brattle Revised Report at 7 (CFP005921).

<sup>58</sup> CFP Ex. 143, Brattle Revised Report at 7 (CFP005921); Tr. Day 52, AM at 71-74 (Newell).

<sup>59</sup> Tr. Day 52, AM at 49-51, 108-111; Tr. Day 52, PM at 102-107; Tr. Day 53, AM at 114-118.

<sup>60</sup> Tr. Day 53, AM at 57-58 (Newell).

<sup>61</sup> Tr. Day 52, PM at 113-114 (Newell and Weiss).

the Project in Pittsburg, HQ's offer price under the IMM's MOPR calculation would be above the \$5.30 clearing price for FCA No. 11.<sup>62</sup>

Outside of the FCM qualification and clearing issues, there are other important uncertainties. One of those is how existing generators will respond to the introduction of 1,090 MW of capacity into the FCM.<sup>63</sup> It is possible that the introduction and the resulting price reductions may cause existing generation resources to retire. If that were to happen, the price suppression benefits of the Project would be negated and prices would begin to rise.<sup>64</sup> Another uncertainty is whether the Project would displace another clean energy project of a similar size and providing similar clean energy products, like another transmission project bringing hydro or renewable power into New England.<sup>65</sup> Another uncertainty is whether a different transmission project may provide the same energy and capacity markets benefits, eliminating the impacts to New Hampshire while providing the same electricity market benefits.

**(b) There is a Broad Range of Potential Electricity Market Benefits From the Project.**

In order to address these various uncertainties with regard to the capacity market benefits, Counsel for the Public's experts, Sam Newell and Jurgen Weiss of Brattle, created four modeling scenarios. These scenarios compare a base case (projected market conditions without introduction of the Project) with a various test cases that include introduction of the Project under different assumptions.<sup>66</sup> Scenario 1 resolves all of the uncertainties in favor of the

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<sup>62</sup> Tr. Day 52, AM at 34-39 (Newell and Weiss).

<sup>63</sup> CFP Ex. 143, Brattle Revised Report at 14 (CFP005928); Tr. Day 52, AM at 100-101 (Newell).

<sup>64</sup> CFP Ex. 143, Brattle Revised Report at 14 (CFP005928).

<sup>65</sup> CFP Ex. 143, Brattle Revised Report at 14 (CFP005928); Tr. Day 52, AM at 124-125 (Newell); Tr. Day 53, AM at 70-71 (Weiss).

<sup>66</sup> CFP Ex. 143, Brattle Revised Report at 16 (CFP005930).



Project.<sup>67</sup> It assumes HQ can sell 1,000 MW of capacity in the FCM, that it will not be priced out of the FCM, that it will not cause any retirements and that there are no other similar projects it would replace.<sup>68</sup> This is the most optimistic scenario for the Project.<sup>69</sup> Under Scenario 1, Brattle found that the Project would provide \$26 million of average annual capacity market savings to New Hampshire retail electric customers in years 2020 through 2032.<sup>70</sup> Total savings, including energy market savings, would be \$34 million per year for those same years.<sup>71</sup> The average annual ratepayer's bill savings from Scenario 1 would be \$21 per year from 2020 through 2032.<sup>72</sup> The results for Scenario 1 are not that different from the results of the Applicants' expert LEI's estimate of New Hampshire customer savings.<sup>73</sup> However, as Brattle testified, LEI has disregarded all of the uncertainties that were identified above and how those would impact potential benefits from the Project, and thereby provides only the most optimistic scenario.<sup>74</sup>

In order to address the many uncertainties, Brattle created three other scenarios. Scenario 2 addresses the possibility that the Project's introduction into the capacity market could actually cause existing generation resources to retire.<sup>75</sup> If that happens, it lessens the beneficial impact of

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<sup>67</sup> CFP Ex. 143, Brattle Revised Report at 15, 30-33 (CFP005929, CFP005944-CFP005947); Tr. Day 52, AM at 65-66 (Newell).

<sup>68</sup> CFP Ex. 143, Brattle Revised Report at 15, 30-33 (CFP005929, CFP005944-CFP005947).

<sup>69</sup> Tr. Day 52, AM at 71 (Newell).

<sup>70</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>71</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>72</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>73</sup> Tr. Day 52, AM at 69 (Newell).

<sup>74</sup> Tr. Day 52, AM at 71, 73 (Newell) ("And what we found is that, with all the big questions, that LEI had made the most optimistic possible assumptions.").

<sup>75</sup> CFP Ex. 143, Brattle Revised Report at 15, 33-35 (CFP005929, CFP004947-CFP005949); Tr. Day 52, AM at 70 ("Newell") ("And then we have one more scenario, which is what we call 'Scenario 2'.

the Project by the amount of the retirements.<sup>76</sup> Scenario 2 hypothesizes that 500 MW of existing generation will leave the market in response to the Project.<sup>77</sup> Scenario 2 also addresses the possibility that only 500 MW of the Project will qualify in the FCM (assuming the Project does not cause any retirements). The results from Scenario 2 cut the projected capacity market benefits in half to \$13 million in average annual savings to New Hampshire retail electric customers from 2020 through 2032.<sup>78</sup> Total average annual savings to New Hampshire customers (energy and capacity combined) under Scenario 2 are estimated to be \$21 million,<sup>79</sup> with average residential bill savings for New Hampshire customers expected to be \$14 per year.<sup>80</sup> Brattle found Scenario 2 to be more likely than Scenario 1 because of their belief that the removal of a significant amount of money from the capacity markets would likely cause some amount of generation to retire from the FCM.<sup>81</sup> In contrast, LEI found that the Project would not cause any generation to retire.<sup>82</sup>

Scenario 3 models the uncertainty that either the Project does not qualify for the FCM or, even if it does qualify, it cannot clear in the FCM.<sup>83</sup> In this case, Brattle shows that the Project will impact ISO-NE's energy markets but will not have any impact in ISO-NE's capacity market

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Which is just like that one, but where there are some plants that decide to retire because of Northern Pass.”).

<sup>76</sup> CFP Ex. 143, Brattle Revised Report at 35 (CFP005949).

<sup>77</sup> CFP Ex. 143, Brattle Revised Report at 33-35 (CFP004947-CFP005949).

<sup>78</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>79</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>80</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>81</sup> Tr. Day 52, AM at 70-72 (Newell) (“And I find that quite unlikely, that you can take that much money out of the market and have nobody change their retirement decision.”); Tr. Day 52, PM at 56 (Newell).

<sup>82</sup> Tr. Day 13, AM at 77 (Frayer) (“And our analysis shows that there aren't any generator retirements as a result of Northern Pass's entry into the market.”).

<sup>83</sup> CFP Ex. 143, Brattle Revised Report at 15, 35-40 (CFP005929, CFP005949-CFP005954).

(FCM).<sup>84</sup> The modeling of this scenario results in \$8 million in average annual energy savings for New Hampshire customers between the years 2020 and 2032.<sup>85</sup> With no savings in the capacity markets, the *total* savings to New Hampshire customers under Scenario 3 would also be \$8 million in years 2020 through 2032,<sup>86</sup> with average electric bill savings for New Hampshire residential customers of only \$5 per year for the same period.<sup>87</sup>

The last scenario that Brattle explored, Scenario 4, looked at the world as if Northern Pass displaced a similar project that supplies 1,000 MW of clean energy.<sup>88</sup> Given proposals discussed during the hearing and also submitted in response to the Massachusetts Clean Energy Request for Proposals, this is a probable scenario.<sup>89</sup> In essence, under Scenario 4 the Project does not deliver any benefits that another displaced project located somewhere else would not have provided. In other words, under this scenario the Project provides no benefits that will not already be realized by NH retail electricity customers due to market demand for delivery of renewable energy into New England, such as the Massachusetts Request for Proposals.<sup>90</sup> In that case, the Project would provide no project-specific wholesale market benefits and no savings to retail electric customers in New Hampshire.

## **(2) Other Energy-Related Regional Benefits of the Project.**

In addition to retail electricity benefits, the Applicants claim other regional economic benefits of the Project. One of those benefits is greenhouse gas (“GHG”) emission reductions

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<sup>84</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>85</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>86</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>87</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

<sup>88</sup> CFP Ex. 143, Brattle Revised Report at 15, 40-44 (CFP005929, CFP005954-CFP005958).

<sup>89</sup> Tr. Day 52, AM at 72-73; Tr. Day 53, AM at 70-71.

<sup>90</sup> CFP Ex. 144, Brattle Supplemental Report at 42 (CFP006041).

and the value of those reductions.<sup>91</sup> LEI estimated that the Project could result in approximately 3.3 – 3.4 million metric tons of avoided annual CO<sup>2</sup> emissions in New England.<sup>92</sup> When looking at GHG emission reductions from a global perspective, these reductions can only be realized if new incremental hydroelectric generation is being delivered over the Project.<sup>93</sup> By contrast, if power from existing HQ hydroelectric generation resources is diverted to the Project from end users in a different geographic region, no actual GHG emission reductions will be realized.<sup>94</sup> It is important to note that if the Project is relying on new incremental generation, that cost will be included in the MOPR calculation, making the FCM bidding price high. In short, it is inconsistent for Applicants to simultaneously claim economic benefits from GHG reductions and a low MOPR price.

Brattle calculated the value of the claimed GHG reductions based on the cost to develop a project with similar clean energy benefits – onshore wind.<sup>95</sup> New Hampshire's share of these benefits would be \$14 million to \$34 million annually.<sup>96</sup> However, it may be inappropriate to assign these benefits to New Hampshire because of the withdrawal of the power purchase agreement between HQ and Eversource/Public Service Company of New Hampshire and the likelihood that clean energy benefits may be allocated 100% to Massachusetts or another state if the Project is chosen in a clean energy request for proposal process.<sup>97</sup>

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<sup>91</sup> App. Ex. 1, Appendix 43, LEI Report at 67 (APP23641).

<sup>92</sup> App. Ex. 1, Appendix 43, LEI Report at 67 (APP23641).

<sup>93</sup> Tr. Day 52, PM at 5 (Weiss).

<sup>94</sup> Tr. Day 52, AM at 47-50 (Weiss).

<sup>95</sup> CFP Ex. 143, Brattle Revised Report at 63 (CFP005977).

<sup>96</sup> CFP Ex. 143, Brattle Revised Report at 65 (CFP005979).

<sup>97</sup> CFP Ex. 143, Brattle Revised Report at 66 (CFP005980).

In addition to GHG emission reduction benefits, LEI also claimed production cost reductions from the Project of between \$137 million and \$425 million average annual savings from 2019 through 2029.<sup>98</sup> However, these savings should not be added to retail cost savings benefits discussed above as they represent the same value expressed in a different manner.<sup>99</sup> These production cost savings will not accrue to New Hampshire or its retail ratepayers because any savings have already been accounted for in the reduction in energy market savings.<sup>100</sup>

Finally, the Applicants stressed the possible insurance value of the Project in extreme weather events.<sup>101</sup> While it is inappropriate to use calculations based on past events to judge future impacts,<sup>102</sup> Brattle acknowledged the benefit may increase the annual wholesale market savings slightly.<sup>103</sup>

### **(3) The Effect of the Project on In-State and Local Economic Activity Including Employment.**

The economy of the region includes an assessment of the economic effect of the Project on the affected communities and the effect of the Project on in-state economic activity during both construction and operation.<sup>104</sup> With regard to employment in the region, the SEC should include an assessment of the Project's impact from construction and operation on both direct and indirect jobs.<sup>105</sup>

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<sup>98</sup> App. 1, Appendix 43, LEI Report at 58 (APP23632).

<sup>99</sup> Tr. Day 53, AM at 36-41 (Newell).

<sup>100</sup> Tr. Day 53, AM at 36-41 (Newell).

<sup>101</sup> App. 1, Appendix 43, LEI Report at 59-64 (APP23633-APP23638).

<sup>102</sup> Tr. Day 52, AM at 60 (Newell) ("But that doesn't tell you anything about going forward what is the value.").

<sup>103</sup> Tr. Day 53, AM at 76-77 (Newell).

<sup>104</sup> Site 301.09(b); Site 301.15(a).

<sup>105</sup> Site 301.09(c); Site 301.15(a).

In order to address these considerations, Counsel for the Public hired Kavet, Rockler & Associates, LLC (“KRA”) as expert witnesses on local (New Hampshire) economic impacts. Overall, KRA found that the Project would have positive impacts on the economy of the region and the number of jobs in the early years, subsiding over time as the impacts from construction disappear and the long-term impacts from hosting the line are felt.<sup>106</sup> The Applicants’ expert analysis produced similar trends, but higher overall numbers for economic impacts and jobs. As addressed below, LEI’s analysis overestimated these benefits compared to the analysis performed by KRA.

**(a)     The Project Will Provide an Increase in New Hampshire Jobs During Its Construction.**

The construction of the Project will include \$1.1 billion of expenditures over a period estimated to be 2016 – 2020.<sup>107</sup> Because of this level of spending, KRA found that there will be an increase of 2,213 construction jobs over that five-year period in New England.<sup>108</sup> For New Hampshire, the Project will create 1,050 construction jobs.<sup>109</sup> Overall, the construction period will cause a net increase in jobs of 1,208 in New Hampshire.<sup>110</sup> However, over the operational phase of the Project, these job gains will recede and will actually turn negative.<sup>111</sup> Total jobs created from 2020 – 2030 are 321, but job losses begin to occur from 2030 – 2040 (-191) and continue in the outer years of the Project operation; 2040 – 2050 would have 360 less jobs from

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<sup>106</sup> CFP Ex. 148, *Economic Impact Analysis and Review of the Northern Pass Transmission project, Supplemental Report*, Kavet Rocker & Associates (“KRA Supplemental Report”), LLC at 75-76 (CFP006313-CFP006314).

<sup>107</sup> CFP Ex. 148, KRA Supplemental Report at 40 (CFP006278).

<sup>108</sup> CFP Ex. 148, KRA Supplemental Report at 42 (CFP006280).

<sup>109</sup> CFP Ex. 148, KRA Supplemental Report at 42 (CFP006280).

<sup>110</sup> CFP Ex. 148, KRA Supplemental Report at 76 (CFP006314).

<sup>111</sup> CFP Ex. 148, KRA Supplemental Report at 76 (CFP006314).

current baselines and 2050 – 2060 would have 473 fewer jobs.<sup>112</sup> The decrease in the outer years is largely a result of rebalancing of electric markets and potential job losses from generation retirements in New Hampshire.<sup>113</sup>

**(b) The Project Will Create an Increase in New Hampshire's GSP During Construction.**

In addition to the Project's impact on jobs, KRA also evaluated impacts to the gross state product ("GSP") of the region and New Hampshire. Similar to jobs, during the construction phase of the Project there is an anticipated increase in the GSP of both the New England States collectively and for New Hampshire individually.<sup>114</sup> The New England States may see an average increase of \$190 million in annual GSP from construction activity during the projected preconstruction and construction period of 2016 – 2020.<sup>115</sup> During that same period, New Hampshire may see an average increase in annual GSP of \$84.6 million from construction activity.<sup>116</sup> Again, similar to employment, these benefits decrease when the Project begins operation. In the first 10 years of operation, the average increase in annual GSP is \$22 million.<sup>117</sup> In the outer decades, the average impacts turn negative, with a decrease in annual GSP in 2030 – 2040 of \$31 million, in 2040-50 of \$54 million and in 2050 – 2060 of \$80

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<sup>112</sup> CFP Ex. 148, KRA Supplemental Report at 76 (CFP006314).

<sup>113</sup> Tr. Day 45, AM at 12 (Kavet) ("So part of that's a big part of what's happening in the REMI model with the supply response, not necessarily the loss of the output locally."); Tr. Day 45, PM at 14-15, 41-42, 54, 66-67 (Kavet and Rockler).

<sup>114</sup> CFP Ex. 148, KRA Supplemental Report at 41-42 (CFP006279-CFP006280).

<sup>115</sup> CFP Ex. 148, KRA Supplemental Report at 42 (CFP006280).

<sup>116</sup> CFP Ex. 148, KRA Supplemental Report at 42, 76 (CFP006280, CFP006314).

<sup>117</sup> CFP Ex. 148, KRA Supplemental Report at 76 (CFP006314).

million.<sup>118</sup> The increase in jobs and GSP in the first decade of operation would only occur if the Project causes retail electric rate reductions.<sup>119</sup>

**(c) Applicants' Estimates for Job Growth and GSP  
Increases Are Overstated.**

Applicants' witness on local economic impacts conducted a similar analysis as that conducted by KRA. In general, LEI found similar benefits of a larger magnitude. These findings are less unreliable because of a number of problems. First, LEI used inappropriately high compensation rates for the professions it analyzed.<sup>120</sup> This resulted in the shift of some of the estimated economic impact towards local markets.<sup>121</sup> Second, LEI failed to nullify certain purchases generated automatically by the REMI model.<sup>122</sup> This led to a \$330 million overstatement of the New Hampshire and New England regional model impact.<sup>123</sup> An additional problem is that LEI used full-time equivalent employees instead of "jobs."<sup>124</sup> This would introduce slightly lower direct employment estimates.<sup>125</sup> A further problem is that LEI failed to include the value of the completed Project as an addition to New Hampshire's nonresidential capital stock in the REMI model.<sup>126</sup> This causes an increase in future employment.<sup>127</sup>

The biggest concern with LEI's analysis is the use of their own energy market benefits. Based on the previous discussion in this brief regarding impacts to wholesale energy markets,

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<sup>118</sup> CFP Ex. 148, KRA Supplemental Report at 76 (CFP006314).

<sup>119</sup> CFP Ex. 148, KRA Supplemental Report at 44 (CFP006282).

<sup>120</sup> CFP Ex. 148, KRA Supplemental Report at 12 (CFP006250); Tr. Day 44, AM at 17 (Rockler).

<sup>121</sup> CFP Ex. 148, KRA Supplemental Report at 40-41 (CFP006278-CFP006279).

<sup>122</sup> CFP Ex. 148, KRA Supplemental Report at 41 (CFP006279).

<sup>123</sup> CFP Ex. 148, KRA Supplemental Report at 41 (CFP006279).

<sup>124</sup> CFP Ex. 148, KRA Supplemental Report at 40 (CFP006278).

<sup>125</sup> CFP Ex. 148, KRA Supplemental Report at 40 (CFP006278).

<sup>126</sup> CFP Ex. 148, KRA Supplemental Report at 40 (CFP006278).

<sup>127</sup> CFP Ex. 148, KRA Supplemental Report at 40 (CFP006278).



these energy market benefits are overstated and lead to inflated job and GSP benefits in the first 10 years of operation of the Project.<sup>128</sup> Given Brattle's two highest outlooks, Scenario 1 and Scenario 2, the benefits in the first 10 years of operation will be much less significant than LEI's overly optimistic estimates.<sup>129</sup>

**(d) Economic Benefits From Special Funds.**

In order to increase the New Hampshire-specific benefits of the Project, the Applicants have created two economic stimulus funds that provide direct payments to New Hampshire businesses, particularly in the North Country. While these funds are not direct economic benefits of Project construction or operation, they do represent potential economic benefits if a certificate is issued for the Project.

**i. The North Country Jobs Fund.**

As part of the Project's proposed benefits, the Applicants created the North Country Jobs Creation Fund (the "Fund").<sup>130</sup> The total amount pledged to the Fund, if Applicants receive a certificate, is \$7.5 million. The Applicants provided initial seed funding of \$200,000.<sup>131</sup> William Quinlin described the Fund as "important economic development and job creation opportunities."<sup>132</sup> While the Fund would provide an influx of money to the North Country, Counsel for the Public has significant concerns with the administration and oversight of the Fund.

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<sup>128</sup> CFP Ex. 148, KRA Supplemental Report at 45-47 (CFP006283-CFP006285).

<sup>129</sup> CFP Ex. 148, KRA Supplemental Report at 45 (CFP006283).

<sup>130</sup> App. Ex. 5, Quinlin Testimony at 5 (APP00140); Tr. Day 39, PM at 109 (Bouthillier).

<sup>131</sup> App. Ex. 5, Quinlin Testimony at 5 (APP00140).

<sup>132</sup> App. Ex. 5, Quinlin Testimony at 5 (APP00140).

The Fund is administered by a non-profit entity<sup>133</sup> whose membership is limited to five individuals.<sup>134</sup> This entity is closely tied to an intervenor organization that was formed to support the Project, the Coos Country Business and Employers Group.<sup>135</sup> The administration of the Fund does not include any economic development experts.<sup>136</sup> The Fund did not consult with the Coos Economic Development Corporation, an established entity with experience in the same region with job creation activities.<sup>137</sup> Nor did the Fund consult with state, local or other regional agencies in how to oversee the Fund.<sup>138</sup>

The Fund distributed \$136,000 in 2015 of the initial \$200,000 seed money from Applicants.<sup>139</sup> There were minimal meetings to decide how to allocate the funds.<sup>140</sup> In deciding how to award the funds, there is no agreement between Applicants and the Fund.<sup>141</sup> There are no published criteria as to how the funds should be awarded or how job creation is evaluated.<sup>142</sup> Nor is there a requirement that recipients report back as to how the funds were used or how many jobs were created.<sup>143</sup> Overall, there has been no analysis as to how the grants already given have

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<sup>133</sup> Tr. Day 1, PM at 10 (Quinlin).

<sup>134</sup> CFP Ex. 37 at 3 (CFP000898); CFP Ex. 38 at CFP000902.

<sup>135</sup> Tr. Day 1, PM at 10 (Quinlin).

<sup>136</sup> Tr. Day 1, PM at 12 (Quinlin); Tr. Day 39, PM at 111-112 (Bouthillier).

<sup>137</sup> Tr. Day 39, PM at 122 (Bouthillier).

<sup>138</sup> Tr. Day 39, PM at 155 (Bouthillier).

<sup>139</sup> Tr. Day 1, PM at 13 (Quinlin).

<sup>140</sup> Tr. Day 39, PM at 111 (Bouthillier).

<sup>141</sup> Tr. Day 1, PM at 61 (Quinlin); Joint Municipal Exhibit 42.

<sup>142</sup> Tr. Day 1, PM at 18 (Quinlin); Tr. Day 39, PM at 148 (Bouthillier).

<sup>143</sup> Tr. Day 1, PM at 63 (Quinlin).

created any jobs.<sup>144</sup> The Fund has had little activity since making the initial distributions in 2015.<sup>145</sup>

**ii. The Forward New Hampshire Fund.**

The Forward New Hampshire Fund (the “FNHFund”) was registered with the New Hampshire Secretary of State’s Office on March 22, 2017.<sup>146</sup> If a certificate is granted, Eversource commits to provide \$20 million per year, for 10 years, for \$200 million for the FNHFund. The FNHFund is intended to promote tourism, clean energy and economic development. The FNHFund is not limited in geographic scope and can make investments anywhere in New Hampshire, but has an emphasis on the North Country.<sup>147</sup>

Decisions about funds disbursed to date have been made by Eversource, raising concerns about the objectivity of criteria for awards of grants from the FNHFund. The FNHFund loaned \$2 million to the Balsams five days after the Balsams petitioned to intervene in support of the Project, and has committed to loan an additional \$3 million to the Balsams.<sup>148</sup> The Balsams did not complete a loan application or provide any specific documentation to receive this loan, and the FNHFund did not provide the Balsams with any criteria to meet to obtain this loan.<sup>149</sup> After receiving the loan, the Balsams has not been required to submit any documentation to the FNHFund in connection with the loan.<sup>150</sup> As part of receiving this loan, Mr. Otten agreed to testify in support of the Project, and the additional loan from the FNHFund to the Balsams

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<sup>144</sup> Tr. Day 1, PM at 14 (Quinlin).

<sup>145</sup> Tr. Day 39, PM at 111 (Bouthillier).

<sup>146</sup> Tr. Day 1, AM at 160 (Quinlin); CFP Ex. 34.

<sup>147</sup> Tr. Day 1 AM at 168-169(Quinlin).

<sup>148</sup> Tr. Day 1 AM at 173-174 (Quinlin).

<sup>149</sup> Tr. Day 44, PM at 22-23 (Otten).

<sup>150</sup> Tr. Day 44, PM at 26 (Otten).

requires Mr. Otten to testify in support of the Project.<sup>151</sup> The loan to the Balsams was contingent on the Balsams supporting the Project.<sup>152</sup>

The FNHFund provided funds for an electronic charging station at Rogers Campground pursuant to a Memorandum of Agreement whereby Rogers Campground agreed to support and promote the FNHFund and the Project and to not disparage the Project.<sup>153</sup> The FNHFund also committed \$20 million to the NH PUC for energy efficiency programs, or \$2 million per year for 10 years, out of the \$200 million pledged. Future disbursements by the FNHFund will be decided by its Board of Directors with input from various advisory committees.<sup>154</sup>

#### **(4) The Effect of the Project on Property Taxes.**

The Applicants assert that tax payments by the Project is a benefit. This includes payments from property taxes and business income taxes. Applicants' expert, Dr. Lisa Shapiro, estimated the property tax payments in the first full year of operation would be within the range of \$35 million to \$40 million.<sup>155</sup> This includes approximately \$21 million to \$26 million in municipal and local education property taxes, \$4 million in county taxes and approximately \$10 million in state utility education property taxes.<sup>156</sup> Counsel for the Public's experts generally agreed with Dr. Shapiro's estimates, but noted that payments would decrease to \$800,000 at the end of the 40-year useful life of the Project.<sup>157</sup>

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<sup>151</sup> Tr. Day 44, PM at 27-28 (Otten).

<sup>152</sup> Tr. Day 44, PM at 27 (Otten).

<sup>153</sup> Tr. Day 1, AM at 165-166 (Quinlin).

<sup>154</sup> Tr. Day 1 AM at 164-167, 176-177, 180 (Quinlin); CFP Ex. 31.

<sup>155</sup> App. Ex. 29, Pre-filed Testimony of Lisa Shapiro ("Shapiro Testimony") at 2 (APP00620).

<sup>156</sup> App. Ex. 29, Shapiro Testimony at 2 (APP00620).

<sup>157</sup> CFP Ex. 146, Exhibit B, Economic Impact Analysis and Review of the Proposed Northern Pass Transmission Project, Kavet, Rockler & Associates, LLC ("KRA Report") at 51 (CFP006167).

These estimates, however, are subject to uncertainty.<sup>158</sup> One major uncertainty is which method of calculating the Fair Market Value (“FMV”) of the Project property should be utilized. There are five accepted methods for determining FMV in New Hampshire: (1) original cost less depreciation, (2) reproduction cost less depreciation, (3) comparable sales, (4) capitalized earnings (income), and (5) cost of alternative facilities.<sup>159</sup> Dr. Shapiro chose the most “conservative” of these methodologies—the original cost less depreciation method.<sup>160</sup> Many of the host towns disagree that this is the most appropriate methodology for determining FMV, or that it is the “industry standard” in the state or throughout the country.<sup>161</sup>

Additionally, the cost that was used in the New Book Value (“NBV”) calculation is an estimate produced by the Applicants approximately two years ago.<sup>162</sup> The actual costs, and therefore the taxes actually paid under the NBV methodology, will not be known until the Project construction is completed.<sup>163</sup> Moreover, the estimates of future tax payments do not take into account any increase in municipal expenses due to the presence of the line or decrease in any value to other property in the community.<sup>164</sup> Municipal witnesses testified that they expect property owners along the proposed route of the Project will seek tax abatements because of a decrease in their property’s value, and that such abatements will offset, to varying degrees, taxes

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<sup>158</sup> App. Ex. 29, Shapiro Testimony at 4 (APP00622); App. Ex. 1, Appendix 44, Northern Pass Transmission Project – Estimate New Hampshire Property Tax Payments Report, Dr. Lisa Shapiro (“Shapiro Report”) at 15 (APP23708); Tr. Day 23, AM at 16, 121, 137 (Shapiro).

<sup>159</sup> App. Ex. 1, Appendix 44, Shapiro Report at 4 (APP23697); Tr. Day 23, AM at 29, 115-116 (Shapiro).

<sup>160</sup> Tr. Day 23, AM at 29, 116-117, 121 (Shapiro).

<sup>161</sup> Tr. Day 23, AM at 120-121 (Shapiro); CFP Ex. 49 at 48-52 (CFP001002-CFP001006); CFP Ex. 155 at 19 (CFP006526) (referring to it as a “common practice”); JT Muni Ex. 233; JT Muni Ex. 240.

<sup>162</sup> Tr. Day 23, AM at 120 (Shapiro).

<sup>163</sup> Tr. Day 23, AM at 22-24 (Shapiro).

<sup>164</sup> Tr. Day 23, PM at 42-43, 71-73, 83-84 (Shapiro).

paid by the Project.<sup>165</sup> Indeed, it is noteworthy that a large majority of the host municipalities oppose the Project despite projected tax benefits that are in many instances very substantial.

Finally, in calculating the business income tax paid by the Project, Dr. Shapiro did not look at the actual tax rate that the Project is likely to pay.<sup>166</sup> She used the then-applicable tax rate of 8.5%.<sup>167</sup> Dr. Shapiro notes that this tax rate is going down per legislative change, regardless of what actual rate Northern Pass Transmission, LLC or its parent, Eversource Energy, have paid in the past or are likely to pay.<sup>168</sup>

#### **(5) The Effect of the Project on Real Estate Values.**

Applicants' expert, Dr. James Chalmers, testified that, "there is no evidence that HVTL [high-voltage transmission lines] result in consistent measureable effects on property values, and where there are effects, the effects are small and decrease."<sup>169</sup> For the Project, Dr. Chalmers' opined that, "these properties that could potentially be affected are homes very close to the ROW that do not have clear visibility of the existing line, but will have clear visibility of the existing line or the new Northern Pass line after it is built."<sup>170</sup> Dr. Chalmers' concluded that less than a dozen properties along the 192-mile proposed route will experience small market value effects. Dr. Chalmers' opinion, methodology and the accuracy of the work of others on which he relied were all challenged, and the Subcommittee received contrary evidence from other experts, real estate brokers, municipal officials and property owners all whom testified that the Project would

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<sup>165</sup> See e.g., Tr. Day 65, AM at 36-38 (Thibault).

<sup>166</sup> Tr. Day 23, AM at 54 (Shapiro).

<sup>167</sup> Tr. Day 23, AM at 55 (Shapiro); Tr. Day 23, PM at 67 (Shapiro).

<sup>168</sup> Tr. Day 23, PM at 66-67 (Shapiro).

<sup>169</sup> App. Ex. 30, Pre-filed Testimony of James Chalmers, Ph.D ("Chalmers Testimony") at 10:26-28 (APP00642).

<sup>170</sup> App. Ex. 30, Chalmers Testimony at 12:11-13 (APP00644).

adversely impact the value of property along the proposed route. Dr. Chalmers' opinion that that the Project will not have a negative impact on the value of properties that are encumbered by the Project, that abut the Project or are non-abutters that have significant views of the Project is not adequately supported and is unpersuasive.

**(a) Literature Review Indicates High-Voltage Transmission Lines Can Have Impacts on Property Values.**

Dr. Chalmers started by looking at existing studies that evaluated whether high-voltage transmission lines ("HVTL") impact property values.<sup>171</sup> The literature that Dr. Chalmers reviewed, however, is not particularly relevant to the specific properties that will be impacted by the Project. None of the studies involve properties located in New Hampshire or areas that are similar to the geography and demography of the Project area.<sup>172</sup> To the extent the literature review looked at commercial properties, it did not look at tourist locations like many of the areas along the corridor.<sup>173</sup> Nor did it look at impacts to second homes, of which there is a high percentage in the northern sections of the Project.<sup>174</sup> Lastly, the studies only looked at proximity to the transmission line and did not evaluate impact to properties that have significant views of the HVTL.<sup>175</sup>

Despite the potential lack of relevance to the current situation, the literature does indicate that HVTL do have impacts to adjacent properties. Dr. Chalmers testified that HVTL can have a

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<sup>171</sup> App. Ex. 30, Chalmers Testimony at 5-14 (APP00638-APP00646).

<sup>172</sup> CFP Ex. 148, KRA Supplemental Report at 21-22 (CFP006259-CFP006260); Tr. Day 24, AM at 24 (Chalmers).

<sup>173</sup> CFP Ex. 148, KRA Supplemental Report at 21-22 (CFP006259-CFP00626-); Tr. Day 24, AM at 40 (Chalmers); Tr. Day 26, AM at 64-66 (Chalmers).

<sup>174</sup> CFP Ex. 148, KRA Supplemental Report at 22 (CFP006260); Tr. Day 26, AM at 64-66 (Chalmers).

<sup>175</sup> CFP Ex. 148, KRA Supplemental Report at 22-23 (CFP006260-CFP006261); Tr. Day 24, AM at 50-51 (Chalmers).

negative impact on property values in the range of 1% – 6%.<sup>176</sup> In other cases, when looking at the same studies, he concluded that the range would be a 3% – 6% decrease.<sup>177</sup> Looking more specifically at rural areas like the northern section of the Project corridor, the price effects could be as high as a 20% – 25% decrease in value and result in extended marketing sales periods.<sup>178</sup>

**(b) The Applicants' Case Studies Are Not Reliable.**

Dr. Chalmers relied on a number of case studies that were performed primarily by Mr. Underwood and Amidon Appraisal Company, as a basis for his overall conclusion about impacts to New Hampshire real estate markets and specific properties along the Project corridor. Dr. Chalmers explains this analysis in his report, where properties along existing HVTL in New Hampshire were evaluated based on retrospective appraisals, sales prices, proximity to and visibility of the HVTL and interviews with the brokers involved in the sales.<sup>179</sup> However, there are numerous reasons why these case studies should not be used as the basis to determine impacts on properties along the Project corridor.

The retrospective appraisals of the properties in these case studies, as are all appraisals, are subjective and can be highly variable.<sup>180</sup> In addition, the HVTLs used to define the set of properties reviewed in the case studies are substantially different than the Project, mainly in that

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<sup>176</sup> App. Ex. 1, Appendix 46, *High Voltage Transmission Lines and Real Estate Markets in New Hampshire: A Research Report*, Chalmers & Associates, LLC (“Chalmers Report”) at 14 (APP23762).

<sup>177</sup> Tr. Day 24, AM at 28-31 (Chalmers); CFP Ex. 379 at 31 (CFP010530); CFP Ex. 377 at 1-2 (CFP010511); CFP 376 at 229 (CFP010485).

<sup>178</sup> CFP Ex. 379 at 31 (CFP010539); CFP Ex. 148, KRA Supplemental Report at 21-22 (CFP006259-CFP006260); *see also* CFP Ex. 378 at 35 (CFP010528) (showing a 15% discount for lots within 1000 feet of centerline of ROW).

<sup>179</sup> App. Ex. 1, Appendix 46, Chalmers Report at 19-20 (APP23767-APP237680).

<sup>180</sup> CFP Ex. 148, KRA Supplemental Report at 23-24 (CFP006261-CFP006262).



the visible structures are much smaller than the Project's structures.<sup>181</sup> In comparing the appraisal prices, the Applicants only looked to sales prices without taking into consideration any withdrawals of listings, which might have affected their opinion of negative sales prices or length of time on the market.<sup>182</sup> Dr. Chalmers admitted that the Project has already caused a thinning of the real estate market in the vicinity of the Project.<sup>183</sup> The Applicants also excluded any property that was not encumbered by the HVTL or abutting the HVTL ROW.<sup>184</sup> This excluded properties that had views of the HVTL and values impacted by its presence, thereby narrowing the data set and making the results more unreliable. The case studies further narrowed the data set by only considering single-family residential properties, excluding condominiums, apartments, commercial properties and view lots. Moreover, in using comparable sales to determine the subject property's sales price, it was pointed out that Applicants' experts made numerous errors in the underlying data, which affects the reliability of the arrived-at market value.<sup>185</sup>

Once the difference between appraised value and the sale price was determined, the Applicants' experts screened out a number of properties based on the lack of proximity and comments by the real estate broker involved.<sup>186</sup> Visibility was not determined using an objective metric, such as using GIS or viewshed modeling.<sup>187</sup> Rather, it was the subjective impression of

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<sup>181</sup> Tr. Day 24, AM at 49-50 (Chalmers).

<sup>182</sup> Tr. Day 25, AM at 37 (Chalmers).

<sup>183</sup> Tr. Day 26, AM at 115 (Chalmers).

<sup>184</sup> Tr. Day 24, AM at 50-51 (Chalmers).

<sup>185</sup> *See generally* Tr. Day 24, PM at 108-166 (Chalmers); Tr. Day 25, PM at 51-132 (Chalmers).

<sup>186</sup> App. Ex. 1, Appendix 46, Chalmers Report at 19 (APP23767).

<sup>187</sup> CFP Ex. 148, KRA Supplemental Report at 23 (CFP006261).

the person conducting this review.<sup>188</sup> The interviews were also not reliable because they are the subjective impressions of two different people, the interviewer and the broker.<sup>189</sup> There are further concerns with the reliability of the interviews because of the credibility of one of the Applicants' experts conducting the case studies had a predetermined opinion on the outcome of the studies<sup>190</sup> and was in financial trouble at the time he performed the case studies.<sup>191</sup>

The greatest concern with the case studies and their lack of reliability is that one of the criteria used to screen out properties (proximity to the HVTL) was based upon the conclusion that Dr. Chalmers reached with regard to his literature review, which he testified were not relevant to the Project corridor.<sup>192</sup> Consequently, Dr. Chalmers concluded that properties more than 100 feet from the HVTL ROW would not be impacted because the properties further away were screened out as part of the methodology of the case studies.<sup>193</sup> Because there are errors in the methodology, errors in the data and subjectivity in the analysis, the conclusion from the case studies that properties outside 100 feet from the ROW will not be impacted is suspect and should be rejected.

**(c) The Applicants' Subdivision Studies Are Not Reliable.**

In addition to the literature review and case studies, Dr. Chalmers also conducted subdivision studies. However, these studies are of little use because, to the degree to which any conclusions can be reached from them, they only address impacts to encumbered properties and

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<sup>188</sup> Tr. Day 24, AM at 59-60 (Chalmers).

<sup>189</sup> Tr. Day 24, AM at 74-76, 116-117 (Chalmers); CFP Ex. 148, KRA Supplemental Report at 24 (CFP006262); Tr. Day 25, PM at 74-81 (Chalmers).

<sup>190</sup> Tr. Day 24, AM at 79-80 (Chalmers); CFP Ex. 148, KRA Supplemental Report at 24 (CFP006262).

<sup>191</sup> Tr. Day 24, AM at 117-125 (Chalmers).

<sup>192</sup> CFP Ex. 148, KRA Supplemental Report at 23-24 (CFP006261-CFP006262).

<sup>193</sup> CFP Ex. 148, KRA Supplemental Report at 23-24 (CFP006261-CFP006262).

not impacts from visibility of the HVTL.<sup>194</sup> All of the witnesses on property values, including Dr. Chalmers, testified that a view of the Project drives any impact on property values. Moreover, these studies are also subject to errors in the underlying data, they considered sales many years ago, often over long periods of time and they do not use standard methodology.<sup>195</sup>

**(d) Chalmers' Overall Conclusion is Unreliable.**

Dr. Chalmers used the case studies and the subdivision studies to make a determination as to whether specific properties would be impacted by the Project. This analysis is unnecessarily limited at the outset because of the earlier conclusions that only abutters and encumbered property can be impacted and that properties more than 100 feet from the ROW will not be impacted. Dr. Chalmers admitted that the Project could negatively affect commercial properties more than 100 feet from the edge of the ROW.<sup>196</sup> There are additional problems as well. First, the impact was based solely on a change in visibility. The three categories were “clearly visible,” “partially visible” and “not visible,” and then each property was evaluated as to whether this would change with construction of the Project.<sup>197</sup> Dr. Chalmers admitted that this was not an analysis that he had ever conducted before.<sup>198</sup> Moreover, the category of “partially visible” was so broad as to not recognize significant impacts from increased number and size of structures or from vegetative clearing.<sup>199</sup> The determination of visibility was done by “eyeballing” from the street the change in visibility simply by using the preliminary Project maps

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<sup>194</sup> Tr. Day 24, PM at 35 (Chalmers) (“Would I be correct in saying that what you really looked at in the subdivision studies were encumbered lots primarily and not -- the encumbrance was the primary issue, not visibility of the line? A. Yeah, visibility wasn't an issue at all. It was proximity.”).

<sup>195</sup> *See generally* Tr. Day 24, PM at 108-166 (Chalmers).

<sup>196</sup> Tr. Day 26, AM at 150-151 (Chalmers).

<sup>197</sup> Tr. Day 25, PM at 88 (Chalmers); Tr. Day 26, PM at 8-10 (Chalmers); CFP Ex. 375.

<sup>198</sup> Tr. Day 26, PM at 10 (Chalmers).

<sup>199</sup> Tr. Day 25, PM at 74-77, 88-80 (Chalmers).

that only show the location of the proposed Project, without being able to access the property or using photo simulations of the proposed towers or the relocated towers.<sup>200</sup> Nor was the conductor (as opposed to the structures) considered in this visibility analysis.<sup>201</sup> As for the structures, the change in size of the structures, which is oftentimes a “big” change, did not impact Dr. Chalmers’ analysis of visibility or impact on value.<sup>202</sup> In making these very subjective determinations, Dr. Chalmers was not able to access the properties to actually see the views he was opining on.<sup>203</sup>

The applicability of Dr. Chalmers’ analysis to the Project’s actual impact is further limited because it does not include commercial properties, of which there are many scenic and/or tourism-based businesses along the route, or properties that are not single-family detached dwellings.<sup>204</sup> Although not addressed in his pre-filed testimony, which explicitly denied investigating the Project’s impacts on commercial properties, Dr. Chalmers indicated at the evidentiary hearing that he did not believe there would be an impact on commercial properties based on Mr. Nichols’ conclusions about impacts to the tourism economy.<sup>205</sup> He later contradicted this statement when he admitted that the Project could have negative effects on the value of businesses dependent on scenic views – even properties more than 100 feet from the ROW.<sup>206</sup>

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<sup>200</sup> Tr. Day 24, PM at 59 (Chalmers); Tr. Day 26, PM at 8 (Chalmers).

<sup>201</sup> Tr. Day 26, AM at 124 (Chalmers).

<sup>202</sup> Tr. Day 26, AM at 12-13, 25 (Chalmers).

<sup>203</sup> Tr. Day 26, PM at 8 (Chalmers).

<sup>204</sup> Tr. Day 26 AM at 148-151 (Chalmers).

<sup>205</sup> Tr. Day 26, AM at 148-150 (Chalmers).

<sup>206</sup> Tr. Day 26, AM 150-151 (Chalmers).

Dr. Chalmers did admit that the Project could have significant “personal” impacts on the property owners in addition to any impacts to the market value of the properties.<sup>207</sup> Finally, Dr. Chalmers’ analysis did not evaluate the construction of the underground portion of the Project on property values.<sup>208</sup> For instance, Dr. Chalmers did not analyze the impact to properties that have the transmission line splice boxes buried in front of them, including potential interference with utilities.

Dr. Chalmers’ conclusion that only 10 – 12 properties along the Project corridor would have an impact to their value was too narrow to be reliable and was based on “data” that was both subjective and overly restrictive.<sup>209</sup>

**(e) Evidence of the Project’s Negative Impact on Property Values.**

Counsel for the Public’s experts on local economic impacts, KRA, found that the Project could cause negative impacts to real property values in New Hampshire.<sup>210</sup> KRA noted that numerous individuals have reported that the Project is already having negative impacts on property values.<sup>211</sup> Using a percentage decrease in property value based on proximity to and visibility of a transmission line determined in the Callanan study, KRA estimated that New Hampshire could see a total decrease in property value of \$15 million as a result of the Project.<sup>212</sup>

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<sup>207</sup> App. Ex. 30, Chalmers Testimony at 13 (APP00645); Tr. Day 24, PM at 104-106 (Chalmers); Tr. Day 26, PM at 107 (Chalmers).

<sup>208</sup> Tr. Day 26, PM at 66-67 (Chalmers).

<sup>209</sup> For instance, using Dr. Chalmers’ limited criteria and Mr. DeWan’s photos and photo simulations, Michelle Kliendienst testified that 50 units in 10 buildings within McKenna’s Purchase could potentially have negative impacts to their value. Tr. Day 70, AM at 152-159 (Kleindienst).

<sup>210</sup> CFP Ex. 146, Pre-filed Testimony of Thomas E. Kavet (“Kavet Testimony”) at 7 (CFP006106).

<sup>211</sup> CFP Ex. 148, KRA Supplemental Report at 56 (CFP006294).

<sup>212</sup> CFP Ex. 148, KRA Supplemental Report at 60-61 (CFP006298-CFP006299).

This represents just over a 1% decrease in the value of the property.<sup>213</sup> Overall, KRA estimated that residential property wealth could be impacted by \$10 million and possibly as much as \$30 million.<sup>214</sup> For the most part, any impacts to commercial properties would be addressed in the evaluation of impacts to New Hampshire's tourism economy.<sup>215</sup> To the degree non-tourism related businesses are impacted by the Project, a 5% decrease in sales (the mid-point in potential impacts to tourism-based businesses) could result in a loss \$500,000 per year in restaurant sales.<sup>216</sup>

Peter Powell, a real estate agent in Coos and Grafton Counties with 43 years of experience, discussed the importance of the North Country and its stewardship on the rest of New Hampshire.<sup>217</sup> Mr. Powell testified that the findings of Dr. Chalmers are inaccurate and not representative of the likely impacts of the Project.<sup>218</sup> Mr. Powell testified that while buyers of properties in in-town village real estate markets in the North County have less options, buyers in the real estate market for rural properties are more flexible and have options, and thus, properties in those markets that are impacted by adverse views of the Project will suffer decreased value. It is Mr. Powell's opinion that the loss in value of property that is impacted by views of the Project would be in the range of 35% – 45%, with a possibility of a 75% impact for raw land.<sup>219</sup> Mr.

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<sup>213</sup> CFP Ex. 148, KRA Supplemental Report at 60 (CFP006298).

<sup>214</sup> CFP Ex. 148, KRA Supplemental Report at 62 (CFP6300).

<sup>215</sup> CFP Ex. 148, KRA Supplemental Report at 62 (CFP6300).

<sup>216</sup> CFP Ex. 148, KRA Supplemental Report at 62 (CFP6300).

<sup>217</sup> WhitefieldBethlehem-Abtr Ex. 10, Pre-filed Testimony of Peter Powell ("Powell Testimony") at 2-3. (Dr. Chalmers did not familiarize himself with the 31 towns that the Project would go through; he did not study any individual real estate market in New Hampshire; he could not comment on the difference between the real estate market in Plymouth versus Concord or Deerfield; and he did not consider himself an expert in the New Hampshire real estate market. Tr. Day 24, AM at 11-12 (Chalmers)).

<sup>218</sup> WhitefieldBethlehem-Abtr Ex. 10, Powell Testimony at 4.

<sup>219</sup> WhitefieldBethlehem-Abtr Ex. 10, Powell Testimony at 6-7.

Powell also testified that a majority of buyers will not buy a property that has a view of the Project, which will reduce the pool of buyers for those properties and thus reduce the value of those properties.<sup>220</sup>

Mr. Ramsdell testified that he was unable to sell his property because of the Project, and that his realtor told him that people liked his property, but would not make an offer because they did not know what the Project would look like.<sup>221</sup> Mr. Ramsdell also testified that when Dalton recently reassessed properties, his property's value decreased by \$45,000, and that the town assessor told him that all property in the vicinity of the Project went down in value more than other property in town.<sup>222</sup>

Mr. Grote testified that he owned several parcels of land in Franconia, and that a 1.53-acre building lot located 1,000 feet from his property on Route 116 was initially listed for sale at \$49,000, but eventually sold for \$25,000 because of the Project.<sup>223</sup>

It was also the opinion of many municipal witnesses from towns where the Project is proposed to be located that the Project would cause reductions in property values that would lead to abatements from the owners of those properties.<sup>224</sup>

#### **(6) The Effect of the Project on Tourism.**

The Applicants must also demonstrate whether or not the Project will unduly interfere with the orderly development of the region as it relates to tourism.<sup>225</sup> Tourism is one of the New

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<sup>220</sup> Tr. Day 59, PM at 19-24 (Powell).

<sup>221</sup> Tr. Day 59, AM at 88-90 (Ramsdell).

<sup>222</sup> Tr. Day 59, AM at 90-91 (Ramsdell).

<sup>223</sup> APOBP Ex. 10, Tr. Day 68, PM at 77-79 (Grote).

<sup>224</sup> JT Muni Ex. 95, Pre-filed Testimony of Wendy Hersom and Frank Lombardi at 8 (JTMUNI004517); JT Muni Ex. 102, Pre-filed Testimony of Deborah Stever at 2-2 (JTMUNI005159-JTMUNI004518); JT Muni Ex. 143, Pre-filed Testimony of Justine M. Courtemanche at JTMUNI006372).

<sup>225</sup> Site 301.09(b)(5).

Hampshire economy's largest components, particularly in northern New Hampshire where much of the Project would be located. Accounting for both direct and indirect spending, tourism adds billions of dollars to New Hampshire's economy each year.<sup>226</sup> In 2014, it accounted for approximately 90,000 jobs, which represented 10.2% of total state employment.<sup>227</sup> The State of New Hampshire invests significant funds in promoting the tourism economy.<sup>228</sup>

Applicants' expert, Mitch Nichols of Nichols Tourism Group, opined that "Northern Pass will not affect regional travel demand and it will not have a measurable effect on New Hampshire's tourism industry."<sup>229</sup> Mr. Nichols' based his opinion on his experience in the tourism industry "assisting destinations to strategically plan ways to maximize tourism's contribution to their economy,"<sup>230</sup> data on New Hampshire's tourism industry and three "study element[s]." Mr. Nichols' methodology and the reliability of his study elements were challenged. Counsel for the Public provided evidence that the Project would likely have a negative impact on tourism. Several municipal officials testified that the Project will adversely impact the tourism industry in their respective areas and the Subcommittee received written statements from out-of-state visitors,<sup>231</sup> from tourist businesses in New Hampshire and the Back

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<sup>226</sup> App. Ex. 1, Appendix 45, *Northern Pass Transmission and New Hampshire's Tourism Industry*, Nichols Tourism Group ("Nichols Report") at 11 (APP23724) (\$15.2 billion).

<sup>227</sup> App. Ex. 1, Appendix 45, Nichols Report at 11 (APP23724).

<sup>228</sup> CFP Ex. 146, Exhibit B, *Economic Impact Analysis and Review of the Proposed Northern Pass Transmission Project*, Kavet, Rockler & Associates, LLC ("KRA Report") at 63 (CFP006179).

<sup>229</sup> App. Ex. 31, Pre-filed Testimony of Mitch Nichols ("Nichols Testimony") at 5:11-12 (APP00663).

<sup>230</sup> App. Ex. 31, Nichols Testimony at 2:7-9 (APP00660).

<sup>231</sup> Including, but not limited to, Public Comment Letters from Elizabeth Taylor, Lincoln, MA dated May 17, 2017; Bridget Sweeney, Danvers, MA dated May 17, 2017; David Schoenberg, Redding, CT dated May 17, 2017; Ken Haberman, Watertown, CT dated December 22, 2017; Debra Brown, Mantua, NJ dated May 17, 2017; Joseph Egan, New Brunswick, NJ dated May 17, 2017; Charles Lee, Fort Smith, AZ dated May 17, 2017; Miles Moore, Alexandria, VA dated November 17, 2017; and David Jenkins, Oakton, VA dated December 19, 2017.



Country Hunters and Anglers Association stating that the Project would negatively impact tourism.<sup>232</sup>

**(a) Applicants' Position That There Will Be No  
Negative Impacts on Tourism.**

Mr. Nichols testified that the "Project will not affect regional tourism demand and it will not have a measurable effect on New Hampshire's tourism industry."<sup>233</sup> He looked at general tourism attributes of New Hampshire without reference to the Project or high-voltage transmission lines.<sup>234</sup> Mr. Nichols admitted the Project will adversely impact specific tourist attractions, as he acknowledged that there will be some "winners" and some "losers,"<sup>235</sup> but he did not study the impact on individual tourist destinations, nor did he study any specific region through which the Project will pass.<sup>236</sup>

Mr. Nichols does not have any experience evaluating the impact of transmission lines on specific tourist attractions or tourism economics in general.<sup>237</sup> Rather, Mr. Nichols' report is based on his experience in developing strategies to attract visitors to his clients' specific tourism destination, without an empirical analysis of the potential impacts.<sup>238</sup> In the limited analysis that Mr. Nichols performed where he attempted to use data, he did not include a specific region that would be impacted by the Project, town or business specific review.<sup>239</sup> Nor did he perform any

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<sup>232</sup> See, eg., Public comment letters from Franconia Inn dated December 2017, Lost River Campground dated June 22, 2017, Ski Fanatics, Inc. dated August 24, 2017 and Lost River Gorge & Boulder Caves dated July 26, 2017.

<sup>233</sup> App. Ex. 1, Appendix 45, Nichols Report at 31 (APP23744).

<sup>234</sup> App. Ex. 1, Appendix 45, Nichols Report at 5-6 (APP23718-APP23719).

<sup>235</sup> Tr. Day 22, AM at 142 (Nichols).

<sup>236</sup> Tr. Day 22, AM at 82 (Nichols).

<sup>237</sup> Tr. Day 21, AM at 27, 42, 106-107, 149-150 (Nichols).

<sup>238</sup> Tr. Day 21, AM at 46-47 (Nichols); Tr. Day 22, AM at 82 (Nichols).

<sup>239</sup> Tr. Day 22, AM at 82 (Nichols).

analysis on the impact on specific tourist destinations from the Project's impacts on scenic views.<sup>240</sup> Mr. Nichols was not familiar with the details of the construction of the Project, and he did not study or analyze the impact on tourism generally, or the impact on specific tourist destinations, from the two to three years of construction, including traffic delays in many tourist areas.<sup>241</sup> Mr. Nichols himself was not familiar with many specific tourist regions of New Hampshire.<sup>242</sup>

Mr. Nichols also based his opinion on his understanding that there are no studies that demonstrate a negative impact to tourism from transmission lines.<sup>243</sup> KRA discovered at least three studies that demonstrated an impact.<sup>244</sup> Even if Mr. Nichols had been correct, the absence of studies does not prove there is no impact.<sup>245</sup>

Mr. Nichols conducted four tourism industry interviews, or a "listening tour." However, there are problems with the way the listening tour was organized and conducted. The attendees were not selected by Mr. Nichols, but by a Project representative and a representative of the New Hampshire Travel Council.<sup>246</sup> There were few attendees at each meeting given the size of the Project.<sup>247</sup> The attendees did not represent a broad cross section of tourist related businesses or a broad cross section of different geographic locations through the 192-mile route. Critical entities

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<sup>240</sup> Tr. Day 21, AM at 14, 77, 84, 89 (Nichols); Tr. Day 22, AM at 11-12, 50-53 (Nichols); Tr. Day 22, PM at 14-16 (Nichols).

<sup>241</sup> Tr. Day 21, AM at 89-92 (Nichols).

<sup>242</sup> Tr. Day 21, AM at 122 (Nichols).

<sup>243</sup> App. Ex. 1, Appendix 45, Nichols Report at 9 (APP23722).

<sup>244</sup> CFP Ex. 146, KRA Report at 64-65 (CFP006180-CFP006181).

<sup>245</sup> CFP Ex. 146, KRA Report at 29 (CFP006145).

<sup>246</sup> Tr. Day 22, AM at 155-156 (Nichols).

<sup>247</sup> CFP Ex. 146, KRA Report at 29 (CFP006145).

like the New Hampshire Division of Parks and Recreation were not invited to these meetings.<sup>248</sup> Mr. Nichols reports that there were lots of people who expressed concern with the Project's impact on tourism.<sup>249</sup> Despite there being "no shortage of concern," Mr. Nichols dismissed these opinions because they provided no empirical support for this position.<sup>250</sup> However, it is unrealistic to expect persons invited to a "listening tour" meeting to have conducted their own research prior to the meeting. Presumably, the attendees were invited to provide their opinions based upon their experience in the New Hampshire tourism industry and not because of their research capabilities.

Mr. Nichols also based his opinion on a survey conducted to "better understand ... the attitudes of prospective New Hampshire visitors."<sup>251</sup> However, it was not a survey to determine visitors' reactions to the Project or to a high-voltage transmission line.<sup>252</sup> Moreover, the survey participants were paid to take the survey, and many of them did not have the income level of the type of visitor that Mr. Nichols admitted one seeks to attract to New Hampshire. Based on their characteristics, the survey likely skewed towards lower income respondents, which would not be an accurate representation of the New Hampshire tourist visitor.<sup>253</sup> Moreover, the survey's use of the term "power lines" in the only question relating to the Project was likely ambiguous enough to mislead respondents about the very infrastructure project Mr. Nichols was attempting to evaluate. The problems with the survey are exemplified by strange results, such as 12% of

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<sup>248</sup> Tr. Day 22, AM at 160-161 (Nichols).

<sup>249</sup> Tr. Day 22, AM at 161 (Nichols).

<sup>250</sup> App. Ex. 1, Appendix 45, Nichols Report at 17 (APP23730); Tr. Day 22, AM at 150 (Nichols).

<sup>251</sup> App. Ex. 1, Appendix 45, Nichols Report at 24 (APP23737).

<sup>252</sup> CFP Ex. 146, KRA Report at 36 (CFP006152); Tr. Day 21, PM at 27-28 (Nichols); Tr. Day 22, AM at 23-25 (Nichols); Tr. Day 22, PM at 116 (Nichols).

<sup>253</sup> CFP Ex. 146, KRA Report at 39 (CFP006155); Tr. Day 21, PM at 33-35 (Nichols).

respondents saying the presence of cell towers were key destination attributes; 9% of respondents reporting that visible power lines were a key destination attribute; and 6.2% of respondents stating that “possible traffic delays” were “an essential or very important benefit.”<sup>254</sup>

Mr. Nichols also conducted two case studies to determine if the construction and operation of high-voltage transmission lines impacted tourism economies. Mr. Nichols had never used this type of analysis before and he was not aware of anyone else who had used this type of analysis.<sup>255</sup> The first case study was of the Phase II transmission line in New Hampshire from 1985 through 1995.<sup>256</sup> Mr. Nichols compared “before” and “after” employment and establishment counts in selected tourism-related industries in the counties through which the Phase II line passes to counties in which the Phase II line does not pass.<sup>257</sup> In addition, Mr. Nichols used outdated SIC Codes from the Bureau of Labor Statistics. Those codes were replaced in 1997 by the North American Industrial Classification System, which is used by all federal statistic agencies to classify businesses.<sup>258</sup>

There are numerous problems with this study element. The analysis does not focus on the Project’s viewshed and included areas remote to the viewshed, which skewed the statistics;<sup>259</sup> the analysis did not account for an intervening recession;<sup>260</sup> the Phase II project was overhead in an existing transmission corridor;<sup>261</sup> and there were several fundamental methodological

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<sup>254</sup> App. Ex. 1, Appendix 45, Nichols Report at 26 (APP23739); CFP Ex. 146, KRA Report at 36-37 (CFP006152-CFP006153); Tr. Day 21, PM at 36-39 (Nichols); Tr. Day 22, AM at 163-166 (Nichols).

<sup>255</sup> Tr. Day 21, AM at 148-149 (Nichols).

<sup>256</sup> App. Ex. 1, Appendix 45, Nichols Report at 19-20 (APP23732-APP23733).

<sup>257</sup> App. Ex. 1, Appendix 45, App. Ex. 1, Appendix 45, Nichols Report at 19-20 (APP23732-APP23733).

<sup>258</sup> Tr. Day 21 AM, at 151-152 (Nichols).

<sup>259</sup> CFP Ex. 146, KRA Report 32 (CFP006148); Tr. Day 21, AM at 159-160 (Nichols).

<sup>260</sup> CFP Ex. 146, KRA Report 32 (CFP006148); Tr. Day 21, AM at 160-162 (Nichols).

<sup>261</sup> CFP Ex. 146, KRA Report 32 (CFP006148); Tr. Day 21, PM at 9-10 (Nichols).

errors.<sup>262</sup> Despite these problems, the corrected numbers do not show any meaningful difference between the two sets of counties.<sup>263</sup>

Applicants did not provide source data for the second case study, the Maine Power Reliability Project.<sup>264</sup> Thus, it is impossible to tell whether the study suffers from all of the same methodological problems. It does suffer from many of the same design problems, including not considering viewshed information and including significant tourist areas remote from the viewshed;<sup>265</sup> the MPRP being an overhead project in an existing corridor;<sup>266</sup> there being an intervening recession;<sup>267</sup> and problems with jobs included in the study.<sup>268</sup> Additionally, the study did not include any data from after construction was completed.<sup>269</sup> Thus, neither study is appropriate for making determinations about the impact of the Project.

**(b) Counsel for the Public's Experts Demonstrated That There Is Likely to Be an Impact on Tourism As a Result of the Project.**

The scenic beauty of New Hampshire is a primary destination attribute for potential tourists in their decision on whether to visit New Hampshire in general or any of its various regions.<sup>270</sup> Given that the Project will be introducing large industrial elements into many of New

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<sup>262</sup> CFP Ex. 146, KRA Report 33 (CFP006149); Tr. Day 21, AM at 147, 151, 152, 154-163 (Nichols); Tr. Day 21, PM at 5-6 (Nichols).

<sup>263</sup> CFP Ex. 146, KRA Report 35 (CFP006151).

<sup>264</sup> CFP Ex. 146, KRA Report 35 (CFP006151).

<sup>265</sup> CFP Ex. 146, KRA Report 35 (CFP006151); Tr. Day 21, PM at 11-27 (Nichols).

<sup>266</sup> Tr. Day 21, PM at 109 (Nichols).

<sup>267</sup> Tr. Day 21, PM at 16-17 (Nichols).

<sup>268</sup> CFP Ex. 146, KRA Report 35 (CFP006151); Tr. Day 21, PM at 18-24 (Nichols).

<sup>269</sup> CFP Ex. 146, KRA Report 35 (CFP006151); Tr. Day 21, PM at 20-24 (Nichols).

<sup>270</sup> CFP Ex. 146, KRA Report at 63 (CFP006179); App. Ex. 1, Appendix 45, Nichols Report at 25-26 (APP23738-APP23739).

Hampshire's scenic landscapes, it will create an incremental degradation of the landscape that is an important source of tourism visitation in a competitive market in the northeast.<sup>271</sup>

During the construction of the Project, the visual and noise impacts of construction and the traffic delays caused by lane and road closures and other construction activities will impact the experience of tourists and act as a barrier to their visitation of certain individual attractions.<sup>272</sup> The Applicants have not provided a specific traffic impact study or a traffic management plan, which would provide some insight into these impacts.<sup>273</sup> These impacts will be particularly felt by the Town of Plymouth and its various businesses given the complexity of the construction that needs to take place in that community as well as the towns of Bethlehem, where the gateway to the town's business district will be impacted, Franconia, where its main intersection will be impacted for up to five months, and Woodstock, where construction will occur at the busy intersection of Route 112 and Route 3, and continue down Route 3.<sup>274</sup>

Despite Mr. Nichols' insistence that there are no studies that demonstrate a negative impact on tourism from high-voltage transmission lines, at least three studies suggest that they can have a negative impact. These studies range in impact from an approximately 3% to 15% decrease in tourist visits.<sup>275</sup> This is supported by Mr. Nichols' survey, which found that "visible

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<sup>271</sup> CFP Ex. 146, KRA Report at 63-64 (CFP006179-CFP006180); Nichols report at 25 (APP23738-APP23739).

<sup>272</sup> CFP Ex. 146, KRA Report at 70 (CFP006186); Tr. Day 21, AM at 11-14, 18 (Nichols); Tr. Day 21, PM at 74-77 (Nichols); Tr. Day 22, AM at 130-131 (Nichols).

<sup>273</sup> Tr. Day 6, AM at 128, 148-151 (Farrington); Tr. Day 21, AM at 10 (Nichols); Tr. Day 22, AM at 131-135 (Nichols).

<sup>274</sup> CFP Ex. 146, KRA Report at 70 (CFP006186); Tr. Day 7, AM at 56-62 (Scott & Johnson).

<sup>275</sup> CFP Ex. 146, KRA Report at 64 (CFP006180) citing *The Impact of Transmission Lines on Property Values: Coming to Terms with Stigma*, by Peter Elliott and David Wadley, Property Management (2002); *Impacts Associated with the Proposed Susquehanna to Roseland Transmission Line*, National Park Service (2012); *Beaulieu-Denny Report Volume 1: Chapter 16 – Tourism, Recreation & Economic Impact*, Brian, et. al. (2009); *Economic Impact of Power-line Siting in Anza-Borrego Desert State Park*, Haefele (2015).

power lines” would be a “destination barrier” for 10% of respondents.<sup>276</sup> Additionally, as is specifically relevant for the underground section of the line, 19% of respondents said “possible traffic delays” would be a destination barrier.<sup>277</sup>

KRA used the range of impacts from the three studies (3% – 15%) as well as the opinions of two local tourism experts (Alice DeSouza, former State Director of Travel and Tourism, and Mark Okrant, Professor Emeritus and Program Coordinator for Graduate Studies in Hospitality and Tourism Management at Plymouth State University and former Director of the Institute for New Hampshire Studies) to estimate impacts to New Hampshire’s tourism economy. Using a 3% reduction in tourist visits, potential annual losses to New Hampshire would be about \$2.4 million.<sup>278</sup> If the impact was at the high end of the range, New Hampshire could lose approximately \$12 million.<sup>279</sup> Using a mid-point in this range, a phased in direct tourism spending reduction of 9% scaled to the area within the Project viewshed could result in direct spending losses of about \$10 million per year, and total economic impacts, including all secondary effects, that could approach average annual losses of more than \$9 million in GSP and the loss of nearly 190 jobs.<sup>280</sup>

Focusing specifically on the Great North Woods, a region that is heavily reliant on tourism, the impacts could be more pronounced. The reduction in direct spending could range from \$2.7 million to \$13.5 million.<sup>281</sup> In addition, certain areas could be significantly impacted

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<sup>276</sup> App. Ex. 1, Appendix 45, Nichols Report at 27 (APP23740).

<sup>277</sup> App. Ex. 1, Appendix 45, Nichols Report at 27 (APP23740).

<sup>278</sup> CFP Ex. 146, KRA Report at 67 (CFP006183).

<sup>279</sup> CFP Ex. 146, KRA Report at 67 (CFP006183).

<sup>280</sup> CFP Ex. 146, KRA Report at 67 (CFP006183).

<sup>281</sup> CFP Ex. 146, KRA Report at 69 (CFP006185).

during construction of the Project. The Town of Plymouth could experience reductions in income of \$3.1 million to \$9.6 million and the loss of 80 to 250 jobs.<sup>282</sup>

**(7)     The Effect of Construction Activities Required By the Project.**

In order for the Subcommittee to determine whether the Project will unduly interfere with the orderly development of the region, the Subcommittee must evaluate the impacts during the construction of the Project.<sup>283</sup> The Application and associated filings do not contain all of the information necessary to fully evaluate the impacts during construction of the overhead portions of the Project. For instance, without the location of laydown and staging areas or concrete batch plants, the full impact from traffic delays cannot be assessed. The Application also lacks sufficient information about the design and construction of the underground portion of the Project for the Subcommittee to fully assess the impact on orderly development from that construction. Specifically, there is insufficient information about the final design of the underground route, including the final location of open-trench construction, the location of splice vaults, and the required work areas for numerous HDD sites.

**(a)     The Project's Route.**

The Project includes 132 miles of overhead lines located in 30 miles of a new ROW from Pittsburg to Dummer on land purchased by Renewable Properties, Inc., an affiliate of Applicants, and 99.5 miles sharing an existing ROW with one or two other transmission lines and some distribution lines starting in Dummer. The Project includes .7 miles of underground at the Connecticut River and 7.5 miles of underground on municipal roads in Clarksville and

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<sup>282</sup> CFP Ex. 146, KRA Report at 71-72 (CFP006186-CFP006187).

<sup>283</sup> RSA 162-H:16, IV(b).



Stewartstown because Renewable Properties was unable to secure property rights in this area.<sup>284</sup>

The Project goes underground through the White Mountain National Forest beginning in Bethlehem and ending in Bridgewater. It also includes six (6) transition stations and a converter station in Franklin.

**(b) Construction of the Overhead Portion of the Project.**

The overhead portion of the Project includes 32 miles of new ROW. This new ROW will be 120-feet wide and require tree clearing.<sup>285</sup> The new ROW will have approximately 280 new lattice towers and nine (9) monopole towers, with heights ranging from 60 to 120 feet.<sup>286</sup> Construction vehicles required to build this portion of the Project include bulldozers, excavators and graders to clear the new ROW and level the access roads and crane pads; logging trucks and dump trucks to haul material; drilled-shaft excavators to drill tower holes and install concrete forms; flatbed trucks to deliver materials; concrete trucks; cranes to install towers; and worker vehicles. Each of the 280 lattice towers will require four to five concrete truck deliveries for a total of 1,120 to 1,400 concrete truck deliveries within the 32 miles.<sup>287</sup> Approximately 25 to 40 trips will be required to complete each lattice tower.<sup>288</sup>

In the 99.8 miles of existing ROW, the Project includes 891 towers, with a mixture of lattice towers, monopoles and H-frames, with heights ranging from 45 to 160 feet. Similar construction vehicles will be required, as well as an estimated 2,800 to 3,500 concrete truck

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<sup>284</sup> Tr. Day, AM at 100-101,105-106 (Quinlan); CFP Ex. 5.

<sup>285</sup> CFP Ex. 129, Exhibit D, *Northern Pass Transmission Line: Overhead Line Review*, Dewberry Engineers (“Dewberry Report-Aboveground”) at 5 (CFP002827).

<sup>286</sup> CFP Ex. 129, Dewberry Report-Aboveground at 5 (CFP002827).

<sup>287</sup> CFP Ex. 129, Dewberry Report-Aboveground at 7 (CFP002829).

<sup>288</sup> Tr. Day 10, AM at 60-61 (Bowes).

deliveries for the Project.<sup>289</sup> In addition, the relocation of existing lines within the 99.8 miles will require the use of construction vehicles and additional concrete deliveries. The ROW will be accessed from private access roads mostly in the far northern section and from public roads throughout the 132 miles of overhead.<sup>290</sup> Within the ROW, the Project will construct access roads between each structure that will be 12 to 16 feet wide gravel roads or timber mats in wetland areas. In addition, the Project will utilize a total of 25 laydown areas ranging from 5 to 50 acres along the 192-mile route as well as smaller staging areas.<sup>291</sup>

**(c) Impacts from Construction of the Overhead  
Portion of the Project.**

The construction of the overhead portion will cause both temporary and permanent impacts. Temporary impacts include increased traffic along the proposed route, which will cause traffic delays, particularly at access points. The full extent of this increased traffic and of traffic delays is not known because Applicants have not identified all of the laydown and staging areas where construction vehicles will be entering and exiting to travel to the ROW, and Applicants have not identified the location of batch plants from which concrete trucks will deliver concrete. Construction of the overhead portion also will result in soil tracking onto public roads, potential damage to public roads, particularly at access points, and increased noise.<sup>292</sup> Access points on local roads include narrow roads, some of which are in disrepair, which will impact traffic in these areas.<sup>293</sup> Construction of the overhead portion also will result in temporary and some

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<sup>289</sup> CFP Ex. 129, Dewberry Report-Aboveground at 7 (CFP002829).

<sup>290</sup> CFP Ex. 129, Dewberry Report-Aboveground at 6 (CFP002828).

<sup>291</sup> Tr. Day 10, PM at 93 (Bowes).

<sup>292</sup> CFP Ex. 129, Dewberry Report-Aboveground at 9 (CFP002831); Tr. Day 6, AM at 152-153 (Johnson).

<sup>293</sup> *E.g.*, Tr. Day 61, AM at 10-21 (Roberge); Tr. Day 66, PM at 157-169 (Robertson and Hartnett); Tr. Day 19, PM at 81093 (Lombardi and Hersom).

permanent impacts to wetlands, water bodies, tree and vegetation loss, loss of wildlife habitats and loss of wildlife. These impacts will be discussed in detail below.

**(d) Construction of the Underground Portion of the Project.**

Construction of the 60 miles of underground will include open-trench construction, installation of cable, installation of splice vaults, HDD drilling and micro-tunnel drilling, and road reconstruction. Open-trench construction and trenchless (HDD drilling) require major construction vehicles and equipment, all of which must be located within the road ROW. For open-trench construction, it is anticipated that Applicants will have several crews working simultaneously, with each crew using a rolling work zone of approximately 1,600 feet, and completing 20 to 100 feet of trench per day.<sup>294</sup> Among other things, open-trench construction will require excavators, dump trucks and concrete truck deliveries, flatbed trucks, cranes for splice vaults, cable trucks, asphalt trucks and asphalt rollers. Approximately every 1,600 feet along the 60 miles of underground construction, an 8-foot wide, 30-foot long and 8-foot tall concrete splice vault will be installed, requiring a 12 to 14-foot work area plus a 5-foot safety barrier. Approximately 153 splice vaults will be installed within the 60-mile underground portion of the route.<sup>295</sup>

During the open-trench construction, the Applicants acknowledged that one travel lane will be closed for each 1,600-foot rolling work zone.<sup>296</sup> In addition, traffic will be temporarily stopped each time a dump truck, a concrete truck or other construction vehicle enters or exits a work area. Each of the 153 splice vaults will be installed in two, precast concrete sections, all of

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<sup>294</sup> CFP Ex. 130, Exhibit B, *Northern Pass Transmission Line: Underground Line Review*, Dewberry Engineers (“Dewberry Report-Underground”) at 9 (CFP002943); Tr. Day 6, PM at 16 (Scott).

<sup>295</sup> CFP Ex. 130, Dewberry Report-Underground at 13, 15 (CFP002947, CFP002949).

<sup>296</sup> Tr. Day 6, PM at 121-122 (Farrington).

which will be delivered on flatbed trucks and lifted into place by a crane. The road will be closed and traffic stopped each time a section of the 153 splice vaults is lifted from a flatbed truck and placed in the excavation hole by a crane.<sup>297</sup> The work at each splice vault will take approximately seven days, including one day to mobilize, five days to splice the cable, and one day to demobilize.<sup>298</sup> Along the 52-mile underground route, one lane will be closed when there is work in an area.<sup>299</sup>

In addition to open trench construction, the Applicants propose to use HDD drilling and micro tunneling in 53 locations along the underground route. Each of the 53 HDD/micro-tunnel locations require an entry pit work zone that is clear and level and approximately 30-feet wide by 300-feet long.<sup>300</sup> Within this work area will be the drilling equipment and other construction equipment such as dump trucks, cranes, mud mixing units, mud pump and mud cleaning units, frac tanks and other equipment.<sup>301</sup> Each HDD drilling site will have an exit work area that will be approximately 30-feet wide by up to 1,170-feet long, depending upon the length of the drill.<sup>302</sup> Each of the HDD drilling sites will require tree removal in order to create the required level, stable areas for the entry and exit work areas.<sup>303</sup> At each of the HDD sites, at least one lane of traffic will be closed. Throughout the 7.5-mile section of underground section in Clarksville and Stewartstown, for each of the eight (8) HDD sites on the municipal roads, the roads will be

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<sup>297</sup> Tr. Day 50, AM at 21-23 (Zysk).

<sup>298</sup> Tr. Day 50, AM at 46-47 (Taylor).

<sup>299</sup> Tr. Day 42, AM at 66 (Johnson).

<sup>300</sup> Tr. Day 50, AM at 12-13 (Taylor); CFP Ex. 551 (Exception Request 184).

<sup>301</sup> CFP Ex. 130, Dewberry Report-Underground at 47 (CFP002981); Tr. Day 50, AM at 17-20 (Zysk).

<sup>302</sup> Tr. Day 50, AM at 12-13 (Taylor); CFP Ex. 574 (Exception Request 153).

<sup>303</sup> Tr. Day 50, AM at 12-13 (Taylor).

closed and traffic will be detoured during the HDD work.<sup>304</sup> Each HDD drilling operation in this area will take three to five weeks or four to six weeks.<sup>305</sup>

The underground construction will require an estimated 10,918 concrete truck deliveries, including 109 deliveries in the .7-mile section; 1,438 deliveries along the municipal roads in the 7.5-mile section; and 9,371 deliveries along the 52-mile section. In addition, this work will require an estimated 8,735 dump truck trips for the removal of native soils from the trench, including 86 trips for the .7-mile section, 1,151 trips for the 7.5-mile section, and 8,735 trips for the 52-mile section.<sup>306</sup>

The underground construction will require the installation of six (6) transition stations. Each transition station will cover approximately 75 by 130 feet, and will be enclosed by a perimeter security fence.<sup>307</sup> Each transition station will require equipment to clear and level the site, and to deliver material to construct the transition station. Transition Station No. 4 off-of Heath Road in Stewartstown will require blasting and the removal of approximately 60,000 to 75,000 yards of material, mostly ledge.<sup>308</sup>

**(e)     Impacts from Construction of the Underground Portion of the Project.**

There are several outstanding issues with the current plans for the underground construction. First, there is no accurate survey of state or local road ROW for much of the underground route.<sup>309</sup> The New Hampshire Department of Transportation (“NHDOT”) rejected

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<sup>304</sup> Tr. Day 50, AM at 12-54 (Taylor); CFP Ex. 228, 229, 30 and 231.

<sup>305</sup> Tr. Day 6, PM at 44 (Scott); Tr. Day 50, AM at 10-11, 16 (Taylor); CFP Ex. 574 (Exception Request No. 153).

<sup>306</sup> CFP Ex. 130, Dewberry Report-Underground at 19 (CFP002953).

<sup>307</sup> App. Ex. 1-1, Application at 31 (APP00053).

<sup>308</sup> Tr. Day 54, PM at 99-100 (Thompson).

<sup>309</sup> Tr. Day 42, AM at 117, 131 (Johnson); Tr. Day 43, AM at 44 (Johnson).

Applicants' survey and has required Applicants to conduct additional survey work.<sup>310</sup> At the time the record closed, Applicants had provided the NHDOT with a revised, draft survey for only two small sections, one of which inaccurately shows a 3-rod section of Route 3 in Plymouth as being 3½-rods wide.<sup>311</sup> Thus, for certain areas it is difficult to determine exactly where Applicants' can install the Project while remaining within the public ROW and whether any private property rights will be needed to construct the Project as proposed.

Applicants initially designed the underground route under the pavement of state roads in knowing violation of the NHDOT's Utility Accommodation Manual (UAM).<sup>312</sup> In redesigning the underground portion after the start of the adjudicative proceedings, the Applicants have had to diverge significantly from the UAM<sup>313</sup> and have submitted close to 200 exception requests to the UAM requirements and NHDOT conditions.<sup>314</sup> Based upon the initial design of the underground portion which was submitted with the Application and public meetings attended by Applicants, members of the public would not anticipate the burial of a high-voltage, direct-current transmission line outside of rural state and town roads. The Applicants did not contact towns for their input on design and construction, or notify host towns of the design change from primarily under the pavement to primarily outside the edge of pavement.<sup>315</sup>

There is no final design that includes the locations of all open trenches, splice pits, HDD pits and work areas, laydown areas, staging areas and excavation spoils areas.<sup>316</sup> There is no

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<sup>310</sup> CFP Ex. 493 (August 11, 2017 DOT Letter).

<sup>311</sup> Tr. Day 64, AM at 63-64 (Ahearn).

<sup>312</sup> Tr. Day 42, AM at 43-44 (Scott).

<sup>313</sup> Tr. Day 42, AM at 46 (Johnson).

<sup>314</sup> Tr. Day 42, AM at 46 (Johnson).

<sup>315</sup> Tr. Day 43, AM at 46 (Bowes).

<sup>316</sup> Tr. Day 42, AM at 46 (Johnson); Tr. Day 43, PM at 87-88 (Johnson and Bowes).

complete understanding of vegetation removal, tree trimming, or impacts to manmade structures.<sup>317</sup> The estimates for vegetative clearing only applied to cutting of trees greater than four inches in diameter; it did not apply to smaller vegetation or “tree trimming.”<sup>318</sup> As a result, there is no complete understanding as to the environmental impact of the construction of the underground portion of the line.<sup>319</sup> There also is no complete understanding of the impacts to traffic, business or state and community organizations, like Plymouth State University.<sup>320</sup> It also is difficult to evaluate the impact to scenic resources and historic sites.<sup>321</sup>

Expected impacts from the underground construction of the Project will be significant, including impacts to traffic for businesses, residences and travelers.<sup>322</sup> There will be numerous lane closures and some road closures with detours that will impact people traveling to and from residences and businesses.<sup>323</sup> Residents along and in the area of the 7.5-mile underground route will encounter road closures and detours up to 22 miles and 30 minutes during construction.<sup>324</sup> Residents along and in the area of the 52 miles of underground will encounter traffic delays along the entire route.<sup>325</sup> The intersection of Route 18 and Route 116 in Franconia, in the heart of Franconia’s business district, will have one lane of traffic in two directions for up to 20

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<sup>317</sup> Tr. Day 42, PM at 105 (Johnson); Tr. Day 43, PM at 11-12 (Johnson).

<sup>318</sup> Tr. Day 42, AM at 140 (Johnson); Tr. Day 43, PM at 26 (Bowes).

<sup>319</sup> Tr. Day 43, PM at 11-12, 53 (Johnson).

<sup>320</sup> Tr. Day 42, AM at 126 (Frazier); Tr. Day 43, PM at 33 (Johnson).

<sup>321</sup> Tr. Day 42, PM at 105-106 (Johnson); Tr. Day 43, PM at 15 (Johnson).

<sup>322</sup> CFP Ex. 130, Pre-filed Testimony of David Taylor (“Taylor Testimony-Underground”) at 6 (CFP002927); CFP Ex. 130, Dewberry Report-Underground at 47-48 (CFP002981-CFP002982).

<sup>323</sup> CFP Ex. 130, Taylor Testimony-Underground at 6 (CFP002927); CFP Ex. 130, Dewberry Report-Underground at 48 (CFP002982); Tr. Day 50, AM at 48-54 (Taylor); CFP Ex. 228-231.

<sup>324</sup> Tr. Day 54, AM at 112-116 (Thompson).

<sup>325</sup> Tr. Day 6, PM at 117 (Farrington) (temporary lights at each splice pit location).

weeks.<sup>326</sup> Traffic in Plymouth will be impacted by the two long HDD sites in north Plymouth at the busy intersection of Route 3 and Route 25, which will result in a lane closure for three to five weeks,<sup>327</sup> and the closing of a traffic lane in downtown Plymouth with the detour of traffic through narrow, local roads in a busy pedestrian area of Plymouth State University, the Plymouth Hospital and the fire station, all of which will negatively impact the flow of traffic throughout Plymouth and affect access to government buildings and business.<sup>328</sup> The lack of parking in downtown Plymouth will be especially difficult for disabled persons.<sup>329</sup>

Traffic delays in Bethlehem, Sugar Hill/Franconia, Woodstock and Plymouth will impact business in each of these areas, and will impact numerous town and regional events that are held throughout the construction season. Individual businesses directly on the Project's route, such as Harmon's Cheese & Country Store and Garnett Hill in Sugar Hill, the Franconia Inn, the Tamarack Tennis Camp in Easton, and the Lost River Campground and the Lost River Gorge & Boulder Caves in Woodstock, as well as businesses in Plymouth, will be directly impacted by construction.<sup>330</sup> Other businesses in the area, such as Polly's Pancakes, Heath's Greenhouse and Nursery in Sugar Hill and the Henry Whipple House in Bristol, will be indirectly impacted by construction because traffic delays will cause tourists and visitors to go elsewhere during construction.<sup>331</sup> Impacts to these businesses will have a ripple effect as they will impact vendors who supply material or services to these businesses as well as their employees. Applicants have not provided sufficient information to gauge the actual impacts to residents, businesses and

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<sup>326</sup> CFP Ex. 555(Exception Request 108); Tr. Day 42, AM at 67-68 (Johnson and Bowes).

<sup>327</sup> CFP Ex. 506 and 507 (Exception Requests Nos. 11A and 11B).

<sup>328</sup> Tr. Day 70, PM at 15-28 (Murphy).

<sup>329</sup> See Public Comment from Marcia Santore dated October 5, 2017.

<sup>330</sup> See Public Comment from Lost River Gorge & Boulder Caves dated July 21, 2017.

<sup>331</sup> Public Statement of Katherine Aldrich Cote with business letters dated July 20, 2017, and Tr. Day 68, AM or PM at 132-133 (Coates); Tr. Day 69, PM at 8-10 (Connors).



communities from the construction of the underground portions of the Project, as well as impacts to first responders such as police, fire and EMTs,<sup>332</sup> or the impacts to schools.<sup>333</sup>

The underground construction will also have physical impacts to neighbors and local infrastructure. It will cause dust and noise that can impact the quality of life to those living and working near the construction activities.<sup>334</sup> It may cause temporary access issues to businesses and residents. The construction will also cause visual impacts on many areas that depend on its aesthetic qualities.<sup>335</sup> The construction can also damage the road surfaces that the construction vehicles will be traveling over and working on.<sup>336</sup> The full impacts are difficult to gauge without final design plans for the underground portion, the locations of laydown and staging areas, or the location of batch plants for concrete.<sup>337</sup>

There also are long-term impacts that will occur if the underground portion of the Project is constructed. It is important that any refinishing of traveled surfaces – either repaving paved surfaces or rebuilding of dirt roads – are left in as good or better condition than before construction begins.<sup>338</sup> These areas should be repaved curb to curb by mill and overlaid methods.<sup>339</sup> Additionally, the removal of roadside vegetation and trees can have long-term

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<sup>332</sup> Tr. Day 68, AM at 44-48 (Meth); Tr. Day 65, AM at 40-46 (Thibault) and Tr. Day 64, PM at 10-15 (Campbell).

<sup>333</sup> Tr. Day 69, PM at 27-30 (Connors).

<sup>334</sup> CFP Ex. 130, Taylor Testimony-Underground at 7 (CFP002928); CFP Ex. 130, Dewberry Report-Underground at 49 (CFP002983).

<sup>335</sup> CFP Ex. 130, Taylor Testimony-Underground at 7 (CFP002928); CFP Ex. 130, Dewberry Report-Underground at 49 (CFP002983).

<sup>336</sup> CFP Ex. 130, Taylor Testimony-Underground at 6-7 (CFP002927-CFP002928); CFP Ex. 130, Dewberry Report-Underground at 48-49 (CFP002982-CFP002983).

<sup>337</sup> Tr. Day 42, AM at 46 (Johnson).

<sup>338</sup> CFP Ex. 130, Dewberry Report-Underground at 51 (CFP002985).

<sup>339</sup> CFP Ex. 130, Dewberry Report-Underground at 51 (CFP002985).

impacts, including to scenic byways and historic resources.<sup>340</sup> Mr. Martland testified that the Project will impact 45 miles of scenic byways in Coos County alone.<sup>341</sup>

Outstanding information that still needs to be produced includes (1) a final survey of the boundary of the road ROW; (2) a determination of the Applicants' requests for exceptions to the UAM and, as a result; (3) final design for the underground portion of the Project;<sup>342</sup> (4) the identification of laydown and staging areas that Applicants intend to use during construction;<sup>343</sup> (5) where blasting will be used;<sup>344</sup> (6) where excavation spoils areas will be located; and (7) where concrete batch plants will be located.<sup>345</sup> The Applicants also have not provided a traffic management plan to explain how impacts from the construction and traffic will be reduced or eliminated.<sup>346</sup>

Based on the information that is yet to be provided, there is not sufficient information to fully determine whether the construction of the underground will unduly interfere with the orderly development of the region, and there is not sufficient information to fully analyze temporary and permanent impacts from the underground construction.

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<sup>340</sup> CFP Ex. 130, Dewberry Report-Underground at 51 (CFP002985); Tr. Day 42, PM at 105 (Johnson).

<sup>341</sup> Tr. Day 63, AM at 110-112 (Martland).

<sup>342</sup> Tr. Day 42, AM at 46, 133 (Johnson).

<sup>343</sup> CFP Ex. 130, Taylor Testimony-Underground at 7 (CFP002928); CFP Ex. 130, Dewberry Report-Underground at 50 (CFP002984); Tr. Day 43, PM at 87 (Johnson and Bowes).

<sup>344</sup> Tr. Day 50, PM at 128 (Taylor).

<sup>345</sup> CFP Ex. 130, Pre-filed Testimony of David Taylor at 7 (CFP002928); Tr. Day 51, AM at 36-37 (Taylor).

<sup>346</sup> Tr. Day 42, AM at 125-126 (Frazier); CFP Ex. 130, Taylor Testimony-Underground at 8 (CFP002929).

**3.     The Provisions of, and Financial Assurances for, the Proposed Decommissioning Plan for the Proposed Facility.**

RSA 162-H:7, V(g) requires an application for a certificate of site and facility to “[d]escribe in reasonable detail the elements of and financial assurances for a facility decommissioning plan.” Site 301.08(d)(2) requires each application for an energy facility to provide “[a] facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates,” and further requires that “the decommissioning plan shall include each of the following:

- (a) A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;
- (b) The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;
- (c) All transformers shall be transported off-site; and
- (d) All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place”

Applicants sought a waiver of Site 301.08(d)(2) which the Subcommittee denied.<sup>347</sup> Applicants subsequently filed a decommissioning plan.

**a.     The Four Forms of Financial Assurance Listed in Site 301.08(d)(2)(b) Are the Only Four Forms of Financial Assurance Permitted.**

Site 301.08(d)(2)(b) specifically requires “[t]he provision of financial assurance *in the form of* an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an

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<sup>347</sup> *Id.* at 56:15-57:5; Order on Applicants’ Request For Partial Waivers Under the Newly Adopted SEC Rules, dated June 23, 2016, pp. 24-29 (“Applicants’ request to waive decommissioning requirements of Site 301.08(c)(2) is denied.”) (“*Waiver Order*”).

investment grade credit rating.” Site 301.08(d)(2)(b) (emphasis added). Applicants have argued that “[i]t is not obvious whether the list was intended to serve as representative examples of financial assurance or to be an exclusive list of the only acceptable forms of assurance,” but the use of the words “in the form of,” and the absence of any catchall or general language demonstrates that the four forms of financial assurance listed are the only four forms of financial assurance permitted.<sup>348</sup>

As the New Hampshire Supreme Court has explained, when legislators seek to craft a non-exhaustive list they generally employ phrases to that effect such as “the phrase ‘may include, but not be limited to’” or “‘for other purposes, such as.’” *Fisher v. Minichiello*, 155 N.H. 188, 192 (2007); *State v. Montgomery*, 144 N.H. 205, 208 (1999); *see also State v. Sideris*, 157 N.H. 258, 262 (2008). The phrase “in the form of” contrasts sharply with the catchall or general language found in non-exhaustive lists, and directs that absent waiver one of the four delineated forms of financial assurance must be provided.

Moreover, as Eversource successfully argued in *Appeal of Campaign of Ratepayers’ Rights*, 162 N.H. 245, 251 (2011) about a section of RSA 162-H, the “familiar axiom” of *expressio unius est exclusio alterius* is dispositive in this case. Where the legislature provided a list of forms of financial assurance that can be used it intended to exclude others. The SEC cannot add to that list “in the absence of a clear showing of legislative intent.” *Id.* The Applicants’ suggestion that what they believe is a redundancy indicates that the list is intended to be representative falls far short of the clear showing that *Campaign of Ratepayers’* held is required. What Applicants have previously proposed does not fall within any of the four

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<sup>348</sup> See Apps. Mtn. to Clarify dated March 24, 2017 at 2.

permissible forms of financial assurance and Applicants should be required to provide one of the four forms before they can be granted a certificate of site and facility.

**b. The Application Must Provide the Necessary Guarantees of Solvency and Completion of Future Decommissioning to Comply With RSA 162-H:7, V(g) and Site 301.08(d)(2).**

As noted above, Site 301.08(d)(2) requires various assurances of solvency and completion of future decommissioning that Applicants' TSA/HQ plan as presently proposed simply does not have. Site 301.08(d)(2)(a) requires "[a] description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials," to be submitted with the Application. As acknowledged by Mr. Ausere, under certain circumstances if NPT defaults under the TSA, no party is obligated to fund decommissioning of the Project.<sup>349</sup>

In addition, it is unknown what the financial status or viability of any of the entities will be 40 or more years from now. Site 301.08(d)(2)(a) expressly requires a "secure" source of funding to implement the plan before the Project is constructed. Applicants' plan to prepare a financial assurance plan decades from now does not account for the significant solvency risks inherent in such a plan. *See, e.g., In re Public Serv. Co. of N.H.*, 114 B.R. 820 (Bankr. D.N.H. 1990). A *secure* and sufficient source of funding is needed now, at the outset of the Project, "to ensure that local taxpayers will not be left with the financial burden of decommissioning in the event that the project becomes obsolete or unprofitable, and is abandoned at some future date."<sup>350</sup>

"The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating" must

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<sup>349</sup> Tr. Day 2, PM at 157-159 (Ausere).

<sup>350</sup> Waiver Order, at 28.

also be submitted with the Application. Site 301.08(d)(2)(b). This very specific requirement setting forth very specific forms of financial assurance ensures that a secure and independent source of funding is available irrespective of future developments. The TSA and NPT are simply too closely linked to the Project's success or failure to provide the same level of protection and thus does not satisfy the purpose of the rule. *See* Site 202.15.

Site 301.08(d)(2) provides an important framework that must be followed to ensure that once a project is no longer valuable or functional that project is not simply abandoned either by choice or by financial insolvency of the companies involved or for any other reason. In fact, one significant concern with Applicants' plan to rely on contractual obligations owed by HQ to Applicants is the inherent uncertainty imbedded in attempts to collect from international sovereign-owned entities. *See NML Capital, Ltd. V. Republic of Argentina*, 2016 U.S. Dist. LEXIS 26355 (S.D.N.Y. Mar. 2, 2016) (describing litigation to recover on Argentine government bonds defaulted in 1994 and as yet unpaid); MacDonald-Laurier Institute, *Provincial Solvency and Federal Obligations* (2012) at 5 (finding a probability of debt default by Québec over 30 years to be 1 in 3); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

If the Project is issued a certificate, Counsel for the Public suggest that the Subcommittee adopt a condition requiring that Eversource provide the necessary financial assurance to fund the decommissioning of the Project.

**4. The Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies.**

**a. Municipal and Regional Planning Commissions.**

The Subcommittee received testimony from representatives of several municipal planning boards and municipal planning directors. Each planning board member and municipal planner testified that the Project would interfere with the orderly development of their respective

regions or municipalities. Not a single planning board member, regional planning commission member, or municipal planning director testified that the Project would not unduly interfere with the orderly development of their municipality or their respective region. These planners and planning board members also testified that the Project was inconsistent with their respective master plans, zoning ordinances, and site plan regulations, and that the Project would unduly interfere with their respective land uses. Contrary to Mr. Varney's view that the Project would not unduly interfere with land use or in the orderly development of the region because the Project will be constructed in an existing ROW, planners and planning board members testified that the size of the transmission line and the increased intensity of the use of the ROW distinguishes the Project from the existing transmission line within the ROW.<sup>351</sup>

The City of Concord ("Concord") provides an example of the difference between Mr. Varney's review of municipal and planning documents and Concord's review of their planning documents. Mr. Varney's analysis of Concord's master plans, zoning ordinances and other planning studies was a summary of those documents without description of how they would be impacted by the Project.<sup>352</sup> He made no attempt to look at specific provisions in the documents and explain whether the Project would be consistent or inconsistent with those goals and directives.

Witnesses from Concord described specific ways that the Project is inconsistent with their master plan and other planning documents. Concord's Master Plan 2030 outlines a number of goals, including:

- Protecting and conserving important open space, environmentally sensitive areas, and natural resources outside the Urban Growth Boundary ("UGB");

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<sup>351</sup> Tr. Day 68, AM at 129-131 (Coates) and Tr. Day 69, PM at 79-81 (Lombardi).

<sup>352</sup> App. Ex. 121, *Review of Master Plans, Northern Pass Transmission Project*, March 2017 Working Draft, Normandeau Associates, Inc., at A-122 (APP60036).

- Promote orderly transition among land uses and separate or buffer incompatible uses to the greatest extent possible in order to limit or minimize undesirable impacts to adjacent land uses;
- Provide for the reservation of land area of adequate size and appropriate location for public facilities and utilities that will serve the future land uses; and
- Improve and enhance the overall appearance and aesthetics of the community inclusive of architectural features, streetscapes, landscapes and signage.<sup>353</sup>

Heather Shank, the Acting City Planner for Concord, described how the Project is inconsistent with Concord's buffering requirement and is out of scale with its surroundings.<sup>354</sup>

Ms. Shank also explained that the Project does not comply with the Housing Section of the Concord Master Plan. Specifically, it does not comply with the goal to "promote the maintenance and enhancement of existing and developing residential neighborhoods, and protect existing and developing residential areas from blighting influences and negative impacts that detract from their livability, quality and aesthetics."<sup>355</sup> This is because the new, taller, more visible line will travel through several single-family neighborhoods, rural properties, and multi-family neighborhoods.<sup>356</sup> Moreover, the Housing Section also has the goal to "Prevent the intrusion of inappropriate non-residential uses into residential neighborhoods and protect neighborhoods from negative influences of adjacent non-residential uses through regulation as well as the retention or installation of buffers between non-residential and residential uses."<sup>357</sup>

Ms. Shank further testified that the Project does not appear to comply with the overall vision for Concord's Master Plan. The overall vision encourages a higher concentration of

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<sup>353</sup> JT Muni Ex. 133, Testimony of Heather Shank ("Shank Testimony") at 3 (JTMUNI005992).

<sup>354</sup> JT Muni Ex. 133, Shank Testimony at 4-6 (JTMUNI005993-JTMUNI005995).

<sup>355</sup> JT Muni Ex. 133, Shank Testimony at 6 (JTMUNI005995); *see also* JT Muni Ex. 134, Exhibit 1, describing utility infrastructure as "blight."

<sup>356</sup> JT Muni Ex. 133, Shank Testimony at 6 (JTMUNI005995).

<sup>357</sup> JT Muni Ex. 133, Shank Testimony at 7 (JTMUNI005996).



development within the UGB and promotes preservation of rural landscapes and scenic views outside the UGB.<sup>358</sup> The Project could possibly limit growth within the UGB and impact rural landscapes and scenic views outside the UGB.<sup>359</sup>

Ms. McClure testified that Concord has a Conservation and Open Space Section in its Master Plan that details the City's views about development within its municipal boundaries.<sup>360</sup> Goals of this section are to "Maintain and enhance scenic views and natural vistas from the City's roads and public properties where possible" and to "preserve open space within the [UGB] to protect environmentally sensitive natural features, to provide non-structured recreational opportunities, and to serve as amenity features within neighborhoods."<sup>361</sup> Mr. McClure testified that the Project impacts a number of areas that are conserved as open spaces and some that are identified for conservation efforts.<sup>362</sup> For example, the Project crosses the Turtle Pond conservation area and crosses about twelve (12) other parcels of open space land protected either by easement or city ownership.<sup>363</sup> The Project also impacts a parcel that is intended to provide linkage from the UGB to the open space parcels.<sup>364</sup> Concord's viewshed analysis confirms that the Project will significantly impact these residential and open space areas.<sup>365</sup>

The Subcommittee also received testimony from planners and planning board members from Whitefield (Frank Lombardi), Easton (James Collier), Plymouth (Brian Murphy), Bristol

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<sup>358</sup> JT Muni Ex. 133, Shank Testimony at 7 (JTMUNI005996).

<sup>359</sup> JT Muni Ex. 133, Shank Testimony at 8 (JTMUNI005997).

<sup>360</sup> JT Muni Ex. 135, Testimony of Jan McClure and Kristine Tardiff, November 15, 2016 ("McClure/Tardiff Testimony 11/15/16"), at 9 (JTMUNI006032).

<sup>361</sup> JT Muni Ex. 135, McClure/Tardiff Testimony 11/15/16 at 9 (JTMUNI006032).

<sup>362</sup> JT Muni Ex. 135, McClure/Tardiff Testimony 11/15/16 at 9 (JTMUNI006032) and Exhibit B.

<sup>363</sup> JT Muni Ex. 135, McClure/Tardiff Testimony 11/15/16 at 10 (JTMUNI006033).

<sup>364</sup> JT Muni Ex. 135, McClure/Tardiff Testimony 11/15/16 at 10-11 (JTMUNI006033-JTMUNI006034).

<sup>365</sup> JT Muni Ex. 136, Testimony of Jan McClure and Kristine Tardiff, December 30, 2016 ("McClure/Tardiff Testimony 12/30/16"), at 2-3 (JTMUNI006118-JTMUNI006119).

(Nicholas Coates), New Hampton (Kenneth Kettenring), Pembroke (Stephanie Verdile) and Deerfield (Kate Hartnett), all of whom testified that the Project would unduly interfere with the orderly development in their respective regions, and would be inconsistent with their respective master plans and other land use regulations. Many municipal representatives testified that the Project would adversely impact the rural character of their town, such as Deerfield and Pembroke, or impact their village atmosphere, such as the Whitefield town common.

Mr. Varney testified that the Project was consistent with the municipal master plans because the master plans did not address transmission lines. Several planners and planning board members disagreed. For example, Stephanie Verdile, Pembroke's professional planner, testified that a master plan identifies things that a community wants and where a community wants development, and that from that master plan, the planning and zoning boards develop specific regulations that meet those wants.<sup>366</sup> Mr. Verdile also testified that a master plan cannot account for every type of use, such as nuclear power plants, and that it is not appropriate to say that a particular use such as a transmission line is not inconsistent with a master plan because the master plan does not specifically address transmission lines.<sup>367</sup>

**b. Municipal Governing Bodies.**

The Project would pass through 31 municipalities and unincorporated places. Twenty-two of the municipalities and unincorporated places intervened to oppose the Project. The Subcommittee received evidence that numerous towns have passed warrant articles in opposition to the Project, and have approved funding to oppose the Project. The Subcommittee also received evidence that residents in some municipalities signed petitions in opposition to the

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<sup>366</sup> Tr. Day 58, PM at 102-105 (Verdile).

<sup>367</sup> Tr. Day 58, PM at 102-105 (Verdile).

Project (New Hampton – 700 signatures,<sup>368</sup> Plymouth – 6,554 signatures<sup>369</sup> and Whitefield – 535 signatures).<sup>370</sup>

The Subcommittee also received testimony from the Board of Selection (municipal governing body) from 13 host towns, the City of Concord and the City of Franklin. Other than the City of Franklin, each municipal governing body testified that the Project would unduly interfere with the orderly development of their respective municipality and region.

Representatives of municipal governing bodies from the towns of Pittsburg (Steve Ellis), Stewartstown (Allen Coates), Whitefield (Wendy Hersom), Bethlehem (Cassandra Laleme), Sugar Hill (Margaret Connors), Franconia (Eric Meth), Easton (Robert Thibault), Plymouth (Brian Murphy), Bristol (Nicholas Coates), New Hampton (Neil Irvine and Barbara Lucas), Concord (Gail Matson and Candace Bouchard), Pembroke (David Jodoin) and Deerfield (R. Andrew Robertson) all testified that the Project would unduly interfere with the orderly development in their respective regions, and would be inconsistent with their respective master plans and other land use regulations. Many town representatives testified that the scale of the Project (tower heights) and increased intensity of the use of the ROW distinguished the Project from the existing transmission line.<sup>371</sup> Many municipal representatives testified that construction vehicles would impact traffic and may damage town roads, particularly Class VI roads.<sup>372</sup> Municipal representatives also testified that the construction of the Project would interfere with local and regional events, and would adversely impact local businesses and their tourism

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<sup>368</sup> Tr. Day 64, PM at \_\_\_\_\_.

<sup>369</sup> Tr. Day 70, PM at \_\_\_\_\_.

<sup>370</sup> Tr. Day 69, PM at 94-96

<sup>371</sup> Tr. Day 68, AM at 129-131 (Coates) and Tr. Day 69, PM at 79-81 (Lombardi).

<sup>372</sup> Tr. Day 58, PM at 124-129 (Verdile and Heiser).

industry.<sup>373</sup> Several municipal representatives testified about their concern with construction adversely affecting their aquifers, such as Easton,<sup>374</sup> or other important water bodies, such as the Gale River in Sugar Hill and Franconia.<sup>375</sup>

## **5. Summary.**

In Summary, energy market benefits are uncertain, but they could reduce electric rates for New Hampshire ratepayers for several years. Construction of the Project will, in the short term, increase New Hampshire's GSP and jobs, but less than estimated by the Applicants. Applicants' evidence that the Project will not impact property values or tourism is not persuasive as there is likely to be a negative impact on both. The Project will pay property taxes to host communities, but the exact amounts and for how long is uncertain. The host municipalities overwhelmingly oppose the Project and believe that it is inconsistent with their master plans and that it will unduly interfere with the orderly development of their respective regions.

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<sup>373</sup> Tr. Day 68, AM at 31-34 (Meth)

<sup>374</sup> Tr. Day 65, AM at 54 (Collier).

<sup>375</sup> Tr. Day 69, PM at 21-25(Connors).

**[PART III-C]**

**C. EFFECTS ON AESTHETICS, HISTORIC SITES, AIR AND WATER QUALITY, THE NATURAL ENVIRONMENT AND PUBLIC HEALTH AND SAFETY.**

The third specific requirement of RSA 162-H:16, IV that must be met before the Subcommittee can issue a certificate is that the Subcommittee must find that “[t]he site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.” RSA 162-H:16, IV(c). There are numerous components and sub-components to this specific finding. The below sub-sections highlight those areas of relevance for the Subcommittee’s determination that Counsel for the Public asserts deserve the Subcommittee’s particular focus and consideration.

**[PART III-C-1]**

**1. Effects on Aesthetics.**

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on aesthetics.” Site 301.05 provides further details, setting forth specific “application requirements.” Among these requirements, Site 301.05 requires Applicants to provide a “[v]isual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.”

The required visual impact assessment must also contain specific components, including but not limited to “[a]n identification of all **scenic resources** within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible.” Site 301.05(b)(5) (emphasis added). As part of its determinations in these proceedings, the Subcommittee will have to interpret its own rule on this issue and decide what is meant by “scenic resources” in Site 301.05(b)(5). That determination will be critical to the Subcommittee’s determination of whether the Applicants have provided sufficient information on all scenic resources. Attached as Addendum A is Counsel for the Public’s legal analysis on the interpretation of the defined term “scenic resources” to aid the Subcommittee in its determination.

The required visual impact assessment must also contain “[a] characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low,” based on consideration of various identified factors. Site 301.05(b)(6). The required visual impact

assessment must also contain “[p]hotosimulations from (a) representative key observation points, from (b) other scenic resources for which the potential visual impacts are characterized as ‘high’ pursuant to (6) above, and, to the extent feasible, from (c) a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility.” Site 301.05(b)(7).

Applicants retained Terrance J. DeWan and Terrance J. DeWan & Associates (“DeWan”) as their aesthetics expert. DeWan’s assessment of the Project’s effect on aesthetics was incomplete because DeWan failed to identify scenic resources and otherwise screened out scenic resources that should be considered when assessing the Project’s impact on aesthetics. DeWan also failed to perform certain analyses that are necessary to assess the Project’s effect on aesthetics. Counsel for the Public will first discuss these problems with DeWan’s methodology and DeWan’s conclusions and then discuss Counsel for the Public’s expert T.J. Boyle Associates, LLC’s (“TJBA”) assessment of the Project’s effect on aesthetics.

**a. Applicants’ Methodology Failed to Identify Numerous Scenic Resources Potentially Impacted by the Project.**

**(1) Applicants’ Definition of Public Access Is Too Narrow.**

In order to conduct the visual impact assessment, DeWan started with an inventory of scenic resources. Under the SEC rule’s definition, a “scenic resource” must have a “legal right of access” for the public.<sup>376</sup> DeWan’s application of this standard was so limited that it excluded

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<sup>376</sup> Site 102.45.

many potential scenic resources.<sup>377</sup> Although there was significant inconsistency when Mr. DeWan was cross-examined,<sup>378</sup> his identification of scenic resources seemed to exclude all resources where the public had visual, but not physical, access to the resource.<sup>379</sup> The SEC should conclude that scenic resources include any resource to which the public has visual access.<sup>380</sup> Indeed, it is impacts to the scenic view from a publicly accessible place, and not impacts to the viewpoint that is relevant to a review of adverse aesthetic effects.

If DeWan had used a broad definition of “public access,” as did TJBA, DeWan would have identified many more resources. For example, the public has access to current use parcels,<sup>381</sup> town forests, and certain water bodies,<sup>382</sup> like Thurston Pond.<sup>383</sup> DeWan did not include any place that required the payment of a fee, such as state parks.<sup>384</sup> There are other resources to which the public has visual access and which should also be considered scenic resources, but were not considered by DeWan. Examples of these are scenic by-ways,<sup>385</sup> farms,<sup>386</sup> and historic sites, districts and landscapes.<sup>387</sup> By narrowly defining public access, DeWan failed to access the Project’s aesthetic effect on many scenic resources along the route.

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<sup>377</sup> CFP Ex. 138, Exhibit CFP-Boyle-4, *Review of the Northern Pass Transmission Line Visual Impact Assessment*, T.J. Boyle Associates, LLC (“Boyle Report”) at 10 (CFP 003743); Tr. Day 30, PM at 66-68 (DeWan); Tr. Day 31, PM at 25 (DeWan); Tr. Day 32, AM at 62-63 (DeWan).

<sup>378</sup> Tr. Day 30, PM at 75-76 (DeWan) (stating people had visual access to scenic view from scenic byways).

<sup>379</sup> Tr. Day 30, PM at 66-68 (DeWan); Tr. Day 31, PM at 25 (DeWan); Tr. Day 32, AM at 62-63 (DeWan).

<sup>380</sup> Tr. Day 30, PM at 66-68 (DeWan); Tr. Day 32, AM at 62-63 (DeWan).

<sup>381</sup> Tr. Day 30, PM at 66-67 (DeWan).

<sup>382</sup> Tr. Day 30, PM at 81-82 (DeWan).

<sup>383</sup> Tr. Day 31, AM at 16 (DeWan).

<sup>384</sup> Tr. Day 34, AM at 124-125 (DeWan).

<sup>385</sup> Tr. Day 30, PM at 75-76 (DeWan).

<sup>386</sup> Tr. Day 30, PM at 110 (DeWan).



The *Antrim Wind* subcommittee determined that a scenic resource did not have “public access” if the public had to pay a fee in order to access it.<sup>388</sup> As discussed during the evidentiary hearings in this docket, such a decision in this case would be inappropriate because many of the locations that are clearly “scenic resources” impacted by the Project require that the public pay a fee to access.<sup>389</sup> Moreover, the length of the Project, the width of its cleared corridor and the size of its towers create a significant landscape level impact that can adversely impact important resources like state parks and grand hotels that rely primarily on the scenic beauty of their surroundings.

**(2) Applicants’ Research on Scenic Resources Was Inadequate and Inappropriately Relied Solely on Designated Resources.**

It is necessary to conduct research when identifying scenic resources. DeWan admitted that in doing this research, he only relied on materials published and available without needing to visit local communities.<sup>390</sup> This mainly involved looking at master plans and conservation plans.<sup>391</sup> He did not attempt to reach out to towns, local organizations or individuals to assist in the identification of scenic resources.<sup>392</sup> DeWan did not attend any public informational

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<sup>387</sup> Tr. Day 30, PM at 112 (DeWan).

<sup>388</sup> *Antrim Wind* Order at 118.

<sup>389</sup> Tr. Day 47, AM at 57 (Mountain View Grand) and 132 (State Parks).

<sup>390</sup> Tr. Day 30, PM at 130 (Kimball); Tr. Day 32, AM at 15, 107-108 (DeWan & Kimball).

<sup>391</sup> Tr. Day 30, PM at 67 (Kimball); Tr. Day 32, AM at 106-108 (DeWan & Kimball).

<sup>392</sup> Tr. Day 31, Am at 72 (DeWan); Tr. Day 32, AM at 106-108 (DeWan & Kimball); CFP Ex. 138, Boyle Report at 47 (CFP003780).

meetings about the Project prior to submitting the VIA.<sup>393</sup> Nor were any surveys conducted of the actual users of the potential resources.<sup>394</sup>

As a result, DeWan severely limited certain statutorily identified resources by only including resources that had received an official designation.<sup>395</sup> Thus, in the case of roads, only state designated scenic byways were included.<sup>396</sup> As for historic sites, only sites that were on the National Register or eligible for the National Register were included.<sup>397</sup> Neither DeWan nor his associates are historic or cultural resources experts and they only did minimal consultation with the Applicants' historic resources experts to identify historic sites.<sup>398</sup> There is even evidence that DeWan missed identifying certain resources that were designated on the National Register or identified as a designated river.<sup>399</sup> This designation requirement employed by DeWan also excluded many publicly accessible recreation areas.<sup>400</sup>

**(3) Any Difficulty of Identifying All Scenic Resources  
Should Not Excuse Applicants From Identifying Them.**

DeWan testified on cross-examination that reviewing all of the resources identified with a broader definition of scenic resource would have been difficult and taken too long.<sup>401</sup> DeWan had the same reaction to performing surveys of the use and enjoyment of the resources.<sup>402</sup> He

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<sup>393</sup> Tr. Day 31, PM at 135-136 (DeWan).

<sup>394</sup> Tr. Day 31, AM at 72 (DeWan).

<sup>395</sup> CFP Ex. 138, Boyle Report at 10 (CPF003743); Tr. Day 30, AM at 72 (DeWan); Tr. Day 33, AM at 104 (DeWan).

<sup>396</sup> Tr. Day 30, PM at 73 (DeWan).

<sup>397</sup> Tr. Day 30, PM at 108 (Kimball).

<sup>398</sup> Tr. Day 31, PM at 126-127 (DeWan).

<sup>399</sup> Tr. Day 32, PM at 16, 53-54 (DeWan).

<sup>400</sup> Tr. Day 31, AM at 20-24 (DeWan & Kimball); Tr. Day 34, AM at 7-9 (DeWan).

<sup>401</sup> Tr. Day 30, PM at 95-96 (DeWan).

<sup>402</sup> Tr. Day 31, AM at 79 (DeWan).

even stated that he screened resources that he did not think the Subcommittee would be interested in,<sup>403</sup> thereby depriving the Subcommittee of the opportunity to make its own independent judgment. Overall, DeWan's identification of scenic resources severely limited the number and scope of resources considered in his evaluation, and does not provide the Subcommittee with an assessment of all scenic resources along the route that is necessary to fully evaluate the Project's effect on aesthetics.

**b. Applicants' Methodology Screened Out Scenic Resources With Potential Visibility.**

**(1) Applicants' Viewshed Analysis Is Too Narrow.**

Following identification of scenic resources, the next step is to determine whether the Project is visible from or in the view of any of the identified scenic resources. Again, DeWan's methodology limited this analysis to eliminate resources impacted by the Project.

The area of potential visual impact ("APVI") was originally set by DeWan at three miles, with a viewshed analysis extended out to five miles. DeWan found 525 resources in this study area.<sup>404</sup> After the new SEC rules were adopted, this APVI was extended to ten miles.<sup>405</sup> When the search area was increased, this only added an additional 72 scenic resources.<sup>406</sup> Rather than expand the search area to 10 miles as required by Site 301.05(b)(4)d(2), DeWan only went out five miles, testifying that they did not go out the 10 miles because they determined that there

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<sup>403</sup> Tr. Day 30, PM at 97 (DeWan).

<sup>404</sup> App. Ex. 16, Pre-filed Direct Testimony of DeWan & Kimball ("DeWan/Kimball Testimony") at 11 (APP00312).

<sup>405</sup> Tr. Day 30, PM at 60 (DeWan).

<sup>406</sup> Tr. Day 30, PM at 60 (DeWan).

would be no visibility or effects beyond five miles.<sup>407</sup> When looking at the extended study area (10 miles), TJBA identified significantly more resources than DeWan considered.<sup>408</sup>

Another concern raised with DeWan's analysis is the use of specific points as opposed to polygons when determining visibility.<sup>409</sup> This is not resolved by using a 50-foot radius around each specific point.<sup>410</sup> Additionally, DeWan's failure to use a bare-earth model in viewshed mapping under identified resources that have potential visibility.<sup>411</sup> Using a bare-earth model accounts for long-term changes in the setting that can occur from loss or removal of intervening vegetation or structures.<sup>412</sup> As pointed out by TJBA, even the model's use of screening vegetation contained errors and likely overstated the ability to screen views of the Project.<sup>413</sup> Thus, the determination of visibility by DeWan drastically understated how the Project will impact identified resources.

**(2) Applicants Inappropriately Applied a Significance Test to Screen Out Impacted Scenic Resources.**

The next step that DeWan applied was a determination of significance. This is not a step contemplated by the SEC rules and further eliminated scenic resources from evaluation. In doing this significance analysis, DeWan departed from typical ranking forms that he has used for other similar projects.<sup>414</sup>

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<sup>407</sup> Tr. Day 30, PM at 81-84 (DeWan).

<sup>408</sup> CFP Ex. 138, Boyle Report at 81 (CFP003814).

<sup>409</sup> CFP Ex. 138, Boyle Report at 18 (CFP003751); Tr. Day 32, AM at 128 (DeWan).

<sup>410</sup> CFP Ex. 138, Boyle Report at 18 (CFP003751).

<sup>411</sup> CFP Ex. 138, Boyle Report at 15-16 (CFP003748-CFP003749); Tr. Day 30, PM at 57-59 (DeWan & Kimball).

<sup>412</sup> Tr. Day 31, PM at 171-174 (DeWan).

<sup>413</sup> CFP Ex. 138, Boyle Report at 16-17 (CFP003749-CFP003750).

<sup>414</sup> Tr. Day 31, AM at 38 (DeWan).

The first step that DeWan applied in evaluating significance was to assign a cultural value ranking to each remaining scenic resource. This is also not a factor contemplated by the SEC rules.<sup>415</sup> DeWan stated that the inclusion of this factor was to get to the “end game,” truncating a methodology he laid out in his analysis.<sup>416</sup> As described in his cross-examination, the cultural value ranking methodology only valued resources that were designated for their state or national significance.<sup>417</sup> This means important local scenic resources like town forests and conservation easements were filtered out and not analyzed for visual impacts.<sup>418</sup> This is despite the fact that New Hampshire residents rate wildlife viewing as one of the most important activities and such wildlife viewing is likely to occur in local scenic areas.<sup>419</sup> As noted earlier, neither Mr. DeWan nor his associates have expertise in identifying or evaluating cultural resources.<sup>420</sup>

**c. Applicants’ Methodology Unreasonably Undervalued Visual Effects of the Project.**

In addition to failing to identify potential scenic resources and screening out scenic resources with visibility of the Project prior to analyzing visual effects, DeWan’s methodology for assessing visual effects was overly restrictive such that very few scenic resources could ever

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<sup>415</sup> CFP Ex. 138, Boyle Report at 20 (CFP003753).

<sup>416</sup> Tr. Day 31, AM at 38 (DeWan).

<sup>417</sup> App. Ex. 1, Appendix 17, DeWan VIA at M-8 (APP14316); CFP Ex. 138, Boyle Report at 19-20 (CFP003752-CFP003753).

<sup>418</sup> Tr. Day 31, AM at 19-20, 39-40 (DeWan & Kimball); Tr. Day 33, AM at 97-99 (DeWan); Tr. Day 35, AM at 49-50 (Kimball).

<sup>419</sup> CFP Ex. 458 at 74 (CFP013191); Tr. Day 31, AM at 40 (DeWan).

<sup>420</sup> Tr. Day 31, PM at 128 (DeWan).

achieve an overall visual impact rating of “high.” Indeed, out of the 525 scenic resources initially identified by DeWan, none received an overall visual impact rating of “high.”<sup>421</sup>

**(1) Applicants’ Expert Did Not Gauge User Impact by  
Surveying Actual Users.**

In the next step to evaluating visual impacts, DeWan evaluated the effect on the viewer/user of the scenic resource. Once again, DeWan included factors not included in the SEC’s rules.<sup>422</sup> By including multiple factors DeWan’s methodology dilutes the impact assessment rating for resources that show higher rankings in one or two factors.<sup>423</sup>

One component of determining viewer effect for DeWan is to evaluate the “extent, duration and use” of the remaining scenic resources. In doing this, DeWan did not engage the public, instead relying on their subjective professional judgment after fieldwork.<sup>424</sup> This was despite the fact that Mr. DeWan’s professional judgment has been unreliable.<sup>425</sup> DeWan and the Applicants rejected performing intercept surveys to understand how actual viewers used those scenic resources,<sup>426</sup> because the surveys would have been too hard since the Project is so large and the Applicants were worried about potential bias against the Project.<sup>427</sup> However, DeWan has often utilized such surveys to determine viewer use of scenic resources in many similar

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<sup>421</sup> App. Ex. 16, DeWan/Kimball Testimony at 23-24 (APP00324-APP00325) (“None of the overall visual impacts to scenic resources that we observed were characterized as ‘high,’ based upon [our] methodology.”).

<sup>422</sup> Tr. Day 31, AM at 46 (DeWan).

<sup>423</sup> Tr. Day 31, AM at 46-50 (DeWan).

<sup>424</sup> Tr. Day 31, AM at 72 (DeWan); CFP Ex. 138, Boyle Report at 47 (CFP003780); Tr. Day 35, AM at 42 (DeWan).

<sup>425</sup> Tr. Day 31, AM at 87-88 (DeWan); CFP Ex. 444 at 5 (CFP012245).

<sup>426</sup> Tr. Day 31, AM at 72 (DeWan); Tr. Day 33, AM at 19-20 (DeWan); CFP Ex. 138, Boyle Report at 47 (CFP003780); Tr. Day 35, AM at 42 (DeWan).

<sup>427</sup> Tr. Day 31, AM at 79 (DeWan); Tr. Day 33, AM at 19-20 (DeWan).

projects.<sup>428</sup> Another reason revealed at the hearings as to why Applicants may not have conducted such surveys is because they indicate transmission lines have high negative impacts.<sup>429</sup> TJBA conducted workshops to help gain such insights into how viewers use the scenic resource.<sup>430</sup>

The second component that DeWan used to determine the effects on viewers was to evaluate the Project's impact on the use and enjoyment of the scenic resource. As with the extent, duration and use of the resource, DeWan failed to gauge future use and enjoyment by talking to the users and viewers of the scenic resource.<sup>431</sup> Moreover, they did not consider the user's enjoyment of the impacted resource, just their estimation of the future use of the resource.<sup>432</sup> Making it even harder to determine how this evaluation was made, DeWan provided no methodology as to how it was performed.<sup>433</sup>

Site 301.05(b)(6)(b) requires the visual impact assessment to consider "the effect [the project will have] on future use and enjoyment of the scenic resource." DeWan admitted in his testimony that continued use may be different from a user's continued enjoyment of that resource, post construction.<sup>434</sup> Despite that, DeWan ultimately combined the two when he found this Project would have either no effect or a low effect on the public's future use and enjoyment

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<sup>428</sup> Tr. Day 31, AM at 72-79 (DeWan).

<sup>429</sup> Tr. Day 31, AM at 72-79 (DeWan); CFP Ex. 445 at 59 (CFP012401); CFP Ex. 446 at 16-18 (CFP0012484-CFP0012486).

<sup>430</sup> CFP Ex. 138, Boyle Report at 70-72 (CFP003803-CFP003805).

<sup>431</sup> Tr. Day 31, AM at 72-79 (DeWan); Boyle Report at 48 (CFP003781); Tr. Day 34, AM at 33 (DeWan).

<sup>432</sup> Tr. Day 31, PM at 59-60 (DeWan).

<sup>433</sup> CFP Ex. 138, Boyle Report at 48 (CFP003781).

<sup>434</sup> Tr. Day 31 PM at 7 (DeWan).

of resources impacted by the Project.<sup>435</sup> In essence, DeWan testified repeatedly that people would still fish, still drive the byways, and still attend the Deerfield Church regardless of the presence of structures and DeWan did not distinguish or rate the diminishment of their “enjoyment” post construction despite Site 301.05(b)(6)(b)’s requirement, which breaks out the effect on future enjoyment from future use. DeWan’s testimony to this effect stands in stark contrast to his admissions that the public has a pretty strong negative opinion as to the impact this Project will have on aesthetics.<sup>436</sup>

**(2) DeWan’s Methodology to Arrive at an Overall Visual Impact Rating Was Unclear.**

Finally, to determine the overall visual impact rating, DeWan used a process of combining the ratings for (1) visual effect, (2) extent, nature and duration, and (3) continued use and enjoyment. Unfortunately, there was no explanation that states the principles or logic used to combine these ratings and come up with a final determination.<sup>437</sup> This calls into question why these rankings were performed if there was not an objective and logical method of utilizing those rankings. As stated above, the outcome of DeWan’s overly complex rating scheme was a finding that none of the scenic resources assessed achieved an overall visual impact rating of “high.”<sup>438</sup>

**d. DeWan’s Overall Conclusion Regarding Unreasonable Adverse Impacts Is Not Explained.**

Site 301.14 (*Criteria Relative to Findings of Unreasonable Adverse Effects*) sets forth seven (7) factors the Subcommittee shall consider in determining whether the Project will have

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<sup>435</sup> CFP Ex. 138, Boyle Report at 48 (CFP003781).

<sup>436</sup> Day 35 AM, at 121-122, lines 22-24, 1-9.

<sup>437</sup> CFP Ex. 138, Boyle Report at 48 (CFP003781); Tr. Day 35, AM at 83 (DeWan).

<sup>438</sup> App. Ex. 16, DeWan/Kimball Testimony at 23-24 (APP00324-APP00325).



an unreasonable adverse effect on aesthetics. Applicants' analysis fails to adequately address all of these factors for any specific resources. DeWan reached an overall conclusion that the Project as a whole will not have an unreasonable adverse effect on aesthetics,<sup>439</sup> without making a determination whether there were adverse effects, unreasonable or not, on impacted scenic resources.<sup>440</sup> Rather, all DeWan did was provide a rating of low, medium or high assessment of "overall visual impact" to the scenic resources they chose to evaluate.<sup>441</sup> No explanation was given as to how DeWan used those ratings to make the overall determination of no unreasonable adverse effect.<sup>442</sup>

The rules require the Applicants to provide a "description of the measures planned to avoid, minimize, or mitigate potential adverse effects" of the Project,<sup>443</sup> and Site 301.14 requires the Subcommittee to consider the effectiveness of Applicants' mitigation plans. As indicated during cross-examination, DeWan had no role in the routing and design of the Project.<sup>444</sup> This means that they had no role in recommending the undergrounding of portions of the Project or to co-locate most of the aboveground portion of the Project in an existing transmission corridor. The mitigation plans that DeWan did provide were general in nature.<sup>445</sup> There are no specific mitigation measures for specific locations.<sup>446</sup> Thus, there are not specific plans for retaining or

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<sup>439</sup> *Id.* at 23 (APP00324).

<sup>440</sup> Tr. Day 32, AM at 99 (DeWan).

<sup>441</sup> App. Ex. 1, Appendix 17, DeWan VIA at M-15 (APP14323).

<sup>442</sup> CFP Ex. 138, Boyle Report at 48 (CFP003781).

<sup>443</sup> Site 301.05(b)(10).

<sup>444</sup> Tr. Day 31, PM at 113-115 (DeWan); Tr. Day 32, AM at 8-9 (DeWan).

<sup>445</sup> CFP Ex. 138, Boyle Report at 66 (CFP003799).

<sup>446</sup> Tr. Day 31, PM at 95 (DeWan).

planting vegetation to screen views of the Project.<sup>447</sup> This is despite the fact that DeWan has commonly suggested specific mitigation plans in the past.<sup>448</sup> DeWan also stated that it has no current plans to be involved in any further discussion of specific mitigation plans that may be necessary to avoid adverse impacts.<sup>449</sup> In some circumstances, it is possible that proposed mitigation measures could have a negative impact on the resource.<sup>450</sup> DeWan also failed to use readily available mitigation strategies like avoiding irregular patterns and matching Project materials.<sup>451</sup> There is no indication of what mitigation measures were suggested to the Applicants that were rejected. Thus, the DeWan analysis fails to satisfy the rules regarding mitigation, and it does not provide any specific measures to reduce any adverse effects to scenic resources.

Nor are mitigation measures something that can reasonably be delegated to another state agency as inferred by the Applicants' references to prior SEC decisions. In the *Antrim Wind* subcommittee's discussion of effects on aesthetics, for example, the specific mitigation techniques proposed by the applicants are described.<sup>452</sup> In the present case, the Applicants have not provided any specific mitigation techniques for the Project's effects on aesthetics. Moreover, the Subcommittee should not delegate the responsibility for approving specific mitigation techniques to a different agency that does not have the statutory mandate to avoid unreasonably adverse effects.<sup>453</sup>

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<sup>447</sup> CFP Ex. 138, Boyle Report at 66 (CFP003799).

<sup>448</sup> Tr. Day 31, PM at 112 (DeWan); Tr. Day 32, AM at 76 (DeWan).

<sup>449</sup> Tr. Day 31, PM at 112 (DeWan); Tr. Day 32, AM at 14, 73-74 (DeWan & Kimball).

<sup>450</sup> CFP Ex. 138, Boyle Report at 63 (CFP003796); Tr. Day 32, PM at 95 (DeWan).

<sup>451</sup> CFP Ex. 138, Boyle Report at 63 (CFP003796).

<sup>452</sup> *Antrim Wind* Order at 121.

<sup>453</sup> See, *infra* Part IV.C.2.

DeWan also acknowledged that the Project design and construction plans are still changing. Despite these changes, DeWan has not reviewed recent design changes.<sup>454</sup> This means that they could not have evaluated impacts to scenic resources from these changes and did not provide any mitigation measures to address them.<sup>455</sup> They have not reviewed the redesign and exceptions process being performed in response to the NHDOT's recommended terms and conditions.<sup>456</sup> This means they have not evaluated tree clearing that is likely to occur as a result of the construction of the underground portion of the Project.<sup>457</sup>

**e. Counsel for the Public's Expert Found Unreasonable Adverse Effects on Specific Resources.**

Counsel for the Public's expert concluded that the Project, as currently designed, including the proposed general mitigation measures, would have an unreasonable adverse effect on aesthetics.<sup>458</sup> Using the SEC's more expansive definition of "scenic resource," TJBA identified over 18,000 potential scenic resources using readily available databases, and identified categories of scenic resources that could be inventoried with some additional effort.<sup>459</sup> This represents a major portion of New Hampshire's landscape.<sup>460</sup> They also included a wide variety of potential scenic resources for further assessment, including: designated scenic resources; conversation lands or easements; lakes, ponds and rivers; scenic drives; other tourist destinations; recreation trails; parks and other recreation areas; historic sites; and town and

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<sup>454</sup> Tr. Day 32, AM at 73-74 (DeWan & Kimball); Tr. Day 32, PM at 123 (Kimball); Tr. Day 33, AM at 76-77 (DeWan).

<sup>455</sup> *Id.*

<sup>456</sup> Tr. Day 33, AM at 76-77 (DeWan); Tr. Day 34, AM at 11-14 (DeWan).

<sup>457</sup> Tr. Day 34, AM at 13-14 (DeWan); Tr. Day 34, PM at 144, 154 (DeWan).

<sup>458</sup> CFP Ex. 138, Boyle Report at 149 (CFP003882).

<sup>459</sup> CFP Ex. 138, Boyle Report at 81 (CFP003815).

<sup>460</sup> CFP Ex. 138, Boyle Report at 149 (CFP003882).

village centers.<sup>461</sup> TJBA also sought input from community members as to the existence and significance of particular scenic resources in the Project area.<sup>462</sup> TJBA evaluated visibility of these potential scenic resources using both a bare earth and vegetative screening visibility analysis.<sup>463</sup>

TJBA used the broader 10-mile APVI, as is required by the SEC rules.<sup>464</sup> This resulted in the determination that 18,933 scenic resources were potentially affected by visual impacts from the Project.<sup>465</sup> After reviewing for linear resources and duplication, TJBA reduced the total potential resources with potential visibility to 7,417 resources.<sup>466</sup> This compared with the 680 scenic resources identified by DeWan.

Like DeWan, TJBA next evaluated User expectations and the Project's effects on future use and enjoyment of the scenic resources.<sup>467</sup> They used a number of resources to understand user expectations and their reactions to the imposition of the Project, including intercept studies performed in Maine, a study of the White Mountain National Forest, New Hampshire Lakes Association Survey, and the community-identified resources from the workshops.<sup>468</sup>

TJBA then proceeded to evaluate the potential visual impacts to the scenic resources they identified.<sup>469</sup> This included both an evaluation as to (1) whether the impact was high, medium or

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<sup>461</sup> CFP Ex. 138, Boyle Report at 68-70 (CFP003801-CFP003803).

<sup>462</sup> CFP Ex. 138, Boyle Report at 70-71 (CFP003803-CFP003804).

<sup>463</sup> CFP Ex. 138, Boyle Report at 150 (CFP003883).

<sup>464</sup> Site 301.05(b)(4); CFP Ex. 138, Boyle Report at 72 (CFP003805).

<sup>465</sup> CFP Ex. 138, Boyle Report at 80 (CFP003813).

<sup>466</sup> CFP Ex. 139, Supplemental Pre-filed Testimony of Buscher, Palmer and Owens ("Boyle Supplemental Testimony") at 2 (CFP005279).

<sup>467</sup> CFP Ex. 138, Boyle Report at 82-97 (CFP003815-CFP003830).

<sup>468</sup> CFP Ex. 138, Boyle Report at 96-97 (CFP003829-CFP003830).

<sup>469</sup> CFP Ex. 138, Boyle Report at 97-98 (CFP003830-CFP003831).

low, and (2) whether the impacts to the resource were unreasonably adverse.<sup>470</sup> They approached this analysis with two levels of review: a checklist identifying low, medium or high impacts and a more detailed descriptive analysis of a sample of selected resources.<sup>471</sup> TJBA performed detailed analyses of 41 scenic resources impacted by the Project.<sup>472</sup>

The results of these impact analyses are as follows: There were adverse visual impacts to all 41 resources evaluated.<sup>473</sup> Twenty-four (24) were considered as high, 13 as medium and 4 as low.<sup>474</sup> TJBA concluded that 29 of the 41 resources would experience an unreasonable adverse effect.<sup>475</sup> Additional mitigation is suggested for 40 of the 41 resources.<sup>476</sup>

Some of the reasons for these findings are because the design does not follow recommended guidelines for the placement and alignment of new transmission corridors and uses a cluttered and disorganized mix of structure types.<sup>477</sup> Moreover, the new structure types and the overall organization of the corridor create an overwhelming industrial character.<sup>478</sup> The height of the proposed structures is out of scale in comparison to similar size transmission lines.<sup>479</sup> Finally, the Applicants fail to incorporate reasonable available mitigation that could significantly reduce adverse impacts.<sup>480</sup>

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<sup>470</sup> CFP Ex. 138, Boyle Report at 98 (CFP003831).

<sup>471</sup> CFP Ex. 138, Boyle Report at 98, 110 (CFP003831, CFP003843).

<sup>472</sup> CFP Ex. 138, Boyle Report at 98 (CFP003831).

<sup>473</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>474</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>475</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>476</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>477</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>478</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>479</sup> CFP Ex. 138, Boyle Report at 119 (CFP003852).

<sup>480</sup> CFP Ex. 138, Boyle Report at 120 (CFP003853).

TJBA suggests numerous mitigation techniques for these areas. The main technique used, which was not used in any detail by the Applicants, was application of vegetative screening.<sup>481</sup> The Applicants could have used a wider variety of structure materials and designs, including wooden structures, unifying form and color of proposed structures, low reflectance materials, corridor configuration alternatives, and new corridor alignment or offsetting impacts.<sup>482</sup> A good example of offsetting mitigation is to bury distribution or sub-transmission lines at Project road crossings.<sup>483</sup>

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<sup>481</sup> CFP Ex. 138, Boyle Report at 120-133 (CFP003853-CFP003866).

<sup>482</sup> CFP Ex. 138, Boyle Report at 133-147 (CFP003866-CFP003880).

<sup>483</sup> CFP Ex. 138, Boyle Report at 144-145 (CFP003876-CFP003878).

**[PART III-C-2]**

**2. Effects on Historic Sites.**

Pursuant to RSA 162-H:16, IV(c), in order to issue a certificate the Subcommittee must find that “[t]he site and facility will not have an unreasonable adverse effect on ... historic sites.”

In making that determination, the SEC’s rules specify that “the committee shall consider:”

- (1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;
- (2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;
- (3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;
- (4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and
- (5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

Site 301.14(b). As stated above, the Subcommittee’s review is limited to the information contained within the record and the Applicants bear the burden of proof to demonstrate the Project meets the statutory standard.

**a. Inventory of Historic Sites and Effects Assessment.**

The first area of consideration required by Site 301.14(b)(1) is “All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources.” This encompasses two primary issues: (1) identification of potentially affected historic sites; and (2) assessment of the potential adverse

effects on identified historic sites and resources. In both categories the Applicants' analysis was under-inclusive.

**(1) Definition and Capture of Historic Sites for Further Review.**

As a starting point, the SEC rules define "historic sites" as meaning:

"historic property" as defined in RSA 227-C:1, VI, namely "any building, structure, object, district, area or site that is significant in the history, architecture, archaeology or culture of this state, its communities, or the nation." The term includes "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior," pursuant to 36 C.F.R. §800.16(l)(1)."

Site 102.23. By its plain language, the rule contemplates a broad definition of "historic sites," by incorporating the expansive definition of "historic property" in RSA 227-C:1, VI. While the rule goes on to clarify in the second sentence that the specific category of resources that are "included in, or eligible for inclusion in, the National Register of Historic Places" falls within the broad definition of RSA 227-C:1, VI, use of the word "includes" demonstrates the General Court's intent that National Register properties are a subset of the broader category of "historic property."<sup>484</sup> Indeed, the very purpose of the SEC review is to "maintain a balance among ... potential significant impacts [including impacts to historic sites] and benefits" of the proposed Project. In order for the Subcommittee to perform this function, a full accounting of the potential impacts of the Project is necessary. The defined term "historic sites" should, therefore, be interpreted broadly to allow for a complete capture of historic sites for further review of the Project's effects thereon. Contrary to the statutory purpose, however, the Applicants' historic resources experts adopted narrow interpretations and employed a methodology that limited the

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<sup>484</sup> See *Wright v. Loon Mountain Recreation Corp.*, 140 N.H. 166, 172 (1995) ("The primary relevant definition of th[e] word [includes] is 'to place, list, or rate as a part or component of a whole or a larger group, class, or aggregate.' *Webster's Third New International Dictionary* 1143 (unabridged ed. 1961) (*Webster's*).") (Thayer, J., dissenting).



number of historic sites identified and further screened-out potentially affected historic sites prior to an analysis of effects.

**(a) Ms. Widell's Definition of Historic Resources  
Was Too Narrow.**

Applicants retained Cherilyn Widell of Widell Preservation Resources, LLC as an expert witness. Contrary to the broadly-worded definition of historic sites adopted by the SEC, Ms. Widell limited the types of resources she considered to only those that were either on the National Register for Historic Places or determined to be eligible for listing on the National Register.<sup>485</sup> While National Register listed or eligible resources are a specific category of “historic sites” called out in the rules, there is no plausible interpretation of Site 102.23 that would limit “historic sites” to only this subcategory. Indeed, Ms. Widell was forced to admit as much on cross-examination.<sup>486</sup> By applying an overly narrow definition of “historic sites,” Ms. Widell failed to capture the full range of “historic sites” that may be impacted by the Project.<sup>487</sup> Counsel for the Public’s expert witness Patricia O’Donnell testified that Ms. Widell’s methodology demonstrated an unreasonable “bias” towards the National Register.<sup>488</sup> Ms. O’Donnell further criticized Ms. Widell’s methodology as inappropriately focusing on architectural features of structures, to the exclusion of both larger areas and landscapes and smaller historic objects and features.<sup>489</sup>

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<sup>485</sup> Tr. Day 29, AM at 18 (Widell).

<sup>486</sup> Tr. Day 29, AM at 21 (Widell) (“Let me try it again. Yes or No. Does it have to be in the National Register? A. (Widell) I believe I answered that “No.”).

<sup>487</sup> CFP Ex. 140, Exhibit B, *Assessment on Potential Effects to Aboveground Historic Sites and Cultural Landscapes for the Northern Pass Project*, Heritage Landscapes, LLC (“Heritage Assessment”) at 7-9 (CFP005452-CFP005454).

<sup>488</sup> CFP Ex. 140, Heritage Assessment at 9 (CFP005454) (“There are many elements of community and state heritage that, while important to the people of New Hampshire, are not eligible for listing in the National Register.”).

<sup>489</sup> CFP Ex. 140, Heritage Assessment at 9-10 (CFP005454-CFP005455).

In a similar vein, Ms. Widell excluded without analysis any resource that was less than 50 years old.<sup>490</sup> The 50-year criterion, however, is not a requirement for eligibility for inclusion in the National Register; rather, it is a guideline that is becoming increasingly disfavored.<sup>491</sup> By adopting the 50-year criterion as a hard-and-fast cut-off, Ms. Widell's analysis in 2015 excluded potential historic sites that are now, or will be before potential Project construction, more than 50 years old, demonstrating the arbitrariness of Ms. Widell's approach. Taken together, Ms. Widell's identification of "historic sites" was artificially narrow and represents an incomplete capture of "all historic sites ... located within the area of potential effects ..." as required by Site 301.06(b).

**(b) Ms. Widell's Area of Potential Effect Was Too Narrow.**

Ms. Widell also limited the number of historic sites identified and analyzed by using an overly narrow Area of Potential Affect ("APE"). Pursuant to the SEC rules, the Applicants were required to identify "all historic sites ... located with the area of potential effects, as defined in 36 C.F.R. §800.16(d) ... ." Site 301.06(b). 36 C.F.R. §800.16(d), in turn, defines the APE as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."<sup>492</sup>

Ms. Widell applied a one-mile APE for review of the overhead portions of the Project in reliance on the U.S. Department of Energy's ("DOE") establishment of a one-mile APE in the

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<sup>490</sup> Tr. Day 29, AM at 17 (Widell).

<sup>491</sup> Tr. Day 27, AM at 16 (Widell); CFP Ex. 141, Supplemental Pre-filed Testimony of Patricia O'Donnell ("O'Donnell Supplemental Testimony") at 5-6 (CFP005749-CFP005750).

<sup>492</sup> 36 C.F.R. § 800.16(d).

Section 106 process.<sup>493</sup> However, the SEC’s rules refer to the federal *definition* of the APE, rather than to the *APE* that is set in the federal Section 106 process. As repeatedly acknowledged at the hearing, the SEC’s review of effects on historic sites is a separate and distinct process from the federal Section 106 process. By referencing the federal definition, as opposed to the federally determined APE, the rules contemplate a separate analysis of the appropriate APE from that performed by DOE.

Given that the “undertaking” in this case is a 192-mile high-voltage transmission line with structures and conductors often well above the tree line, the federal definition reasonably indicates use of a broader APE than one-mile to either side of the ROW. Indeed, the SEC’s rules require a visual impact assessment for transmission line projects covering an area with a 10-mile radius to assess aesthetic effects on scenic resources,<sup>494</sup> which include “historic sites that possess a scenic quality.”<sup>495</sup> Where historic sites out to 10 miles are required to be reviewed for potential visual impacts under the SEC rules, it is nonsensical to arbitrarily limit review of the Project impacts to historic sites to a one-mile APE.

In consideration of the “scale and nature of the undertaking” and the SEC’s rules, Ms. O’Donnell concluded that a 10-mile APE would be appropriate under the federal definition.<sup>496</sup> Other witnesses argued for an even larger APE in recognition of the topography and long-

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<sup>493</sup> App. Ex. 18, Pre-filed Testimony of Cherilyn Widell (“Widell Testimony”) at 3 (APP00354); App. Ex. 1, Appendix 18, *Northern Pass Transmission Project: Assessment of Historic Properties*, Preservation Company (“PC Assessment”) at 1 (APP14771); Tr. Day 2, PM at 164-165, 168 (Widell); Tr. Day 28, AM at 82 (Widell).

<sup>494</sup> Site 301.05(b)(4)(d).

<sup>495</sup> Site 102.45(e).

<sup>496</sup> CFP Ex. 140, Heritage Assessment at 21 (CFP005466).

distance views along portions of the Project route.<sup>497</sup> By applying a restrictive one-mile APE, Ms. Widell excluded many historic sites that could potentially be adversely impacted by the Project, and thereby under-represented the true scope of potential impacts of the Project on historic sites.

With regard to the underground portions of the Project, Ms. Widell and the Preservation Company relied on an overly narrow *direct APE* of 20 feet from the edge of pavement, and completely ignored the 200 foot *indirect APE*, further limiting their identification of historic sites potentially affected by the Project. While construction activities for the underground portion of the Project will be limited to not more than 20-feet outside the edge of pavement,<sup>498</sup> the potential for direct effects from vibration extend as far as 500 feet.<sup>499</sup> Indeed, Ms. Widell testified that the construction on the underground section of the Project would conform with the NHDOT standard specifications relating to vibration effects,<sup>500</sup> which require preconstruction surveys and vibration monitoring out 150 feet from construction activities.<sup>501</sup> By identifying only those historic sites within 20 feet from the edge of pavement, Ms. Widell failed to capture potential historic sites that could be directly affected by construction vibration in the area between 20 and 500 feet from the edge of pavement.

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<sup>497</sup> NAPO-SB Ex. 2, Amended Supplemental Pre-filed Testimony of Rebecca W. Moore at 3-4 (“For example, the entire L&CTR-HCL, including the Connecticut River, is easily visible from the northwestern summit of Mt. Washington, a distance of 20 miles.”).

<sup>498</sup> Tr. Day 43, PM at 21-22 (Bowes).

<sup>499</sup> Tr. Day 53, PM at 58 (O’Donnell); CFP Ex. 140, Heritage Assessment at 13 ((CFP005458) (citing “Current Practices to Address Construction Vibration and Potential Effects to Historic Buildings Adjacent to Transportation Projects” prepared by Wilson Ihrig & Associates, Inc., ICF International, and Simpson, Gumpertz & Heger, Inc., September 2012).

<sup>500</sup> Tr. Day 40, PM at 59-60 (Widell).

<sup>501</sup> CFP Exhibit 489, §3.4 (CFP013489).

Similarly, despite the fact that the DOE recommended a 200-foot indirect APE from the edge of pavement for the underground sections of the Project,<sup>502</sup> Ms. Widell testified that she did not consider indirect visual impacts to historic sites along the underground portion of the Project.<sup>503</sup> Ms. Widell did not even attempt to identify potential historic sites outside of the 20-foot direct APE.<sup>504</sup> Accordingly, Ms. Widell's capture of historic sites that may be affected by the Project along the underground route is incomplete.

**(c) Ms. Widell's Background Research on Historical Resources Was Limited.**

In addition to an overly restrictive methodology, the research that Ms. Widell conducted to identify historic resources was also limited and likely resulted in an incomplete identification of resources potentially impacted by the Project and that should have been analyzed further. Ms. Widell and the Preservation Company mainly used a windshield study and looked to Section 106 project area forms, town master plans and tax maps to identify potential historic sites.<sup>505</sup> Despite the definition of "historic sites" as "any building, structure, object, district, area or site that *is significant in the history, architecture, archaeology or culture* of this state, *its communities*, or the nation," Ms. Widell and the Preservation Company did not review other local documents or consult with local officials or historical societies.<sup>506</sup> Ms. Widell even went so far as to criticize Counsel for the Public's experts for conducting community workshops to get localized input.<sup>507</sup>

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<sup>502</sup> App Ex. 204 at 9 (APP68674).

<sup>503</sup> Tr. Day 40, PM at 10-11 (Widell).

<sup>504</sup> *Id.*

<sup>505</sup> App. Ex. 1, Appendix 18, PC Assessment at 6-9 (APP14776-APP14779); CFP Ex. 140, Heritage Assessment at 9 (CFP005454).

<sup>506</sup> CFP Ex. 140, Heritage Assessment at 9 (CFP005454); Tr. Day 29, AM at 12-13, 129 (Widell).

<sup>507</sup> App. Ex. 95, Supplemental Pre-Filed Testimony of Cherilyn Widell ("Widell Supplemental Testimony") at 7 (APP53908).

Those community workshops resulted in the identification of over 500 potential historic sites,<sup>508</sup> which Ms. Widell acknowledged were historically and culturally significant to the state's communities.<sup>509</sup> In addition, Ms. Widell's review ignored many smaller structures like historic stone walls and trees.<sup>510</sup> By excluding these and other categories of potential historic sites, Ms. Widell significantly under identified historic sites that have a potential to be impacted by the Project.

Indeed, in a November 30, 2015 letter to the SEC, the NHDHR expressed concern with Ms. Widell and the Preservation Company's lack of historical research and evaluation methodology, noting that their methodology "varies from the methodology adopted by DHR and USDOE for the Section 106 review in a number of important ways."<sup>511</sup> Similarly, NHDHR raised concerns that Ms. Widell and the Preservation Company's "identification findings are not research-based," and that their "[c]onclusions as to whether a property was considered historic were based on a visual assessment and the consultant's judgment, rather than on an understanding of a property's history and an analysis of its significance within the larger contexts of architectural or historic patterns of development in the community."<sup>512</sup> These concerns highlight the limitations of Ms. Widell's review and identification of historic sites for further analysis.

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<sup>508</sup> CFP Ex. 140, Heritage Assessment at 33-36 (CFP00548-81).

<sup>509</sup> Tr. Day 27, AM at 21 (Widell).

<sup>510</sup> Tr. Day 29, PM at 7-8 (Widell).

<sup>511</sup> CFP Ex. 425 (CFP011897-CFP011898).

<sup>512</sup> *Id.*

**(d) Ms. Widell's Viewshed Analysis Screened Out Resources With Potential Visibility of the Project.**

Following initial identification efforts, which cataloged 1,284 properties within the one-mile APE with structures built prior to 1968,<sup>513</sup> Ms. Widell and the Preservation Company applied a “viewshed analysis” to determine which of the identified potential historic sites had a “sufficient visual relationship with the Project to merit further assessment.”<sup>514</sup> The “viewshed analysis” resulted in only 194 potential historic sites that received additional analysis.<sup>515</sup> It is difficult to tell, however, exactly how the “viewshed analysis” was conducted because the Preservation Company report is not transparent about the techniques and methodology utilized.<sup>516</sup> Moreover, the Preservation Company did not provide a witness to explain this process. Nonetheless, it is apparent that the viewshed analysis significantly limited the number of historic sites analyzed for potential effects from the Project.

Ms. Widell testified that the viewshed analysis began by eliminating properties that fell outside of the modeled viewshed maps showing the area of potential visibility.<sup>517</sup> She further specified that the viewshed analysis did not utilize a bare ground model for identifying views of the Project.<sup>518</sup> Ms. Widell indicated that the viewshed maps utilized were those prepared by DeWan,<sup>519</sup> which as described above included vegetative screening. Due to seasonal loss of screening leaves and changes in vegetative cover over time by tree harvests and/or die-off of

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<sup>513</sup> Tr. Day 26, PM at 148, 156 (Widell).

<sup>514</sup> Tr. Day 26, PM at 148 (Widell).

<sup>515</sup> App. Ex. 95, Widell Supplemental Testimony at 1-2 (APP53902-APP53903).

<sup>516</sup> CFP Ex. 140, Heritage Assessment at 14 (CFP005459).

<sup>517</sup> Tr. Day 27, AM at 29-31 (Widell).

<sup>518</sup> CFP Ex. 140, Heritage Assessment at 14 (CFP005459); Tr. Day 27, AM at 39 (Widell).

<sup>519</sup> Tr. Day 30, AM at 156 (Widell).

trees during the decades-long lifespan of the Project, vegetative screening viewshed mapping may significantly underestimate the actual visibility of the Project from historic sites.<sup>520</sup>

In addition to eliminating historic sites from further analysis using vegetation-screened viewshed maps, Ms. Widell described a process of eliminating additional historic sites based on “distance or very minimal” visibility.<sup>521</sup> Specifically, Ms. Widell testified that field reviews were conducted to determine “whether you were able to see more than minimal views of the existing transmission line from a public place on the property.”<sup>522</sup> In other words, historic properties that had potential visibility based on screened viewshed maps were eliminated if the existing *lower* transmission lines were only minimally visible from limited public viewpoints on the property, thereby further reducing the number of historic sites reviewed for potential effects from the Project.

Finally, for those historic sites that passed the gauntlet of viewshed mapping and field review, Ms. Widell and the Preservation Company employed 3-D modeling to assess potential visibility. The 3-D model further utilized vegetative screening to eliminate potential views of the Project, and employed a 40-foot “tree wall” screen.<sup>523</sup> The “tree wall” was assumed to be completely opaque,<sup>524</sup> irrespective to seasonal leaf-off conditions or potential tree removal or mortality. Ms. Widell emphasized repeatedly that the Applicants’ assessment of potential effects was limited to then-current conditions with no regard for potential changes over the lifespan of

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<sup>520</sup> CFP Ex. 140, Heritage Assessment at 14 (CFP005459); Tr. Day 28, AM at 120 (Widell); Tr. Day 28, PM at 85-86 (Widell); Tr. Day 29, AM at 68-69 (Widell).

<sup>521</sup> Tr. Day 27, PM at 31 (Widell).

<sup>522</sup> Tr. Day 27, PM at 41 (Widell).

<sup>523</sup> Tr. Day 30, PM at 11-12 (Widell).

<sup>524</sup> Tr. Day 30, PM at 12 (Widell).



the Project.<sup>525</sup> Taken together, the record indicates that Ms. Widell's viewshed analysis included multiple layers that eliminated historic sites with potential visibility of the Project from further review, thereby limiting the information available to the Subcommittee for consideration when assessing the actual impacts of the Project on historic sites.

**(e) Cultural Resource Identification Was Limited to  
a One-Mile APE.**

Another shortcoming of Ms. Widell's original identification effort was a failure to consider large area historic sites such as cultural landscapes. It was only after NHDHR requested specific review of potential cultural landscapes through the Section 106 process that the Applicants performed the necessary analysis.<sup>526</sup> As a result, cultural landscape study area reports and identification of specific potential cultural landscapes were not completed until after Ms. Widell submitted her supplemental testimony in April, 2017. The result of the cultural landscape studies was identification of approximately 26 potential cultural landscapes that were not part of Ms. Widell's original analysis or opinion.

Despite the large size and unique nature of cultural landscapes, as compared to individual historic properties, Ms. Widell arbitrarily eliminated from consideration the majority of identified potential cultural landscapes because they were located outside Ms. Widell's one-mile APE. Most of the identified cultural landscapes "recommended for future review" were within areas of potential visibility within three to five miles of the Project.<sup>527</sup> By eliminating cultural

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<sup>525</sup> Tr. Day 27, AM at 40 (Widell); Tr. Day 28, PM at 121-123 (Widell).

<sup>526</sup> CFP Ex. 443, August 25, 2017, Letter from Division of Historical Resources at 2 (CFP012220); Tr. Day 40, PM at 29 (Widell).

<sup>527</sup> Tr. Day 40, PM at 113-115 (Widell); Compare App. Ex. 211 at APP81222-APP82762 (showing potential cultural landscapes recommended for future study) with App. Ex. 205 at APP79582-APP79611 (showing area of potential Project visibility); Tr. Day 53, PM at 22-24 (O'Donnell).

landscapes with potential visibility of the Project from further review, Ms. Widell provided an incomplete picture of the potential effects of the Project on historic sites.

**(f) Incomplete Capture of Historic Sites for Further Review Compromises the Subcommittee's Ability to Assess the Actual Impacts of the Project.**

As with other aspects of the Project, the Applicants and their consultants have narrowly interpreted the SEC rules regarding historic sites, and utilized a methodology that inappropriately eliminated significant numbers of potential historic sites from further review. As set forth above, Ms. Widell's starting point—a universe of roughly 1,200 potential historic sites—captures only those historic sites within the one-mile APE, that are at least 50-years old, and that are listed or considered eligible for listing in the National Register of Historic Places. By contrast, Ms. O'Donnell identified a universe of over 3,000 potential historic sites, not including scenic roads, designated scenic rivers, recreational trails, or current use parcels.<sup>528</sup>

After starting with an incomplete capture of potential historic sites, Ms. Widell eliminated over 1,000 of the potential historic sites based solely on a viewshed analysis. As a result, Ms. Widell performed an effects assessment on only 194 historic sites across the entire 192-mile long Project. An additional 10 cultural landscapes were assessed for effects of the Project. By utilizing a methodology that produced an incomplete capture of historic sites potentially affected by the Project, and presenting effects assessments for only a fraction of the identified historic sites, the Applicants have provided the Subcommittee only a partial picture of the potential effects of the Project on historic sites, thereby compromising the Subcommittee's ability to make an informed determination of whether the Project will have an unreasonable adverse effect on historic sites pursuant to Site 301.14(b).

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<sup>528</sup> CFP Ex. 141, Exhibit E, *Heritage Landscapes Assessment Report Table 2- Revised* (CFP005764).

**(2) Analysis of Project Effects on Historic Sites.**

In addition to starting with a drastically reduced number of historic sites for assessment of potential effects, Ms. Widell's evaluation of adverse effects was also flawed. First, Ms. Widell used a method for determining adverse effects that was not approved by the NHDHR.<sup>529</sup> Moreover, the use of the Vermont methodology was selective and incomplete.<sup>530</sup> She missed many of the particular effects that are a result of indirect impacts.<sup>531</sup> Even Ms. Widell's use of the federal criteria for determining adverse impacts was unnecessarily limited. She focused primarily on architectural retention of a building's original details (Criterion C).<sup>532</sup> By doing this, she eliminated the importance of setting for each of the properties she evaluated.<sup>533</sup> Accordingly, Ms. Widell's opinion that only seven historic sites would be adversely affected by the Project significantly underestimates the Project's actual effects. Indeed, NHDHR's preliminary findings indicate a substantially larger number of adverse effects.<sup>534</sup>

**(a) Ms. Widell Failed to Assess Effects on Historic Sites Along the Underground Portion of the Project.**

As addressed above, Ms. Widell did not assess the effects of the Project on historic sites located outside the 20-foot direct APE for the underground sections of the Project, despite DOE's establishment of a 200-foot indirect APE.<sup>535</sup> In addition to not having identified historic sites outside the 20-foot direct APE, Ms. Widell could not assess indirect effects to historic sites

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<sup>529</sup> CFP Ex. 420 at 3 (CFP011867); Tr. Day 26, PM at 129, 131 (Widell).

<sup>530</sup> Tr. Day 27, PM at 83 (Widell).

<sup>531</sup> CFP Ex. 140, Heritage Assessment at 12-13 (CFP005457-CFP005458).

<sup>532</sup> CFP Ex. 140, Heritage Assessment at 16 (CFP005461).

<sup>533</sup> CFP Ex. 140, Heritage Assessment at 16 (CFP005461); Tr. Day 27, AM at 102-103 (Widell).

<sup>534</sup> See *infra*, Part III.C.2.d; December 21, 2017 Letter submitted by NHDHR to SEC finding two archeological sites and 37 historic sites (including cultural landscapes) to be adversely effected.

<sup>535</sup> Tr. Day 40, PM at 10-11 (Widell); *supra* Part III.C.1.a(1)(b).

along the underground route because she had no knowledge of the extent or specific location of vegetative clearing, grading, or other potential alterations of terrain along the underground route.<sup>536</sup> While Ms. Widell testified that the Applicants would avoid all direct impacts to historic sites on the underground route, her opinion was not based on any specific knowledge of the final underground routing of the Project or of any engineering constraints that might apply.<sup>537</sup> Accordingly, the Applicants only evidence of the effects on historic sites along the underground route—approximately 60 miles of the entire Project corridor—is Ms. Widell’s unsupported assertion that all impacts will be avoided.

**(b) Ms. Widell Inappropriately Discounted Effects  
to Cultural Landscapes.**

Ms. Widell’s assessment of cultural landscapes suffered from two significant flaws. First, as discussed above, Ms. Widell performed no assessment of cultural landscapes that are located outside of the Section 106 one-mile APE, thereby excluding from review cultural landscapes with potential visibility of the Project.<sup>538</sup> In addition, for those cultural landscapes that were assessed, Ms. Widell discounted effects on the portions of the cultural landscape outside of the one-mile APE. For example, the Short Falls Cultural Landscape lies primarily outside the one-mile APE, with only 1.6 percent of its geographical area within the APE. In assessing the effects of the Project on the cultural landscape, the effects table indicates:

There are no views of the project from the cultural landscape *within the one-mile Project APE*. Therefore, the project will not introduce visual elements that will diminish the property’s setting or landscape.

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<sup>536</sup> Tr. Day 27, AM at 110 (Widell).

<sup>537</sup> Tr. Day 40, PM at 49-50, 65-66 (Widell).

<sup>538</sup> See *supra*, Part III.C.2.a(1)(e).

Because the project will not be within view *in the one-mile APE for indirect effects* in the Short Falls Cultural Landscape there will be no effect on the cultural landscape.<sup>539</sup>

Based on this analysis, Ms. Widell made a recommended finding of “no adverse effect,” despite the fact that significant portions of the cultural landscape have potential visibility of the Project.<sup>540</sup> By discounting visual impacts outside the one-mile APE, Ms. Widell minimized reporting of adverse effects on cultural landscapes.

In addition to minimizing visual impacts, Ms. Widell attempted to discount adverse effects to cultural landscapes by limiting the scope of the adverse effect to a single character-defining feature or resource within the cultural landscape. For example, the Mount Prospect-Martin Meadow Cultural Landscape is an irregularly shaped, 2,635-acre “rural and vernacular designed landscape encompassing agricultural and recreational properties that has been associated with the Weeks family for approximately 200 years.”<sup>541</sup> Weeks State Park is one of the contributing elements to the cultural landscape and is a historic site on its own merit as well.<sup>542</sup> The effect table for the Mount Prospect-Martin Meadow Cultural Landscape states a conclusion of: “**Adverse Effect**, primarily with respect to the portion of the cultural landscape comprising part of Weeks State Park.”<sup>543</sup> During cross-examination Ms. Widell attempted to qualify or diminish the adverse effect finding, going so far as to state that the adverse effect was limited to Weeks State Park and did not apply to the cultural landscape as a whole.<sup>544</sup>

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<sup>539</sup> App. Ex. 211 at APP83164, APP83166 (emphasis added).

<sup>540</sup> *Id.* at APP83169-APP83171.

<sup>541</sup> App. Ex. 211 at APP83099.

<sup>542</sup> Tr. Day 40, PM at 90-94 (Widell).

<sup>543</sup> App. Ex. 211 at APP83098 (emphasis in original).

<sup>544</sup> Tr. Day 40, PM at 91 (Widell).

Ms. Widell came to a similar conclusion for both the North Road/Lost Nation Road Cultural Landscape and the Upper Ammonoosuc River Cultural Landscape, attempting to limit or diminish the finding of adverse effect as applying only to one or two contributing elements of the cultural landscape and not to the cultural landscape as whole.<sup>545</sup> Ms. O'Donnell criticized this attempt to dilute or segregate adverse effects from the broader cultural landscape, which is intended to capture the association among all of the contributing elements across a related geographical and cultural landscape.<sup>546</sup> By carving out adverse effects from the broader cultural landscapes, Ms. Widell inappropriately attempted to minimize or dilute the adverse effects. Indeed, Ms. Widell did not include the Mount Prospect-Martin Meadow Cultural Landscape or North Road/Lost Nation Road Cultural Landscape in her final list of adverse effects because she testified the adverse effect was already accounted for through findings for Weeks State Park and the North Road Agricultural Historic District.<sup>547</sup> As with other aspects of Ms. Widell's assessment of effects, her treatment of cultural landscapes under-reported the actual adverse effects of the Project on historic sites.

**b. The Number and Significance of Any Adversely Affected Historic Sites and Archeological Resources, Taking into Consideration the Size, Scale and Nature of the Proposed Facility.**

Pursuant to Site 301.14(b)(2), the Subcommittee must consider the “number and significance” of adversely affected historic sites in the context of the “size, scale and nature” of the proposed facility. Given the large number of adverse effects and the overwhelming presence of the Project across large historical districts, cultural landscapes, and crossing scenic roads,

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<sup>545</sup> App. Ex. 211 at APP83135, APP83192; Tr. Day 40, PM at 95-102 (Widell).

<sup>546</sup> Tr. Day 53, PM at 37-38, 47-48 (O'Donnell).

<sup>547</sup> App. Ex. 95, Widell Supplemental Testimony at Attachment 2 (APP63069); Tr. Day 40, PM at 119-120 (Widell).

rivers, and conservation areas, the significance of the adverse effects is extensive.<sup>548</sup> Moreover, the large size and scale of the Project—192 miles with overhead structures extending well-above tree-line and the northern section in a new ROW—makes the Project’s effects pervasive and unavoidable. While the rules contemplate that a larger project may have a larger number of overall adverse effects, the prevalence of adversely affected historic sites (even limiting review to Section 106 eligible resource within the restricted one-mile APE) is significant.

**c.     The Extent, Nature and Duration of the Potential Adverse Effects on Historic Sites and Archeological Resources.**

Pursuant to Site 301.14(b)(3), the Subcommittee must consider the “extent, nature, and duration” of the adverse effects of the Project. Here, the proposed high-voltage transmission line is anticipated to be a permanent, or nearly permanent facility. Accordingly, and consistent with NHDHR guidance, the adverse effects to historic sites should be considered permanent.<sup>549</sup> While some of the visual impacts may change over time with growth of vegetation, vegetative changes can also increase visibility over time due to timber harvests, disease, or other landscape changes.

**d.     Findings and Determinations by the New Hampshire Division of Historical Resources of the Department of Cultural Resources and, If Applicable, the Lead Federal Agency, of the Proposed Facility's Effects on Historic Sites As Determined Under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9.**

The Section 106 process is an iterative, consultative process that has been ongoing through the hearings and testimony presented by witnesses for the Applicants, Counsel for the Public, and the Intervenors, and will continue for many months to come. Unlike many other projects where the Section 106 process is substantially complete before adjudicatory hearings

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<sup>548</sup> CFP Ex. 140, Heritage Assessment at 114 (CFP005561).

<sup>549</sup> CFP Ex. 443 at 10 (CFP012228).

conclude, to date the record contains only a preliminary report of NHDHR's determinations of effects on historic sites, and no determination by DOE.<sup>550</sup> As indicated by NHDHR, as of December 21, 2017 "the Section 106 consultation process has not been implemented to determine the project's effects on historic and archaeological resources and to resolve adverse effects."<sup>551</sup>

The state of the record leaves the Subcommittee with only limited information on the "findings and determinations" of NHDHR and DOE to consider pursuant to Site 301.14(b)(4). Nonetheless, the "preliminary" findings and determinations of NHDHR submitted on the eve of the close of the record are informative. In stark contrast to Ms. Widell's finding of seven (7) adversely effected historic sites, NHDHR has preliminarily determined that 37 out of the 114 aboveground resources assessed in the Section 106 process would have an adverse effect from the Project.<sup>552</sup> NHDHR's adverse effect findings include eight (8) of the 11 cultural landscapes assessed.<sup>553</sup> While NHDHR's findings are preliminary, and in some respects qualified on lack of final engineering plans for the underground section of the Project, they indicate a much greater level of impact than Ms. Widell's findings. Moreover, when considering the broader definition of "historic site" under Site 102.23, as compared to the Section 106 definition, it is reasonable to assume that a larger number of historic sites will be adversely affected by the Project.

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<sup>550</sup> December 21, 2017 NHDHR letter submitted to SEC.

<sup>551</sup> *Id.* at 1.

<sup>552</sup> December 21, 2017 NHDHR letter submitted to SEC at 2, Table 1.

<sup>553</sup> *Id.* at 3.



e. **The Effectiveness of the Measures Proposed by the Applicants to Avoid, Minimize, or Mitigate Unreasonable Adverse Effects on Historic Sites and Archaeological Resources, and the Extent to Which Such Measures Represent Best Practical Measures.**

The final consideration for the Subcommittee pursuant to Site 301.14(b) is the effectiveness of proposed avoidance, minimization and mitigation efforts. Ms. Widell's details for avoiding, minimizing or mitigating the few adverse effects that she did find made minimal to no attempt to minimize or avoid adverse effects from the Project.<sup>554</sup> She only provided minimal generalized recommendations for mitigating adverse impacts.<sup>555</sup> In fact, she relies primarily on the Section 106 process and the Programmatic Agreement to develop specific mitigation measures for specific historic sites.<sup>556</sup> However, the Programmatic Agreement provides only a *process* for developing mitigation and does not set forth any specific avoidance, minimization or mitigation proposals for specific affected historic sites.<sup>557</sup> In fact, the Programmatic Agreement requires the creation of an Historic Properties Treatment Plan ("HPTP") to address adverse effects, but as of the close of the record in this docket no HPTP had been created or submitted to the Subcommittee.<sup>558</sup>

To the extent avoidance and minimization were addressed by the Applicants, it was limited to burial of certain portions of the Project, siting part of the overhead portion of the Project in an existing utility ROW, and converting some transmission structures from a lattice

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<sup>554</sup> Tr. Day 27, AM at 83 (Widell); Tr. Day 28, PM at 28-29 (Widell).

<sup>555</sup> App. Ex. 18, Widell Testimony at 9-10 (APP00360-APP00361).

<sup>556</sup> Tr. Day 41, AM at 33-34 (Widell).

<sup>557</sup> App. Ex. 204, Programmatic Agreement at 26-32 (APP68691-APP68697); Tr. Day 40, PM at 23 (Widell) ("Would you agree that the Programmatic Agreement itself doesn't get into the details for specific mitigation of individual properties, and that's something that would be in the Historic Properties Treatment Plan? A. (Widell) Yes.").

<sup>558</sup> App. Ex. 204, Programmatic Agreement at 30-32 (APP68695-APP68697); Tr. Day 40, PM at 24 (Bunker).

tower to a monopole design.<sup>559</sup> However, while these efforts did reduce adverse effects, even after those changes significant adverse effects remain as stated by Ms. O'Donnell and as preliminarily found by NHDHR.<sup>560</sup>

**f. Identification and Effects on Archeological Resources.**

The Applicants hired Victoria Bunker, Ph.D. to review archeological resources and analyze the Project's impact on those resources. Dr. Bunker started with a Phase I-A analysis, which uses desktop research and pedestrian surveys to determine areas of archeological sensitivity.<sup>561</sup> The result of the Phase I-A analysis indicated whether Dr. Bunker and her staff needed to perform a Phase I-B analysis of certain sensitive sites.<sup>562</sup> The Phase I-B includes site surveys and confirms the presence or absence of archeological sites for both pre-contact Native American and post-contact European-American resources.<sup>563</sup> For the most part, all Phase I-A and Phase I-B analyses have been completed for the Project.<sup>564</sup> The exception is a section of the underground portion of the Project in Clarksville and Stewartstown where a Phase I-B analysis has not yet been performed.<sup>565</sup> There was information presented that there may be human remains underneath the road where the Applicants intend to bury a portion of the Project.<sup>566</sup>

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<sup>559</sup> App. Ex. 1, PC Assessment at 18-20 (APP14788-APP14790).

<sup>560</sup> CFP Ex. 140, Heritage Assessment at 113-115 (CFP005560-CFP005562); December 21, 2017 NHDHR letter submitted to SEC at 3-5.

<sup>561</sup> App. Ex. 17, Pre-filed Testimony of Victoria Bunker, Ph.D. ("Bunker Testimony") at 4 (APP00335).

<sup>562</sup> App. Ex. 17, Bunker Testimony at 4 (APP00335).

<sup>563</sup> App. Ex. 17, Bunker Testimony at 4 (APP00335).

<sup>564</sup> Tr. Day 40, PM at 14 (Bunker).

<sup>565</sup> Tr. Day 40, PM at 14 (Bunker).

<sup>566</sup> Tr. Day 41, AM at 37 (Bunker).

Applicants and Dr. Bunker have not performed the Phase I-B analysis at this location because they do not yet have permission to work in those local roads.<sup>567</sup>

Excluding those areas, the NHDHR determined that 73 of 85 archeological sites were not eligible for listing in the National Register.<sup>568</sup> Of the 12 remaining sites, NHDHR determined that there would be no effect to 10 of them.<sup>569</sup> Applicants stated that it was not possible to avoid impacts to the remaining two sites.<sup>570</sup> Therefore, Applicants will need to implement minimization or mitigation techniques to avoid an “adverse effect” finding under Section 106.<sup>571</sup> As of this date, Applicants have not proposed any minimization or mitigation techniques for these two impacted archeological sites. Nor have they determined whether the sites in Clarksville and Stewartstown will be impacted by the Project.

**g. Finding of No Unreasonable Adverse Effect.**

Based on the considerations required under Site 301.14, the Subcommittee is charged with determining whether the Project will have no unreasonable adverse effect on historic sites. As a preliminary matter, NHDHR does not make a finding on unreasonable adverse effect through the Section 106 process or otherwise. Rather, the Subcommittee bears the burden of making this determination based on the evidence and opinions presented by the parties. Here, Ms. Widell opined that there would be no unreasonable adverse effect and Ms. O’Donnell opined that there would be an unreasonable adverse effect to historic sites. The ultimate determination rests with the Subcommittee.

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<sup>567</sup> Tr. Day 49, AM at 117 (Coates).

<sup>568</sup> December 21, 2017 NHDHR letter submitted to SEC at 2.

<sup>569</sup> *Id.*

<sup>570</sup> *Id.*

<sup>571</sup> *Id.*

**(1) Applicants' Expert's Conclusion of No Unreasonable Adverse Effect Was Flawed.**

Applicants' expert witness on aboveground historic sites, Ms. Widell in collaboration with the Preservation Company, analyzed the Project's impacts on aboveground historic sites. It is important to note, however, that the Preservation Company's report did not attempt to reach a conclusion on whether the Project would have an unreasonable adverse effect on aboveground historic sites.<sup>572</sup> Nor did Ms. Widell's work attempt to analyze whether the Project would have any unreasonable adverse effects on any *individual* historic sites.<sup>573</sup> Rather, Ms. Widell concluded only that the Project *as a whole* would not have an unreasonable adverse effect on New Hampshire's aboveground historic sites.<sup>574</sup> As set out in the sections above, Ms. Widell's conclusion is flawed because it rests on an incomplete capture of "historic sites" in an overly narrow APE, relies on an inadequate viewshed analysis, and a misapplication of state and federal guidance on evaluating adverse effects. Moreover, Ms. Widell has no prior experience evaluating impacts to "historic sites" in New Hampshire or the entire New England region.<sup>575</sup> Nor has she ever testified before the SEC, applied the unreasonable adverse effect standard or the SEC's definition of an historic site.<sup>576</sup>

**(2) Counsel for the Public's Expert on Aboveground Historic Resources Found the Proposed Design of the Project Would Have an Unreasonable Adverse Effect on Historic Sites.**

Counsel for the Public's expert witness on aboveground historic sites, Patricia O'Donnell of Heritage Landscapes, LLC ("Heritage Landscapes"), performed an independent review of the

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<sup>572</sup> App. Ex 1, Appendix 18, PC Assessment at 4-5 (APP14775-APP14776).

<sup>573</sup> Tr. Day 27, AM at 77 (Widell); Tr. Day 28, PM at 25-26, 68 (Widell).

<sup>574</sup> App. Ex. 18, Widell Testimony at 9-12 (APP00360-APP00363).

<sup>575</sup> Tr. Day 28, AM at 74-75 (Widell).

<sup>576</sup> Tr. Day 28, AM at 80 (Widell).

Project and the Applicants' submissions on historic resources. Ms. O'Donnell found the potential for many more adverse effects to historic sites than reported by Ms. Widell.<sup>577</sup> Heritage Landscapes used the much broader definition of "historic site" from the SEC's rules, which included historic graveyards, land conservation, current use, recreation lands, scenic roads, public trails, and public waters.<sup>578</sup> Heritage Landscapes also utilized a broader set of resources to identify potential historic sites, including participating in community workshops.<sup>579</sup> They also used a more appropriate 10-mile area of potential visual impact that is applicable to historic sites with a scenic quality.<sup>580</sup> In addition, Heritage Landscapes used bare-earth viewshed mapping to identify potential historic resources that are affected by the Project,<sup>581</sup> accounting for inappropriately modeled vegetation and removal of screening over time.<sup>582</sup> Heritage Landscapes concluded that "[d]ue to the widespread and pervasive counts and acreage of historic sites and cultural landscapes and the long term presence of the proposed project if constructed, there would be unreasonable adverse effects."<sup>583</sup>

**(3) The Subcommittee Cannot Defer Its Statutory Responsibility to the Section 106 Process.**

As discussed in more detail below, *see infra* Part IV-C.2, the Subcommittee cannot delegate its statutory responsibility to issue the findings required by RSA 162-H:16, IV. *See, e.g.,* RSA 162-H:4, III-b ("The committee may not delegate its authority or duties, except as

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<sup>577</sup> CFP Ex. 141, Exhibit E, *Heritage Landscapes Assessment Report Table 2- Revised* (CFP005764).

<sup>578</sup> CFP Ex. 140, Heritage Assessment at 22-23 (CFP005467-CFP005468).

<sup>579</sup> CFP Ex. 140, Heritage Assessment at 20-37 (CFP005465 - CFP005482).

<sup>580</sup> CFP Ex. 140, Heritage Assessment at 21, 23 (CFP005466, CFP005468).

<sup>581</sup> CFP Ex. 140, Heritage Assessment at 38, fn. 28 (CFP005483); Tr. Day 54, AM at 27, 86 (O'Donnell).

<sup>582</sup> Tr. Day 54, AM at 86-87 (O'Donnell).

<sup>583</sup> CFP Ex. 140, Heritage Assessment at 116 (CFP005563).

provided under this chapter.”). Nothing prevents the Subcommittee from considering the NHDHR’s and the DOE’s Section 106 process when making its ultimate finding pursuant to RSA 162-H:16, IV(c), but the ultimate responsibility is non-delegable and must be made by the Subcommittee.

It is clear from a review of the Applicants’ analysis that their evidence in this docket is designed to address the scope of review in the section 106 process. Further compounding this problem is that Applicants recommend that the SEC defer its determination as to unreasonable adverse effects to the ongoing Section 106 process.<sup>584</sup> To be more specific, the Applicants argue that the SEC should defer to the process as laid out in the Programmatic Agreement.<sup>585</sup>

However, in addition to the inability of the Subcommittee to delegate the statutory finding required by RSA 162-H:16, IV(c), the Programmatic Agreement contains no detail about how the process would continue to identify historic sites, evaluate effects, monitor construction and provide for avoidance, minimization or mitigation of the historic sites.<sup>586</sup> Moreover, the process laid out in the Programmatic Agreement could take significantly longer than the SEC’s review period.<sup>587</sup> The process under the Programmatic Agreement is not one that puts the finishing touches on the review; it is the ultimate determination under Section 106 of what Section 106 eligible resources exist in the Section 106 APE, if these resources will be adversely affected, and how they must be mitigated under the Section 106 rules.<sup>588</sup>

More importantly, the SEC should not defer to the ongoing process laid out in the Programmatic Agreement because it does not address the statutory standard that the SEC needs

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<sup>584</sup> Tr. Day 41, AM at 61-63 (Widell).

<sup>585</sup> Tr. Day 41, AM at 61-62 (Widell).

<sup>586</sup> *See generally* App. Ex. 204, *Programmatic Agreement*.

<sup>587</sup> Tr. Day 41, AM at 129, 143 (Widell).

<sup>588</sup> Tr. Day 41, AM at 121-129, 139-143 (Widell).

to apply.<sup>589</sup> It is one thing to delegate monitoring compliance authority to another agency as is allowed in the governing statute.<sup>590</sup> It is a completely different proposition to delegate the necessary and ultimate determination of whether the Project will have an unreasonable adverse effect.<sup>591</sup> In addition to the problem that the Section 106 process does not address the necessary statutory finding, it is also not a permitting process, but rather a consultative process that requires stake holding entities to consult on the design and effect of the Project and possible mitigation techniques for those effects.<sup>592</sup>

Finally, delegations by prior subcommittees in the *Antrim Wind* and *Merrimack Valley Reliability Project* (“MVRP”) decisions are neither binding nor analogous to the instant case. In the case of the MVRP, prior to subcommittee deliberations, the NHDHR stated that it had determined through the federal Section 106 process that the project would have “no effects” on historic resources.<sup>593</sup> Thus, the MVRP subcommittee was justified in delegating to NHDHR the limited role to “specify the use of any appropriate technique, methodology, practice, or procedure associated with architectural, historical or other cultural resources effected [sic] by the Project.”<sup>594</sup> In the case of *Antrim Wind*, the subcommittee did not delegate for determinations of adverse effects or unreasonable adverse effects. Rather, it delegated to NHDHR the role for

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<sup>589</sup> Tr. Day 53, PM at 65-66 (O’Donnell); App. Ex. 113D, APP85070-71; *see generally* App. Ex. 116, *Division for Historic Resources Policy Memorandum*.

<sup>590</sup> RSA 162-H:4, III.

<sup>591</sup> RSA 162-H: 16, IV (“[T]he committee shall find: The site and facility will not have an unreasonable adverse effect on . . . historic sites.”) (emphasis added).

<sup>592</sup> Tr. Day 53, PM at 71 (O’Donnell); CFP Ex. 443, *August 25, 2017, Letter from Division of Historic Resources Applicants* (CFP012219) (“ . . . the federal Section 106 process functions independently of the SEC process.”), (CFP012227) (“Section 106 of the National Historic Preservation Act is a consultative regulation, rather than a permitting one.”).

<sup>593</sup> *Joint Application of New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility*, Docket No. 2015-05, October 4, 2016, Order at 33.

<sup>594</sup> *Id.*

implementation of already determined mitigation techniques and procedures for newly discovered resources and/or impacts.<sup>595</sup>

By contrast, in the instant case NHDHR has made a *preliminary* finding of 39 historic sites or archeological resources adversely affected by the Project, but notes that the Section 106 process is ongoing with no final determination as to adverse effects.<sup>596</sup> Moreover, key aspects of the Programmatic Agreement remain incomplete, such as an HPTP, which will set forth the specific mitigation procedures.<sup>597</sup> Given the drastically different status of the Section 106 process and degree of adverse effects in this case, as compared to both the *Antrim Wind* and *MVRP* cases, the delegation decisions of those prior subcommittees are neither relevant to nor controlling on this Subcommittee.

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<sup>595</sup> *Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No. 2015-02, March 17, 2017, Order at 60.

<sup>596</sup> December 21, 2017 NHDHR letter submitted to SEC at 1, Table 1.

<sup>597</sup> Tr. Day 40, PM at 24-25 (Bunker).



**[PART III-C-3]**

**3. Effects on Air Quality, Water Quality and the Natural Environment.**

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on ... air and water quality [and] the natural environment” for a certificate to issue. Site 301.07 sets forth specific “application requirements” to provide the Subcommittee with necessary “information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment.”

With respect to the Subcommittee’s required findings, Site 301.14(c)-(d) requires the Subcommittee to “consider the determinations of the New Hampshire department of environmental services ... and other relevant evidence” on the issue of air quality and “the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal agencies ... and other relevant evidence” with respect to water quality. Finally, Site 301.14(e) provides that “[i]n determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:”

- (1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;
- (2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;
- (3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;

(4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(5) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on the affected wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and the extent to which such measures represent best practical measures;

(6) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on terrestrial or aquatic significant habitat resources, and the extent to which such measures represent best practical measures; and

(7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

Site 301.14(e). As discussed below, Applicants have fallen short on this required finding in that they failed to identify all potentially impacted species and failed to implement reasonable avoidance and minimization measures.

**a. Applicants' Proposed Avoidance and Minimization Measures Do Not Represent Best Practical Measures for Protection of Rare, Threatened and Endangered Species.**

Pursuant to Site 301.07(c)(5) and (6), the Applicants provided correspondence and other communications with the New Hampshire Department of Fish and Game ("NHFG") regarding the "measures planned to avoid, minimize, or mitigate potential adverse impacts of construction and operation of the proposed facility on wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources."<sup>598</sup> Site 301.07(c)(5). These communications demonstrate a process of consultation with NHFG staff and include iterations of proposed "Avoidance and Minimization Measures and Time of Year Restrictions for Wildlife Resources" ("AMMs").

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<sup>598</sup> App. Ex. 124 and 124a.

Implementation and compliance with the AMMs is required pursuant to Condition 7 of the March 1, 2017 final decision recommending approval of a wetland permit with conditions by the New Hampshire Department of Environmental Services (“NHDES”):<sup>599</sup>

Prior to tree clearing, site preparation or project construction, the Permittee shall coordinate with the NH Fish and Game Department (NHFG) to finalize the Wildlife Avoidance and Minimization Measures and Time of Year Restrictions for protected wildlife and all rare, threatened, endangered species found to be associated with the project, which provide the best resource protection timing requirements practicable as agreed to by the agency and in consideration of the seasonal temperature variations, logistics, and project schedule. The Wildlife Avoidance and Minimization Measures and Time of Year Restrictions shall be submitted to DES for review and approval and shall be implemented by the Permittee.

At the time the record closed on December 22, 2017, the most recent version of the Applicants’ AMMs was dated November 2, 2017.<sup>600</sup> As set forth below, Counsel for the Public’s expert Arrowwood Environmental, LLC (“Arrowwood”) noted several deficiencies in the AMMs, which didn’t address some species and did not include best practical measures for the protection of other protected species. Without the proposed additional or revised AMMs set out below, properly implemented and monitored, Arrowwood concluded that they could not find that the Project would have no unreasonable adverse effect on wildlife.

**(1) The Potential Effects of the Proposed Facility on Bats and Suggested Avoidance and Minimization Conditions.**

There are three types of bats potentially impacted by the Project: eastern small-footed (state endangered), northern long-eared (federally threatened) and Indiana bats (federally endangered).

**(a) Eastern Small-footed Bats.**

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<sup>599</sup> App. Ex. 75 at APP44448.

<sup>600</sup> App. Ex.124a at APP85617-APP85627.

Applicants' initial filing erroneously opined that the small-footed bats would "escape as needed" when construction studies began.<sup>601</sup> Counsel for the Public's expert, Dr. Scott Reynolds, verified these bats would not abandon their roosts in response to sound or vibration, especially in the fall and winter when low body temperatures would prevent flight even if they appreciated the danger.<sup>602</sup> Dr. Reynolds verified that small-footed bats would be present in the rocky outcrops year round and thus construction limitations alone would not effectively minimize the adverse impacts of construction on the species. In order to avoid adversely impacting the species, further investigation to confirm which rocky outcrops are inhabited by the species must be undertaken.<sup>603</sup>

The Applicants subsequently conceded there was no scientific data to support the statement that small-footed bats would "escape as needed" in response to construction activities and they abandoned their initial AMMs. The Applicants' November 2017 AMMs state that, when a structure will be built on a rocky outcrop, "a survey to determine bat presence/absence must be conducted prior to construction." The AMM does not define how the survey will be conducted or who will interpret the results. The AMM also fails to address the impact of blasting adjacent to rocky outcrops that may house the small-footed bats. Dr. Reynolds recommended that Applicants assume small-footed bats are "present" in any location where there is potential habitat and the bats' presence cannot be ruled out.<sup>604</sup> The Subcommittee should

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<sup>601</sup> App. Ex. 1, Appendix 36 at 10-9 (APP22198).

<sup>602</sup> CFP Ex. 136, Exhibit E, Arrowwood Environmental, *Independent Review of Significant Wildlife Habitats and Rare, Threatened and Endanger Species* ("Arrowwood Report"), Appendix B, Dr. D. Scott Reynolds, *Impact Assessment of the Northern Pass Transmission Project on Bats* ("Reynolds Report") at B-15 (CFP003657).

<sup>603</sup> *Id.*

<sup>604</sup> Tr. Day 56, PM at 31-32 (Reynolds).

require that the Applicants avoid blasting and/or construction activities on or adjacent to any rocky outcrops unless it has been conclusively established that small-footed bats are not present.

**(b) Northern Long-eared Bats.**

Dr. Reynolds also questioned the reliability of the Applicants' survey of the northern long-eared bat.<sup>605</sup> Dr. Reynolds expressed particular concern that "no tree removal activity be conducted in proximity to the Bristol mine location between August 1 and May 31 as the hibernaculum has the potential to be used as a swarming area and winter hibernaculum throughout this time period." He suggested additional acoustic monitoring within the 35-acre area that is proposed for clearing in June to verify the absence of bats prior to clearing activities.<sup>606</sup> Dr. Reynolds testified that Applicants should assume the bat's presence at confirmed locations as well as locations where its presence cannot be ruled out.<sup>607</sup>

Applicants' November 2017 AMMs agree to avoid tree cutting at known and inconclusive long-eared bat sites between April 15 and September 30, but do not address the known Bristol mine hibernacula. The November 2017 AMMs also fail to include buffer zones around "known" roosting trees and restrictions on blasting as would be necessary to adequately minimize adverse impacts to this species.<sup>608</sup>

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<sup>605</sup> CFP Ex. 136, Reynolds Report at B-8 (CFP003659).

<sup>606</sup> CFP Ex. 136, Reynolds Report at B-9 (CFP003660).

<sup>607</sup> Tr. Day 56, PM at 30-32 (Reynolds).

<sup>608</sup> App. Ex. 124a at APP85620; Tr. Day 56, PM at 17-18, 33 (Reynolds).

**(c) Indiana Bat.**

Dr. Reynolds testified that it was unlikely that Indiana bats are actually present in the Project ROW,<sup>609</sup> however, the Applicants' October 30, 2017 report<sup>610</sup> confirmed their presence in every segment of the ROW except segment 8, 12.<sup>611</sup> If there are any Indiana bats present in the proposed ROW, the Application is deficient as it fails to include any AMMs to protect the species from construction activities.<sup>612</sup>

**(2) The Potential Effects of the Proposed Facility on Butterflies and Suggested Avoidance and Minimization Conditions.**

In her pre-filed testimony, Dr. Barnum stated the Project was not expected to have a long-term population level effect on any species with "one exception," the Karner Blue Butterfly ("Kbb").<sup>613</sup> The Kbb has been federally and state endangered since 1992.<sup>614</sup> The Project traverses two Kbb populations, the largest of which is located in Concord and the second in Pembroke. The Applicants' original application proposed disturbing 61% (17,026 square feet) of the Kbb Concord habitat.<sup>615</sup> Because the Kbb are always present in some life stage on the lupine habitat as eggs, larva and or adults, disturbing 61% of the habitat would necessarily be fatal to some percentage of the Kbb.

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<sup>609</sup> Tr. Day 57, AM at 37 (Reynolds).

<sup>610</sup> See, generally, App. Ex. 124a, 2017 Northern Long-eared Bat Acoustic Survey at APP85629.

<sup>611</sup> Tr. Day 56, AM at 25 (Reynolds); App. Ex. 124a at 85675-85678 (MYSE, myotis septentrionalis).

<sup>612</sup> Tr. Day 56, AM at 25 (Reynolds).

<sup>613</sup> App. Ex. 23, Pre-filed Testimony of Sarah Barnum, Ph.D. at 12 (APP00447).

<sup>614</sup> CFP Ex. 136, Exhibit E, Arrowwood Environmental, *Independent Review of Significant Wildlife Habitats and Rare, Threatened and Endanger Species* ("Arrowwood Report"), Appendix A, *Karner Blue Butterfly*, ("Kbb Report") at A-1 (CFP003620).

<sup>615</sup> App. Ex. 1, Appendix 36 at 12-3 (APP22210).

Applicants estimated the 61% habitat loss would result in a “potential loss” of 208 Kbb eggs based upon a 2015 egg count.<sup>616</sup> The 2015 egg count is an unreliable indicator of the future egg loss as the Kbb population was particularly low in 2015 and has since rebounded.<sup>617</sup> During the hearings, Applicants redesigned the ROW through the Concord Kbb habitat and claimed it had reduced the impact from 17,026 square feet to 1,043 sq. feet.<sup>618</sup> However, on December 18, 2017, Applicants reported their 1,043 sq. foot calculation was erroneous and the figure was three times that size, 3,129 sq. feet. The uncertainty over the exact size of the Concord Kbb habitat loss, coupled with a mortality loss derived from a 2015 egg count when the Kbb population was at below average numbers raises serious questions as to the actual impact this project is likely to have upon the Kbb at the Concord site.

Applicants’ most recent AMMs state “work should take place outside of the April 1-August 31 (lupine) growing season, ideally in winter under frozen conditions with snow cover, to the extent practicable.”<sup>619</sup> Counsel for the Public’s experts testified these AMMs should be revised and construction activities should be limited to true winter conditions with snow running from December 21 to March 20.<sup>620</sup> The preference would be to perform the work when actual winter conditions exist – snow cover and frozen conditions.<sup>621</sup> There should not be a “to the extent practicable” exception from a winter only construction schedule.<sup>622</sup> Timber mats should

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<sup>616</sup> *Id.*

<sup>617</sup> CFP Ex. 136, KBB Report at A-5 (CFP003624).

<sup>618</sup> Tr. Day 57, AM at 10 (Amaral).

<sup>619</sup> App. Ex. 124a at APP85621.

<sup>620</sup> Tr. Day 56, PM at 40 (Amaral); Tr. Day 57, AM at 74 (Amaral).

<sup>621</sup> Tr. Day 56, PM at 39 (Amaral); Tr. Day 57, AM at 74 (Amaral).

<sup>622</sup> Tr. Day 56, PM at 42 (Lew-Smith); Tr. Day 57, AM at 74-75 (Amaral).

be used, but there should be a restriction on the length of time (one to two weeks) that they are allowed to cover the Kbb habitat (wild lupine).<sup>623</sup>

To offset the anticipated Kbb mortality associated with construction activities at the Concord site, Applicants have purchased a parcel of land outside of the ROW as additional habitat.<sup>624</sup> As a condition of permitting, Applicants should be required to fund the restoration of this property<sup>625</sup> and the development of an appropriate restoration plan.<sup>626</sup> In addition, Applicants should be required to develop a ROW management plan to assure appropriate avoidance and minimization of impacts during operation of the Project.<sup>627</sup>

In addition to the Kbb, the frosted elfin (state endangered) is “known to be present in the Concord Pine Barrens portion of the Project area.”<sup>628</sup> Additionally the dusky wing skipper (state endangered) and pine pinion moth (state threatened) have “potential to be present in the Project area, based on their habitat needs and known distributions.”<sup>629</sup> Applicants did not inventory these three species nor did they address the impact the Project may have upon them.<sup>630</sup> Without an inventory, the SEC has insufficient evidence from which to determine whether the Project will have an unreasonable adverse effect upon them.

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<sup>623</sup> Tr. Day 56, PM at 41 (Lew-Smith).

<sup>624</sup> Tr. Day 57, AM at 12-13 (Amaral).

<sup>625</sup> Tr. Day 57, AM at 12-13 (Amaral).

<sup>626</sup> Tr. Day 57, AM at 15 (Amaral).

<sup>627</sup> Tr. Day 57, AM at 15 (Amaral).

<sup>628</sup> App. Ex. 1, Appendix 36 at 12-3 (APP22210).

<sup>629</sup> *Id.*

<sup>630</sup> Tr. Day 56, PM at 43 (Parsons); Tr. Day 57, AM at 126 (Amaral).



**(3) The Potential Effects of the Proposed Facility on Birds  
and Suggested Avoidance and Minimization Conditions.**

There are several species of birds that have the potential to be unreasonably adversely affected by the Project: the great blue heron, raptors, common nighthawk and bald eagles.

Applicants should utilize a quarter-mile buffer zone for any actively used great blue heron nests.<sup>631</sup> Applicants should also be required to perform an aerial survey to locate great blue heron nests.<sup>632</sup>

Applicants have proposed a series of AMM techniques for active raptor nests.<sup>633</sup> First, the identification of nests should be done through an aerial survey.<sup>634</sup> Moreover, if there is a significant amount of time between work periods, the survey should be performed again.<sup>635</sup>

With regard to the common nighthawk, the AMM should require Applicants to describe the methodology to “pre-determine” the buffer area around nests.<sup>636</sup> The Subcommittee should not allow this methodology to be left indeterminate. Finally, the AMM techniques for bald eagles should specify that the nest identification must be performed by an aerial survey.<sup>637</sup>

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<sup>631</sup> Tr. Day 57, AM at 56-57 (Parsons).

<sup>632</sup> Tr. Day 57, AM at 56-57 (Parsons).

<sup>633</sup> App. Ex. 124a at APP85619-APP85620.

<sup>634</sup> Tr. Day 56, PM at 69 (Parsons).

<sup>635</sup> Tr. Day 56, PM at 68-69 (Parsons).

<sup>636</sup> App. Ex. 124a at APP85620; Tr. Day 56, PM at 69-70 (Parsons).

<sup>637</sup> Tr. Day 56, PM at 69 (Parsons).

**(4) The Potential Effects of the Project on Mammals and  
Suggested Avoidance and Minimization Conditions.**

**(a) Lynx.**

The Canadian lynx (federally endangered) is located in the spruce-fir forests of the northern and mountain areas of New Hampshire.<sup>638</sup> There are five potential lynx denning sites, three of which will be directly impacted by the Project.<sup>639</sup> In order to avoid impacts to the lynx, Applicants have proposed a number of AMM techniques.<sup>640</sup> Importantly, if denning habitat is determined to be occupied, Applicants will not clear between May 1st through July 15th.<sup>641</sup> The main concern is that Applicants have not detailed how they would survey for the presence of the lynx, especially if there was a lack of snow.<sup>642</sup> Applicants should be required to explain how these surveys will be conducted to ensure discovery of lynx (or not) in these locations.

**(b) American Marten.**

The American Marten (state threatened) lives primarily in coniferous and mixed hardwood-coniferous forests, with a range that includes the southern edge of the White Mountains northward into Maine and Canada.<sup>643</sup> Two hundred, thirty-eight (238) acres of potentially high quality marten habitat would be converted to scrub-shrub and herbaceous natural communities in the new ROW for the Project.<sup>644</sup> Applicants have not proposed any AMM techniques to avoid or minimize impacts to the marten. Applicants should be required to develop AMM techniques for marten that include seasonal restrictions on construction and the

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<sup>638</sup> CFP Ex. 136, Arrowwood Report at 30 (CFP003536).

<sup>639</sup> CFP Ex. 136, Arrowwood Report at 31 (CFP003537).

<sup>640</sup> App. Ex. 124a at APP85618.

<sup>641</sup> App. Ex. 124a at APP85618.

<sup>642</sup> Tr. Day 56, PM at 70-71 (Parsons).

<sup>643</sup> CFP Ex. 136, Arrowwood Report at 32-33 (CFP003538-CFP003539).

<sup>644</sup> CFP Ex. 136, Arrowwood Report at 37 (CFP003543).

prohibition of off-highway recreational vehicles (*e.g.* snowmobiles and ATVs) in the new ROW and access roads.<sup>645</sup> Applicants also should be required to confirm that the proposed mitigation parcels provide accessible high quality marten habitat.<sup>646</sup>

**(5)     The Potential Effects of the Proposed Facility on Plants and Suggested Avoidance and Minimization Conditions.**

**(a)     Wild Lupine.**

Wild lupine is a state threatened perennial species that provides important habitats for both the Kbb and the frosted elfin.<sup>647</sup> As discussed above in relation to the Kbb, Applicants have made positive redesigns to reduce the size of the lupine impact in the Concord area, but more minimization efforts could be undertaken, including a snow only construction schedule. Additionally, Applicants should be required to undertake similar design avoidance measures in Pembroke by relocating the access road.<sup>648</sup>

**(b)     Licorice Goldenrod.**

Licorice goldenrod is a state endangered species that occupies dry, sandy sites and is found along the southern part of the Project corridor.<sup>649</sup> Applicants have not taken an obvious avoidance measure by moving the access road out of the population located in Pembroke.<sup>650</sup> Nor have any AMM techniques been proposed to mitigate impacts to this species (*e.g.* construction

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<sup>645</sup> Tr. Day 56, PM at 72-73 (Parsons).

<sup>646</sup> Arrowwood Supplemental at 9 (CFP003686).

<sup>647</sup> Arrowwood Report at 94 (CFP003600).

<sup>648</sup> Tr. Day 57, AM at 84 (Lew-Smith).

<sup>649</sup> CFP Ex. 136, Arrowwood Report at 91 (CFP003597).

<sup>650</sup> CFP Ex. 136, Arrowwood Report at 94 (CFP003600); Tr. Day 57, AM at 101 (Lew-Smith).

mats, seasonal construction and transplantation methods).<sup>651</sup> Therefore, it cannot be concluded there will not be an unreasonable adverse effect on licorice goldenrod.

**(c) The Small Whorled Pogonia.**

The small whorled pogonia is a globally threatened orchid. The majority of the world's remaining population of this plant is located in New Hampshire and Maine.<sup>652</sup> Applicants have not identified the presence or absence of this species through an appropriate inventory.<sup>653</sup> Counsel for the Public's expert confirmed the plant is likely to be present in the Project area. Without a further inventory of the plant, it is impossible to determine the Project will not have an unreasonable adverse effect on the small whorled pogonia. Applicants should be required to conduct an appropriate survey and to develop effective AMMs.

**(d) Red Threeawn.**

Red Threeawn is a state threatened species located within the Project area.<sup>654</sup> Applicants do not propose any avoidance measures for this species.<sup>655</sup> To the degree that impacts cannot be avoided, Applicants should be required to adopt some common best management practices: seasonal restrictions, seed collection, establishment of conservation areas and re-seeding areas post-construction.<sup>656</sup>

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<sup>651</sup> CFP Ex. 136, Arrowwood Report at 94 (CFP003600).

<sup>652</sup> CFP Ex. 136, Arrowwood Report at 99 (CFP003605).

<sup>653</sup> CFP Ex. 137, Arrowwood Supplemental at 4 (CFP003681); Tr. Day 56, PM at 81-82 (Lew-Smith).

<sup>654</sup> CFP Ex. 137, Arrowwood Supplemental at 2 (CFP003679).

<sup>655</sup> CFP Ex. 137, Arrowwood Supplemental at 2 (CFP003679).

<sup>656</sup> CFP Ex. 137, Arrowwood Supplemental at 2 (CFP003679).

**b. Applicants Have Not Adequately Avoided Adverse Impacts to Vernal Pools.**

Vernal pool wetlands provide critical habitat to a wide variety of invertebrate and vertebrate species.<sup>657</sup> A number of vernal pools were located within the Project corridor. After Counsel for the Public's experts identified pools that could be avoided, the Project was redesigned to avoid three vernal pools. However, Arrowwood identified another 15 sites where avoidance or minimization seems practicable through minor shifts in work area configurations or minor re-routing of access routes.<sup>658</sup> Applicants have not proposed to make these alterations.<sup>659</sup> Furthermore, Applicants did not evaluate indirect impacts to vernal pools buffers.<sup>660</sup> Without any further identification and avoidance, the Project will have an unreasonable adverse effect on vernal pools and their buffers. Moreover, failure to avoid the remaining impacted vernal pools constitutes an unreasonable adverse effect.<sup>661</sup>

**c. Independent Environmental Monitors Are Critical to Ensure BMPs and AMMs are Adequately Implemented.**

Because of the wide variety of species and habitats that will be adversely impacted, the number of wetlands that will be impacted, the variety and complexity of BMPs and AMMs that will be required, and the sheer size of the Project, an independent firm with sufficient resources and budget should be appointed to monitor the construction and perform post-construction monitoring. This independent monitor should have the authority to stop work on the Project if environmental conditions are not being met or if unforeseen circumstances arise which adversely affect threatened or endangered species or significant wildlife habitat resources. Further, the

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<sup>657</sup> CFP Ex. 136, Arrowwood Report at 19 (CFP003525).

<sup>658</sup> CFP Ex. 137, Arrowwood Supplemental at 6 (CFP003683).

<sup>659</sup> Tr. Day 56, PM at 86 (Lew-Smith).

<sup>660</sup> CFP Ex. 137, Arrowwood Supplemental at 6-7 (CFP003683-CFP003684).

<sup>661</sup> Tr. Day 56, PM at 86 (Lew-Smith).

independent monitor should answer to an entity other than the Applicants to avoid any implicit bias. The choice of the independent monitor should be approved by the SEC and New Hampshire DES, Fish and Game and DNCR.<sup>662</sup>

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<sup>662</sup> CFP Ex. 136, Supplemental Pre-filed Testimony of Lew-Smith, Parsons, Reynolds and Amaral at 22 (CFP003699).

[PART III-C-4]

4. Effects on Public Health and Safety.

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on ... public health and safety” for a certificate to issue. Site 301.08 sets forth specific “application requirements” to provide the Subcommittee with necessary “information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety.”

Site 301.08(b) further requires for “electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.” Site 301.08(d) also requires for all energy facilities:

(1) Except as otherwise provided in (a)(1) above, an *assessment of operational sound* associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to *increase sound by 10 decibel A-weighted (dBA) or more over background levels*, measured at the L-90 sound level, at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

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(3) A plan for *fire safety* prepared by or in consultation with a fire safety expert;

(4) A plan for *emergency response* to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Site 301.08(d) (emphasis added).

Site 301.14(f) in turn requires the Subcommittee, in “determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety,” to:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

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(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

Site 301.14(f).

**a. Concerns Were Expressed Regarding the Potential Public Health and Safety Hazards of the Proposed Facility.**

Among other things, the Subcommittee must consider “the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures.” Site 301.14(f).

The Applicants’ expert on the impacts of electromagnetic fields (“EMF”) was Dr. William H. Bailey, a Principle Scientist in the Center for Occupational and Environmental Health Risk Assessment at Exponent Inc.<sup>663</sup> A significant portion of Dr. Bailey’s work is on

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<sup>663</sup> App. Ex. 25, Pre-filed Testimony of Dr. William H. Bailey at 1 (APP00470).



behalf of or advising utilities.<sup>664</sup> This includes advising utilities on the best way to communicate about the risks of high voltage transmission lines and EMF.<sup>665</sup>

Dr. Bailey acknowledged that there are gaps in the knowledge about the biological effects of EMF and that more research is needed.<sup>666</sup> Epidemiological studies suggest that exposure to low frequency magnetic fields (a component of EMF) cause small increases in the risk of childhood leukemia.<sup>667</sup> However, despite these studies, researchers are unable to determine how EMF can cause this increased risk.<sup>668</sup> For that reason, the International Agency for Research on Cancer and the United States National Institute of Environmental Health Science have categorized power-frequency EMF as “possibly carcinogenic.”<sup>669</sup>

In light of this increased risk, the World Health Organization has recommended that the design and siting of transmission lines incorporate “prudent avoidance,” or low-cost measures, to avoid exposure to people, especially children.<sup>670</sup> This standard is also referred to as the “precautionary principle.”<sup>671</sup> Some states have adopted specific standards for the maximum amount of EMF when siting new transmission lines.<sup>672</sup> The State of Connecticut has developed a

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<sup>664</sup> Tr. Day 4, AM at 13-15, 26-28 (Bailey).

<sup>665</sup> Tr. Day 4, AM at 26-35 (Bailey).

<sup>666</sup> Tr. Day 4, AM at 38 (Bailey).

<sup>667</sup> Tr. Day 4, AM at 39 (Bailey) (“A number of epidemiological studies suggest small increases in risk of childhood leukemia with to low frequency magnetic fields in the home.”); AD-N-ABTR Ex. 1, Pre-filed Direct Testimony of F. Maureen Quinn at 4.

<sup>668</sup> Tr. Day 4, AM at 41; AD-N-ABTR Ex. 1, Testimony of Quinn at 4.

<sup>669</sup> Tr. Day 4, AM at 53 (Bailey).

<sup>670</sup> Tr. Day 4, AM at 61-62 (Bailey).

<sup>671</sup> Tr. Day 67, PM at 197 (Quinn).

<sup>672</sup> Tr. Day 4, AM at 92-93 (Bailey).

process for measuring baseline EMF readings and incorporating no-cost and low-cost design features.<sup>673</sup>

If the SEC issues a certificate for the Project, Counsel for the Public requests that the SEC include a condition requiring the Applicants to include prudent avoidance design features into the Project, meaning it will require the Applicants to incorporate no-cost and low-cost design techniques that will lower people's, especially children's, exposure to electromagnetic fields caused by the Project.

**b. Concerns Were Expressed Regarding the Co-location of the Transmission Line With Portland Natural Gas Transmission System Pipeline.**

The Subcommittee received evidence about the co-location of the Project and the Portland Natural Gas Transmission System gas pipeline (the "PNGTS") within the ROW in Dummer, Stark and Northumberland. Applicants produced an Interference Assessment dated June 30, 2017.<sup>674</sup> The Interference Assessment was an initial "high level" assessment that merely identified interference topics that require further assessment and identified some potential safety concerns.<sup>675</sup> The Interference Assessment recommended further investigation and detailed analysis.<sup>676</sup> If the Subcommittee issues a certificate, the Subcommittee should condition it on the completion of a satisfactory study and the implementation of any necessary mitigation or safety measures.

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<sup>673</sup> Tr. Day 4, AM at 94 (Bailey).

<sup>674</sup> App. Ex. 179.

<sup>675</sup> App. Ex. 179 at 7 (APP63357).

<sup>676</sup> App. Ex. 179 at 9 (APP63359).

**[PART III-D]**

**D. PUBLIC INTEREST.**

The fourth and final requirement of RSA 162-H:16, IV that must be met for the Subcommittee to issue a certificate is that the Subcommittee must find that “[i]ssuance of a certificate will serve the public interest.” RSA 162-H:16, IV(e). Based upon the text, legislative history, and interpretations of RSA 162-H:16, IV(e) and related statutory provisions and rules, the “public interest” factor requires an independent finding from the Subcommittee that the “significant impacts” of the Project are balanced by significant “benefits” of the Project in the areas set forth in RSA 162-H:1 and enumerated in Site 301.16. In this section, Counsel for the Public identifies the factors the Subcommittee must weigh and reviews the evidence on those factors.

**1. Issues That Should Inform the Subcommittee’s Comprehensive Analysis Pursuant to RSA 162-H:16, IV(e).**

The Subcommittee must balance the benefits and adverse impacts of the Project to determine whether the “issuance of a certificate will serve the public interest.” That analysis should be the Subcommittee’s final step. The analysis should include the Subcommittee’s consideration of the prior three findings under RSA 162-H:16, IV, since those issues are relevant to the public interest. The analysis, however, should neither defeat nor be dictated by the Subcommittee’s findings on the prior three statutory requirements, which have specific statutory standards, such as “adequate,” “unduly interfere with” and “unreasonable adverse effect.” None of these statutory standards appear in RSA 162-H:16, IV(e). In determining whether the “Issuance of a certificate will serve the public interest” the legislature did not include a statutory standard. Thus, the “public interest” review looks beyond the Subcommittee’s prior analysis to

balance the totality of the Project's benefits and impacts across the areas enumerated in the purpose section and Site 301.16.

By way of example, the Subcommittee may find that the Project does not have an unreasonable adverse effect on air and water quality under RSA 162-H:16, IVc). When considering the public interest, however, the Subcommittee should not rely on its prior finding; it must consider any adverse effects on air and water quality that do not rise to the level of "unreasonably adverse" in balancing the Projects overall benefits and impacts across all areas of review. Such consideration does not negate the Subcommittee's finding of no unreasonably adverse effects on air and water quality, but that finding similarly does not preclude the Subcommittee from considering some adverse effects on air and water quality in determining whether the Project will serve the public interest. Indeed, a Project could have no "unreasonable adverse effects" but still be contrary to the public interest where the aggregation of not unreasonable adverse effects in multiple areas outweighs a project's benefits to the public. It is this final review that the General Court intended when it amended RSA 162-H:16 to include a public interest determination prior to issuance of a certificate.

As part of its analysis of the public interest, the Subcommittee must also consider the input it has received from members of the public, both orally from hundreds of speakers at the five public information sessions, the five public hearings in the host counties, and the four hearings in Concord for receipt of public comments, as well as the thousands of public comments filed with the SEC and several petitions containing hundreds of names. The overwhelming number of public comments, in all their different forms, are in opposition to the Project. The Subcommittee also should consider, when weighing whether the Project is in the public interest, the fact that of the 31 host municipalities, 22 of them intervened to oppose the Project and only

one host municipality intervened in support of the Project. Residents of host communities also expressed their opposition to the Project by passing warrant articles in opposition, voting to appropriate town funds to retain legal counsel to oppose the Project and by raising private donations to support opposition to the Project. The Subcommittee also observed opposition to the Project during the Subcommittee's many site visits.

## **2. The Legal Standard.**

RSA 162-H:16, IV and Site 301.16 (*Criteria Relative to Finding of Public Interest*) require that the Subcommittee balance the potential impacts and the potential benefits of the Project in determining whether the Project will serve the public interest. The Applicants have argued in this proceeding that the Subcommittee need only determine whether the Project provides some benefit, and if it does, the Subcommittee should find that the Project serves the public interest. Counsel for the Public believes that the Applicants' position rests on an unreasonably narrow and restrictive reading of the statute, and is not supported by the text of the statute or the statute's legislative history. Attached as Addendum is Counsel for the Public's legal analysis of RSA 162-H:16, IV(e).

## **3. Potential Benefits and Adverse Impacts.**

### **a. Site 301.16 (a) the Welfare of the Population; (c) the Location and Growth of Industry; and (d) the Overall Economic Growth of the State (Economic Benefits).**

On the benefit side of the equation, there was broad agreement that construction of the Project will provide economic benefits to New Hampshire, including jobs and increased Gross State Product, though those benefits will fade and eventually become negative in later years after construction is complete. Once completed, the Project will increase the host communities' tax base over some period of time. The Forward NH Fund, if administered properly, should provide

positive job growth and economic impact. If the North Country Job Creation Fund is professionally administered, rather than its current unstructured approach, it too can provide some positive job growth. The Project may provide some electric rate relief over several years if NPT qualifies and clears in the ISO-NE Forward Capacity Market auction. The Project also will have some potential non-economic benefits. The Project may reduce greenhouse gas emissions and will help diversify New England's energy supply mix.<sup>677</sup> The Project also committed to upgrading the Coos Loop to address constraint issues faced by some generators, which should allow for greater export of power.

The Project's benefits must be weighed against the likely adverse economic impacts of the Project. During construction certain businesses will suffer and certain jobs may be lost because of traffic delays from lane closures and/or road closures, including businesses along the underground route. Construction of the Project also will likely increase the need for municipal services such as police and public works, and may hinder first responders. Construction and related traffic delays will also negatively impact residents who commute to work in the area of the proposed route as well as interfere with local and regional events, which will negatively impact local businesses. While direct construction impacts will be temporary—lasting approximately two to three years—this temporary disruption could have longer-term impacts to some businesses and communities.

The pervasive and sometimes dominant view of the completed Project and its resulting impact on tourism, real estate values and orderly development in the regions along the proposed route could be the most significant permanent impact of the Project. These negative impacts are difficult to quantify, but to the extent they occur, they will be felt for a long time. The presence

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<sup>677</sup> Tr. Day 52 AM, at 50-51 (Weiss) ("It is entirely unclear whether it would reduce greenhouse gas emissions at all.").

of the Project will permanently change the views of many residential, municipal and commercial properties and will alter the character of many towns and landscapes with views of the 132 miles of the overhead route. The underground portion could adversely impact future work in the area of the buried cable and the 153 buried splice vaults. In the areas of gravel roads or road shoulders, the heat from the cable could cause increased maintenance costs.

In an attempt to offset negative impacts of the Project, the Applicants proposed, after the Application was filed, a Guarantee Program for single-family homes that may suffer a decrease in value from the Project. Few homes, however, will qualify for the program, which is limited to residential property and includes very specific criteria. The Applicants also proposed a program for damage to property and for business losses, but the details for these programs need substantial refinement in order to effectively implement their concepts. On this record, they only offer promises without sufficient specifics to evaluate their scope or their effectiveness in mitigating property damage or business loss.

**b. Site 301.16 (b) Private Property.**

No benefits to private property are anticipated from the Project. Rather, the hundreds of residential, municipal and commercial properties located along the 192-mile route, or with new views of the overhead portion of the Project will be negatively affected to varying degrees. While the extent of negative impacts to property values is difficult to quantify, the evidence supports a finding that property values will be negatively affected by views of the Project in the range of 1-6% or higher for scenic view properties. In addition, there was significant testimony and public comment on the Project's negative impact on the use and enjoyment of private property throughout the State.<sup>678</sup> In some instances, the Project will be built in very close

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<sup>678</sup> See, e.g., See, e.g., BILODEAU Ex. 2, Pre-filed Testimony of Philip H. and Joan C. Bilodeau at 1-3; CS Ex. 1, Pre-filed Testimony of Bradley Thompson at 2; CS Ex. 1, Pre-filed Testimony of Jon and

proximity to residential properties and the scale and size of the Project significantly exceeds abutters' reasonable expectations of future development of the ROW.

Construction of the underground portion of the Project could also adversely impact private property along the route. For the vast majority of the underground route, the public ROW is an easement over the private property of the landowners who abut the road. Where the correct location of the ROW boundary is uncertain, the possibility of direct trespasses on private property exists. Cutting of trees within the ROW may impact the views and value of encumbered private property. Installing a 320,000-volt transmission line and large concrete splice vaults may interfere with future use or maintenance of some private property and exceeds the reasonable expectations of residents and businesses who purchased private property encumbered by a state or local ROW for viatic uses. Vibration from construction of the underground route, including the 53 HDD/micro-tunnel sites, could adversely impact foundations, stone walls, septic systems and other private property within several hundred feet of the ROW. Open trenching, HDD drilling, and micro-tunneling could also adversely impact water bodies or aquifers, which could adversely affect wells on private property.

**c. Site 301.16(e) Environment of the State, (h) Air and Water Quality, and (i) the Use of Natural Resources.**

NPT's partnership with the National Fish and Wildlife Foundation should benefit New Hampshire and the region's wildlife and environment. NPT's commitment to reserve up to 5,000 acres of unused land in the North Country for preservation and recreational activities could benefit New Hampshire if done appropriately. Also, the Project may lead to lower carbon

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Lori Levesque at 2; DWBA Ex. 7, Pre-filed Testimony of Bruce and Sondra Brekke at 1-2; DFLD-ABTR Ex. 2, Pre-filed Testimony of Jo Ann Bradbury at 2-1; SPNF Ex. 139, Pre-filed Testimony of Dean Wilbur at 3; SPNF Ex. 143, Pre-filed Testimony of Donald and Diane Bilodeau, Dawn Bilodeau Scribner, and Dana Bilodeau at 4-6.



emissions, although it is unclear whether net reductions will be realized or whether New Hampshire will directly benefit since the credit may be applied to Massachusetts if NPT wins the Mass RFP or a similar energy solicitation.

Construction of the Project, on the other hand will result in some damage to the environment, despite the requirement for the use of Best Management Practices and AMMs. There will be temporary and permanent damage to wetlands, forests, wildlife, wildlife habitats, flora and fauna, including the Karner Blue butterfly and likely other important species that depend on wild lupine habitat. There is also the potential for negative runoff and erosion impacts from clearing of ROWs.<sup>679</sup> Blasting, trenched burial, HDD drilling, and micro-tunneling activities could also adversely impact aquifers, streams, or other water bodies, with a corresponding impact to wells and drinking water. While these potential adverse impacts may not be unreasonable individually, the sheer size of the Project results in extensive impacts across large areas of the State.

**d. Site 301.16(f) Historic Sites and (g) Aesthetics.**

The Project will provide no benefits to historic sites or aesthetics. The pervasive views of the Project will alter the character and setting of large areas of the State that are rich with cultural and historic significance and scenic quality. In addition to unreasonable adverse effects on identified scenic resources, which are assessed pursuant to RSA 162-H:16,IV(a), there are hundreds of scenic resources and scenic byways with varying levels of adverse effects from the Project. Moreover, the Project will negatively affect views and scenic quality to innumerable locations that may not technically qualify as “scenic resources” under Site 102.45. The

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<sup>679</sup> Pemi Ex. 3, Pre-filed Testimony of Barry Draper at 2.

Subcommittee should consider the overall impact of the Project on the scenic quality of the State when considering whether issuing a certificate for the Project is in the public interest.

With regard to historic sites, in addition to the adverse effects to two archeological sites and 37 aboveground historic properties and cultural landscapes identified by NHDHR through the Section 106 process, an additional 500 to 3,000 historic sites will be adversely affected to varying degrees by visibility of the Project.<sup>680</sup> Moreover, because the final engineering and vegetative clearing plans for the underground section of the Project are not yet complete, there is insufficient information in the record to assess the full scope of impacts to aesthetics and historic sites on 60 miles of the Project route.

**e. Site 301.16 (j) Public Health and Safety.**

There are no particular public health and safety benefits arising from the Project. As this is not a reliability project, there is no direct benefit to the reliability or functionality of the electrical grid in New Hampshire. Similarly, there is no clear negative public health and safety impacts of the Project. Concerns have been raised with co-location of the Project with the Portland Natural Gas Transmission System pipeline, but the Applicants' assessment of the potential public safety risk is incomplete. While there is evidence of a small increase in the risk of childhood leukemia associated with exposure to low frequency magnetic fields such as those created by HVTLs, no direct causal connection has been confirmed. There may be some public safety issues created by road closures, traffic, dust, and other construction-related impacts.

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<sup>680</sup> CFP Ex. 140, Heritage Assessment at 14 (CFP005594) (reporting that 496 of the historic resources identified by Applicants have views of the Project); CFP Ex. 141, O'Donnell Supplemental Testimony at 7 (CFP005751) (listing counts of historic sites with potential views within the 10-mile APE).

#### **4. Public Comments.**

RSA 162-H:10, III requires that the Subcommittee “shall consider and weigh all evidence presented at public hearings and shall consider and weigh written information and reports submitted to it by members of the public before, during and subsequent to public hearings, but prior to the closing of the record of the proceeding.” The Subcommittee should consider these public comments in determining whether the issuance of a certificate to the Project will serve the public interest.

The Subcommittee received hundreds of oral and written comments at the five public hearings that were held in the host counties. The Subcommittee also received hundreds of oral and written comment at the four public comment session held in Concord. A number of individual public members spoke in favor of the Project, many because of jobs that would be created during the two to three years of construction. The vast majority of the comments from individual public members were in opposition to the Project for reasons discussed previously in this brief. Some individual businesses and business organizations spoke in favor of the Project, either because of benefits during construction or in the belief that the Project would provide some measure of reduced electric rates. Several individual businesses spoke against the Project because they believe that disruption from construction of the Project or visual impacts from the complete Project would negatively impact their businesses, their employees and their vendors.

The SEC received over 4,500 written comments and signed petitions on the Project. An overwhelming number of these comments and petitions were against the Project. There were 195 individual written comments in favor of the Project, including 60 businesses and two host communities (Dummer and Franklin). There were 4,322 written comments against the Project, including 152 businesses and municipalities.

In addition to the above, the SEC also received five petitions from members of the Public, and a petition from 107 state legislators, all in opposition to the Project. These include (1) a petition submitted on March 10, 2016 by Ellen Schaffer containing 1,102 persons opposing the Project but supporting burial of entire line, especially in Concord, if the Project must be approved; (2) a petition dated March 13, 2017 submitted by Melissa Elander entitled “*Petition to Save New Hampshire Landscapes. Deny Northern Pass Application*” containing the names of 3,365 persons; (3) a petition from Change.Org entitled “*Northern Pass Power Line Opponents*” containing the names and comments of 1,216 persons; (4) a petition submitted at the Public Statement Hearing on July 20, 2017 entitled “*Petition to Stop Northern Pass & Keep Tourist Industry Alive*” containing the names of 266 persons; and (5) an updated “*Petition to Save New Hampshire Landscapes and Deny Northern Pass Application*” submitted at the Public Statement Hearing on July 20, 2017 containing the names of 5,448 persons with comments.

##### **5. Balancing Significant Impact and Benefits of the Project.**

As described above, the Subcommittee’s responsibility under RSA 162-H:16, IV(e) is to balance the significant benefits and impacts of the Project across the areas enumerated in RSA 162-H:1 and Site 301.16. The Project is anticipated to create economic and employment benefits during construction, energy market benefits of an uncertain magnitude during operation, and provide property tax benefits. The Applicants’ experts provided a best-case scenario for these benefits, some of which were the subject of significant dispute during the hearing. In addition, the Applicants have created two funds intended to provide economic development to New Hampshire if the Project is approved.

The Subcommittee must balance these potential benefits against the significant impacts of the Project, including disruptions to businesses and individuals during construction, longer-

term impacts to tourism and property values, degradation of the scenic quality of the State, interference with private property, and negative impacts to historic sites and the environment. In addition, the Subcommittee must take into account the opinions of the public expressed through municipal governments and public comment, which were overwhelmingly opposed to the Project as proposed by Applicants. Only if the Subcommittee finds that the balance of all the benefits and impacts of the Project serves the public interest can a certificate be issued.

**[PART IV]**

**IV. ADDITIONAL ISSUES IDENTIFIED BY COUNSEL FOR THE PUBLIC FOR THE SUBCOMMITTEE’S CONSIDERATION.**

As noted, the General Court created a role of “counsel for the public,” and specifically directed in RSA 162-H:10, V that “[t]he site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter.” In the course of his review of these proceedings, Counsel for the Public has identified several additional issues that require the Subcommittee’s attention and determination.

**A. WHETHER APPLICANTS SHOULD BE REQUIRED TO OBTAIN APPROVALS FROM TOWN GOVERNING BODIES FOR USE OF THE RIGHT OF WAY IN LOCALLY MAINTAINED ROADS PURSUANT TO RSA 231:160.**

The Applicants propose to use approximately 52.5 miles of state highways and 7.5 miles of municipal roads to locate the underground portion of the HVDC line. The Applicants have requested that the NHDOT and the SEC approve the use of both state highways and local roads, and to delegate to the NHDOT the responsibility for work on town roads, including curb cuts, driveway permits, and traffic management and control plans, pursuant to RSA 231:160 and RSA 162-H. The Applicants have asserted that they do not need to seek permission from municipal authorities to bury the transmission line in or adjacent to local roads within the public road ROW. The following analysis is offered to aid the Subcommittee’s determination of the limits of its jurisdiction and whether town approvals will be needed for the project to proceed.

**1. The Relevant Statutes.**

Apart from RSA 162-H itself, the two primary relevant statutory provisions for this issue are RSA 231:160 and RSA 231:161. RSA 231:160 provides:

Telegraph, television, telephone, electric light and *electric power poles and structures and underground conduits and cables*, with their respective attachments and appurtenances *may be erected, installed and maintained in any public highways* and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation *as provided in this subdivision and not otherwise*.

RSA 231:160 (emphasis added).

The statute permits the placement of electric structures and underground conduits and cables with their respective attachments under public highways<sup>681</sup> “as provided in this subdivision and not otherwise.” RSA 231:160. RSA 231:159 provides that “[t]he provisions of this subdivision apply to all cities and towns now or hereafter incorporated, except such provisions thereof as may have been or are hereafter specifically amended or repealed in the act of incorporation.”

RSA 231:161 dictates the procedure for obtaining approval to install conduits, cables or wires under a public road. The procedure in RSA 231:161 lays out three categories of jurisdiction for public roads: (1) town maintained highways, (2) city maintained highways, and (3) state maintained highways. To install items in town and city maintained highways the petition for a permit or license must be addressed to the selectmen of the town in which such highway is located or to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located. The statute thereby requires approval from those local authorities where the public highway in question is town or city maintained. RSA 231:161. The local officials cannot unreasonably deny permits.

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<sup>681</sup> The New Hampshire Supreme Court has previously noted that the term “public highway” is broad and includes even discontinued roads. *King v. Town of Lyme*, 126 N.H. 279, 283 (1985) (quoting RSA 229:5, VII).

The commissioner of transportation has exclusive jurisdiction over certain roads under the statute. Pursuant to RSA 231:161, I(c), “[p]etitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases.” To the extent the roads in question fall within those categories of roads the Applicants are correct that only NHDOT and SEC approval is required.

RSA 231:166 grants the Applicants the right to petition the court to overturn an adverse decision by a local authority. But ultimately, RSA 231:160 and RSA 231:161 require the Applicants to obtain approval from local governing bodies in the manner directed by RSA 231:161. The remaining question becomes whether RSA 162-H and the SEC process supplants the express process set forth in RSA 231:160 and RSA 231:161.

**2. NHDOT Has Recently Informed the Subcommittee That It Has No Jurisdiction or Interest in Any Delegation of Authority From the Subcommittee With Respect to Local Roads.**

By letter dated December 22, 2017, the NHDOT addressed the Applicants’ December 12, 2017 request for the SEC to delegate authority to the NHDOT, including authority over local roadways. Among other things, the NHDOT informed the Subcommittee as follows:

- “The Department does not have the resources to monitor the work on municipally maintained local roads which would require knowledge of local ordinances and municipal operations which the Department does not have.” Dec. 22, 2017 NHDOT Letter at 1.
- “Additionally the Department does not believe it should be approving and overseeing construction and making decisions that may impact long term operations and maintenance on roadways that others will have maintenance responsibilities for nor authority over.” *Id.*
- “The Department has a policy of not using local roadways for project traffic control unless approved by the local community.” Dec. 22, 2017 NHDOT Letter at 2.



- “The Department would not look favorably on using non state roads for detours and traffic control on this utility project unless this was a request and/or approved by the local community that is responsible for roadway operations and maintenance.” *Id.*

The NHDOT’s letter also expressly states that “[t]he Department has no jurisdiction on municipally maintain[ed] roadways and since we would have no long term maintenance responsibility or authority for the locally maintain[ed] sections, we do not believe NHDOT should be making decisions which could impact the long term operation and maintenance of their roadways.” Dec. 22, 2017 NHDOT Letter at 1. Additionally, the NHDOT informed the Subcommittee that it “does not have the authority to approve detours on local roads and does not want to set the prescedent [sic] that would usurp local authority with regards to usage for their roadways;” *id.* at 2, and that it “does not have the authority or resources to issue permits on local roads.” *Id.*

The NHDOT letter raises an additional issue. The letter states: “[t]here is also a concern that state highway funds would be used for non-state highway uses and that may be a violation of state law.” Dec. 22, 2017 Letter at 2. Applicants’ proposal for the NHDOT to assume responsibility over local roads and thereby expend highway funds for that purpose would potentially violate Article 6-a of the New Hampshire State Constitution.<sup>682</sup> Furthermore, the expenditure of highway funds and resources by the NHDOT to facilitate the Project is potentially itself a use of highway funds for a non-highway purpose. Article 6-a has “consistently been held to limit the expenditure of funds derived from the regulation of motor vehicles to highway

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<sup>682</sup> Article 6-a, Use of Certain Revenues Restricted to Highways, states: “All revenue in excess of the necessary cost of collection and administration accruing to the state from registration fees, operators’ licenses, gasoline road tolls or any other special charges or taxes with respect to the operation of motor vehicles or the sale or consumption of motor vehicle fuels shall be appropriated and used exclusively for the construction, reconstruction and maintenance of public highways within this state, including the supervision of traffic thereon and payment of the interest and principal of obligations incurred for said purposes; and no part of such revenues shall, by transfer of funds or otherwise, be diverted to any other purpose whatsoever.” N.H. Const. pt. II, art. 6-a.

purposes.”<sup>683</sup> As the New Hampshire Supreme Court discussed at length in *New Hampshire Motor Transport Ass’n v. State*, the legislative history of that constitutional amendment and the rejection of numerous efforts to repeal or limit that amendment demonstrate how significant and fundamental it is to New Hampshire law.<sup>684</sup>

**3. To the Extent the Subcommittee Rejects the Position of the NHDOT and Sees Past the Article 6-a Issue, the Subcommittee Must Determine Whether RSA 162-H Supplants RSA 231:160-161 to Grant Applicants’ Request.**

No provision in RSA 162-H expressly supplants RSA 231:161. RSA 162-H:1 (*Declaration of Purpose*) provides that:

The legislature recognizes ... that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:4 (*Powers and Duties of the Committee*) provides that:

I. The committee shall:

- (a) Evaluate and issue any certificate under this chapter for an energy facility.
- (b) Determine the terms and conditions of any certificate issued under this chapter.
- (c) Monitor the construction and operation of any energy facility granted a certificate under this chapter to ensure compliance with such certificate.
- (d) Enforce the terms and conditions of any certificate issued under this chapter.
- (e) Assist the public in understanding the requirements of this chapter.

RSA 162-H:4 gives the SEC broad powers and responsibilities that could arguably encompass what local governments would ordinarily do under RSA 231:161. However, RSA 162-H does not have an explicit preemption of the authority provided to municipal governing bodies by RSA 231:161, which expressly involves municipal governing bodies. The legislature is presumed to

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<sup>683</sup> *Opinion of the Justices*, 117 N.H. 655, 657 (1977).

<sup>684</sup> *New Hampshire Motor Transport Ass’n v. State*, 150 N.H. 762 (2004).

be aware of RSA 231:160, which it enacted, and had the legislature intended for RSA 162-H to supplant RSA 231:160, the legislature would have expressly so provided.

In *Pub. Serv. Co. v. Town of Hampton*,<sup>685</sup> decided under a prior version of the SEC framework (RSA 162-F), the New Hampshire Supreme Court rejected a town's attempt to force the utility to bury aboveground transmission lines for the Seabrook Nuclear Generating Station by enacting a town ordinance after the utility had obtained a certificate to proceed with the project. The Court determined that the legislative intent of the SEC framework under the statute as it existed at that time, was to provide a comprehensive statutory scheme providing that "all interests be considered and all regulatory agencies combined for the twin purpose of avoiding undue delay and resolving all issues in an integrated fashion."<sup>686</sup> The Court stated that "[b]y specifically requiring consideration of the views of municipal planning commissions and legislative bodies, the legislature assured that their concerns would be considered in the comprehensive site evaluation."<sup>687</sup> The Court stated "it is inconceivable that the legislature, after setting up elaborate procedures and requiring consideration of every imaginable interest, intended to leave the regulation of transmission lines siting to the whim of individual towns."<sup>688</sup> The Court noted that "[t]owns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature."<sup>689</sup> Consistent with that read of the statutory scheme, the Court held that the action by the defendant town in enacting an ordinance specifically for the Seabrook station project, after the utility received its certificate, was "repugnant to RSA ch. 162-F because it [wa]s contrary to the legislative intent that all matters

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<sup>685</sup> *Pub. Serv. Co. v. Town of Hampton*, 120 N.H. 68 (1980).

<sup>686</sup> *Id.* at 71.

<sup>687</sup> *Id.*

<sup>688</sup> *Id.*

<sup>689</sup> *Id.*

regarding the construction of bulk power plants and transmission lines covered by the statute be determined in one integrated and coordinated procedure by the site evaluation committee whose findings are conclusive.”<sup>690</sup> The Court further explained that “[b]y enacting RSA ch. 162-F, the legislature ha[d] preempted any power that the defendant towns might have had with respect to transmission lines embraced by the statute, and the actions by the defendant towns with regard to transmission lines [wa]s of no effect.”<sup>691</sup>

*Pub. Serv. Co. v. Town of Hampton*, is distinguishable from the situation here. There, the town enacted a town ordinance, which was specifically directed at the construction of the Seabrook station, after the SEC had issued a certificate. This matter does not involve a town ordinance that was directed to a specific project. Here, a state statute that applies equally to all roads and all towns in New Hampshire, and not a single town’s post-certificate ordinance, is at issue. Also, it is not a matter of any particular municipality having the opportunity to provide the Subcommittee with their views. Many towns have done so. This case also involves whether Applicants must comply with municipal regulations such as driveway permits that were put into place before the Application was filed. Several town representatives testified that they have experience with utility projects, and despite their view of the Project, they would fulfill their duty to impartially follow municipal regulations if the Project complied with them.<sup>692</sup>

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<sup>690</sup> *Id.*

<sup>691</sup> *Id.*

<sup>692</sup> Tr. Day 61, AM at 24-26 (Roberge); Tr. Day 65, AM at 22-24 (Thibault); Tr. Day 68, AM at 123-124 (Coates).

**4. Counsel for the Public Recommends the Subcommittee Defer to the Local Authorities With Respect to Local Roads and Delegate Monitoring Responsibility to Those Same Entities.**

Irrespective of what determination the Subcommittee makes with respect to its authority to authorize the use of local roads notwithstanding RSA 231:160-161, Counsel for the Public submits the permitting and monitoring of the local roads impacted by the Project should be left to the local officials. Such an outcome would be consistent with the carefully crafted process laid out by RSA 231:160-161. It also would be consistent with the expressed position of the NHDOT as set forth in the December 22, 2017 letter. It would also be consistent with the expressed position of the local authorities as set forth in their testimony before the Subcommittee. It would likely further avoid at least the lion's share of the concern with respect to Article 6-a of the New Hampshire Constitution. It would also have the benefit of local knowledge applied to local issues and ordinances and respect for those ordinances and local requirements. Local officials are required to act reasonably in response to the requests for approval submitted to them, including by Applicants. The local officials who testified explained that they would comply even if their town's position opposed the project generally.<sup>693</sup> Applicants' have a right to appeal adverse or arbitrary decisions of local authorities.

**5. If the Subcommittee Determines It Has Jurisdiction to Authorize the Use of Local Roads Notwithstanding RSA 231:160-161, and It Chooses to Do So, That Jurisdiction Likely Does Not Extend to How Local Roads Are to be Restored.**

If the Subcommittee determines that the Applicants are not required to obtain a municipality's permission to place the transmission line within the ROW of a local road, the Subcommittee could find that municipalities may prescribe how the Applicants must restore

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<sup>693</sup> Tr. Day 61, AM at 24-26 (Roberge); Tr. Day 65, AM at 22-24 (Thibault); Tr. Day 68, AM at 123-124 (Coates).

local roads. While the question of whether the Applicants may use local roads for the underground portion of the Project may conceivably be subject to the SEC's exclusive jurisdiction over the siting of certain energy facilities, how the Applicants use the road, or how they restore the road after they install the transmission line, is outside the central siting function of the SEC and more appropriately remains under local control.

Presumably, any permit issued by the NHDOT for the Project's use of state highways will include requirements for restoring the highways upon completion of the Project. The NHDOT declined to determine specifications to which local roads must be restored. The SEC could condition any certificate on the restoration of municipal roads to a certain condition or standard.

RSA 231:185 (Restoring Highway) requires anyone who excavates a public highway to lay water or gas pipes, or other pipes or structures, must obtain the permission of the selectmen or highway agent of a town or mayor or alderman or street commissioner of a city. They also must "restore the highway ... to as good a condition as it was in before so doing ... ."<sup>694</sup> Under RSA 236:11 (Restoration), any person who excavates or disturbs the shoulders or surface of any highway "shall restore such highway to a condition at least equal to the condition that was present before the excavation or disturbance." RSA 236:10 (Regulations; Bond) provides that the municipal officials may make "rules and regulations to govern the excavation and restoration of such highway" and may require a satisfactory bond for the work. Although these provisions are typically invoked in connection with projects that are not governed by RSA 162-H, they are not inconsistent with RSA 162-H, and the SEC typically does not prescribe road repair requirements, such that RSA 231 and RSA 236 should not be supplanted by RSA 162-H.

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<sup>694</sup> RSA 231:185.

**B. THE SUBCOMMITTEE CANNOT GRANT THE APPLICATION PRIOR TO RESOLUTION OF THE APPLICANTS' EASEMENT RIGHTS IN CAPE HORN STATE FOREST.**

Site 301.03(c)(6) requires all applications to include “[e]vidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site” including ownership, lease, easement or other contractual right or interest. Applicants have acknowledged that they do not possess an easement over a portion of the Cape Horn State Forest through which the Project is proposed to pass.

Mr. Johnson testified that PSNH has easements in Cape Horn State Park, that the easements include a series of contiguous parcels where Mr. Gallagher granted easements to PSNH and that PSNH proposed to lease the easements to NPT for the Project.<sup>695</sup> Among those contiguous parcels, there is one parcel where no easement was granted within the deed from Mr. Gallagher.<sup>696</sup> The parcel for which the deed does not include an easement to PSNH is shown as lot 92 on Counsel for the Public’s Exhibit 250.<sup>697</sup> PSNH does not have an easement on that parcel.<sup>698</sup> That issue needs to be resolved in order for NPT to have the necessary property rights to construct the transition line through that parcel in Cape Horn State Park.<sup>699</sup>

Without established legal rights to a portion of the proposed Project route, Applicants cannot legally construct the Project as proposed. Nor can the benefits of the Project be realized if the Project cannot be fully constructed. Accordingly, if the Subcommittee determines that a certificate of site and facility should issue for the Project, such certificate should be conditional

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<sup>695</sup> Tr. Day 7, AM at 112 (Johnson).

<sup>696</sup> Tr. Day 7, AM at 113 (Johnson).

<sup>697</sup> Tr. Day 7, AM at 113 (Johnson).

<sup>698</sup> Tr. Day 7, AM at 114 (Johnson).

<sup>699</sup> Tr. Day 7, AM at 114 (Johnson).

until such time as the Applicants submit to the SEC proof of the Applicants' legal right to construct the Project over the disputed parcel in the Cape Horn State Forest.

**C. WHETHER THE SUBCOMMITTEE CAN GRANT THE APPLICATION ON THE CURRENT RECORD.**

**1. The Record Does Not Contain Pieces of Information Important to the Subcommittee's Ultimate Determination.**

RSA 162-H:10, IV provides that "[t]he site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration." As noted above and briefly summarized below, there are numerous pieces of information missing from this proceeding that the Subcommittee should deem necessary before issuing any site certificate. The following information remains outstanding:

- A survey approved by NHDOT establishing the extent and location of the public ROWs for those state roads in which the Applicants propose to bury the portions of the Project;
- A design for the underground sections of the Project that can be constructed within the established and approved ROWs;
- An assessment of the impacts to historic sites, aesthetics, the environment, and orderly development of the region along the underground sections of the Project after final Project designs are established;
- The findings and determinations of the NHDHR and US DOE of the Projects effects on historic sites as determined in the Section 106 process;
- Financial assurance for the decommissioning plan; and
- Resolution of the easement gap in Cape Horn State Forest.

Without this information, the Subcommittee would be unable to make all of the findings required to issue a certificate. As the New Hampshire Supreme Court has explained, "[t]he site evaluation committee must furnish basic findings of fact to support the conclusions that the



statute requires it to make.”<sup>700</sup> For example, any conclusion concerning whether the proposed facility will have “an unreasonable adverse effect” on one of the areas of inquiry “must be supported by specific basic findings of fact delineating the probable effects” of the proposed facility.<sup>701</sup> The Court explained that among other things in “the process of making basic findings the committee will be 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.”<sup>702</sup> Those “basic findings of fact” must be based “on the existing record” and must “support the ultimate conclusions [the Subcommittee] has reached.”<sup>703</sup> Given that, and the Subcommittee’s statutorily required findings, the issuance of any certificate should be conditioned on provision of the above-noted information by Applicants.

## **2. The Subcommittee Cannot Delegate Statutory Findings to Another State Agency.**

In order to address the significant gaps in the record, the Applicants have suggested that decisions regarding final designs for the underground section of the Project can be delegated to NHDOT and decisions regarding historic sites can be delegated to NHDHR. However, as explained further below, Counsel for the Public takes the position that these issues are central to the Subcommittee’s required statutory findings set forth in RSA 162-H:16, IV. Further, Counsel for the Public believes that the Subcommittee’s statutory responsibility to issue the findings set forth in RSA 162-H:16, IV is non-delegable. RSA 162-H:16, IV provides that “the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this

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<sup>700</sup> *Soc’y for Prot. of New Hampshire Forests v. Site Evaluation Comm.*, 115 N.H. 163, 174 (1975).

<sup>701</sup> *Id.*

<sup>702</sup> *Id.*

<sup>703</sup> *Id.* at 175.

chapter.” The task is statutorily given to the site evaluation committee and the site evaluation committee alone.

**a. Delegation Authority Under RSA 162-H:4 Is Expressly  
Limited.**

RSA 162-H does anticipate and encourage consultation and coordination with other agencies and entities,<sup>704</sup> but the ultimate decision on issuing and fashioning a certificate rests with the Subcommittee. As the New Hampshire Supreme Court recognized in *In re Londonderry Neighborhood Coal*, the critical requirement is that the “the ultimate decision as to the terms and conditions of the certificate” be made by the site evaluation committee.<sup>705</sup>

The text of RSA 162-H:4 further demonstrates that the Subcommittee cannot delegate its statutory responsibility under RSA 162-H:16, IV. RSA 162-H:4, III-b specifically directs that “[t]he committee may not delegate its authority or duties, except as provided under this chapter.” That specific rejection of delegation by the site evaluation committee is essentially underlined by the companion provisions to RSA 162-H:4, III-b, which actually set forth the limited means of delegation available.

RSA 162-H:4, III grants the Subcommittee the authority to delegate its “authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met.” In other words, the Subcommittee can delegate monitoring responsibilities but the delegatee must ensure the terms and conditions set by the Subcommittee are dutifully complied with.

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<sup>704</sup> See, e.g., RSA 162-H:16, I, III.

<sup>705</sup> *In re Londonderry Neighborhood Coal*, 145 N.H. 201, 205 (2000) (“The fact that EFSEC imposed additional terms and conditions when State agency recommendations were not comprehensive demonstrates that EFSEC did not delegate its authority to determine the certificate's terms and conditions.”) (addressing predecessor RSA 162-H (1994)).

RSA 162-H:4, III-a further grants the authority to “delegate ... 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.*”<sup>706</sup> In other words, the delegatee is vested with the limited authority of specifying which practice among previously approved practices is permitted. Where the delegatee is provided any discretion in its action, that discretion is so limited that it proves the point on the limits of the delegation.

**b. Final Design of the Underground Section Is Not Delegable.**

As of the close of the record, the width of state road ROWs along the proposed underground portion of the Project is undetermined and the final engineering design of the underground section of the Project is incomplete. As described by the Applicants’ construction panel when recalled to testify, the Applicants must first survey the underground route to establish the width of the ROWs, obtain NHDOT approval of the survey, establish a new design to site the Project within the established ROWs, submit new exception requests to NHDOT for approval of any part of the Project proposed to be placed in or under the pavement, including to avoid scenic impacts, private property, and/or historic sites, and work with NHDOT to obtain approval of all necessary exception requests.<sup>707</sup> Following final engineering plans, the Applicants will prepare a

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<sup>706</sup> RSA 162-H:4, III-a (emphasis added).

<sup>707</sup> Tr. Day 42, AM at 10-12, 51, 131-133, 137-139 (Johnson & Bowes).

full traffic management plan.<sup>708</sup> At the close of the record on December 22, 2017, only two short segments of the underground survey had been submitted to NHDOT.<sup>709</sup>

Accordingly, at this stage the Subcommittee lacks information on where the Project will be placed within the still undetermined ROW. While it is true that final construction and engineering details are often worked out after issuance of a certificate, in this case the critical deficiency is uncertainty over the impacts of the Project within the underground section. For example, placement of the Project within the pavement or outside the pavement in a given location can have significantly different impacts. Placement outside the pavement may require vegetative clearing, impacts to wetlands or streams, grading, and possible interference with stone walls, wells, septic systems or other private property. On the other hand, placement in the pavement may avoid those impacts but result in greater traffic delays due to lane or road closures. With 53 HDD sites and 152 splice vaults proposed in the underground section, these impacts are significant.

Indeed, the opinions of the Applicants' expert witnesses on environmental impacts, aesthetics, historic sites, property values, and tourism are all based on a now outdated design for the underground section. Because the specific placement of the Project can drastically alter the impacts of the Project, the expert opinions offered by the Applicants are at best incomplete. Without at least a reasonable degree of certainty as to the proposed placement of the Project within the ROW and in relation to natural and built features along the ROW, it would be very difficult for the Subcommittee to make a finding of no unreasonable adverse impact for the Project.

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<sup>708</sup> Tr. Day 42, AM at 124-126 (Frazier).

<sup>709</sup> CFP Ex. 614, 615, 616, 617.

While the Applicants argue that they will attempt to avoid all negative impacts during the redesign of the underground section, such optimistic statements cannot replace evidence in the record of the extent of adverse impacts of the Project. The Applicants may have every intention of avoiding adverse impacts, but avoidance may not be practicable in all or even most instances. Simply put, the record is insufficient to support the Applicants' claims.

Accordingly, while resolution of exception requests could be delegated to NHDOT and resolution of mitigation measures for adverse impacts to historic sites could be delegated to NHDHR and the Section 106 process, such delegations can come only after the Subcommittee fulfills its statutory requirement to determine whether the four criteria under RSA 162-H:16, IV for issuance of a certificate have been satisfied. Reliance on the outcome of future action by NHDOT or other state agencies to establish that the Project will have no unreasonable adverse effects would constitute an impermissible delegation of the Subcommittee's statutory responsibility to assess the Project on the record before the Subcommittee.

**D. THE SUBCOMMITTEE HAS AUTHORITY TO GRANT REASONABLE  
CONDITIONS ON ITS ISSUANCE OF THE CERTIFICATE.**

RSA 162-H:4, I(b) specifically directs the Subcommittee to “[d]etermine the terms *and conditions* of any certificate issued under this chapter.”<sup>710</sup> The Subcommittee is further charged with monitoring the construction and operation of any proposed facility to ensure compliance with the certificate and enforcing “the terms and conditions of any certificate issued under this chapter.”<sup>711</sup> The Subcommittee is granted authority to delegate monitoring to ensure among other things “that the terms and conditions of the certificate are met.”<sup>712</sup>

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<sup>710</sup> RSA 162-H:4, I(b) (emphasis added).

<sup>711</sup> RSA 162-H:4, I(c)-(d).

<sup>712</sup> RSA 162-H:4, III.

That authority is not unlimited, however, as the New Hampshire Supreme Court has recognized in the PUC context.<sup>713</sup> But while the takings clause can impose some limit on the breadth of the Subcommittee's conditions, just like the PUC the Subcommittee "is nevertheless still free to attach reasonable conditions ... as it properly finds to be 'necessary in the public interest'" or in furtherance of the other required findings pursuant to RSA 162-H:16, IV.<sup>714</sup> This is particularly so where the cost of any conditions can be "recovered through the rate structure."<sup>715</sup>

Counsel for the Public suggests that if the Subcommittee decides to grant a certificate to the Applicants, the Subcommittee should consider attaching the following conditions to the certificate:

**1. Best Management Practices – Construction.**

Further Ordered that, prior to any construction activity, Applicants shall file with the SEC a copy of all Best Management Practices ("BMPs") for all construction activity; including, without limitation BMPs for entering and exiting the ROW or any construction site; sweeping paved roads at access points; BMPs relating to Applicants' Storm Water Pollution Prevention Plan; BMPs for specific locations such as steep slopes near water bodies; BMPs for HDD/micro-tunnel drilling locations; and BMPs for work near archeological and historic sites.

**2. Avoidance, Minimization and Mitigation – Natural Environment.**

Further Ordered that, prior to any construction activity, Applicants shall identify and implement the following avoidance, minimization and mitigation measures ("AMMs") in addition to or supplementing the Avoidance and Minimization Measures and Time of Year Restrictions for Wildlife Resources approved by NHDES in accordance with Condition 7 of the March 1, 2017 recommended wetlands application filed by the Applicants:

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<sup>713</sup> See *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1072 (1982).

<sup>714</sup> *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. at 1072 (quoting RSA 369:1); see also *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 722 (1984).

<sup>715</sup> *Id.*

**a. Eastern Small-Footed Bats.**

Investigate and confirm which rocky outcrops are inhabited by eastern small-footed bats and avoid any blasting and/or construction activities on or adjacent to any rocky outcrops inhabited by eastern small-footed bats.

**b. Northern Long-Eared Bats.**

No tree removal activity shall be conducted in proximity to identified long-eared bat sites, including the Bristol mine location, between August 1 and May 31, and Applicants shall perform acoustic monitoring within any area that will be cleared to verify the absence of bats prior to tree clearing activity.

**c. Indiana Bat.**

Applicants shall establish AMMs to protect this species from construction activity.

**d. Butterflies.**

Applicants shall limit all construction activity within the locations of the Karner Blue Butterfly (“Kbb”) in Concord and Pembroke to the period of December 21 to March 20 (winter conditions). Timber mats shall be used. Their continuous use shall be limited to a two (2) week period and timber mats shall be removed when they are not in use.

Applicants shall develop a restoration plan for the parcel of land in Concord to be used to offset the impacts to the Kbb and shall fund the restoration of this property.

Applicants shall develop and file with the SEC a ROW management plan for avoidance and minimization of impacts to the Kbb during operation of the Project.

**e. Birds.**

**(1) Great Blue Heron.**

Prior to construction, Applicants shall perform an aerial survey to locate great blue heron nests and shall utilize a quarter-mile buffer zone for any activity near active blue heron nests.

**(2) Active Raptor Nests.**

Prior to construction, Applicants shall perform an aerial survey to identify active raptor nests and follow Applicants’ proposed AMMs for active raptor nests.

**(3) Common Nighthawk.**

Prior to construction, Applicants shall file AMMs for the common nighthawk that describes the methodology to “predetermine” the buffer area around nests.

**(4) Bald Eagles.**

Prior to construction, Applicants shall file AMMs that provide for nest identification by an aerial survey.

**f. Mammals.**

**(1) Lynx**

Prior to construction, Applicants shall file with the SEC AMMs that describe how Applicants will survey sites for lynx denning sites to discover the presence of lynx, and shall not clear any trees between May 1 and July 15 in locations where Lynx are discovered.

**(2) American Marten.**

Prior to construction, Applicants shall file with the SEC proposed AMMs to avoid or minimize impacts to the American Marten, which shall include seasonal restrictions on construction and the prohibition of off-highway recreational vehicles in the new ROW and access roads. Applicants also shall confirm that the proposed mitigation parcels provide accessible high quality martin habitat.

**g. Plants.**

**(1) Wild Lupine.**

Applicants shall limit all construction activity in the Concord and Pembroke locations where wild lupine are present to the period of December 21 to March 20, and shall use timber mats, but limited to a two (2) consecutive week period, and remove timber mats when they are not in use.

**(2) Licorice Goldenrod.**

Prior to construction, Applicants shall file with the SEC proposed AMMS for the licorice goldenrod.

**(3) The Small Whorled Pogonia.**

Prior to construction, Applicants shall survey the ROW and file with the SEC an inventory of all small whorled pogonia within the ROW and shall file AMMs for this plant.

**(4) Red Threeawn.**

Prior to construction, Applicants shall file with the SEC BMPs that include seasonal restrictions, seed collection, the establishment of conservation areas and reseeding areas after construction.



### **3. Monitoring.**

Further Ordered that, once construction begins, Applicants shall file weekly with the SEC a copy of all reports by all construction and environmental monitors. The SEC shall post said reports on its website. Applicants also shall identify a specific contact person from the Project, with their contact information, to whom all questions, concerns or other communications should be sent regarding monitoring reports. The Project's contact person shall respond in writing within three (3) business days to all written communications they received regarding a monitoring report. The SEC, or any state agency to which the SEC delegates authority to, shall have continuing jurisdiction to address any violations of these conditions, all BMPs or all AMMS for the Project. Following remediation of any such violation, Applicants shall file with the SEC a report of remediation, and the SEC shall post said reports on its website.

### **4. Blasting.**

Further Ordered that, prior to any blasting, Applicants shall identify drinking water wells located within 2,000 feet of the proposed blasting activities and develop a groundwater quality sampling program to monitor for nitrates and nitrites, either in the drinking water supply wells or in other wells that are representative of the drinking water supply wells in the area.

Further Ordered that, the groundwater quality sampling program shall include pre-blasting and post-blasting water quality monitoring to be approved by the New Hampshire Department of Environmental Services ("NHDES") prior to commencing blasting.

Further Ordered that, the groundwater sampling program shall be implemented by Applicants once approved by the NHDES.

Further Ordered that, the NHDES is authorized to monitor the implementation and enforcement of the groundwater quality sampling program to ensure that terms and conditions of the program and the Certificate are met, and any actions to enforce the provisions of the Certificate must be brought before the SEC.

Further Ordered that, the NHDES is authorized to specify the use of any appropriate technique, methodology, practice or procedure, as may be necessary, to effectuate conditions addressing the groundwater sampling program or to carry out the requirements of the groundwater quality sampling program.

### **5. Noise.**

Further Ordered that, Applicants shall retain a third-party noise expert, as approved by the SEC Administrator, to take field measurements in order to evaluate and validate noise complaints.

**6. Timber Mats.**

Further Ordered that, Applicants shall remove any timber mats that have not been used for 10 consecutive days.

**7. Tamarack Tennis Camp.**

Further Ordered that, Applicants shall not perform any construction activity during any time that the Tamarack Tennis Camp is in session.

**8. Municipal Construction Permits.**

Further Ordered that, Applicants shall obtain all construction permits from any municipality through which the Project will pass, such as driveway permits, in order to comply with existing municipal construction rules and regulations.

**9. Restoration of Municipal Roads.**

Further Ordered that, all municipal roads that are damaged by construction of the Project shall be restored in compliance with all existing municipal rules and regulations, to the satisfaction of the municipal engineer, road agent or other authorized municipal officer.

**10. Public Meetings.**

Further Ordered that, prior to construction of the underground portion of the Project, Applicants shall hold a public meeting with the combined Boards of Selectmen for (1) Clarksville/Stewartstown; (2) Bethlehem/Sugar Hill/Franconia/Easton; and (3) Woodstock/Thornton/Campton/Holderness/Plymouth, to discuss the construction schedule in their respective towns and to coordinate the construction in order to avoid or minimize impacting local or regional events that are scheduled to be held in said towns.

Further Ordered that, Applicants shall provide each host town and the Administrator of the SEC with copies of Applicants' proposed construction plans, blasting plans, schedule and other public information (Ref. RSA 91-A:5) to be made available to the public.

Further Ordered that, the construction plans, schedule and other information provided to each host town and Administrator of the SEC shall be updated to reflect changes in the Project's schedule or other changes during construction.

Further Ordered that, the meetings between Applicants and the host towns shall be attended by persons knowledgeable with Applicants' construction plans and responsible for managing construction activities.

Further Ordered that, the meetings between Applicants and the host towns shall be public meetings under RSA 91-A, moderated by the towns' Board of Selectmen, except as provided by RSA 91-A:3.

Further Ordered that, Applicants shall provide to the SEC for posting on the SEC's website information concerning complaints during construction, if any, and their resolution, except that confidential, personal or financial information (Ref. RSA 91-A:5) regarding the complaint should be redacted.

Further Ordered that, in the event of significant unanticipated changes or events during construction that may impact the public, the environment, compliance with the terms and conditions of the Certificate, public transportation or public safety, Applicants shall notify the Board of Selectmen of all affected host towns or their respective designee and Administrator of the SEC in writing as soon as possible but no later than seven (7) days after the occurrence.

Further Ordered that, in the event of emergency conditions which may impact public safety, Applicants shall notify the host town's appropriate officials and the Administrator of the SEC immediately.

#### **11. Independent Claims Process.**

Further Ordered that, the SEC shall appoint an attorney or retired judge (the "Claims Administrator") who shall independently administer a claims process for all claims relating to damage to property, loss of business or loss of income caused by construction of the Project (the "Claims Process"). Counsel for the Public and Applicants shall jointly or separately file with the SEC proposed procedures for filing and deciding said claims, including criteria for eligibility, a procedure for filing claims, required proof of the damage or loss, the presentation and consideration of claims, the basis for recovery and the manner of deciding claims. Applicants shall establish a fund for the payment of claims ("Claims Fund") which fund shall be solely administered by the Claims Administrator, who shall provide to the SEC a quarterly report of the Claims Fund, including all disbursements. The Claims Administrator shall be paid an hourly rate to be determined by the SEC, and said compensation and all expenses of the Claims Administrator shall be paid from the Claims Fund, subject to approval by the SEC. Upon issuance of a certificate, Applicants shall deposit Five Hundred Thousand (\$500,000) Dollars to establish the Claims Fund, and shall deposit any additional funds necessary to pay all claims awarded by the Claims Administrator and to pay the Claims Administrator's compensation and expenses. The Claims Administrator shall accept written claims until the five-year anniversary date of the date when the SEC's order granting a certificate shall become a final order. The Claims Administrator shall process and provide a written decision on all written claims filed with the Claims Administrator prior to said deadline. The Claims Administrator's decision and any reconsideration thereof shall be final and non-appealable. The Claims Process is not mandatory. Any party may file a claim in any court of competent jurisdiction in lieu of filing a claim in the Claims Process. If a party files a claim in the Claims Process, that party waives the right to file the same claim in court, and the Claims Process becomes the exclusive forum for deciding all claims filed in the Claims Process. All funds remaining in the Claims Fund after the payment of all timely filed claims and the payment of the Claims Administrator's compensation and expenses shall be returned to Applicants.

**12. Cape Horn Forest.**

Further Ordered that, prior to construction, Applicants shall provide the SEC with proof that Applicants have the legal right to construct the Project in the ROW in Cape Horn State Forest, including resolution of the gap in Applicants' easement rights.

**13. EMF Monitoring.**

Further Ordered that, Applicants, in consultation with the PUC's Safety Division, shall measure actual electro-magnetic fields associated with operation of the Project both before and after construction of the Project during peak-load, and shall file with the SEC the results of the electro-magnetic fields' measurements.

Further Ordered that, if the results of the electro-magnetic fields measurements exceed the guidelines of the International Committee on Electromagnetic Safety or the International Commission on Non-Ionizing Radiation Protection, Applicants shall file with the SEC a mitigation plan designed to reduce the levels so that they are lower than the PUC's or SEC's standards.

**14. North Country Jobs Fund.**

Further Ordered that, the North Country Jobs Fund (the "Fund") employ an independent economic development professional to provide advice on the selection of Fund recipients, and to file annually with the SEC a summary of Fund disbursements and the use and results of grants awarded by the Fund

**15. The Forward New Hampshire Fund.**

Further Ordered that, the Forward New Hampshire Fund ("FNHFund") have a board of directors who have no financial affiliation (employment, vendor, etc.) with Applicants; that the FNHFund employ an independent economic development professional to establish written criteria for the application and receipt of loans or grants from the FNHFund; and that the FNHFund file annually with the SEC and with the Director of Charitable Trust in the Office of the Attorney General a report of its activities, including a report of its expenditures, all loans or grants made by the FNHFund and a review of how each loan or grant was used and their results in creating jobs or economic development.

**16. Decommissioning.**

Further Ordered that, prior to construction Eversource Energy shall execute a payment guarantee in the face amount of \$100 million, in a form acceptable to Counsel for the Public and the SEC, that will unconditionally guarantee the payment of all costs of decommissioning the Project, consistent with the Decommissioning Plan prepared by GZA GeoEnvironmental, Inc. that was filed on July 22, 2016. On each tenth anniversary of said payment guarantee, NPT shall file the SEC an updated budget for the costs of decommissioning the Project, and Eversource

Energy or its successor or assigns shall provide a replacement payment guarantee in the face amount of said updated budget.

**17. Coos Loop.**

Further Ordered that, NPT shall complete, as part of the construction of the Project, all of the upgrades to the Coos Loop and the transmission lines that connect the Coos Loop to the New England electrical grid that are required to remove the current constraints or flowgate restrictions on the Coos Loop, including without limitation, upgrading 16 miles of the Q-195 transmission line, .5 miles of the O-154 transmission line, and whatever ISO-NE determines is necessary to address voltage stability at the substation in Berlin or at another substation on the Coos Loop, as set forth in Counsel for the Public's Exhibits 46 and 47.

**18. Co-location with PNGTS.**

Further Ordered that, prior to construction the Applicants shall file with the SEC Administrator and the PUC an engineering study that investigates and addresses all safety and operational issues that arise from the co-location of the Project and the PNGTS gas pipeline within the same ROW, which shall include specific mitigation and safety measures (the "Study"). The Applicants shall not begin construction of the Project until the SEC or the PUC, if delegated authority by the SEC, approves the Study and any recommended mitigation and safety measures, and Applicants provide the SEC Administrator with acceptable assurances that all said mitigation and safety measures will be implemented.

## [PART V]

### V. CONCLUSION.

An unprecedented amount of information, testimony, exhibits and public comments have been submitted in this proceeding, which the Subcommittee is now tasked with weighing in consideration of the statutory requirements for issuance of a certificate of site and facility. Counsel for the Public has endeavored to test the assumptions of the Applicants and intervenors, and assist in the development of a full and complete record of the facts and issues raised in this matter. This post-hearing brief, while lengthy, is by no means comprehensive. Nonetheless, Counsel for the Public has attempted to present the relevant evidence, assess the legal requirements, and provide guidance on the interpretation of the statute and rules.

While Counsel for the Public does not take an express position on the Subcommittee's ultimate decision in this case, he does note the significant impediments to a finding that the Project meets the statutory requirements for approval of a certificate of site and facility, including the incompleteness of key aspects of the records discussed above and the uncertainty inherent in projections of future benefits of the Project. In addition, Counsel for the Public notes the overwhelming opposition to the Project expressed by intervenors, municipal governing bodies, legislators, and the public. This public opposition must be carefully weighed by the Subcommittee, particularly as it assesses the ultimate requirement that "issuance of a certificate will serve the public interest."

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,



Dated: January 12, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing POST-HEARING BRIEF has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: January 12, 2018

By:   
Thomas J. Pappas, Esq. (N.H. Bar No. 4111)

**ADDENDUM A**  
**LEGAL ANALYSIS OF THE INTERPRETATION OF “SCENIC RESOURCES”**

**1. Statutory Scheme Regarding “Scenic Resources.”**

As noted above, the definition of “scenic resources” is relevant to the operation of Section 301.05 (Effects on Aesthetics) in the SEC Rules. Section 301.05 requires that each application for a certificate include a visual impact assessment of the proposed energy facility regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics. Section 301.05(b) requires such a visual impact assessment to contain a variety of components, including:

(1) A description and map depicting the locations of the proposed facility and all associated buildings, structures, roads, and other ancillary components, and all areas to be cleared and graded, *that would be visible from any scenic resources*, based on both bare ground conditions using topographic screening only and with consideration of screening by vegetation or other factors;

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(5) an *identification of all scenic resources* within the area of potential visual impact and a *description of those scenic resources* from which the proposed facility would be visible;

(6) A *characterization of the potential visual impacts* of the proposed facility, and of any visible plume that would emanate from the proposed facility, *on identified scenic resources* as high, medium, or low, *based on consideration of the following factors*:

- (1) The expectations of the typical viewer;
- (2) The effect on future use and enjoyment of the *scenic resource*;
- (3) The extent of the proposed facility, including all structures and disturbed areas, visible from the *scenic resource*;
- (4) The distance of the proposed facility from the *scenic resource*;
- (5) The horizontal breadth or visual arc of the visible elements of the proposed facility;
- (6) The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;
- (7) The duration and direction of the typical view of elements of the proposed facility; and
- (8) The presence of intervening topography between the *scenic resources* and elements of the proposed facility;



(7) photosimulations from representative key observation points, *from other scenic resources for which the potential visual impacts are characterized as 'high'* pursuant to (6) above, and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility.

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Site 301.05 (emphasis added).

Site 102.25 in turn provides that “key observation point” means “a view point that receives regular *public use* and from which the proposed facility would be visible.” Site 102.25 (emphasis added). The term “scenic resources” is also used in Site 301.14, which requires that “[i]n determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the Committee shall consider:

- (1) The existing character of the area of potential visual impact;
- (2) The significance of affected *scenic resources* and their distance from the proposed facility;
- (3) The extent, nature, and duration of *public uses* of affected *scenic resources*;
- (4) The scope and scale of the change in the landscape visible from affected *scenic resources*.

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Site 301.14 (emphasis added).

With respect to the definition itself, Section 102.45 of the SEC Rules provides that “‘Scenic resources’ means resources *to which the public has a legal right of access* that are:

- (a) Designated pursuant to applicable statutory authority by national, state, or municipal authorities for their scenic quality;
- (b) Conservation lands or easement areas that possess a scenic quality;
- (c) Lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality;
- (d) Recreational trails, parks, or areas established, protected or maintained in whole or in part with public funds;
- (e) Historic sites that possess a scenic quality; or
- (f) Town and village centers that possess a scenic quality.”

Site 102.45 (emphasis added).

The New Hampshire Supreme Court construes regulations using the same interpretation principles of construction as when interpreting statutes. *Appeal of Michele*, 168 N.H. 98, 123 A.3d 255, 102 (2015); *Appeal of Old Dutch Mustard Co., Inc.*, 166 N.H. 501, 506, 99 A.3d 290, 293-94 (2014). That approach requires that New Hampshire courts “first look to the language of the statute or regulation itself, and, if possible, construe that language according to its plain and ordinary meaning.” *Appeal of Old Dutch Mustard Co. Inc.*, 166 N.H. at 506 (citing *Vector Mktg. Corp. v. N.H. Dep’t of Revenue Admin.*, 156 N.H. 781, 783 (2008) and *N.H. Dep’t of Envtl. Servs. v. Marino*, 155 N.H. 797, 713 (2007)). “When the language of the statute or regulation is clear on its face, its meaning is not subject to modification.” *Id.*

The New Hampshire Supreme Court also stresses that courts in this state must “interpret statutes and regulations in the context of the overall statutory and regulatory scheme and not in isolation.” *Id.* The stated “goal is to apply statutes and regulations in light of the legislature’s or commissioner’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme.” *Id.*

## **2. Interpretation of a Public “Legal Right of Access.”**

As noted above, Section 102.45 of the SEC Rules defines “Scenic Resources” as “resources to which the public has a legal right of access that are ...” and provides categories of such resources. By its language, therefore, the definition takes the term “resources” and applies that term to resources that “the public has a legal right of access” to and then further provides the types of categories which qualify under the Rule. Thus, before considering the types of categories that fall within the definition, the definition first calls for an analysis of the qualifier

“to which the public has a legal right of access.” That qualifier in turn calls for an analysis of what is meant by the concept of a “legal right of access.”

The concept of “legal right of access” has been addressed by both the New Hampshire Supreme Court and the United States District Court for the District of New Hampshire, albeit not in the context of the SEC Rules specifically. In these cases, the concept of “legal right of access” was construed broadly to encompass more than simply actual access.

In *Capitol Plumbing & Heating Supply Co. v. State*, 116 N.H. 513 (1976), the New Hampshire Supreme Court considered the appropriate measure of damages for the taking of a landowner’s loss of access rights, which were later restored by emendation to the original return of highway layout. The original highway layout in the case “resulted in the plaintiff’s loss of the right to use a certain private ROW leading to Storrs Street and in the loss of access to Bridge Street.” *Id.* at 514. Subsequently, the “right of access was restored by emendation to the layout” and the question of law presented by the transfer concerned only the measure of damages. The Court explained that “[t]he owner of land abutting on a street or highway has a private right of access in that street or highway, which includes not only the right to go to and from the land but also the right to have those premises accessible to others [and] [a]lthough this right of access may be limited by regulation, it cannot be taken without compensation.” *Id.* (citing cases).

The Court then noted that “Plaintiff was legally deprived of the right of access only during the period of time from the layout on November 20, 1970, to the emendation restoring the right of access on June 26, 1974, or a period of three-and-one-half years” but “[e]ven during this time, plaintiff in fact had full access, as the State did not enforce its rights.” *Id.* at 514-15. The Court explained that “[t]here was in fact no actual loss of access but only of the legal right of access.” *Id.* at 515. Nevertheless, the Court held that the temporary loss of only the legal right

of access, even without loss of actual access, required compensation. *Id.* Critically for interpretive purposes here, the Court distinguished between the concept of a “legal right of access,” and the concept of “actual access.” *See also Berlinguette v. Stanton*, 120 N.H. 760, 763 (1980) (“In *Capitol Plumbing* ... we noted that a landowner who suffered a temporary loss of access for three and one-half years was entitled to damages even though there was loss only of the legal access, not of actual access.”). By finding that loss of a “legal right of access,” while maintaining “actual access” permitted the recovery of damages, the court necessarily implied that legal right of access is a broader concept than actual access, or that actual access is a component of legal right of access.

The United States District Court for the District of New Hampshire has considered the concept of “legal access” in the context of the interpretation of RSA 270:61, II(b). That statutory provision provides that “[a]ny person applying for a mooring permit shall: ... [s]how to the satisfaction of the director that he has legal access over land to such mooring... .” RSA 270:61, II(b). Attempting to define the term “legal access,” the court explained that “[t]he word ‘access’ is defined as ‘the ability, right, or permission to [], enter ... or use[.]’” *F.D.I.C. v. Caia*, 830 F. Supp. 60, 65 (D.N.H. 1993) (quoting *The Random House Dictionary of the English Language*, p. 11 (Random House 2nd ed. 1987)). The court further explained that that “definition aptly describes one of the characteristics of nonpossessory interests in land of which easements are a subcategory.” *Id.* Based on that reading of the statute, the court held that “[a]ll that is required to obtain a mooring permit is a showing that the party seeking the permit has legal access over land to the mooring, ownership of shorefront property need not be demonstrated.” *Id.* at 65-66.

In light of these precedents, Counsel for the Public submits that the proper interpretation of the phrase “resources to which the public has a legal right of access” includes a broad

category of resources to which the public has “the ability, right, or permission to [], enter ... or use[.]” *F.D.I.C.*, 830 F. Supp. at 65. As discussed in more detail below, the potentially unreasonable breadth such an interpretation could otherwise have on the definition of “scenic resources” under the SEC Rules is tempered by both the categories contained in that definition and the use to which the SEC Rules put the term “scenic resources.”

### **3. The Breadth of “Resources to Which the Public Has a Legal Right of Access.”**

Under the definition of “legal access” as “the ability, right, or permission to [], enter ... or use[.]” the definition of “scenic resources” would include various state resources as a starting point. *See F.D.I.C.*, 830 F. Supp. at 65. In addition, the public as a whole has the ability, right or permission to enter or use a significant number of resources beyond the state resources, including various forms of private property.

In New Hampshire, a landowner can bar people from entering their land by ‘posting’ it, *i.e.*, by putting up a publicly displayed notice which informs people they are trespassing if they enter the property. New Hampshire’s posting statute, RSA 635:4, provides that an individual may “post his land to prohibit criminal trespass and physical activities by posting signs of durable material with any words describing the physical activity prohibited, such as ‘No Hunting or Trespassing.’” The sign must be printed with block letters no less than two (2) inches high, and have the owner’s name and address. RSA 635:4. In addition, the signs shall be no further than 100 yards apart on all sides of the property and shall also be posted at gates, bars and all commonly used entrances. *Id.* Any person who enters posted land without permission may be found guilty of criminal trespass under RSA 635:2. An individual commits criminal trespass in New Hampshire if “knowing that he is not licensed or privileged to do so, he enters or remains in any place.” RSA 635:2.

Many landowners in New Hampshire, however, have chosen not to post their property and instead permit access to their property by members of the public for various uses. The New Hampshire Fish and Game website indicates a tradition in New Hampshire of public use of private land. Specifically, the website states “[i]n New Hampshire and elsewhere in New England, we enjoy a long, proud tradition of public use of private land.”<sup>1</sup> The Fish and Game website acknowledges such right of access is not in the state law books, but indicates such right is part of the common law going back to early colonists. Counsel for the Public submits that this long tradition reflects the common law of the state, and coupled with RSA 635:4, gives the public the legal right of access to various private lands in this state in the absence of posting by the landowners to the contrary.<sup>2</sup>

This is particularly so with a category of private property known as current use property. New Hampshire’s current use statute, RSA 79-A, was enacted in 1973 and is a tax policy designed to make it easier for landowners to keep open space undeveloped. When land is enrolled in the program, the land is assessed and taxed at its actual current use and not at its highest and best use. In order for land to qualify for the current use program the land in question must be at least ten (10) acres in size or provide \$2,500 per year in agricultural or horticultural products. N.H. Admin. Rules CUB 304.01. The exceptions to the 10-acre requirement are a certified tree farm and unimproved wetlands, which can be any size. *Id.*

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<sup>1</sup> See [www.wildlife.state.nh.us/pubs/documents/samples/land-use-issues-explained.pdf](http://www.wildlife.state.nh.us/pubs/documents/samples/land-use-issues-explained.pdf).

<sup>2</sup> It is worth noting that Part I, article 12 of the New Hampshire Constitution states that “[n]o part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.” N.H. Const. Art. 12, I. That clause requires just compensation in the event of a taking, *Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66-70 (1834), but accessing private property is distinguishable from taking private property and the landowner has the ability to cut off public access by posting their property. Accordingly, Counsel for the Public does not regard article 12 as impacting the analysis here.

When land is enrolled in the current use program there is no requirement that the landowner open the land for public use, but if land is in current use an additional assessment reduction is available if the landowner allows certain recreational activities on the land. Pursuant to the statute, a 20% reduction is available for land open to public recreational use, without an entrance fee, for 12 months a year. RSA 79-A:4. If land is enrolled in the recreational use program there can be “no prohibition of skiing, snowshoeing, fishing, hunting, hiking or nature observation on such open space land, unless these activities would be detrimental to a specific agricultural or forest crop or activity.” *Id.* In other words, when land has been granted the additional 20% reduction for recreational use, the landowner cannot post their land to prohibit those activities described - skiing, snowshoeing, fishing, hunting, hiking or nature observation. However, a posting prohibiting those activities will be allowed if it has been approved. CUB 305.03. In addition, the landowner may post their property to prohibit trespassing upon the property for all other activities. For example, a landowner could post their property to prohibit the use of ATVs and camping. Posting land to prohibit these activities will not affect the 20% recreation adjustment. Viewing the definition of a “legal right of access” as “the ability, right, or permission to [], enter ... or use” property discussed above, current use land benefiting from the recreational assessment reduction provided by RSA 79-A:4 should be considered land to which the public has a legal right of access under the SEC Rules. *See F.D.I.C.*, 830 F. Supp. at 65.

Applicants are expected to argue that the above reading of the “scenic resources” definition is impermissibly broad. However, the types of categories set forth in Section 102.45 and the SEC Rules limit both the breadth and application of the term “scenic resources” in a manner consistent with the purposes governing the SEC Rules and the statutory framework.

**4. The Breadth of the Initially Broad Definition of “Scenic Resources” As “Resources To Which the Public Has a Legal Right of Access” Is Partially Limited By the Categories Contained in the “Scenic Resources” Definition.**

As noted above, Section 102.45 of the SEC Rules provides that “Scenic resources” means resources to which the public has a legal right of access *that are*:

- (a) Designated pursuant to applicable statutory authority by national, state, or municipal authorities for their scenic quality;
- (b) Conservation lands or easement areas that possess a scenic quality;
- (c) Lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality;
- (d) Recreational trails, parks, or areas established, protected or maintained in whole or in part with public funds;
- (e) Historic sites that possess a scenic quality; or
- (f) Town and village centers that possess a scenic quality.

Site 102.45 (emphasis added). Accordingly, Section 102.45 of the SEC Rules requires that for a resource to be a scenic resource it must not only be a resource to which the public has a legal right of access, but also a resource that falls within one of the types of categories listed. The language of the categories themselves are broad, but they do serve to limit the breadth of “resources to which the public has a legal right of access” in “scenic resources” to only those types of categories set forth in the subsections. The following analysis considers the scope and meaning of each of the enumerated categories of “scenic resources” in Site 102.45.

**a. Resources that are Designated Pursuant to Applicable Statutory Authority by National, State, or Municipal Authorities for Their Scenic Quality.**

This is a relatively straightforward category of resources that are easily identifiable by virtue of specific designation by applicable statutory authority of national, state or municipal authorities. Examples of such designated scenic resources include national scenic byways such as the Kancamagus Scenic Byway; scenic byways established under RSA 238:19 (New



Hampshire Scenic and Cultural Byways Program); scenic roads established under RSA 231:157 (Town Roads); and scenic rivers designated under RSA 483.

**b. Resources that are Conservation Lands or Easement Areas that Possess a Scenic Quality.**

This also is a relatively straightforward category of resources to identify because generally whether or not a resource qualifies as conservation land or an easement area can be ascertained from the land records associated with that resource. The fact that easement areas are specifically mentioned in this subsection could be construed to reinforce the broad definition of resources to which the public has a legal right of access as not being limited to only easement rights or rights of a similar character. Since the subsections in SEC Rule 102.45 are limits on the broader category of “resources to which the public has a legal right of access,” the specific reference to easement areas could be read to suggest broader categories of rights associated with mere licenses.

**c. Resources that are Lakes, Ponds, Rivers, Parks, Scenic Drives and Rides, and Other Tourism Destinations that Possess a Scenic Quality.**

Subsection (c) of SEC Rule 102.45 lists “lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality” as a category of “resources to which the public has a legal right of access” that also qualify as “scenic resources.” Pursuant to the language of SEC Rule 102.45, and “its plain and ordinary meaning,” therefore, any lakes, ponds, rivers, parks, scenic drives and rides, and other tourism destinations that possess a scenic quality that the public has the ability, right or permission to enter or use should qualify as “scenic resources” under SEC Rule 102.45. *See Appeal of Old Dutch Mustard Co. Inc.*, 166 N.H. at 506.

**(1) Public Water Bodies.**

Natural water bodies of 10 acres or more, which are considered state owned pursuant to RSA 271:20, would be scenic resources. The same is true of navigable rivers, which also are public waters. Thus, all lakes and ponds over 10 acres in size which have public access; navigable rivers with public access; state or local parks; and public roads and drives can constitute scenic resources.

**(2) Scenic Drives and Rides.**

Inclusion of “scenic drives and rides” in subsection (c), without reference to official designation, which is already captured in subsection (a), indicates the SEC’s intent to include undesignated public roadways with a scenic quality within the definition of “scenic resources.” Because subsection (a) already includes designated resources, any attempt to require designation for “scenic drives and rides” under subsection (c) would render the words “scenic drives and rides” meaningless. Thus, the appropriate interpretation of “scenic drives and rides” is any publicly accessible roadway (“drive”) with scenic quality, as well as scenic railroads, ATV and snowmobile trails (“rides”) that are open to public access.

**(3) Other Tourism Destinations.**

The phrase “and other tourism destinations” in subsection (c) is less clear. This phrase could be read in one of three ways. First, it could be read as a stand-alone category of simply “tourism destinations,” separate and apart from the preceding terms. Counsel for the Public submits that that interpretation would be improper because it essentially ignores the “and other” language, and the language ties the term “tourism destinations” to the other terms used in Rule 102.45. That first interpretation would therefore be contrary to interpretive principles counseling against surplusage in statutory or regulatory language.

Second, it could be read to modify the preceding terms by limiting them all to only lakes, ponds, rivers, parks, and scenic drives and rides that are also tourism destinations. Counsel for the Public rejects this interpretation, however, because it would lead to absurd scenarios clearly not intended by the drafters. Among other things, it could apply to exclude scenic drives and scenic lakes from the aesthetics analysis simply because those particular locations were not also tourist destinations. Impacts on those locations are clearly contemplated in an aesthetics analysis given their aesthetic beauty, and any interpretation that would exclude them from the analysis must be rejected. Additionally, if the drafters had wanted to achieve such an absurd interpretation the appropriate formulation would have been “tourism destinations that possess a scenic quality, such as lakes, ponds, rivers, parks, and scenic drives and rides.” The drafters took that approach with the definition of “[s]equential observation,” defining it to mean “a viewer is capable of seeing multiple energy facilities *from different viewpoints* as the viewer travels along a particular route *such as a trail, river, scenic byway, or on a lake.*” Site 102.46 (emphasis added).

The third potential approach would be to employ the doctrine of *ejusdem generis*. *Ejusdem generis* “limits general terms [that] follow specific ones to matters similar to those specified.” *Gooch v. United States*, 297 U.S. 124, 128 (1936). Here the preceding terms are lakes, ponds, rivers, parks, scenic drives and rides. The doctrine of *ejusdem generis* applied here could give definition to the term “tourism destinations” by defining that term as destinations similar to lakes, ponds, rivers, parks, and scenic drives and rides. In other words, locations that would likely draw tourists due to their inherent scenic quality. This both avoids surplusage by not ignoring the “and other” language and also provides definition and context to the “tourism destinations” term. Counsel for the Public believes that the third approach is most consistent

with the statutory text and applicable statutory interpretation principles and should be the approach adopted by the Subcommittee. Among other things, the third approach would avoid absurd results such as excluding scenic drives or scenic lakes from the analysis that must be done simply because they are not designated specifically as tourist destinations.

Whichever approach is taken, Counsel for the Public submits that “tourism destinations” should at a minimum include recognized tourism destinations such as those found in tourist information pamphlets, provided they possess a scenic quality. *See* RSA 236:86.

**d. Resources that are Recreational Trails, Parks, or Areas Established, Protected or Maintained in Whole or in Part with Public Funds.**

Site 102.45(d) covers areas that are specifically designated as recreational trails or parks. It also more broadly covers recreational trails, parks, or areas established, maintained or protected to some level with public funds. In addition to public trails and parks, this could cover a private viewing location where public funds have established access or a viewing bench. This subsection would not include any private property that received no public funds, regardless of whether the public has access to the property, but there is an argument that could be made that this subsection could apply to current use properties that take advantage of the recreational use discount pursuant to RSA 79-A:4.

As noted above, when land is enrolled in the current use program it is entitled to favorable tax treatment that reduces the tax burden on the private landowner. An additional assessment reduction is available if the landowner allows certain recreational activities on the land. Pursuant to the statute, a 20% reduction is available for land open to public recreational use, without an entrance fee, for 12 months a year. RSA 79-A:4.

The stated purpose of the current use statute in New Hampshire is to “encourage the preservation of open space” and thereby provide “a healthful and attractive outdoor environment

for work and recreation of the state's citizens, maintain[] the character of the state's landscape, and conserve[] the land, water, forest, agricultural and wildlife resources." RSA 79-A:1. That purpose is accomplished by permitting landowners to pay lower taxes than they would otherwise pay by valuing their property at its current use instead of its highest and best use, as generally otherwise required by tax law. The effect of this is that the public subsidizes these landowners by accepting lower tax payments than the public would otherwise be entitled to receive. Counsel for the Public submits that this could constitute establishing, protecting or maintaining these current use areas with public funds. If the Subcommittee adopts that position, any recreational trails, and parks, as well as any current use properties open for recreational use would constitute scenic areas under Subsection (d).

**e. Resources that are Historic Sites that Possess a Scenic Quality.**

Site 102.45(e) covers historic sites to which the public has a legal right of access and which possess a scenic quality. Historic sites that do not possess some scenic quality will not meet this description. Site 301.06 separately requires an "adverse effect" assessment of historic sites, so those that are not also covered as scenic resources will be addressed by Site 301.06.

In the context of aesthetic impacts to historic sites, the concept of visual access is important. A publicly accessible view of a historic property that possesses a scenic quality should qualify as a scenic resource, even if the public does not have actual access to the historic property itself. For example, the view from a public road of a historic building significant for its architecture and setting, such as a unique post-and-beam barn in a scenic agricultural setting, would properly be considered a scenic resource because the public has visual access to the character defining features that make the property a historic site. Requiring actual access to the

barn would defeat the purpose of the rules and unnecessarily restrict the Subcommittee from assessing the actual aesthetic impacts of the Project.

**f. Resources that are Town and Village Centers that Possess a Scenic Quality.**

This is a relatively straight forward category of resources to identify because town and village centers are easily identifiable and by their nature, all will be resources that the public has a legal right of access to. The only qualifier that could limit this category further would be whether those town and village centers also possess a scenic quality.

**5. Interpreted in the Context of the Overall Statutory and Regulatory Scheme, as well as the Policy Sought to be Advanced by the Entire Statutory and Regulatory Scheme, Counsel for the Public Submits that Public Right of Access and Scenic Resources Should be Read Broadly.**

As explained above, New Hampshire courts must “interpret statutes and regulations in the context of the overall statutory and regulatory scheme and not in isolation.” *Appeal of Old Dutch Mustard Co. Inc.*, 166 N.H. at 506. The “goal is to apply statutes and regulations in light of the legislature’s or commissioner’s intent in enacting them, and in light of the policy sought to be advanced by the entire statutory and regulatory scheme.” *Id.*

The stated purpose of the SEC Rules is set forth in Section 101.01 (Purpose), which provides that “[t]he purpose of the rules of the site evaluation committee is to: (a) Describe the requirements and procedures of the site evaluation committee in reviewing and acting upon applications to construct energy facilities; and (b) Describe the organization of the site evaluation committee and any designated subcommittee.” That statement of purpose demonstrates that the intention of the rules of the site evaluation committee is to provide the logistical procedures associated with reviewing and acting upon applications to construct energy facilities in accordance with RSA 162-H.

RSA 162-H, the statutory framework in which the SEC operates, also has a stated purpose, which provides that:

[t]he legislature recognizes that *the selection of sites for energy facilities may have significant impacts on and benefits to the following*: the welfare of the population, *private property*, the location and growth of industry, the overall economic growth of the state, *the environment of the state*, historic sites, *aesthetics*, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest 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*; that undue delay in the construction of new energy facilities be avoided; *that full and timely consideration of environmental consequences be provided*; that all entities planning to construct facilities in the state be required to provide *full and complete disclosure to the public of such plans*; and that ***the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.*** In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:1 (emphasis added). The key section of this statement of purpose, as it relates to the logistics of reviewing and acting upon applications to construct energy facilities, is that “the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.” RSA 162-H:1. According to the statement of purpose, “it is in the public interest to maintain a balance among” various “potential significant impacts and benefits in decisions about the siting, construction and operation of energy facilities in New Hampshire,” including the impacts on or benefits to “private property” and “aesthetics,” among other things. RSA 162-H:1.

These requirements of maintaining a balance among various potential impacts and benefits of energy facility construction and ensuring that everything is considered and resolved

in one integrated fashion calls for the Subcommittee to be fully informed of the universe of potential benefits and impacts of the proposed energy facility. This integrated and balanced review requires that where there is any doubt as to whether something should be considered a scenic resource under the SEC Rules, that doubt should be resolved in favor of inclusion as scenic resources so that information about the resource can be properly included and integrated into the SEC's balanced review. The SEC cannot weigh and balance impacts if potential scenic resources are excluded from identification and analysis. The best way to ensure one integrated and balanced consideration of the proposed energy facility is to include all relevant information for the SEC's consideration.

Sites 301.05 and 301.14 provide numerous provisions involving scenic resources, which demonstrate the significance of the Subcommittee considering all scenic resources, broadly defined, when balancing all factors in one, integrated proceeding. Among other things, the Subcommittee is specifically required to consider whether a proposed energy facility will have an unreasonable adverse effect on aesthetics by considering not only "[t]he significance of affected scenic resources and their distance from the proposed facility," but also "[t]he extent, nature, and duration of public uses of affected scenic resources." Site 301.14. To the extent Applicants claim that a resource is not a scenic resource because its level of tourism is insufficiently high, *i.e.*, a single hiker visiting Percy Peak to admire the view, any issues with the frequency of use by the public can be appropriately considered and weighed as part of the integrated balancing review conducted by the SEC. This is akin to the weight versus admissibility argument for the exclusion of evidence – maybe it is a close call for some resources to be included in the category of scenic resources to be considered, but if they are of relatively minimal importance to the public (whether by virtue of their character/quality or the frequency



with which the public uses them) they simply will not carry much weight in the Subcommittee's analysis.

The task of interpretation of the SEC Rules on this issue rests in the Subcommittee's hands, but ultimately Counsel for the Public submits that the "overall statutory and regulatory scheme" and "the policy sought to be advanced by the entire statutory and regulatory scheme" favors a broad interpretation of scenic resources to ensure that all potential impacts and benefits of new energy facility construction are appropriately balanced and considered in an integrated fashion. *Appeal of Old Dutch Mustard Co. Inc.*, 166 N.H. at 506. Where inclusion of a resource as a "scenic resource" is a close call, the purpose of the statutory and regulatory framework calls for its inclusion and any issues with its significance as a scenic resource can be addressed as part of the SEC's balance of the various impacts and benefits.

**ADDENDUM B**  
**LEGAL ANALYSIS OF RSA 162-H:16, IV(e)**

**1. *The Plain Meaning of RSA 162-H Requires a Balance Between Potential Impacts and Benefits of Proposed Projects as Part of the Public Interest Finding.***

The New Hampshire Supreme Court “interpret[s] statutes not in isolation, but in the context of the overall statutory scheme [and the] analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies.” *Appeal of New Hampshire Right to Life*, 166 N.H. 308, 311 (2014) (quoting *Petition of Mooney*, 160 N.H. 607, 609-10 (2010)). The Court will “not look to legislative history to modify the meaning of a statute that is plain on its face.” *State Employees’ Ass’n of NH, Inc. v. State*, 127 N.H. 565, 568 (1986).

In RSA 162-H the General Court saw fit to link RSA 162-H:1 and RSA 162-H:16, IV together, joining the requisite findings requirement in RSA 162-H:16, IV with the stated objectives provided by the Legislature in RSA 162-H:1.<sup>1</sup> Among other things, those provisions expressly require a “balance” among “potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire.” RSA 162-H:1; RSA 162-H:16, IV.

RSA 162-H:1 provides:

***The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following:*** the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. ***Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in***

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<sup>1</sup> Applicants have previously sought to minimize RSA 162-H:1 as a mere “introduction” to the statute, but as the analysis contained herein reveals, the linkage between RSA 162-H:1 and RSA 162-H:16, IV alone demonstrates otherwise.

*New Hampshire*; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. ***In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.***

RSA 162-H:1 (emphasis added).

Among other things, the Legislature enacted RSA 162-H:16, IV with RSA 162-H:1 and “[i]n furtherance of [RSA 162-H:1’s stated] objectives.” RSA 162-H:16, IV directs the Subcommittee to “determine if issuance of a certificate will serve the objectives of this chapter,” *i.e.*, the objectives stated in RSA 162-H:1 and expressly noted as such. “In order to issue a certificate,” the Subcommittee must make the four findings found in RSA 162-H:16, IV. The Subcommittee cannot make the required determination or findings until *after* it has first given “due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, *including potential significant impacts and benefits.*” RSA 162-H:16, IV (emphasis added).

As a matter of plain language interpretation, RSA 162-H requires consideration of *both* the potentially significant impacts as well as any potentially significant benefits in connection with the Subcommittee’s determination and findings pursuant to RSA 162-H:16, IV. No reasonable statutory construction of the text of the statute supports the position that the public interest analysis required by RSA 162-H:16, IV(e) should consider only the potential benefits of the Project and not the potential negative impacts of the Project.<sup>2</sup>

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<sup>2</sup> Also RSA 162-H:16, IV(e)’s finding requirement that “[i]ssuance of a certificate will serve the public interest” is stated broadly and without limiting language limiting the analysis only to benefits or excluding impacts from the analysis.

Applicants previously argued that if the Subcommittee weighs and balances the potentially significant impacts and benefits of the proposed Project in making its decision and finding on whether or not the issuance of the certificate will “serve the public interest,” the other three factors would be “subsumed by the fourth” and “make the fourth finding superior to the others.”<sup>3</sup> Applicants’ proposed “answer” to its perceived problem is to subjugate the public interest finding to the other three factors. *See, e.g., id.* at 14 (“Ultimately, in the event that an applicant has the financial, technical, and managerial capability to construct and operate a facility, and that facility will not unduly interfere with the orderly development of the region or have unreasonable adverse effects on any areas contemplated in RSA 162-H:16, IV(c), the facility will serve the public interest, and the SEC may issue a certificate, if the facility will provide benefits. The benefits, however, are viewed independently; they are not netted, weighed or balanced against impacts, but considered in relation to the factors listed in Site 301.16.”). One cannot justify ignoring the plain meaning of the broad language of the actual text of RSA 162-H:16, IV(e) by claiming that provision impermissibly encroaches on the other three factors while simultaneously asking the Subcommittee to permit the three other factors to encroach on the fourth factor.

While the New Hampshire Supreme Court will avoid interpreting statutes in such a fashion as to render statutory provisions “meaningless,” Applicants are simply incorrect that an analysis and balancing of all of the “potential significant impacts and benefits” related to a Project would subsume the other three findings and effectively nullify them. *Holt v. Keer*, 167 N.H. 232, 242 (2015). And while all four findings overlap with each other to some extent that fact does not prevent any of the provisions from having independent effects and it does not

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<sup>3</sup> *Applicants’ Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan* (June 26, 2017) at 8.

render any of the provisions superfluous or redundant. *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-26 (2002).

For example, Applicants focus on Finding (c), which requires a finding that “[t]he site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.” RSA 162-H:16, IV(c). While an analysis of Finding (e), that the “[i]ssuance of a certificate will serve the public interest,” will undoubtedly include an analysis of potential impacts of overlapping significance to Finding (c), the two Findings are distinct and require separate analyses. RSA 162-H:16, IV(e). For Finding (c) the inquiry is whether the Project will have “*unreasonable* adverse effect[s]” on the noted items. RSA 162-H:16, IV(c) (emphasis added). For Finding (e) *any* adverse effects on the noted items, as well as additional items set forth in RSA 162-H:1, will be considered as part of the comprehensive balancing of all potential impacts and benefits of the Project. Accordingly, the Subcommittee could appropriately find in connection with Finding (c) that while the Project has significant adverse effects on “aesthetics, historic sites, air and water quality, the natural environment, and public health and safety,” the adverse effects are not extensive enough to be “unreasonable.” RSA 162-H:16, IV(c). Similarly, the Subcommittee could note numerous ways in which the Project interferes with “the orderly development of the region” but nevertheless determine that the evidence was sufficient to find that the Project did not “*unduly* interfere[d] with the orderly development of the region.” RSA 162-H:16, IV(b) (emphasis added).

Despite those determinations, the statute requires the Subcommittee to then consider the adverse effects on the noted items, as well as the interference with the orderly development of the region, along with all other pertinent impacts of the Project as set forth in RSA 162-H:1 that do not fall within the other three findings, and “balance” those impacts against the asserted

benefits of the Project. While the decisions of adverse effects in Findings (b) and (c) may not deny the issuance of a site certificate, that does not preclude them from consideration under Finding (e). If, hypothetically, a project had no benefits, then balancing zero benefits against adverse effects to the noted items in Finding (c) and interference with orderly development of the region under Finding (b) must tip the balance against the Project because the scales would contain *something* in the impacts column against *nothing* on the benefits side. Applicants' prior interpretation of the statute would prevent such an outcome, because it would artificially circumscribe the Finding (e) by precluding consideration of impacts considered in any fashion in Findings (a)-(c). Under Applicants' proffered interpretation, if they can avoid a finding of unreasonableness and "unduly-ness," they can remove any consideration of negative impacts from the public interest analysis completely. That is not the statutory directive.

The findings contained in RSA 162-H:16, IV can be harmonized without nullifying the findings under any of the four sections. This is particularly so where RSA 162-H:16, IV expressly calls for "due consideration" of all "potential significant impacts and benefits" in connection with the Subcommittee's requirement to determine that issuance of the certificate "will serve the objectives of this chapter," which are set forth in RSA 162-H:1 and reference the Legislature's stated public interest.<sup>4</sup>

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<sup>4</sup> Applicants have also claimed that "[u]nder a net benefits or balancing approach, the SEC could arguably weigh the impacts and benefits of an energy facility in a manner of its own devising." *Applicants' Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan* (June 26, 2017) at 9. Applicants are mistaken, as RSA 162-H:16, IV calls for a determination that the issuance of a certificate will serve the objectives of the chapter, directing the Subcommittee to RSA 162-H:1 which sets forth specific objectives. The SEC explicitly recognized this statutory directive when it promulgated N.H. CODE ADMIN. RULES Site 301.16, which specifically constrains the SEC's analysis under RSA 162-H:16, IV(e) and explicitly imports the directives set forth in RSA 162-H:1.

2. ***In Addition to the Statutory Text, the Relevant Legislative History of RSA 162-H Also Reveals the General Court Intended the Public Interest Finding to Entail Full Consideration of the Impacts and Benefits of a Proposed Project.***

While the statutory language at issue is not ambiguous and controls the Subcommittee's review of the Applicants' request for a certificate of site and facility, a review of the legislative history of the recent amendments to RSA Ch. 162-H is, nevertheless, informative. The language in RSA 162-H:1 and RSA 162-H:16, IV that is pertinent to this issue was enacted by amendment to the statute with an effective date of July 1, 2014. The relevant legislative history of RSA 162-H as demonstrated by its amended language and the official legislative history materials reveals that the Legislature intended a comprehensive impact and benefits analysis to be conducted by the Subcommittee with respect to its public interest finding.

a. ***The Actual Alterations Made to the Text of RSA 162-H by the July 2014 Amendments Reflect a Coupling of the "Public Interest" Finding Requirement and Analysis of the Potential Impacts and Benefits of the Project in Question.***

When considering the legislative history of a particular statute, there is no better indicator of the intended change than a comparison of the language that predated the amendment in question with the changed language that results from the amendment. *Cagan's, Inc. v. Dep't of Revenue Admin.*, 126 N.H. 239, 247 (1985) ("our touchstone is the language of the statute itself"). There were several critical changes to the statute that were accomplished by the July 2014 Amendments, and the following redlines demonstrate those changes graphically for ease of reference:

For RSA 162-H:16, IV:

IV. ~~The site~~ **After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site** evaluation committee, ~~after having considered available alternatives and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether shall determine if issuance of a certificate will serve~~ the objectives of this chapter ~~would be best served~~

**by. In order to issue a certificate, the issuance of the certificate, must committee shall find that the site and facility:**

(a) **ApplicantThe applicant** has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) **WillThe site and facility will** not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) **WillThe site and facility will** not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

**(e) Issuance of a certificate will serve the public interest.**

RSA 162-H:16, IV (eff. Aug. 8, 2009 to June 30, 2014); RSA 162-H:16, IV (as altered by July 2014 Amendments).

As the above redline reveals, the July 2014 Amendments to RSA 162-H:16, IV not only added the requirement that the Subcommittee specifically find that “[i]ssuance of a certificate will serve the public interest,” it further amended that provision of the statute at the same time to include consideration of “potential significant impacts and benefits.” *Id.*

For RSA 162-H:1:

The legislature recognizes that the selection of sites for energy facilities, **including the routing of high voltage transmission lines and energy transmission pipelines, will may** have **a significant impact upon impacts on and benefits to the following:** the welfare of the population, **private property**, the location and growth of industry, the overall economic growth of the state, the environment of the state, **historic sites, aesthetics, air and water quality,** the use of natural resources, **and public health and safety.** Accordingly, the legislature finds that it is in the public interest to maintain a balance **betweenamong those potential significant impacts and benefits in decisions about the environmentsiting, construction, and the need for newoperation of** energy facilities in New Hampshire; that undue delay in the construction of **needednew energy** facilities be avoided **and;** that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion, **all to assure that the state has an adequate and reliable supply of energy in conformance with sound environmental principles. The legislature, therefore, In furtherance of these objectives, the**



**legislature** hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:1 (eff. Aug. 8, 2009 to June 30, 2014); RSA 162-H:1 (as altered by July 2014 Amendments).

As the above redline reveals, the July 2014 Amendments to RSA 162-H:1 specifically changed the Legislature’s finding from a finding “that it is in the public interest to maintain a balance between the environment and the need for new energy facilities in New Hampshire” to a finding “that it is in the public interest to maintain a balance among [specified prior and new] potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire.” *Id.* In other words, at precisely the same time the Legislature added the required Finding (e) – that “[i]ssuance of a certificate will serve the public interest,” RSA 162-H:16, IV(e), it changed its legislative finding *of what that public interest was* to “maintain[ing] a balance” among the specified “potential significant impacts and benefits” set forth in RSA 162-H:1. RSA 162-H:1.<sup>5</sup> Additionally, RSA 162-H:1 added an express reference to the “furtherance of these objects” as the purpose of the subsequent provisions (including RSA 162-H:16, IV).

The changes from the July 2014 Amendments alone demonstrate the coupling of RSA 162-H:1 and RSA 162-H:16, IV and the direction by the Legislature that Finding (e) entails a balancing of impacts and benefits to ensure that issuance of a certificate will serve the public

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<sup>5</sup> Applicants have correctly noted that the SEC Rule relative to public interest criteria used language from RSA 162-H:1, but they incorrectly asserted that “RSA 162-H:1 has followed the same formula for decades.” *Applicants’ Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan* (June 26, 2017) at 11. The change noted above requiring balancing of impacts and benefits is new and was newly enacted contemporaneously with the creation of the public interest finding in RSA 162-H:16, IV(e).

interest. The legislative history of the legislative process leading to those changes further supports that direction.

**b. *The Legislative History of the July 2014 Amendments Further Reflects a Coupling of the “Public Interest” Finding Requirement and Analysis of the Potential Impacts and Benefits of the Project in Question.***

The legislative efforts that ultimately culminated in the July 2014 Amendments to RSA 162-H were precipitated by the previously enacted SB99 in the prior General Court session.<sup>6</sup> “Last Session the General Court enacted SB99, mandating a stakeholder process to examine the Site Evaluation Committee (SEC) and the tools it has to serve the public and project developers as it goes about its work. That process, led by the Office of Energy and Planning, engaged the public, energy industry, state agencies, and the non-government organization community and culminated in a comprehensive report at the end of December of 2013 that identified a number of concerns about the structure of the SEC and how it functions and a number of potential solutions.”<sup>7</sup>

In early 2014, a bill was introduced in the New Hampshire Senate, SB 245, to address concerns laid out in the SB 99 report. That initial bill made only a minor change to RSA 162-H:1 of no practical consequence here. It made no change with respect to RSA 162-H:16, IV.<sup>8</sup> On February 13, 2014, an amendment was introduced to SB 245, Amendment 2014-0568s (the “Feb. 13 Amendment”). That Amendment changed the text of RSA 162-H:1 (in relevant part) by altering the finding of the legislature with respect to the “public interest.”<sup>9</sup> Instead of finding that it is in the public interest to maintain a balance between the environment and the “need for”

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<sup>6</sup> April 8, 2014 Letter from Senator Jeanie Forrester to House Science, Technology and Energy Committee Chair David Borden re SB 245 (2014).

<sup>7</sup> *Id.*

<sup>8</sup> SB 245-FN, as introduced, 2014 Session, available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf).

<sup>9</sup> Amendment 2014-0568s to SB 245-FN (2014), available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf).

new energy facilities in New Hampshire, the Feb. 13 Amendment found that it is in the public interest to maintain a balance between the environment and the “potential benefits of” new energy facilities in New Hampshire.<sup>10</sup> It further changed the finding that undue delay in the construction of “needed” facilities be avoided and that full and timely consideration of environmental consequences be provided to a finding that undue delay in the construction of facilities “that provide net public benefits” be avoided and that full and timely consideration of environmental consequences be provided.<sup>11</sup> The shift from consideration of whether new energy facilities were “needed” to a consideration of the “potential benefits” of proposed new energy facilities and the requirement that delay be avoided only for facilities “that provide net public benefits” was significant enough to generate some discussion in the Senate testimony considered by the Legislature.

In addition to those proposed changes, Feb. 13 Amendment further changed the text of RSA 162-H:16, IV by expressly including potential consideration of alternatives not described in the application and by adding a new subsection to RSA 162-H:16, IV, subsection (e).<sup>12</sup> The new subsection (e) was to require that the proposed site and facility:

(e) Will provide demonstrable net public benefits when considering the costs and benefits of the project to the environment, the New Hampshire economy, New Hampshire energy consumers, and the communities affected by the project, with such benefits reflected in enforceable conditions of the certificate.

*See id.* Again, the addition of this provision was significant enough to generate references in the testimony presented to the legislature.

The Senate Committee considered the testimony received and on March 6, 2014, issued a Report with the recommendation that the bill “ought to pass” with a new amendment,

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<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Amendment 2014-0921s (the “March 6 Amendment”).<sup>13</sup> That proposed Amendment significantly altered both RSA 162-H:1 and RSA 261-H:16, IV in relevant ways. First, it contained a legislative recognition that the selection of sites for energy facilities may have significant “impacts and benefits on the following” and added to the prior categories to include “property values,” “historic sites,” “aesthetics,” “air and water quality,” and “public health and safety.”<sup>14</sup> It then further altered the legislative finding to read that “it is in the public interest to maintain a balance between those potential significant impacts and the need for new energy facilities in New Hampshire” instead of a balance between just the environment and the need for new energy facilities.<sup>15</sup>

With respect to RSA 162-H:16, IV, the March 6 Amendment maintained the prior change referencing other alternatives in the prior proposed bill that was initially proposed in the Feb. 13 Amendment, but jettisoned the proposed subsection (e) from the Feb. 13 Amendment and replaced it with the following new subsection and added subsection (f):

- (e) The site and facility will serve the public interest when taking into account:
  - (1) The net environmental effects of the facility, considering both beneficial and adverse effects.
  - (2) The net economic effects of the facility, including but not limited to costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies.
  - (3) Whether construction and operation of the facility will be consistent with federal, regional, state, and local policies.
  - (4) Whether the facility as proposed is consistent with municipal master plans and land use regulations pertaining to (i) natural, historic, scenic, cultural resources and (ii) public health and safety, air quality, economic development, and energy resources.
  - (5) Such additional public interest considerations as may be deemed pertinent by the committee.

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<sup>13</sup>Amendment 2014-0921s to SB 245-FN (2014), available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

(f) The site and facility will be consistent with the state energy strategy established in RSA 4-E:1.<sup>16</sup>

Between March 13, 2014 and March 20, 2014, however, a new amendment, Amendment 2014-1125s (the “March 20 Amendment”) was proposed that retained many of the changes to RSA 162-H:1 from the March 6 Amendment, but altered the legislative finding to read: “Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in the siting, construction and operation of new energy facilities in New Hampshire ... .”<sup>17</sup> The March 20 Amendment further cut back the proposed amendments to RSA 162-H:16, IV, by making only the following limited change to the text of RSA 162-H:16, IV, but notably changing the site evaluation committee’s test from considering whether the “objectives of this chapter” would be best served by issuance of the certificate to whether the “public interest” would be best served by issuance of the certificate:

IV. The site evaluation committee, after having considered available alternatives and fully reviewed the environmental impact of the site or route, and other relevant factors bearing on whether the ~~objectives of this chapter~~ public interest would be best served by the issuance of the certificate, must find that the site and facility:

It further added subsection (e), which simply required that the SEC find that the site and facility: “(e) Will serve the public interest.” *Id.*

According to a prepared statement authored by the bill’s chief sponsor, Senator Jeanie Forrester, Chairman, Senate Finance, addressing the March 20 Amendment and included in the House’s official legislative history materials, “[t]he “amended bill mandates that the SEC make a finding that a proposed project serves the public interest, *after considering all environmental,*

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<sup>16</sup> Applicants’ previous discussion of the legislative history reaches this point in the process and effectively ends, jumping instead to the end with no discussion of the intervening events that took place, which events explain why Applicants’ interpretation of that process is incomplete and therefore inaccurate in the final analysis.

<sup>17</sup> Amendment 2014-1125s to SB 245-FN (2014), available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf)

*social, and economic impacts and benefits.”*<sup>18</sup> Senator Forrester explained that “[t]his is a *workable, common-sense requirement that recognizes that*, even in a restructured energy market, *all major energy projects should provide a strong package of public benefits* – whether for our natural resources, for ratepayers and businesses, for public health, or for the state’s economy, or for all of the above – *and that these benefits must be weighed against the projects’ potential adverse impacts*. Other states, including Maine and Vermont, have such a requirement, *ensuring that the greater good of the state and its communities is weighed as part of every siting decision.*”<sup>19</sup>

That statement, following both the elimination of the purported net benefit language cited by Applicants and the inclusion of essentially the current language of RSA 162-H:16, IV(e) is from the bill’s chief sponsor and is consistent with the plain language of RSA 162-H that ties the “impacts and benefits” stated in RSA 162-H:1 with the requirement of a finding that the issuance of a certificate will serve the public interest found in RSA 162-H:16, IV(e). It is also consistent with the comprehensive nature of any public interest analysis under RSA 162-H:16, IV(e) reflected in the legislative history.

There is no clear explanation in the legislative history of the July 2014 Amendments to RSA 162-H to account for the change from the detailed factors provided to the public interest test found in the March 6 Amendment, which was not enacted, and the simple reference to “public interest” found in the March 20 Amendment, but there is also no indication that the change was an actual rejection of a “net benefits test.” The legislative history instead reflects that interested individuals and organizations noted the potential vagueness of the “net public

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<sup>18</sup> April 8, 2014 Letter from Senator Jeanie Forrester to House Science, Technology and Energy Committee Chair David Borden re SB 245 (2014).

<sup>19</sup> *Id.* (emphasis added).

benefit” test found in the Feb. 13 Amendment and it is likely that the detailed factors laid out in the March 6 Amendment were drafted to address that very concern.<sup>20</sup>

While there was no intervening testimony to account for the departure from the March 6 Amendment to the pared down version of the March 20 Amendment, the catch-all provision of RSA 162-H:16, IV(e)(5) found in the March 6 Amendment of “[s]uch additional public interest considerations as may be deemed pertinent by the committee” appears to have led some on the committee to question the need for specifically enumerated factors in the public interest test where a catch-all category encompassed them all. Coupled with this were the changes that had also been developing to the legislature’s finding of purpose in RSA 162-H:1, which identified specific areas of potential impact that must be balanced in the considerations by the SEC relative to the public interest. The change in the March 20 Amendment to the “siting, construction and operation” of new energy facilities appears to have been an attempt to tie in those impacts and benefits to the analysis that must be undertaken by the SEC in section 162-H:16, IV.

Despite that tie-in attempt, several interested individuals provided written testimony in the House in April of 2014 that identified the lack of definition of the public interest test of RSA 162-H:16, IV(e) in the March 20 Amendment as a potential interpretative problem that should be addressed.<sup>21</sup> Linowes and Lerner saw the potential linkage between RSA 162-H:16, IV and RSA 162-H:1 and Lerner suggested that “there needs to be consistency between the language in the

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<sup>20</sup> See, e.g., *Testimony of S. Geiger of EBP Renewables in Senate Energy Committee Minutes; Letter from then Chairman and Vice Chairman of the SEC* dated February 18, 2014, available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf)

<sup>21</sup> See, e.g., Written Testimony of Lisa Linowes on SB 245, as amended by Amendment 2014-1125s, dated April 7, 2014 at 5; Written Testimony of Karen Lukemon at 2; Written Testimony of Lori Lerner on SB 245, as amended by Amendment 2014-1125s, dated April 8, 2014.

Declaration of Purpose and the Findings to ensure the SEC has given due consideration to all aspects of the ‘Purpose.’”<sup>22</sup>

In apparent response to those concerns, and consistent with Sen. Forrester’s statement on the issue, the tie-in attempt was made even more explicit in the subsequent amendment to SB 245, Amendment 2014-1442h (the “April 17 Amendment”).<sup>23</sup> That amendment altered RSA 162-H:1 to its present form, and changed the balance from “the siting, construction and operation of new energy facilities in New Hampshire ...” to “decisions about the siting, construction, and operation of energy facilities in New Hampshire ... .”<sup>24</sup> Additionally, the April 17 Amendment changed RSA 162-H:16, IV to require “due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits ... .”<sup>25</sup> The amendment also included subsection (e) in its present form, requiring that “[i]ssuance of a certificate will serve the public interest.”<sup>26</sup> The reference in RSA 162-H:1 to “decisions about the siting, construction, and operation of energy facilities” was clearly a reference ahead to RSA 162-H:16, IV, where the factors for decision making are enumerated, and the reference in RSA 162-H:16, IV to “potential significant impacts and benefits” was clearly a reference back to RSA 162-H:1. Those changes appear to have been a direct attempt to provide the linkage between RSA 162-H:1 and RSA 162-H:16, IV(e) called for by the statements in the House testimony.

A subsequent amendment, Amendment 2014-1795h, made no change to the relevant text. The House Committee Report’s Statement of Intent discussed many benefits of the bill but made

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<sup>22</sup> *Id.*

<sup>23</sup> Amendment 2014-1125s to SB 245-FN (2014), available at: [http://gencourt.state.nh.us/SofS\\_Archives/2014/senate/SB245S.pdf](http://gencourt.state.nh.us/SofS_Archives/2014/senate/SB245S.pdf).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*



no mention of the public interest test. The only “official” statement on the public interest issue was Sen. Forrester’s statement, which concerned what is essentially the current test of the statute and which rejects any interpretation in the nature of the one previously offered by Applicants.

**3. The SEC Cannot Disregard the Statute’s Purpose Section, RSA 162-H:1.**

Applicants previously sought to avoid the linkage between RSA 162-H:1 and RSA 162-H:16, IV by claiming RSA 162-H:1 is a mere “purpose section” that should essentially be disregarded, citing the SEC’s decision in *Groton Wind, LLC*, SEC Docket No. 2010-01. This attempt to minimize RSA 162-H:1 and the reliance on that decision are both misplaced.

First, RSA 162-H:1 is no mere “purpose section” because the text and structure of the statute links the definition of “public interest” in RSA 162-H:1 and the balancing required therein with the requirement in RSA 162-H:16, IV(e) to find that the issuance of the certificate will serve the public interest.

Second, the Legislature regularly includes critical operative text in the purpose section and the New Hampshire Supreme Court often relies on the purpose section in its statutory analysis. *See, e.g., Kearsarge Soaring Ass’n v. Kearsarge Valley Golf Club, Inc.*, 123 N.H. 263, 266 (1983) (“The defendant’s literal interpretation of the statutory language could lead to results which do violence to the expressed legislative intent underlying RSA chapter 422.”); *Foster v. Town of Henniker*, 132 N.H. 75, 77, 562 A.2d 163, 165 (1989) (“The ‘Declaration of Public Interest’ which comprises section one of the chapter is clear and forthright”); *Blue Mountain Forest Ass’n v. Town of Croydon*, 117 N.H. 365, 376 (1977). Similarly, the SEC regularly looks to the purposes section to decide issues. *See SEA-3, Inc.*, Docket No. 2015-01 (Order on Pending Motions August 10, 2015) (looking to the purpose section, RSA 162-H:1, to determine that Counsel for the Public can hire RR safety inspectors and noting that the statute recognizes

“it is in the public interest to maintain a balance among ... impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire...”).

Third, the *Groton Wind* decision was issued on May 6, 2011, more than three years *before* the operative text in RSA 162-H:1 and RSA 162-H:16, IV was added expressing the balancing public interest test and including it among other required findings. *See Decision Granting Certificate of Site and Facility with Conditions*, pp. 27-31 (May 6, 2011). Indeed, the *Groton Wind* decision was discussed and criticized in the legislative history of RSA 162-H. Any prior determination on the linkage between RSA 162-H:1 and RSA 162-H:16, IV is irrelevant because the operative language is now different and includes the linkage discussed above.

Moreover, the *Groton Wind* decision hinged on reference to RSA 362-F:1, which states “[i]t is ... in the public interest to stimulate investment in low emission renewable energy generation technologies in New England and, in particular, in New Hampshire, whether at new or existing facilities.” *See also Decision Granting Certificate of Site and Facility with Conditions*, p. 30 (May 6, 2011) (quoting RSA 362-F:1). In light of this “public interest” stated in RSA 362-F:1, the *Groton Wind* decision held “[t]herefore, the construction of the Project is consistent with legislative objectives insofar as it will supply renewable power for New England.” *Id.*

RSA 362-F:1 is the purpose section of RSA 362-F. *See* RSA 362-F:1 (titled “Purpose”). The SEC relied on the statement of public interest found in that purpose section even though that purpose section was from a different statute and not found within RSA 162-H. The Subcommittee here cannot ignore the statement of public interest that was added to the purpose section of RSA 162-H:1 following the *Groton Wind* decision, particularly since RSA 162-H:1 is contained in the same statute as RSA 162-H:16, IV.

**4. The Decisions and Statutes Previously Cited by Applicants do not Alter the Result Required by the Plain Text of RSA 162-H and its Legislative History.**

Applicants previously cited other New Hampshire statutes and decisions as examples of a public interest inquiry. Applicants' discussion of them is incomplete and fails to address factors that distinguish those statutes and decisions from RSA 162-H, and thus does not alter the necessary conclusion from the statutory text and legislative history discussed above.

**a. Other Statutes with a Public Interest Inquiry do not Demonstrate an Intent to Limit the SEC's Inquiry under RSA 162-H:16, IV(e).**

Applicants have referenced other statutes that only inquire as to whether permission or authority would be for the public good or in the public interest, and argue that such statutes permit broader discretion than RSA 162-H:16, IV(e). By including the three other required findings, in addition to the public interest finding, Applicants contend that the "four-part test" in RSA 162-H:16 is more guided and constrained and therefore provides less discretion to the SEC.<sup>27</sup> Applicants are incorrect as a matter of statutory interpretation.

RSA 162-H:16, IV broadly requires "due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits" before the SEC can "determine if issuance of a certificate will serve the objectives of this chapter." Those objectives are specifically laid out in RSA 162-H:1 and include the public interest analysis and its relevant factors.

In addition, RSA 162-H:16, IV requires the Subcommittee to make four separate findings "[i]n order to issue a certificate." Contrary to Applicants' assertion, one of those required findings mandates that the Subcommittee independently find that "[i]ssuance of a certificate will serve the public interest." RSA 162-H:16, IV(e). The fact that RSA 162-H:16, IV also requires

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<sup>27</sup> Applicants' Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan (June 26, 2017) at 6-7.

three other required findings does not minimize any component of the separate public interest finding requirement.

The statutes cited by Applicants have similar requirements. Transfers pursuant to RSA 374:30 must not only meet the public good requirement of RSA 374:30, but they also must meet the various requirements set forth in RSA 374:32, which provides that “if the commission shall find that the public good so requires, such transfer, lease, or contract shall first be authorized by the vote of 2/3 of the shares of the capital stock of each of the interested corporations present and voting at meetings duly called to consider the subject; and all statutes regulating, protecting, and determining the rights of a dissenting stockholder of a railroad in the case of a lease or union with another railroad shall be applicable, and the rights of any stockholder of such corporation dissenting from such transfer, lease, or contract, if the same shall be authorized as above provided, shall be regulated, protected, and determined by such statutes.”

Similar to RSA 162-H:16, IV(a)-(c), RSA 374:32 sets forth additional independent requirements to the public good requirement of RSA 374:30, which do not eviscerate or minimize the public good test under RSA 374:30

**b. Balancing Benefits and Impacts When Determining the Public Interest is Consistent with New Hampshire Case Law.**

Applicants previously cited *Grafton Cty. Elec. Light & Power Co. v. State* for the proposition that the public good “is equivalent to a declaration that the proposed action must be one not forbidden by law, and that it must be a thing reasonably to be permitted under all the circumstances of the case.” 77 N.H. 539, 94 A. 193, 195 (1915). More relevant is *Grafton’s* explanation that “[t]he question of public good is not to be answered by looking only to the immediate interests of the public served by these companies, nor by a mere consideration of advantage to those who furnish the service. As before stated, *it is a question of what is*

*reasonable taking all interests into consideration.” Id.* (emphasis added). Determining what is a reasonable taking by considering *all* interests is precisely what the Legislature has directed the Subcommittee to do under RSA 162-H:1 and RSA 162-H:16, IV.

Applicants have also cited *Pinetree Power, Inc.* as an example of the New Hampshire Supreme Court rejecting a net benefits test. The “net benefit” test proposed in *Pinetree Power*, however, was a net economic benefit to rate payers test. *In re Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005). The Court rejected that test because it was insufficiently broad, not because it was overly broad. *Id.* at 95, 97. The Court held that the “statutory scheme [at issue] support[ed] the conclusion that the ‘public interest’ of PSNH’s customers encompasses more than simply rates.” *Id.* at 97. The Court specifically considered expressed legislative purposes in relevant statutes and noted the expressed intention of the Legislature for “commitments to renewable energy resources [] to ‘be balanced against the impact on generation prices’ and can have ‘significant environmental, economic, and security benefits.’” *Id.* (quoting RSA 374–F:3, IX (Supp.2004)).<sup>28</sup>

The broad inquiry of all impacts and benefits called for by RSA 162-H:1 and RSA 162-H:16, IV is consistent with the approach taken by the Court in *Pinetree Power*. The Court’s rejection of a narrower “net benefits” test is essentially a rejection of Applicants’ attempted narrowing of the broad statutory directive found in RSA 162-H:16, IV(e).

## **5. Conclusion.**

Based upon the plain text of the statute and considering RSA 162-H as a whole, in determining whether the Project serves the public interest, the Subcommittee must balance the

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<sup>28</sup> It is also noteworthy that the Court specifically lamented that “RSA 369–B:3–a does not define what constitutes the ‘public interest’ of PSNH’s retail customers,” and had to rely instead on the guidance of other “statutes governing utility restructuring.” *In re Pinetree Power, Inc.*, 152 N.H. at 96. By contrast, RSA 162-H:1 expressly states “the legislature finds that it is in the public interest 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.” That definition of the “public interest” in RSA 162-H should be followed.

potential benefits and the potential impacts of the Project, and not merely consider whether the Project provides any benefit. This interpretation of RSA 162-H is supported by the legislative history as well as past decisions of the New Hampshire Supreme Court.