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MCLANE MIDDLETON

May 24, 2017

Via Electronic Mail & Hand Delivery

Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

Re: 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 (the "Applicants") for a Certificate of Site and Facility
Motion For Rehearing

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of a Motion For Rehearing.

Please contact me directly should you have any questions.

Sincerely,

Thomas B. Getz

TBG:slb

cc: SEC Distribution List

Enclosure

THE 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 CERTIFICATE OF SITE AND FACILITY

MOTION FOR REHEARING

NOW COME Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") (collectively, the "Applicants"), by and through their attorneys, McLane Middleton, Professional Association, and respectfully move for rehearing of the April 24, 2017 Order Denying Applicants' Motion to Strike ("Alternatives Order") as it applies to alternative route testimony. As explained herein, evidence offered by other parties concerning "alternatives" not identified by the Applicants is not relevant to the findings that the Site Evaluation Committee ("SEC" or "Subcommittee") must make. Despite the clear direction of the statute, these parties would have the SEC create a regulatory anachronism that ignores the Legislature's restructuring of the electric industry and its ensuing realignment of RSA Chapter 162 with the realities of a competitive marketplace.[1]

I. BACKGROUND

1. The Applicants filed an Application for a Certificate of Site and Facility with the SEC on October 19, 2015, for a 192-mile electric transmission line with associated facilities (the "Project"). The Subcommittee designated for this proceeding accepted the Application pursuant to RSA 162-H:7, VI, on December 18, 2015.

[1] See Attachment A, for example, concerning House Bill 55, which was enacted in 2009. The comments of then PUC Commissioner Clifton Below at the Senate Committee on Energy, Environment and Economic Development hearing, on April 23, 2009, are instructive background concerning the relationship between the restructuring of the electric industry and the siting of energy facilities.

2. On March 29, 2017, the Applicants filed a Motion to Strike Certain Track 1 Testimony ("Track 1 Motion") in which they moved to strike, among other things, alternative route testimony. The Presiding Officer denied the Track 1 Motion saying that other parties were not prevented "from submitting their own evidence about alternatives." He also concluded that "at this juncture we cannot say that all evidence of alternatives routes or sites is irrelevant..."

I. DISCUSSION

3. RSA 162-H:7, V (b) required that the Applicants "[i]dentify both the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant's preferred choice." In their Application, at p. 43, the Applicants did just that. Essentially, the Applicants identified the 192-mile route from Pittsburg to Deerfield, including approximately 60 miles of underground facilities in public highways. They also pointed out that the route previously identified in 2013, which was reviewed by the Department of Energy ("DOE"), was no longer their preferred choice but was considered available.

4. In a letter to the SEC dated February 26, 2016, the Applicants submitted additional information to conform to the SEC's readopted rules, which, among other things, explained that the 2013 route, although considered technically available, is in reality not a viable alternative. The Merriam Webster Dictionary defines an alternative as "a proposition or situation offering a choice between two or more things only one of which may be chosen" and it defines available as "present or ready for immediate use." Accordingly, consistent with the plain language of the statute, the Applicants have no available alternatives to the preferred route inasmuch as there are no other choices that are ready for immediate use.

A. Restructuring

5. The concept of available alternatives as it applies currently to the siting of energy facilities must be considered in the context of the fundamental changes brought about by the restructuring of the electric industry in New Hampshire. Prior to restructuring, which the Legislature enacted in 1996 through RSA Chapter 374-F, except for certain small power producers, energy facilities (previously defined as bulk power supply facilities) were constructed and operated by public utilities subject to the comprehensive jurisdiction of the Public Utilities Commission ("PUC"), which included the regulation of rates. At that time, when a public utility sought to construct a bulk power supply facility, either a generation or transmission project, it would have to demonstrate to the PUC that the electricity from the project was needed, because the prudent costs of such projects would become part of the just and reasonable rates that all public utility ratepayers were required to pay.

6. As part of the old regulatory scheme, the public utility, in addition to demonstrating the need for the electricity, would also set forth available alternatives, which could be numerous for a vertically integrated electric utility with the power of eminent domain. For instance, in Docket No. DSF 91-130, concerning a PSNH 115 kV transmission line, the PUC considered other routes as well as system alternatives, such as, load management and the addition of generation. While such alternatives were available to public utilities prior to restructuring, they are not alternatives available to the Applicants, or similarly situated market participants, today, whether it be a wind farm or an elective transmission line.

7. The Legislature unbundled generation, transmission and distribution services in order to harness the power of competitive markets, and Congress pursued the same goal by permitting elective transmission upgrades such as Northern Pass. Competitive markets thus

replaced cost-of-service regulation and had the twin effects of expanding the universe of potential developers of energy facilities, while shrinking the universe of alternatives that might be available to such developers. Consequently, the required findings by the SEC under RSA 162-H:16, IV (b) and (c) are directed to the merits of the proposed site and facility itself, and whether the facility would unduly interfere with the orderly development of the region or have unreasonable adverse effects, not whether the Project is better or worse than some alternative that the Applicants are not in a position to construct.

B. Rehearing

8. In the Alternatives Order, the Presiding Officer denied the Applicants' motion to strike testimony concerning alternatives. The Applicants based their motion on the September 22, 2016 Order on Motions to Compel, which found that certain data requests were irrelevant because they did not seek information about the route as presented by the Applicants but instead sought information about, for instance, Interstate 93. Nevertheless, the Alternatives Order found that other parties were not prevented from submitting their own evidence about alternatives. The Alternatives Order states: "At this juncture we cannot say that all evidence of alternative routes or sites is irrelevant... Evidence of alternatives might be relevant to the statutory factors that must be considered by the Subcommittee in granting or denying a Certificate or conditions that may be imposed if a Certificate is granted." The Applicants seek rehearing of this conclusion.

9. A motion for rehearing must (1) identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered, (2) describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable, and (3) state concisely the factual findings, reasoning or legal conclusion proposed by the moving party. Site 202.29(d).

10. The purpose of rehearing "is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision ..." *Dumais v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted when the Committee finds "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. NH Pers. Comm.,* 17 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). "A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome." *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No 25,810 at 4 (Sept. 8, 2015).

C. Relevance

11. The Alternatives Order mistakenly conceives the relevance of intervenor evidence that purports to be about alternatives, but which are not, in fact, alternatives. The SEC's findings are absolute, not relative, meaning that it must determine whether, for instance, the Project as proposed would have an unreasonable adverse effect on aesthetics. This finding does not include consideration of whether some alternative not available to the Applicants would have less effect, or, for that matter, more. The plain language of RSA 162-H:16, IV (b) and (c) says that in order to issue a certificate the SEC must find that a facility, i.e., the proposed facility, not some hypothetical facility, will not unduly interfere with the orderly development of the region and that it will not have various unreasonable adverse effects. Furthermore, unlike the PUC with respect to bulk power supply facilities prior to restructuring, the SEC does not have the choice here between or among alternatives because there are no actual alternatives.

12. The Alternatives Order refers to evidence of alternatives and speculates that such evidence might be relevant to the statutory findings; however, as is the case here, the Applicants do not have any alternative routes. It is an error of reasoning and law to conclude that such

evidence might be relevant to the findings the SEC must make. Even if the SEC were to examine some alternative suggested by an intervenor, and even if it were to conclude that such an alternative would have less impact, or in some theoretical way might be preferable, then what? The Applicants are not in a position to construct any such alternative and there is no basis in RSA 162-H:16, IV for the SEC to make a finding based on an alternative that the Applicants have not identified pursuant to RSA 162-H:7, V (b).

13. In their objections to the Applicants' Track 1 Motion, Counsel for the Public ("CFP), the City of Concord et al. ("Towns"), and the Society for Protection of New Hampshire Forests ("SPNHF") all press arguments about why testimony about alternatives not proposed by the Applicants should be permitted. CFP posits that the "availability of viable alternatives" ought to be weighed in the SEC's consideration of whether the Project unduly interferes with the orderly development of the region. The Towns contend that, inasmuch as the SEC must consider all relevant information, it "is not necessarily limited to alternatives presented by the Applicant." SPNHF argues that information about alternatives is relevant to what alternatives the Applicants consider available.

14. CFP creates out of whole cloth the notion of "viable" alternatives and tries to link it to the actual required findings. Under CFP's backdoor theory, the SEC could find that a project unduly interfered with the orderly development of the region, or did not serve the public interest, if a viable, less interfering alternative existed, even if the alternative had not been identified in the applicant's application as an alternative it considered available, and is in fact not something the Applicants are in a position to construct. In the first case, CFP does not explain what would constitute a viable alternative. More important, CFP seeks to undo specific action taken by the Legislature when it amended RSA 162-H:16, IV in 2014, by removing any

reference to alternatives in the findings provision of the statute. Instead, alternatives are now mentioned in the application provision of the statute and only in terms of what an applicant considers available, which is logically consistent with the restructured electric industry in New Hampshire.

15. The Towns describe the statutory changes that were made in 2014, pointing out that RSA 162-H:16, IV previously said that the SEC, "after having considered available alternatives" etc. must make certain findings. That provision now says that "after due consideration of all relevant information" etc. the SEC shall make certain findings. The Towns say that it is "apparent" from the new language that the SEC's "consideration of alternative routes is not necessarily limited to alternatives presented by the Applicant." Quite the contrary, it is apparent from the 2014 amendment to RSA 162-H:7 V (b) that the Legislature put entirely in the hands of an applicant what it considers to be an available alternative.

16. SPNHF takes the argument a step further and seeks to examine the Applicants' state of mind as to what they considered available as alternatives when they filed their Application. Such a leap in logic, however, presumes that an applicant for an energy facility must identify all other possible options in an application and defend the decisions it makes in a competitive marketplace. In other words, irrespective of the express statutory changes to the contrary, SPNHF wants to apply to the Applicants the regulatory approach that applied in the past to rate-regulated public utilities. The SEC, however, rejected such an approach under the prior statute when it found in Groton Wind, Docket No. 2010-01, that "RSA 162-H does not require the subcommittee to consider every possible alternative, including ones unavailable to the Applicant." Decision Granting Certificate of Site and Facility (May 6, 2011) p. 27. See also,

Laidlaw Berlin BioPower, Docket No. 2009-02, Decision Granting Certificate of Site and Facility (November 8, 2010), p. 37.

17. CFP and the others rely on the circular reasoning that evidence of alternatives is relevant because the SEC must consider all relevant information. CFP says that the "statute makes clear that the presence of viable alternatives is to be considered" but it does not cite which statute makes this clear nor does it define "viable" or reveal its source. What is clear from the statutory change in 2014 is that when an application is filed the applicant must identify its preferred choice and alternatives "*it considers available.*" The statutory change offers no recourse or review inasmuch as the new provision affords complete discretion to the applicant and it relates to the completeness of an application, not to the ultimate findings by the SEC.

18. In SEC proceedings under the prior statute and subsequent to restructuring, the SEC considered alternatives in terms of whether the applicant conducted a reasonable site selection process. See, for example, the various wind projects, Lempster, Granite Reliable, Groton, and Antrim. Even in that context, however, the SEC, as noted above, said that it was not required to consider all possible alternatives. Of further guidance in this regard is the SEC's decision in Granite Reliable Power, Docket No. 2008-04, Decision Granting Certificate of Site and Facility (July 15, 2009) p. 28, where the Subcommittee found that "the proposed site, its significant wind resources, its proximity to the transmission system and an already existing network of logging roads, coupled with the High Elevation Mitigation Settlement Agreement, render the proposed site the preferred location among the available alternatives for the construction of the proposed facility." In that case, the Subcommittee's practical analysis was confined to actual variations of the proposed facility that could be constructed.

19. Similarly, the SEC expressly rejected consideration of alternative projects in both the Groton and Laidlaw cases, where intervenors argued that other renewable energy projects were more efficient or caused less impact than the proposed facility. See Groton, p. 26-27, and Laidlaw, p. 37. The lesson to be drawn from those cases was that an alternative was unavailable to the applicant if it was not something the applicant could implement.

20. Perhaps more telling, in regard to what is construed to be available, is the SEC's action in Antrim Wind, Docket No. 2012-01, Decision Denying Certificate for Site and Facility (April 25, 2013), p. 54, where it limited available alternatives to what the applicant explicitly identified in its application. In that case, the SEC concluded that the proposed project would have an unreasonable adverse effect on aesthetics but refused to consider the alternative of a smaller project in either the number or height of the turbines. Putting aside the narrowness and reasonableness of such an approach under the circumstances, it does reinforce the view that the SEC makes its findings based on the independent merits of the project proposed and not in relation to some "alternative" that the applicant does not propose.

II. CONCLUSION

21. In New Hampshire's restructured electric industry, an applicant for a generation facility or an applicant for an elective transmission upgrade is extremely unlikely to have available alternatives beyond their proposed locations. It may be possible to make adjustments within the preferred site of a generation project, or within the preferred right-of-way for a transmission line, but such applicants do not have the power of eminent domain that would expand the universe of possible sites, nor do they have the advantage of cost-of-service regulation that would make other alternatives financially feasible.

22. The Applicants have submitted their preferred choice; they do not have any available alternatives, that is, alternatives that are ready for immediate use, as defined by Merriam Webster. RSA 162-H:7, V (b) speaks to the Applicants' "preferred choice and other alternatives *it considers* available." (Emphasis supplied.) Other alternatives they consider available would be the Applicants' second, third choices, etc., if there were any. The point is that it is up to the Applicants to identify their preferred choices and the alternatives they consider available, which is wholly a matter of their judgment. The SEC then makes its findings within the scope of the choices put forward by the Applicants, whether it is one or more than one.

23. It is instructive to look at the statutory change made in 2014 to understand why evidence about routes not identified by the Applicants is therefore not relevant. Prior to that time, the SEC was required to make its findings "after having considered available alternatives." Since that time, the applicant is required to identify in its application its preferred choice and "other alternatives it considers available." Clearly, the Legislature has shifted the focus, consistent with the restructuring of the electric industry, such that the Application defines the parameters of the sites or routes that the SEC reviews.

24. It is the SEC's duty to determine whether the Project has any unreasonable adverse effects, whether it unduly interferes with the orderly development of the region, and whether it serves the public interest. The Project stands or falls on its own merits. Hence, it is not relevant to any statutory finding whether some theoretical alternative posed by another party might be less adverse or less interfering because those alternatives are not the Applicants' preferred choice and the Applicants do not consider them available. The SEC cannot deny a Certificate because it would have been "better" if the Applicants had done something else, any

more than it can grant a Certificate because the Applicants' preferred choice is better than other alternatives it did not prefer or did not pursue.

25. The following parties object to the Applicants' Motion for Rehearing:

a) The Society for the Protection of New Hampshire Forests
b) Municipal Group 1 South
c) Municipal Group 3 North
d) Municipal Group 2
e) Municipal Group 1 North
f) Ammonoosuc Conservation Trust
g) Conservation Law Foundation
h) Appalachian Mountain Club
i) Grafton County Commissioners
j) Municipal Group 3 South
k) Deerfield Abutters
l) National Trust for Historic Preservation
m) North County Scenic Byways Council
n) Sugar Hill Historical Museum
o) Combined Northern Abutters and Non-Abutters
p) Dummer, Stark and Northumberland Abutters;

WHEREFORE, the Applicants respectfully request that the Committee:

A. Grant rehearing; and

B. Grant such further relief as it deems appropriate.

Respectfully submitted,
Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: May 24, 2017 By: _____

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Thomas Getz, Bar No. 923
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Certificate of Service

I hereby certify that on the 24th day of May, 2017, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon SEC Distribution List.

_____
Thomas B. Getz

Energy, Environment and Economic Development Committee
Hearing Report

TO: Members of the Senate

FROM: Patrick Murphy, *Legislative Aide*

RE: Hearing report on HB55 relative to energy facility siting construction and operation.

HEARING DATE: April 23, 2009

MEMBERS OF THE COMMITTEE PRESENT:
Senator Fuller Clark (Dist 24), Senator Merrill (Dist 21), Senator Cilley (Dist 6), Senator Lasky (Dist 13), Senator Odell (Dist 8), Senator Carson (Dist 14)

MEMBERS OF THE COMMITTEE ABSENT:
None

Sponsor(s):
Rep. Kaen, Straf 7

What the bill does:
This bill removes references to bulk power facilities from the energy facilities to be considered by the site evaluation committee and makes certain modifications to the membership and procedures of the committee.

Supporters of the bill:
Representative Kaen, Straf 7; Representative Harvey, Hills 21; Commissioner Below, PUC; Assistant Commissioner Mike Walls, DES; Anne Ross, PUC; Madeline McElaney, NH SEA; Donna Gamache, PSNH; Deb Hale, National Grid; Peter Wells, Unitil

Those in opposition to the bill:
None

Speaking to the bill/Neutral:
Allen Brooks, NH DOJ

Summary of testimony received:

Representative Kaen

- This bill was one line when it was introduced, then the PUC asked for help in revising the law to facilitate their process.

Commissioner Below of the PUC and Assistant Commissioner Mike Walls of DES

- The issue is that the statute had some archaic elements that were getting hard to administer.
- HB 55 adds language to current statute in the declaration of purpose to include the routing of high voltage transmission lines and energy transmission pipelines. The purpose statement will now also state that full and timely consideration of environmental consequences be provided; and that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public.
- The biggest change in current statute would be getting rid of the bulk power facilities distinction found on page 2, lines 6 through 13 of the compare document that Joel Anderson (House Committee Research) provided. To absorb that change, the definition of energy facility has also been amended.
- This bill has exempted merchant generation from being a bulk energy supplier.
- Other very small technical changes were made that appear in the compare document.
- This bill will not change the fact that PSNH will still present plans to the PUC for modifications or transmission planning.
- Please see the Comparison Document for HB 55 which shows all of the changes made to RSA 162-H by HB 55 as amended by the House.

Assistant Attorney General Alan Brooks and Assistant Commissioner Mike Walls of DES

- Testified to provide information only, does not have a position on the bill. Expressed concern about the definition of an energy facility, and the possibility that communities and their smaller projects were being left out. Assistant Commissioner Walls is not concerned with the definition, when the definitions were being merged technical corrections were made. There was no intent to leave anyone out. These small projects wouldn't meet the threshold of federal review.
- Assistant Attorney General Brooks also expressed concern with section 7 of the compare document as it relates to local representation. Assistant Commissioner Walls stated that this would prevent redundancy in federal review, and that these concerns imply an inadequate federal review, which are concerns that DES does not share.

Funding:

None

Action:

Executive action is pending.

ATTACHMENT A

Date: April 23, 2009
Time: 10:00 a.m.
Room: LOB 102

The Senate Committee on Energy, Environment and Economic Development held a hearing on the following:

HB 55 (New Title) relative to energy facility siting construction and operation.

Members of Committee present: Senator Fuller Clark
Senator Merrill
Senator Cilley
Senator Lasky
Senator Carson

The Chair, Senator Martha Fuller Clark, opened the hearing on HB 55 and invited the prime sponsor, Representative Naida Kaen, to introduce the legislation.

Representative Naida Kaen: Thank you, Madam Chairman.

Senator Martha Fuller Clark, D. 24: Thank you.

Representative Kaen: My name is Naida Kaen. I represent Strafford District 7. To begin, the bill was one line when I introduced it. It read, it changed the word kilowatts to kilovolts. It was intended to fix a mistake that was made in a floor amendment last session. And, then, my file became very thick because the, I was approached by the PUC to help them revise the law so as to facilitate their process. And, in the interest of giving you the very best information, I would ask you to ask all questions of Commissioner Below instead of me.

Senator Martha Fuller Clark, D. 24: Thank you. And, I don't have a sign up sheet, oh. Commissioner Below, you're on, again.

Commissioner Clifton Below: And, may I ask if Assistant Commissioner Mike Walls might join me from the Department of Environmental Services because we actually worked quite a bit on this together.

Senator Martha Fuller Clark, D. 24: Certainly.

Commissioner Below: Okay.

Assistant Commissioner Michael Walls: I rarely get a word in edgewise, so.

Senator Martha Fuller Clark, D. 24: So, what's new?

Assistant Commissioner Walls: That's all I am going to say.

Senator Martha Fuller Clark, D. 24: What's new? Right. We are lucky to have such a brilliant commissioner.

Commissioner Below: No, Mike, really did a lot of the work getting this going.

Senator Martha Fuller Clark, D. 24: Oh, Mike I didn't mean you weren't brilliant.

Senator Amanda Merrill, D. 21: And, Assistant Commissioner.

Senator Martha Fuller Clark, D. 24: Assistant Commissioner. Brilliant Commissioner and Assistant Commissioner.

Commissioner Below: Oh, there's one more. Essentially, the issue is that the energy facility evaluation siting statute had some archaic elements that were becoming increasingly difficult to administer in application. And, this derives primarily from a historical artifact that there was a distinction between energy facilities and what is termed in the statute bulk power facilities, bulk power supply facilities. And, the distinction, historically, was that bulk power supply facilities were essentially electric generation and transmission lines that were developed by regulated utilities. And, the distinction was that these bulk power supply facilities would first go through a PUC process to get a certificate of need and then get passed onto the Siting Evaluation Committee. And, there were parallel provisions throughout the statute for the two different entities; including even in the declaration of purpose, the current statute has a I and a II; I applies to energy facilities, II sort of applied to the bulk power supply facilities.

With the restructuring of the electric utility industry, generation is no longer typically developed by vertically integrated regulated utility, so there is really no point. And, in fact, the statute kind of had exempted, as part of restructuring there was an amendment, that exempted essentially merchant

developed generation from being the bulk power supply facility and sort of made it an energy facility. But, it was perhaps not the most artful thing there either. And, I guess I'll take some ownership of that, too. Back when I was in the House, again, Representative, then Representative Bradley, Representative McGilvery and I were charged, at one point, with trying to amend the siting statute to help it conform with what we were doing with restructuring. And, at that time, we got into it and said, "Boy this is kind of a can of worms. There is a lot that needs to be done to revamp this statute" and we sort of took the short cut and did the minimum necessary and it's come, came back to haunt me because, as a member of the Siting Evaluation Committee, of which the PUC is only a portion, DES is actually sort of the lead agency that, if you will. I don't think it's explicitly administratively attached to DES, but it sort of is, that's where its home is, where the records are kept. And, the Commissioner of DES is Chair of the Site Evaluation Committee. But, it is sort of a virtual committee in that it has no real offices or staff. It just comes together with different agency heads and division directors as needed. And, it has no budget. All of the costs are assessed back to the applicants, and hires an outside attorney to assist it in those matters.

So, that's the context for this. And, I don't know how much you want us to walk you through all the changes, but Joel Anderson, the staffer for the House committee, prepared this compare document that compares the current statute, shows the current statute and how it would be changed if the bill, you know, by the bill as passed by the House. And, if you'd like, I could try to run you through that, but it's really how much do you want to get into this?

Please see Attachment #1, the Comparison Document for HB 55.

Senator Martha Fuller Clark, D. 24: Are there questions from various Committee members? I think that perhaps one thing that will happen is that people will have a chance to review this and if there are questions that come up, perhaps we can, you know, find a moment as we're moving forward with the Committee, to get those questions answered.

Commissioner Below: The House committee just spent a good deal of time working on this and it went through a number of iterations and work sessions and I don't know, was there more than one public hearing on it? I think probably at least one additional public hearing on the proposed amendment.

Representative Kaen: Yes, my file is very thick.

Senator Martha Fuller Clark, D. 24: And, were there any areas of major controversy that you want to draw our attention to?

Commissioner Below: Well, there were a few areas of controversy that were left out, so they are no longer controversial for you.

Senator Martha Fuller Clark, D. 24: Okay.

Commissioner Below: So, that helps. You know, the biggest thing that starts off is getting rid of the distinction of bulk power facilities. You know, having one statement of purpose that sort of integrates the two statements of purposes. So, you see that... Let me just take a couple of minutes, if I may, to run, highlight it.

On page two, you see at line six through seventeen, the deletion of the bulk power supply facility. Further down and you see deletion of commission because the PUC no longer has any distinct role under this statute; it's just the Siting Committee. It functionally didn't have any anymore, but it was sort of more of an artifact that we still had this distinct element. Energy facility has been amended to draw in the power generation and transmission. There is a slight change to this current law to clarify that, on page three, line nine, that an electric transmission line of design rating in excess of two hundred kilovolts would be automatically subject to the Site Evaluation Committee review; that's a fairly large transmission line. I am sorry I must be referring to the compare document. And, previously the laws covered one hundred kilovolt transmission lines over a route not already occupied by transmission lines. And, but it allowed the committee discretion to look at smaller transmission lines. So, this really doesn't change the authority of the Siting Committee, it just makes it clear that these large transmission lines would still get reviewed.

So, there is just a lot of little technical corrections like on page three at line twenty-five, instead of referring to board of selectmen, it is the governing bodies of communities. On page four, this is somewhat significant, at line six, there is one person who is added to the Site Evaluation Committee, which is the Commissioner of the Department of Culture Resources or the Director of Division of Historical Resources' designee. In general, the concept behind the Site Evaluation Committee was that all of the agencies that might individually have some review, sort of have a combined effort and do a joint review. And, there is still permits that DES has to issue, like wetlands permits that they still do, but they become part of the overall site evaluation process, so that they have to not just in parallel, but they kind of all end up integrated by the Site Evaluation Committee.

Under federal law, I believe...

Senator Martha Fuller Clark, D. 24: Section 106?

Commissioner Below: Might be. You know more than me. On cultural, Historical Resources gets involved in reviewing many of these projects to ensure that cultural resources, you know, to be reviewed for the impact of archeological sites or historic resources. So, it made sense to also bring in on board like the other agencies.

One thing that has evolved, it shows up sort of at the bottom of page four, is that previously we, somebody could file an application and then file testimony later on, that's, maybe that's not exactly where it shows up. But, we've integrated that so that when somebody files an application, they also pre-file their initial testimony, so it sort of speeds up the process and clarifies the process for having public informational hearings in each county where the facility is proposed.

There is a, on page five at line twenty-three, it allows the chair, who is normally the Commissioner of DES, to designate the Assistant Commissioner of DES, to assume their responsibilities as a subcommittee for purposes of this paragraph. You might recall that a year or two ago legislation was passed to try to expedite siting review of renewable energy facilities. And, in the process of doing that, the Legislature allowed for the possibility of subcommittees. The Site Evaluation Committee I think has, is normally 14 people, allowed a subcommittee half of, at least half of that, seven, to go through these renewable projects. This bill would allow subcommittees for any project, not just renewable projects. And, it did call for either the Chair or the Vice Chair, meaning either the Commissioner of DES or the Chair of the PUC, to be the chair of any given subcommittee. This allows Commissioner Burack to appoint Assistant Commissioner Walls to function as a chair, potentially, on a subcommittee.

Assistant Commissioner Walls: It's punitive in nature.

Commissioner Below: He didn't speak up enough. And, it also makes the subcommittees function as the committee.

Senator Martha Fuller Clark, D. 24: Committee.

Commissioner Below: So, when you have seven or eight people on the subcommittee, they do the whole process. There is ambiguity that may be at the end of their process, they kick it back up to the full committee for the final...

Senator Martha Fuller Clark, D. 24: And, have to start over.

Commissioner Below: Final order and how could you do that if you didn't participate in all the hearings on the case and read all of the filings? It just didn't make sense.

So, a lot of what comes on the next page is just sort of a rearrangement of things. There is a lot of strikeout, but as Joel has noted, some things have simply been moved around or there are strikeouts because there was separate reference to bulk power facilities compared to energy facilities.

Mike, if you see anything, speak up.

Assistant Commissioner Walls: That's the gist of it.

Commissioner Below: There is a bit of clarification on the timeframes, but I don't think it changes anything, maybe just simply a reinsertion on pages eight and nine of something that was elsewhere. That is sort of the long and short of it.

The, on page 11, I think this was always the intent, at the bottom at line thirty-six, there is just a clarification that any certificate issued by the Site Evaluation Committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. And, there is a clarification, that could mean full membership of the subcommittee. A certificate shall be conclusive when all questions of siting, land use, air and water quality. And, that is actually already in the statute. Line thirty-four you see a strike out, it's just sort of reorganized. But, it just makes the whole process clearer. And, when you get out on page twelve and thirteen, a lot of that is just the strikeout of the separate bulk power facility plans.

I think it is important to note that the utilities still, like PSNH, as part of their integrated resource planning process, still do regularly present to us their planning framework for where they may be possibly considering new generation. Although they are proscribed in law from building a completely new generation, you know, they're still, they may be looking at modifying a plan or things like that. That's part of the integrated resource plan, as well as their transmission planning and stuff like that.

It is important to note that as a general rule, transmission planning is under federal jurisdiction and it occurs in a regional context through the regional transmission organization, ISO-New England, which we actively participate in. But, that is, it's not really, it doesn't really make sense to have these bulk

power facility plans filed at the commission level because we already get the information through other mechanisms and/or it is really part of a regional planning process that we participate in.

Senator Martha Fuller Clark, D. 24: Terrific. I think that was helpful for us. Additional questions from anyone on the Committee? Thank you both very much. I have one last speaker and that's Allen Brooks. Welcome, Allen.

Attorney Allen Brooks: Thank you very much. My name is Allen Brooks. I am Assistant Attorney General at the Department of Justice. And, my apologies up front, I was asked to testify by Assistant Attorney General Peter Roth, who could not be here. Peter serves as counsel for the public to the SEC. Under statute, someone from the Attorney General's Office, Peter, is appointed to represent essentially the public interest in that process. He did have a couple points for information only. We neither support nor oppose.

And, I believe that, I talked a little bit with Assistant Commissioner Walls beforehand and if he is willing to, I bet that he can actually address some of the concerns that Peter raises in this, which is really for information,.

Senator Martha Fuller Clark, D. 24: So, Mike, would you like to come forward again?

Attorney Brooks: There is always room at the table for Michael. Thank you. The first question was simply in section three the definition of energy facility. Essentially, it looks like it excludes pipelines that are considered part of the local distribution network. There are also, in sections (b), (c), (d) and (e), it depends on the size of the transmission facility. The concern was that a lot of what we do, as counsel for the public, involves representing local communities, very small communities who might not have, either the financial resources to hire a counsel for this, they may not have local zoning. And, will making these threshold requirements mean that these local communities no longer have the representation that they usually get? That is basically put out there again as information and Mike can address that somewhat. But, we don't take a position on the policy matter; we just want to raise that and let everyone know that that is something that we do quite a bit during the SEC hearings and that is a concern that was raised.

Do you want me to go through all of them or do you want to do it point by point?

Assistant Commissioner Walls: Well, Madam Chairman, I am Mike Walls, the Assistant Commissioner at DES. And, Attorney Brooks and I did speak about this before the hearing. My view is that we tried to merge the

definitions of bulk power supply facility and energy facility and we have largely captured the same kinds of facilities, even the larger definition of energy facilities so that it covers pretty much the same thing. Now, in the process in the House, we, there were some technical corrections made to the definitions, and I actually couldn't really follow those and I don't think that, we didn't intend to leave anything out that was covered before.

I think there are some small projects that Attorney Brooks is referring to that probably aren't, don't rise to the threshold of being covered by the SEC to begin with. If it's a local transmission line that's below a certain size, it wouldn't be a project that meets the threshold for SEC review anyway. So, I guess I don't really share the concern.

Senator Martha Fuller Clark, D. 24: Okay. Thank you. Any other comments that you wish to make in terms of the comments that came to us from the Attorney General's Office?

Attorney Brooks: Well, we just have two distinct comments from that, if I could go through those. The other concern was that, in section seven, there is an addition of the word federal, essentially saying that, if you have federal approval, you are at least a candidate for not having to go through SEC review if you meet other criteria. The concern was that the federal process, the FERC process, again, doesn't necessarily look at the local interests and is a process that is at least perceived to be more on paper and doesn't have the level of public hearings that we have. And so, there is a concern, that again, something will be missed. But, I believe that this is more specifically addressed by even the language and Mr. Walls.

Assistant Commissioner Walls: Right. And, the statute, as drafted now, and as proposed in this bill, would prevent redundancy in regulatory review. I mean, the concern expressed here really assumes an inadequacy in the part of the federal review, which we simply don't share that. If it's being reviewed by the Federal Energy Regulatory Commission for its regional purposes, and the SEC looks at it and decides that that is sufficient, I think in terms of the law, that is certainly legally sufficient review of any particular project.

Senator Martha Fuller Clark, D. 24: Are there questions for Assistant Commissioner Walls? Thank you very much. I have no one else signed up to speak. Is there anyone else who wishes to comment at this time? Seeing none, I'll close the hearing on House Bill 55.

Hearing closed at 10:20 a.m.

Respectfully submitted,

Danielle C. Barker

Danielle C. Barker
Senate Secretary

7/29/09

1 Attachment