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June 26, 2017

Via Electronic Mail & Hand Delivery

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

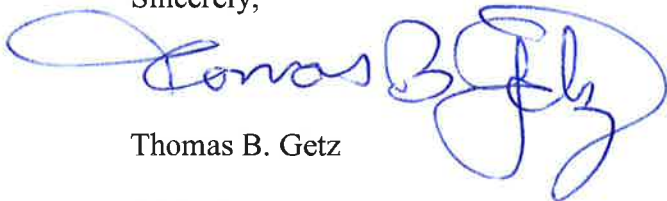
**Re: Site Evaluation Committee Docket No. 2015-06
Joint Application of Northern Pass Transmission LLC and Public Service Company
of New Hampshire d/b/a Eversource Energy (the “Applicants”) for a Certificate of
Site and Facility
Motion for Clarification And/Or Rehearing
Order on Motion to Strike Forward NH Plan**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of a Motion For Clarification And/Or Rehearing Order On Motion To Strike Forward NH Plan.

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 CLARIFICATION AND/OR REHEARING
ORDER ON MOTION TO STRIKE FORWARD NH PLAN**

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 request clarification and/or rehearing of the May 26, 2017 Order on the Society for the Protection of New Hampshire Forests (“SPNHF”) Motion to Strike Portions of the Applicants’ Forward NH Plan (“Forward NH Order”) insofar as it relates to the four findings the Subcommittee will make pursuant to RSA 162-H:16, IV.

As explained below, the Forward NH Order could be read as concluding that the Subcommittee will apply a net benefits test when determining whether to issue a Certificate in this proceeding. The finding as to whether issuance of a Certificate will serve the public interest, which the Site Evaluation Committee (“SEC”) must make as one of its four required findings, however, is not a net benefits test. Furthermore, there is a fundamental difference between the four-part test that the Legislature has enacted for energy facilities and the stand-alone public interest tests that it has enacted in other circumstances, examples of which are discussed herein.

I. BACKGROUND

1. The Applicants filed an Application for a Certificate of Site and Facility on October 19, 2015, for a 192-mile electric transmission line with associated facilities (the "Project"). Among other things, the Applicants identified, beginning at p. 92 of their Application, those benefits associated with the Project that would serve the public interest as required by RSA 162-H:16, IV (e).

2. On March 29, 2017, SPNHF filed a pre-hearing motion in which they sought to strike the Applicants' description of the benefits of the Forward NH Plan. The Presiding Officer denied the Motion, discarding SPNHF's argument that only certain types of benefits could be considered by the Subcommittee. The Forward NH Order rightfully concludes, at p. 5, that "the Subcommittee will consider all of the impacts and benefits of the Project in determining whether to grant or deny a Certificate" and goes on to recount some of the benefits that will be analyzed. However, the Forward NH Order also says that in doing so the Subcommittee will "determine whether the benefits of the Project outweigh any adverse effects." The Applicants are concerned that this last phrase could be read as endorsing the application of a net benefits test in this proceeding.

3. In a somewhat related motion that SPNHF filed jointly with the Grafton County Commissioners on April 24, 2017, they asked the Presiding Officer to clarify when evidence relevant to the public interest standard may be introduced. They interpreted the public interest finding as, in effect, a net benefits test, which they described as a "holistic" approach. The Applicants objected to that characterization on May 4, 2017. The Presiding Officer granted the joint motion to clarify on June 12, 2017, observing at the same time that there was considerable

doubt as to whether clarification was necessary but, to avoid confusion, he confirmed that evidence relevant to the public interest standard could be introduced throughout the hearing. In addition, he pointed out in a footnote that the Order considered neither the Intervenors' nor the Applicants' interpretation of the public interest finding.

4. In this motion, the Applicants ask that the Presiding Officer, at a minimum, clarify similarly that the SEC has not yet interpreted the public interest finding, or that, in the alternative, it be made clear that RSA 162-H:16, IV, (e) does not constitute a net benefits test.

II. STANDARD FOR REHEARING

5. 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).

6. 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).

7. The following supports the Applicants' interpretation of the public interest finding and its position that the reference to determining "whether the benefits of the Project outweigh

any adverse effects” is mistakenly conceived if it is intended as an acceptance or adoption of a net benefits test. In addition, it is an error of law insofar as the Forward NH Order concludes that RSA 162-H:1, the Purpose section, requires the SEC to employ a net benefits test.

III. LEGISLATIVE AND RULEMAKING HISTORY

8. In 2014, as a result of Senate Bill 245 (“SB 245”), the Legislature added RSA 162-H:16, IV (e), which requires a finding that a Certificate will serve the public interest. As it made its way through the legislative process, SB 245 included a pointed debate over the nature of the public interest finding that would be required of the SEC. That debate focused primarily on whether to adopt a net benefits test.

9. When SB 245 was initially considered by the Senate Energy and Natural Resources Committee, it included as the new, fourth required finding under RSA 162-H:16, IV, the following:

(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.

(Emphasis supplied.)

10. SB 245 was considered by the full Senate and referred to the Committee on Finance, which removed the net benefits test. It adopted instead language requiring that issuance of a Certificate will “serve the public interest.” It is this formulation of the public interest element that was ultimately enacted as RSA 162-H:16, IV (e).

11. As part of the rulemaking process required by the 2014 amendments to RSA Chapter 162-H, the SEC was directed to undertake a rulemaking that included criteria for siting energy facilities under RSA 162-H:16, IV. In its October 2, 2015 Final Proposal to the Joint Legislative Committee on Administrative Rulemaking (“JLCAR”), the SEC, among other things, proposed criteria relative to finding whether an energy facility would serve the public interest that spoke in terms of considering the “beneficial and adverse environmental effects” as well as the “beneficial and adverse economic effects” of a facility.

12. The proposed rule, set forth below, closely resembled the public interest language that was removed during the legislative process, making cosmetic changes, such as, substituting “beneficial and adverse effects” for “net effects.” JLCAR Staff Comments on Potential Bases for an Objection on Legislative Intent, at p. 3, noted that the “language describes public interest by referring to several different criteria. While these criteria do not include the phrase ‘net,’ criteria (a) and (b) apparently do refer to net requirements.”

Site 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The *beneficial and adverse environmental effects* of the facility, including effects on air and water quality, wildlife, and natural resources;

(b) The *beneficial and adverse economic effects* of the facility, including the costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies;

(c) The extent to which construction and operation of the facility will be consistent with federal, regional, state, and local plans and policies, including those specified in RSA 378:37 and RSA 362-F:1;

(d) The municipal master plans and land use regulations pertaining to (i) natural, scenic, historic, and cultural resources, and (ii) public health and safety, air quality, economic development, and energy resources; and

(e) The extent to which siting, construction, and operation of the facility will have impacts on and benefits to the welfare of the population, the location and growth of industry, historic sites, aesthetics, the use of natural resources, and public health and safety, consistent with RSA 162-H:1.

(Emphasis supplied.)

13. On October 16, 2015, JLCAR entered a preliminary objection to the SEC's proposed rule. JLCAR had considered the legislative history of SB 245 and objected on the grounds that the proposed net benefits test was contrary to legislative intent. The SEC responded to the preliminary objection on November 25, 2015, removing the net balancing language, i.e., references to beneficial and adverse effects, and substituting instead references to factors included in the Declaration of Purpose in RSA 162-H:16-1. The JLCAR Staff Comments Regarding Objection Responses, at p.1, nonetheless, stated: "If, when this rule is applied, it caused an internal inconsistency in the rules, it would be objectionable on the basis of clarity." JLCAR ultimately approved the revised version of the rule, which is set forth further below.

IV. PUBLIC INTEREST STANDARDS

14. The statutory scheme established by the Legislature for the issuance of a Certificate is fundamentally different from the one it established, for example, to determine when an entity may commence business as a public utility. The four-part test that the Applicants must meet for a Certificate in this proceeding is not a stand-alone public interest test. In other words, the Legislature did not simply say that, in order to issue a Certificate, the SEC shall find that it is in the public interest.

15. A number of examples of stand-alone public interest tests can be found in statutes administered by the Public Utilities Commission (“PUC”), including: RSA 374:26, which governs permission to engage in business as a public utility; RSA 374:30 and 33, which govern public utility mergers and acquisitions; and, RSA 369:1, which governs the issuance of securities. Respectively, under RSA 374:26 the PUC may grant authority to commence business when it “would be for the public good,” under RSA 374:30 a utility may transfer or lease its franchise, works or system when the PUC finds “it will be for the public good,” under RSA 374:33, a utility may acquire stock when the PUC finds it “lawful, proper and in the public interest,” and, under RSA 369:1 a utility may issue securities when the PUC finds that it is “consistent with the public good.”

16. As noted above, pursuant to RSA 374:26, the PUC may grant permission to commence business as a public utility when it is for the public good. In determining when to permit an entity to operate as a public utility in New Hampshire, the PUC must make that single finding. The PUC was provided little additional guidance by the Legislature, although due process is required. The PUC has interpreted the statute over time, and through precedent fleshed out the test for determining the public good. As a consequence, the PUC focuses largely on whether an entity has the financial, technical and managerial capability to operate and maintain its business when determining the public good under this statute.

17. The Legislature, however, took a very different approach with respect to the construction of energy facilities in New Hampshire by providing significant guidance to the SEC in the form of four mandatory findings. As a result, it is clear that the SEC has far less discretion, that is, it is more guided or constrained than the PUC is when the PUC renders a

decision under a stand-alone public interest test. But see, *Appeal of Pinetree Power, Inc.* below for an example of a guided public interest test administered by the PUC.

V. STATUTORY CONSTRUCTION

18. A number of basic rules of statutory construction are pertinent to determining what it means to “serve the public interest” in the context of issuing a Certificate under RSA 162-H:16, IV. The New Hampshire Supreme Court has said that it: looks to the plain and ordinary meaning of words; construes statutes so that they do not contradict each other; interprets statutes not in isolation but in the context of the overall statutory scheme; construes statutes so that they lead to reasonable results; construes the various statutory provisions harmoniously; examines the statute’s overall objective; and, looks to legislative history. See, for example, *Appeal of New Hampshire Right to Life*, 166 N.H. 308, 311 (2014), *Petition of James M. Mooney*, 160 N.H. 607, 609-610 (2010), *Appeal of Northern New England Telephone Operations, LLC*, 165 N.H. 267, 271 (2013), *In re Pennichuck Water Works, Inc.*, 160 N.H. 18, 27 (2010), and *Appeal of Pinetree Power, Inc.*, 152 N.H. 92, 96 (2005), which is discussed further below.

19. It is critical as a matter of statutory construction to recognize that the Legislature did not repeal the three existing findings, but added a fourth, and all four findings must necessarily be applied in a way that they do not contradict one another. In addition to being contrary to legislative intent, a net benefits test would lead to contradictory results. Consequently, the Subcommittee must harmonize the fourth finding with the other three so that they each maintain their vitality and are not subsumed by the fourth. If the Legislature had intended to make the fourth finding superior to the others, it could have and would have done so.

20. Unlike the stand-alone PUC public interest tests, the public interest element of the four-part SEC test is guided or limited by the context of the other three required findings. In order to issue a Certificate in this proceeding, RSA 162-H:16, IV requires the SEC to find that; (1) the applicant has the financial, technical and managerial capabilities to construct and operate the facility, (2) that the facility will not unduly interfere with the orderly development of the region, (3) that the facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety, and (4) that the project serves the public interest. In making a finding that the project will serve the public interest, the SEC must harmonize that finding with the previous three separate, yet equally important considerations.

21. Under 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. Such an approach, however, would render meaningless the findings regarding undue interference and unreasonable adverse effects, and would be contrary to legislative history, which shows that a net benefits test was considered and rejected.

22. In order to lead to a reasonable result, one in which the parts of the test do not contradict one another, which comports with the plain meaning of the statutory language, and which is consistent with legislative history, to “serve the public interest” should be read to require that an applicant demonstrate that a facility will provide benefits, which is something the SEC had not been required to consider prior to the 2014 amendment. The new finding should not be read to include consideration of adverse effects or impacts that are the subject of other findings, which is the only sure way to give full force and effect to each of the four parts.

VI. SUPREME COURT DECISIONS

23. The general rule for what constitutes the public good or public interest in the case of a stand-alone public interest test is set forth in *Grafton County Electric Light & Power v. State*, 77 N.H. 539 (1915). In that case, the Court concluded, in the context of a statute relative to the transfer of property by public utilities, that the measure described by the Legislature as 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.” *Id.* As noted above, however, the SEC has not been charged with applying a stand-alone public interest test and its discretion is as a consequence more constrained.

24. A sounder analytical basis for examining the breadth of the SEC’s discretion when considering whether an energy facility will serve the public interest is found in *Pinetree Power, Inc.* There the Court reviewed a PUC decision applying RSA 369-B:3-a, which provides that PSNH may modify a generation asset if the PUC finds that it is “in the public interest of retail customers of PSNH to do so, and provides for the cost recovery of such modification or retirement.” (Emphasis added) *Appeal of Pinetree Power, Inc.*, 152 N.H. at 97. In that instance, the Legislature did not give the PUC the broad discretion it did in the other statutory provisions noted above, but provided additional guidance.

25. In *Pinetree Power, Inc.*, the PUC had approved a modification by PSNH to the fossil fuel-fired Schiller Station to permit the burning of wood. The PUC concluded that the “project yields certain overall public policy goods such as economic benefits and environmental improvements.” *Id.* at 96. It also found that such positive contributions, combined with favorable rate effects, served as a basis for determining that the project was in the public interest of the retail customers of PSNH. Also of note, the Court found that there was no basis for the

argument by opponents that the PUC should have applied a net benefits test. The Court stated that there was no basis in the statutory scheme or case law for applying such a test.

26. The Court considered the nature of the public interest-related test in the *Pinetree Power, Inc.* case in the context of the overall statutory scheme and it also found the legislative history to be instructive. The PUC, moreover, focused on public policy goals, such as economic benefits and environmental improvements, in rendering its decision. The SEC should take the same approach employed by the Court and the PUC, which is to reject the net benefits test and focus on the benefits that the Project will provide.

VII. PURPOSE SECTION

27. As noted above in the context of rulemaking history, the SEC rule relative to public interest criteria uses language from the Purpose section of RSA Chapter 162-H. RSA 162-H:1 has followed the same formula for decades. *See* 1991 Laws of NH 295, 1998 Laws of NH 264, 2009 Laws of NH 65, and 2014 Laws of NH 217. The Legislature has long recognized that there will be significant impacts from the siting of energy facilities. It has found that the public interest requires that a balance be maintained between the environment and the need for new facilities, or more recently, among potential significant impacts and benefits. It therefore established a procedure for the review and approval of proposed facilities.

28. The procedure established by the Legislature included, among other things, the creation of the Site Evaluation Committee, the use of adjudicative hearings, and the requirement that the SEC make certain enumerated findings in order to issue a Certificate. The three core findings have remained in place, namely: an applicant must demonstrate financial, technical and managerial capability; a facility must not have unreasonable adverse effects; and, a facility must not unduly interfere with the orderly development of the region. Certain findings, such as

determining the need for a facility, were eliminated in recognition of the restructuring of the electric industry. More recently, the finding was added requiring that a facility serve the public interest.

29. It is important to keep the Purpose section in context; it is not a substantive grant of authority to the SEC. While it is part of the statutory scheme and can be useful in divining legislative intent, it does not specifically require anything of the SEC. Furthermore, as the Court has noted, it is important to remember that legislative intent is “determined by examining the construction of the statute as a whole, and not simply by examining isolated words and phrases found therein.” *NH Division of Human Services v. Hahn*, 133 N.H. 776, 778 (1990); *see also Appeal of Pinetree Power, Inc.*, 152 N.H. at 96 (Noting that the Court will “interpret statutes not in isolation, but in the context of the overall statutory scheme.”).

30. Viewing the construction of RSA Chapter 162-H as a whole, the Purpose section is the introduction, in which the Legislature tells the reader in general terms what it intends to accomplish. The succeeding sections of the Chapter are the operative provisions of the law. Key among them is RSA 162-H:16, which contains the findings that the SEC must make in order to issue a Certificate. Through the findings, the Legislature makes its intent concrete and expresses the balance referred to in the Purpose section in terms that can be implemented by the SEC.

31. The SEC previously addressed the question of whether the Purpose section constitutes a basis for a generalized balancing test in *Groton Wind, LLC*, SEC Docket No. 2010-01. There the SEC rejected an argument by certain intervenors that the Purpose section justified a generalized balancing test that would effectively trump the required statutory findings. The SEC pointed out that the intervenors mistakenly conflated the general language of the Purpose section with the specific required findings. The SEC noted that the balance sought by the Legislature

was achieved by the statutory scheme, which mandated specific findings in order to issue a Certificate. See *Decision Granting Certificate of Site and Facility with Conditions*, pp. 27-31 (May 6, 2011). In *Groton Wind*, the SEC also rejected the argument for a generalized balancing test based on the prefatory language to RSA 162-H:16, IV, which speaks to the consideration of other relevant factors. The SEC found that the language did not “give *carte blanche* authority to create a new test that would weigh negative impacts against benefits.” *Id.*, p. 30.

VIII. RECENT SEC DECISIONS

32. The SEC has applied the criteria set forth in Site 301.16 relative to a finding of public interest in two proceedings, namely, *Antrim Wind Energy LLC*, Docket No. 2015-02 and *Eversource – Merrimack Valley*, Docket No. 2015-05, issuing decisions on March 17, 2017 and October 16, 2016, respectively. Site 301.16 provides:

In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

- (a) The welfare of the population;
- (b) Private property;
- (c) The location and growth of industry;
- (d) The overall economic growth of the state;
- (e) The environment of the state;
- (f) Historic sites;
- (g) Aesthetics;
- (h) Air and water quality;
- (i) The use of natural resources; and
- (j) Public health and safety.

33. In neither case did the SEC apply a net benefits test when making its public interest finding, inasmuch as Site 301.16 does not provide for such weighing or balancing. Instead, the SEC considered the list of factors in a way that harmonized the new public interest finding with the other three findings, giving full force and effect to each finding. In both cases, the SEC enumerated its other statutory findings, noted the project would not have unreasonable

adverse effects, identified benefits, and found that the project would serve the public interest. Specifically, in the *Merrimack Valley* case, the SEC recognized that the transmission line was a reliability project important to the region and, in the *Antrim Wind* case, the SEC recognized economic benefits to the region and the state, as well as better air quality.

IX. CONCLUSION

34. By adding the public interest finding, the Legislature clearly intended that the SEC do “something new” that was not required previously under the three existing findings. That “something new” is determining whether the Project will provide benefits, which the SEC was not required to do before the addition of the public interest finding. To go further and apply a net benefits or independent balancing test would effectively transform the four findings into one. If the Legislature had repealed the other three findings and turned instead to a stand-alone public interest test, then the SEC may have had the discretion to apply some form of balancing test, but the Legislature has not seen fit to delegate such broad authority to the SEC relative to certificates for energy facilities.

35. The public interest finding in RSA 162-H:16, IV is a part of the whole; it is one element of a four-part test and operates within certain confines. 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.

36. The legislative history of SB 245, the statutory scheme of RSA Chapter 162-H, and the rules of statutory construction all support the conclusion that the adverse effects of an energy facility are properly determined when the SEC makes its findings under RSA 162-H:16, IV (b) and RSA 162-H:16, IV (c), and the beneficial effects are properly determined when the SEC makes its determination under RSA 162-H:16, IV (e). Finally, the SEC's deliberations and decisions in the *Merrimack Valley* and *Antrim Wind* proceedings are consistent with and support this view.

37. The following parties object to the Applicants' Motion: the Society for the Protection of New Hampshire Forests; Municipal Group 2; Towns of Bethlehem, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill, and Whitefield; the Environmental NGOs; the Pemigewasset River Local Advisory Committee; Deerfield Abutters; Non-Abutting Property Owners Bethlehem to Plymouth; Whitefield to Bethlehem Abutters; and, Dummer, Stark and Northumberland Abutters. The IBEW concurs with the Motion.

WHEREFORE, the Applicants respectfully request that the Subcommittee:

- A. Clarify and/or grant rehearing; and
- B. Grant such further relief as it deems appropriate.

Respectfully submitted,

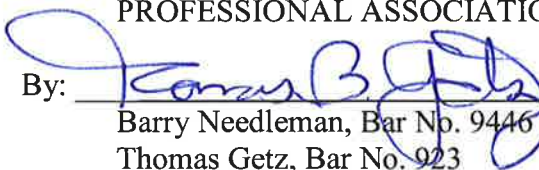
Northern Pass Transmission LLC and Public
Service Company of New Hampshire d/b/a
Eversource Energy

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: June 26, 2017

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Certificate of Service

I hereby certify that on the 26th day of June, 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