

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-06

JOINT APPLICATION OF NORTHERN PASS TRANSMISSION, LLC & PUBLIC SERVICE
COMPANY OF NEW HAMPSHIRE D/B/A/ EVERSOURCE ENERGY FOR A
CERTIFICATE OF SITE AND FACILITY

**OBJECTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE
FORESTS TO THE APPLICANTS' MOTION FOR CLARIFICATION AND/OR
REHEARING OF ORDER ON MOTION TO STRIKE FORWARD NH PLAN**

The Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully requests that the Presiding Officer of the Site Evaluation Committee (the “SEC”) deny the Motion of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”) for Clarification and/or Rehearing of the May 26, 2017, Order on the Forest Society’s Motion to Strike Portions of the Applicants’ Forward NH Plan (the “Forward NH Order”).¹ The Forest Society states as follows in support of its Objection:

1. In their Motion, Applicants ask that the Presiding Officer either clarify that the SEC has not yet interpreted the public interest standard of RSA 162-H:16, IV(e), or, in the alternative, make clear that the public interest standard does not constitute a “net benefits” test.

2. The Presiding Officer should deny this Motion because no clarification is necessary, as the Presiding Officer’s Order does not address the issue of how the SEC is to interpret and apply the public interest standard.

3. Alternatively, in the event the Presiding Officer does grant the request, the Presiding Officer should make clear that the public interest standard is holistic, independent

¹ By so objecting, the Forest Society does not withdraw its Motion for Rehearing of the Forward NH Order and still seeks a rehearing for the reasons stated in the Forest Society’s Motion.

from, and co-equal with the other standards of RSA 162-H:16, IV, and involves the balancing of both impacts and benefits, as guided by the criteria of Site 301.16.

I. No Clarification is Necessary

4. The Applicants filed their Motion out of a concern that the Forward NH Order adopted an interpretation of the public interest standard that functions as a net benefits test.

5. This concern is unfounded.

6. In pertinent part, the Forward NH Order concludes as follows:

the Subcommittee will consider all of the impacts and benefits of the Project in determining whether to grant or deny a Certificate. In doing so, the Subcommittee will be able to analyze . . . [the] alleged benefits, and determine whether the benefits of the Project outweigh any adverse impacts.

Forward NH Order, Docket No. 2015-06, at 5 (May 26, 2017).

7. This Order is consistent with other orders of this Docket: it declines to consider at this time the competing arguments about the public interest standard. *See also Order Granting Motion to Clarify (Public Interest)*, Docket No. 2015-06, at 3 n.1 (June 12, 2017) (declining to consider either Applicants' or Intervenors' arguments regarding the public interest standard). Therefore, Applicants' concern is unfounded.

8. Now is not the appropriate time for the Presiding Officer to consider dueling interpretations of the public interest standard. Other parties do not appear to have shared the concern. For example, if the Forward NH Order had indeed adopted a net benefits test, would not the Forest Society have cited to it in its subsequently filed motion seeking clarity as to when parties may submit evidence relevant to the public interest standard?

9. Further, an objection to a motion for clarification and/or rehearing of an order that is not directly related to the interpretation of the public interest standard is not an adequate

procedural opportunity for all parties to make their arguments for how the standard should be interpreted.

10. Unless a party reads the closing paragraph of the Forward NH Order exactly as Applicants, other parties did not have the same amount of time to make arguments in favor of their preferred interpretation. It would be unfair and violate parties' due process rights for the Presiding Officer to make a final determination on its interpretation of the standard based on the arguments made in and in response to Applicants' Motion.

11. When the SEC decides the time is appropriate to confront the issue of how the public interest standard should be interpreted and applied, all parties should be given equal and sufficient time and opportunity to brief the SEC on this important substantive issue. Presumably, parties will have the opportunity to address this issue in their post-hearing memoranda of law.

12. At the very least, should the Presiding Officer share the Applicants' concern about the Forward NH Order, the Presiding Officer should hold a rehearing rather than merely issue a clarification on its interpretation of the public interest standard.

II. Alternatively, Applicants' Requested Rehearing and/or Clarification is Unwarranted Because the Public Interest Standard is Broader than Applicants Suggest

A. Applicants' Interpretation

13. Applicants seek a clarification that the public interest standard is not a net benefits test, by which they appear to mean an independent test that weighs the impacts and benefits together in light of the Site 301.16 criteria. In closing their Motion, Applicants describe their preferred interpretation of the standard:

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.

Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan, Docket No. 2015-06, ¶ 34 (June 26, 2017) [hereinafter, *Applicants Motion*]. .

14. The SEC should deny Applicants' Motion because this interpretation would render the public interest standard nearly meaningless; pursuant to this interpretation, an applicant could satisfy the standard by merely tacking onto its proposal some token benefits—such as a series of grants or awards to towns that are unrelated to the infrastructure project proposed.

15. Furthermore, the statute, rules, and legislative history demonstrate that the public interest standard is broader than Applicants argue.

16. Specifically, it is an independent, holistic test, whereby the SEC shall look to all the public interest criteria of Site 301.16 to broadly determine if the project, measured by all characteristics, both benefits and impacts, ultimately serves the public interest. Because the criteria of Site 301.16 overlap with some of the other standards of RSA 162-H:16, IV, when applying the public interest standard, the SEC must balance impacts and benefits.

A. Statute and Rules

17. RSA 162-H:16, IV(e) 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. In order to issue a certificate, the committee shall find that . . . [i]ssuance of a certificate will serve the public interest.

(emphasis added).

18. Site 301.16, “Criteria Relative to a Finding of Public Interest,” provides the following criteria that the SEC “shall consider” in determining whether a proposed energy facility will serve the public interest:

- (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.

19. Many of these criteria repeat or mirror considerations present within subsections (a), (b), and (c) of RSA 162-H:16, IV.

20. This statutory structure is not an unintentional redundancy. Rather, subsection (e), the public interest standard, while containing similar language to that found in previous subsections, is an independent standard of co-equal value with subsections (a), (b), and (c). It requires the SEC balance the impacts and benefits of the Project in light of the Site 301.16 criteria.

21. This interpretation of subsection (e) does not eviscerate the prior subsections, but allows that SEC to view all of the factors of all subsections, as well as the purposes of RSA 162-H, more holistically and broadly to determine if the project, measured by all characteristics, both benefits and impacts, ultimately serves the public interest.

22. Applicants’ interpretation that the SEC should consider only the benefits of a project when applying subsection (e) has no support in the plain language or statutory structure of RSA 162-H:16, IV(e) or Site 301.16.

23. In Section VII of their Motion, Applicants impliedly argue that because the criteria listed in Site 301.16 were derived from the purpose section of RSA 162-H, they should not be interpreted as providing any authority to the SEC. *See Applicants' Motion*, ¶¶ 27-31.

24. This argument is flawed. The criteria of Site 301.16 are rules concerning RSA 162-H:16, IV(e), which without argument is an operative provision of the statute. It is irrelevant that they were inspired by or derived from the language of the purpose section

25. Further, the only explicit mention of “benefits” in the statute comes from the prefatory portion of RSA 162-H:16, IV. And, as emphasized above, the full phrase is “impacts and benefits.” Applicants seek to have it both ways. *Id.* ¶ 31. On the one hand, they argue this prefatory section’s mandate to consider all relevant factors, which include impacts and benefits, cannot be read to require the SEC to weigh negative impacts and benefits. On the other, they advocate for a benefits-only test, but the only mention of “benefits” in plain language of the statute or the rules is in this prefatory section. If this section is to be given no weight in the interpretation of the public interest standard, then there is no textual support for consideration of benefits.

B. Legislative History

26. The legislative history further supports this holistic and broad approach.

27. Prior to its amendment in 2014, RSA 162-H:16, IV provided a three-part process to determine whether to issue a Certificate of Site and Facility. This required the SEC to consider: 1) the applicant’s financial, technical, and managerial capability; 2) whether the project would unduly interfere with the orderly development of the region; and 3) whether the project would have unreasonable adverse effects upon a number of areas.

28. In 2014, the Legislature passed Senate Bill 245, which in pertinent part added a fourth part to section IV: a requirement that the issuance of a certificate be in the public interest. Subsequently, the Legislature mandated the rules be amended to accomplish this newly added statutory mandate, including adding the criteria of Site 301.16.

29. The legislative and rulemaking record supports the interpretation of the public interest standard as a holistic and broad approach, independent from and co-equal to the other standards of RSA 162-H:16, IV. While Applicants are correct that the final version of Senate Bill 245 removes the phrase “net benefits,” that does not mean that the Legislature eliminated any balancing or holistic consideration.

30. As the co-sponsors of Senate Bill 245 explained in a November 16, 2016, letter to the SEC Chairman, such a conclusion would defy common sense and the entire record of legislative history. They wrote:

The reason this language was dropped from the Senate passed version of SB 245 is because we, the co-sponsors, held a meeting with a large number of stakeholders shortly before SB 245 was acted on by the Senate Finance Committee. In the interest of reaching a broad consensus on the legislation, Senator Bradley asked the group if the group could agree to drop this guidance language (regarding the considerations by which the SEC would reach a determination on the new public interest finding).

....

The response from a member of the conservation community was that yes . . . so long as all present agreed that this issue would be addressed in the Administrative Rules.

....

So, the notion that the Senate affirmatively dismissed this language, or that somehow the Senate concluded that any ‘net benefit’ determination should not be in the Administrative Rules is a misreading of the full legislative history.

Letter from Sen. Jeanie Forrester *et al* to Martin P. Honigberg, SEC Chairman (Nov. 16, 2015).

31. The Legislature intended the additions to 301.16 to serve as criteria to guide the SEC's determination of the public interest standard, which involves balancing of benefits and impacts. *See* Letter from Sen. Jeanie Forrester *et al* to Martin P. Honigberg, SEC Chairman (Nov. 16, 2015). Senator Forrester had previously explained that the purpose of the public interest standard is for the SEC to “weigh [these benefits] against the projects' potential adverse impacts.” Letter from Sen. Jeanie Forrester to Chairman Borden & Members of the Science, Technology and Energy Committee (Apr. 8, 2014).

32. The SEC's originally proposed final rules, which are excerpted and emphasized in paragraph 12 of Applicants' Motion, explicitly required a balancing of impacts and benefits for each of the criteria. Although the SEC approved revision of these rules to address objections, they did so with this explicit caveat:

The SEC [authorized revision of the rules] without finding that the public interest criteria set forth in the final proposal were inconsistent with the intent of the legislature in adopting the SB 245 amendments to RSA 162-H. The legislative history of SB 245, while perhaps not completely clear on this point, does not compel the conclusion that the final proposal criteria violate this legislative intent.

Letter from Martin P. Honigberg, SEC Chairman, to Rep. Carol M. McGuire, Chair of the JLCAR (Nov. 25, 2015).

33. Senator John Reagan offered the following explanation for how a balancing of impacts and benefits is consistent with the intent of the statute at a December 3, 2015, meeting of the JLCAR:

The new public interest rule proposal is also consistent with other statutory provisions. As just one example, a proposed project could be singularly disqualified if it had an unreasonable adverse effect on historic sites. However, if it just had an adverse effect, not an unreasonable adverse effect, it could be still qualifying under that separate standard. That impact on historic sites would then be considered in the public interest standard together with all of the items on the list, including any benefits.

JLCAR, OR 2015-11, at 7 (Dec. 3, 2015).

34. Senator Reagan’s clarification demonstrates that the Legislature intended for subsection (e) to be an independent standard that is harmonized and co-equal with the other standards, and involves consideration and balancing of both benefits and impacts.

35. In short, Applicants’ proposed interpretation of the rule conflicts with the clearly expressed intent of the co-sponsors of Senate Bill 245 and the SEC.

C. Prior SEC Decisions and Case Law

36. The two prior decisions of the SEC applying Site 301.16, *Antrim Wind Energy LLC*, Docket No. 2015-02 and *Eversource - Merrimack Valley*, Docket No. 2015-05, are not dispositive of this issue.

37. Neither decision explicitly rejected balancing of benefits and impacts as guided by the Site 301.16 criteria.

38. To the contrary, in the *Antrim* deliberations, SEC members noted that they had met the public interest standard based on their consideration of the other standards throughout the course of deliberation. Day 3 – Afternoon Session Only – December 12, 2016 SEC 2015-02 *Antrim Wind Energy*, at 143-147. Those prior deliberations included discussion of both impacts and benefits.

39. In *Eversource – Merrimack Valley*, the SEC was not confronted with the issue of whether the public interest standard requires a balancing test. Nonetheless, the decision shows that the SEC considered impacts, as well as benefits, when it determined the project was in the public interest. *See Decision and Order Granting Application for Certification of Site and Facility*, Docket No. 2015-05, at 90 (Oct. 4, 2016) (“The Project will not have an unreasonable adverse effect on the economy, environment, historic sites, aesthetics, air and water quality, the

natural environment and public health and safety. We find that construction and operation of the Project is in the public interest.”).

40. Moreover, even if the SEC did explicitly reject a public interest test that includes balancing impacts and benefits in a prior decision, such a decision is not binding on the SEC in this Docket.

41. Finally, Applicants’ citations to case law are similarly unpersuasive. None of the cases cited concern the interpretation of Site 301.16 or RSA 162-H:16, IV(e).

42. *Grafton County Electric Light & Power v. State*, is inapplicable because it deals with a stand-alone public interest test contained in a completely different statute. 77 N.H. 539 (1915).

43. The public interest standard here is not a stand-alone test—it is an independent test within RSA 162-H:16, IV—and it is subject to the constraints provided in the statute and rules. There is no need for the SEC to consider a case concerning the meaning of public interest generally in New Hampshire common law when that standard is defined in the statute and rules.

44. Applicants also cite *Appeal of Pinetree Power, Inc.*, arguing the SEC should take the same approach as the Court and PUC in that case and reject a net benefits test. 152 N.H. 92 (2005); *Applicants’ Motion*, ¶ 26. This is similarly unpersuasive.

45. In *Pinetree Power*, the pertinent issue was whether the PUC correctly interpreted RSA 369-B:3-a, which requires the PUC find, “[p]rior to any divestiture of its generation assets, PSNH may modify or retire such generation assets if the [PUC] finds that it is in the public interest of retail customers of PSNH to do so,” 152 N.H. at 96, to include more than just consideration of economic benefits. *See id.* at 97. This is a different issue than the one at issue in this Motion.

46. Further, unlike the public interest standard at issue in this Docket, which is guided in part by the criteria Site 301.16, the public interest standard in this case was not defined. As such, the Court looked to other statutes and legislative history, and concluded the standard included more than merely consideration of economic interests. *Id.*

47. Finally, Applicants emphasize that the Court also specifically rejected the appellant's argument that the public interest standard was a "net benefits" test. *Id.* This holding is inapposite because it is not a general rejection of all so-called net benefits test. Rather, the Court rejected a specific net benefits test, a test that the appellants argued required the PUC give priority to rate relief and find that customer have more to gain from a modification than they stand to lose. *Id.* at 96.

48. The Applicants in this Docket use the phrase "net benefits test" to mean something different than what the *Pinetree* parties characterized it as. Applicants employ the phrase "net benefits test" to mean that the SEC must balance the impacts and benefits of the Project in the light of the criteria of Site 301.16. In that sense, the public interest standard is a net benefits test.

WHEREFORE, the Forest Society respectfully asks that the Presiding Officer:

- A. Deny this Motion because no clarification is necessary, the Presiding Officer's Order not having addressed the issue of how the SEC is to interpret and apply the public interest standard or, in the alternative;
- B. Order that the public interest standard is holistic, independent from, and co-equal with the other standards of RSA 162-H:16, IV, and involves the balancing of both impacts and benefits, as guided by the criteria of Site 301.16; and
- C. Grant such other and further relief as may be reasonable and just.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,

BCM Environmental & Land Law, PLLC



Date: July 6, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this day, July 6, 2017, a copy of the foregoing Response and
Objection was sent by electronic mail to persons named on the Service List of this docket.



Amy Manzelli, Esq.