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

MCKENNA'S PURCHASE'S OBJECTION TO THE APPLICANTS' MOTION FOR REHEARING AND REQUEST TO VACATE DECISION OF FEBRUARY 1, 2018 AND TO RESUME INCOMPLETE DELIBERATIONS

NOW COMES McKenna's Purchase, by and through undersigned counsel, Wadleigh, Starr & Peters, P.L.L.C., and hereby objects to the Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations (the "Motion") filed by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH," and together with NPT, the "Applicants"), stating as follows:

1. In their Motion dated February 28, 2018, the Applicants request that the Site Evaluation Committee ("SEC") vacate its decision denying their Application and resume deliberations. Although the Applicants devote 29 pages to their argument as to why they believe that they are entitled to the relief that they seek, as explained in more detail below, there is neither legal nor evidentiary support for the assertions made in their Motion. Accordingly, the Applicants' Motion should be denied.

2. Pursuant to RSA 541, a party can apply for rehearing "specifying in the motion all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion." RSA 541:3. "Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. The SEC regulations further provide that the "motion for rehearing shall: (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; (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and (4) Include any argument or memorandum of law the moving party wishes to file." N.H. Code Admin. R. Site 202.29(d).

3. Here, however, there is nothing within the Motion that provides the SEC with "good reason" to grant the Motion because the Applicants have failed to demonstrate any way in which the SEC's decision denying their Application was "unlawful, unjust or unreasonable" as required by statute and administrative rule.

4. First, the Motion is premised upon an incorrect legal assertion that the SEC is required to deliberate upon and make findings concerning each of the statutory criteria set forth in RSA 162-H:16, IV before denying an application for a certificate.

5. The plain language of RSA 162-H:16, IV clearly states that the SEC has to make findings relative to the various statutory criteria only when it decides to issue a certificate. In other words, contrary to the Applicants' argument, the SEC is not required to apply all of the statutory criteria and make findings on each when the SEC decides to deny an application for a certificate, as occurred in this case. Cf., e.g., Motion, p. 6. In full, the statutory provision provides:

> After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee 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:
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> (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest.

RSA 162-H:16, IV (emphases added). Accordingly, the plain language of the statute belies the Applicants' assertion in their Motion that the SEC was required to examine, deliberate upon, and/or make findings relative to, each of the above-mentioned criteria before denying their Application.

6. To read the statute as the Applicants do would add words to the statute that the legislature did not see fit to include. See, e.g., In re Town of Seabrook, 163 N.H. 635, 653 (2012) (explaining that statutory language is accorded "its plain and ordinary meaning" and that courts "will not add words the legislature did not see fit to include"); In re Town of Bethlehem, 154 N.H. 314, 319 (2006) (explaining that courts "will not consider what the legislature might have said or add words that the legislature did not include"). Had the legislature wanted to impose the same requirements upon the SEC when denying an application for a certificate as when issuing one, the legislature could have easily stated as much in the statute. See Petition of Malisos, 166 N.H. 726, 730 (2014) (concluding that, when interpreting a certain statute, had the "legislature intended the term 'spouse' to exclude from retirement benefits a legally separated spouse, it could have said so"). However, the legislature did not do so, and, therefore, we are left

with the plain language of the statute, which requires the SEC to make findings on each criteria set forth in RSA 162-H:16, IV only if it issues a certificate– circumstances not present here.[1]

7. To the extent that the Applicants separately assert that certain administrative regulations (such as those found in N.H. Code Admin. R. Site 202.28) require the SEC in this case to examine, deliberate upon, and/or make findings relative to each of the statutory criteria set forth in RSA 162-H, or require the SEC to consider certain conditions, they are mistaken.

8. As the New Hampshire Supreme Court has explained, although it "is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, the authority to promulgate rules and regulations is designed only to permit the [agency] to fill in the details to effectuate the purpose of the statute." Bach v. New Hampshire Dep't of Safety, 169 N.H. 87, 92 (2016) (quotations omitted). Accordingly, "administrative rules may not add to, detract from, or modify the statute which they are intended to implement." Id. (quotation omitted). "Moreover, agency regulations that contradict the terms of a governing statute exceed the agency's authority." In re Wilson, 161 N.H. 659, 662 (2011).

9. Thus, here, where RSA 162-H:16 requires the SEC to consider all of the statutory criteria and certain conditions only when issuing a certificate, any interpretation of the regulations set forth by the Applicants that purports to change or add to the statutory requirements is simply an untenable argument. See Bach, 169 N.H. at 94 (concluding that administrative rules were ultra vires and invalid when they added to, detracted from, or modified

[1] Additionally, it should be noted that many of the cases and authorities cited, and relied upon, by the Applicants throughout their Motion involved circumstances in which a certificate was issued – that is, circumstances in which all of the statutory criteria were required to have been considered given the plain language of the statute. Such circumstances are not applicable here where the Application was denied. Accordingly, the Applicants erroneously rely upon such sources to support their position.

the statute at issue); see also N.H. Code Admin. R. Site 301.17 (providing that the committee shall consider conditions to be included in the certificate only when a certificate is to be issued, "in order to meet the objectives of RSA 162-H").

10. Additionally, the Applicants appear to impermissibly create, out of whole cloth, a burden shifting argument that has no support in the statutory or regulatory scheme. See Motion, p. 11, footnote 17. Under this irrational theory, if the applicant fails to meet its burden to prove facts sufficient for the SEC to make the requisite findings necessary for the issuance of a certificate, then the burden would shift to the opponents of the application to prove their objection(s). This argument has no basis, and is, in fact, expressly contradicted by the plain language of N.H. Code Admin. R. Site 202.19(b), which places, and keeps, the burden upon the applicant for a certificate to prove "facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16."

11. The Applicants also appear to set forth and rely upon arguments and evidence – including those contained in the Attachments to the Motion – that are entirely new and not part of the record before the SEC. The Applicants are prohibited from doing this pursuant to the plain language of N.H. Code Admin. R. Site 202.26(a), which applies to a Motion for Rehearing, and which states that "[a]t the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record." (Emphasis added.) The only exception to this rule is that, prior "to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing." N.H. Code Admin. R. Site 202.26(b). The Applicants here, however, did not make such a request, and, in fact, in their Motion they explicitly state that they "are not seeking to reopen the record." Motion, p. 2, footnote 3. Accordingly, it is too late for

the Applicants to offer any new evidence and arguments, and, therefore, the SEC should not entertain such as part of the Applicants' Motion.

12. Common sense further dictates that the Applicants' Motion be denied. The Applicants offered only a single "expert" witness, Mr. Chalmers, for the extraordinary proposition that a 192-mile high voltage transmission line will have essentially no effect on property values. Given this, little discussion was necessary to deny the certificate, especially when the members of the SEC did not find Chalmers' testimony to be credible. See 93 Clearing House, Inc. v. Khoury, 120 N.H. 346, 350 (1980) (explaining that the "trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses"). This can be confirmed by the following testimony taken from the transcripts of the SEC's deliberations:

> **Mr. Way**: "And I really wasn't convinced by the explanation that [Chalmers] gave that he sort of evolved in his opinion, and I didn't know if anybody else felt that way. . . . The McKenna's Purchase, I did have kind of a hard time with that. McKenna's Purchase, I had some concerns about that. . . . Well, I mean, there's no impact to property values that's being proposed [by Chalmers]. Do we accept that as a committee?" Deliberations Transcript, Day 2, Morning Session, p. 112, 114.[2]
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> **Commissioner Bailey**: "Unfortunately, I didn't find Dr. Chalmers very convincing at all." Deliberations Transcript, Day 2, Morning Session, p. 115.
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> **Chairman Honigberg**: "I think Ms. Menard and others identified other flaws in Dr. Chalmers' work, or the underlying work that went into Dr. Chalmers' opinions, errors regarding the subdivision studies, errors regarding comparable sales, what should be included and what shouldn't. . . . I, like Commissioner Bailey, did not find him an especially credible witness on this because of the mistakes that he did not seem to recognize were mistakes until they were put in front of him, some things that to hear others who are in the industry just didn't make sense." Deliberations Transcript, Day 2, Morning Session, p. 115.
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> **Ms. Weathersby**: "In addition to the flaws and errors, I think Mr. Chalmers -- I think there were also gaps in his analysis, and I'm thinking particularly that his non-analysis of commercial properties, particularly hotels, commercial properties of a more residential nature, hotels, bed and breakfasts, Percy Lodge and campground, places that are primarily tourist-driven, where people come to the areas in part for the views and

[2] All of the transcripts can be found at https://www.nhsec.nh.gov/projects/2015-06/2015-06.htm.

also, of course, for recreation and other reasons, that those properties were not analyzed. . . . I think that Mr. Chalmers' failure to analyze commercial businesses, second homes, specifically second homes, that was a shortcoming." Deliberations Transcript, Day 2, Morning Session, p. 115-16.

Director Wright: "My gut reaction, and I don't know if I should say 'gut reaction,' but the fact that the conclusion's that would be no impacts outside of things 100 feet away doesn't seem to me to be credible. I'm not sure I can pinpoint something to that, but it just doesn't seem credible to me." Deliberations Transcript, Day 2, Morning Session, p. 116-17.

Ms. Dandeneau: "I just wanted to say that I agree with what the Committee is saying so far and that one other gap that kind of stuck out to me was that Mr. Chalmers didn't even evaluate some properties in some of the municipalities that are going to be affected by this project. So that was an additional gap that I struggled with." Deliberations Transcript, Day 2, Morning Session, p. 117-18.

Perhaps the most telling reaction was after Chairman Honigberg introduced the subject of Mr. Chalmers' opinion:

Chairman Honigberg: Mr. Chalmers "concluded that there were only, I think the number was nine properties along the course of the entire Project that would be affected or could be affected. He was criticized at length [laughter]." Deliberations Transcript, Day 2, Morning Session, p. 107 (emphasis added, brackets in original).

Given the above, and contrary to the assertions set forth by the Applicants, the SEC did not need much time, and certainly needs no additional time, to deliberate upon the Application and to deny the same.

13. At bottom, the Applicants have offered an ill-conceived plan, unsupported by evidence and unrealistic in execution. The position that this project would have no discernable effect on property values or tourism defies common sense and logic. The SEC is not required to fill in the missing pieces for the Applicants. Additionally, the SEC did all that it was required to do when it denied the Application for a certificate.

14. Accordingly, there is nothing within the Applicants' Motion that demonstrates that the SEC's decision here was in any way unlawful, unjust or unreasonable. In fact, there is

neither factual nor legal support for the assertions made in the Applicants' Motion. Therefore, the Motion should be denied.

WHEREFORE, McKenna's Purchase respectfully requests that the SEC:

A. Deny the Applicants' Motion and refuse to grant any of the relief sought therein; and

B. Grant such further relief as is equitable and just.

Respectfully submitted,

MCKENNA'S PURCHASE

By their attorneys,

WADLEIGH, STARR & PETERS P.L.L.C.

Dated: March 8, 2018 By: _____ for

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March 2018, an electronic copy of the foregoing pleading was served upon the Distribution List, and that an original and one copy of the foregoing pleading will be hand-delivered to the New Hampshire Site Evaluation Committee on or before March 9, 2018.

By: _____ for

Stephen J. Judge, Esq.