

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-06

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

**OBJECTION TO
APPLICANTS' MOTION FOR REHEARING AND REQUEST TO VACATE
DECISION**

Ammonoosuc Conservation Trust (“ACT”), Appalachian Mountain Club (“AMC”), and Conservation Law Foundation (“CLF”) (collectively, “NGO Intervenors”) hereby object to Applicants’ Motion for Rehearing and Request to Vacate Decision. The NGO Intervenors object as follows.

Introduction

1. On February 1, 2018, after more than two years of reviewing evidence, including many thousands of written documents as well as extensive hearings held on 70 days over a period of eight months, the Site Evaluation Committee orally voted 7-0 to reject the Petition of Eversource Energy and Northern Pass Transmission (“Applicants”) to site and construct the 192-mile Northern Pass transmission line from Pittsburgh, NH to Deerfield, NH. The Committee’s oral vote indicated unanimous agreement that the Applicants failed to satisfy their burden to establish by a preponderance of the evidence that the proposed project would not unduly interfere with the orderly development of the region, with due consideration to the views of municipal and regional planning commissions and municipal governing bodies, as required by RSA 162-H:16, IV(b).

Despite the fact that no final decision has yet been issued, on February 28, 2018, the Applicants submitted a Motion for Rehearing and Request to Vacate Decision.

Argument

I. The Applicants’ motion is in blatant disregard of the Committee’s rules and should be summarily denied, and its extra-record materials stricken

2. The Applicants’ Motion for Rehearing demonstrates a troubling disregard for the Site Evaluation Committee’s rules and practices – and indeed broadly held administrative standards – both in its premature timing and in its reliance on new information not found in the docket record that closed on December 22. For the reasons that follow, the motion should be summarily dismissed and the new, extra-record materials stricken.

A. The Applicants’ motion should be summarily denied because it is premature

3. The Motion for Rehearing must be summarily rejected because no final, appealable decision has been published. A motion for rehearing that precedes issuance of a final decision is fatally premature. The Committee is required to “make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and *issue an order* pursuant to RSA 541-A:35 issuing or denying a certificate.” Site 202.28 (emphasis added). During deliberations, and pursuant to an oral vote, the Committee made oral findings regarding the criteria for certification set forth by law and rule. The Committee found that the Applicants failed to establish by a preponderance of the evidence that the Northern Pass transmission line would not have an undue adverse impact on the orderly development of the region. Delib. Tr. Day 3PM 26. However, the Committee has not had the opportunity to set forth “findings of fact and conclusions of

law, separately stated” in a written order as required. *See* Site 202.28 (requiring a written order); RSA 541-A:35 (directing that “[a] final decision shall include findings of fact and conclusions of law”). Without a “an order pursuant to RSA 541-A:35 issuing or denying a certificate,” Site 202.38, that sets forth “findings of facts and conclusions of law,” no final, appealable decision has been rendered by the Committee.

4. Absent a final disposition, motions for rehearing are not permitted. RSA 541:3 permits any party to file a rehearing within 30 days of “any order or decision” “in respect to any matter determined in the action or proceeding, or covered or included in the order.” An order is defined as “the whole or part of an agency’s *final disposition* of a matter.” RSA 541-A:1, XI (emphasis added). But where a final disposition by the Site Evaluation Committee in the form of an order issuing or denying a certificate, as required by Site 202.28, has not been rendered, the opportunity for rehearing is not ripe under RSA 541:3. Site 202.49, which supplements RSA 541, also makes clear that a “committee decision or order” is a prerequisite. Site 202.29(c).

5. The rules are unambiguous that a final disposition by the Committee entails not only a hearing followed by oral deliberations, but also “issuance of an order.” *See* Site 202.38. It would be contrary to logic and the plain meaning of the words to suggest that “issuance of an order” does not mean issuance of a *written* order. Furthermore, allowing requests for rehearing before a written order is issued would lead to absurd results and undermine the efficiency of the Committee’s administration of the adjudicative process. Allowing parties to seek rehearing before a written decision, on the basis of a transcript of the Committee’s written decision would allow multiple bites at the proverbial apple, because a party could repeatedly seek rehearing after each oral

finding and then also after issuance of a written order. Indeed, in this case the Applicants seek to reserve the right to file yet another motion for rehearing after issuance of the Committee's written decision. *See* Motion at 5, n. 6. Furthermore, such a contortion of the administrative process would also lead to disharmony of filing dates among the parties, and potential unfairness, to the extent some parties move for rehearing 30 days after oral statements by the Committee, but other parties wait until 30 days after having the benefit of a written decision fully setting forth the Committee's findings of fact and conclusions of law.

6. Additionally, allowing parties to nit-pick the oral statements of the Committee members during the deliberations phase would chill the deliberations process, hindering a fair and efficient proceeding. The Committee should have the benefit of a full, frank, and iterative deliberative process that, while rightly on-record, cannot be nitpicked after each oral finding, and that process should culminate—as the rules direct—in a well-ordered written decision with full factual and statutory citation.

7. Relying on an oral record alone would not serve the interests of justice or facilitate proper motions for rehearing. In this instance, the Applicants' Motion for Rehearing reflects a gross exercise in cherry-picking certain statements by individual Committee members, while ignoring other findings—including as to the lack of credibility of the Applicants' witnesses and evidence—that support the vote that took place on February 1. A written order issued by the Committee as a whole, as is required by law, would mitigate this cherry-picking of statements made by individual Committee members.

8. The Committee should summarily deny the Applicants' Motion for Rehearing as premature and as violating the Committee's rules and inconsistent with the orderly administration of proceedings.

B. The Applicants' submission of new information flies in the face of the Committee's rules; such information should be stricken

9. The Applicants' motion relies on extra-record information in clear disregard of the Committee's rules. Site 202.26, titled "Closing the Record," states in pertinent part: "At the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record..." The record in this proceeding closed on December 22.

10. Despite these facts, the Applicants seek to introduce new information, including information on subjects including mitigation measures, discussions with Counsel for the Public, newly adopted positions of the Applicants, and new proposed project modifications, none of which is properly admissible for consideration by the Committee at this late stage of the proceeding. The Applicants seek to introduce this information in a hail-Mary attempt to cure its failure to demonstrate by a preponderance of the evidence that the project will not unduly interfere with the orderly development of the region, among other undue impacts. Although the extra-record evidence offered by the Applicants would achieve no such cure, it is essential that this last-ditch effort to amend and expand the record at the rehearing stage be rejected as contrary to justice and administrative efficiency. Offering new evidence at this late stage flaunts law and order and cannot cure a two-year long record. The Committee should strike all new information in the motion, including the attachments and any argument that relies on them.

II. Should the Committee Reach the Merits of the Applicants' Motion, the Motion Fails to Establish that the Committee Acted Unreasonably or Unlawfully

11. For the above-stated reasons, the Committee should summarily deny Applicants' motion and strike the new information contained therein. In addition to violating the Committee's rules with respect to the timing of requests for rehearing, the premature nature of Applicants' motion places the parties in the unfair position of litigation without the benefit of a written decision. In the event, however, that the Committee considers the merits of the Applicants' motion, and in light of the limited time period for responsive briefing, the NGO Intervenors request additional time to prepare and file a substantive response. In the meantime, the NGO Intervenors provide the following limited response to the Applicants' substantive arguments.

A. The Applicants' motion fails to establish that the Committee acted unreasonably or unlawfully by not continuing deliberations following its dispositive vote on undue interference with the orderly development of the region

12. Should the Committee choose to entertain any part of the Applicants' Motion for Rehearing at this time, without the benefit of a written order to aid all parties in the docket—the motion is without merit. Northern Pass has failed to demonstrate that the Committee acted unreasonable or unlawfully in rendering a determination under RSA 162-H:16, IV without deliberating on all four criteria established under the statute. RSA 162-H:16 sets forth four major criteria that an applicant must satisfy in order for a certificate to be granted. Accordingly, the statute makes clear that in order for the Committee to grant a certificate, it must determine that the Applicant has satisfied its burden of proving that the project satisfies all four criteria. If any single criteria is not met, a certificate cannot be granted. The statute, however, does not require the

Committee, in determining that a project does *not* satisfy the criteria, to proceed through all four criteria. Consistent with the Committee's proper application of the criteria, the failure of an applicant to satisfy any one of the criteria is fatal.

13. The Committee's rules do not change the approach set forth by statute. Site 202.28(a), on which the Applicants rely in their motion, states that "[t]he committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate." The Committee did just that – it rendered an oral determination (yet to be set forth in a final order) regarding the criteria stated in RSA 162-H:16, IV; namely, that the project fails to satisfy the criteria. The Committee could, and did, exercise its discretion to render this determination based on the Applicants' failure to satisfy all of the criteria. Had the rules contemplated the approach advocated by the Applicants in their motion, they would have specified that even in cases of a denial of a certificate, the committee or subcommittee shall make a finding regarding each of the applicable criteria.

14. The Committee, with the benefit of 70 days of hearings, dozens of witnesses, and lengthy briefing from Northern Pass and other parties, properly determined that the Applicants failed to meet their burden of proof with respect to the required showing that the project would not unduly interfere with the orderly development of the region. As part of this determination, members of the Committee, as made clear during deliberations, found key witnesses for the Applicants severely lacking in credibility, their testimony utterly inadequate to establish by a preponderance of the

evidence that the project would not unduly interfere with the orderly development of the region.

15. The Committee members uniformly found the testimony of Applicants' Witness Chalmers not credible, erroneous, and deficient in necessary information. *See* Deliber. Tr. Day 2AM at 112, 114-17 (statements of Mr. Way, Chairman Honigberg, Comm. Bailey, Ms. Weathersby, Dir. Wright, Ms. Dandeneau). To this end, Commissioner Bailey concluded, "Unfortunately I didn't find Dr. Chalmers very convincing at all," *id.* at 115, and Ms. Weathersby summarized, "In addition to the flaws and errors...there were also gaps in his analysis." *Id.* at 115-16.

16. The Committee members likewise found the Applicants' Witness Nichols wholly lacking in credibility. In this vein Commissioner Bailey stated, "... of all the witnesses, Mr. Nichols was the least credible in my mind. And not credible almost at all." Deliber. Tr. Day2PM at 87. Mr. Way opined, "Of all that I heard through this process, this testimony just didn't resonate with me. I saw it as flawed in quite a few areas..." *Id.* at 83-4. Addressing the quality of the listening sessions that Mr. Nichols convened, Director Wright stated, "I just didn't find them to be hardly worth anything." *Id.* at 89. In addition to "flawed," "not credible," and "hardly worth anything," members of the Committee described elements of Mr. Nichols's work by the following terms: "completely superficial" (*id.* at 87), "useless" (*id.* at 97), and "deficient in many respects." Delib. Tr. Day3AM at 18.

17. In addition to condemning the key testimonies of witnesses Chalmers and Nichols, Committee members found unpersuasive other major testimony on orderly development put forward by the Applicants. Ms. Dandeneau disagreed with Witness

Varney’s analysis that the project would not change land use. Delib. Tr. Day3AM at 12. Commissioner Bailey similarly found the Applicants’ analysis of land use impacts “fell short” and contained “deficiencies” that included “not providing all the information required under our rules.” *Id.* at 17.

18. Ultimately, for these and other well-supported reasons, the Committee members concluded that the Applicants had not established that the project would not unduly interfere with the orderly development of the region. On this basis, certification could not be granted.

B. Not only was the Committee not required to deliberate all four elements of the statute, it also was not required to attempt to fashion cures for each of the project’s numerous failings

19. Absent a preponderance of the evidence from the Applicants to establish that the project as proposed would not unduly interfere with the orderly development of the region, the Committee had no burden to try to cure this deficiency. Specifically, the Committee members were not required to address the credibility of other parties’ evidence (although the Committee did in fact elect to give thought to such subjects)—and by no means was the Committee required to try to “get to yes” by fashioning conditions and mitigation measures. Although the record reflects that the Committee did consider a range of potential mitigation measures in its deliberations, the statute places the burden of proof squarely on the applicant.

20. In their motion, the Applicants contort the actual burden set forth by statute and rule – that *they*, as petitioners for a certificate to site and construct an energy facility in New Hampshire, must meet the burden of proof as to each required element. The Applicants’ Motion seeks to place this burden on the Committee, suggesting that the

Committee should have cured the Applicants' failures. But nothing in the statute requires the Committee to impose conditions rather than rejecting an application for certification – and if that were the intent, the language statute and the prevailing burden of proof would be rendered meaningless.

21. In reality, where the Applicant fails by a long shot to meet its burden of proof, it would be contrary to logic and efficiency for the Committee to be required to orally deliberate each additional element of the statute or each potential condition. To be clear, the Committee did receive evidence over the course of more than two years on all four major elements set forth by the statute, and it was obligated to and did review and consider that evidence. But the burden of proof rests with the Applicants and nothing requires the Committee to orally deliberate on all four elements of the statute if it is clear the burden of proof has not been met. Neither is the Committee required to orally deliberate on every piece of evidence, every possible condition, or every alternative to the project as proposed. Such a requirement would be absurd and unnecessarily prolong an already lengthy process.¹ There can be no rule that requires an agency to make rainbows where there is only rain.

22. The Applicants' motion moreover assumes that conditions or project modifications *could* sufficiently cure the deficiencies in their application, yet this assumption is without grounds in the record. Indeed, the Applicants took the position throughout Docket 2015-06 that the Committee is not permitted to entertain alternatives to the project as described and proposed by the Applicants, and worked to exclude evidence of potential alternatives and modifications.

¹ Indeed, where the Applicants failed to meet their burden of proof, the SEC would have been well within its discretion to reject the application for certification after the closing of Applicants' case in chief.

23. Having devoted more than two years, including 70 days of hearings and countless hours spent reviewing evidence and briefing, the Committee could, and properly did, determine that Northern Pass failed to meet its burden. The written evidence, hearings, and briefing included a range of advocacy about conditions that the Committee could impose on the project. The Committee consequently was well aware of potential conditions, including conditions that it may not have discussed during oral deliberations.

24. Despite its awareness of potential conditions, the Committee nonetheless found that the Applicants failed to satisfy their burden to prove that the proposed project would not unduly interfere with the orderly development of the region, with due consideration to the views of municipal and regional planning commissions and municipal governing bodies, as required by RSA 162-H:16, IV(b).

25. The Committee's decision to terminate deliberations was well-reasoned and consistent with law. After hearing the positions of all of the Committee members, in considering whether to make the orderly development vote official or to continue deliberations, Mr. Way opined, "[O]n orderly development, it's not even close..." Delib. Tr. Day 3 PM at 6. Because of the extremity of the deficiencies in the Applicants' case, he reasoned that the Committee should make the vote final and discontinue deliberations because, in his words, "[I]t's not something where we're going to be able to come back and walk out of it." *Id.* Similarly, Commissioner Bailey reasoned, "By statute... we have to make four findings in order to grant the Certificate. I think [from] the conversation we had earlier this morning, it was clear that we can't make one of those findings.... We've reached a point where we know we can't grant the certificate." *Id.* at

4. Ms. Dandeneau reasoned that it was “beyond the point right now” to consider the final two elements of the statute “if we know that we can’t grant the Certificate[.]” *Id.* at

5. Each of these and other statements in the transcript support a well-reasoned decision to terminate the deliberations per agency discretion, and consistent both with the law and with commonsense principles of efficiency. The Committee neither had an obligation to continue deliberations nor to consider additional conditions.

C. Although the Committee should strike as extra-record all new accommodations, conditions, and project modifications proposed in the Applicants’ motion, the NGO Intevenors note they fall far short of a cure

26. Even if, assuming arguendo, the Committee had any burden to orally review or contemplate every possible condition to help cure the project’s deficiencies, the conditions now proposed by Eversource and Northern Pass are still inadequate to overcome their failure to meet their burden. As discussed above, the newly proposed conditions are not part of the record and cannot properly be considered. Even if they were, new proposed conditions—such as merely shifting around dollars within Eversource’s previously proposed Forward NH Fund—are wholly inadequate to render the project’s significant impacts acceptable and enable the Applicants to satisfy their burden to establish that the project will not have undue interference on the orderly development of the region. The continued opposition of municipalities, among other things, demonstrates that the new proposed conditions – like the Applicants’ previously proposed conditions and “benefits package” – are insufficient.

D. The Applicants' motion fails to demonstrate that the Committee applied an erroneous standard

27. In its premature Motion for Rehearing, the Applicants also contend that the subcommittee failed to apply the correct standard, but this is wrong. While fly-specking and cherry-picking statements of Committee members (again, without the benefit of a written order), the Applicants' motion attempts to suggest that the Committee erred. But it is clear from the wording of the motion to deny certification that the subcommittee knew the standard it was applying and, in fact, rendered a vote on that standard.

28. Commission Bailey moved as follows (Delib. Tr. Day3PM 25-26):

I move at this time that we deny the Application for a Certificate of Site and Facility, because the Applicant has failed to provide by a preponderance of the evidence that the Site and Facility, the Project, 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.... This is to deny the Application.

Pursuant to this motion and under the guidance of agency counsel, the Application was orally denied by all seven members of the Committee. *Id.*

29. For all of these reasons, should the Committee consider the merits of Applicants' Motion for Rehearing, the motion should be denied.

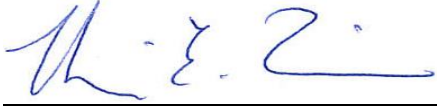
WHEREFORE, the NGO Intervenors respectfully request that the Committee:

A. Summarily deny the Motion for Rehearing as premature, and strike all new evidence in the Motion for Rehearing, including the attachments provided with the Motion and all associated briefing; or

B. Alternatively, grant all parties the opportunity to respond in writing to the February 28, 2018 Motion for Rehearing within ten days of publication of a final written order in Docket No. 2015-06; or

C. Deny the Motion for Rehearing on its merits.

Respectfully submitted,


By: 
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Dated: March 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has on this 8th day of March, 2018
been sent by email to the service list in Docket No. 2015-06.



Melissa E. Birchard