

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

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 for the Construction of a New High Voltage Transmission Line in New Hampshire

Docket No. 2015-06

**MUNICIPAL GROUPS 1 SOUTH, 2, 3 SOUTH AND 3 NORTH'S
OBJECTION TO MOTION FOR REHEARING OF DECISION
AND ORDER DENYING APPLICATION**

Municipal Intervenor Groups 1 South, 2, 3 South and 3 North (collectively “the Referenced Municipal Groups”) respectfully object to the motion for rehearing of decision and order denying application filed by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”), stating as follows:

1. On February 1, 2018, the Site Evaluation Committee (“SEC” or “Subcommittee”) took a vote on a motion to end deliberations after three days in the above-referenced matter. Tr. 2/1/18 at 24 (Day 3PM Deliberations). The Subcommittee then unanimously approved a motion finding that the Applicants had failed to meet their burden of proof under RSA 162-H:16 to show that “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 the municipal and regional planning commissions and municipal governing bodies” (“the orderly development criteria”). Tr. 2/1/18 at 24-26 (Day 3PM Deliberations).

2. On March 30, 2018, the Subcommittee issued its written decision memorializing its February 1st vote to deny the certificate because Applicant failed to establish that the Project would not unduly interfere with the orderly development of the region (“the Order”).

3. On April 27, 2018, the Applicants filed a Motion for Rehearing of Decision and Order Denying Application (hereinafter “Motion for Rehearing”). In summary, the Applicants argue that: (1) the Subcommittee failed to assess whether there were conditions that would have arguably resulted in a different finding on undue interference with orderly development; (2) the Subcommittee’s decision is void due to vagueness concerns; (3) the Subcommittee failed to explain how the evidence led to a denial of the certificate based on the orderly development criteria; and (4) the Subcommittee’s decision ignored past SEC precedent and misconstrued the evidence offered by the Applicants. Those arguments should be rejected.

4. Several of these arguments were previously raised by the Applicant in its February 28, 2018 Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations (“February 28th Rehearing Motion”). The Referenced Municipalities objected on March 8, 2018 to the February 28th Rehearing Motion. Due to the overlap in the arguments raised by the Applicant in its February 28th Rehearing Motion and the pending Motion for Rehearing, the Referenced Municipalities incorporate by reference their March 8th objection in its entirety.

5. The Motion for Rehearing appears to take the position that the Subcommittee’s decision to deny the Certificate was legally erroneous despite the fact that *every* member of the Subcommittee evaluated and weighed the multitudes of evidence before them and each concluded that the Applicant had failed to meet the orderly development criteria due to concerns with the Project’s impact on land use, property values, and tourism. A fair reading of the Subcommittee’s Order and deliberations paints the picture of a carefully considered decision, well supported by the record, and absent any legal errors or “good cause” that would warrant rehearing. The motion should be denied.

I. The Motion for Rehearing Should Be Denied On Its Merits

A. Standard of Review

6. The requirements for a motion for rehearing are set forth in RSA chapter 541. Under RSA 541:4, a party seeking rehearing is required to “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” The purpose of rehearing “is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision” *Damqis v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing should only be granted when the Subcommittee finds “good reason” or “good cause” has been demonstrated. *See O’Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

7. Moreover, while any decision of the Subcommittee will be reviewable by the New Hampshire Supreme Court under RSA Chapter 541, its orders will be deemed *prima facie* “lawful and reasonable.” RSA 541:13. The burden is on the complaining party to prove by “a clear preponderance of the evidence” that an order is “unjust or unreasonable.” *Id.* It is the expressed intention of RSA 541:13 to ensure that the decisions of an administrative agency “are entitled to great weight and are not to be set aside lightly.” *Plymouth Fire District v. Water Pollution Commission*, 103 N.H. 169, 173-174.

B. The Subcommittee’s Order and Underlying Deliberations Denying the Certificate Were Neither Vague Nor Ad Hoc Decision Making

1. There is No Requirement for the Subcommittee to Define Terms or to Produce Advisory Opinions on Approvable Projects

8. The Motion for Rehearing argues that the Order and deliberations that informed it were void for vagueness and/or ad hoc decision making. *See Motion for Rehearing*, at 22-41.

More specifically, the Applicant asserts that the deliberations and Order were deficient because they contained no definition of “undue,” “interference,” or “region,” as used in Site 301.15. *Id.* at 24. The Subcommittee is not required to define various terms that the legislature did not see fit to define themselves; rather, the Subcommittee’s role is to evaluate the Application pursuant to RSA 162-H, et seq. and corresponding administrative rules.

9. It is the Applicant who bears the burden of establishing the facts required by RSA 162-H:16 to warrant issuance of a certificate. RSA 162-H:16, IV; *see also* Site 202.19(b). The Applicant must prove each of the four criteria of RSA 162-H:16, IV by a preponderance of the evidence. Site 202.19(b). The deliberations and Order make clear that the Applicant failed in this regard. In arriving at that conclusion, however, neither RSA 162-H nor its administrative rules require the Subcommittee to provide definitions for those terms.

10. One of the best recognized canons of statutory construction is that words and phrases should be given their common and approved meaning. *See* RSA 21:2; *see also, e.g., New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit*, 169 N.H. 95, 103 (2016). In addition, the legislature empowered the SEC (or the Subcommittee in this case) to determine when issuance of a certificate is warranted under the facts, and has given the Subcommittee the sole responsibility in that regard. The Subcommittee’s interpretation of the terms “undue,” “interference,” and “region,” as contained in RSA 162-H:16, IV, Site 301.09, and Site 301.15, are entitled to great deference unless that interpretation is in clear conflict with express statutory language. *See Appeal of Hampton Falls*, 126 N.H. 805, 809 (1985); *see also Com. Of Mass., Dept. of Educ. v. United States Dept. of Educ.*, 837 F.2d 526, 541 (1st Cir. 1988). The Applicant has not pointed to any express statutory language that conflicts with the Subcommittee’s usage of these terms. In addition, a review of the transcript of deliberations

shows each member considered the various terms at issue and concluded that the Applicant had failed to satisfy its burden to demonstrate that the Project would not unduly interfere with the orderly development of the region. *See generally*, Tr. 2/1/18 at 6-32¹ (Day 3AM Deliberations).

11. In support of its argument that the Subcommittee took part in ad hoc decision making, the Applicant cites to *Derry Sr. Dev., LLC v. Town of Derry*, 157 N.H. 441 (2008). *See* Motion for Rehearing, at 26. The facts of that case are easily distinguishable from the Subcommittee's evaluation of the Application. In *Derry Senior Development*, the town planning board rejected a site plan application based in part on its concerns with septic system design. The plaintiff had previously obtained septic system approval from DES, however, and the town site plan regulations created a presumption that septic systems approved by DES were in fact safe. *Derry Senior Development*, 157 N.H. at 450. In reversing the planning board's decision, the Court noted the lack of evidence in the record of the septic system having any negative effect on the health and safety of town residents. *See id.* In contrast, there is no law or regulation binding upon the Subcommittee which creates a presumption of no undue interference with orderly development if a state permit has been issued, nor has any comparable state agency approval been issued for the Project to serve as prima facie evidence that the Applicant has satisfied the orderly development criteria. In addition, the record before the SEC was replete with evidence that supports the Subcommittee's finding; therefore, even if some state agency approval could act to establish prima facie satisfaction of the orderly development criteria, there is ample evidence in the record upon which the Subcommittee members could nonetheless rely on to rule that the Project failed to satisfy the orderly development criteria.

¹ See particularly pages 10, 14, 18, 20-21, 25, 29, and 31-32.

2. There is An Obvious and Reasonable Correlation Between the Elements of Site 301.19 and the Standard in Site 301.15

12. Contrary to the Applicant’s characterization, there is sufficient and apparent evidence in the deliberation and Order to demonstrate the relationship between the elements of Site 301.09 and the standard in Site 301.15. RSA 162-H:16, IV sets forth the statutory findings that must be established in order for the Subcommittee to issue the certificate, and subparagraph (b) therein specifies that the Subcommittee must find that 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.” RSA 162-H:16, IV. Site 301.15 then adds further details to the required orderly development finding by specifying what the Subcommittee must consider and evaluate. More specifically, one of the three subparagraphs of Site 301.15 requires the Subcommittee to consider “[t]he extent to which the siting, construction, and operation of the proposed facility will affect *land use, employment, and the economy* of the region.” Site 301.15(a) (emphasis added)². Those three areas, land use, employment, and economy, are also the subject of Site 301.09, which requires certain information to be contained in the Application. For those three areas, land use, employment, and economy, Site 301.09 requires the Applicant to provide the Subcommittee with ten (10) subcategories of information to aid in its consideration of orderly development. *See* Site 301.09 (a, b, & c). By tracking what the Applicant is required to submit to the Subcommittee (Site 301.09), what the Subcommittee is required to consider in evaluating orderly development (Site 301.15(a) & (c)), and the findings that are necessary to warrant issuance of the certificate (RSA 162-H:16, IV), it is apparent that the administrative rules and statute work hand-in-hand to

² In addition, Site 301.15(c) requires the Subcommittee to consider, among other things, the views of municipal governing bodies.

provide a road map for the Subcommittee to follow; each step informs the next and provides the Subcommittee with the information it requires to render a valid, informed decision.

13. While the statute and administrative rules do not specify the weight to be given to the various components, the Subcommittee has discretion, as the agency tasked with implementing these laws, to evaluate and weigh the evidence before it as it deems appropriate to render a decision. *See Appeal of Hampton Falls*, 126 N.H. at 809, *infra*.

14. In reaching its ultimate conclusion on the orderly development criteria, the Subcommittee applied the correct legal standard. On the second day of deliberations, the Subcommittee members evaluated the evidence submitted on the various elements of the orderly development criteria. *See generally* Tr. 1/31/18 (Day 2 AM and PM Deliberations). One of the roles of the Subcommittee as the fact finder is to evaluate and weigh the evidence before it and to resolve conflicts in the evidence as needed. *See e.g. Plymouth Village Fire Dist. v. Water Pollution Comm'n*, 103 N.H. 169, 173 (1961) (stating that agency as fact finding tribunal may accept or reject testimony as is appropriate and resolve conflicts in evidence)(citation omitted); *In re Huston*, 150 N.H. 410, 414-415 (2003) (stating that weighing testimony and assessing its credibility are within sole province of administrative agency, and that when witnesses present conflicting evidence agency may resolve by crediting some witnesses over others)(citations omitted). On the third day of deliberations, in order to more concisely frame those discussions, Chairman Honigberg provided an overview of the legal framework and standards to apply when evaluating the various elements of orderly development. Tr. 2/1/18, at 3-6 (Day 3AM Deliberations) (discussing RSA 162-H:16, IV(b), N.H. Site 301.15, and N.H. Site 301.09). That overview and the subsequent discussions demonstrate that the Subcommittee properly evaluated the orderly development criteria in concluding the Applicants failed to meet their burden. It is

noteworthy that each Subcommittee member found that after considering the various components of orderly development the Applicants failed to meet its burden. *See generally* Tr. 2/1/18, at 6-32³ (Day 3AM Deliberations).

15. Contrary to the characterization in the Motion for Rehearing, the Subcommittee's ultimate decision with regard to orderly development was not based upon one single subcategory of Site 301.09 outweighing all the other evidence, *cf.* Motion for Rehearing, at 26-28; rather, the Subcommittee had sufficient credible evidence regarding the Project's inconsistency with prevailing land uses, and potential for negative impacts on property values and tourism to outweigh the other elements of orderly development. *See id.*; *see also*, Order, at 283-286. When combined with the almost universal views of the municipal governing bodies that participated in this docket, the Subcommittee had ample evidence before it to find that the Applicant had not satisfied the orderly development criteria. *See id.*; *see also* Post-Hearing Memorandum Filed by Municipal Groups 1 South, 2, 3 South and 3 North, at 1-2, incorporated by reference.

2. The Order Contains the Necessary Findings of Fact Required by RSA 541-A:35 and *SPNHF v. SEC*, 115 N.H. 163 (1975)

16. The Motion for Rehearing asserts that the Subcommittee's Order was legally deficient for not including findings of fact as required by RSA 541-A:35 and *Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975). Motion for Rehearing, at 37-40. The Order issued by the Subcommittee contains the factual findings required by RSA 541-A:35 and is easily distinguishable from what was before the Court in *SPNHF v. SEC*.

17. RSA 541-A:35 requires an agency final decision to include findings of fact, and if they are set forth in statutory language, those findings "...shall be accompanied by a concise and

³ See particularly pages 10, 14, 18, 20-21, 25, 29, and 31-32.

explicit statement of the underlying facts supporting the findings.” RSA 541-A:35. The Order is in full compliance with RSA 541-A:35. The Order takes certain subject areas and first lays out the respective positions of the parties, and then concludes each section with the Subcommittee’s deliberations on that subject area. *See generally*, Order, at 74-285. Within these “Deliberations” sections can be found the required findings of fact, where the Subcommittee memorialized its consideration and weighing of the evidence before it and made findings with regard to each respective subject area.⁴ The Applicant’s argument that these sections somehow do not satisfy the statute does not withstand a simple review of the Order.

18. The deliberations and Order are also easily distinguishable from *Society for the Protection of New Hampshire Forests v. Site Evaluation Committee*, 115 N.H. 163 (1975). In that case, the Court found that the SEC’s order granting a certificate to operate a nuclear generating facility in Seabrook, NH lacked the requisite findings of fact and remanded the application back to the SEC to make those necessary findings. *See SPNHF*, 115 N.H. at 175. The SEC’s findings in that application amounted to several sentences that closely tracked the statutory language and did not include the basis for the SEC’s conclusions. *Id.*, at 172. In contrast, the Order herein devotes over 30 pages to the Subcommittee’s consideration and weighing of the evidence before it and the corresponding findings with regard to each respective subject area. *See infra*, Note 4. The Order, and the findings of fact therein, is therefore consistent with the Court’s mandate in that case “...to understand administrative decisions and to

⁴ More specifically, Deliberations and findings of fact on the following subject matters can be found at the corresponding pages of the Order: Construction, at 115-122; Employment, at 127-128; Wholesale Electricity Market Savings and Various Effects on Economy, at 160-163; Property Values, at 194-199; Tourism, at 225-227; Financial Assurances for Decommissioning, at 230; and Land Use and Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies, at 275-283.

ascertain whether the facts and issues considered sustain the ultimate result reached.” *See* Motion for Rehearing, at 39 (citing to *SPNHF v. SEC*, 115 N.H. 163, 173 (1975)).

C. The Subcommittee Properly and Reasonably Considered the Evidence Before It To Find that Orderly Development Was Not Satisfied

1. The Use of Existing Corridors Does Not Equate to Satisfaction of the Orderly Development Criteria and the Applicant Bears the Burden of Establishing That to Obtain a Certificate

19. The Applicant argues the Subcommittee improperly disregarded SEC precedent and unreasonably disagreed with the opinion of the Applicant’s expert regarding whether the Project as proposed was consistent with prevailing land uses. *See* Motion for Rehearing, at 41-53. However, these claims are unavailing.

20. The gist of the Applicant’s argument is that the Committee was prohibited from finding that the Project would unduly interfere with the orderly development of the region simply because most of it would be sited within an existing utility corridor. As the Applicant notes in their motion, the SEC has, indeed, approved projects in the past based in part on the fact that those projects would be sited primarily within existing transmission corridors. Motion for Rehearing, at 43-46. The Subcommittee in its Order explicitly agreed with Mr. Varney’s assertion that construction of transmission lines in existing corridors is a sound planning principle. Order, at 277.

21. However, as the Subcommittee noted, the rules required it to consider “the extent to which the siting, construction and operation of the proposed facility will affect land use.” Site 301.15(a). The rules do not provide that this analysis may be skipped for projects located within an existing transmission corridor. If it were as simple as the Applicant claims, surely this would be reflected in the statute or rules and no application for or review by the Subcommittee would even be necessary if an existing corridor is utilized— but this is not the case. The rules provide

instead that the SEC is required to review a project's impact on land use regardless of whether it would be located within an existing right of way. *See* Post-Hearing Memorandum Filed by Municipal Groups 1 South, 2, 3 South and 3 North, at 28-29, incorporated by reference; *see also* Order at 247.

22. What the Applicants continue to ignore is that the Project they have proposed is qualitatively different than any transmission project the SEC has ever evaluated, including those cited as examples in the Applicant's Motion for Rehearing. This Project would have an effect on land use outside of the boundaries of the transmission corridor (as concisely described on pages 278-79 of the Order) and the Subcommittee could not simply ignore that fact, or the magnitude of that effect. Furthermore, the Subcommittee's consideration of the land use doctrine of "expansion of a nonconforming use" was not the creation of a new standard, but rather a convenient and reasonable way to consider whether significant increases in the intensity of a use result in something that is inconsistent with the prevailing land use. *See* Site 301.09(a)(1 & 2). This is consistent with the spirit of the rules and was an appropriate way for the Subcommittee to evaluate the Project's impact on and consistency with prevailing land uses.

2. The Subcommittee's Consideration of Aesthetics and Visual Impacts as Part of the Orderly Development Analysis was Proper and Reasonable

23. The Applicants argue in their Motion for Rehearing that the Subcommittee improperly considered the Project's effects on, among other things, aesthetics, tourism, and property values in the course of its analysis of the interference that the Project would impose on the orderly development of the region. *See* Motion for Rehearing, at 51-53. However, this argument ignores the fact that all of these issues are relevant to land use planning and regulation, which is exactly what the "orderly development" analysis is designed to address.

24. A core aspect of land use regulation in New Hampshire is that proper land use regulations enhance the public health, safety and welfare, and meet more effectively the demands of evolving and growing communities. *See RSA 672:1, II, III.* Master plans, which are created to aid in the development of “ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire,” may include sections addressing key aspects such as the community’s economic goals, natural resources, recreation resources, and other resources. *See RSA 674:2, I, III; see e.g., Referenced Municipalities emphasis on protecting “rural character.”* It is well-established, for instance, that a municipality may exercise its zoning power solely to advance aesthetic values because the preservation or enhancement of the visual environment may promote the general welfare. *Taylor v. Town of Plaistow*, 152 N.H. 142, 145 (2005). Aesthetics, tourism and property values are related factors which all may have an effect on the development of a community and the region in which it is located. It would therefore be illogical and inconsistent with its enabling legislation and administrative rules for the Subcommittee to ignore these aspects of land use in its consideration of the Project’s impact on the orderly development of the region.

WHEREFORE, the Referenced Municipal Groups request that the Site Evaluation Committee:

- a. Deny the Motion for Hearing;
- b. Disregard and/or Strike from the Record Attachments A, B and C to the Motion for Rehearing; and
- c. Grant such further relief as it deems appropriate.

Respectfully submitted,

By and through its attorneys,

CITY OF CONCORD

Dated: May 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing was sent by electronic mail to persons named on the Service List of this docket.

Dated: May 7, 2018

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