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June 22, 2016

VIA E-MAIL (Pamela.Monroe@sec.nh.gov and rulemaking@sec.nh.gov)
Pamela G. Monroe, Administrator
N.H. Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: Rules Related to Certificates of Site and Facility, Site 300; Docket No. 2016-01

Dear Administrator Monroe:

This letter provides comments in response to the Site Evaluation Committee ("SEC")'s May 18, 2016 "Rulemaking Notice" ("Rulemaking Notice") concerning the above-referenced matter. Specifically, it addresses federal pre-emption.

As has already been noted on this docket, there is no authority to support the proposition that the rules proposed in this proceeding are pre-empted by federal law.

The most recent statement on the matter from the highest court in the land *is* the law of the land, and it refutes preemption. Although the particular focus of the matter is state anti-trust laws, the following broad language at pages 10-11 of the United States Supreme Court decision in Oneok, Inc. v. Learjet, Inc., 575 U.S. ___, ___ (2015) applies to all pre-emption considerations:

> "… **As we have repeatedly stressed, the Natural Gas Act 'was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.'** *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517–518 (1947); see also *Northwest Central*, 489 U. S., at 511 (**the 'legislative history of the [Act] is replete with assurances that the Act "takes nothing from the State [regulatory] commissions**"' (quoting 81 Cong. Rec. 6721 (1937))). Accordingly… we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within a pre-empted field as defined by our precedents …
>
> Those precedents emphasize the importance of considering the *target* at which the state *aims* in determining whether that law is pre-empted. … 'the significant distinction' for purposes of pre-emption in the natural-gas context is distinction between 'measures *aimed directly* at [pre-empted areas], and those aimed at' subjects left to the States to regulate …"

Id. (emphasis added)(citations omitted).

The proposed SEC rules concern New Hampshire's regulation of the health and safety of its own citizens within its borders, matters long traditionally left to the States, and their local communities, to regulate. *See, e.g., Thayer v. Town of Tilton*, 151 N.H. 483, 486-490 (2004). They suggest no measures which have been expressly pre-empted by the Natural Gas Act, or which are even the subject of related regulation under the Code of Federal Rules, but only reasonable measures which "fill in the gaps" left by federal law and regulation, or which may be reasonably reconciled should there be any arguable overlap. Thus, any pre-emption argument fails its burden. *Oneok, Inc. v. Learjet, Inc.*, *supra*, 575 U.S. at ___ (10); *Thayer v. Town of Tilton*, *supra*, 151 N.H. 483; *see also State v. Exxon Mobil Corp.*, 2013-0591, 2013-0668 (N.H., October 2, 2015)(proponent of obstacle preemption bears a heavy burden).

The *Panhandle* case cited by the *Oneok* Court in the above language further supports the conclusion that pre-emption is not a concern:

> "The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. **We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states, and in no manner usurping their authority**. *Public Utilities Comm'n v. Gas Co.*, 317 U.S. 456, 467; *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 609-610; *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690. And, as was pointed out in *Federal Power Comm'n v. Hope Natural Gas Co.*, *supra*, 320 U.A. at 610, "**the primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of cooperative action[18] between federal and state agencies.**"

Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n, 332 U. S. 507, 520 (1947)(emphasis added).

State authorities having siting, construction and operational jurisdiction over natural gas facilities, such as the SEC, are common in the natural gas arena, with authority exclusive from or complementary to Natural Gas Act jurisdiction and regulation. The proposed SEC rules, indeed, "protect customers against exploitation at the hands of natural gas companies," *Panhandle Eastern Pipe Line Co.*, *supra*, 332 U.S. at 520, in that they flesh out protective measures not otherwise provided by federal law, and the Federal Energy Regulatory Commission ("FERC") itself would expect SEC applicants to cooperate with the State in meeting such reasonable measures. As the FERC stated in paragraph 85 of 154 FERC ¶ 61,191:

> "The Commission encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures. That a state or local authority requires something more or different than the Commission does not necessarily make it unreasonable for an applicant to comply with both the Commission's and state or local agency's requirements."

Plainly, the New Hampshire General Court and SEC consider the SEC to have jurisdiction to adopt the proposed rules, or we would not be discussing the matter.

Finally, while the final say on what federal law requires or does not require comes from the United States Supreme Court, and its last word on the subject rejects pre-emption, as noted above, the SEC should not be swayed by any argued "other law." While opinions from other courts around the country may be argued as being "persuasive" authority on an issue—they are not *binding* authority, as New Hampshire state courts are not required to follow the opinions of any state or federal courts around the country, and the New Hampshire federal district court is only obligated to follow the opinions of the 1st Circuit (Court of Appeals), the court which decides appeals from the New Hampshire federal district court. Even then, litigants would be able to appeal an unfavorable decision on the issue to the United States Supreme Court. So, again, unless and until an opponent of the proposed rules produces an on-point Supreme Court decision running counter to the Supreme Court decisions and principles discussed herein—which on-point decision would necessarily have to post-date *Oneok, Inc.* to supersede its pronouncements—the SEC must adhere to its statutory obligations and push forward with the proposed rules, as such rulemaking is within its own determination of jurisdiction and no pre-emption.

Very truly yours,

By: //s// Richard Husband
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