

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**DOCKET NO. 2015-04**

**Application of Public Service Company of New Hampshire  
d/b/a Eversource Energy**

**For a Certificate of Site and Facility**

**TOWN OF NEWINGTON'S POST-HEARING BRIEF**

Susan S. Geiger, Esq. (NH Bar # 925)  
Orr & Reno, P.A.  
45 South Main Street  
Concord, NH 03302-3550  
(603) 223-9154  
[sgeiger@orr-reno.com](mailto:sgeiger@orr-reno.com)

John J. Ratigan, Esq. (NH Bar #4849)  
Donahue, Tucker & Ciandella, PLLC  
225 Water Street  
Exeter, NH 03833  
(603) 778-0686  
[jratigan@dtclawyers.com](mailto:jratigan@dtclawyers.com)

Elizabeth A. Boepple, Esq. (NH Bar# 20218)  
BCM Environmental & Land Law, PLLC  
3 Maple Street  
Concord, NH 03301  
(603) 369-6305  
[boepple@nhlandlaw.com](mailto:boepple@nhlandlaw.com)

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## **I. EXECUTIVE SUMMARY**

Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”, “Eversource” or “the Applicant”) has failed to meet its burden of demonstrating by a preponderance of the evidence that the proposed Seacoast Reliability Project (“SRP”, “the Seacoast Project” or “the Project”) meets all of the criteria for a certificate of site and facility contained in RSA 162-H:16, IV and the rules of the New Hampshire Site Evaluation Committee (“the Committee”, “the Subcommittee” or “SEC”).

Ample record evidence unquestionably shows that the proposed 12.9 mile, 115 kV high voltage transmission line which would occupy a distribution line easement within Newington’s small Residential District (which includes Newington’s Historic District and other properties listed or eligible for listing on the National Register of Historic Places) would be contrary to Newington’s Master Plan and Zoning Ordinance provisions and therefore would unduly interfere with the orderly development of the region. The Subcommittee is required by RSA 162-H:16, IV (b) to give “due consideration” to Newington’s views concerning orderly development and therefore must reject the Applicant’s witness’s dismissive attitude toward Newington’s planning documents. The Subcommittee must also reject the Applicant’s witness’s simplistic conclusion that as long as the Project is constructed in an existing utility right of way (“ROW”), the Project will not unduly interfere with the orderly development. Because this position is essentially the same position that the Applicant’s witness took in the Northern Pass docket, and because it was expressly rejected by the SEC, the Subcommittee here must reach the same result.

Further evidence of undue interference with the orderly development of the region is the fact that the Project intends to convert Little Bay - a precious and unique natural resource currently used for research, aquaculture and recreation - into a high voltage transmission line

corridor. That compelling fact alone requires that the Subcommittee find that the Project would unduly interfere with the orderly development of the region. In addition, the Applicant has failed to provide sufficient information to enable the SEC to find that the Project will not unreasonably adversely affect Little Bay's water quality and natural environment. The Applicant has also improperly negotiated with the New Hampshire Department of Environmental Services ("DES") for revisions to DES's final permit conditions. When taken together, these serious substantive and procedural issues warrant findings adverse to the Applicant.

The evidence also shows that the Project will have an unreasonable adverse effect on aesthetics and historic sites in Newington. The SEC should not accept the conclusions of Applicant's aesthetics and historic resource witnesses because their analyses were seriously flawed and contrary to SEC rules. Moreover, the Applicant's failure to provide any specific information about its plans to relocate the existing distribution line in Newington leaves the Subcommittee with insufficient record evidence to determine the entirety of the Project's impacts.

The Project will not serve the public interest as demonstrated by the fact that the overwhelming number of comments from members of the public indicated opposition to the Project. Evidence concerning the existence of viable alternatives that would avoid Little Bay and Newington, and the Project's adverse impacts on private property, historic sites, aesthetics, water quality and the use of Little Bay all outweigh any benefits that the Project would provide.

Lastly, the Applicant has failed to obtain approval from the Governor and Executive Council for the use of Little Bay. In addition, when it petitioned the New Hampshire Public Utilities Commission ("PUC") for a license to cross Little Bay, the Applicant did not inform the PUC that concrete mattresses (which would substantially interfere with the public's use and

enjoyment of the bay) would be used in connection with that crossing. These deficiencies also demonstrate the Project's failure to serve the public interest.

The Subcommittee should deny a certificate of site and facility for this Project. In the alternative, if a certificate is granted, the Subcommittee must, at a minimum, require that the transmission line be buried in Newington's Residential District in order to properly mitigate the Project's unreasonable adverse effects and undue interference with the orderly development of the region.

## **II. BACKGROUND/INITIAL STATEMENT OF FACTS**<sup>1</sup>

### **A. The Town of Newington, New Hampshire**

The Town of Newington, New Hampshire ("Newington") is one of the four host communities of the proposed Seacoast Reliability Project. Newington was granted full party intervenor status in this docket on August 28, 2016 and has actively participated in these proceedings to preserve the rural character of its community, protect its residential and historic districts from industrial development, and to protect Little Bay, one of the richest estuaries in North America designated by the federal government as a National Estuarine Research Reserve.<sup>2</sup>

Newington is a very small community with a population of approximately 755 residents and a relatively small geographic footprint (approximately 8.9 square miles).<sup>3</sup> Residential areas occupy just 27% of Newington's land; other areas include the Great Bay National Wildlife Refuge (19%), the commercial and industrial district (14%), conservation and municipal land (10%) and the Spaulding Turnpike (3%).<sup>4</sup> In addition, 25% of Newington's land area is used by Pease

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<sup>1</sup> Additional facts are provided as needed in other sections of this brief.

<sup>2</sup> *Attachment DJH-3 (Master Plan Development Policies)*, NEW-Ex. 1-3, at 4.

<sup>3</sup> *Prefiled Direct Testimony of Denis J. Hebert – 7/28/17*, NEW-Ex. 1, at 4.

<sup>4</sup> *Attachment DJH-1 (Map)*, NEW-Ex. 1-1.

Development Authority and was formerly controlled by Pease Air Force Base strictly for federal military purposes.<sup>5</sup> The federal government acquired that land by eminent domain and when that taking occurred, the electric distribution line on that property was moved to its current location within the right-of-way (“ROW”) running through Newington’s residential and historic districts where Eversource intends to install the Project’s high-voltage transmission line.<sup>6</sup>

Newington has several historic sites and has taken great care to protect them.<sup>7</sup>

Newington’s 110-acre Old Town Center Historic District is listed on the National Register of Historic Places and features, among other things, the oldest Town Forest (dating to 1620) in the United States.<sup>8</sup> Newington’s strong commitment to local historic and cultural preservation is demonstrated by its designation as a Certified Local Government under the National Historic Preservation Act, and its appointment of an Historic District and an Historic District Commission under RSAs 674:46 and 674:46-a, respectively.<sup>9</sup>

Pursuant to its authority under RSA 231:157, Newington has designated several of its roads as “scenic roads”.<sup>10</sup> These roads are west of the Spaulding Turnpike and include, among others, Nimble Hill Road, Little Bay Road, Fox Point Road and Old Post Roads.<sup>11</sup> The Application in this docket indicates that the distribution line between Little Bay Road and Fox Point Road will be removed and rebuilt along public streets<sup>12</sup> but does not identify the precise areas where the rebuilt lines will be installed or describe the line’s appearance or impacts to those areas.<sup>13</sup>

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<sup>5</sup> NEW-Ex. 1, at 5; NEW-Ex. 1-1.

<sup>6</sup> NEW-Ex. 1, at 5.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, p. 25.

<sup>10</sup> *Id.*, p. 22.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*, p. 23.

<sup>13</sup> *Id.*

Newington is a host community to a great deal of energy and other infrastructure that provides regional benefits.<sup>14</sup> These facilities include: two electric generators; a liquefied petroleum gas facility (SEA-3); three major tank farms (63 tanks with a combined capacity of 3.1 million barrels);<sup>15</sup> and a natural gas pipeline.<sup>16</sup> None of these facilities are located within Newington’s residential or historic districts.<sup>17</sup> Applicant witness Robert Varney testified he is “probably not” aware of any other New Hampshire towns the size of Newington that are host to all of those facilities.<sup>18</sup>

Because of extensive infrastructure and other industrial, commercial and state development, as well as open space preservation, there is very little residential land remaining in Newington.<sup>19</sup> Excluding Pease Development Authority and the Great Bay National Wildlife Refuge, Newington’s land area consists only of 4.7 square miles.<sup>20</sup> Of that, only 1.5 square miles are for residential use, and much of this land includes wetlands or is in conservation.<sup>21</sup> Newington has taken great care to protect what’s left of its residential and historic areas.<sup>22</sup>

### **B. Newington’s Master Plan and Zoning Ordinances**

Newington’s long-standing commitment to thoughtful land use planning is reflected in its Master Plan,<sup>23</sup> Zoning Ordinance (originally adopted in 1951)<sup>24</sup> and Land Use Regulations.<sup>25</sup> Newington’s Master Plan is contained in Applicant’s Exhibit 227. It is important to note that in 2015, pdf page 199 of Applicant’s Exhibit 227 (“Utility Easements”) was superseded by pdf page

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<sup>14</sup> NEW-Ex. 1, at 5.

<sup>15</sup> *Id.*

<sup>16</sup> Tr. 10/11/18, Morning Session, at 40-41 (Varney).

<sup>17</sup> *Id.*, at 41 (Varney).

<sup>18</sup> *Id.*

<sup>19</sup> NEW-Ex. 1, at 6.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Town of Newington’s Master Plan*, App Ex 227

<sup>24</sup> NEW-Ex. 1, at 4.

<sup>25</sup> *Complete Newington Zoning Ordinance and Land Use Regulations*, NEW-Ex. 19.



481 of that same exhibit.<sup>26</sup> Several sections of Newington's Master Plan underpin and compel Newington's position in the instant proceeding. They provide, in part, as follows:

### **Development Policies**

#### Policy One

#### **Newington's rural residential character should be preserved.**

The protection of the quality of the town's residential areas is central to the Master Plan...The purpose is simply to ensure that the quality of life in Newington's residential areas is protected from incompatible uses.<sup>27</sup>

#### Policy Eleven

#### **The Shorelines of Great Bay and Little Bay should be protected.**

The bays' scenic and natural resources are unparalleled in New Hampshire. The bay and its immediate environs provide habitat to a wide range of wildlife. Several bald eagles, for example, are known to winter along the Newington shore. As one of the richest estuaries in North America, the bay has been designated by the federal government as a National Estuarine Research Reserve.<sup>28</sup>

#### Policy Twelve

#### **Newington seeks to ensure the preservation of the town's historic resources.**

Much of Newington's historic, architectural and scenic resources have suffered in the past due to the arrival of Pease Air Force Base and the rapid growth east of the Spaulding Turnpike. The Town seeks to protect remaining resources.<sup>29</sup>

### **Public Utilities**

#### Utility Easements

Utility easements often times present significant obstacles to the development of otherwise suitable building land. While electric distribution lines are need to power today's residences, *electric transmission lines are generally viewed as uses incompatible with residential uses.* This is particularly true in Newington, where the residential district is small, compact; with a long established history of residential development amidst the surrounding heavily intensive nonresidential development that characterizes most of the rest of town. *The residential district...is small enough to be easily avoided. The*

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<sup>26</sup> *Newington Response to Data Request 5b*, App Ex 220.

<sup>27</sup> App Ex 227, at 419.

<sup>28</sup> *Id.*, at 422.

<sup>29</sup> *Id.*

*prospect of splintering the residential district with upgrade electric transmission line development within existing easements is strongly disfavored.* (Emphasis added.)

*The proposed installation of an electric transmission line* between the Gundalow Landing neighborhood, through the Frink Farm heritage site, the Hannah Lane neighborhood, and continuing through the Fox Point neighborhood towards the Spaulding Turnpike *would interject a significant visual blight upon Newington's small residential district.* (Emphasis added.)

*It has been the town's policy to require land developers to place their electric utility service improvements in the Residential District underground. This policy should extend also to electric transmission line improvements.* It is strongly recommended that electric transmission line improvements, if they must pass through Newington from East to West, that the transmission line follow the approximate route used by the PNGTS gas transmission lines that skirts [sic] the northwestern boundary of the Pease Development Authority. Such utility infrastructure improvements should be kept at the very periphery of the Residential District should be placed underground, and *under no circumstances should such improvements be permitted to be constructed above ground within existing easements that bisect the heart of the Residential District.* (Emphasis added.)<sup>30</sup>

#### **Future Land Use**

##### Electrical Transmission Lines

*The Town supports improvements to electrical transmission infrastructure, outside the residential district,* that would help to attract electrical generating plants to Newington's industrial waterfront.<sup>31</sup>

#### **Historic Resources**

##### Recommendations

##### **Knight Brook Corridor**

*One of the region's most scenic and historically significant landscapes of open fields and farmland* is that 250-acre tract situated immediately northwest of the Town Center, *comprised of the Frink, Pickering, Hislop and the former Rowe properties. Every effort should be made to preserve this open space.*<sup>32</sup> (Emphasis added.)

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<sup>30</sup> *Id.*, at 481.

<sup>31</sup> *Id.*, at 353.

<sup>32</sup> *Id.*, at 48.

With the exception of the above-referenced Utilities Easements language adopted in 2015, all of the foregoing provisions have appeared in Newington’s Master Plan since it was adopted in 2009.<sup>33</sup>

Newington’s Zoning Ordinance establishes several zones and describes the Residential District as one in which the “principle use of the land is for single-family dwellings at low density, together with recreational facilities which will encourage the development of well-rounded neighborhood living.”<sup>34</sup> It also states that future development that does not perform a neighborhood function may require additional approvals from the Planning Board on a case by case basis.<sup>35</sup> The Zoning Ordinance lists uses permitted within the Residential Zone, none of which include high voltage transmission towers or lines.<sup>36</sup> Under the express terms of Newington’s Zoning Ordinance, the omission of a use from the list of allowed uses in a particular district “constitutes prohibition of that use in that district.”<sup>37</sup> Accordingly, high voltage transmission towers and lines are prohibited in Newington’s Residential District. It should be noted, however, that transmission facilities *are* permitted uses in Newington’s Industrial Zone.<sup>38</sup>

Newington’s Zoning Ordinance states that the town’s Historic District was established pursuant to RSA 674:46 “[f]or the preservation of places and structures of architectural value and the heritage of the municipality which reflects its cultural, social, economic, political and

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<sup>33</sup> App Ex 220.

<sup>34</sup> NEW-Ex. 19, at 14.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*, at 14-15.

<sup>37</sup> *Id.*, at 20.

<sup>38</sup> *Id.*, at 17.

architectural history.”<sup>39</sup> Uses in the Historic District are limited to those allowed in the Residential District.<sup>40</sup>

Newington roads west of the Spaulding Turnpike and north of the Newington/Greenland town line are designated by the Zoning Ordinance as scenic roads.<sup>41</sup> The Zoning Ordinance provides that “[w]hen an activity such as the cutting or removal of trees or the alteration of all or a portion of a stone wall is proposed on a designated scenic read [sic], the Planning Board shall follow the procedures described in NH RSA 231:158.”<sup>42</sup>

Newington’s Zoning Ordinance restricts building heights in Newington’s Residential District to 35 feet.<sup>43</sup> The Ordinance lists height restrictions for several other zones and goes on to say that those height limits do not apply to “transmission towers.”<sup>44</sup> However, nothing in the exemption language overrides the other above-cited Zoning Ordinance provisions which clearly establish that transmission towers are permitted in the Industrial District, but are not among the permitted uses in the Residential District.

Newington’s Subdivision Regulations and Road Construction Specifications both contain provisions requiring that all utility lines be “placed underground in the street right-of-way or in dedicated easements.”<sup>45</sup>

### **C. Project Description**

The Project consists of a new 115 kV AC electric power transmission line and towers to be owned and operated by Eversource, running approximately 12.9 miles from the Madbury Substation in Madbury, through the Town of Durham, Little Bay and the Town of Newington, and

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<sup>39</sup> *Id.*, at 18.

<sup>40</sup> *Id.*, at 19.

<sup>41</sup> *Id.*, at 21.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at 25.

<sup>44</sup> *Id.*

<sup>45</sup> NEW-Ex. 19, at 81 and 128.

terminating at the Portsmouth Substation.<sup>46</sup> For 12.0 miles, the line “will be a new transmission route along an existing electric utility ROW; 0.9 miles will be in an existing transmission corridor.”<sup>47</sup>

For the overhead portion of the Project, the Project corridor is currently occupied by a 34.5 kV distribution line for approximately 9.7 miles and by a transmission line for 0.8 miles. For the underground portion...the Project is proposed to be constructed for an approximate aggregate total distance of 1.3 miles partially below an existing utility corridor currently occupied by a 34.5 kV distribution line, and partially within private property easements acquired or to be acquired outside of the existing corridor. The submarine portion of the Project will be constructed for approximately 1.1 miles within a designated cable corridor under Little Bay.<sup>48</sup>

At the westerly shore of Little Bay in Durham, the line will transition from overhead to underground and will be buried primarily via jet plow<sup>49</sup> under Little Bay to the easterly shore of Little Bay in Newington.<sup>50</sup>

After crossing under Little Bay, the Project will continue underground in Newington, approximately 1,800 feet through Gundalow Landing, crossing under Little Bay Road, circumventing a pond/vernal pool in the Flynn Pit Town Forest.<sup>51</sup> The line will then transition to overhead in the existing distribution line corridor until reaching the Newington Center Historic District where it will transition underground at the Frink Farm.<sup>52</sup> The line will continue

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<sup>46</sup> *Revised Land Use Report submitted as Attachment A with Bob Varney’s Supplemental Pre-Filed Testimony*, App Ex 226, at 5.

<sup>47</sup> *Id.*

<sup>48</sup> *Amended Stipulated Facts and Requested Findings of Applicant and Counsel for the Public dated September 17, 2018*, App Ex 194, at 2.

<sup>49</sup> *A description of jet plowing and other methods for installing the submarine cable appears in the Application*, App Ex 1, at 63-64.

<sup>50</sup> *Revised Land Use Report submitted as Attachment A with Bob Varney’s Supplemental Pre-Filed Testimony*, App Ex 226, at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*; see also *Appendix 02a - Environmental Maps, App Ex 084, Map 21*. Note that this map erroneously depicts the Historic District as not extending to the boundary of the Frink and Pickering properties, notwithstanding that the Applicant acknowledges that the entire Frink property is located within the Historic District. See, e.g., App Ex 1, at

underground for approximately 2,680 feet under the Frink Farm, the Newington Center District and Hanna Lane residential neighborhood to a point west of Fox Point Road where it will transition to overhead until it reaches the Portsmouth Substation.<sup>53</sup>

The proposed high voltage transmission line will be located upon residential, historic, conservation and municipal property in Newington's Residential District.<sup>54</sup> The new line will be placed upon new poles that will be much taller and larger – in some cases twice as tall and much larger in circumference than the distribution poles that currently exist in the ROW.<sup>55</sup> In addition to having taller and larger poles than the existing distribution line, the proposed high voltage transmission line will perform a different function than the distribution line.<sup>56</sup>

As indicated above, the Applicant proposes to bury two segments of the high voltage transmission line in Newington. However, the Applicant refuses<sup>57</sup> to bury the line in the remaining areas of Newington's Residential District, even though the Town's Master Plan clearly forbids overhead transmission lines in those areas.<sup>58</sup> The locations where the Applicant is unwilling to bury the high voltage transmission line in Newington are indicated on a map marked as NEW-Ex. 2-4. The length of the line in these additional areas is approximately 5,250 feet or just under one mile.<sup>59</sup> Applicant Witness Bowes testified that there is no technical reason why the high voltage transmission line cannot be buried in those areas,<sup>60</sup> but that Eversource generally

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109 (“In the area of the Newington Center Historic District and the Frink Farm located within the district...”)(Emphasis added.)

<sup>53</sup> App Ex 226, at 5.

<sup>54</sup> *Attachment DJH-4/Supplemental (Map showing Newington's requested burial locations)*, NEW-Ex. 2-4.

<sup>55</sup> Tr. 10/11/18, Morning Session, at 45-46 (Varney).

<sup>56</sup> *Id.*, at 44-45.

<sup>57</sup> *See, e.g.*, Tr. 8/30/18, Afternoon Session, at 14 (Bowes).

<sup>58</sup> *See* App Ex 227, at 481.

<sup>59</sup> *Supplemental Prefiled Testimony of Denis J. Hebert -7/20/18*, NEW-Ex. 2, at 9-10.

<sup>60</sup> Tr. 9/17/18, Morning Session, at 30-31 (Bowes).

doesn't place underground lines in an overhead right-of-way.<sup>61</sup> Notwithstanding that company practice, Mr. Bowes admitted that Eversource was committed to placing 60 miles of the Northern Pass Project's high voltage transmission lines underground.<sup>62</sup>

Eversource's President, William Quinlan testified that the Applicant will seek to recover from all ratepayers in the New England region the costs of burying the transmission line in burial locations proposed by the company.<sup>63</sup> His testimony implied that if the SEC were to order burial in additional locations, those costs would be "localized" or borne by Eversource's customers only. Mr. Bowes testified that it is more expensive to place a transmission line underground than overhead, and that the extra cost is approximately "\$8 million per mile."<sup>64</sup> Even if added burial costs in this case rose to \$10 million per mile and were to be recovered only from Eversource's customers, the additional cost to those ratepayers would be minimal, *i.e.*, \$0.01 per month for a customer using 700 kWh of electricity.<sup>65</sup>

#### **D. Alternate Routes and Solutions**

Mr. Andrew's prefiled testimony (App. Ex. 003) describes the process by which ISO-NE selected the Project to address transmission grid reliability issues in the Seacoast Region. Newington did not participate in this process because it did not have notice of the process.<sup>66</sup> Two potential solutions to the Seacoast Reliability Project were presented to the ISO-NE Planning Advisory Committee on January 18, 2012.<sup>67</sup> They included the Gosling Road autotransformer and a 115kV line from Madbury to Portsmouth.<sup>68</sup> Although ISO-NE selected

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<sup>61</sup> *Id.*, at 31 (Bowes).

<sup>62</sup> Tr. 8/30/18, Afternoon Session, at 14 (Bowes).

<sup>63</sup> Tr. 8/29/18, Afternoon Session, at 14-15 (Quinlan).

<sup>64</sup> Tr. 8/30/18, Afternoon Session, at 7 (Bowes).

<sup>65</sup> NEW-Ex. 1-9.

<sup>66</sup> NEW-Ex. 1, at 38.

<sup>67</sup> *Attachment DJH-7 (ISO-NE NH/VT Transmission System Solutions Update – January 18)*, NEW-Ex. 1-7.

<sup>68</sup> *Id.*

the latter solution, the Gosling Road autotransformer scored higher in several areas except cost.<sup>69</sup> In particular, the Gosling Road autotransformer would require only 3 new circuit miles while the Madbury to Portsmouth line would require 19 new circuit miles.<sup>70</sup> “Gosling Road” would also completely avoid impacting Little Bay and Newington.

Two other transmission line routes<sup>71</sup> examined but rejected by Eversource would also avoid impacting Little Bay and Newington. Both of these routes currently contain high voltage transmission lines<sup>72</sup> and would be acceptable to ISO-NE. As Mr. Andrew testified, “what the ISO approved was the concept of a line from Madbury to Portsmouth. How we get from Point A to Point B, overhead, underground, things, that's route selection. So from the ISO's perspective, as long as the line connects these two points, and it creates enough capacity, it's big enough, it's an acceptable solution.”<sup>73</sup>

### **III. LEGAL STANDARDS**

#### **A. Standard of Review**

RSA 162-H:16, II requires that the Subcommittee’s decision on whether to issue a certificate of site and facility must be based on the record.<sup>74</sup> The Subcommittee must give “due consideration” to “*all relevant information* regarding the *potential* siting or *routes* of a proposed energy facility, including potential significant impacts and benefits....” RSA 162-H:16, IV.

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<sup>69</sup> *Id.*, at 6.

<sup>70</sup> *Id.*

<sup>71</sup> These routes are shown on the map marked as NEW-Ex. 7.

<sup>72</sup> Tr. 9/18/18, Morning Session, at 61-62 (Andrew).

<sup>73</sup> Tr. 9/18/18, Afternoon Session, at 7(Andrew).

<sup>74</sup> RSA 541-A:31, VI provides that the record in a contested case such as the instant docket includes: (a) any prehearing order; (b) all pleadings, motions, objections, and rulings; (c) evidence received or considered; (d) a statement of matters officially noticed; (e) proposed findings and exceptions; (f) any decision, opinion, or report by the officer presiding at the hearing; (g) the tape recording or stenographic notes or symbols prepared for the presiding officer at the hearing, together with any transcript of all or part of the hearing considered before final disposition of the proceeding; (h) staff memoranda or data submitted to the presiding officer, except memoranda or data prepared and submitted by agency legal counsel or personal assistants and not inconsistent with RSA 541-A:36; and (i) matters placed on the record after an ex parte communication.



(Emphasis added.) After so doing, the SEC must determine if issuing a certificate will serve the objectives of RSA 162-H. *Id.*

RSA 162-H's objectives are set forth in the "Declaration of Purpose" section of the statute and include: *balancing* the Project's "significant impacts and benefits"; assuring that "*full and timely consideration of environmental consequences be provided;*" and providing "full and complete disclosure to the public". RSA 162-H:1 (Emphasis added.) The legislature has expressly recognized that energy facility siting may have significant impacts on and benefits to: the welfare of the population; private property; the location and growth of industry; the overall economic growth of the state; the environment of the state; historic sites; aesthetics; air and water quality; the use of natural resources; and public health and safety.

The foregoing list of issues must also be considered by the SEC when making its "public interest" determination under RSA 162-H:16, IV (e). *See* N.H. Admin. R. Site 301.16. As indicated below, the public interest finding required by RSA 162-H:16, IV (e) is separate and distinct from other findings that the SEC must make. Unlike the other statutorily-required findings (which include standards such as "adequate," "unduly interfere with," and "unreasonable adverse effect"), the legislature did not specify a standard for determining whether an energy project will serve the public interest. Accordingly, the "public interest" criterion of RSA 162-H:16 (e) requires the Subcommittee to assess this issue separately and differently from the other statutory criteria for issuing a certificate listed in RSAs 162-H:16, IV (a) through (c). More specifically, the express wording of RSA 162-H:1 requires that the impacts and benefits of each of those issues be "balanced."

The SEC must also consider and weigh all evidence presented at public hearings and consider and weigh all written information and reports submitted by members of the public prior

to closing of the record. RSA 162-H:10, III. Transcripts of oral public comments must also be considered, as they are part of the record. *See* RSA 541-A:31, VI (g).

Lastly, the SEC must consider, as appropriate, prior SEC findings and rulings on the same or similar subject matters but is not bound thereby. RSA 162-H:10, III.

### **B. Required Findings**

In order to issue a certificate, RSA 162-H:16, IV requires that the SEC make the following findings:

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

### **C. Applicant's Burden of Proof**

Applicant bears the burden of proving facts sufficient for the SEC to make all of the findings required under RSA 162-H:16, IV by a preponderance of the evidence. *See* N.H. Code Admin. R. Site 202.19(a) and (b). “Proof by a preponderance of the evidence’ means that what is sought to be proved is determined to be more probable than not.” N.H. Code Admin. R. Site 102.37. The preponderance standard allows for the balancing of evidence from both sides. *Petition of Preisendorfer*, 143 N.H. 50, 54-55 (1998) (quotations and citations omitted). Thus, the SEC must weigh the evidence and find it more likely than not that the evidence supports each and every one of the determinations needed to issue a certificate for the Project.

## IV. ARGUMENT

### **A. The Project Will Unduly Interfere With the Orderly Development of the Region**

#### **1. The Applicant has failed to meet its burden of production.**

Under N.H. Admin. Rule Site 301.09, the Applicant had the burden of including Newington's Master Plans and Zoning Ordinances in its application. The Applicant failed to meet both requirements. Eversource submitted Newington's Master Plan (Applicant's Exhibit 227) during the adjudicative phase of this proceeding – well after its application was filed- and Newington submitted its own Zoning Ordinance (NEW-Ex. 19) during the adjudicative hearings. The Applicant also failed to meet its burden of providing evidence of all of the property interests that would enable it to construct, operate and maintain the facility on, over, or under the site as required by N.H. Admin. Rule Site 301.03(c)6). More specifically, the Applicant failed to provide evidence that it has sought an easement from the Governor and Executive Council for placing the proposed transmission lines under Little Bay or placing the concrete mattresses along the shores of Little Bay as required by RSA 4:40 and the other authorities cited in CLF Exhibit 23. Lastly, notwithstanding that the Project includes relocating an existing distribution line in Newington, the Application fails to identify the precise areas along Newington's roads where the existing distribution line will be relocated, or an assessment of the relocated line's impacts.

All of the above-described information bears on the question of whether the Project will unduly interfere with the orderly development of the region. Without it, the Subcommittee will be unable to validly make the determination required by RSA 162-H:16, IV (b). For example, the lack of evidence concerning Governor and Council approval of the Little Bay crossing and placement of concrete mattresses along the Bay's shoreline deprives the Subcommittee of evidence of whether the Project can legally be sited in those locations. Also, the Applicant's failure to include information about impacts of the relocated distribution line in Newington leaves the SEC

unable to fully and completely assess the entirety of the Project's impacts. Both deficiencies warrant denying the Project a certificate. Rewarding the Applicant's noncompliance with SEC rules by issuing a certificate would make a mockery of the SEC's rules and processes. That unreasonable and unlawful result must be avoided.

**2. The Applicant has failed to meet its burden of proof.**

The Applicant has failed to meet its burden of proving by a preponderance of the evidence that the Project will not unduly interfere with the orderly development of the region as required by RSA 162-H:16, IV (b). On this issue, the Applicant provided the testimony of Robert Varney. As established in Mr. Hebert's supplemental testimony and in Mr. Varney's oral testimony at hearing in this docket, Mr. Varney's conclusion regarding this Project's effect on the orderly development of the region is nearly identical to the position which he took and which the SEC rejected in the Northern Pass docket.<sup>75</sup> Mr. Varney's position relies heavily on the fact that the Project will be constructed in an existing utility right of way. In both the Northern Pass docket and in this proceeding, Mr. Varney concluded that "[s]iting a new transmission line in existing corridors is a sound planning and environmental principle because it reinforces local patterns of development and minimizes environmental impacts. There will be no changes to prevailing land uses as a result of the operation of the Project."<sup>76</sup>

The SEC expressly rejected this position in the Northern Pass docket, and the Subcommittee in the instant docket should do the same. The legal standard for assessing whether a transmission project will unduly interfere with the orderly development of the region is the same for *all* transmission projects, irrespective of whether they are "merchant" projects like Northern

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<sup>75</sup> NEW-Ex. 2, at 4 -5.

<sup>76</sup> *Pre-filed Direct Testimony of Robert W. Varney (10/16/15) SEC Docket No. 2015-06 – Northern Pass Transmission LLC*, NEW-Ex. 10, at 8; *Pre-Filed Testimony of Robert Varney dated April 12, 2016*, App Ex 013, at 8.

Pass, or “reliability” projects like the Seacoast Project. There is simply no legal basis for treating this Project differently than Northern Pass on this particular issue.

The Northern Pass Subcommittee found that “[o]ver-development of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the orderly development of the region.”<sup>77</sup> That finding was not specific to Northern Pass; it is a general and logical factual statement. This statement happens to be true in the instant docket where the Applicant proposes to convert a residential district easement currently occupied by 34.5kV distribution line into a high voltage transmission corridor having much taller and wider towers than the distribution line and which will directly impact property that is listed on the National Register of Historic Places. As the Subcommittee found in Northern Pass, “increased tower heights and reconfiguration of existing facilities” would, in certain areas “create a use that is different in character, nature and kind from the existing use”... and “would have a substantially different effect on the neighborhood than does the existing the existing ... facilities.”<sup>78</sup> These same findings apply with equal force to the Seacoast Project given that Mr. Varney himself admitted that the existing 34.5 kV distribution line is different from a 115 KV high voltage transmission line, that those facilities perform different functions, and that they are different in size and appearance, i.e. the 115 kV poles are taller and larger in circumference than the 34.5 kV poles.<sup>79</sup> The circumstances in the instant case warrant the same findings that the SEC made in Northern Pass, i.e., the Project will unduly interfere with the orderly development of the region. As required by RSA 162-H:10, III and to promote consistency in its decision-making, the Subcommittee must consider the SEC’s orderly development findings in the Northern Pass docket here.

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<sup>77</sup> *Decision and Order Denying Application for Certificate of Site and Facility (03/30/18) - SEC Docket No. 2015-06 – Northern Pass Transmission LLC*, NEW-Ex. 11, at 278.

<sup>78</sup> *Id.*, at 279.

<sup>79</sup> Tr. 10/11/18, Morning Session, at 44-46 (Varney).

Another shortcoming on the part of Mr. Varney's testimony is that it improperly dismissed the significance of Newington's Master Plan, in contravention of the SEC's determination that "that master plans represent considered views of the communities and should not be disregarded or minimized in importance."<sup>80</sup> One of the principal responsibilities of a New Hampshire municipal planning board is to prepare and revise a master plan. *See* RSAs 674:1, I. and 674:2.

The purpose of the master plan is to set down as clearly and practically as possible **the best and most appropriate future development** of the area under the jurisdiction of the planning board, **to aid the board in designing ordinances that result in preserving and enhancing the unique quality of life and culture of New Hampshire**, and to guide the board in the performance of its other duties in a manner that achieves the principles of **smart growth, sound planning, and wise resource protection**.

RSA 674:1, I (Emphasis added.) In the presentation of its case and in its cross examination of certain witnesses, the Applicant seemed to imply that the 2015 amendment to Newington's Master Plan (which expressly requires burial of the Project line in Newington's Residential District) should be discounted because it was made in consideration of the Project. However, such an approach is completely improper as it ignores the fact that, as indicated below in Section IV. A. 4, the 2015 amendment reinforces and is consistent with earlier Master Plan and Zoning Ordinance provisions which clearly prohibit transmission lines in the Residential District. It also ignores that Newington Planning Board has express statutory authority to amend its Master Plan and is encouraged by the legislature to do so every 5 to 10 years. *See* RSAs 675:6, and 674:3, II. Such amendment can be accomplished following a public hearing preceded by 10 days' public notice per RSA 675:7. *See* RSA 675:6. The fact that a planning board can amend a Master Plan in as short a period as 10 days indicates that the legislature intended a flexible, responsive procedure for amending master plans – one that involves the public, but that

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<sup>80</sup> NEW-Ex. 11, at 280-281.

can also be accomplished quickly to respond to developing circumstances if necessary. Accordingly, because Newington's current Master Plan was adopted in 2009 (for the period 2010-2020), the amendment adopted in 2015 is legitimate as it conforms to the timeframe contained in the above-referenced statutes. There is nothing improper about it, especially given that the amendment simply reinforces with clarity several other Master Plan and Zoning Ordinance provisions stating that transmission lines are either not allowed or must be buried in the Residential District.

Newington's 2010-2020 Master Plan contains clear language that reflects the expectation that transmission lines will be located in the town's commercial/industrial zoning districts, but not a permissible use in the Residential District. This language predates the time when Project plans were publicly announced. When the Newington Planning Board learned in November 2013 that Eversource was proposing to construct a high voltage transmission line through the heart of Newington's Residential and Historic Districts, the Planning Board did two things: it worked with the Applicant to see if the transmission line could be routed to the south, near and through the Pease Development Authority, and it worked to revise the Master Plan in 2015 to reinforce the principal that an above ground transmission line in the Residential District is not permitted. The amendment language clearly reflects discussions that Newington was having with the Applicant about alternate routes and burying the line, and complements many other Master Plan and Zoning Ordinance provisions prohibiting above ground transmission lines in the Residential District.

The amendment to the Public Utilities section of the Master Plan was adopted in February 2015, a full 14 months before the Application was filed with the Site Evaluation Committee. This time period is significant because it exceeds the 12 month protective period for

applicants who have come before a municipal planning board with a plan for design review. *See* RSA 676:12. If an applicant comes before the planning board with a design review plan pursuant to RSA 676:4, II(b), such plan is protected from the application of proposed zoning or building code amendments if a formal application is submitted to the Planning Board within 12 months of the end of the design review process. The policy objective behind RSA 676:12 is that if an applicant comes before the Board to discuss the design review of a project, such a discussion should be insulated from changes to the ordinance or building code for a period of one year. This statute protects the applicant from the Planning Board proceeding to amend its zoning ordinance to prohibit or alter the project that was the discussion of design review, provided that a formal application is submitted within one year. Similarly, if a subdivision or site plan review application is submitted to the Planning Board prior to the posting of the first legal notice of a proposed building code or zoning ordinance amendment, such an application will not be subject to such proposed amendments if the application has been the subject of notice by the Planning Board pursuant to RSA 676:4, I(d). Conversely, if the Planning Board posts a notice of building code or zoning amendment within 120 days of the annual or special town meeting that the measure will be voted on, all applications to the Board filed after that public notice of proposed amendment will be subject to the building code or ordinance amendment, should the amendment be adopted.

The protections and policies adopted by the legislature in RSA 676:12 could have been extended to master plan, site plan or subdivision regulation amendments had the legislature desired to do so, but it did not. However, even if these provisions were applicable to the instant Application, the above-referenced statutory protections would not apply because the Application



was filed 14 months after the amendment was adopted, and more than two years after the Applicant informed Newington about the Project.

**3. The SEC must give due consideration to the views of Newington’s Board of Selectmen and Planning Board.**

RSA 162-H:16, IV (b) requires the SEC to give due consideration to the views of municipal governing and planning bodies when determining whether an energy project will unduly interfere with the orderly development of the region. This means that the SEC must “listen to and consider the views expressed by municipalities.” *Joint Application of Northern Pass Transmission, LLC et al.*, Decision and Order Denying Application for Certificate of Site and Facility, SEC Docket No. 2015-06 (Mar. 30, 2018), p. 276. Newington’s governing body (*i.e.* Board of Selectmen) and its Planning Board have expressed their views in this docket through Planning Board Chairman Denis Hebert’s written and oral testimony. Mr. Hebert’s testimony clearly indicates the Town’s position that the Project would unduly interfere with the orderly development of the region given that the Town’s land use planning principles and requirements would prohibit the Project from being constructed in its proposed location in Newington. Alternatively, if the Project is to be constructed in Eversource’s existing distribution line easement, Newington’s Board and Selectmen and Planning Board believe that the high voltage transmission line should be buried in the portion of the easement located in Newington’s Residential and Historic Districts, consistent with the mandate of the Newington Master Plan and Zoning Ordinance. These positions are not taken lightly or arbitrarily; they are required by and consistent with the provisions of Newington’s land use planning provisions set forth above and discussed below.

**4. The Project is Inconsistent with Newington’s Master Plan and Zoning Ordinance.**

**a. The Project is Prohibited in Newington’s Residential District.**

Newington’s planning policies and land use regulations manifest the Town’s consistent and long-standing positions that electric transmission lines either be constructed outside the Residential District or be buried. With the exception of the 2015 amendment, all of these policies and regulations predate the announcement of the Seacoast Project and therefore cannot possibly be viewed as “targeting” it. Instead, they must be viewed as the Town’s position on “the best and most appropriate future development of the area...preserving and enhancing the unique quality of life and culture in New Hampshire...”, consistent with “principles of smart growth, sound planning and wise resource protection.” RSA 674:2, I.

The very first policy statement in Newington’s Master Plan is that the “protection of the quality of the town’s residential areas is central to the Master Plan...The purpose is simply to ensure that the quality of life in Newington’s residential areas is protected from incompatible uses.”<sup>81</sup> The Master Plan also states that “electric transmission lines are generally viewed as incompatible with residential uses. This is especially true in Newington, where the residential district is small, compact;...The prospect of splintering the residential district with upgrade electric transmission line development within existing easements is strongly disfavored.”<sup>82</sup>

Since its adoption in 2009, the Town’s Master Plan has included language evidencing Newington’s support for improvements to transmission infrastructure so long as such improvements occur “outside the residential district.”<sup>83</sup> This language predates the

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<sup>81</sup> NEW-Ex. 1-3.

<sup>82</sup> NEW-Ex. 1-4.

<sup>83</sup> *Attachment DJH-3/Supplemental (Master Plan –Electrical Transmission Lines)*, NEW-Ex. 2-3.

announcement of the Seacoast Project by several years. The Master Plan also recognizes that “[i]t has been the town’s policy to require land developers to place their electric utility service improvements in the Residential District underground.”<sup>84</sup> This statement refers to Newington’s Subdivision Regulations and Road Construction Specifications both of which predate the announcement of the Project and which require that all utility lines be “placed underground in the street right-of-way or in dedicated easements.”<sup>85</sup> In addition, Newington’s Zoning Ordinance does not list high voltage transmission towers or lines as permitted uses within the Residential District. The omission of that use from the list of allowed uses in the Residential District “constitutes prohibition of that use in that district.”<sup>86</sup>

When taken together, the above-referenced provisions clearly indicate that the Project would be prohibited in Newington’s Residential District if the Project was subject to the jurisdiction of the Newington Planning Board. These provisions are reinforced by the 2015 Master Plan amendment which expressly states that the Project should either be built outside or at the very periphery of the Residential District, should be placed underground and “*under no circumstances should such improvements be permitted to be constructed above ground within existing easements that bisect the heart of the Residential District.*”<sup>87</sup> (Emphasis added.)

Newington’s written land use policies and regulations clearly reflect the Town’s long-standing commitment to sound land use planning to ensure orderly development. The Town’s policies and regulations specifically speak to where transmission and utility lines should and should not be located, and unambiguously establish that the Project is not allowed in the

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<sup>84</sup> NEW-Ex. 1-4.

<sup>85</sup> NEW-Ex. 19, at 81 and 128.

<sup>86</sup> *Id.*, at 20.

<sup>87</sup> App Ex 227, at 481.

Residential District, all of which support a finding that above-ground transmission lines will unduly interfere with the orderly development of the region. These views must be given “due consideration” by this Subcommittee, and they compel a finding that the Project will unduly interfere with the orderly development of the region.

**b. Siting a High Voltage Transmission Line in Newington’s Historic District Violates the Master Plan and Therefore Unduly Interferes with the Orderly Development of the Region.**

Newington’s Master Plan expresses the Town’s intent to ensure the preservation of the Town’s historic resources which have suffered in the past due to the encroachment upon Newington land by Pease Air Force Base and the rapid growth east of the Spaulding Turnpike.<sup>88</sup> “One of the region’s most scenic and historically significant landscapes of open fields and farmland is...comprised of the Frink, Pickering, Hislop and the former Rowe properties.”<sup>89</sup> Given that the Project is proposed to be located upon the Frink and Pickering properties, it clearly and unduly interferes with the Town’s plan regarding orderly development in this historic region and contravenes the Town’s position that “[e]very effort should be made to preserve this open space.”<sup>90</sup> Because constructing above ground transmission poles and wires in this region would be completely at odds with the Town’s efforts to preserve this open space, the Project would unduly interfere with the orderly development of this area. Although a 34.5 kV distribution line currently exists there, installing a 115 kV line and taller poles would significantly encroach upon that open space, as well as create a change in the use of that property, both of which violate the Town’s policy of preserving the area.

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<sup>88</sup> *Id.*, at 422.

<sup>89</sup> *Id.*, at 48

<sup>90</sup> *Id.*

**c. Siting a High Voltage Transmission Line Under and Along the Shores of Little Bay Violates the Master Plan, is Unreasonable, and Therefore Unduly Interferes with the Orderly Development of the Region.**

Newington’s Master Plan calls for the protection of Little Bay and the Shorelines of Great Bay.<sup>91</sup> “The bays’ scenic and natural resources are unparalleled in New Hampshire.”<sup>92</sup> The Bay is one of the richest estuaries in North America and provides habitat to a wider range of wildlife.<sup>93</sup> Several bald eagles are known to winter there<sup>94</sup>, and Dr. Miller has confirmed this statement with testimony regarding her personal observations of eagles nesting near her home on the Durham side of the bay.

Little Bay also plays a role in the local economy, as indicated by Mr. Baker’s testimony concerning his and others’ use of the bay for raising and harvesting oysters. In addition, Dr. Miller and Ms. Vivian Miller both testified about their recreational use of the bay and how that use would be impaired if concrete mattresses were to be installed along the shores of the bay.

Little Bay is a national treasure that has been designated by the Environmental Protection Agency as an estuary of national significance under Section 320 of the Clean Water Act.<sup>95</sup> Significant resources have been devoted to reversing degradation of Little Bay and to improving its ecology.<sup>96</sup> These facts alone beg the question of why any reasonable person would find it acceptable to disturb this precious natural resource by constructing a high voltage transmission line under the bay and along its shores. In fact for many years, Eversource itself has refrained

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<sup>91</sup> App Ex 227, at 422.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *DES – Technical Support Document for the Great Bay Estuary Aquatic Life Support Assessments Reports – March 27, 2017*, TD/UNH Ex. 12, at 4.

<sup>96</sup> *Email from Cynthia Copeland, Executive Director, Strafford Regional Planning Commission to Pam Monroe, copy of Copeland letter to Todd Selig – January 3, 2017*, TD/UNH Ex. 23; Tr. 10/26/18, Afternoon Session, at 236 (Fitch).

from reactivating an uncharged distribution line that lies on the floor of Little Bay. Ms. Miller testified that she was told by Eversource's predecessor, Public Service Company of New Hampshire ("PSNH"), the distribution line under Little Bay will never change; they'll "never go across the bay because of the environmental issues. This will always be a distribution line."<sup>97</sup> That statement from the Applicant's predecessor confirms that from the perspective of orderly development it makes absolutely no sense to install a high voltage transmission line in this precious area. Moreover, such an installation and disturbance of Little Bay contravenes Newington's Master Plan and defies logic and reason. It also displays an utter disregard for the national, state and local efforts to preserve and protect this unique resource.

The Subcommittee should not be complicit in Eversource's plans, and should not be swayed by the fact that the Project has been labeled a "reliability" project - especially given that there are alternatives to addressing grid reliability issues in the Seacoast Region, as explained below. For the reasons set forth above and for those presented by Durham/UNH and CLF, *any* industrial development of Little Bay's bed and shorelines would be unreasonable. Accordingly, because the Project proposes to pass through the unique and precious resource of Little Bay, the Subcommittee must find that the Project will unduly interfere with the orderly development of the region.

**5. The SEC Must Consider Alternate Routes That Avoid Little Bay and Newington.**

The Subcommittee must give "due consideration" to "*all relevant information* regarding the *potential* siting or *routes* of a proposed energy facility, including potential significant impacts and benefits..." RSA 162-H:16, IV. (Emphasis added.) In this docket, such relevant

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<sup>97</sup> Tr. 10/26/18, Afternoon Session, at 152 (Miller).

information includes available alternative transmission line routes from Madbury to Portsmouth which Eversource considered but rejected, primarily because Eversource found it more expedient to use an existing distribution line easement rather than collocating the new line in existing transmission line corridors. These alternative routes are shown on a map marked NEW-Ex. 7. As the map demonstrates, both of the alternative routes avoid Little Bay and Newington. Both of these routes contain high voltage transmission lines<sup>98</sup> and would be acceptable to ISO-NE, according to Mr. Andrew. He testified that ISO-NE approved “the concept of a line from Madbury to Portsmouth” – not the particular route chosen by Eversource for this Project – and “as long as the line connects these two points, and it creates capacity...it’s an acceptable solution.”<sup>99</sup>

This Subcommittee is not bound to accept and approve Eversource’s preferred route from Madbury to Portsmouth simply because Eversource finds that route expedient. Precedent exists for directing an applicant to pursue a different route, especially when the applicant’s preferred route conflicts with a town’s master plan and zoning ordinance “which have attempted to preserve the rural nature and charm of the area.” *PNGTS Decision*, SEC Docket No. 96-01 and 96-03 (July 16, 1997), p. 17. When compared with the preferred route, the other two alternative routes appear more reasonable and consistent with the orderly development of the region as they currently contain high voltage transmission lines and would avoid unreasonably impacting Little Bay and Newington. The Subcommittee must give these routes “due consideration” as required by RSA 162-H:16, IV.

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<sup>98</sup> Tr. 9/18/18, Morning Session, at 61-62 (Andrew).

<sup>99</sup> Tr. 9/18/18, Afternoon Session, at 7 (Andrew).

## **B. The Proposed Project Would Have Unreasonable Adverse Effects on Aesthetics**

The proposed project would have an unreasonable adverse effect on aesthetics. Applicant has not satisfied its burden. Its witness did not comply with applicable rules and employed a flawed, subtractive methodology that eliminated potential scenic resources from their analysis. Beyond that, the overall record demonstrates there would be unreasonable adverse effects on scenic resources. Additionally, Applicant submitted otherwise flawed reports and testimonies on these topics.

The Seacoast of New Hampshire is undoubtedly a hub for industrial and commercial activity. In the town of Newington alone, existing energy and industrial infrastructure includes “two electric generating facilities, a liquified petroleum gas facility, three major tank farms (63 tanks with a combined capacity of 3.1 million barrels), and several other industrial operations.”<sup>100</sup> Additionally, Newington has given over extensive tracts of land for uses such as Pease Development Authority (originally taken by eminent domain for development of the former Pease Airforce Base) and New Hampshire Department of Transportation’s (“DOT’s”) use for the Spaulding Turnpike.<sup>101</sup> But it is precisely because of the extensive areas already devoted to such high intensity land uses that Newington has been proactively safeguarding and protecting its now especially precious scenic, historic and residential uses through its Master Plan.<sup>102</sup>

Newington’s protection of its scenic and historic resources goes beyond general aesthetic concerns. It is at the very heart of Newington’s Master Plan<sup>103</sup> and speaks to the high value it places on how those resources contribute to the uniqueness of New Hampshire’s seacoast. The purposes of RSA 162-H:1 make clear it is the Subcommittee’s responsibility to ensure these

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<sup>100</sup> *Pre-filed Direct Testimony Denis Hebert*, NEW-Ex 1, at 5.

<sup>101</sup> *Id.*, at 5-6.

<sup>102</sup> *Id.* at 6-13.

<sup>103</sup> *Id.*; NEW 1-3; NEW 2-3.



precious elements of Newington are not forever scarred by this transmission line running above ground contrary to Newington's stated provisions to protect its residential areas, scenic roadways and historic resources.

Applicant has deliberately chosen to limit its—and by extension the Subcommittee's—field of view, in an effort to minimize the visual impacts of the proposed Project. Evidence presented by Newington, Counsel for the Public (“CFP”), and other intervenors, which encompasses a broader view consistent with legal requirements, shows that the proposed Project would have unreasonable adverse effects on New Hampshire's scenic and historic resources.

**1. Applicant's Witness for Aesthetics did not Comply with SEC Law.**

The Applicant's aesthetics witness, David Raphael (“Raphael”), used a similar failed methodology as that which Applicant's aesthetic witness employed in Northern Pass: a restrictive interpretation of the SEC rules that effectively created an elimination process; winnowing down the resources they evaluated in their Visual Impact Assessment (“VIA”) rather than, as the rules intend, conducting a comprehensive review of the visual impacts to all scenic and historic resources. Mr. Raphael's exclusionary approach resulted in minimizing the potential impacts to scenic resources such as Little Bay, Nimble Hill Road, the Darius Frink Farm, the Pickering Farm and the Knight's Brook Corridor in Newington as just a few examples. These landscapes are comprised of scenic, cultural, and historic resources richly textured with farmland, stonewalls, historic homes, and mature trees. As such, it is simply not credible to believe as Applicant's witness Mr. Raphael would urge the SEC, that there would be no unreasonable adverse effect created by the intrusion of high voltage lines and poles carrying those lines within an existing distribution right of way.

Mr. Raphael's analysis violates Site 301.05(b)(4)<sup>104</sup>, which requires a visibility analysis "for proposed [e]lectric transmission lines longer than 1 mile [that are] located within any rural area . . . extend to . . . [a] radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased."<sup>105</sup> As it did in Northern Pass, the Applicant yet again allowed its aesthetic consultant in this project to limit its geographic scope to only 3 miles out on either side of the project corridor.<sup>106</sup> Mr. Raphael made his determination to limit the scope despite the explicit rule requiring the greater geographic scope thereby substituting his own judgment for that which is required by law.<sup>107</sup>

The Subcommittee should not allow Applicant through its aesthetic witness to substitute its preferential judgment in the face of an unambiguous legal requirement. Failure to comply with this legal requirement coupled with Mr. Raphael's flawed methodology cannot support a reliable determination of the Project's unreasonable adverse effect on scenic resources.

## **2. Applicant's Flawed Methodology Eliminated Potential Scenic Resources and Minimized the Potential Effect.**

The testimony during the hearings made evident that Mr. Raphael's limited geographic scope in direct contravention of the SEC's rules, his elimination process methodology, and minimizing the Project's impact resulted in a failure to adequately assess the Project's effect on

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<sup>104</sup> It is well-settled in New Hampshire law that administrative rules have the force and effect of law. *See, e.g., Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 621 (2005) ("We agree that rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law. Administrative agencies may, however, properly be delegated the authority to fill in details to effectuate the purpose of the statute. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of laws.") (quoting and citing *Opinion of the Justices*, 121 N.H. 552, 557 (1981)).

<sup>105</sup> N.H. CODE ADMIN. RULES Site 301.05(b)(4).

<sup>106</sup> App Ex 051 at 7; Tr. 10/15/18, Afternoon Session at 71 (Raphael).

<sup>107</sup> App Ex 051 at 7.

scenic resources.<sup>108</sup> For example, during Counsel for the Public’s (“CFP”) questioning of Mr. Raphael, he conceded that his methodology eliminated the Newington Historic District during the initial stage of his assessment from further review because he deemed it to have a low scenic quality despite its high cultural value.<sup>109</sup> While the Newington Historic District received his initial review because it fell within his limited geographic scope, his subjective valuation method simply eliminated this significant and important resource from *any* further consideration of project impact. The significance of this error is obvious.

Under Mr. Raphael’s flawed methodology, even if a scenic resource survives the first round of elimination, its importance and value in other respects is rendered virtually meaningless in the next phase of his review: the Visual Effect category. In this stage of review, Mr. Raphael describes the criteria he uses as follows:

1. Scale and Spatial Presence – is the project a *dominant element* in the view
2. Prominence – does the project *stand out and draw attention*
3. Compatibility – is the project consistent or inconsistent with the built or natural elements currently visible in the landscape<sup>110</sup>

Here, the subjective nature and built-in bias toward the Project create yet another high hurdle for a scenic resource to overcome. The presumptive bias is clear: “Because the new transmission line is proposed in an existing utility corridor, viewers are already used to the presence of a transmission line in the landscape.”<sup>111</sup> The scale and presence are therefore reviewed as a comparison. However, even if, as is clearly the case here, additional clearing, taller and more substantial structures, additional and thicker power lines are all present, in Mr. Raphael’s own

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<sup>108</sup> Tr.10/15/18, Afternoon Session, at 87 (Raphael).

<sup>109</sup> *Id.*

<sup>110</sup> App Ex 051, at 19, (emphasis added).

<sup>111</sup> *Id.*

words, that “does NOT translate into an unreasonable adverse determination.”<sup>112</sup> In short, further elimination and reductive assessment is done to justify a determination of no unreasonable adverse effect.

It is this flawed methodology that failed to consider the real, substantial and ultimately unreasonable adverse effect on Newington’s scenic resources. For example, Mr. Raphael’s Addendum to Visual Assessment for the proposed installation of the concrete mattresses in Little Bay found that the introduction of these industrial elements, “would be acceptable due to the presence of existing development, the lack of outstanding or unique characteristics associated with the channel, and the fact that the transmission facility was already established across the channel.”<sup>113</sup>

The importance of Little Bay should not be so easily dismissed. “The bays’ scenic and natural resources are unparalleled in New Hampshire.”<sup>114</sup> But Mr. Raphael deemed its significance almost inconsequential since, after all, the resource was already impacted by the “transmission facility” (which is an erroneous characterization given that the facility is actually a distribution line). By that reasoning, one could justify disregarding the impact of this Project on most any scenic and historic resource in Newington which had previously experienced a degradation from some modern industrial development including a distribution pole.

Likewise, Mr. Raphael’s assessment of Newington’s locally designated scenic Nimble Hill Road<sup>115</sup> reflects how his flawed methodology fails to adequately assess or give credit to the Town’s respect for and preservation of its scenic and historic resources. Mr. Raphael’s analysis found that despite giving the road a high cultural value rating, the Project would not have an

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<sup>112</sup> *Id.*

<sup>113</sup> Attachment C to *Addendum to the Visual Assessment*, App Ex 142, at 1

<sup>114</sup> NEW- Ex 1-3, at 4.

<sup>115</sup> NEW-Ex 1, at 8.

unreasonable adverse effect. He stated: “Nimble Hill Road has some pleasant scenery and historic buildings, but it is not a unique road ... the resource has features such as tree lined sections and some stone walls that are fairly common among local roads in the Seacoast region...”<sup>116</sup> The fact that there were no “distant views” or “outstanding scenery” made this scenic resource, in his estimation, one of only low scenic value.<sup>117</sup> Nothing in Mr. Raphael’s VIA explains why those criteria of “outstanding scenery” and “distant views” rather than avenues of tree lined streets, historic homes, and stone walls meet the SEC definition of scenic resources in Site 102.45: “Scenic Resources” means resources to which the public has a legal right of access that are: (a) designated pursuant to applicable statutory authority by national, state, or municipal authorities for their scenic quality.” Nothing within this rule requires that the scenic resource include “outstanding scenery” or “distant views”. As with Little Bay, Mr. Raphael substituted his flawed and subjective methodology in place of the requirements of an SEC Rule.

Another fatal flaw in Mr. Raphael’s methodology is his interpretation of the phrase, “to which the public has a legal right of access,” that is part of the definition for Scenic Resources under Site 102.45.

Mr. Raphael’s conclusion is that public access means the public must have a stated legal right to set foot upon the land. But this reflects a fundamental misconception of New Hampshire law and tradition. New Hampshire presumes that all land is open to the public for viatic<sup>118</sup> purposes and hunting, among other things, unless the landowner takes affirmative steps (such as posting) to close it. This is part of a proud New Hampshire tradition of neighborliness. It also

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<sup>116</sup> *Supplemental Pre-Filed Testimony of David Raphael dated July 27, 2018*, APP Ex 142, at 4.

<sup>117</sup> *Id.*

<sup>118</sup> Of or relating to traveling, a road, or a way.

means that the public is able to “see the view” in a lot more places than Applicant is willing to admit. This openness is also reflected in New Hampshire’s property tax law where owners are entitled to a reduced property tax rate for affirmatively opening their land, listing the land as “Current Use – Recreational.”<sup>119</sup> Nearly 1.5 million acres in New Hampshire enjoy this status.<sup>120</sup>

Mr. Raphael’s Visual Assessment section in which he describes the process he used to identify scenic resources states: “This VA is focused on those resources that have a scenic value or purpose associated with them and where public access is established.”<sup>121</sup> Mr. Raphael also references SEC decisions to suggest his definition of public access is determinative of his interpretation. Not only are past SEC decisions not binding precedent on the present Subcommittee, but one of those decisions, Antrim II does not stand for the proposition Mr. Raphael suggests.

The property in question in Antrim II is private or perhaps quasi-private property, but the critical element here is the “viewpoint.”<sup>122</sup> The particular view of the project under discussion in Antrim II could be accessed and seen only from that private property.<sup>123</sup> If the view can be accessed only from a private property, then that may well not meet the definition under Site

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<sup>119</sup> RSA 79-A:1 (“It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state’s citizens, maintaining the character of the state’s landscape, and conserving the land, water, forest, agricultural and wildlife resources. It is further declared to be in the public interest to prevent the loss of open space due to property taxation at values incompatible with open space usage”). See also generally RSA 79-A (settling forth New Hampshire’s current use taxation).

<sup>120</sup> Based on 2016 data from the State of New Hampshire, out of New Hampshire’s total land mass of 5,742,659 acres, 1,491,829 of them enjoy the status of Current Use-Recreation. Considering all types of current use, all told, more than half of New Hampshire’s land enjoys current use status. (3,008,456.44 acres in current use out of New Hampshire’s total land mass of 5,742,659 acres. See <https://www.revenue.nh.gov/mun-prop/property/equalization-2016/documents/cu-alpha.pdf> (last visited 11/13/18).

<sup>121</sup> App Ex 051, at 8

<sup>122</sup> SEC Docket No. 2015-02, *Decision and Order Granting Application for Certificate of Site and Facility*, at 117–118 (3/17/17).

<sup>123</sup> *Id.*

102.45. However here, Applicant (through Mr. Raphael), as it did in Northern Pass urges a much narrower reading of the public-right-of-access reference, one which eliminates from consideration scenic resources that do *not* require a viewpoint exclusively from private property. Antrim II did not adopt this unlawfully narrow interpretation of the public access requirement in Site 102.45.

Here again, Mr. Raphael's minimalist approach excluded scenic resources, leaving the Subcommittee without proof that the proposed Project would not unreasonably affect aesthetics. In sum, Mr. Raphael's flawed methodology including a narrow and inaccurate interpretation of the SEC definition and rules illustrates Applicant's failure to meet its burden. The Project will have an unreasonable adverse effect on aesthetics.

**C. The Proposed Project would have Unreasonable Adverse Effects on Historic Sites and Archaeological Resources**

Historic sites and archeological resources are integral components of Newington's landscape and valuable heritage. It is the combination of beloved historic and archeological assets woven together with the Seacoast's gentle and natural beauty that forms the fabric of the landscapes Newington cherishes and protects through its land use policies.

The Applicant has not met its burden to prove the proposed Project would not have an unreasonable adverse effect on them. The Applicant's analysis of historic sites is unlawfully narrow and otherwise flawed and incomplete. The methodology employed by Applicant's witness for historic resources did not use New Hampshire's broad definition of what qualifies as a historic resource. They did not review the significantly larger area of potential effect. And even if all potentially impacted resources had been identified, they did not establish a plan for avoidance, minimization, or mitigation of adverse effects.

The Subcommittee should reject Applicant’s exclusive reliance on the Section 106 process’s Memorandum of Agreement amongst the federal agency (US Army Corps of Engineers), Applicant, and New Hampshire State Historic Preservation Officer, and the Memorandum of Understanding between Applicant and New Hampshire State Historic Preservation Officer to satisfy the criteria of Site 301.14(b).<sup>124</sup>

**1. Applicant’s Methodology for Analyzing Impacts to Historic Sites was Unlawfully Narrow.**

The methodology used by Applicant’s witness for historic resources, Cherilyn Widell<sup>125</sup> was fundamentally flawed because she applied the definition of historic properties for the Section 106 process—not the New Hampshire definition of historic sites, which is significantly broader than the Section 106 definition.

Site 102.23 provides that “[h]istoric sites’ means ‘historic property,’ as defined in RSA 227-C:1, VI, namely ‘any building, structure, object, district area or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation.’ The term includes ‘any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the secretary of the Interior,’ Pursuant to 36 CFR §800.16(1)(1).”

The meaning of this definition becomes clear through application of the standard tools of statutory interpretation. When construing statutes and administrative regulations,<sup>126</sup> the

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<sup>124</sup> No government agency except this Subcommittee will determine if Applicant has met the requirements of RSA 162-H. While the Subcommittee should consider the input of appropriate federal agencies, no decision of another agency, taken alone or together with others, is dispositive of the Subcommittee’s decision here because no other agency applies the broad, multi-faceted RSA 162-H standard.

<sup>125</sup> *Pre-filed Testimony of Cherilyn E. Widell*, App Ex 076, at 2 (stating the purpose of her testimony is to provide assessment of potential effects of the proposed project on above-ground historic sites).

<sup>126</sup> It is well-settled in New Hampshire law that administrative rules have the force and effect of law. *See, e.g., Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 621 (2005) (“We agree that rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law. Administrative agencies



Subcommittee (like a court) must look first to the language used and, where possible, ascribe the plain and ordinary meanings to words used.<sup>127</sup> It must interpret “disputed language of a statute or regulation in the context of the overall statutory or regulatory scheme and not in isolation.”<sup>128</sup> In doing so, it shall “construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.”<sup>129</sup> It “cannot consider what the legislature might have said or add language that the legislature did not see fit to include.”<sup>130</sup> It “must give effect to all words in [the] statute and presume that the legislature did not enact superfluous or redundant words.”<sup>131</sup> Finally, when one statute references another, those statutes must be read together.<sup>132</sup>

Here, the plain language of Site 102.23 demonstrates that the definition is much broader than Applicant has interpreted it to be. The first sentence references and quotes RSA 227-C:1, VI, which includes “*any building . . . that is significant in the history . . . of this state, its communities, or the nation.*”<sup>133</sup> The language of the quoted statute is broader and goes far beyond a definition consisting only of eligibility for or actual listing on the National Register of Historic Places.

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may, however, properly be delegated the authority to fill in details to effectuate the purpose of the statute. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of laws.”) (quoting and citing *Opinion of the Justices*, 121 N.H. 552, 557 (1981)).

<sup>127</sup> The SEC uses the same rules of statutory interpretation as the courts use. See, e.g., SEC Docket No. 2015-01, Request of SEA-3, Inc., *Order on Pending Motions*, at 8–9 (8/10/15) (applying canons of statutory construction to interpret the authority of counsel for the public); SEC Docket No. 2010-01, Application of Groton Wind, LLC, *Decision Granting Certificate of Site and Facility with Conditions*, at 37–38 (5/6/11) (applying canons of statutory construction to interpret the orderly development standard before the current administrative rules existed); SEC Docket No. 2009-01, Motion of Campaign for Ratepayers Rights, et al., *Order Denying motion for Declaratory Ruling*, at 8 (8/10/09) (applying canons of statutory construction to interpret the undefined term “sizable addition”). *Bovaird*, 166 N.H. at 759.

<sup>128</sup> *Bovaird*, 166 N.H. at 759.

<sup>129</sup> *Franklin v. Town of Newport*, 151 N.H. 508, 510 (2004).

<sup>130</sup> *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183–84 (2014).

<sup>131</sup> *Hodges v. Johnson*, 2017 N.H. LEXIS 232, \*25 (N.H. 2017) (citing *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525–26 (2002)).

<sup>132</sup> *State v. Patterson*, 145 N.H. 462, 464 (2000) (“The language of RSA 318-B:28-a referencing RSA 651:5 signifies that the two statutes must be read together.”)

<sup>133</sup> N.H. CODE ADMIN. RULES Site 102.23 (emphasis added).

Moreover, reading the quoted section of the statute in context, RSA 227-C:1, VII also illustrates the very broad meaning that lawmakers intended historic sites to have in New Hampshire law. That section’s definition of “historic resource” references, for example, any object within a historic property that “enhances an understanding and appreciation of New Hampshire history”, “[a]ny object, or group of objects, and the district, area, or site they define, which may yield significant data but whose value and significance has yet to be determined by the division of historical resources, as well as properties that are Register eligible.”<sup>134</sup>

Finally, the last sentence of Site 102.23 states that the meaning of historic sites “*includes* ‘any . . . object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior.’”<sup>135</sup> The use of “includes” demonstrates the sentence referencing the National Register of Historic Places is meant to be illustrative of the broader meaning of “historic sites,” not its exclusive meaning. It does not mean Applicant need identify and Subcommittee need consider only those historic sites and archeological resources deemed eligible for or included on the National Register. Applicant’s exceedingly narrow interpretation of historic sites clearly contravenes both the plain language of the law and the intent of New Hampshire lawmakers.

Site 301.05 sets forth the parameters for Applicant to conduct a visual impact assessment—an assessment that specifically includes “a narrative and graphic description... of the physiographic historical and cultural features of the landscape . . . .”<sup>136</sup> The deficiency of the one-mile APE compounds the problem created by Applicant’s use of a narrowed historic sites

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<sup>134</sup> RSA 227-C:1, VII.

<sup>135</sup> N.H. CODE ADMIN. RULES Site 102.23 (emphasis added).

<sup>136</sup> N.H. CODE ADMIN. RULES Site 301.05(b)(4) (describing the area for “[e]lectric transmission lines larger than 1 mile shall extend to a 2 mile radius if located within any urban cluster;... A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased”).

definition with the resulting effect that historic sites and cultural landscapes were either not identified or not adequately assessed for adverse effects.

**2. The Project will have an Unreasonable Adverse Effect on Newington’s Historic Sites.**

Newington agrees with CFP’s historic expert witness, Patricia O’Donnell, in her approach to a more comprehensive capture of historic sites by, 1) broadening the area of potential effect (APE); and 2) using a “broader consideration of historic sites that are important to the culture and history of the four host towns.”<sup>137</sup> Ms. O’Donnell’s justification and grounding in New Hampshire law are fully set forth in her report captioned “Heritage Landscapes Assessment Report on Potential Effects to Above Ground Historic Sites for New Hampshire Seacoast Reliability Project” (CFP, Ex 5-a “HL Report”). In expanding the scope, she more accurately identified many additional historic and scenic sites that would be adversely impacted. The following is her summary table of those sites<sup>138</sup>:

Historic Site Cultural Landscape Category	Count or Measure Potentially Visible
National Register/State Listed	26
Local, DOE, other non-listed historic	8
GNIS Identified Historic	9
Historic Graveyards	50
Conservation Lands	87
Recreation Lands – Sites	12
Recreation Lands – Areas	13

<sup>137</sup> *Heritage Landscapes Assessment Report on Potential Effects to Above-Ground Historic Sites for the New Hampshire Seacoast Reliability Project*, CFP Ex 5-a, at 33.

<sup>138</sup> *Id.*

Scenic Roads	15.4 miles
Trails	3.5 miles
Public Waters – Lakes or Ponds	12
Designated Rivers	4.3 miles
Public Water Access Points	5

While this table gives a breadth and depth to sites throughout the Project area it is relevant to help the Subcommittee understand the intensity of the concerns expressed by Newington – a host town that has already given over so much of its land for utility infrastructure – but to also understand the extraordinary resources found in this sliver of New Hampshire along the Atlantic coast line.

Further underscoring Newington’s concerns, Ms. O’Donnell also identified a much more comprehensive list of sites subject to both direct and indirect effects than Applicant. For example, using the one-mile APE, in Newington Ms. Widell found only the Alfred Pickering Farm and the Little Bay Underwater Cable Terminal Houses District, Durham and Newington would be adversely affected.<sup>139</sup> In contrast, Ms. O’Donnell’s list of sites just within the 500’buffer area is set forth in the table<sup>140</sup> below:

Historic Graveyards	2
Stone walls and Fences	259
Conservation Lands (tracts) (any portion of tract within direct impact buffer)	2
Recreation Lands (sites)	0

<sup>139</sup> *Supplemental Pre-Filed Testimony of Cherilyn Widell dated July 27, 2018*, App Ex 143, at 3 (Also discussing that any adverse effect would be mitigated through the MOU and MOA).

<sup>140</sup> CFP Ex 5-a, at 52.

Recreation Lands – Areas (any portion of tract within direct impact buffer)	2
Designated Roads (miles)	0.5
Trails (miles)	0
Public Lakes or Ponds	1
Public Water Access Points	0
Designated Rivers (miles)	0
Applicant identified PAF historic sites	31

Included in this list are the “Thomas Pickering cemetery and the Downing Family cemetery, each located less than 200 feet from the proposed project.”<sup>141</sup>

Beyond the 500 foot buffer area but still within the 1 mile APE, the numbers of affected sites increases and are reflective of Newington’s combination of natural features and historic alterations to the natural environment.<sup>142</sup> Those sites include 7.5 miles of designated roads, 6 historic graveyards, “the Fox Point area, beginning at the intersection with Little Bay Road marked by what appears to be a historic barn or mill structure”<sup>143</sup> and such landscape features as “Flynn Pit and Beane’s Hill, which was ‘historically known for its views of the Piscataqua.’”<sup>144</sup> Ms. O’Donnell also correctly pointed out that the “Applicant’s materials raised questions about why important features such as the historic (and designated scenic) roads within Newington are not considered for effect in conjunction with historic buildings and land use patterns.”<sup>145</sup>

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<sup>141</sup> CFP Ex 5-a, at 52.

<sup>142</sup> CFP Ex 5-a, at 53

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* (quoting from *Application Appendix 10, Project Area Form, p.12*)

<sup>145</sup> CFP Ex 5-a, at 53.

Ms. O'Donnell called out direct impacts to the Flynn Pit, the Frink Farm and Newington's many stone walls.<sup>146</sup> For example, in her assessment of the stone walls she states: "There is no indication of how many stone walls that define historic properties are intended to be addressed during construction of either the overhead or underground sections of the Project, and if dismantled, whether they will be replaced following construction."<sup>147</sup>

Applicant completely ignored indirect effects on sites. Of significance are Newington's National Register Historic District and Little Bay Road.<sup>148</sup> While Applicant has agreed to bury the line through the Frink Farm (a site within the Historic District but also an individually recognized site) which will, if done correctly and not leave the trench outline evident through "differential back fill treatment or soil compaction"<sup>149</sup>, mitigate the impact to the Newington Historic District. However, "a proposed tower within a 100 foot cleared corridor adversely effects views from the important historic intersection of Old Post Road and Nimble Hill Road."<sup>150</sup> Little Bay Road, identified by Applicant as a scenic resource, will also be impacted despite design amendments. "There remain towers in the open fields and woodland adjacent to the Pickering Farm. The towers range in height between 65 ft to 75 ft within a 100 foot corridor, inserting significant intrusions of scale into the experience of historic character of Little Bay Road, not only due to structure height but also clearing width."<sup>151</sup>

All of these sites shape the character of the town. All of these sites would be adversely impacted. Applicant's constricted, one-mile APE and limitation of sites only deemed historic because they were listed on or eligible for listing on the National Register eliminated assessing

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<sup>146</sup> CFP Ex 5-a, at 54.

<sup>147</sup> Applicant attempted to address at least some of the stone wall impacts after Mr. Hebert pointed during the technical sessions and in his Pre-file Testimony that Applicant had failed to identify *any* stone walls in Newington.

<sup>148</sup> CFP Ex 5-a, at 55.

<sup>149</sup> CFP Ex 5-a, at 54.

<sup>150</sup> *Id.*

<sup>151</sup> CFP Ex 5-a, at 55.

the real visual impact this proposed Project would have on Newington's historic sites. In sum, given all of the known effects and likely effects both direct and indirect, the Subcommittee should find, as did Ms. O'Donnell<sup>152</sup>, that the Project will have an unreasonable adverse effect on Newington's historic resources.

### **3. Applicant's Failure to Include the Relocated Line is Fatal to the Application.**

Finally, entirely absent from the original Application, all Supplements to it, and all Assessments conducted on behalf of Applicant for scenic and historic resource impacts, are the potential effects on both historic and scenic resources from the relocated distribution line.<sup>153</sup> The Applicant has made representations to Newington that, as part of this Project, it intends to relocate the existing distribution line to run along the Town's roadways. An assessment of what that impact might be has not been conducted.<sup>154</sup> Consequently there is simply *no* evidence for the Subcommittee to review whether and to what extent historic and scenic sites that otherwise might have no effect from the new line, will now be *directly* impacted by the re-located line. The potential for the re-located line to weave a modern utility element through the heart of Newington's historic district is a very real danger. Again, Applicant has failed to meet its burden. Leaving out a critical component of the Project constitutes grounds for the Subcommittee to deny the Application.

### **D. The Project Will Have an Unreasonable Adverse Effect on Water Quality and The Natural Environment**

The Applicant has failed to prove by a preponderance of the evidence that the Project will not have an unreasonable adverse effect on water quality and Little Bay. Newington joins in the arguments proffered by Intervenor Conservation Law Foundation and Durham/UNH on this

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<sup>152</sup> *Id.*

<sup>153</sup> Tr. 10/26/18 Morning Session, at 31-32 (O'Donnell).

<sup>154</sup> *Id.*

issue and strongly urges the Subcommittee to carefully review the scientific evidence (or lack thereof) regarding the Project's potential impacts on Little Bay. The record evidence is insufficient for the Subcommittee to determine with any degree of certainty the effect that plowing Little Bay's sedimentary layers and installing concrete mattresses along its shorelines will have upon that precious natural resource and the quality of water therein. Given that the Project poses potential, substantial risks to Little Bay's ecosystem and water quality, it would be unconscionable for the Subcommittee to issue a certificate for this Project without knowing the results of jet plow testing.

The Department of Environmental Services' ("DES's") proposed certificate conditions do not fully ameliorate the above-described evidentiary problem. DES's proposed conditions are defective because they fail to comport with the standard in RSA 162-H:1 requiring that "**full and timely** consideration of environmental consequences be provided" and that "full and complete disclosure" be provided to the public. DES's recommendation regarding jet plow testing and reporting are improper because they will occur after the conclusion of the adjudicative phase of these proceedings and because they do not require that the jet plow test report be provided to the parties for comment. As indicated above, the absence of information on jet plowing's actual impacts on Little Bay is a serious evidentiary shortcoming which precludes the Subcommittee from granting a certificate, and DES's proposed conditions do not provide a sufficient basis upon which to make a favorable finding regarding impacts to Little Bay.

As a matter of law, the Subcommittee cannot conclude that the Project will have no unreasonable adverse effect on water quality simply because DES has recommended conditional approval of the permits over which it has authority. RSA 162-H does not charge the SEC with just confirming that other state agencies have recommended approval of the portions of the



Application. Instead, the SEC must consider DES’s recommendations as well as “other relevant evidence submitted pursuant to Site 202.24.”<sup>155</sup> Such relevant evidence includes Durham/UNH’s experts’ testimony as well as the lack of conclusive evidence to support the Applicant’s position that the Project will not have an unreasonable adverse effect on water quality.

### **E. The Project Will Not Serve the Public Interest**

As discussed above in the Legal Standards section, the SEC must make an independent finding that the “significant impacts” of the Project are balanced with the “benefits” of the Project in the identical list of issues specified in RSA 162-H:1 and Site 301.16. Those issues are: the welfare of the population; private property; the location and growth of industry; the overall economic growth of the state; the environment of the state; historic sites; aesthetics; air and water quality; the use of natural resources; and public health and safety. Of these issues, Newington submits that the Project’s impact on the population’s welfare, private property, historic sites, aesthetics, water quality and the use of natural resources outweigh any benefits that the Project may have.

#### **1. Impacts on the Population’s Welfare**

Regarding this issue, the SEC must carefully consider the public comments provided at the hearing held October 11, 2018 in Portsmouth, and written public comments in this docket. Those comments overwhelmingly indicate opposition to the Project for various reasons. The SEC must also consider whether this Project best serves the public welfare given that there are alternative transmission line routes and an autotransformer solution, all of which would either

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<sup>155</sup> N.H. Code Admin. R. Site 301.14 (d).

avoid or greatly mitigate the Project's impacts. More specifically, Mr. Andrew has testified that the alternative routes would be acceptable to ISO-NE. It is also important to consider that the Gosling Road solution would completely avoid the construction of new high voltage transmission lines through UNH, Durham, Little Bay and Newington.<sup>156</sup> Gosling Road would also avoid impacts to aesthetics, historic sites, water and the natural environment in those areas and would require only 3 miles of new transmission lines.<sup>157</sup> In addition, from a reliability standpoint, the population's welfare would be better served by Gosling Road than a submerged line under Little Bay.<sup>158</sup> For example, if one of the autotransformers failed, a back-up transformer would provide immediate back-up power<sup>159</sup> whereas if the submerged line failed, repair time could take several months and up to an entire year.<sup>160</sup> In addition, Gosling Road would provide over twice the amount of power than the proposed transmission line at just 22% more cost<sup>161</sup>.

While Newington understands that the Gosling Road solution was not selected by ISO-NE, it believes that the Subcommittee must nonetheless carefully consider the evidence about the benefits of that solution as compared with the many negative aspects of the Project, including the longer time needed to repair a submerged line versus an autotransformer.

## **2. Impacts on Private Property**

The Subcommittee must carefully consider the Project's impacts on the property of the intervenors and whether it can be adequately mitigated by burying the line, a property value

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<sup>156</sup> NEW-Ex. 1, at 19.

<sup>157</sup> NEW-Ex. 1-7, at 6.

<sup>158</sup> See NEW-Ex. 1-7, at 6 – Gosling Road scored more favorably (with more positive attributes) than the Project on the reliability criterion.

<sup>159</sup> Tr. 9/18/18, Morning Session, at 54 (Andrew).

<sup>160</sup> Tr. 8/30/18, Afternoon Session, at 25 (Bowes).

<sup>161</sup> *Prefiled Direct Testimony of Denis J. Hebert*, NEW-Ex. 1, at 16.

guarantee or other measures. The Subcommittee must also not be influenced by the number of contacts that Eversource has had with intervenors; it is the quality not the quantity of those discussions that is of significance. If Eversource has yet to reach satisfactory arrangements with the property owners most directly affected by the Project, the Subcommittee should question why this is the case. Unmitigated impacts to private property should result in either certificate denial or imposition of reasonable conditions (like a property value guarantee) if a certificate is issued.

### **3. Impacts on Historic Sites**

The Subcommittee must weigh the Project's impacts to Newington's Historic District against any anticipated benefit. The Applicant touts the fact that the Project will entail moving the existing distribution line in this area, and that it will bury the new transmission line (except for the transition structure) in most of the Frink farm property. While this sounds beneficial, the absence of any visual or narrative information about the impacts of the relocated distribution line (which will be installed along Newington's scenic roads) leaves a hole in the record that cannot be filled by speculation. The Applicant must provide a complete assessment of the relocated line's impacts in order for the Subcommittee to properly determine the Project's actual impacts on historic and other resources in Newington. Simply knowing that a large stretch of distribution line will be removed from the Frink farm tells only part of the story. We are left to wonder what the relocated line will look like, where it will be installed and what impacts it might have on its surroundings. This is unacceptable and, accordingly, the application should be denied.

#### **4. Impacts on Aesthetics**

The Project will obviously have effects on aesthetics, and as indicated previously herein, those effects will be unreasonably adverse. The best way to address these adverse impacts is to bury the line in Newington's Residential and Historic Districts, as required by Newington's Master Plan and land use regulations. Yet, Eversource refuses to do this.

#### **5. Impacts on Water Quality**

Record evidence shows that jet plowing under Little Bay poses a great degree of risk to water quality. Given that Little Bay is very precious natural resource worthy of protection, the risks associated with jet plowing are simply not worth taking especially considering that Eversource has alternatives that avoid Little Bay. Because the actual impacts of jet plowing on Little Bay's water quality are unknown at this time, the certificate should be denied. In the alternative, the Subcommittee should wait to issue its decision until after the jet plow trial run occurs, and after the Applicant has provided the trial run report to the parties and given the parties an opportunity to provide comments on the report to the Subcommittee.

#### **6. Impacts on the Use of Little Bay**

It is important to note that this factor requires an assessment of the impacts on the "use" of natural resources. This is different from assessing the Project's environmental impacts on Little Bay. As Dr. Miller and Ms. Miller testified, they "use" the bay for recreational purposes such as kayaking and swimming, and that those uses will be impaired if this Project is built. Others "use" the bay for aquaculture, and Mr. Baker has testified about the Project's potential impacts on the use of the bay for oyster farming. Importantly, Little Bay is also used for research.

The Subcommittee must consider whether “using” Little Bay for a high voltage transmission line site is appropriate in light of the impacts it will have on others’ uses of the Bay, and in light of the Bay’s status as an estuary which national, state and local entities have exercised substantial efforts to protect. This usage consideration goes to the very heart of the Subcommittee’s statutory duties – deciding whether it is appropriate to “use” Little Bay as a high voltage transmission line corridor. Based on the record, it is difficult to understand how one could reasonably conclude that “using” this unique site for this particular purpose is in the public interest. While Newington recognizes that ISO-NE has identified the need for a solution to address grid reliability in the Seacoast Region, the solution should not come at the great expense of a precious natural resource which many seek to protect and to “use” for different, less impactful purposes. Moreover, Eversource should not automatically be allowed to “use” Little Bay simply because an existing, uncharged distribution line is currently located there or because it may be more convenient to “use” Little Bay instead of the two other existing transmission line corridors that Eversource has identified as potential routes from Madbury to Portsmouth. Also, as indicated elsewhere herein, it is questionable as to whether Eversource may even have the legal right to use Little Bay for this Project given that Eversource has not obtained permission from the Governor and Executive Council as required by RSA 4:40.

In short, the benefits associated with using Little Bay for a high voltage transmission line are greatly outweighed by the negative impacts associated with depriving others of their current uses of the Bay for business and pleasure, and would undermine the efforts of those who seek to preserve and protect Little Bay for future generations. For these reasons, a certificate for this site should be denied.

## **F. Other SEC Requirements**

Newington's failure to brief every single criterion that the SEC must evaluate in this docket should not be construed to mean that Newington finds those other criteria insignificant or unimportant. Rather, given limited time and resources, Newington has focused its arguments on those issues directly implicated by the Town's responsibility to assess whether the Project is consistent with Newington's planning policies and land use requirements, and on advocating for those policies and regulations. However, a lingering question is whether the Applicant possesses the requisite technical and managerial capabilities given that jet plowing has never been done in New Hampshire, and that it is being proposed to be conducted in Little Bay, a precious and unique natural resource. The Subcommittee should carefully review the evidence on this issue and should not simply assume that because Eversource is a large utility company, it or its subcontractors necessarily have the required technical and managerial capabilities to construct the Project in accordance with the terms of a certificate if one is granted.

## **G. Applicant's and DES's Proposed Delegations and Conditions Unlawfully Exceed the SEC's Statutory Authority**

The SEC's authority to delegate certain Committee functions to state agencies and the Committee's administrator is narrowly prescribed by RSA 162-H:4, III, III-a and III-b. The Subcommittee cannot delegate its authority broadly to DES on such issues as deciding whether to permit jet plowing or approving the locations of laydown areas and marshalling yards. Many of DES's proposed permit conditions leave unanswered questions about how the jet plowing test run will be evaluated and approved. They also do not appear to allow for a full vetting of the jet plow issues by all parties before the Subcommittee. The SEC, not DES, must exercise its statutory authority to ensure that environmental consequences of this Project are fully understood before any certificate decision is made.

## **H. Applicant and DES Engaged in Improper Negotiations After DES's Final Conditions Were Submitted to SEC**

As indicated in the Joint Motion to Strike filed on October 24, 2018 by CLF, Durham/UNH and Newington, the Applicant and DES engaged in improper negotiations resulting in amendments to the “final” permit conditions originally issued by DES on February 28, 2018. The arguments as to why this process is fundamentally unfair and improper as a matter of law are set forth in the Joint Motion and are incorporated herein by reference. The Subcommittee must not condone this activity and must make clear that when an agency’s “final” permit conditions are issued as required by RSA 162-H:7, VI-c, an Applicant may argue for amendments before the Committee but it is not free to go back to the agency and negotiate different conditions. The unfairness of such backroom tactics is obvious. Intervenors and Counsel for the Public are deprived of the opportunity to provide their input on the final conditions as well as any changes the Applicant is asking the agency to make to the supposedly “final” permit conditions. The Subcommittee should not tolerate such tactics. Accordingly, the Motion to Strike should be granted and the February 28, 2018 final permit conditions should stand unless the Subcommittee determines, based on the record, that different conditions should be imposed. In that event, the Subcommittee must act in accordance with RSA 162-H:7-a. I(e).

## **V. Conclusion**

### **A. Certificate of Site and Facility Must Be Denied**

For all of the reasons set forth above, the SEC must deny a certificate of site and facility for the Project given that the Applicant has failed to meet its burden of proving all of the applicable statutory and regulatory criteria.

## **B. Alternatively, Certificate Conditions Must Be Imposed**

In the event that the SEC determines that the Project satisfies all of the statutory and regulatory requirements for a certificate, the SEC must impose reasonable conditions to ensure that the Project has complied with applicable law, and to mitigate the Project's impacts. The Subcommittee must include all certificate conditions recommended by state agencies. RSA 162-H:16, I. In addition, the Subcommittee may include "reasonable terms and conditions." RSA 162-H:16, VI. Newington believes that the following conditions are warranted by the unique circumstances presented by this Project, *i.e.*, that it will be constructed within a residential district and upon property listed on the National Register of Historic Places, and will also be constructed under tidal waters held by the state in trust for the public.

### **1. The high voltage transmission line must be buried in all areas where it passes through Newington's Residential and Historic Districts.**

Burial will assure that the Project does not unduly interfere with the orderly development of the region and will not have an unreasonable adverse effect on aesthetics and historic sites. While completely avoiding Newington's Residential District is the superior option, burial is the next best way to effectively mitigate the adverse effects that an overhead high voltage transmission line would have on Newington's Residential District. It is a reasonable condition given that: Eversource already plans to bury two segments of the line in Newington; burial is required by Newington's Master Plan and Newington's Land Use Regulations<sup>162</sup>; the height of the transmission towers exceed those allowed by Newington's Zoning Ordinance; alternatives exist that would completely avoid impacting Newington's residential and historic districts; the additional length of buried line would be just under a mile which is very reasonable given that

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<sup>162</sup> Newington's Subdivision and Road Construction Regulations require all utility lines be placed underground in street rights of way or dedicated easements. *See* NEW-Ex. 19, at 81 and at 128.



Eversource would have voluntarily buried 60 miles of Northern Pass transmission lines; the additional cost of line burial to ratepayers is minimal but would have enormous mitigating effects; and Eversource can readily acquire the right to bury the line in the Frizzell property.<sup>163</sup> Eversource should be ordered to negotiate with affected property owners to acquire the right to bury the transmission line in the locations where Newington requests burial. Eversource should also be ordered to exercise its eminent domain authority under RSA 371:1 to acquire burial rights in the event it cannot obtain them voluntarily.

**2. The provisions of Newington’s MOU and Amendment regarding construction and blasting should be included as Certificate Conditions.**

The Memorandum of Understanding (“MOU”) between Newington and Eversource and the Addendum thereto, both express Newington’s and the Applicant’s desires that if a certificate is granted in this docket, the terms of the MOU and Addendum should be included as certificate conditions.<sup>164</sup>

**3. Property value guarantee.**

Given that the Project has the potential to adversely impact property values,<sup>165</sup> and given that Eversource was willing to provide a property value guarantee in the Northern Pass proceeding,<sup>166</sup> it would be reasonable for the SEC to order the Applicant to provide the same type of guarantee in this proceeding.

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<sup>163</sup> Tr. 10/25/18, Afternoon Session, at 77 (Frizzell).

<sup>164</sup> *Attachment DJH-1/Supplemental (MOU), NEW-Ex. 2-1, at 1 and Attachment DJH-2/Supplemental (Addendum to MOU), NEW-Ex. 2-2, at 1.*

<sup>165</sup> *The Wall Street Journal: The Electrifying Factor Affecting Your Property’s Value*, NEW-Ex. 15.

<sup>166</sup> Tr. 8/29/18, Morning Session, at 62 (Quinlan).

**4. The conditions listed in Site 301.17 should be included in the certificate in order to meet the objectives of RSA 162-H:**

(a) A requirement that the certificate holder promptly notify the committee of any proposed or actual change in the ownership or ownership structure of the holder or its affiliated entities and request approval of the committee of such change;

(b) A requirement that the certificate holder promptly notify the committee of any proposed or actual material change in the location, configuration, design, specifications, construction, operation, or equipment components of the energy facility subject to the certificate and request approval of the committee of such change;

(c) A requirement that the certificate holder continue consultations with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency, and comply with any agreement or memorandum of understanding entered into with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency;

(d) Delegation to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy facility subject to the certificate and to ensure that related terms and conditions of the certificate are met;

(e) Delegation to the administrator or another state agency or official of the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within the certificate and with respect to any permit, license, or approval issued by a state agency having permitting or other regulatory authority;

(f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission

pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;

(g) A requirement that the energy facility be sited subject to setbacks or operate with designated safety zones in order to avoid, mitigate, or minimize potential adverse effects on public health and safety;

(h) Other conditions necessary to ensure construction and operation of the energy facility subject to the certificate in conformance with the specifications of the application; and

(i) Any other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

In addition to the above conditions listed in Site 301.17, Newington requests that the Subcommittee also require that the Applicant provide notice to Newington and the other parties to this docket contemporaneously with notice to the SEC described in condition (b) above, and require the Applicant to consult and work with Newington prior to making any changes in route alignment pursuant to condition (f) above.

**5. The Subcommittee should require the Applicant to comply with RSA 4:40 and obtain permission from Governor and Council for laying cable and concrete mattresses under and on the shorelines of Little Bay.**

The authorities cited in CLF Exhibit 23 and the rationale expressed therein clearly support the position that the Applicant must obtain an easement from the Governor and Executive Council and the Long Range Planning and Utilization Committee prior to drilling below tidal waters such as those of Little Bay which are held by the state in trust for the public. Such permission must also be obtained for the installation of concrete mattresses, as such installation will permanently impact and interfere with the public's use and enjoyment of Little

Bay's shoreline.<sup>167</sup> Accordingly, the SEC must impose this requirement upon the Applicant. Given that Little Bay is a precious natural resource, if the Subcommittee has any question regarding this legal issue, it should seek an opinion from the Attorney General's Office prior to issuing a certificate for the Project.

**6. The Subcommittee should require the Applicant to Inform the Public Utilities Commission of its Intent to Use Concrete Mattresses in Little Bay.**

For the reasons discussed in Durham/UNH's brief, the Applicant should be required to submit information to the New Hampshire Public Utilities Commission ("PUC") regarding the installation of concrete mattresses along the shores of Little Bay prior to the issuance of any certificate. This critical information was not supplied by the Applicant to the PUC when the Applicant sought a license from the PUC to cross Little Bay and when it represented to the PUC that the Project would not substantially affect the public's rights in Little Bay.<sup>168</sup> This omission constitutes a "material misrepresentation" within the meaning of RSA 162-H:12, II which could lead to suspension of a certificate. In these circumstances, it is reasonable that the Subcommittee require the Applicant to supply the PUC with information about the concrete mattresses before issuing a certificate.

Respectfully submitted,  
THE TOWN OF NEWINGTON  
By and through its attorneys:



Susan S. Geiger, Esq. (NH Bar # 925)  
Orr & Reno, P.A.  
45 South Main Street  
Concord, NH 03302-3550  
(603) 223-9154  
[sgeiger@orr-reno.com](mailto:sgeiger@orr-reno.com)

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<sup>167</sup> Tr. 10/26/18, Afternoon Session, at 131 -132; and at 144 (Miller).

<sup>168</sup> *Order Nisi Granting License (PUC Order No. 25,998)*, App Ex 154, at 5.



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John J. Ratigan, Esq. (NH Bar #4849)  
Donahue, Tucker & Ciandella, PLLC  
225 Water Street  
Exeter, NH 03833  
(603) 778-0686  
[jratigan@dtclawyers.com](mailto:jratigan@dtclawyers.com)



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Elizabeth A. Boepple, Esq. (NH Bar# 20218)  
BCM Environmental & Land Law, PLLC  
3 Maple Street  
Concord, NH 03301  
(603) 369-6305  
[boepple@nhlandlaw.com](mailto:boepple@nhlandlaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2018 a copy of the foregoing Post-Hearing Brief was sent by electronic mail to persons named on the Service List of this Docket.



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Susan S. Geiger