

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy
("Eversource") for a Certificate of Site and Facility for the Construction of a New 115 kV
Transmission Line from Madbury Substation to Portsmouth Substation

COUNSEL FOR THE PUBLIC'S POST-HEARING BRIEF

Christopher G. Aslin, Esq. (N.H. Bar No. 18285)
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679
christopher.aslin@doj.nh.gov

November 15, 2018

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE STANDARD OF REVIEW FOR ISSUANCE OF A CERTIFICATE OF SITE AND FACILITY AND APPLICABLE BURDEN OF PROOF.....	3
	A. PREVIOUS DECISIONS BY THE SEC ARE NOT BINDING.	6
	B. THE SUBCOMMITTEE’S REVIEW MUST CONSIDER AND WEIGH PUBLIC COMMENTS AND REPORTS SUBMITTED TO THE SEC.	7
III.	SPECIFIC FINDINGS.....	8
	A. FINANCIAL, TECHNICAL, AND MANAGERIAL CAPABILITY.	8
	B. EFFECTS ON THE ORDERLY DEVELOPMENT OF THE REGION.....	10
	1. The Extent to Which the Siting, Construction, and Operation of the Proposed Facility Will Affect Land Use, Employment, and the Economy of the Region.	11
	a. Effects on Land Use.....	12
	b. The Effects of the Project on the Economy of the Region.	15
	(1) The Effect of the Project on Tax Revenue and In-State Economic Activity.	15
	(2) The Effect of the Project on Real Estate Values.....	16
	(a) Dr. Chalmers’ Opinion Relies on an Overly Simplistic and Inadequately Verified Visibility Analysis	18
	(b) The Applicant’s Agreed-Upon Dispute Resolution Process Mitigates the Potential Adverse Effect of the Project on Property Values.	19
	(3) The Effect of the Project on Tourism and Recreation.	20
	(4) The Effect on Community Services and Infrastructure.....	21
	c. The Effects on Employment in the Region.....	22
	2. The Provisions of, and Financial Assurances for, the Proposed Decommissioning Plan for the Proposed Facility.....	23

3.	The Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies.....	25
a.	Municipal and Regional Planning Commissions.....	26
4.	Summary of Orderly Development of the Region.....	28
C.	EFFECTS ON AESTHETICS, HISTORIC SITES, AIR AND WATER QUALITY, THE NATURAL ENVIRONMENT, AND PUBLIC HEALTH AND SAFETY.....	30
1.	Effects on Aesthetics.....	31
a.	Mr. Raphael’s Methodology Failed to Identify or Assess All Scenic Resources Potentially Impacted by the Project.....	32
b.	Mr. Raphael Failed to Assess the Aesthetic Impact of the Project on All Historic Sites with Scenic Quality.....	35
c.	Mr. Raphael’s Assessment of Aesthetic Impacts to Little Bay Was Significantly Flawed.....	36
d.	Counsel for the Public’s Aesthetics Expert, Michael Lawrence, Found Areas Where the Project Would Cause Adverse Impacts If Not Mitigated.....	37
e.	The Applicant’s Mitigation Commitment Alleviates the Impact of the Project on the Viewing Public.....	39
2.	Effects on Historic Sites.....	41
a.	The Subcommittee Must Conduct an Independent Review Beyond the Section 106 Review Conducted by NHDHR.....	41
b.	Inventory of Historic Sites and Effects Assessment.....	43
(1)	Definition and Capture of Historic Sites for Further Review.....	43
(a)	Ms. Widell’s Definition of Historic Resources Was Too Narrow.....	44
(b)	Ms. Widell’s Area of Potential Effect Was Too Narrow.....	47
(c)	Ms. Widell’s Background Research on Historical Resources Was Limited.....	50
(d)	Incomplete Capture of Historic Sites for Further Review Compromises the Subcommittee’s Ability to Assess the Actual Impacts of the Project.....	50
(2)	Analysis of Project Effects on Historic Sites.....	51

c.	The Number and Significance of Any Adversely Affected Historic Sites and Archeological Resources, Taking into Consideration the Size, Scale, and Nature of the Proposed Facility.	52
d.	The Extent, Nature and Duration of the Potential Adverse Effects on Historic Sites and Archeological Resources.....	53
e.	Findings and Determinations by NHDHR and USACE of the Proposed Facility's Effects on Historic Sites As Determined Under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9.....	53
f.	The Effectiveness of the Measures Proposed by the Applicants to Avoid, Minimize, or Mitigate Unreasonable Adverse Effects on Historic Sites and Archaeological Resources, and the Extent to Which Such Measures Represent Best Practical Measures.	54
g.	Identification and Effects on Archeological Resources.....	55
h.	Finding of No Unreasonable Adverse Effect.....	56
(1)	The Applicant's Expert's Conclusion of No Unreasonable Adverse Effect Was Flawed.....	56
(2)	Counsel for the Public's Expert on Aboveground Historic Resources Found the Proposed Design of the Project Would Have an Unreasonable Adverse Effect on Historic Sites.	57
3.	Effects on Air Quality, Water Quality, and the Natural Environment.....	59
a.	Effects on Air Quality.....	60
b.	Effects on Water Quality	60
(1)	Effects on Wetlands and Streams	61
(2)	Effects on Little Bay	62
(a)	Alternative Methods - Horizontal Directional Drilling.....	62
(b)	Impacts and Risks of the Jet Plow Process.....	64
(c)	Environmental Effects of Concrete Mattresses	66
c.	Effects on the Natural Environment	67
4.	Effects on Public Health and Safety.	69

a.	Potential Public Health Effects of Electromagnetic Fields Generated by the Proposed Facility.	70
D.	PUBLIC INTEREST.	72
1.	Issues That Should Inform the Subcommittee’s Comprehensive Analysis Pursuant to RSA 162-H:16, IV(e).....	72
2.	The Legal Standard.	74
a.	The Plain Meaning of RSA 162-H Requires a Balance Between Potential Impacts and Benefits of Proposed Projects as Part of the Public Interest Finding.	74
b.	Balancing Benefits and Impacts When Determining the Public Interest is Consistent with New Hampshire Case Law.	78
3.	Potential Benefits and Adverse Impacts.	80
a.	Site 301.16 (a) the Welfare of the Population; (c) the Location and Growth of Industry; and (d) the Overall Economic Growth of the State (Economic Benefits).....	80
b.	Site 301.16 (b) Private Property.....	81
c.	Site 301.16(e) Environment of the State, (h) Air and Water Quality, and (i) the Use of Natural Resources.	82
d.	Site 301.16(f) Historic Sites and (g) Aesthetics.....	82
e.	Site 301.16 (j) Public Health and Safety.....	83
4.	Balancing Significant Impact and Benefits of the Project.	84
IV.	ADDITIONAL ISSUES IDENTIFIED BY COUNSEL FOR THE PUBLIC FOR THE SUBCOMMITTEE’S CONSIDERATION.	85
A.	WHETHER THE APPLICANT SHOULD BE REQUIRED TO OBTAIN APPROVALS FROM TOWN GOVERNING BODIES FOR USE OF THE RIGHT OF WAY IN LOCALLY MAINTAINED ROADS PURSUANT TO RSA 231:160.	85
1.	The Relevant Statutes.	85
2.	The Subcommittee Must Determine Whether RSA 162-H Supplants RSA 231:160-161 to Grant Applicant’s Request.....	87
3.	Counsel for the Public Recommends the Subcommittee Defer to the Local Authorities With Respect to Local Roads and Delegate Monitoring Responsibility to Those Same Entities.	89

B. THE EXTENT OF THE SUBCOMMITTEE'S DELEGATION AUTHORITY.90

1. The Subcommittee Cannot Delegate Statutory Findings to Another State Agency. 90

2. Delegation Authority Under RSA 162-H:4 Is Expressly Limited. 90

C. THE SUBCOMMITTEE HAS AUTHORITY TO GRANT REASONABLE CONDITIONS ON ITS ISSUANCE OF THE CERTIFICATE.92

V. CONCLUSION.....94

Counsel for the Public, by his attorneys, the Office of the Attorney General, hereby submits this post-hearing brief pursuant to the October 31, 2018 Order on Exhibits and Schedule for Final Briefs.

I. INTRODUCTION

On April 12, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource” or the “Applicant”), submitted an Application for a Certificate of Site and Facility (the “Application”) to the New Hampshire Site Evaluation Committee (the “Subcommittee” or “SEC”) to construct a new 12.9 mile 115 kV transmission line to run from the Madbury Substation in the Town of Madbury, through the Town of Durham, under Little Bay, through the Town of Newington, and to the Portsmouth Substation in the City of Portsmouth (the “Project”).

Pursuant to RSA 162-H:9, I, Counsel for the Public “shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.” Counsel for the Public’s role in this proceeding, consistent with its statutory authority, has been to investigate the Project, the information contained in the Application, the pre-filed testimony and other evidence presented by the Applicant and intervenors in order to develop a full record and a complete understanding of the benefits and impacts of the Project for the Subcommittee’s review. Pursuant to the authority granted in RSA 162-H:10, V, Counsel for the Public retained expert consultants to “conduct such reasonable studies and investigations as [he] deem[ed] necessary or appropriate to carry out the purposes of this chapter ...,” and presented the findings of the expert witnesses to the Subcommittee through pre-filed and live testimony.

In this post-hearing brief, Counsel for the Public summarizes the key evidence presented in pre-filed testimony and during the 15-day evidentiary hearings, and provides analysis of the legal issues the Subcommittee must decide in determining whether to issue a certificate of site and facility (“Certificate”) to the Applicant. The brief is organized to follow the statutory findings required under RSA 162-H:16, IV and the specific considerations set forth in the SEC rules. Section II sets forth the applicable standard of review and burdens of proof. Section III addresses each of the required substantive findings for issuance of a certificate and presents the evidence relevant to each issue. In Section IV, Counsel for the Public provides analysis of additional legal issues necessary to a decision being rendered by the Subcommittee.

II. THE STANDARD OF REVIEW FOR ISSUANCE OF A CERTIFICATE OF SITE AND FACILITY AND APPLICABLE BURDEN OF PROOF.

The siting of energy facilities and the Subcommittee's review of the Applicant's request for a certificate of site and facility is governed by RSA Ch. 162-H. Through the statute the General Court has explicitly recognized that "the selection of sites for energy facilities may have significant impacts on and benefits to" (1) the welfare of the population, (2) private property, (3) the location and growth of industry, (4) the overall economic growth of the state, (5) the environment of the state, (6) historic sites, (7) aesthetics, (8) air and water quality, (9) the use of natural resources, and (10) public health and safety. RSA 162-H:1. In express recognition of the potential impacts on and benefits to those concerns, the General Court found that it is in the public interest to:

- maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire;
- avoid undue delay in the construction of new energy facilities;
- provide full and timely consideration of environmental consequences;
- require all entities planning to construct facilities in the state to provide full and complete disclosure to the public of such plans; and
- ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.

RSA 162-H:1. Accordingly, the Subcommittee's review of the Application occurs within the context of, and is guided by, the public interest findings and the statutory purpose set forth above.

RSA 162-H:16 establishes the findings that must be made for the Subcommittee to issue a certificate. RSA 162-H:16, IV specifically requires that "[a]fter due consideration of all

relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.” This general standard ties back to the statement of purpose and the enumerated areas of potential impacts and benefits set forth in RSA 162-H:1, requiring a consideration of those issues before a siting decision can be made.

In addition to the overarching general standard for issuance of the certificate, RSA 162-H:16, IV further sets forth four specific findings that the Subcommittee is required to make,¹ “[i]n order to issue a certificate.” Those four specific findings are:

- 1) That 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.
- 2) That the site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
- 3) That 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.
- 4) That issuance of a certificate will serve the public interest.

RSA 162-H:16, IV. Each of these four specific requirements has numerous subparts, with additional specific requirements that must be met and which will be discussed in further detail below. *See infra* Part III.

In addition to the statutory requirements, the Subcommittee’s review is governed and guided by the SEC’s administrative rules adopted pursuant to RSA 162-H:10, VI. The SEC rules

¹ See RSA 162-H:16, IV (“In order to issue a certificate, the committee *shall* find that . . .”) (emphasis added); *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008).

provide additional detail to the statutory requirements and dictate what materials must be submitted with an application as well as what information and issues the Subcommittee must consider in making each of the required findings under RSA 162-H:16, IV. Following comprehensive amendments to RSA Ch. 162-H by the General Court in 2014, a significant revision to the SEC Site rules was completed in December 2015. Only three energy facilities have been reviewed by the SEC under the amended rules—the Antrim Wind facility, the Merrimack Valley Reliability Project, and the Northern Pass Transmission project. Accordingly, many provisions of the amended rules have not been fully interpreted by a subcommittee of the SEC.

With respect to all of the requirements and findings that must be met under the statute or the Site rules, the burden is on the Applicant to make the necessary showings for a certificate to issue. *See* Site 202.19(b) (“An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.”); *see also* Site 202.19(a) (“The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.”).

Finally, as part of its review, the Subcommittee is also authorized to consider reasonable terms and conditions that may be included in any certificate issued as may be deemed necessary by the Subcommittee. RSA 162-H:4, I(b); RSA 162-H:16, VI & VII. Site 301.17 further enumerates certain conditions that the Subcommittee must consider when determining whether a certificate should issue. In addition, any certificate issued is required to incorporate “such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority, under state or federal law, to regulate any aspect of the

construction or operation of the proposed facility.” The requirement to include state agency conditions is subject, however, to the Subcommittee’s authority to deviate from state agency conditions by following the procedure set forth at RSA 162-H:7-a, I(e).

A. PREVIOUS DECISIONS BY THE SEC ARE NOT BINDING.

Although the decisions in the *Antrim Wind* case,² the *Merrimack Valley Reliability Project* case,³ and the *Northern Pass Transmission* case⁴ were the first SEC decisions to apply the newly-adopted rules, pursuant to RSA 162-H:10, III, prior SEC decisions are not binding on subsequent SEC decisions.⁵ Indeed, each Subcommittee is comprised of different members considering the unique facts and circumstances of the proceeding before it – an inherently fact-specific determination that does not lend itself to precedential effect. Even in the more constrained context of administrative agency law, while “a court may require that an agency acknowledge and explain its departure from precedent ... an agency will be permitted to ‘refuse to follow its earlier decision so long as its action is not palpably arbitrary or unreasonable, and does not obviously discriminate against a litigant.’”⁶ In the federal context, the First Circuit Court of Appeals has explained that “[t]he agency’s actions are presumed to be valid,” and so

² *Re: Application of Antrim Wind Energy, LLC for a Certificate of Site and Facility*, Docket No. 2015-02.

³ *Re: Joint Application of New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility*, Docket No. 2015-05.

⁴ *Re: Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility*, Docket No. 2015-06.

⁵ RSA 162-H:10, III (“The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.”). *See also Re: Gas Service, Inc.*, 70 NH PUC 339 (1985) (“The Commission is not bound to prior decisions if provided with persuasive arguments and actual results which demonstrate that benefits can be gained by not reaffirming said decisions.”); *Re: Manchester Gas Company*, 70 NH PUC 334 (1985) (same).

⁶ *Re: Application of Stare Decisis by Administrative Agency*, Opinion No. 84-172-I (N.H.A.G. 1984), available at 1984 WL 248883 (quoting 2 F.E. Cooper, *State Administrative Law*, 532 (1st ed. 1965)).

the Secretary's decision to depart from prior precedent need only be 'supported by a rational basis.'" ⁷ That "rational basis" is met where the agency simply explains why the prior decision is distinguishable. ⁸

While the Subcommittee may consider, as appropriate, the findings and rulings in the *Antrim Wind*, *MVRP*, and *Northern Pass* decisions, these prior projects each differ significantly from the present Project and the Subcommittee in this docket should not be restricted to the decisions that the *Antrim Wind*, *MVRP*, or *Northern Pass* subcommittees made in the context of those projects.

B. THE SUBCOMMITTEE'S REVIEW MUST CONSIDER AND WEIGH PUBLIC COMMENTS AND REPORTS SUBMITTED TO THE SEC.

Pursuant to RSA 162-H:10, III, the Subcommittee "shall consider and weigh all evidence presented at public hearings and shall consider and weigh written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding." The Subcommittee must take the public comments into consideration as it reviews each of the specific required findings for issuance of a certificate. Counsel for the Public will discuss public comments in the section addressing the public interest finding.

⁷ *Int'l Jr. College of Bus. And Tech., Inc. v. Duncan*, 802 F.3d 99, 113 (1st Cir. 2015) (quoting *P.R. Tel. Co. v. Telecomm. Regulatory Bd. of P.R.*, 665 F.3d 309, 319 (1st Cir. 2011) and *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 117 (1st Cir. 2009)).

⁸ *Int'l Jr. College of Bus. And Tech., Inc.*, 802 F.3d at 113 ("Even if we assume, however, that the Secretary owed International an explanation, International's claim would still fail because the Secretary more than adequately explained why International's case was distinguishable from Gibson's.").

III. SPECIFIC FINDINGS.

A. FINANCIAL, TECHNICAL, AND MANAGERIAL CAPABILITY.

“[I]n order to issue a certificate, the committee [must] find that ... [t]he 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.” RSA 162-H:16-IV(a). Site 301.04 lists a variety of documents and information that bear on this finding, each of which must be provided by the Applicant as part of the Applicant’s application. Counsel for the Public has reviewed those submissions, as well as the relevant testimony and other records provided during the course of these proceedings. Counsel for the Public believes that there is sufficient evidence for the Subcommittee to find that the Applicant has met its burden of demonstrating that it 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.” RSA 162-H:16, IV(a).⁹

Notwithstanding the evidence of the Applicant’s ability to manage large, complex construction projects, including evidence that the Applicant has contracted with experienced contractors and engineering consultants, there is always a risk that the Applicant or its contractors will fail to implement or follow Best Management Practices during construction or maintenance work.¹⁰ If the Subcommittee issues a certificate to the Applicant, the Subcommittee should include conditions to ensure the implementation of appropriate Best Management

⁹ See also Applicant’s Exhibit 184 – Stipulated Facts and Requested Findings of Applicant and Counsel for the Public, Findings 5-10 (hereinafter “Stipulated Findings”).

¹⁰ Tr. Day 15, PM at 181-182 (Fitch).

Part III-A
Financial, Technical and Managerial Capability

Practices and sufficient independent monitoring with strong enforcement powers to ensure compliance and to deter noncompliance.¹¹

¹¹ *See, e.g.*, App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval, Conditions 1-6, 8 (hereinafter “Proposed Conditions”).

B. EFFECTS ON THE ORDERLY DEVELOPMENT OF THE REGION.

“[I]n order to issue a certificate, the committee [must] find that ... [t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of (1) municipal and regional planning commissions and (2) municipal governing bodies.” RSA 162-H:16, IV(b).

To enable that determination to be made, Site 301.09 required the Applicant to include in its Application “information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places, and the applicant’s estimate of the effects of the construction and operation of the facility on:

- (a) Land use in the region, including the following:
 - (1) A description of the prevailing land uses in the affected communities; and
 - (2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;

- (b) The economy of the region, including an assessment of:
 - (1) The economic effect of the facility on the affected communities;
 - (2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;
 - (3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;
 - (4) The effect of the proposed facility on real estate values in the affected communities;
 - (5) The effect of the proposed facility on tourism and recreation; and
 - (6) The effect of the proposed facility on community services and infrastructure;

- (c) Employment in the region, including an assessment of:
- (1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and
 - (2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

Site 301.09. The Subcommittee is required to assess that information “[i]n determining whether a proposed energy facility will unduly interfere with the orderly development of the region.”

Site 301.15. Specifically, the Subcommittee is tasked with considering:

- (a) The extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;
- (b) The provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and
- (c) The views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.

Site 301.15. These issues are discussed in further detail below in the same order they are set forth in Site 301.15.

- 1. The Extent to Which the Siting, Construction, and Operation of the Proposed Facility Will Affect Land Use, Employment, and the Economy of the Region.**

To determine whether a proposed energy facility will unduly interfere with the orderly development of the region, the Subcommittee must consider numerous subparts in line with the application requirements of Site 301.09.

a. Effects on Land Use.

The Applicants provided testimony from Robert Varney of Normandeau Associates to address the effects of the Project on land use in the region.¹² Mr. Varney produced hundreds of pages of reports summarizing land uses in the area of the Project and municipal and regional planning documents. However, his opinion on land use boils down to a relatively simple proposition:

It will be an electric line corridor before and an electric line corridor afterwards. The structures will be taller. There will be incremental height difference. But the use, the land use itself is staying the same.¹³

Accordingly, because most of the Project would be built in an existing electric transmission line corridor and thus there will be no change in the existing land use, Mr. Varney opined that there would be no undue interference with the orderly development of the region.¹⁴

Mr. Varney's conclusion was based on his conception that an energy facility would not be "inconsistent with [prevailing] land uses"¹⁵ unless the facility prevents the continuation of adjacent land uses.¹⁶ In addition, Mr. Varney testified that he did not consider any diminution in the quality of adjacent land uses unless the diminution actually prevents the continued adjacent

¹² App. Ex. 13, Pre-filed Testimony of Robert Varney ("Varney Direct Testimony"); App. Ex. 63, Application Appendix 43, *Review of Land Use and Local and Regional Planning, The Seacoast Reliability Project*, April 2016 ("Land Use Report"); App. Ex. 81, Amended Pre-filed Testimony of Robert Varney ("Amended Varney Testimony"); App. Ex. 146, Supplemental Testimony of Robert Varney ("Supp. Varney Testimony"), including Attachment A, *Review of Land Use and Local and Regional Planning, The Seacoast Reliability Project*, July 2018 Update ("Revised Land Use Report"), and Attachment C, *Review of Master Plans in Abutting Municipalities – Seacoast Reliability Project*, July 27, 2018.

¹³ Tr. Day 8, AM at 49-50 (Varney).

¹⁴ App. Ex. 13, Varney Direct Testimony at 9-10.

¹⁵ Site 301.09(a)(2).

¹⁶ Tr. Day 8, AM at 81 (Varney); App. Ex. 146, Attachment A, Revised Land Use Report at 35.

land use from continuing.¹⁷ Mr. Varney specifically denied that the change in scope of the use of the right-of-way (“ROW”) from a distribution line on 40-foot wooden structures to a transmission line on 75-100 foot steel monopoles and H-frame structures would prevent adjacent land uses.¹⁸ And while Mr. Varney acknowledged that the Project could have some impacts on adjacent land uses during construction, he opined that such impacts were temporary and inconsequential.¹⁹

To bolster his position, Mr. Varney attempted to analogize the scope and impact of the Project with that of the Merrimack Valley Reliability Project.²⁰ On cross-examination, however, Mr. Varney admitted that there were substantial differences between the two projects, including the significantly larger existing ROW for the MVRP,²¹ the larger number and size of the existing transmission lines for the MVRP,²² and the substantially larger increase in height of the structures for the SRP as compared to the MVRP.²³ Mr. Varney also included statements in his report regarding the consistency of the Project with designated scenic roads, emphasizing the limitations of NH RSA 238:22, II.²⁴ However, RSA 238:22, II applies only to “the expansion of

¹⁷ Tr. Day 8, AM at 81-82 (Varney). Mr. Varney qualified his position, stating that an effect of an energy facility that violated applicable standards (such as noise ordinances or air emission standards) would be inconsistent with adjacent land uses by preventing their continuation. Tr. Day 8, AM at 82-84 (Varney).

¹⁸ Tr. Day 8, AM at 50 (Varney).

¹⁹ Tr. Day 8, AM at 96-97 (Varney).

²⁰ App. Ex. 146, Supp. Varney Testimony at 15-16 (noting that “SRP is similar to the Merrimack Valley Reliability Project (‘MVRP’),” that the structures of both projects were “similar in size,” and that “the MVRP is more visible to the travelling public than SRP . . .”).

²¹ Tr. Day 8, AM at 112-113 (Varney).

²² Tr. Day 8, AM at 110-112 (Varney).

²³ Tr. Day 8, AM at 113-116 (Varney).

²⁴ App. Ex. 146, Attachment A, Revised Land Use Report at 17 & 44 (citing RSA 238:22, II in bold print).

existing public utility lines” (emphasis added), and Mr. Varney admitted that the SRP does not yet exist.²⁵

Notwithstanding Mr. Varney’s narrow conception of when an energy facility may be inconsistent with adjacent land uses, the Subcommittee must consider whether the change in scope (size and structure type) and use (from distribution to transmission) would make the Project inconsistent with adjacent land uses. Site 301.09(a)(2). Mr. Varney’s testimony and report offer limited analysis of this issue beyond his conclusory opinion that siting within an existing electric corridor will not prevent adjacent land uses, leaving it up to the Subcommittee to reach its own conclusion based on the evidence presented. The Subcommittee should look beyond the narrow conception of the type of use to the actual change caused by the Project to assess whether it is consistent or inconsistent with prevailing land uses.

²⁵ Tr. Day 8, AM at 97-98 (Varney).

b. The Effects of the Project on the Economy of the Region.

The second factor in considering whether the Project will unduly interfere with the orderly development of the region is the effect of the Project on the economy of the region. Pursuant to SEC rules, this factor includes several subparts: (1) the economic effect on affected communities; (2) the economic effect on in-state economic activity; (3) the effect on State, regional, and municipal tax revenues; (4) the effect on real estate values; (5) the effect on tourism and recreation; and (6) the effect on community services and infrastructure. In the following sections, Counsel for the Public addresses these subparts of the economic impacts of the Project.

(1) The Effect of the Project on Tax Revenue and In-State Economic Activity.

For subparts (1), (2), and (3), the Applicant provided the testimony and analysis of Lisa K. Shapiro, Ph.D.²⁶ Dr. Shapiro's testimony provided an analysis of the economic effect of the Project on in-state economic activity and an estimate of the first-year tax payments by the Applicant if SRP is constructed.

With regard to tax revenue, Dr. Shapiro's analysis shows a projected combined local, county and state property tax payment in the Project's first year of operation in the range of \$1.6

²⁶ App. Ex. 9, Pre-filed Testimony of Lisa K. Shapiro, Ph.D. ("Shapiro Direct Testimony"); App. Ex. 64, Application Appendix 44, State and Local Tax Revenue Data; App. Ex. 83, Amended Testimony of Lisa K. Shapiro, Ph.D. ("Amended Shapiro Testimony"); App. Ex. 101, Application Appendix 44a, State and Local Tax Revenue Data.

– \$2.2 million.²⁷ Dr. Shapiro testified that tax payments are expected to gradually decrease over time, but could not provide an estimate of how much or how fast.²⁸

Dr. Shapiro utilized the REMI model to analyze in-state economic activity based on the estimated \$84 million cost of constructing the Project.²⁹ The estimated cost of the Project was the only input to the REMI model,³⁰ yielding a projected cumulative increase during construction in the state’s economic output of \$13.9 – \$14 million and Gross State Product of \$17.3 – \$19.9 million.³¹ Similarly, with only positive inputs, the REMI model estimated cumulative increases in personal income for New Hampshire workers of \$8.1-\$12.3 million.³² Dr. Shapiro, however, did not take into account potential business losses or the increase in electricity rates for New Hampshire electric ratepayers.³³

(2) The Effect of the Project on Real Estate Values.

Based on a series of case studies, Applicant’s expert, Dr. James Chalmers, concluded that, “there is a limited number of properties with characteristics identified by the case study research that indicate the potential for adverse market value effects due to the HVTL [high-voltage transmission lines] should they be put on the market.”³⁴ Dr. Chalmers opined that, “when any of the case study properties combined a house that was within 100 feet of the ROW

²⁷ App. Ex. 83, Amended Shapiro Testimony at 9.

²⁸ Tr. Day 6, PM at 69-71 (Shapiro).

²⁹ App. Ex. 83, Amended Shapiro Testimony at 5.

³⁰ Tr. Day 6, PM at 21 (Shapiro).

³¹ App. Ex. 83, Amended Shapiro Testimony at 8.

³² *Id.* at 9.

³³ Tr. Day 6, PM at 22-23, 58-59.

³⁴ App. Ex. 147, Supplemental Testimony of James Chalmers, Ph.D. (“Supp. Chalmers Testimony”) at 23:8-10.

boundary, a lot that was encumbered by the ROW easement and had either partial or clear visibility of HVTL structures from outside the house, the likelihood of a price effect went up to about 50%.”³⁵ Dr. Chalmers concluded that only four properties along the 12.9-mile proposed route will experience small market value effects.³⁶ Dr. Chalmers’ opinion that that the Project will not have a negative impact on the value of properties that are encumbered by the Project, that abut the Project, or that are non-abutters with significant views of the Project is, however, only a generalized opinion not adequately supported and based on a subjective, coarse, and inaccurate methodology.

Despite the inclusion of three separate types of studies in his report and testimony, Dr. Chalmers testified that his opinion is based primarily on his case studies and did not rely on either his subdivision studies or market activity research.³⁷ Yet even the case studies generated a wide range of outcomes, with price effects reported from 1.6% to 17.9%. The variability in results may reflect the highly subjective nature of the retrospective appraisal approach utilized by Dr. Chalmers and the high variability in the specific circumstances of the properties studied. Moreover, Dr. Chalmers admitted that the case studies allow only “useful generalizations about groups of properties that have certain characteristics,” and do not represent a prediction of “what will happen to individual properties.”³⁸ Accordingly, Dr. Chalmers’ conclusions are at best

³⁵ App. Ex. 147, Supp. Chalmers Testimony at 2:23-3:1.

³⁶ Tr. Day 8, PM at 124-125 (Chalmers).

³⁷ Tr. Day 7, AM at 97-98 (Chalmers). Dr. Chalmers admitted that the market activity research had inadequate sample sizes to be informative, and that his subdivision studies provided only “generalizations.” *Id.*

³⁸ Tr. Day 7, AM at 115 (Chalmers).

rough approximations and may not predict the actual effects of the Property on property values along the ROW.

(a) Dr. Chalmers' Opinion Relies on an Overly Simplistic and Inadequately Verified Visibility Analysis

Central to Dr. Chalmers' analysis was a measure of the visibility of HVTL from encumbered properties. However, visibility was not determined using an objective metric, such as viewshed modeling.³⁹ Rather, it was the subjective impression of Dr. Chalmers using aerial mapping, the project maps, and personal observations from public roads and, in some cases, from the ROW.⁴⁰

Dr. Chalmers used three categories to rate visibility: "clearly visible," "partially visible," and "not visible," and then evaluated each property as to whether this visibility would change with construction of the Project.⁴¹ Yet, the category of "partially visible" was so broad as to not recognize significant changes in visibility from increased number and size of structures or from vegetative clearing.⁴² For example, Dr. Chalmers admitted that a change in visibility from one partially obscured structure to three or four partially obscured structures would be reported as no change in visibility in his analysis.⁴³ Moreover, in making these very subjective determinations, Dr. Chalmers was not able to access the properties to actually see the views he was opining on.⁴⁴ Dr. Chalmers' haphazard assessment of visibility resulted in clear errors, such as his assessment

³⁹ Tr. Day 7, AM at 126 (Chalmers).

⁴⁰ Tr. Day 7, AM at 86-89 (Chalmers).

⁴¹ Tr. Day 7, AM at 98-99 (Chalmers).

⁴² Tr. Day 7, PM at 65-67 (Chalmers).

⁴³ Tr. Day 7, AM at 99-100 (Chalmers).

⁴⁴ Tr. Day 7, AM at 86-89 (Chalmers).

that there would be no visibility from homes on Fairchild Drive, while a photosimulation created by the Applicant's aesthetic expert showed partial visibility of one structure from Fairchild Drive.⁴⁵ In light of the subjective and unreliable nature of Dr. Chalmers' assessment of anticipated change in visibility, his conclusion that only 4 properties along the Project corridor would have an impact to their value is not reliable.

(b) The Applicant's Agreed-Upon Dispute Resolution Process Mitigates the Potential Adverse Effect of the Project on Property Values.

To mitigate against potential property value impacts, the Applicant has agreed to a mitigation and dispute resolution process that includes adjudication of diminution in value claims by an independent claims administrator. Proposed Conditions # 20-21 set out a procedure whereby affected property owners can obtain an independent review of claims of a loss in property value arising from the construction or operation of the Project.⁴⁶ If imposed by the Subcommittee as a condition of a Certificate, the Dispute Resolution Process would provide an unbiased avenue for affected property owners to be compensated for any diminution in value that could be adequately demonstrated through an appraisal or other evidence acceptable to the Administrator. Thus, to the extent that Dr. Chalmers' testimony under-estimates the extent of property value losses, the Applicant would be obligated to pay such losses if awarded by the claims administrator.

⁴⁵ Tr. Day 7, AM at 127-129 (Chalmers); App. Ex. 52, Exhibit 14 (Fairchild Drive photo simulation).

⁴⁶ App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval at 3-4.

(3) The Effect of the Project on Tourism and Recreation.

The Applicant submitted the testimony of Mr. Varney with respect to the effect of the Project on tourism and recreation.⁴⁷ In Mr. Varney's initial testimony, tourism was touched on only in passing, with no supporting analysis or report provided.⁴⁸ Subsequently, as an attachment to his supplemental testimony, Mr. Varney provided a more lengthy review of tourism in the Project area in his Tourism Report.⁴⁹ While Mr. Varney provides a significant amount of detail about area businesses and tourist attractions, his analysis is based solely on his personal opinion, with no supporting analysis. The Tourism Report is replete with conclusory statements such as "[t]he Project . . . will not affect the number of patrons or travelers at the Dairy Bar/Amtrak Station."⁵⁰ On cross-examination, Mr. Varney admitted that he conducted no surveys or other analysis to support his conclusions, other than considering parking and physical accessibility to local businesses.⁵¹ Further, to the extent Mr. Varney considered the impact of changed visibility of the Project, he relied on Mr. Raphael's visual assessment.⁵² However, Mr. Raphael's analysis focused on scenic resources and did not include an analysis of the Project's visibility from local businesses and tourist attractions.

During the proceedings, several witnesses testified to the importance of the scenic and historic character of the Project area and of the importance of recreational opportunities to the

⁴⁷ App. Ex. 13, Varney Direct Testimony; App. Ex. 81, Amended Varney Testimony; App. Ex. 146, Supp. Varney Testimony, including Attachment B, *Review of Tourism and Regional Recreation, The Seacoast Reliability Project*, July 2018 ("Tourism Report").

⁴⁸ App. Ex. 13, Varney Direct Testimony at 6-7.

⁴⁹ App. Ex. 146, Attachment B, Tourism Report.

⁵⁰ App. Ex. 146, Attachment B, Tourism Report at 8.

⁵¹ Tr. Day 8, AM at 106-107 (Varney).

⁵² Tr. Day 8, AM at 103-104 (Varney).

region.⁵³ While Mr. Varney expressed an opinion that the Project will have no effect on recreational activities or tourism-based businesses, his analysis was not based on any particular expertise nor was it rooted in a sound analytical methodology. The Subcommittee is essentially left with the personal opinion of Mr. Varney to assist its review of the evidence in determining the effect of the Project on tourism and recreation.

(4) The Effect on Community Services and Infrastructure

The final subpart of the effects on the economy factor is the effects of the Project on community services and infrastructure. Site 301.09(b)(6). Mr. Varney addresses this factor briefly in his testimony and report, concluding that “the Project will not place any new or significant demands on local or regional services, facilities or infrastructure.”⁵⁴ To the extent that construction could impact local infrastructure, the Applicant has entered into memoranda of understanding with the towns of Newington and Durham,⁵⁵ as well as with the University of New Hampshire.⁵⁶ If compliance with the MOUs is made a condition of a Certificate, construction impacts to local infrastructure should be adequately addressed.⁵⁷

⁵³ See, e.g. TD-UNH Ex. 1, Pre-filed Testimony of Todd Selig at 4; Tr. Day 15, PM at 144-145 (V. Miller); Tr. Day 15, PM at 164-165 (Heald); Tr. Day 15, PM at 131-132, 246-247 (R. Miller).

⁵⁴ App. Ex. 146, Attachment A, Revised Land Use Report at 62; App. Ex. 13, Varney Direct Testimony at 9.

⁵⁵ App. Ex. 168 (Newington MOU); App. Ex. 270 (Durham MOU).

⁵⁶ App. Ex. 267 (UNH MOU).

⁵⁷ See App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval, proposed conditions 9-12.

c. The Effects on Employment in the Region

The Applicant provided the testimony of Dr. Shapiro to address the effect of the Project on employment in the region.⁵⁸ Using the REMI model, Dr. Shapiro estimated direct construction jobs ranging from 24-52 in number.⁵⁹ In addition, the REMI model estimates between 54 and 97 direct, induced, and indirect jobs during the peak construction year.⁶⁰ Job creation is positive, but fairly modest for this Project and last only for the construction period of the Project. No long-term jobs are predicted. In addition, to the extent Dr. Shapiro's inputs to the REMI model exaggerate the amount of net economic input from the Project, the job estimates will similarly over estimate actual job creation.

⁵⁸ App. Ex. 83, Amended Shapiro Testimony at 7-8.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

2. The Provisions of, and Financial Assurances for, the Proposed Decommissioning Plan for the Proposed Facility.

RSA 162-H:7, V(g) requires an application for a certificate of site and facility to “[d]escribe in reasonable detail the elements of and financial assurances for a facility decommissioning plan.” Site 301.08(d)(2) requires each application for an energy facility to provide “[a] facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates,” and further requires that “the decommissioning plan shall include each of the following:

- (a) A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;
- (b) The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;
- (c) All transformers shall be transported off-site; and
- (d) All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place”

Applicant sought a partial waiver of Site 301.08(d)(2).⁶¹ The Subcommittee granted the waiver with respect to the requirement that a decommissioning plan be included with the application, but reserved judgment on the substance of the issues until deliberations.⁶²

⁶¹ Applicant’s Motion to Partially Waive Site 301.08(c)(2), dated April 12, 2016. Note that the reference to Site 301.08(c)(2) was correct at the time the motion was filed, but the rule was subsequently re-codified as Site 301.08(d)(2).

⁶² *Order on Applicant’s Motion for Partial Waiver of the Requirements of N.H. Code Admin. Rules, Site 301.08(d)(2)*, dated December 29, 2016.

As set forth in the Partial Objection of Counsel for the Public to Applicant's Motion to partially Waive Site 301.08(c)(2),⁶³ Counsel for the Public objected to the Applicant's request for waiver of subparts (a), (c), and (d) of Site 301.08(d)(2), but agreed that due to the status of the SRP as a reliability project, the costs for which are governed by a Federal Energy Regulatory Commission (FERC) tariff, waiver of Site 301.08(d)(2)(b) was appropriate.⁶⁴ To address the special status of the SRP as a reliability project with a long life-span, and in recognition of the changed circumstances that may exist in the future when decommissioning may be contemplated, Counsel for the Public and the Applicant agreed on proposed conditions that would require Eversource to report periodically to the SEC on the continued need for the Project, and to decommission the Project in accordance with then-applicable rules when the Project ceases to be used and useful.⁶⁵

⁶³ Partial Objection of Counsel for the Public to Applicant's Motion to partially Waive Site 301.08(c)(2), dated October 20, 2016.

⁶⁴ *Id.*

⁶⁵ App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval, proposed conditions 36-37.

3. The Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies.

Pursuant to Site 301.15, “[i]n determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider: . . . (c) The views of municipal; and regional planning commissions and municipal governing bodies regarding the proposed facility.” In furtherance of these considerations, Site 301.09 requires the application to include “the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places”

With regard to the latter requirement that the application contain “master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places,” there was some dispute as to whether that information was submitted by the Applicant.⁶⁶ While Mr. Varney alleged that his Land Use Report contained links to the relevant master plans and zoning ordinances, the links did not appear in the original Land Use Report or the Revised Land Use Report.⁶⁷ By the close of the adjudicatory hearings a second revised report with links to the relevant master plans and zoning ordinances was submitted to the Subcommittee for consideration,⁶⁸ but the lack of clear inclusion in the application and during the proceedings caused considerable confusion. Counsel for the Public suggests that in the

⁶⁶ Tr. Day 8, AM at 21-27, 147-149 (Varney).

⁶⁷ *Id.*; App. Ex. 63, Application Appendix 43, Original Land Use Report; App. Ex. 146, Attachment A, Application Appendix 43a, Revised Land Use Report.

⁶⁸ App. Ex. 226, Second Revised Land Use Report, Application Appendix 43b

future applications should not be accepted as complete without confirmation that the application is in compliance with Site 301.09 by including all required master plans and zoning ordinances.

a. Municipal and Regional Planning Commissions.

The Subcommittee received testimony from representatives of two of the four host municipalities: the Town of Durham through Town Administrator Todd Selig,⁶⁹ and the Town of Newington through Planning Board Chair Denis Hebert.⁷⁰ Both towns presented sections of their master plans that relate to the Project,⁷¹ and both argued that the Project as designed was inconsistent with the towns' planning principles.⁷² The Town of Newington argues that the Project was in direct violation of the Newington Master Plan's utility section that requires burial of all new electric transmission lines in the town's residential and historic districts.⁷³ Newington also pointed out inconsistencies between the Project and the town's policy principles set forth in the master plan regarding the impact to Little Bay, conservation areas, wetlands, historic resources, stone walls, and scenic roads.⁷⁴

⁶⁹ TD-UNH Ex. 1, Pre-filed Direct Testimony of Todd Selig ("Selig Direct Testimony").

⁷⁰ New. Ex. 1, Pre-filed Direct Testimony of Denis J. Hebert ("Hebert Direct Testimony"); New. Ex. 2, Supplemental Testimony of Denis J. Hebert ("Supp. Hebert Testimony").

⁷¹ New Ex. 19, Newington Master Plan; TD-UNH Ex. 24, Excerpts from Durham Master Plan; TD-UNH 30, Durham Master Plan. Both towns also submitted their zoning ordinances into the record. *See* New. Ex. 17, Town of Newington Zoning Ordinance; TD-UNH Ex. 31, Durham Zoning Ordinance.

⁷² New. Ex. 1, Hebert Direct Testimony at 11; New. Ex. 2, Supp. Hebert Testimony at 6-9; Tr. Day 10, PM at 149 (Selig).

⁷³ New. Ex. 1-4, Newington Master Plan *Utility Easements* section; New. Ex. 2-3, Newington Master Plan *Future Land Use* section on electrical transmission lines. While the Applicant raised concerns that the Utility Easements section of the Master Plan was adopted after the Town was notified of the Project, the timing and motivation of the revision to the Master Plan is inconsequential. The Master Plan revision was made before the application was filed, and reflects the long-standing views of the municipality to protect its remaining residential district from additional electrical transmission infrastructure.

⁷⁴ New. Ex. 1, Hebert Direct Testimony at 7-10; New. Ex. 2, Supp. Hebert Testimony at 7-9.

Overall, the two intervening towns disagreed with Mr. Varney's view that the Project would not unduly interfere with land use or in the orderly development of the region because the Project will be constructed in an existing ROW.⁷⁵ The Subcommittee must take these municipal views into consideration when making its decision on orderly development.

⁷⁵ New. Ex. 1, Hebert Direct Testimony at 14; TD-UNH Ex. 1, Selig Direct Testimony at 2-3.

4. Summary of Orderly Development of the Region.

The Applicant submitted the testimony of Mr. Varney to opine on the Projects overall effect on the orderly development of the region. Mr. Varney offered expert opinion testimony on two subparts of orderly development – land use planning and tourism, though as stated above his conclusions were largely conclusory based on his personal assessment without objective analysis. Mr. Varney relied on other experts for the Applicants to analyze the other subparts of orderly development: (1) the economic effect on affected communities, (2) in-state economics, (3) state and local taxes, (4) real estate values, and (5) impacts to jobs.⁷⁶ He did not perform a separate analysis or provide an expert opinion on those subjects but instead accepted the conclusions from other experts.⁷⁷ Mr. Varney is not himself qualified to offer opinions on these issues.

In summary, the evidence on land use was mixed, with Mr. Varney concluding the Project would not be inconsistent with adjacent land uses, and the town intervenors pointing to inconsistencies between the Project and municipal planning principles. With regard to effects on the economy, the Project is anticipated to increase tax revenue for the four host municipalities and to increase New Hampshire's GSP temporarily during construction. Similarly, a modest number of jobs will be created for the few years of construction only. The Applicant's evidence that the Project will not impact property values is not persuasive, as there is likely to be a negative impact on more than the four individual properties identified by Dr. Chalmers. Two of

⁷⁶ Tr. Day 8, AM at 76-77 (Varney).

⁷⁷ Tr. Day 8, AM at 76-77 (Varney).

the host municipalities oppose the Project as designed and believe that it is inconsistent with their master plans and will unduly interfere with the orderly development of the region.

C. EFFECTS ON AESTHETICS, HISTORIC SITES, AIR AND WATER QUALITY, THE NATURAL ENVIRONMENT, AND PUBLIC HEALTH AND SAFETY.

The third specific requirement of RSA 162-H:16, IV that must be met before the Subcommittee can issue a certificate is that the Subcommittee must find that “[t]he 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.” RSA 162-H:16, IV(c). There are numerous components and sub-components to this specific finding. The below sub-sections highlight those areas of relevance for the Subcommittee’s determination that Counsel for the Public asserts deserve the Subcommittee’s particular focus and consideration.

1. Effects on Aesthetics.

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on aesthetics.” Site 301.05 provides further details, setting forth specific “application requirements.” Among these requirements, Site 301.05 requires the Applicant to provide a “[v]isual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.” Site 301.05(a).

The required visual impact assessment must also contain specific components, including but not limited to “[a]n identification of all scenic resources within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible.” Site 301.05(b)(5). The required visual impact assessment must also contain “[a] characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low,” based on consideration of eight enumerated factors:

- a. The expectations of the typical viewer;
- b. The effect on future use and enjoyment of the scenic resource;
- c. The extent of the proposed facility, including all structures and disturbed areas, visible from the scenic resource;
- d. The distance of the proposed facility from the scenic resource;
- e. The horizontal breadth or visual arc of the visible elements of the proposed facility;
- f. The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;
- g. The duration and direction of the typical view of elements of the proposed facility; and

- h. The presence of intervening topography between the scenic resource and elements of the proposed facility.

Site 301.05(b)(6). Finally, the required visual impact assessment must include a “description of the measures planned to avoid, minimize, or mitigate potential adverse effects of the proposed facility . . . , and the alternative measures considered but rejected by the applicant.” Site 301.05(b)(10).

In assessing the effect on aesthetics, the SEC rules require that the committee consider:

- (1) The existing character of the area of potential visual impact;
- (2) The significance of affected scenic resources and their distance from the proposed facility;
- (3) The extent, nature, and duration of public uses of affected scenic resources;
- (4) The scope and scale of the change in the landscape visible from affected scenic resources;
- (5) The evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24;
- (6) The extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity; and
- (7) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures.

Site 301.14(a).

a. Mr. Raphael’s Methodology Failed to Identify or Assess All Scenic Resources Potentially Impacted by the Project.

The Applicant retained David Raphael of LandWorks as its aesthetics expert and submitted his pre-filed testimony.⁷⁸ Mr. Raphael conducted a visual assessment of the Project’s

⁷⁸ App. Ex. 17, Pre-filed Direct Testimony of David Raphael (“Raphael Direct Testimony”); App. Ex. 75, Amended Direct Testimony of David Raphael (“Amended Raphael Testimony”); App. Ex. 142, Supplemental Testimony of David Raphael (“Supp. Raphael Testimony”).

effects on aesthetics, and supplemented the report with several addenda throughout the course of proceedings.⁷⁹ As part of his visual assessments, Mr. Raphael created a series of photo simulations, which were submitted by the Applicant as separate exhibits for convenience.⁸⁰

Mr. Raphael developed his own methodology for his visual assessment (“VA”) based on a conglomeration of federal and state methodologies and his personal experience.⁸¹ Mr. Raphael purported to have identified all scenic resources within a 3-mile radius of the Project as well as those scenic resources within a 10-mile radius that were within the area of potential visual impact based on Mr. Raphael’s viewshed model.⁸² The viewshed model utilized a normalized forty-foot opaque tree cover for forested areas, thus limiting the potential visibility of the Project and the extent of scenic resources assessed.⁸³ Moreover, Mr. Raphael’s interpretation of what constitutes a “scenic resource” was overly restrictive, for example, failing to account for publicly funded trails that have primary purpose other than scenic views and arbitrarily eliminating snowmobile and ATV trails from consideration as scenic resources.⁸⁴

⁷⁹ App. Ex. 51, Visual Assessment for the Seacoast Reliability Project (April 2016); App. Ex. 95, Addendum to the LandWorks Visual Assessment for the Seacoast Reliability Project (October 7, 2016); App. Ex. 142, Attachment C, Addendum to the Visual Assessment addressing concrete mattresses (July 2017); App. Ex. 142, Attachment D, Addendum to the Visual Assessment addressing Nimble Hill Road (June 29, 2018).

⁸⁰ App. Ex. 52, Visual Assessment Maps for the Seacoast Reliability Project; App. Ex. 96, Visual Assessment Photo simulations; App. Ex. 142, Attachments A and B, additional photo simulations.

⁸¹ Tr. Day 9, PM at 71 (Raphael).

⁸² Tr. Day 9, PM at 71-72 (Raphael).

⁸³ Tr. Day 9, PM at 82-84 (Raphael). Mr. Raphael’s report did not include a bare earth viewshed model, nor did his testimony or report indicate that he used such a model for identification of scenic resource as required by Site 301.05(b)(1). *See also* Site 301.05(b)(6)(h) (requiring consideration of the intervening topography, but not vegetation, when assessing the potential visual impacts of proposed facilities). Nonetheless, the Applicant introduced a bare earth viewshed map showing significantly greater potential visibility on the final day of hearings without any explanation of whether or how it was used by Mr. Raphael. App Ex. 266; Tr. Day 15, PM at 75-76 (O’Donnell).

⁸⁴ Tr. Day 9, PM at 78-82 (Raphael).

Using his vegetated viewshed model, Mr. Raphael eliminated 151 of the 181 scenic resources he identified based on apparent lack of visibility.⁸⁵ For the remaining 30 identified scenic resources, Mr. Raphael employed a complex, multi-layered methodology to further filter out scenic resources from additional review.⁸⁶ Mr. Raphael's methodology deployed a gauntlet of three separate layers of analysis, each with numerous sub-parts and diverse scoring regimes.⁸⁷ Only an exceptional scenic resource could successfully emerge from Mr. Raphael's regime. Indeed, Mr. Raphael filtered out 21 scenic resources in the first phase of analysis, including Little Bay and the Newington Center Historic District.⁸⁸ Only a single scenic resource, Little Bay Road, made it to the third level of review, but it too was later eliminated from final review of adverse effects.⁸⁹

Rather than provide a detailed assessment of the potential impacts of the Project on scenic resources using the factors set forth in Site 301.05(b)(6), Mr. Raphael's methodology appears to be designed to eliminate resources from further analysis. In fact, only one scenic resource, Little Bay Road, was even assessed for the expectations of the typical viewer (Site 301.05(b)(6)(a)), the effect on future use and enjoyment of the scenic resource (Site 301.05(b)(6)(b)), or the duration and direction of the typical view of elements of the proposed facility (Site 301.05(b)(6)(h)), as those components are part of the third phase of Mr. Raphael's

⁸⁵ Tr. Day 9, PM at 84 (Raphael).

⁸⁶ Tr. Day 9, PM at 84-85 (Raphael).

⁸⁷ Tr. Day 9, PM at 84-93 (Raphael); App. Ex. 52, LandWorks Visual Assessment at 15-30.

⁸⁸ Tr. Day 9, PM at 85-87 (Raphael). Little Bay received ratings of "moderate" for both cultural designation and scenic quality, and the Newington Center Historic District received ratings of "high" for cultural designation, but "low" for scenic quality resulting in both of these resources receiving a "moderate" rating for visual sensitivity. Only resources rated "moderate-high" or "high" moved on to the next phase of Mr. Raphael's review.

⁸⁹ Tr. Day 9, PM at 90-91 (Raphael); App. Ex. 95, Addendum to LandWorks Visual Assessment at 8.

methodology. Moreover, even where scenic resources made it to the third phase of review for the effect on viewer, Mr. Raphael's methodology is designed in such a way that practically no scenic resources in New Hampshire could ever achieve the necessary rating of "medium-high" or "high" to be considered for significant adverse effect.⁹⁰

b. Mr. Raphael Failed to Assess the Aesthetic Impact of the Project on All Historic Sites with Scenic Quality.

In order to satisfy the requirement that the VA identify and assess "all scenic resources within the area of potential visual impact," Site 301.05(b)(5), Mr. Raphael was required to include consideration of "historic sites that possess a scenic quality." Site 102.45(e). As described in greater detail below, the universe of historic sites considered by the Applicant was limited to only National Registry listed or eligible sites. *See, infra*, Part III-C-2. However, even within this overly-narrow interpretation of "historic sites," Mr. Raphael did not identify or assess any historic sites identified as eligible for listing in the National Registry.⁹¹ While the Applicant later attempted to demonstrate that eligible resources had been considered, the evidence presented was inconclusive at best and actually showed that any effort to review eligible resources was conducted long after Mr. Raphael's analysis and opinion had been rendered.

For example, the Applicant pointed to a July 6, 2017 e-mail from Mark Doperalski asking NHDHR for a list of eligible resources as evidence that Mr. Raphael considered eligible

⁹⁰ Tr. Day 9, PM at 92-99 (Raphael) (discussing the mutually exclusive nature of the remoteness and extent of use subcategories of the Effect on Viewer rating).

⁹¹ App. Ex. 51, LandWorks Visual Assessment at 9 ("For purposes of the VA, *only listed* historic sites that have setting included as a feature of their significance are reviewed in this analysis.") (emphasis added); Tr. Day 9, PM at 74 (Raphael) ("Q. But with regard to historic sites, in terms of your analysis, is it correct that you only looked at historic sites that were listed in the national registry of the state registry of historic places? A. Yes.").

resources.⁹² However, the e-mail provided no evidence that the list of eligible resources was provided to Mr. Raphael or assessed by him or anyone else on behalf of the Applicant. Further, the July 6, 2017 request for eligible resources came approximately 6 weeks after Mr. Raphael's technical session and just a few weeks before the Applicant responded to technical session requests.⁹³ Interestingly, the Applicant's response to the technical session request did not include the list of eligible resource, but only the list of 138 *listed* resources reviewed.⁹⁴ Taken together, there is no evidence in the record that Mr. Raphael either identified or assessed eligible historic sites that possess a scenic quality within the area of potential visual impact.⁹⁵

c. Mr. Raphael's Assessment of Aesthetic Impacts to Little Bay Was Significantly Flawed.

In his initial VA, Little Bay was rated "moderate" for visual sensitivity and, therefore, did not be considered in the later phases of analysis under Mr. Raphael's methodology.⁹⁶ Nonetheless, Mr. Raphael provided a further assessment of Little Bay as a "sensitive resource" at the end of the VA.⁹⁷ The analysis assumed a viewer in the middle of the channel approximately ½ mile from either shore.⁹⁸ As a predictable result of Mr. Raphael's selection of the center of the channel as the observation point, the visual impact of the Project was deemed minimal. Mr. Raphael discounted recreational use of Little Bay in the tidal flats along shore, despite testimony

⁹² App. Ex. 265; Tr. Day 15, AM at 90-91 (O'Donnell).

⁹³ Tr. Day 15, PM at 78-80 (O'Donnell).

⁹⁴ CFP Ex. 11, Applicant's Responses to June 12 and 15 Technical Session Requests, Response 3-2 at 134 (CFP000728-CFP000734); Tr. Day 15, PM at 77-78.

⁹⁵ Counsel for the Public will address additional information submitted by the Applicant pursuant to Applicant's Motion to Reopen the Record in a supplement to this Post-Hearing Brief pursuant to the Presiding Officer's November 14, 2018 Order.

⁹⁶ Tr. Day 9, PM at 87 (Raphael); App. Ex. 51, LandWorks Visual Assessment at 63-64.

⁹⁷ App. Ex. 51, LandWorks Visual Assessment at 97, 100-102.

⁹⁸ App. Ex. 51, LandWorks Visual Assessment at 100.

from intervenors who use Little Bay for recreation in the vicinity of the proposed cable crossing.⁹⁹

In addition, Mr. Raphael's analysis did not initially address proposed concrete mattresses.¹⁰⁰ When later addressed in an addendum, Mr. Raphael again chose a distant view to assess and represent the visual impacts of the concrete mattresses on the Durham shore.¹⁰¹ Moreover, Mr. Raphael's photo simulations of the concrete mattresses did not accurately show the low tide condition, instead using a base photo taken well after low tide and then adjusting the image to "approximate" mean low low water ("MLLW") tide conditions.¹⁰² In these ways, Mr. Raphael under-represented the visual impact of the concrete mattresses.

d. Counsel for the Public's Aesthetics Expert, Michael Lawrence, Found Areas Where the Project Would Cause Adverse Impacts If Not Mitigated.

Counsel for the Public retained Michael Lawrence of Michael Lawrence Associates to review the LandWorks Visual Assessment and submitted his testimony and report.¹⁰³ Mr. Lawrence opined that he generally agreed with Mr. Raphael's finding that "the Project will not be widely visible due to the topography and forest cover across much of the Project route," but

⁹⁹ Tr. Day 15, PM at 144-145 (V. Miller); Tr. Day 15, PM at 164-165 (Heald); Tr. Day 15, PM at 131-132, 246-247 (R. Miller).

¹⁰⁰ App. Ex. 51, LandWorks Visual Assessment at 100-102 (neither mentioning nor depicting concrete mattresses).

¹⁰¹ App. Ex. 146, Attachment A, Revised Photo simulation of Little Bay Durham Shore; App. Ex. 146, Attachment C, Addendum to LandWorks Visual Assessment.

¹⁰² App. Ex. 186, Revised Photo Simulation of Little bay Durham Shore (Aug. 2018) at 4, 8 (The "Note" at page 8 states "Approximate low tide water level (MLLW*) is simulated in this photograph. *MLLW=Mean Lower Low Water"); CFP Ex. 17 (showing exposed mudflats at low tide in contrast to the photo simulation); Tr. Day 9, PM at 4-8 (Raphael) (establishing photo taken at 1:27 pm, almost two hours after low tide at 11:37 am).

¹⁰³ CFP Ex. 4, Pre-filed Testimony of Michael C. Lawrence ("Lawrence Direct Testimony"); CFP Ex. 4-a, Lawrence Aesthetic Analysis Review.

found that, as proposed, “the Project will be highly visible at road crossings and across portions of the University of New Hampshire (UNH) campus.”¹⁰⁴ Mr. Lawrence concluded that at thirteen identified locations “the combination of significantly taller structures (double or triple the height of existing structures) and substantial tree removal to the full width of the right-of-way (ROW) will dramatically change the visual character and decrease the aesthetic quality,” resulting in “significant adverse visual impacts” at those locations.¹⁰⁵ Mr. Lawrence further noted that “reasonable mitigation measures could be employed to reduce visual impacts.”¹⁰⁶

In his supplemental testimony, Mr. Raphael criticized Mr. Lawrence’s thirteen locations of concern, asserting that only eleven qualified as scenic resources under the SEC rules.¹⁰⁷ However, on cross-examination Mr. Raphael admitted that four of the eleven locations were part of the UNH campus, which Mr. Raphael also identified as scenic resource, and one of the eleven, the Mills Scenic Byway (Rte 108), was also listed by Mr. Raphael as a scenic resource.¹⁰⁸ Two other locations – the Mill Road crossing and the Route 4 crossing could qualify as scenic resources under the “scenic drives and rides” category in Site 102.45(c). For those locations that do not technically qualify as scenic resources, as areas “that receive[] regular public use and from which the proposed facility would be prominently visible” they are “key observation points” as defined in Site 102.25.

On the whole, Mr. Lawrence took a more holistic approach to assessing the visual impacts of the Project, and identified the areas that the Project will have the greatest visual

¹⁰⁴ CFP Ex. 4, Lawrence Direct Testimony at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ App. Ex. 142, Supp. Raphael Testimony at 5.

¹⁰⁸ Tr. Day 9, PM at 107-108 (Raphael).

impact and where mitigation efforts would be most impactful. Following a commitment by the Applicant to offer mitigation at the 13 locations identified by Mr. Lawrence, and with landowner approval to implement mitigation measures, Mr. Lawrence agreed that the Project would not have an unreasonable adverse effect at those locations.¹⁰⁹

e. The Applicant's Mitigation Commitment Alleviates the Impact of the Project on the Viewing Public.

The rules require the Applicant to provide a “description of the measures planned to avoid, minimize, or mitigate potential adverse effects” of the Project,¹¹⁰ and Site 301.14(a)(7) requires the Subcommittee to consider the effectiveness of Applicants’ mitigation plans. Mr. Raphael outlined the mitigation measures employed by the Applicant in the LandWorks VA and his pre-filed testimony,¹¹¹ and later expressed the Applicant’s commitment to provide and implement planting plans at the thirteen locations of concern identified by Mr. Lawrence.¹¹² However, these planting plans have not been approved by landowners or submitted into the record at this time. Thus, the Subcommittee will have to decide whether it can assess “the effectiveness” of the proposed mitigation. Moreover, the Subcommittee should not delegate the responsibility for approving specific mitigation techniques to a different agency that does not have the statutory mandate to avoid unreasonably adverse effects.¹¹³

¹⁰⁹ App. Ex. 194, Amended Stipulated Facts and Requested Findings of Applicant and Counsel for the Public at 1-2 (revised Stipulation # 12).

¹¹⁰ Site 301.05(b)(10).

¹¹¹ App. Ex. 51, LandWorks Visual Assessment at 104-105; App. Ex. 17 at 12-14.

¹¹² App. Ex. 142, Supp. Raphael Testimony at 4.

¹¹³ See, *infra* Part IV.B.

As set forth in the joint proposed conditions, Eversource has agreed to provide proposed planting plans to Mr. Lawrence and consider his comments.¹¹⁴ Ultimately, however, only the Committee or its designee has the authority to approve or disapprove proposed planting plans as consistent or inconsistent with any finding by the Subcommittee on no unreasonably adverse effects to aesthetics. In the event the Subcommittee issues a Certificate, the Subcommittee should consider what level of oversight of the visual mitigation is necessary and how such oversight should be implemented.

¹¹⁴ App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval at 6 (proposed conditions 32 and 33).

2. Effects on Historic Sites.

Pursuant to RSA 162-H:16, IV(c), in order to issue a certificate the Subcommittee must find that “[t]he site and facility will not have an unreasonable adverse effect on ... historic sites.” In making that determination, the SEC’s rules specify that “the committee shall consider:”

- (1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;
- (2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;
- (3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;
- (4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and
- (5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

Site 301.14(b). As stated above, the Subcommittee’s review is limited to the information contained within the record and the Applicant bears the burden of proof to demonstrate the Project meets the statutory standard.

a. **The Subcommittee Must Conduct an Independent Review Beyond the Section 106 Review Conducted by NHDHR.**

As a starting point, an important distinction must be made between the statutory standard of review the Subcommittee must apply under RSA 162-H:16, IV(c) and the review conducted by the New Hampshire Division of Historic Resources (“NHDHR”) or the U.S. Army Corps of Engineers (“USACE”) as part of the federal Section 106 process. While the analysis of NHDHR and USACE through the Section 106 process is highly relevant, neither entity is responsible for,

nor has either entity made a finding, determining whether or not the Project meets the statutory requirement of RSA 162-H:16, IV(c). That responsibility rests squarely on the SEC and cannot be delegated or deferred to another state or federal agency. *See, e.g.*, RSA 162-H:4, III-b (“The committee may not delegate its authority or duties, except as provided under this chapter.”). Accordingly, it is statutorily required that the Subcommittee make an independent assessment of the record evidence, which includes but is not limited to the findings of NHDHR and USACE with regard to the Section 106 process, to determine whether the Applicant has met its burden to prove that the Project satisfies the statutory requirements for a certificate of site and facility under RSA Ch. 162-H.

The importance of the distinction between the reviews conducted by NHDHR/USACE and the SEC’s required review is exemplified by the different definitions and standards that apply in the two processes. For example, in the Section 106 process the review is limited to historic resources that are either listed in the National Register of Historic Places, or eligible for listing. By contrast, as set out in more detail below, the SEC has established a broader definition of “historic sites” that must be reviewed for potential effects. Similarly, the standard of review in the Section 106 process looks only to adverse effects at the resource level and does not include the SEC’s more particular “unreasonable adverse effect” at either the resource or project level. Moreover, the Section 106 process is not a permitting process, but rather a consultative process between state and federal agencies, consulting parties, and the Applicant. Because the scope of review does not align between the SEC rules and the Section 106 process, the SEC is obligated to look beyond the findings of NHDHR and USACE in order to assess whether the Applicant has demonstrated that the Project “will not have an unreasonable adverse effect on ... historic sites.” RSA 162-H:16, IV(c).

b. Inventory of Historic Sites and Effects Assessment.

The first area of consideration required by Site 301.14(b)(1) is “[a]ll of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources.” This encompasses two primary issues: (1) identification of potentially affected historic sites; and (2) assessment of the potential adverse effects on identified historic sites and resources. In both categories the Applicant’s analysis was under inclusive.

(1) Definition and Capture of Historic Sites for Further Review.

As a starting point, the SEC rules define “historic sites” as meaning:

“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, archaeology 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 C.F.R. §800.16(1)(1).”

Site 102.23. By its plain language, the rule contemplates a broad definition of “historic sites,” by incorporating the expansive definition of “historic property” in RSA 227-C:1, VI.¹¹⁵ While the rule goes on to clarify in the second sentence that the specific category of resources that are “included in, or eligible for inclusion in, the National Register of Historic Places” falls within the

¹¹⁵ As demonstrated by the Division of Historic Resources’ (“DHR”) own rules, the definition of “historic property” in RSA 227-C:1, VI includes much more than only those resources that are listed or eligible for listing in the National Register. Cul-H 102.15 explains that DHR interprets “historic property” to include, but not necessarily be limited to:

“properties identified as historic properties by the state of New Hampshire pursuant to RSA 227-C; properties designated as historically significant by a local governing body, local legislative body, local land use board, or other legally established municipal board or commission such as a heritage commission”

Cul-H 102.15.

broad definition of RSA 227-C:1, VI, use of the word “includes” demonstrates the SEC’s intent that National Register properties are a subset of the broader category of “historic property.”¹¹⁶ Indeed, the very purpose of the SEC review is to “maintain a balance among ... potential significant impacts [including impacts to historic sites] and benefits” of the proposed Project. In order for the Subcommittee to perform this function, a full accounting of the potential impacts of the Project is necessary. The defined term “historic sites” should, therefore, be interpreted broadly to allow for a complete capture of historic sites for further review of the Project’s effects thereon. Contrary to the statutory purpose, however, the Applicants’ historic resources experts adopted narrow interpretations and employed a methodology that limited the number of historic sites identified prior to an analysis of effects.

(a) Ms. Widell’s Definition of Historic Resources Was Too Narrow.

Applicants retained Cherilyn Widell of Widell Preservation Resources, LLC as an expert witness, and submitted her pre-filed testimony in support of the Application.¹¹⁷ Contrary to the broadly-worded definition of historic sites adopted by the SEC, Ms. Widell limited the types of resources she considered to only those that were either on the National Register for Historic Places or determined to be eligible for listing on the National Register.¹¹⁸ While National Register listed or eligible resources are a specific category of “historic sites” called out in the

¹¹⁶ See *Wright v. Loon Mountain Recreation Corp.*, 140 N.H. 166, 172 (1995) (“The primary relevant definition of th[e] word [includes] is ‘to place, list, or rate as a part or component of a whole or a larger group, class, or aggregate.’ *Webster’s Third New International Dictionary* 1143 (unabridged ed. 1961) (*Webster’s*).”) (Thayer, J., dissenting).

¹¹⁷ App. Ex. 19, Pre-filed Direct Testimony of Cherilyn Widell (“Widell Direct Testimony”); App. Ex. 76, Amended Testimony of Cherilyn Widell (“Amended Widell Testimony”); App. Ex. 143, Supplemental Testimony of Cherilyn Widell (“Supp. Widell Testimony”).

¹¹⁸ Tr. Day 10, PM at 8-9 (Widell).

rules, there is no plausible interpretation of Site 102.23 that would limit “historic sites” to only this subcategory.

Ms. Widell makes two arguments in support of her narrow reading of Site 102.23, neither of which are convincing. First, Ms. Widell notes that “the SEC definition in Site 102.23 provides only a single example of what a historic site is, referring specifically to those properties that are included, or eligible for inclusion, in the National Register.”¹¹⁹ However, Ms. Widell fails to explain how inclusion of only one example should be interpreted to exclude all other categories, or why the word “includes” should be read out of the rule. Indeed, the rule itself defines “historic sites” as including “any . . . object, district, area or site *that is significant in the history . . . or culture* of this state, its communities, or the nation,” which necessarily includes more than only National Register listed or eligible resources. Site 102.23 (emphasis added).

Ms. Widell’s second argument is that “National Register eligibility (or listing) is also DHRs sole focus in its review of SEC applications.”¹²⁰ In support of this assertion, Ms. Widell points to a January 15, 2016 NHDHR Policy Memorandum.¹²¹ However, rather than render an interpretation of the SEC’s definition of “historic sites,” the Policy Memo actually addresses NHDHR’s completeness review for SEC applications. Specifically, the Policy Memo states:

In order to determine whether an application for certificate before the New Hampshire Site Evaluation Committee (SEC) *is complete*, the Division of Historical Resources (DHR) conducts a *preliminary review* of the materials to determine whether they contain sufficient material *for the DHR’s purposes under Section 106 of the National Historic Preservation Act.* . . .¹²²

¹¹⁹ App. Ex. 143, Supp. Widell Testimony at page 8, lines 17-19.

¹²⁰ App. Ex. 143, Supp. Widell Testimony at page 8, lines 19-21.

¹²¹ App. Ex. 143, Attachment D, *Policy Memorandum – Agency Review of Applications before the New Hampshire Site Evaluation Committee* (NHDHR Jan. 15, 2016) (hereafter the “Policy Memo”).

¹²² App. Ex. 143, Attachment D, Policy Memo at 1 (emphasis added).

Indeed, as with other “state agencies with permitting or other regulatory authority,” NHDHR’s role in making a completeness determination is focused on “elements required *for such agency’s permitting or other programs.*”¹²³ In the case of NHDHR, the “permitting or other programs” is the federal Section 106 process. Thus, NHDHR’s focus on resources that are National Registry eligible or listed reflects the standards and definitions of the federal Section 106 process and cannot be reasonably interpreted to reflect the SEC’s standard of review.¹²⁴ Moreover, even if NHDHR had expressed an interpretation of the SEC rules, it is the SEC, not NHDHR, that has the ultimate authority to interpret its own administrative rules. Neither of Ms. Widell’s justifications for her narrow reading of “historic sites” are persuasive.

By applying an overly narrow definition of “historic sites,” Ms. Widell failed to capture the full range of “historic sites” that may be impacted by the Project.¹²⁵ Counsel for the Public’s expert witness Patricia O’Donnell testified that Ms. Widell’s methodology demonstrated an unreasonable “bias” towards the National Register despite the broader definition of “historic sites” in Site 102.23 and “historic property” in RSA 227-C:1, VI.¹²⁶ Ms. O’Donnell further criticized Ms. Widell’s methodology as inappropriately focusing on architectural features of

¹²³ NH RSA 162-H:7-a, I(a) (emphasis added).

¹²⁴ See, e.g., App. Ex. 143, Attachment D, Policy Memo at 3 (describing NHDHR’s role in the Section 106 review process).

¹²⁵ CFP Ex. 5-a, *Assessment Report on Potential Effects to Above-Ground Historic Sites for the New Hampshire Seacoast Reliability Project*, Heritage Landscapes, LLC (“Heritage Assessment”) at 7-10 (CFP000186-CFP000189).

¹²⁶ CFP Ex. 5, Pre-filed Direct Testimony of Patricia M. O’Donnell (“O’Donnell Direct Testimony”) at 2-3 (CFP000166-CFP000167) (“[T]he Applicant’s report follows rigid adherence to National Register listing and eligibility, while the broader definition of historic sites expressed in New Hampshire legislation is ignored.”).

structures, to the exclusion of both larger areas and landscapes and smaller historic objects and features.¹²⁷

For example, Ms. Widell failed to identify historic features, such as stone walls, that contribute to the historic and cultural heritage of New Hampshire, as independent historic sites worthy of analysis.¹²⁸ Indeed, it was only at the urging of DHR and certain intervenors that Ms. Widell focused specifically on stone walls, and then only in the context of identified historic districts determined eligible for listing in the National Register.¹²⁹ Similarly, Ms. Widell failed to consider other categories of historic sites that meet the SEC's definition.¹³⁰ Taken together, Ms. Widell's identification of "historic sites" was artificially narrow and represents an incomplete capture of "all historic sites ... located within the area of potential effects ..." as required by Site 301.06(b).

(b) Ms. Widell's Area of Potential Effect Was Too Narrow.

Ms. Widell also limited the number of historic sites identified and analyzed by using an overly narrow Area of Potential Affect ("APE"). Pursuant to the SEC rules, the Applicants were required to identify "all historic sites ... located with the area of potential effects, as defined in 36 C.F.R. §800.16(d)" Site 301.06(b). 36 C.F.R. §800.16(d), in turn, defines the APE as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if such properties exist. The area of

¹²⁷ CFP Ex. 5-a, Heritage Assessment at 10 (CFP000189).

¹²⁸ CFP Ex. 6, Supplemental Testimony of Patricia M. O'Donnell ("Supp. O'Donnell Testimony") at 3 (CFP000254).

¹²⁹ App. Ex. 127 at 1-2, July 26, 2017 Memo to Nadine Miller, DHR.

¹³⁰ CFP Ex. 5-a, Heritage Assessment at 61-62 (CFP 000240-CFP000241).

potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”¹³¹

Ms. Widell applied a one-half mile APE (1/2 mile to either side of the ROW centerline) for review of indirect effects of the Project on historic sites after consultation with NHDHR in the Section 106 process.¹³² However, the SEC’s rules refer to the federal *definition* of the APE, rather than to the *APE* that is set in the federal Section 106 process. As set forth above, the SEC’s review of effects on historic sites is a separate and distinct process from the federal Section 106 process. By referencing the federal definition, as opposed to the federally determined APE in the Section 106 process, the rules contemplate a separate analysis of the appropriate APE from that performed within the Section 106 process.

Given that the SEC’s rules require a visual impact assessment for transmission line projects covering an area with a 10-mile radius to assess aesthetic effects on scenic resources,¹³³ which include “historic sites that possess a scenic quality,”¹³⁴ it is reasonable to infer that the SEC contemplated potential indirect effects on historic sites well beyond a half-mile of the Project. Where historic sites with a scenic quality within a 10-mile radius are required to be reviewed for potential visual impacts under the SEC rules, it is inappropriate to arbitrarily limit review of the Project impacts to historic sites to a one-half mile APE.

In consideration of the “scale and nature of the undertaking,” Mr. Raphael’s viewshed model, and the broader scope of review under the SEC’s rules, Ms. O’Donnell concluded that a

¹³¹ 36 C.F.R. § 800.16(d).

¹³² Tr. Day 10, PM at 5 (Widell); App. Ex. 29, Application Appendix 10, Project Area Form at 6.

¹³³ Site 301.05(b)(4)(d).

¹³⁴ Site 102.45(e).

3-mile APE would be appropriate under the federal definition.¹³⁵ By applying a restrictive half-mile APE, Ms. Widell excluded many historic sites that could potentially be adversely impacted by the Project, and thereby under-represented the true scope of potential impacts of the Project on historic sites both by type of historic site and by the geographic area considered.¹³⁶

With regard to the direct effects of the Project, Ms. Widell and the Preservation Company relied on an overly narrow *direct APE* of the 60-100 foot wide ROW corridor, further limiting their identification of historic sites potentially affected by the Project. The direct APE was established in reliance on the U.S. Army Corps of Engineers (“USACE”) determination of potential effects in the Section 106 process.¹³⁷ While construction activities for the Project will be limited to the ROW corridor and access roads, the potential for direct effects from vibration extend as far as 500 feet.¹³⁸ Indeed, Ms. Widell testified that vibration from construction activities could have direct effects on historic resources outside the ROW corridor out to 150 feet or beyond.¹³⁹ Nevertheless, Ms. Widell testified that she did not consider “whether vibration monitoring would be necessary or appropriate with regard to historic resources” for the Project.¹⁴⁰ Thus, Ms. Widell’s use of a direct APE of only 60-100 feet fails to account for potential direct vibration effects to historic sites within 150-500 feet of the ROW corridor.

¹³⁵ CFP Ex. 5-a, Heritage Assessment at 8-9 (CFP000187-CFP000188).

¹³⁶ CFP Ex. 5-a, Heritage Assessment maps (CFP000242-CFP000250).

¹³⁷ Tr. Day 10, PM at 5 (Widell); App. Ex. 29, Application Appendix 10, Project Area Form at 6.

¹³⁸ CFP Ex. 5-a, Heritage Assessment at 9 (CFP000188) (citing “Current Practices to Address Construction Vibration and Potential Effects to Historic Buildings Adjacent to Transportation Projects” prepared by Wilson Ihrig & Associates, Inc., ICF International, and Simpson, Gumpertz & Heger, Inc., September 2012).

¹³⁹ Tr. Day 10, PM at 7 (Widell).

¹⁴⁰ Tr. Day 10, PM at 7-8 (Widell). *See also* CFP Ex. 19, §3.4 (CFP001139).

(c) Ms. Widell's Background Research on Historical Resources Was Limited.

In addition to an overly restrictive methodology, the research that Ms. Widell conducted to identify historic resources was also limited and resulted in an incomplete identification of resources potentially impacted by the Project and that should have been analyzed further. Ms. Widell and the Preservation Company mainly used a windshield study and looked to Section 106 project area forms, town master plans and tax maps to identify potential historic sites.¹⁴¹ Despite the definition of “historic sites” as “any building, structure, object, district, area or site that *is significant in the history, architecture, archaeology or culture of this state, its communities, or the nation,*” Ms. Widell and the Preservation Company did not consult with local officials or historical societies.¹⁴² Indeed, it was only through the intervention and testimony of the Durham Historic Association that many historic sites were eventually assessed by Ms. Widell, such as smaller structures like historic stone walls and granite quarry features.¹⁴³ By excluding these and other categories of potential historic sites, Ms. Widell significantly under identified historic sites that have a potential to be impacted by the Project.

(d) Incomplete Capture of Historic Sites for Further Review Compromises the Subcommittee's Ability to Assess the Actual Impacts of the Project.

As with other aspects of the Project, the Applicant and their consultants have narrowly interpreted the SEC rules regarding historic sites, and utilized a methodology that inappropriately

¹⁴¹ App. Ex. 29, Appendix 10, Project Area Form at 6-7; CFP Ex. 140, Heritage Assessment at 9 (CFP005454).

¹⁴² Tr. Day 10, PM at 54-55 (Widell);

¹⁴³ App. Ex. 143, Supp. Widell Testimony, Attachment A, *Comments on Durham Historic Association (DHA) List of Resources*.

eliminated significant numbers of potential historic sites from further review. As set forth above, Ms. Widell's starting point—a universe of 197 potential historic sites—captures only those historic sites within the half-mile APE and that are listed or considered potentially eligible for listing in the National Register of Historic Places.¹⁴⁴ By contrast, Ms. O'Donnell identified a universe of over 1,132 potential historic sites, not including scenic roads, designated scenic rivers, recreational trails, or current use parcels.¹⁴⁵

After starting with an incomplete capture of potential historic sites, Ms. Widell eliminated most of the potential historic sites based on lack of visibility or integrity, and performed an effects assessment on only 10 historic sites across the entire 12.9-mile long Project.¹⁴⁶ By utilizing a methodology that produced an incomplete capture of historic sites potentially affected by the Project, and presenting effects assessments for only a fraction of the identified historic sites, the Applicant has provided the Subcommittee only a partial picture of the potential effects of the Project on historic sites, thereby compromising the Subcommittee's ability to make an informed determination of whether the Project will have an unreasonable adverse effect on historic sites pursuant to Site 301.14(b).

(2) Analysis of Project Effects on Historic Sites.

In addition to starting with a drastically reduced number of historic sites for assessment of potential effects, Ms. Widell's evaluation of adverse effects was also flawed. For the eleven historic sites that Ms. Widell evaluated for effects, she found that only two would have an

¹⁴⁴ App. Ex. 19, Widell Direct Testimony at 6; Tr. Day 10, AM at 5 (Widell).

¹⁴⁵ CFP Ex. 5-a, Heritage Assessment at 33, 39, 46, 52, 57 (CFP000212, CFP000218, CFP000225, CFP000231, CFP000236) (the total includes 912 GIS stone wall data points, which may include multiple crossings of stone walls).

¹⁴⁶ App. Ex. 143, Supp. Widell Testimony at 2-3; App. Ex. 164, Historic Properties Effects Tables.

adverse effect from the Project – the Alfred Pickering Farm and the Little Bay Underwater Cable Terminal Houses Historic District.¹⁴⁷ It was only after NHDHR’s review and concerns raised by the Durham Historic Association, that Ms. Widell conceded that two additional historic sites would have an adverse effect – the Newington & Bennett Roads Farms Historic District and the Durham Point Historic District.¹⁴⁸ Indeed, where NHDHR raised concerns specific to direct impacts to stone walls within these two historic districts, Ms. Widell’s previous assessment of effects minimized the importance of stone walls to the setting and integrity of the historic districts.¹⁴⁹ Ms. Widell’s approach consistently diluted the adverse effects to smaller features in larger historic districts even where those features contribute to the setting and character of the historic district and also qualify as “historic sites” under Site 102.23 on their own merit.

c. The Number and Significance of Any Adversely Affected Historic Sites and Archeological Resources, Taking into Consideration the Size, Scale, and Nature of the Proposed Facility.

Pursuant to Site 301.14(b)(2), the Subcommittee must consider the “number and significance” of adversely affected historic sites in the context of the “size, scale and nature” of the proposed facility. In this case the Subcommittee is hampered by Ms. Widell’s overly narrow interpretation of the SEC rules that resulted in an incomplete capture of potential historic sites. Because Ms. Widell failed to identify or assess effects for many historic sites with potential visibility of the Project, as well as the hundreds of stone walls that are in or adjacent to the

¹⁴⁷ App. Ex. 164, Historic Properties Effects Tables at 12, 44.

¹⁴⁸ App. Ex. 167, NHDHR Final Report (August 1, 2017) at 2.

¹⁴⁹ App. Ex. 164, Historic Properties Effects Tables at 21-25 (discussing impacts to stone walls in the Durham Point Historic District but concluding that the “overall integrity of setting of the large district will not be changed”), 54-58 (discussing impacts to stone walls in the Newmarket & Bennett Roads Farms Historic District but concluding that “[c]hanges to isolated stone walls will have no effect on the setting, feeling or association of the large historic district”).

project corridor, it is not possible to fully assess the number and significance of any adversely affected historic sites.¹⁵⁰

d. The Extent, Nature and Duration of the Potential Adverse Effects on Historic Sites and Archeological Resources.

Pursuant to Site 301.14(b)(3), the Subcommittee must consider the “extent, nature, and duration” of the adverse effects of the Project. Here, the proposed high-voltage transmission line is anticipated to be a permanent, or nearly permanent facility. Accordingly, the adverse effects to historic sites should be considered permanent. While some of the visual impacts may change over time with growth of vegetation, vegetative changes can also increase visibility over time due to timber harvests, disease, or other landscape changes.

e. Findings and Determinations by NHDHR and USACE of the Proposed Facility's Effects on Historic Sites As Determined Under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9.

The Section 106 process is an iterative, consultative process that has been ongoing throughout the proceedings before the SEC. NHDHR and the USACE identified adverse effects to four historic resources – the Alfred Pickering Farm, the Little Bay Underwater Cable Terminal Houses Historic District, the Durham Point Historic District, and the Newmarket & Bennett Roads Farms Historic District – and assessed appropriate mitigation efforts for those adverse effects.¹⁵¹ Specifically, the MOU contemplates that the Applicant will avoid and minimize impacts to stone walls within the affected historic districts, and will publish a booklet on the history of agriculture in Newington as mitigation for adverse effects to the Alfred Pickering

¹⁵⁰ CFP Ex. 5-1, Heritage Assessment at 61-62 (CFP000240-CFP000241).

¹⁵¹ App. Ex. 167, NHDHR Final Report (August 1, 2017); App. Ex. 200, Memorandum of Understanding Between New Hampshire State Historic Preservation Officer and Eversource Energy Regarding the Seacoast Reliability Project, Madbury to Portsmouth, New Hampshire (the “MOU”).

Farm.¹⁵² A separate Memorandum of Agreement with the USACE requires that the Applicant temporarily move the Durham cable house during Project construction, then replace the cable house in a more favorable location post-construction.¹⁵³ The MOA also requires the Applicant to fund and install interpretive signage and displays in both Durham and Newington.¹⁵⁴

The Subcommittee should consider these findings and mitigation agreements specific to the federal Section 106 process while assessing the broader question of whether the Applicant has demonstrated that the Project “will not have an unreasonable adverse effect on ... historic sites,” RSA 162-H:16, IV(c), keeping in mind the broader definition of “historic site” under Site 102.23, as compared to the Section 106 definition.

f. The Effectiveness of the Measures Proposed by the Applicants to Avoid, Minimize, or Mitigate Unreasonable Adverse Effects on Historic Sites and Archaeological Resources, and the Extent to Which Such Measures Represent Best Practical Measures.

The final consideration for the Subcommittee pursuant to Site 301.14(b) is the effectiveness of proposed avoidance, minimization and mitigation efforts. Because of Ms. Widell’s narrow interpretation of the SEC rules, the Applicant’s proposed efforts for avoiding, minimizing or mitigating adverse effects to historic sites are almost exclusively limited to those established through the Section 106 process and the MOU and MOA. The exception is stone walls outside of the two identified National Registry eligible historic districts, which the Applicant has agreed to avoid and minimize effects to following requests from the Durham Historic Association and the Towns of Durham and Newington.

¹⁵² App. Ex. 200, MOU at 2-4.

¹⁵³ App. Ex. 200, MOU Appendix A, *Memorandum of Agreement Between US Army Corps of Engineers, New Hampshire Division of Historical Resources, Eversource* (the “MOA”) at 2-3.

¹⁵⁴ *Id.* at 3.

The Subcommittee must determine whether the Applicant's proposed avoidance, minimization and mitigation of adverse effects to historic sites (including those not captured in the Section 106 process) are adequate to meet the requirement that the Project "not have an unreasonable adverse effect on ... historic sites." RSA 162-H:16, IV(c). To the extent the Subcommittee believes that additional avoidance, minimization or mitigation measures are necessary to meet the statutory standard, the Subcommittee could consider proposals by the Town of Newington and other intervenors for additional burial of sections of the Project to further eliminate impacts to historic sites, or by the Durham Historic Association for utilization of ground-penetrating radar ("GPR") to confirm that no human remains will be disturbed in the vicinity of the Samuel Hill burial site.¹⁵⁵

g. Identification and Effects on Archeological Resources.

The Applicant hired Victoria Bunker, Ph.D. to review archeological resources and analyze the Project's impact on those resources. Dr. Bunker started with a Phase I-A analysis, which uses desktop research and pedestrian surveys to determine areas of archeological sensitivity.¹⁵⁶ The result of the Phase I-A analysis indicated whether Dr. Bunker and her staff needed to perform a Phase I-B analysis of certain sensitive sites.¹⁵⁷ The Phase I-B includes site surveys and confirms the presence or absence of archeological sites for both pre-contact Native American and post-contact European-American resources.¹⁵⁸ All Phase I-A and Phase I-B

¹⁵⁵ DHA Ex. 1, Pre-filed Testimony of the Durham Historic Association (Janet Mackie and Nancy Sandberg) at 36-37.

¹⁵⁶ App. Ex. 18, Pre-filed Testimony of Victoria Bunker, Ph.D. ("Bunker Direct Testimony") at 2-3.

¹⁵⁷ App. Ex. 18, Bunker Direct Testimony at 3-4.

¹⁵⁸ App. Ex. 18, Bunker Direct Testimony at 4-5.

analyses have been completed for the Project.¹⁵⁹ The NHDHR initially determined that one the LaRoche Brook Wetlands Cellar Hole site in Durham might be effected by the Project,¹⁶⁰ but later found that it would be avoided and that “no significant archeological site will be affected by the Seacoast Reliability Project.”¹⁶¹

h. Finding of No Unreasonable Adverse Effect.

Based on the considerations required under Site 301.14, the Subcommittee is charged with determining whether the Project will have no unreasonable adverse effect on historic sites. As a preliminary matter, NHDHR does not make a finding on unreasonable adverse effect through the Section 106 process or otherwise. Rather, the Subcommittee bears the burden of making this determination based on the evidence and opinions presented by the parties. Here, Ms. Widell opined that there would be no unreasonable adverse effect and Ms. O’Donnell opined that there would be an unreasonable adverse effect to historic sites. The ultimate determination rests with the Subcommittee.

(1) The Applicant’s Expert’s Conclusion of No Unreasonable Adverse Effect Was Flawed.

Applicants’ expert witness on aboveground historic sites, Ms. Widell in collaboration with the Preservation Company, analyzed the Project’s impacts on aboveground historic sites. Ms. Widell initially concluded that the Project would not have an unreasonable adverse effect on historic sites, despite potential indirect effects to three historic sites and direct effects to the

¹⁵⁹ App. Ex. 144, Supplemental Testimony of Victoria Bunker, Ph.D. (“Supp. Bunker Testimony”) at 1-2; Tr. Day 2, AM at 45-46 (Bunker).

¹⁶⁰ App. Ex. 144, Supp. Bunker Testimony at 2-3. On cross-examination, however, Dr. Bunker admitted that a structure work pad and access road were proposed in close proximity to the site, and that artifacts had been found within the area of proposed disturbance. Tr. Day 2, AM (Confidential) at 74-49.

¹⁶¹ App. Ex. 167, NHDHR Final Report (August 1, 2017) at 1.

Durham cable house.¹⁶² Following NHDHR's findings of additional adverse effects and significant amendments to the Project, Ms. Widell maintained her opinion of no unreasonable adverse effect.¹⁶³ However, it is important to note that Ms. Widell did not attempt to analyze whether the Project would have any unreasonable adverse effects on any *individual* historic sites. Rather, Ms. Widell concluded only that the Project *as a whole* would not have an unreasonable adverse effect on New Hampshire's aboveground historic sites.¹⁶⁴ As set out in the sections above, Ms. Widell's conclusion is flawed because it rests on an incomplete capture of "historic sites" in an overly narrow APE, and a misapplication of state and federal guidance on evaluating adverse effects.

(2) Counsel for the Public's Expert on Aboveground Historic Resources Found the Proposed Design of the Project Would Have an Unreasonable Adverse Effect on Historic Sites.

Counsel for the Public's expert witness on aboveground historic sites, Patricia O'Donnell of Heritage Landscapes, LLC ("Heritage Landscapes"), performed an independent review of the Project and the Applicant's submissions on historic resources. Ms. O'Donnell used the much broader definition of "historic site" from the SEC's rules, which included historic graveyards, land conservation, current use, recreation lands, scenic roads, public trails, and public waters,¹⁶⁵ and found the potential for many more adverse effects to historic sites than reported by Ms. Widell.¹⁶⁶ She also used a more appropriate 3-mile area of potential visual impact that is

¹⁶² App. Ex. 19, Widell Direct Testimony at 9-11.

¹⁶³ App. Ex. 143, Supp. Widell Testimony at 10.

¹⁶⁴ App. Ex. 19, Widell Direct Testimony at 9-11; App. Ex. 143, Supp. Widell Testimony at 10.

¹⁶⁵ CFP Ex. 5-a, Heritage Assessment at 7-10 (CFP000186-CFP000189).

¹⁶⁶ *Id.* at 59 (CFP000238).

applicable to historic sites with a scenic quality.¹⁶⁷ In large part due to the incomplete capture of historic sites and missing assessment of effects,¹⁶⁸ Heritage Landscapes concluded that “[d]ue to the widespread counts and acreage of historic sites within the four host towns, and the long-term presence of the Project, Heritage Landscapes finds there would be unreasonable adverse effects.”¹⁶⁹

Without a full identification of historic sites with the potential to be impacted by the Project, and an assessment of the actual effect of the Project on all identified historic sites, the Applicant’s analysis is incomplete and may substantially under-report the Project’s actual effects on historic sites. As Ms. O’Donnell analogized, “if we are talking about a puzzle and we’re only looking at 4 pieces and there are 40, how do we get an equitable final result?”¹⁷⁰ Even if those 4 pieces end up being representative of the whole, it is not inclusive; a more transparent and comprehensive process would provide the Subcommittee with the full information required by the rules and necessary to make a finding that the Project will not result in unreasonable adverse impacts to historic sites.

¹⁶⁷ *Id.* at 8-9 (CFP000187-CFP000188).

¹⁶⁸ Tr. Day 15 PM at 46-48 (O’Donnell).

¹⁶⁹ CFP Ex. 5-a, Heritage Assessment at 62 (CFP000241).

¹⁷⁰ Tr. Day 15, PM at 48 (O’Donnell).

Effects on Air Quality, Water Quality and the Natural Environment

3. Effects on Air Quality, Water Quality, and the Natural Environment.

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on ... air and water quality [and] the natural environment” for a certificate to issue. Site 301.07 sets forth specific “application requirements” to provide the Subcommittee with necessary “information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment.”

With respect to the Subcommittee’s required findings, Site 301.14(c)-(d) requires the Subcommittee to “consider the determinations of the New Hampshire department of environmental services ... and other relevant evidence” on the issue of air quality and “the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal agencies ... and other relevant evidence” with respect to water quality. Finally, Site 301.14(e) provides that “[i]n determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:”

- (1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;
- (2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;
- (3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;
- (4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service,

Effects on Air Quality, Water Quality and the Natural Environment

and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(5) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on the affected wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and the extent to which such measures represent best practical measures;

(6) The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate potential adverse effects on terrestrial or aquatic significant habitat resources, and the extent to which such measures represent best practical measures; and

(7) Whether conditions should be included in the certificate for post-construction monitoring and reporting and for adaptive management to address potential adverse effects that cannot reliably be predicted at the time of application.

Site 301.14(e). As discussed below, the Applicant has fallen short on this required finding in that it failed to identify all potentially impacted species and failed to implement reasonable avoidance and minimization measures.

a. Effects on Air Quality

With regard to effects on air quality, the Project will have no appreciable long-term effect on air quality, and the Applicant has committed to employ construction BMPs to control dust during construction.¹⁷¹

b. Effects on Water Quality

The effects of the Project on water quality, and in particular the proposed crossing of Little Bay, were perhaps the single greatest area of concern raised during proceedings. Water quality impacts are subject to a series of permitting requirements at the Department of Environmental Resource (“DES”), including wetlands, alteration of terrain, and shoreland protection, as well as federal Section 401 water quality certificate requirements. DES conducted

¹⁷¹ App. Ex. 184, Stipulated Facts and Requested Findings of Applicant and Counsel for the Public at 4 (Stipulations 16-17).

Effects on Air Quality, Water Quality and the Natural Environment

a thorough review of the Project and issued a final decision on recommended permit conditions in a February 28, 2018 letter to the SEC (the “Final Decision”).¹⁷²

(1) Effects on Wetlands and Streams

The Project will have a substantial effect on wetlands and streams, including temporary impacts to over 300,000 square feet (approximately 7 acres) and permanent destruction of nearly 800 square feet of wetlands for the installation of foundations and other structures.¹⁷³ The majority of the temporary impacts will be caused by timber matting used to temporarily cross or work on top of wetland and stream areas. Concerns were raised by various parties with the potential for soil compaction and damage to the wetlands from the weight of vehicles, equipment and the timber mats themselves. The Applicant is required by DES to implement Best Management Practices to minimize impacts to wetlands and surface waters.¹⁷⁴ In addition, DES has required the Applicant to retain independent environmental monitors to assure compliance with all environmental permit conditions and to monitor revegetation for a full growing season after construction is complete.¹⁷⁵ Finally, the Applicant is required to pay \$349,834.26 into the

¹⁷² App Ex. 166, NHDES Final Decision. As set forth in Counsel for the Public’s Response to the Joint Motion to Strike (Nov. 2, 2018) and Counsel for the Public’s Motion to Strike NHDES’s October 29, 2018 Revised Final Decision (Nov. 2, 2018), incorporated herein by reference, Counsel for the Public argues that the February 28, 2018 submission is the agency’s “final decision” pursuant to RSA 162-H:7, VI-c. Counsel for the Public asserts that subsequent correspondence from DES regarding the agency’s position on proposed revisions to the Final Decision, App. Ex. 183, and the agency’s issuance of a purported Revised Final Decision, Comm. Ex. 12c and 12d, are informational only and do not constitute part of the “final decision” for purposes of RSA 162-H:7, VI-c or RSA 162-H:16, I.

¹⁷³ App. Ex. 145, Attachment C, Appendix A at electronic page 452; App. Ex. 182, Applicant Correspondence with NHDES at 7.

¹⁷⁴ App. Ex. 166, NHDES Final Decision at 9, Conditions 24 & 26.

¹⁷⁵ *Id.*, Conditions 29-31.

Aquatic Resource Mitigation Fund as compensatory mitigation for impacts to wetlands and surface waters.¹⁷⁶

(2) Effects on Little Bay

The Applicant proposes to cross Little Bay by burying the electric transmission cable in the floor of Little Bay through a combination of direct trenching at the shore landings, diver hand jetting, and jet plowing.¹⁷⁷ Extensive testimony was offered on the detail of this process and the projected impacts to water quality in Little Bay.¹⁷⁸ In the following sections, Counsel for the Public highlights areas of concern and issues that the Subcommittee may need to decide in order to issue a Certificate.

(a) Alternative Methods - Horizontal Directional Drilling.

Numerous parties, including DES, have raised the question of whether horizontal directional drilling (“HDD”) is a more appropriate and less impactful method of crossing Little Bay.¹⁷⁹ In response to DES’s recommendation of additional analysis, the Applicant submitted supplemental testimony and analysis comparing the benefits and detriments of HDD versus jet

¹⁷⁶ *Id.* at 7.

¹⁷⁷ App. Ex. 73, Substituted Pre-Filed Direct and Amended Testimony of William F. Wall, at 4-8; App. Ex. 148, Appendix 4b, Revised Environmental Maps at Maps 20-22; App. Ex. 149, Appendix 5b, Revised Engineering Design Drawings at 24-29..

¹⁷⁸ *See generally*, testimony of the Applicant’s construction panel, Tr. Day 2, PM and Tr. Day 3, AM & PM, and the testimony of the Applicant’s environmental panel, Tr. Day 4, PM, Tr. Day 5, AM & PM, and Tr. Day 6, AM.

¹⁷⁹ App. Ex. 166, DES Final Decision at 1-3.

Effects on Air Quality, Water Quality and the Natural Environment

plowing.¹⁸⁰ Counsel for the Public's technical expert, Payson Whitney from the ESS Group, also submitted testimony on this issue.¹⁸¹ Mr. Whitney, in substantial agreement with the Applicant's experts, testified that HDD would require a significantly longer construction process and would involve substantial impacts to abutting landowner along the ROW in the form of noise and physical intrusion.¹⁸² The Applicants also estimated that the cost of a full HDD approach would be approximately \$132 million more than the proposed jet plow.¹⁸³

Similarly, in large part due to the constraints of shallow intertidal areas on both sides of Little Bay, a partial HDD option would involve a very long HDD resulting in similarly large impacts on the land adjacent to Little Bay.¹⁸⁴ The HDD options eliminate the water quality concerns associated with sediment disturbance from jet plowing activities, but introduce a small probability of an inadvertent return whereby bentonite slurry material can be released into Little Bay.¹⁸⁵ On the whole Mr. Payson testified that jet plowing is a routine process for installing submarine electric cables and that the Applicant's proposed approach was consistent with Mr. Payson's experience with other submarine cable projects.¹⁸⁶ The Subcommittee will need to

¹⁸⁰ App. Ex. 134, Supplemental Joint Testimony of Kenneth Bowes, David Plante, Nicholas Strater, and Marc Dodeman (July 1, 2018); App. Ex. 135, Supplemental Joint Testimony of Sarah Allen, Ann Pembroke, and Kurt Nelson (July 1, 2018); App. Ex. 133, *Horizontal Directional Drilling and Jet Plow: A Comparison of Cable Burial Installation Options for a 115 kV Electric Transmission Line in Little Bay* ("Applicant's HDD Comparison Report").

¹⁸¹ CFP Ex. 2, Supplemental Testimony of Payson R. Whitney, III, P.E. (July 2, 2018) ("Whitney HDD Testimony").

¹⁸² CFP Ex. 2, Whitney HDD Testimony at 7 (CFP000062).

¹⁸³ App. Ex. 134, Supplemental Joint Testimony of Kenneth Bowes, David Plante, Nicholas Strater, and Marc Dodeman at 15.

¹⁸⁴ Tr. Day 3, PM at 92-94 (Strater).

¹⁸⁵ CFP Ex. 2, Whitney HDD Testimony at 6-8 (CFP000061-CFP000063).

¹⁸⁶ Tr. Day 12, PM at 52-54 (Whitney).

determine whether the differing impacts and risks of HDD are, on balance, greater or lesser than the impacts and risks of the proposed jet plowing.

(b) Impacts and Risks of the Jet Plow Process.

The primary impact of concern of jet plowing is the disturbance and transfer of sediments and the potential release of any contaminants contained in disturbed sediments. To address this concern, the Applicant's retained expert consultants to model the dispersion and fate of disturbed sediments within Little Bay.¹⁸⁷ The model predicts both the concentration of disturbed sediments in the water column and the extent of dispersion of disturbed sediments due to wind and tidal action.¹⁸⁸ During cross examination, limitations in the inputs of the model were pointed out, including the mismatch between the modelled continuous advance rate of the jet plow and the practical and physical limitations on a continuous jet plow crossing due to stops for adjustment of anchor positions and tidal access to shallow intertidal areas.¹⁸⁹ Accordingly, the model may not accurately predict the extent or location of the resulting sediment plume.

In addition to the dispersion of sediments, jet plowing involves a risk that any contaminants in the disturbed sediments will be released into the water column and potentially made bioavailable. To address this risk, the Applicant conducted sediment testing to identify the presence of contaminants.¹⁹⁰ The results of two rounds of sediment testing at 12 locations across

¹⁸⁷ App. Ex. 55, Appendix 35, *Modeling Sediment Dispersion from Cable Burial for Seacoast Reliability Project, Little Bay, New Hampshire* ("RPS Sediment Modelling Report"); App. Ex. 104, Appendix 35a, *Revised Modeling Sediment Dispersion from Cable Burial for Seacoast Reliability Project, Little Bay, New Hampshire* ("Revised Sediment Modelling Report").

¹⁸⁸ *Id.*

¹⁸⁹ Tr. Day 6, AM at 50-59 (Swanson).

¹⁹⁰ App. Ex. 150, *Characterization of Sediment Quality Along Little Bay Crossing* (Dec. 1, 2016); App. Ex. 105, *Supplement to Characterization of Sediment Quality Along Little Bay Crossing* (June 30, 2017).

the proposed route provided no evidence of significant contamination.¹⁹¹ However, sampling does not rule out the presence of contaminants in other portions of the Bay floor along the Project route, and a risk remains that undiscovered contaminants could be disturbed.¹⁹² Some intervenors and many members of the public have expressed significant concerns over the risk of a catastrophic release of contaminants into Little Bay from the jet plow method.¹⁹³ The Subcommittee will have to determine the magnitude of this risk and whether the risk constitutes an unreasonable adverse effect on water quality.

To address uncertainties in the modelling and to calibrate the equipment and monitoring process for a potential jet plow installation, the Applicant has agreed to conduct a jet plow trial run approximately three weeks prior to the proposed cable laying.¹⁹⁴ A trial run would provide additional information regarding the accuracy of the modelling and the presence or absence of contaminants in the sediments, and allow for adjustments to the jetting process to reduce impacts.¹⁹⁵ A trial run is not without its own risks in the possibility of disturbing contaminated sediments. Of importance will be the balancing of the practical and financial need for the trial run to be conducted close in time with the jet plow cable runs, and the analytical need for time to assess the information gathered through the trial run. The Subcommittee should consider

¹⁹¹ Tr. Day 6, AM at 35-37 (Pembroke).

¹⁹² Tr. Day 6, AM at 37-39 (Pembroke & Bjorkman).

¹⁹³ *See, generally*, Tr. Newington Public Statement Hearing (Oct. 11, 2018).

¹⁹⁴ App. Ex. 140, Supplemental Joint Testimony of Kenneth Bowes and David Plante at 3.

¹⁹⁵ CFP Ex. 2, Whitney HDD Testimony at 11-12. For example, Ms. Pembroke testified that the Applicant will use the jet plow trial run “as a test case for how to operate the plow,” and mentioned the possibility of “modifying equipment” by “plug[ing] some of the upper jets” to “reduce fluidization of the uppermost sediments which are the ones that could be suspended into the water column.” Tr. Day 6, AM at 70 (Pembroke).

whether jet plow trial run results should be submitted to the SEC for review and approval as a condition of the authority to implement cable burial using the jet plow method.

Finally, uncertainty remains with regard to the details of a mixing zone and monitoring plan proposed by the Applicant. The mixing zone is a regulatory device that allows a geographic area in which the Applicant can exceed water quality standards for a short duration without violation.¹⁹⁶ At this time the precise extent of the mixing zone is unknown as DES has requested revisions to the Applicant's proposal.¹⁹⁷ Similarly, the details of the monitoring plan remain in flux with DES requesting a revised plan prior to implementation.¹⁹⁸ DES has also required independent environmental monitors that will be approved by DES.¹⁹⁹ The Subcommittee will have to decide whether any issuance of a Certificate is conditioned on SEC review and approval of a final mixing zone and monitoring plan.

(c) Environmental Effects of Concrete Mattresses

A final area of significant concern is the proposed use of concrete mattresses to secure the electric transmission cable in areas where full burial depths are not achievable. Based on probing conducted by the Applicant's consultants, the Applicant anticipates that concrete mattresses are likely to be needed from the outer extent of open trenching at the shores extending out into Little Bay for a distance of a few hundred feet on either shore.²⁰⁰ Concrete mattresses

¹⁹⁶ Tr.. Day 6, AM at 40-45 (Allen).

¹⁹⁷ *Id.*; App. Ex. 166, NHDES Final Decision at 12 (wetlands condition 44).

¹⁹⁸ App. Ex. 166, NHDES Final Decision at 12-14 (wetlands condition 45).

¹⁹⁹ App. Ex. 166, NHDES Final Decision at 11 (wetlands condition 40).

²⁰⁰ App. Ex. 125, Revised Little Bay Impact Assessment Report at 2 (identifying the likely need for concrete mattresses for approximately 140 from the west shore of Little Bay and 290 feet from the east shore of Little Bay); App. Ex. 125, Revised Little Bay Impact Assessment Report at Appendix A, Durocher Marine Survey Report; App. Ex. 148, Revised Environmental Maps at Maps 20 & 22; App. Ex. 149, Revised Engineering Drawings at 24 & 29.

Effects on Air Quality, Water Quality and the Natural Environment

are proposed to be interlaced together to avoid overlap that would increase their vertical profile.²⁰¹ Concrete mattresses constitute permanent fill on the Bay floor and 8,681 square feet of concrete mattress are included as permanent fill in the wetlands permit conditions in the DES Final Decision.²⁰² Alternatives to concrete mattresses, such as the use of split pipes, were deemed infeasible by the Applicant due to ampacity limitations.²⁰³ Beyond environmental concerns, the concrete mattresses pose aesthetic and navigational concerns that are addressed elsewhere in this brief.

c. Effects on the Natural Environment

Pursuant to Site 301.07(c)(5) and (6), the Applicant submitted proposed best management practices and time of year restrictions (the “BMP/TOYs”) for protected rare, threatened or endangered wildlife and plants (“RTE Species”).²⁰⁴ Implementation and compliance with the BMP/TOYs, approved by New Hampshire Fish and Game Department (“NHFG”) and the New Hampshire Natural Heritage Bureau (“NHB”), is required as a condition of the DES Final Decision.²⁰⁵ Counsel for the Public finds the BMP/TOYs generally protective of RTE species, but notes some areas that could be clarified or improved in the BMP/TOYs for consideration by the Subcommittee.

²⁰¹ Tr. Day 6, AM at 71-73 (Allen).

²⁰² App. Ex. 166, NHDES Final Decision at 7; App. Ex. 182, Applicant Correspondence with NHDES re proposed changes to Final Decision at 27 (proposing text corrections to Final Decision to reflect revised area of concrete mattresses); App. Ex. 183, NHDES August 31, 2018 Response at 17 (indicating DES’ concurrence with the Applicant’s proposed text corrections).

²⁰³ Tr. Day 3, PM at 86 (Dodeman).

²⁰⁴ App. Ex. 124, Best Management Practices and Construction Plan for Protected Wildlife and Plants (Sept. 15, 2017).

²⁰⁵ App. Ex. 166, NHDES Final Decision at 10 (wetlands conditions 32-36).

First, to the extent not already required, pre-construction surveys should be conducted for all RTE species identified in the Project ROW or that may have habitat within the Project ROW. Many of the initial surveys conducted by the Applicant's consultants are now two or more years old.²⁰⁶ Given the passage of considerable time, re-surveys are appropriate and should be required.

Second, with regard to raptors and bald eagles, pre-construction surveys for active nests should be performed by aerial survey. There was evidence that the Applicant's ground surveys were ineffective in discovering at least one bald eagle next in proximity to the Project ROW,²⁰⁷ and visual scans from the ROW itself are inadequate to locate active nests that may exist within the 660 foot to ¼ mile construction buffers.

Third, to the extent that construction activities are proposed in the winter in areas where RTE snake or turtle hibernacula may be present, the Applicant should be required to have environmental monitors perform sweeps of construction areas, remove identified RTE species, and install exclusion fencing prior to applicable hibernation periods. In this way, RTE species can be prevented from establishing hibernacula within the Project corridor where they may be subject to harm during winter construction.

²⁰⁶ Tr. Day 6, AM at 8-10 (Allen).

²⁰⁷ DR Ex. 11, Supplemental Testimony of Regis C. Miller at 1; Tr. Day 6, AM at 28-30 (Allen).

4. Effects on Public Health and Safety.

RSA 162-H:16, IV(c) requires the Subcommittee to find that “[t]he site and facility will not have an unreasonable adverse effect on ... public health and safety” for a certificate to issue. Site 301.08 sets forth specific “application requirements” to provide the Subcommittee with necessary “information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety.”

Site 301.08(b) further requires for “electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.” Site 301.08(d) also requires for all energy facilities:

(1) Except as otherwise provided in (a)(1) above, an *assessment of operational sound* associated with the proposed facility, if the facility would involve use of equipment that might reasonably be expected to *increase sound by 10 decibel A-weighted (dBA) or more over background levels*, measured at the L-90 sound level, at the property boundary of the proposed facility site or, in the case of an electric transmission line or an energy transmission pipeline, at the edge of the right-of-way or the edge of the property boundary if the proposed facility, or portion thereof, will be located on land owned, leased or otherwise controlled by the applicant or an affiliate of the applicant;

- (3) A plan for *fire safety* prepared by or in consultation with a fire safety expert;
- (4) A plan for *emergency response* to the proposed facility site; and
- (5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Site 301.08(d) (emphasis added).

Site 301.14(f) in turn requires the Subcommittee, in “determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety,” to:

(1) For all energy facilities, consider the information submitted pursuant to Site 301.08 and other relevant evidence submitted pursuant to Site 202.24, the potential adverse effects of construction and operation of the proposed facility on public health and safety, the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

(4) For electric transmission lines, consider the proximity and use of buildings, property lines, and public roads, the risks of collapse of towers, poles, or other supporting structures, the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

Site 301.14(f).

a. Potential Public Health Effects of Electromagnetic Fields Generated by the Proposed Facility.

Among other things, the Subcommittee must consider “the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures.” Site 301.14(f).

The Applicant’s expert on the impacts of electromagnetic fields (“EMF”) was Dr. William H. Bailey, a Principle Scientist in the Center for Occupational and Environmental Health Risk Assessment at Exponent Inc.²⁰⁸ Dr. Bailey acknowledged that the World Health Organization continues to site gaps in the knowledge about the biological effects of EMF and that more research is needed.²⁰⁹ Epidemiological studies suggest that exposure to low frequency

²⁰⁸ App. Ex. 11, Pre-filed Testimony of William H. Bailey, Ph.D. (“Bailey Direct Testimony”) at 1.

²⁰⁹ Tr. Day 7, PM at 91-94 (Bailey).

magnetic fields (a component of EMF) cause small increases in the risk of childhood leukemia.²¹⁰ However, despite these studies, researchers are unable to determine how EMF can cause this increased risk.²¹¹ Dr. Bailey testified that these concerns have been alleviated by additional research.²¹²

Dr. Bailey reviewed the Applicant's modeling of expected electromagnetic fields ("EMF") generated by the Project if constructed and concluded that the projected fields are well below international public exposure limits.²¹³ To confirm the accuracy of the modelled results and to ensure that actual EMF generated by the Project do not exceed international public exposure standards, Counsel for the Public proposed, and the Applicant agreed, to conduct pre- and post-construction measurements of EMF as a proposed condition of the issuance of a certificate.²¹⁴

²¹⁰ Tr. Day 7, PM at 93-94 (Bailey) (agreeing that there is "some statistical correlation between childhood leukemia and exposure to electromagnetic fields").

²¹¹ Tr. Day 7, PM at 93-94 (Bailey).

²¹² Tr. Day 7, PM at 94 (Bailey).

²¹³ App. Ex. 11, Bailey Direct Testimony at 10.

²¹⁴ App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval at 6 (proposed conditions 34 and 35).

D. PUBLIC INTEREST.

The fourth and final requirement of RSA 162-H:16, IV that must be met for the Subcommittee to issue a certificate is that the Subcommittee must find that “[i]ssuance of a certificate will serve the public interest.” RSA 162-H:16, IV(e). Based upon the text, legislative history, and interpretations of RSA 162-H:16, IV(e) and related statutory provisions and rules, the “public interest” factor requires an independent finding from the Subcommittee that the “significant impacts” of the Project are balanced by significant “benefits” of the Project in the areas set forth in RSA 162-H:1 and enumerated in Site 301.16. In this section, Counsel for the Public identifies the factors the Subcommittee must weigh and reviews the evidence on those factors.

1. Issues That Should Inform the Subcommittee’s Comprehensive Analysis Pursuant to RSA 162-H:16, IV(e).

The Subcommittee must balance the benefits and adverse impacts of the Project to determine whether the “issuance of a certificate will serve the public interest.” That analysis should be the Subcommittee’s final step. The analysis should include the Subcommittee’s consideration of the prior three findings under RSA 162-H:16, IV, since those issues are relevant to the public interest. The analysis, however, should neither defeat nor be dictated by the Subcommittee’s findings on the prior three statutory requirements, which have specific statutory standards, such as “adequate,” “unduly interfere with” and “unreasonable adverse effect.” None of these statutory standards appear in RSA 162-H:16, IV(e). In determining whether the “[i]ssuance of a certificate will serve the public interest” the legislature did not include a statutory standard. Thus, the “public interest” review looks beyond the Subcommittee’s prior analysis to balance the totality of the Project’s benefits and impacts across the areas enumerated in the purpose section and Site 301.16.

By way of example, the Subcommittee may find that the Project does not have an unreasonable adverse effect on air and water quality under RSA 162-H:16, IV(b)(c). When considering the public interest, however, the Subcommittee should not rely on its prior finding; it must consider any adverse effects on air and water quality that do not rise to the level of “unreasonably adverse,” in balancing the Project’s overall benefits and impacts across all areas of review. Such consideration does not negate the Subcommittee’s finding of no unreasonably adverse effects on air and water quality, but that finding similarly does not preclude the Subcommittee from considering some adverse effects on air and water quality in determining whether the Project will serve the public interest. Indeed, a Project could have no “unreasonable adverse effects” but still be contrary to the public interest where the aggregation of not unreasonable adverse effects in multiple areas outweighs a project’s benefits to the public. It is this final review that the General Court intended when it amended RSA 162-H:16 to include a public interest determination prior to issuance of a certificate.

As part of its analysis of the public interest, the Subcommittee must also consider the input it has received from members of the public, both orally from dozens of speakers at the two public information sessions and the three public hearings in the host counties, as well as the written public comments filed with the SEC.²¹⁵ The overwhelming number of public comments, in all their different forms, are in opposition to the Project. The Subcommittee also should consider, when weighing whether the Project is in the public interest, the fact that of the four host municipalities, two of them intervened to oppose the Project and no host municipality

²¹⁵ NH RSA 162-H:10, III.

intervened in support of the Project. The Subcommittee also observed opposition to the Project during the Subcommittee's site visits.

2. The Legal Standard.

RSA 162-H:16, IV and Site 301.16 (*Criteria Relative to Finding of Public Interest*) require that the Subcommittee balance the potential impacts and the potential benefits of the Project in determining whether the Project will serve the public interest.

a. The Plain Meaning of RSA 162-H Requires a Balance Between Potential Impacts and Benefits of Proposed Projects as Part of the Public Interest Finding.

The New Hampshire Supreme Court “interpret[s] statutes not in isolation, but in the context of the overall statutory scheme [and the] analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies.”²¹⁶ The Court will “not look to legislative history to modify the meaning of a statute that is plain on its face.”²¹⁷

In RSA 162-H the General Court saw fit to link RSA 162-H:1 and RSA 162-H:16, IV together, joining the requisite findings requirement in RSA 162-H:16, IV with the stated objectives provided by the Legislature in RSA 162-H:1.²¹⁸ Among other things, those provisions expressly require a “balance” among “potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire.” RSA 162-H:1; RSA 162-H:16, IV.

²¹⁶ *Appeal of New Hampshire Right to Life*, 166 N.H. 308, 311 (2014) (quoting *Petition of Mooney*, 160 N.H. 607, 609-10 (2010)).

²¹⁷ *State Employees' Ass'n of NH, Inc. v. State*, 127 N.H. 565, 568 (1986).

²¹⁸ The Applicant has previously sought to minimize RSA 162-H:1 as a mere “introduction” to the statute, but as the analysis contained herein reveals, the linkage between RSA 162-H:1 and RSA 162-H:16, IV alone demonstrates otherwise.

RSA 162-H:1 provides:

The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: 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. *Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire;* that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. *In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.*²¹⁹

Among other things, the Legislature enacted RSA 162-H:16, IV with RSA 162-H:1 and “[i]n furtherance of [RSA 162-H:1’s stated] objectives.” RSA 162-H:16, IV directs the Subcommittee to “determine if issuance of a certificate will serve the objectives of this chapter,” *i.e.*, the objectives stated in RSA 162-H:1 and expressly noted as such. “In order to issue a certificate,” the Subcommittee must make the four findings found in RSA 162-H:16, IV. The Subcommittee cannot make the required determination or findings until *after* it has first given “due consideration of 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).

As a matter of plain language interpretation, RSA 162-H requires consideration of *both* the potentially significant impacts as well as any potentially significant benefits in connection

²¹⁹ RSA 162-H:1 (emphasis added).

with the Subcommittee's determination and findings pursuant to RSA 162-H:16, IV. No reasonable statutory construction of the text of the statute supports the position that the public interest analysis required by RSA 162-H:16, IV(e) should consider only the potential benefits of the Project and not the potential negative impacts of the Project.²²⁰

Applicant is anticipated to argue that if the Subcommittee weighs and balances the potentially significant impacts and benefits of the proposed Project in making its decision and finding on whether or not the issuance of the certificate will "serve the public interest," the other three findings in RSA 162-H:16, IV would effectively be subsumed by the fourth finding making it superior to the others. However, while the New Hampshire Supreme Court will avoid interpreting statutes in such a fashion as to render statutory provisions "meaningless," the language of RSA 162-H:16, IV simply does not support a finding that an analysis and balancing of all of the "potential significant impacts and benefits" related to a Project would subsume the first three findings in the public interest finding and effectively nullify them.²²¹ And while all four findings overlap with each other to some extent that fact does not prevent any of the provisions from having independent effects and it does not render any of the provisions superfluous or redundant.²²²

For example, while an analysis of Finding (e), that the "[i]ssuance of a certificate will serve the public interest," will undoubtedly include an analysis of potential impacts of overlapping significance to Finding (c), that "[t]he site and facility will not have an unreasonable

²²⁰ Also RSA 162-H:16, IV(e)'s finding requirement that "[i]ssuance of a certificate will serve the public interest" is stated broadly and without limiting language limiting the analysis only to benefits or excluding impacts from the analysis.

²²¹ *Holt v. Keer*, 167 N.H. 232, 242 (2015).

²²² *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-26 (2002).

adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety,” the two Findings are distinct and require separate analyses. RSA 162-H:16, IV(c) & (e). For Finding (c) the inquiry is whether the Project will have “*unreasonable* adverse effect[s]” on the noted items. RSA 162-H:16, IV(c) (emphasis added). For Finding (e) *any* adverse effects on the noted items, as well as additional items set forth in RSA 162-H:1, will be considered as part of the comprehensive balancing of all potential impacts and benefits of the Project. Accordingly, the Subcommittee could appropriately find in connection with Finding (c) that while the Project has significant adverse effects on “aesthetics, historic sites, air and water quality, the natural environment, and public health and safety,” the adverse effects are not extensive enough to be “unreasonable.” RSA 162-H:16, IV(c). Similarly, the Subcommittee could note numerous ways in which the Project interferes with “the orderly development of the region” but nevertheless determine that the evidence was sufficient to find that the Project did not “*unduly* interfere[d] with the orderly development of the region.” RSA 162-H:16, IV(b) (emphasis added).

Despite those determinations, the statute requires the Subcommittee to then consider the adverse effects on the noted items, as well as the interference with the orderly development of the region, along with all other pertinent impacts of the Project as set forth in RSA 162-H:1 that do not fall within the other three findings, and “balance” those impacts against the asserted benefits of the Project. While the decisions of adverse effects in Findings (b) and (c) may not deny the issuance of a site certificate, that does not preclude them from consideration under Finding (e). If, hypothetically, a project had no benefits, then balancing zero benefits against adverse effects to the noted items in Finding (c) and interference with orderly development of the

region under Finding (b) must tip the balance against the Project because the scales would contain *something* in the impacts column against *nothing* on the benefits side.

The findings contained in RSA 162-H:16, IV can be harmonized without nullifying the findings under any of the four sections. This is particularly so where RSA 162-H:16, IV expressly calls for “due consideration” of all “potential significant impacts and benefits” in connection with the Subcommittee’s requirement to determine that issuance of the certificate “will serve the objectives of this chapter,” which are set forth in RSA 162-H:1 and reference the Legislature’s stated public interest.

b. Balancing Benefits and Impacts When Determining the Public Interest is Consistent with New Hampshire Case Law.

The Applicant has previously cited *Grafton Cty. Elec. Light & Power Co. v. State* for the proposition that the public good “is equivalent to a declaration that the proposed action must be one not forbidden by law, and that it must be a thing reasonably to be permitted under all the circumstances of the case.”²²³ More relevant is *Grafton’s* explanation that “[t]he question of public good is not to be answered by looking only to the immediate interests of the public served by these companies, nor by a mere consideration of advantage to those who furnish the service. As before stated, *it is a question of what is reasonable taking all interests into consideration.*”²²⁴ Determining what is a reasonable taking by considering *all* interests is precisely what the Legislature has directed the Subcommittee to do under RSA 162-H:1 and RSA 162-H:16, IV.

²²³ *Grafton Cty. Elec. Light & Power Co. v. State*, 77 N.H. 539, 94 A. 193, 195 (1915).

²²⁴ *Id.* (emphasis added).

The Applicant has also cited *Pinetree Power, Inc.*²²⁵ as an example of the New Hampshire Supreme Court rejecting a net benefits test. The “net benefit” test proposed in *Pinetree Power*, however, was a net economic benefit to rate payers test.²²⁶ The Court rejected that test because it was insufficiently broad, not because it was overly broad.²²⁷ The Court held that the “statutory scheme [at issue] support[ed] the conclusion that the ‘public interest’ of PSNH’s customers encompasses more than simply rates.”²²⁸ The Court specifically considered expressed legislative purposes in relevant statutes and noted the expressed intention of the Legislature for “commitments to renewable energy resources [] to ‘be balanced against the impact on generation prices’ and can have ‘significant environmental, economic, and security benefits.’”²²⁹

Based upon the plain text of the statute and considering RSA 162-H as a whole, in determining whether the Project serves the public interest, the Subcommittee must balance the potential benefits and the potential impacts of the Project, and not merely consider whether the Project provides any benefit.

²²⁵ *In re Pinetree Power, Inc.*, 152 N.H. 92 (2005).

²²⁶ *In re Pinetree Power, Inc.*, 152 N.H. 92, 97 (2005).

²²⁷ *Id.* at 95, 97.

²²⁸ *Id.* at 97.

²²⁹ *Id.* (quoting RSA 374-F:3, IX (Supp.2004)). It is also noteworthy that the Court specifically lamented that “RSA 369-B:3-a does not define what constitutes the ‘public interest’ of PSNH’s retail customers,” and had to rely instead on the guidance of other “statutes governing utility restructuring.” *In re Pinetree Power, Inc.*, 152 N.H. at 96. By contrast, RSA 162-H:1 expressly states “the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire.” That definition of the “public interest” in RSA 162-H should be followed.

3. Potential Benefits and Adverse Impacts.

a. Site 301.16 (a) the Welfare of the Population; (c) the Location and Growth of Industry; and (d) the Overall Economic Growth of the State (Economic Benefits).

On the benefit side of the equation, there was broad agreement that construction of the Project will provide short-term economic benefits to New Hampshire, including jobs and increased Gross State Product during the construction phase of the Project. Once completed, the Project will increase the host communities' tax base over some period of time. The Project is also recognized by the Independent System Operator of New England ("ISO-NE") as a reliability project designed to meet identified electric transmission grid reliability needs in the region. As such, the Project will increase the reliability of the electric transmission grid in the region and benefit local electricity consumers by reducing the risk of interruptions in access to electric power.

The Project's benefits must be weighed against the potential for adverse economic impacts of the Project. These include the cost of the Project paid through a transmission charge on electric ratepayers' bills. As a reliability project, the Project costs are generally socialized to all ratepayers in the territory of ISO-NE – the six New England states.²³⁰ However, Project costs can also be "localized" if it is determined that there is a lower cost "feasible and practical transmission alternative" or where costs are "a result of local and state regulatory and/or legislative requirements."²³¹ Localized costs are paid by either all New Hampshire rate payers, or possibly by only Eversource's NH customers.²³² This can result in New Hampshire ratepayers

²³⁰ App. Ex. 138, Supplemental Testimony of William J. Quinlan at 1.

²³¹ Tr. Day 1, PM at 9-11 (Quinlan); Tr. Day 4, AM at 126-130 (Andrew); Comm. Ex. 8.

²³² Tr. Day 1, PM at 9-11 (Quinlan).

shouldering a larger percentage of the Project costs and should be carefully considered by the Subcommittee prior to imposing high cost conditions of approval.

Though not quantified, concerns were also raised with the potential impact of the Project to local tourism, and any significant contamination in Little Bay could result in losses to oyster farmers.²³³ In addition, the presence of the Project will permanently change the views of many residential, institutional and commercial properties and will alter the character of many towns and landscapes with views of the Project. In an attempt to offset negative impacts of the Project, the Applicant has agreed to a mitigation and dispute resolution process that includes the opportunity for independent adjudication of claims for property damage, business losses, and diminution in property value caused by the Project.²³⁴

b. Site 301.16 (b) Private Property.

No benefits to private property are anticipated from the Project. Rather, the dozens of residential, institutional and commercial properties located along the 12.9-mile route, or with new views of the Project will be negatively affected to varying degrees due to taller structures and a widening of the cleared ROW. While the extent of negative impacts to property values is difficult to quantify, the evidence supports a finding that property values will be negatively affected by views of the Project in the range of 1-6% or higher for individual properties.²³⁵

The crossing of Little Bay, and the placement of concrete mattresses in the shallow intertidal areas of the Bay could also adversely impact private property near the cable corridor,

²³³ FDS Ex. 1, Pre-filed Testimony of Jason Baker on Behalf of Fat Dog Shellfish Company, LLC at 3-4.

²³⁴ App. Ex. 193, Eversource and Counsel for the Public Stipulated Proposed Conditions of Approval at 3-4 (proposed conditions 17-21); App. Ex. 268, Applicant's and Counsel for the Public's Joint Proposed Dispute Resolution Process Procedures.

²³⁵ Tr. Day 7, AM at 106-107 (Chalmers).

including adverse effects to owners' access to and enjoyment of the water.²³⁶ Vibration from construction of the Project could adversely impact foundations, stone walls, septic systems and other private property within several hundred feet of the ROW.²³⁷

c. Site 301.16(e) Environment of the State, (h) Air and Water Quality, and (i) the Use of Natural Resources.

Construction of the Project will result in some damage to the environment, despite the requirement for the use of Best Management Practices and Time of Year restrictions, and has the potential to cause significant damage to the Little Bay ecosystem if significant contaminants are disturbed and dispersed into the water column by the jet plow operation. There will be temporary and permanent damage to wetlands, including the placement of permanent concrete mattresses in shallow intertidal areas of Little Bay. There will also be some temporary and permanent impacts to RTE species and habitat. The Subcommittee must look beyond the various DES permits and examine the totality of these adverse impacts and risks of harm to the environment.

d. Site 301.16(f) Historic Sites and (g) Aesthetics.

In general, the Project will provide no net benefits to historic sites or aesthetics. While some adverse effects to a few historic sites are proposed to be mitigated, many other historic sites were not fully analyzed and may experience unmitigated adverse impacts. In addition, some of the proposed mitigation does not directly address the adverse impacts of the Project, such as the proposed pamphlet on Newington's farming history, which does nothing to mitigate the reduced integrity of the setting of the Alfred Pickering Farm. With regard to aesthetics,

²³⁶ Tr. Day 15, PM at 144-145 (V. Miller); Tr. Day 15, PM at 131-132, 246-247 (R. Miller).

²³⁷ CFP Ex. 5-a, Heritage Assessment Report at 9 (CFP000188).

mitigation is proposed at road crossings, but will not fully eliminate the varying levels of adverse aesthetic impact of the Project on scenic resources and scenic roads and byways. Moreover, the Project will negatively affect views and scenic quality to many locations that may not technically qualify as “scenic resources” under Site 102.45. The Subcommittee should consider the overall impact of the Project on the scenic quality of the region when considering whether issuing a certificate for the Project is in the public interest.

With regard to historic sites, in addition to the adverse effects to two archeological sites and 37 aboveground historic properties and cultural landscapes identified by NHDHR through the Section 106 process, an additional 500 to 3,000 historic sites will be adversely affected to varying degrees by visibility of the Project.²³⁸ Moreover, because the final engineering and vegetative clearing plans for the underground section of the Project are not yet complete, there is insufficient information in the record to assess the full scope of impacts to aesthetics and historic sites on 60 miles of the Project route.

e. Site 301.16 (j) Public Health and Safety.

As a reliability project, there is an anticipated direct benefit to the reliability and functionality of the electrical grid in New Hampshire if the Project is constructed, which contributes to the health and safety of the public. And, there is no clear negative public health and safety impacts of the Project. While there is evidence of a small increase in the risk of childhood leukemia associated with exposure to low frequency magnetic fields such as those created by HVTLs, no direct causal connection has been confirmed. There may be some public safety issues created by road closures, traffic, dust, and other construction-related impacts.

²³⁸ CFP Ex. 140, Heritage Landscapes Report at 14 (CFP005594) (reporting that 496 of the historic resources identified by Applicants have views of the Project); CFP Ex. 141, Supp. O’Donnell Testimony at 7 (CFP005751) (listing counts of historic sites with potential views within the 10-mile APE).

4. Balancing Significant Impact and Benefits of the Project.

As described above, the Subcommittee's responsibility under RSA 162-H:16, IV(e) is to balance the significant benefits and impacts of the Project across the areas enumerated in RSA 162-H:1 and Site 301.16. The Project is anticipated to create economic and employment benefits during construction, provide property tax benefits, and contribute to the reliability of the regional electric transmission grid.

The Subcommittee must balance these potential benefits against the potentially significant impacts of the Project, including possible diminution in property values for some properties along the Project route, degradation of the scenic quality of the region, interference with private property during construction, and negative impacts to historic sites and the environment. With regard to the proposed crossing of Little Bay, the Subcommittee must also weigh the evidence and proposed implementation and monitoring procedures for jet and hand jetting to determine the level of risk of a significant impact to the important and fragile Great Bay ecosystem. In addition, the Subcommittee must take into account the opinions of the public expressed through municipal governments and public comment, which were generally opposed to the Project as proposed by Applicant. Only if the Subcommittee finds that the balance of all the benefits and impacts of the Project serves the public interest can a certificate be issued.

IV. ADDITIONAL ISSUES IDENTIFIED BY COUNSEL FOR THE PUBLIC FOR THE SUBCOMMITTEE'S CONSIDERATION.

As noted, the General Court created a role of “counsel for the public,” and specifically directed in RSA 162-H:10, V that “[t]he site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter.” In the course of his review of these proceedings, Counsel for the Public has identified several additional issues that require the Subcommittee’s attention and determination.

A. WHETHER THE APPLICANT SHOULD BE REQUIRED TO OBTAIN APPROVALS FROM TOWN GOVERNING BODIES FOR USE OF THE RIGHT OF WAY IN LOCALLY MAINTAINED ROADS PURSUANT TO RSA 231:160.

The Applicant proposes to cross over and under several state and municipal roads. The Applicant has requested that the SEC approve the crossing of municipal roads, notwithstanding RSA 231:160.²³⁹ The Applicant has asserted that it does not need to seek permission from municipal authorities to construct the transmission line over or under local roads. The following analysis is offered to aid the Subcommittee’s determination of the limits of its jurisdiction and whether town approvals will be needed for the project to proceed.

1. The Relevant Statutes.

Apart from RSA 162-H itself, the two primary relevant statutory provisions for this issue are RSA 231:160 and RSA 231:161. RSA 231:160 provides:

Telegraph, television, telephone, electric light and *electric power poles and structures and underground conduits and cables*, with their respective attachments and appurtenances *may be erected, installed and maintained in any public highways* and the necessary and proper wires and cables may be supported

²³⁹ App. Ex. 140, Supplemental Joint Testimony of Kenneth Bowes and David Plante at 8-9.

on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation *as provided in this subdivision and not otherwise.*²⁴⁰

The statute permits the placement of electric structures and underground conduits and cables with their respective attachments under public highways²⁴¹ “as provided in this subdivision and not otherwise.” RSA 231:160. RSA 231:159 provides that “[t]he provisions of this subdivision apply to all cities and towns now or hereafter incorporated, except such provisions thereof as may have been or are hereafter specifically amended or repealed in the act of incorporation.”

RSA 231:161 dictates the procedure for obtaining approval to install conduits, cables or wires under a public road. The procedure in RSA 231:161 lays out three categories of jurisdiction for public roads: (1) town maintained highways, (2) city maintained highways, and (3) state maintained highways. To install items under or over town and city maintained highways the petition for a permit or license must be addressed to the selectmen of the town in which such highway is located or to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located. The statute thereby requires approval from those local authorities where the public highway in question is town or city maintained. RSA 231:161. The local officials cannot unreasonably deny permits.

RSA 231:166 grants the Applicant the right to petition the court to overturn an adverse decision by a local authority. But ultimately, RSA 231:160 and RSA 231:161 require the Applicant to obtain approval from local governing bodies in the manner directed by RSA

²⁴⁰ RSA 231:160 (emphasis added).

²⁴¹ The New Hampshire Supreme Court has previously noted that the term “public highway” is broad and includes even discontinued roads. *King v. Town of Lyme*, 126 N.H. 279, 283 (1985) (quoting RSA 229:5, VII).

231:161. The remaining question becomes whether RSA 162-H and the SEC process supplants the express process set forth in RSA 231:160 and RSA 231:161.

2. The Subcommittee Must Determine Whether RSA 162-H Supplants RSA 231:160-161 to Grant Applicant's Request.

No provision in RSA 162-H expressly supplants RSA 231:161. RSA 162-H:1

(Declaration of Purpose) provides that:

The legislature recognizes ... that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

RSA 162-H:4 (*Powers and Duties of the Committee*) provides that:

I. The committee shall:

- (a) Evaluate and issue any certificate under this chapter for an energy facility.
- (b) Determine the terms and conditions of any certificate issued under this chapter.
- (c) Monitor the construction and operation of any energy facility granted a certificate under this chapter to ensure compliance with such certificate.
- (d) Enforce the terms and conditions of any certificate issued under this chapter.
- (e) Assist the public in understanding the requirements of this chapter.

RSA 162-H:4 gives the SEC broad powers and responsibilities that could arguably encompass what local governments would ordinarily do under RSA 231:161. However, RSA 162-H does not have an explicit preemption of the authority provided to municipal governing bodies by RSA 231:161, which expressly involves municipal governing bodies. The legislature is presumed to be aware of RSA 231:160, which it enacted, and had the legislature intended for RSA 162-H to supplant RSA 231:160, the legislature would have expressly so provided.

In *Pub. Serv. Co. v. Town of Hampton*,²⁴² decided under a prior version of the SEC framework (RSA 162-F), the New Hampshire Supreme Court rejected a town's attempt to force the utility to bury aboveground transmission lines for the Seabrook Nuclear Generating Station by enacting a town ordinance after the utility had obtained a certificate to proceed with the project. The Court determined that the legislative intent of the SEC framework under the statute as it existed at that time, was to provide a comprehensive statutory scheme providing that "all interests be considered and all regulatory agencies combined for the twin purpose of avoiding undue delay and resolving all issues in an integrated fashion."²⁴³ The Court stated that "[b]y specifically requiring consideration of the views of municipal planning commissions and legislative bodies, the legislature assured that their concerns would be considered in the comprehensive site evaluation."²⁴⁴ The Court stated "it is inconceivable that the legislature, after setting up elaborate procedures and requiring consideration of every imaginable interest, intended to leave the regulation of transmission lines siting to the whim of individual towns."²⁴⁵ The Court noted that "[t]owns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature."²⁴⁶ Consistent with that read of the statutory scheme, the Court held that the action by the defendant town in enacting an ordinance specifically for the Seabrook station project, after the utility received its certificate, was "repugnant to RSA ch. 162-F because it [wa]s contrary to the legislative intent that all matters regarding the construction of bulk power plants and transmission lines covered by the statute be

²⁴² *Pub. Serv. Co. v. Town of Hampton*, 120 N.H. 68 (1980).

²⁴³ *Id.* at 71.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

determined in one integrated and coordinated procedure by the site evaluation committee whose findings are conclusive.”²⁴⁷ The Court further explained that “[b]y enacting RSA ch. 162-F, the legislature ha[d] preempted any power that the defendant towns might have had with respect to transmission lines embraced by the statute, and the actions by the defendant towns with regard to transmission lines [wa]s of no effect.”²⁴⁸

Pub. Serv. Co. v. Town of Hampton, is distinguishable from the situation here. There, the town enacted a town ordinance, which was specifically directed at the construction of the Seabrook station, after the SEC had issued a certificate. This matter does not involve a town ordinance that was directed to a specific project. Here, a state statute that applies equally to all roads and all towns in New Hampshire, and not a single town’s post-certificate ordinance, is at issue. Also, it is not a matter of any particular municipality having the opportunity to provide the Subcommittee with their views. Many towns have done so. This case also involves whether the Applicant must comply with municipal regulations such as driveway permits that were put into place before the Application was filed.

3. Counsel for the Public Recommends the Subcommittee Defer to the Local Authorities With Respect to Local Roads and Delegate Monitoring Responsibility to Those Same Entities.

Irrespective of what determination the Subcommittee makes with respect to its authority to authorize the use of local roads notwithstanding RSA 231:160-161, Counsel for the Public submits the permitting and monitoring of the local roads impacted by the Project should be left to the local officials. Such an outcome would be consistent with the carefully crafted process laid out by RSA 231:160-161. It also would be consistent with the MOUs entered into by the towns

²⁴⁷ *Id.*

²⁴⁸ *Id.*

of Newington and Durham, and would have the benefit of local knowledge applied to local issues and ordinances and respect for those ordinances and local requirements. Local officials are required to act reasonably in response to the requests for approval submitted to them, including by the Applicant. The Applicant has a right to appeal adverse or arbitrary decisions of local authorities.

B. THE EXTENT OF THE SUBCOMMITTEE'S DELEGATION AUTHORITY.

1. The Subcommittee Cannot Delegate Statutory Findings to Another State Agency.

The Applicant has suggested that certain decisions and oversight of final construction plans can be delegated to NHDOT and decisions regarding historic sites can be delegated to other state agencies, such as DES and NHDHR. However, as explained further below, Counsel for the Public takes the position that the Subcommittee's statutory responsibility to issue the findings set forth in RSA 162-H:16, IV is non-delegable. RSA 162-H:16, IV provides that "the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter." The task is statutorily given to the site evaluation committee and the site evaluation committee alone.

2. Delegation Authority Under RSA 162-H:4 Is Expressly Limited.

RSA 162-H does anticipate and encourage consultation and coordination with other agencies and entities,²⁴⁹ but the ultimate decision on issuing and fashioning a certificate rests with the Subcommittee. As the New Hampshire Supreme Court recognized in *In re*

²⁴⁹ See, e.g., RSA 162-H:16, I, III.

Londonderry Neighborhood Coal, the critical requirement is that the “the ultimate decision as to the terms and conditions of the certificate” be made by the site evaluation committee.²⁵⁰

The text of RSA 162-H:4 further demonstrates that the Subcommittee cannot delegate its statutory responsibility under RSA 162-H:16, IV. RSA 162-H:4, III-b specifically directs that “[t]he committee may not delegate its authority or duties, except as provided under this chapter.” That specific rejection of delegation by the site evaluation committee is essentially underlined by the companion provisions to RSA 162-H:4, III-b, which actually set forth the limited means of delegation available.

RSA 162-H:4, III grants the Subcommittee the authority to delegate its “authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met.” In other words, the Subcommittee can delegate monitoring responsibilities but the delegatee must ensure the terms and conditions set by the Subcommittee are dutifully complied with.

RSA 162-H:4, III-a further grants the authority to “delegate ... the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, *or the authority to specify minor changes in the 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*

²⁵⁰ *In re Londonderry Neighborhood Coal*, 145 N.H. 201, 205 (2000) (“The fact that EFSEC imposed additional terms and conditions when State agency recommendations were not comprehensive demonstrates that EFSEC did not delegate its authority to determine the certificate’s terms and conditions.”) (addressing predecessor RSA 162-H (1994)).

*issuance of the certificate.*²⁵¹ In other words, the delegatee is vested with the limited authority of specifying which practice among previously approved practices is permitted. Where the delegatee is provided any discretion in its action, that discretion is so limited that it proves the point on the limits of the delegation.

Taken together, the Subcommittee must carefully consider whether it can make the statutory findings for issuance of a certificate under RSA 162-H:16, IV on the record before it, and not in reliance on future decisions that are deferred to state agencies. In addition, the Subcommittee must take care in not approving conditions that inappropriately defer decisional authority to any other state agency or body.

C. THE SUBCOMMITTEE HAS AUTHORITY TO GRANT REASONABLE CONDITIONS ON ITS ISSUANCE OF THE CERTIFICATE.

RSA 162-H:4, I(b) specifically directs the Subcommittee to “[d]etermine the terms *and conditions* of any certificate issued under this chapter.”²⁵² The Subcommittee is further charged with monitoring the construction and operation of any proposed facility to ensure compliance with the certificate and enforcing “the terms and conditions of any certificate issued under this chapter.”²⁵³ The Subcommittee is granted authority to delegate monitoring to ensure among other things “that the terms and conditions of the certificate are met.”²⁵⁴

That authority is not unlimited, however, as the New Hampshire Supreme Court has recognized in the PUC context.²⁵⁵ But while the takings clause can impose some limit on the

²⁵¹ RSA 162-H:4, III-a (emphasis added).

²⁵² RSA 162-H:4, I(b) (emphasis added).

²⁵³ RSA 162-H:4, I(c)-(d).

²⁵⁴ RSA 162-H:4, III.

²⁵⁵ *See Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. 1062, 1072 (1982).

breadth of the Subcommittee's conditions, just like the PUC the Subcommittee "is nevertheless still free to attach reasonable conditions ... as it properly finds to be 'necessary in the public interest'" or in furtherance of the other required findings pursuant to RSA 162-H:16, IV.²⁵⁶ This is particularly so where the cost of any conditions can be "recovered through the rate structure."²⁵⁷

Applicant's Exhibit 193 sets out Counsel for the Public and the Applicant's joint proposed conditions of approval for consideration by the Subcommittee should the Subcommittee decide to grant a certificate of site and facility to the Applicant. Additional conditions proposed by Counsel for the public are included in the topical sections of this post-hearing brief, above.

²⁵⁶ *Appeal of Pub. Serv. Co. of New Hampshire*, 122 N.H. at 1072 (quoting RSA 369:1); *see also Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 722 (1984).

²⁵⁷ *Id.*

V. CONCLUSION.

Counsel for the Public submits the foregoing analysis of the record evidence and legal interpretation of the applicable statutes and rules for the benefit of the Subcommittee during its deliberations on whether or not to issue a certificate of site and facility to the Applicant. Counsel for the Public takes no position on the ultimate question of whether the Applicant has satisfied its burden to demonstrate the four required statutory criteria for issuance of a certificate of site and facility. That decision rests squarely in the discretion of the Subcommittee.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,



Dated: November 15, 2018

By: Christopher G. Aslin, Esq. (N.H. Bar No. 18285)
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679
christopher.aslin@doj.nh.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing POST-HEARING BRIEF has this day been forwarded via e-mail to all persons named on the Distribution List of this docket.

Dated: November 15, 2018

By: Christopher G. Aslin, Esq.