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March 4, 2019

Via Hand Delivery and Email
Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
c/o New Hampshire Public Utilities Commission
21 South Fruit St., Suite 10
Concord, NH 03301-2429

Re: SEC Docket No. 15-04, Application of Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site And Facility for the Construction of a New 115 kV Transmission Line from Madbury Substation to Portsmouth Substation – Town of Durham Motion for Rehearing

Dear Ms. Monroe:

Enclosed, on behalf of the Town of Durham in the above-captioned docket, is a Motion for Rehearing. Also enclosed is a copy of the appearance of Jeremy D. Eggleton for the Town of Durham. Copies are being provided electronically to the Site Evaluation Committee and the Service List.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance.

Sincerely,

Douglas L. Patch

DLP/eac
Enclosure

cc (via email): Service List in SEC Docket 15-04

2364153_1

STATE OF NEW HAMPSHIRE
BEFORE THE

NEW HAMPSHIRE SITE EVALUATION COMMITTEE

SEC Docket No. 2015-04

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

TOWN OF DURHAM
PARTIALLY ASSENTED-TO MOTION FOR REHEARING

The Town of Durham ("Durham"), pursuant to RSA 541:3 and N.H. Code Admin. Rules Site 202.29, respectfully moves for rehearing of the New Hampshire Site Evaluation Committee's ("the Subcommittee" or "SEC") Decision and Order Granting Application for Certificate of Site and Facility with Conditions issued on January 31, 2019 in the above-captioned docket ("the Order") granting a certificate to Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource" or "the Applicant") to construct a new high voltage transmission line from Madbury Substation to Portsmouth Substation ("the Project").

INTRODUCTION

After three years of litigation and 15 days of contested hearings the Subcommittee granted a certificate of site and facility to Eversource for the Project. For the reasons spelled out below and further described in Durham and the University of New Hampshire's ("UNH") post-hearing brief, submitted in this docket on November 15, 2018 and incorporated herein by reference, Durham submits that the Order is unjust and unreasonable and that it contains a number of errors of law. Among these are that Eversource failed to meet its burden of showing by a preponderance of the evidence that the Project would meet the criteria in RSA 162-H:16, IV. Also, in granting a certificate the Subcommittee overlooked and failed to weigh substantial evidence that was contrary to the findings which it made. In addition, the Subcommittee also made a number of errors of law both during the adjudicative process and in the Order. Durham is therefore requesting that the Subcommittee rehear this case, correct these errors and deny a certificate for the Project.

ARGUMENT

A. Standard of Review.

Pursuant to RSA 162-H:11 decisions of the Subcommittee are reviewable under RSA 541. Under RSA 541:3 "any party to the action or proceeding before the commission, or any person directly affected thereby" may request rehearing. "The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested." *Dumais v. State of New Hampshire Personnel Commission*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4. A rehearing may be granted upon a finding of "good reason." RSA 541:3. *See also O'Loughlin v. New Hampshire Personnel Commission*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

Durham, a party to this proceeding as well as a person (*see* RSA 21:9) directly affected by the Order, respectfully submits that several conclusions in the Order are incorrect, unlawful, and/or unreasonable.

B. The Subcommittee's determination that the Applicant does not need to obtain approval from the Executive Council to install cable and concrete mattresses in Little Bay is unlawful.

During the course of this proceeding and in post-hearing briefs Durham and other parties noted that the SEC statutes and rules (RSA 162-H:7, IV and N.H. Code Admin. Rules Site 301.03(d)) require that the application must contain sufficient information to satisfy each agency having jurisdiction over any aspect of the Project and that the Applicant must identify all other state agencies having permitting authority or other regulatory authority.[1] Durham and other

[1] "Eversource is responsible for obtaining *any and all other permits for the construction and installation of the proposed crossings from any federal, state, and local authorities having jurisdiction.* Because the NHDES is responsible for maintaining the official list of public waters, we require that notice of the proposed crossings be sent to NHDES. We also require notice be provided to the New Hampshire Site Evaluation Committee and to the towns of Durham and Newington." March 10, 2017 PUC Order *Nisi* Granting License, page 7 (emphasis added). Eversource's reliance upon RSA 371:17, requiring it to obtain a "license from the Commission to construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state," is inapposite. This is

parties asserted that Eversource is required by RSA 4:40 to obtain the approval of the Governor and Council to construct the transmission lines and insert the concrete mattresses in Little Bay, a tidal water of the state, and that it failed to do so. In support of this position, the parties relied not only upon the statutory framework, which is clear, but upon a memorandum from the Office of the Attorney General in a prior SEC docket which stated that the approval of the Governor and Council was required in analogous circumstances. CLF Exh. 23; *see* SEC Docket No. 2012-02. The Subcommittee rejected this argument, essentially ruling that approval is required only when state-owned property is "disposed" or "leased" and saying that it is up to the Applicant to decide whether they need an easement or a license to install the lines and over 8600 square feet of concrete mattresses in tidal waters. Order, pp. 71-74.

This was an unlawful decision because the permanent use of property held by the state in the public trust for the benefit of a private applicant such as Eversource is a "disposal" or "disposition" of the property by any definition. *See Purdie v. Attorney General*, 143 N.H. 661, 663 (1999) ("[L]ands subject to the ebb and flow of the tide are held in public trust.") (citing *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. 82, 89 (1994)); *Chernaik v. Brown*, ___ P.3d ____, (Or. App., January 9, 2019), Slip Op. at *9 (the "public-trust doctrine is rooted in the idea that the state is *restrained* from *disposing or allowing uses of public-trust resources* that substantially impair the recognized public use of those resources.")(emphasis in original and added). In essence, the state is providing Eversource a durable right to use state property held in the public trust for a term of years. This is a dedication of the property to one private user that necessarily implicates the interests of other users, including recreational users. *Opinion of the Justices*, 139 N.H. at 90 (citing *Hartford v. Gilmanton*, 101 N.H. 424, 425-26 (1958) (public waters may be used to boat, bathe, fish, fowl, skate, and cut ice). As RSA 4:40 requires the Governor and Council to approve the "disposal" of state owned property, that approval was necessary for Eversource to obtain as part of this application process. Since it did not obtain that approval, Eversource's application is incomplete.

In addition, the Subcommittee's interpretation that Eversource only needs to obtain a "license" not an "easement" is both incorrect and immaterial. It is incorrect because when a

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not, contrary to Eversource's argument and the Subcommittee's decision, an either/or proposition. Eversource must obtain the license from the PUC contemplated by RSA 371:17 *and* the review and approval by the Governor and Council of the disposition of the land beneath and adjacent to the tidal waters contemplated by RSA 4:40.

power company acquires property rights to run new power lines in any other context, it would never rely upon the uncertainty of a license that is unilaterally revocable by the grantor to construct a multi-million-dollar piece of infrastructure. If there is any form of guarantee or irrevocability attached to the property right given, then the right given is an easement, or, at minimum, a lease. This is particularly the case where the license is one that permits and encourages—as this "license" does—the expenditure of resources to create a permanent asset. *Decker Car Wash, Inc. v. BP Products North America, Inc.*, 649 S.E.2d 317, 319-20 (Georgia App., 2007) (and cases cited). Under such circumstances, the license becomes irrevocable and the use of the land is, in effect, an easement. *Id.* Even if the use of the land is not "permanent" in the sense that an express deeded easement of no specified duration might be, the use of the land in question is intended to be permanent in relation to the lifetime of the Project. Although no specific term of years is contemplated by the permit or license granted, there is no contemplation that the state will revoke the license given during the useful lifetime of the infrastructure in question. Again, such a provision would be anathema to any project that required financing or the amortization of investment. Thus, a license granted for the permanent duration of a project, until that project is concluded, is nothing other than a lease of the property in question, with all the concomitant guarantees of permanency and irrevocability that come with such an instrument. *See Gourmet Dining, LLC v. Union Twp.*, 30 N.J. Tax 381, 421 (2018) ("A lease is defined as a 'contract for exclusive possession of lands, tenements or hereditaments for life, for term of years, at will, or for any interest less than that of lessor, usually for a specified rent or compensation'... The name that parties give to an agreement is not determinative, and the court must distinguish a lease from a license, which is an agreement that only gives permission to use the land at the owner's discretion.") (citing Black's Law Dictionary 889 (6th Ed. 1990), other citations omitted).

The Subcommittee's own decision contemplates that the powerlines and concrete mattresses will be in place at least until the Project is ultimately decommissioned in the fullness of time. In addition, just as the record in this docket shows that the abandoned electric cables that have not been used for years are still in Little Bay, the transmission lines and concrete mattresses proposed for this Project are likely to be used indefinitely and to be abandoned in Little Bay when they are no longer used. Thus, there can be no legitimate question in this case that the permit or license at issue constitutes a "contract for exclusive possession of lands" for a

"term of years," to wit, the useful life of the proposed Project and beyond. *Id.* This represents a term of years, measured by the longevity of the infrastructure itself. Accordingly, RSA 4:40, I requires that the Governor and Council approve such a lease, and the Subcommittee's distinction on the point is immaterial.

The Subcommittee's rejection of the "disposal" argument is thus incorrect because it is based on the false assumption that concrete mattresses will not be permanently installed. The Subcommittee apparently believes that the structures could be removed in the future because the Applicant did not seek to exempt concrete mattresses from its future decommissioning plan. Order at 74. However, this position is invalid as it ignores the facts in the record which show that Eversource does not anticipate the need to decommission the transmission line. App. Exh. 1, p. 110. According to Eversource's witnesses Kenneth Bowes and David Plante "[i]t is extremely rare for transmission line owners to decommission and completely remove a 115 kV transmission line and related facilities." App. Ex. 140, p. 9. Lines 27-29. "Such lines are typically rebuilt, as needed, and continue in service indefinitely." App. Exh. 1, p. 110. Moreover, the Subcommittee's decision ignores the information in the record where Eversource describes the concrete mattresses as having *permanent* impacts. *See,* e.g. App. Exh. 1, pp. 28, 114, 119.

The foregoing evidence completely invalidates the Subcommittee's assumption that the transmission line and concrete mattresses will not be permanently installed and therefore no "disposal" of state land will occur. Rather, the more logical assumption, based on the Applicant's own testimony, is that that once the transmission line and concrete mattresses are installed in Little Bay that they will not be removed. To underscore the likelihood of such permanence, the Subcommittee need look no further than the four cables of inactive distribution line that Eversource's predecessor, Public Service Company of New Hampshire, abandoned and left in place under Little Bay. App. Ex. 154, p. 3.

Furthermore, as a matter of policy, the Subcommittee's interpretation empowers an applicant to avoid the Governor and Council review merely by choosing what permitting approach it would like to take. But in this case the Applicant will be placing powerlines and concrete mattresses in the fragile soils of an important public water body, irrespective of whether it obtains a license or an easement to do so. It is nonsensical as a matter of public policy to require review by the Governor and Council in one instance, but not the other.

The issue of Governor and Council review arises not only with regard to the placement of powerlines and concrete mattresses under the water. In addition, RSA 482-A:3, II requires that all requests for wetlands permits from DES involving public-owned water bodies must be submitted to the Governor and Council for approval. DES even recognized that this was the case. Applicant's Exh. 32, p. 27. Nonetheless, this was never done and should be considered yet another fatal absence in the list of approvals which the Project must obtain. This Subcommittee does not have the authority to waive or overlook this statutory requirement.

Just as important is the fact that the Subcommittee's ruling on this question oversteps the authority given to it by the Legislature. *See Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245, 255 (2011) (where the Court rejected the Committee's argument that it had inherent authority to assess costs on petitioners). The SEC only has such authority as is granted to it by the Legislature and it does not have authority to determine property rights of Eversource and landowners (which in this case are the state and the public since the land under tidal waters is held in trust for the public). As the Public Utilities Commission ("PUC") has determined and as should be the case here, authority to decide such property rights issues rests with the courts, not the SEC. *See* Order No. 25,882 (April 15, 2016) and Order No. 26,020 (May 24, 2017) in PUC docket DE 15-464.

C. The Subcommittee's determination that further review of the Public Utilities Commission's decision to grant a license to install cable in Little Bay is unnecessary despite the Applicant's failure to provide any information about concrete mattresses is unlawful and unreasonable.

Durham argued in its post-hearing brief that the Applicant's failure to inform the PUC in DE 16-441 of the need to install over 8600 square feet of concrete mattresses, which the evidence in this docket shows will interfere with the public's use and enjoyment of these tidal waters, was another flaw in the Applicant's case. While the Subcommittee agreed that the Applicant had failed to tell the PUC that it was using over 8600 square feet of concrete mattresses, by advising the PUC that it "*may be using* 'supplemental mechanical protection'" the SEC determined that further review by the PUC was unnecessary. Order at 71 (emphasis added). It is difficult to understand how the PUC could have made the determination it is required to make without the specific knowledge of the need for over 8600 square feet of concrete mattresses. As the PUC has made clear in recent orders, to grant a license to cross public waters

it "must find that the licensed use 'may be exercised without substantially affecting the public rights in said waters or lands.'" *See* for example Order No. 25,910 (June 28, 2016) in DE 15-460 and 15-461 at 10. This involves exploring "the proposed uses of the licenses and the impact, if any, of those uses on the public's rights. *Id.* To determine whether the public's rights would be affected by this Project the PUC would have had to explore the extensive use of concrete mattresses in Little Bay, something which it clearly did not do because it was not provided any information about the mattresses. This analysis is required by law. The propriety of concrete infrastructure in the bay goes beyond environmental and aesthetic issues, which the PUC leaves to the SEC, and the SEC has no authority to waive or limit this analysis, which the PUC was required to complete.

On the one hand the Subcommittee allows Eversource to continue to negotiate in private with one state agency, DES, when it does not like the permit conditions it recommends in a "final decision." *See* section D below. On the other hand the SEC says that all Eversource has to do is to provide another agency, the PUC, cursory, uninformative and arguably misleading information about the Project in order to get a "final decision" from that agency. The SEC gives Eversource what amounts to unbridled discretion about how it handles permit and license applications and how it provides information to the agencies, the parties and the public. This approach is contrary to the law and to the detriment of the process and the due process rights of the parties shut out of the decision-making loop. *Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975) ("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard.").

The failure to provide the concrete mattress information to the PUC means that Eversource did not meet the statutory requirement that the application must contain sufficient information to satisfy each agency having jurisdiction over any aspect of the Project. RSA 162-H:7, IV and N.H. Code Admin. Rules Site 301.03(d). The vague reference to "supplemental mechanical protection," Order at 71, failed to describe the Project to the PUC with sufficient detail to meet the requirements of the law. *See In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 203-04 (2000) (holding that failure to provide adequate information was cured by describing "*in detail* the type and size of each part of its proposed facility") (citing RSA 162-H:7, V(a)). Consequently, the PUC could not render a meaningful "final decision" as required

by RSA 162-H:7. The Subcommittee erred as a matter law and should not have reached this conclusion.

D. The Subcommittee unlawfully and unreasonably delegates too much authority to state agencies and officials to make determinations that the Subcommittee is required by law to make.

RSA 162-H:4 limits the SEC's ability to delegate its authority as follows: "to the administrator or such state agency or official as it deems appropriate 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 issuance of the certificate." RSA 162-H:4, III-a (emphasis added.) The statute also contains the following statement: "The committee may not delegate its authority or duties, except as provided under this chapter." RSA 162-H:4, III-b. The import of this language is quite clear. The Legislature granted to the SEC limited authority to delegate and did not want the Subcommittee to delegate its authority to state officials beyond what it had specifically authorized. What the Subcommittee has done in the Order is to illegally and unreasonably delegate a number of final decisions on plans, the results of further studies, and even yet-to-be obtained permits to state officials, in effect shirking its statutory responsibilities. Durham submits that this constitutes an error of law.

Although there are many examples of this illegal delegation, one of the primary ones involves the jet plow trial run, which the Subcommittee is delegating to DES. That delegation is not just to oversee the jet plow trial run, but to also make a decision as to whether the results of that trial run should cause either a delay or a significant modification to the jet plowing, or perhaps even another method of installing the three separate, mile long, high voltage cables in Little Bay. This goes well beyond the use of a technique, methodology, practice or procedure approved by the Subcommittee. This was not a matter of the Subcommittee choosing from among options approved and recommended by the appropriate state agency. *See Londonderry Neighborhood Coal.*, 145 N.H. at 205. This constitutes a delegation of authority to evaluate the impact of the jet plow procedure, the viability of the jet plow procedure, and whether or not that

procedure will result in an unreasonable adverse effect on the environment. In effect it delegates a ruling on all those criteria to DES. It also shuts all of the parties out of the process by not allowing them to review and comment on the results of the trial run to the SEC, the body required by law to be making this determination. *Id.* at 204 (intervenors and parties do not have a right to comment on conditions subsequent to approval). It thus violates the due process and transparency requirements of the SEC process and the New Hampshire Constitution as well. *Society for Protection of N.H. Forests*, 115 N.H. at 168.

In its February 2018 "final decision" DES recommended that the results of the jet plow trial run be provided *back to the SEC* for its review. App. Exh. 166, p. 3. Despite this recommendation from DES the Subcommittee is now content to cede all oversight of the jet plow trial run to DES and post the results of the trial run on the website, apparently believing that this cures any defects in the process. As the Subcommittee makes clear in the Order, it is only viewing the trial run as an opportunity to "verify the accuracy of the modeling" put forth by the Applicant's consultants. Order at 170. It is relying on "the experience and expertise of NHDES to appropriately review, approve and oversee the plans." Order at 169. The Subcommittee has handed this aspect of the Project off to DES like a hot potato, defying DES' express recommendation and denying the parties and the public any right to review or challenge the implementation of this untested procedure. This constitutes an unlawful delegation of authority.

The Order goes on to say: "The Subcommittee is confident in the expertise and ability of DES *to determine which conditions should be implemented.*" Order at 169 (emphasis added). Similarly, the Subcommittee noted: "NHDES has experience and expertise to determine the adequacy of the [Soil and Groundwater Management] Plan prepared by the Applicant." Order at 172. The determination of conditions for the implementation of aspects of the Project is part of the Subcommittee's non-delegable authority. *See* RSA 162-H:4, III-a, III-b. The same defect mars the Order's discussion of the impact of the proposed Project on oysters and other organisms in Little Bay, where the Subcommittee says "it relies on the experience and expertise of NHDES with regard to the *level of testing that should be required.*" Order at 208 (emphasis added). Also: "The Subcommittee delegates to NHDES the authority to determine whether updated surveys for rare, threatened, and endangered species shall be completed prior to construction of the Project." Order at 209. The Subcommittee also delegates to DES the process for review and

hearings to address any reports associated with this Project that will subsequently be filed with DES: "NHDES is sufficiently qualified to address such concerns and comments. Establishment of a duplicative process with the Committee will cause unnecessary delay in construction of the Project." Order at 209.

It is important to recall that Eversource first provided notice of this Project to the SEC four years ago, in 2015. Virtually all of the delays associated with this Project have been caused by the Applicant's own inability to complete the necessary studies and reports. Despite these significant delays, here we are four years later and many of the reports and analyses have yet to even be submitted to DES, yet the Subcommittee is now so concerned about causing any further delays in this Project that it is willing to delegate all of this authority to DES and remove itself from important decisions about the Project. These reports and analyses could have been "reasonably anticipated prior to the issuance of the certificate." *See* RSA 162-H:4, III-a.

One other example is the Subcommittee's delegation to the New Hampshire Division of Ports and Harbors and/or the NH Department of Safety Marine Patrol the determination of whether placing over 8600 square feet of concrete mattresses in Little Bay "creates a navigational hazard." Order at 229. Also of note is the Subcommittee's delegation to agencies with permitting and other regulatory authority the power to approve locations for marshalling yards and laydown areas: "The Subcommittee is confident in the ability of the respective agencies to review the required permit applications and *issue required permits* without the oversight of the Administrator." Order at 253 (emphasis added). It was also an illegal delegation of authority for the Subcommittee to delegate to the Department of Transportation (DOT) "the authority to make its determinations and to issue the required permits, licenses, and approvals in accordance with existing DOT policies, rules, and recommendations." Order at 68.

The purpose clause of the SEC statute, RSA 162-H:1, makes it very clear that through this process "full and timely consideration of environmental consequences be provided..." Relying upon so many unfinished reports to issue a certificate, delegating substantive reviews of those reports and trials to DES, and ceding permitting authority and other determinations to other agencies, does not accomplish this purpose. Moreover, it defeats the purpose of providing "full and complete disclosure to the public of such plans" and the purpose of resolving "all environmental, economic, and technical issues" in "an integrated fashion." Under the SEC

statute, RSA 162-H:7, IV, each application must contain "sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility, and shall include each agency's completed application forms." From the record and from the Order it is clear that this statutory requirement was not met. The Subcommittee's improper delegation of authority to DES, the Marine Patrol and other agencies to conduct substantive reviews, make fundamental decisions and impose material conditions is not a valid remedy for Eversource's failure to have submitted a complete and thorough application.

E. The Subcommittee unreasonably concluded that the Project will not have an unreasonable adverse effect on the environment.

The Subcommittee concluded that the Project will not have an unreasonable adverse effect on water quality and the natural environment. Order at 172, 199. Durham submits that this conclusion is contrary to the evidence in the proceeding and therefore unreasonable and an error of law. With regard to the Project impacts to nitrogen levels in Little Bay the Order states on page 168: "The Project, however, will not add nitrogen." On page 171 the Order concludes: "Considering the expert testimony and the avoidance, mitigation, and minimization measures adopted by NHDES and agreed to by the Applicant, and the conditions imposed, the Subcommittee finds that the Project will not have an unreasonable adverse effect on water quality." The Subcommittee appears to further support this conclusion on the assumption that remaining concerns can be addressed through the performance of a trial run, as stated on Page 168: "However, to address the level of uncertainty associated with the modeling, the Applicant agreed to and is ordered to conduct a jet plow trial run."

Durham submits that the Subcommittee's conclusion that the Project will not have an unreasonable adverse effect on water quality is based upon their incorrect interpretation of the evidence presented through testimony and/or a lack of understanding of the overall nitrogen cycle in the estuary. In addition, there are logistical issues associated with implementing the trial run as proposed that will make it difficult or impossible to make substantive changes to the field procedure before the full-scale Project takes place, and that will allow no changes relative to pore water nitrogen release.

The Environmental Protection Agency has designated the Great Bay estuary, including Little Bay, as officially impaired. Nitrogen loading is responsible for eutrophication that has, among other impacts, led to declining eelgrass habitat, a critical component of the estuarine ecosystem. During the testimony of Durham's experts, nitrogen loading and direct immediate impacts on water quality as a result of jet plowing activities were identified as significant concerns. These concerns were articulated in pre-trial expert testimony, responses to Applicant data requests, supplemental testimony, and in responses to questions during cross-examination and from Subcommittee members. The testimony provided to date clearly presents the ecological issues associated with nitrogen and how the proposed operations will exacerbate nitrogen loading issues in Little Bay. As clearly stated in Day 13 Hearing testimony by Dr. Stephen Jones, nitrogen levels in the Little Bay system are in a state of relative equilibrium between open water, sediment pore water, and sediments. The total nitrogen in the system includes nitrogen in sediments and associated pore water; however, nitrogen at depth is essentially unavailable to biological aspects of the nitrogen cycle and does not substantially impact available nitrogen levels in the estuarine water column.

By disturbing sediments to depths as great as five feet below the sediment surface, previously unavailable nitrogen will be introduced as available nitrogen into the water column where it will add to the nitrogen loaded to the estuary. This is an issue that local municipalities have spent hundreds of millions of dollars to mitigate over the past 10 years. So, although the total nitrogen in the system is unchanged, the available nitrogen in the water column, where algae of all sizes grow, will change significantly as a result of jet plow operations.

It is also evident from statements in the Order that the Subcommittee is relying upon the results of a jet plow trial run and associated water quality monitoring to address any uncertainties regarding sediment/pore water contaminant levels, sediment suspension/dispersion/resuspension, and sediment dispersion model accuracy. However, as articulated in the Durham experts Day 13 Hearing testimony, there are several concerns with the trial run. The trial run is proposed to occur just 21 days prior to the start of jet-plow activities and a report summarizing trial run activities and results is due to DES seven days after the trial run is completed. This schedule presents logistical issues for adequate data review and interpretation that could diminish the potential that trial run results can be used to make meaningful adjustments to the jet plow operations or to the monitoring program. The schedule requires that the trial run data be

collected, analyzed at a laboratory, tabulated, interpreted, and presented in a report within a seven day period. Then DES has 14 days to analyze the data and proposed modifications, if warranted. Considering the large volume of data that is proposed to be collected during the trial run, and the complicated nature of interpreting so many diverse analysis methods and their accuracy, let alone the frequent need to re-analyze samples, it is highly questionable that DES can review the data, formulate questions for clarification, and receive acceptable clarification from the Applicant within a 14-day period, in addition to then requiring the Applicant to re-formulate any problems with the monitoring and jet plow plans that would then require subsequent DES approval. In addition, it is clear that, given the compressed schedule and what the Subcommittee has indicated about how DES is to handle the process going forward, while those comments may be available to Durham and other interveners to review in advance of the actual crossing, there is no meaningful opportunity for anyone else other than DES and the Applicant to provide any further input and the Subcommittee has ceded all final determinations to DES.

The Applicant's testimony provided on Day 3 afternoon of the hearings revealed new information that the actual duration of the jet plow operation for an individual crossing is expected to take 15 hours, will be conducted during both ebb and flood tidal conditions, and will not be continuous. This directly contradicts the model submitted by the Applicant, which assumed that an individual crossing would be conducted continuously over a seven-hour period during an ebb tide. It should be noted that crossing duration is critical because the direction of tidally induced currents (and the corresponding direction of sediment transport) reverses approximately every six hours. Considering that the model results provided the basis for monitoring station locations, the monitoring station locations are not positioned to evaluate flood tide conditions (please note the proposed monitoring stations are located to monitor a mixing zone that is entirely predicated on the completely irrelevant seven-hour crossing-ebbing-tide modeled scenario.) This provides another aspect of uncertainty regarding the trial run and the ability to use it to identify issues and make adjustments pertaining to the monitoring plan and jet plow procedures. In addition, should the trial results indicate that monitoring station locations be adjusted, it is questionable whether the proposed trial run time table is adequate to accommodate such adjustments (e.g., as proposed, DES comments may not be provided until the actual day

that jet plow activities commence and there is no meaningful opportunity for anyone else to comment).

For the reasons articulated above and further discussed in Durham and UNH's post-hearing brief, which is incorporated by reference here, Durham submits that the Subcommittee's finding that the Project will not have an unreasonable adverse effect on water quality and the natural environment is unreasonable and unlawful.

F. The Subcommittee misinterpreted the law with regard to the import of "final decisions" by state agencies and unlawfully allowed the Applicant and DES to communicate and modify the agency's "final decision" on the issuance of a permit and made other unlawful procedural errors.

RSA 162-H:7, VI-c, establishes the process for agency review of aspects of the application and very specifically provides that "all state agencies having permitting or other regulatory authority shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after the application has been accepted." In this case DES submitted its "final decision" on February 28, 2018, saying this: "Water Division staff have completed their technical review of the application and have made a final decision on the parts of the application that relate to NHDES permitting or regulatory authority..." App. Exh. 166, p. 1. During a technical session on July 10, 2018 Durham asked for any subsequent correspondence between Eversource and DES. The response to that request, provided on July 17, 2018, was the first notice that the SEC, Durham or any other party to the proceeding had that Eversource and DES were having ongoing, post-hoc discussions about making changes to the permit conditions established in the February 28, 2018 "final decision." All intervenor supplemental testimony had to be filed by July 20, 2018, three days later. Those parties were required to submit testimony without the benefit of any detailed knowledge about what else DES and Eversource might work out that would change DES' "final decision." When preparing and submitting this testimony the intervenors could not rely upon the DES "final decision" to be the final list of proposed permit conditions the statute specifically required. Durham and other parties also received weeks later other information that was not provided on July 17, 2018 but that was responsive to the July 10 discovery request. Eversource filed supplemental testimony on July 27, 2018 in which it stated it had concerns about the DES permit conditions and that it hoped to resolve those concerns with DES.

On August 10, 2018 the Presiding Officer, on her own without the approval of the rest of the Subcommittee, sent a letter to DES requesting that they identify the concerns about the permit conditions expressed by the Applicant and whether those concerns were appropriate in light of DES's statutory responsibilities. The authority the Presiding Office cited in the letter and relied on for sending the letter said "if the committee intends to impose certificate conditions that are different than those proposed by state agencies" it must notify the state agencies to seek confirmation that such conditions are appropriate and give agencies 10 days to respond. RSA 162-H:7-a, I(e). There are two problems with this letter. The first is that the Presiding Officer acted on her own, not with the approval of the Subcommittee, and the second that the statute clearly contemplates this kind of request take place only if the Subcommittee intends to impose different conditions. The hearings had not even started when this letter was sent so there is no way that the Subcommittee could have weighed testimony from all of the parties and made a neutral and unbiased determination based on the record. These were glaring procedural errors, contrary to the law and the process that was carefully established and spelled out in the law. They also violated fundamental principles of due process, which were prejudicial to the intervenors. As a consequence of the ongoing discussions between DES and the Applicant concerning further modification to the conditions of the "final decision," of which the intervenors had no notice and no part, the intervenors have been harmed. *Society for Protection of N.H. Forests*, 115 N.H. at 168 ("Where issues of fact are presented for resolution by an administrative agency due process requires a meaningful opportunity to be heard."). These procedural failings were unreasonable and unfair and constitute an error of law.

The Subcommittee erred as a matter of law in denying two motions associated with these errors. The first was an August 21, 2018 motion requesting a suspension of the proceedings and that the parties be included in any discussions with DES. The second was an October 24, 2018 motion requesting that the Subcommittee strike from the record the post-final decision recommendations from DES and related testimony.[2] For the reasons set forth above, these were clear errors of law.

[2] Later in the proceeding, DES submitted modifications to the "final decision" which were the product of exclusive discussions between Eversource and DES, to the exclusion of the public and other parties to the proceeding. Comm. Exh. 12-b, 12-c, and 12-d.

G. The Subcommittee unreasonably concluded that there is an immediate reliability need for the Project.

The Subcommittee concluded that the economy of the Seacoast is growing and the need for reliable energy is important for growth in the region. They noted that construction of the Project will resolve reliability issues of the grid and ensure that extreme emergency situations will not cause the Seacoast to face blackouts. The Subcommittee went on to note that it relies on the expertise of the Independent System Operator for New England ("ISO-NE") to identify the Project that presents the best solution for addressing reliability needs. Order at 325-326. This amounts to another improper delegation of responsibility and authority since the ISO did not choose the route for this Project, Eversource did.

The problem with this analysis by the Subcommittee is that it is dependent on reliability needs findings by ISO-NE that date back almost nine years and which at that time identified an immediate need for a reliability project in this area. The passage of this time without any apparent problems with the system suggests that the need is not what it was once thought to be. The appropriate way to address this would have been to involve the ISO in this proceeding to obtain an updated analysis and to make them available for questioning by the Subcommittee and the parties. The Subcommittee has clear statutory authority to do this. RSA 162-H:16, III. The Subcommittee arbitrarily and unreasonably refused to do this. *See* Order on Partially-Assented-to Motion to Consult with ISO-New England (April 19, 2018).

The analysis also overlooks the fact that Eversource has already invested approximately $50 million in the infrastructure of this area to improve reliability and that in doing so they have reduced the need for this Project. So far there have been no outages caused by the failure to build the remaining projects in the suite, which are the subject of this proceeding. Just because Eversource made the decision to build the other projects in the suite without first obtaining the approval for the Project that is the subject of this proceeding, the "linchpin" in the suite,[3] doesn't mean that the SEC should feel that it has no choice but to approve this Project. Moreover, as Durham and others noted in their post-hearing briefs, the SEC can and should require a deeper look at alternatives that do not require going under Little Bay and using what is a distribution ROW to accommodate a much larger high voltage transmission system. Because the

[3] Day 1AM, p. 34, lines 11-12.

transmission line under Little Bay would take up to six months to fix if it fails it is difficult to understand how this Project would meaningfully improve reliability. Day 4AM, pp. 54-55. In addition, the new load forecasts have been lower. Day 4AM, p. 120. Times have changed from when the study was done in 2010-2012; the increase in and effect of energy efficiency programs and distributed generation projects has been much more significant than expected. Demand growth in the Seacoast region has been 1-2 percent. On the one hand Eversource said that increased demand on the Seacoast is driving the need for this Project, but on the other that because the load is going to stay flat there is no need for a project like the Gosling Road Transformer to create more margin for future development. As Durham argued in its post-hearing brief, this Subcommittee should make them take the time to more thoroughly analyze and present a route that will not jeopardize Little Bay and severely negatively impact the Towns of Durham and Newington. The Subcommittee's failure to do so ignores the evidence in the record and is unreasonable and arbitrary.

H. The Subcommittee's determination that it should ignore the ways in which the Project will interfere with the orderly development of the region is contrary to precedent and is unlawful and unreasonable.

In the Order the Subcommittee said that it gave due consideration to the views of municipalities, as it is required to do, but that it was not required to deny a project that is inconsistent with those views. Order at 312. While the Subcommittee may be technically correct, what it has done in this case based on the evidence before it is unreasonable as a matter of law, and arbitrary because it is inconsistent with and departs from principles established in a clearly reasoned prior decision of the SEC. As the SEC noted in the Decision and Order Denying Application for Certificate of Site and Facility (March 30, 2018) in the Northern Pass docket SEC Docket Number 2015-06 ("Northern Pass Order"): "The pre-emptive authority of the Site Evaluation Committee does not diminish the importance of considering the views of municipal and regional planning agencies and municipal governing bodies. Rather, the Committee must listen to and consider the views expressed by municipalities." Northern Pass Order at 276. Durham submits that the Subcommittee did not listen to and consider those views to the extent that it should have in this case.

In reaching the decision in this case the Subcommittee said that Mr. Varney, Eversource's witness on this issue in both this and the Northern Pass dockets, did an analysis that

was "thorough and extensive." Order at 311. As Durham pointed out in its post-hearing brief, however, both the Eversource application and Mr. Varney's testimony contained significant misstatements about Durham's ordinances. Mr. Varney incorrectly stated that the Project is consistent with zoning ordinances in Durham. Day 8AM, p. 136. He also incorrectly testified that transmission infrastructure is not a prohibited use in any of the four communities and that it was an existing use, and that local ordinances do not speak to transmission lines as permitted or not. Day 8AM, p. 138. The Application made similar factually incorrect statements. App. Exh. 1, E-pp. 143-144. Under Durham Zoning Ordinances, TD-UNH Exh. 31, E-p. 48, section 175-11, any use not specifically permitted or permitted by conditional use permit is prohibited. Transmission lines are only permitted as conditional uses and only in the Wetland Conservation Overlay District (TD-UNH Exh. 31, E-p. 101, section 175-61) and in the Shoreland Protection Overlay District (TD-UNH Exh. 31, E-p. 106, section 175-72). Under town ordinances if something is allowed by conditional use it requires a several part test to be met and a super majority vote of the Planning Board. This means that the Project is very clearly contrary to the views of the Durham local planning board and governing body, which have approved these ordinances. The Subcommittee's failure to take this into account is unreasonable and arbitrary.

The Applicant did not meet its burden of showing by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region. It is insufficient to argue that this Project, a high voltage transmission line, would utilize an existing right-of way ("ROW") for a partially abandoned distribution line to justify the Project being consistent with the orderly development of the region.[4] This is the primary argument relied upon by the Applicant's witness on this issue, Mr. Varney. App. Exh. 13, p. 7 of 10.

As the SEC noted in the Northern Pass Order at 277: "The Applicant's primary claim about land use, as expressed by Mr. Varney, is that the majority of the Project will be constructed

[4] The cases which the Applicant cited in the Application to support putting this Project in an existing electric utility corridor both involved an existing transmission, not distribution, corridor. App. Exh. 1, E-p. 25. One was an existing gas transmission corridor; the other was an existing electric transmission corridor. The SEC found that "the use of [an] existing right of way is much more consistent with the orderly development of the region and has less impact on the environment." Decision in Portland Natural Gas Transmission System Maritimes ("PNGTS") & Northeast Pipeline Company, SEC, Docket No. 96-01 and Docket No. 96-03, 1, 17 (July 16th, 1997). In addition, the SEC found that, in the context of sighting transmission projects, "the single most important fact bearing on this finding [that the facility will not unduly interfere with the orderly development of the region] is that the proposed transmission line occupies or follows **existing utility transmission rights-of-way**." Findings of the Bulk Power Facility Site Evaluation Committee, SEC DSF 850-155, 1, 11 (Sept. 16th, 1986) [Emphasis added].

in an existing transmission right-of-way corridor. Mr. Varney testified that construction of transmission lines in existing corridors is a sound planning principle. Tr., Day 37, Morning Session, 09/21/2017, at 18. Mr. Varney is correct, but he fails to note that it is not the only principle of sound planning nor is it a principle to be applied in every case." The Northern Pass docket involved a proposal to add high voltage transmission lines to a right of way that already has high voltage transmission lines. SRP involves a proposal to add high voltage transmission lines to a right of way that is only used for distribution lines and portions of that right of way are no longer in use at all. Because of this distinction the analysis articulated by the Subcommittee in SEC Docket 2015-06 should be even more applicable and persuasive in this docket. In the Northern Pass Order at 279 the SEC said: "There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would *create a use that is different in character, nature and kind from the existing use*. There are places along the route where the Project would have a substantially different effect on the neighborhood than does the existing transmission facilities." *Id.* (emphasis added). That description could have been written about this Project.

What the SEC said in the Northern Pass Order at 280 also applies to the analysis on which Eversource relied in this docket: "While Mr. Varney did review relevant master plans and some local ordinances, he did little in the way of applying the details of the Project to the plans and ordinances." Given the inaccuracies in the application and testimony cited above, that is clearly the case here, *i.e.* Eversource did little in the way of applying the details of the SRP Project to the local ordinances and master plans. For this reason it is unreasonable and unlawful for the Subcommittee to rely on Mr. Varney's analysis. Although "the law has never bound commission discretion by a rigid adherence to stare decisis," decisions still need to demonstrate a basic consistency with one another. *Vautier v. State*, 112 N.H. 193, 196 (1972). To the extent that an agency departs from principles established in a clearly reasoned prior decision, it must explain its new decision and reasoning in a manner that allows parties to expect consistency and predictability in the administrative process. *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st. Cir. 2010); *Valdiviezo-Galdamez v. Attorney Gen. of U.S.,* 663 F.3d 582, 608 (3d Cir. 2011) ("An administrative agency can clearly change or adopt its policies; however, an agency acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision.") (quoting *Johnson v. Ashcroft,* 286 F.3d 696, 700 (3d Cir.2002)). In this case, the

Subcommittee failed to distinguish or differentiate the facts of this case from those of the Northern Pass Order in a way that would support the disparate outcome.

Durham submits that it is arbitrary, unreasonable and an error of law for the SEC to apply the law in such different ways to these two projects.[5] *See* Northern Pass Order.

I. The DES mitigation requirement that funds be set aside for salt marsh restoration at Wagon Hill in Durham is not guaranteed and should therefore be taken into consideration by the SEC.

In the Order in this docket the Subcommittee recognized that DES was requiring the Applicant to pay $349,834.26 into the Aquatic Resource Mitigation Fund ("ARM") within 120 days of the issuance of the Certificate. The Subcommittee noted that $213,763.28 "*will be paid to Durham* for salt marsh restoration at Wagon Hill Farm." Order at 33 (emphasis added). This contribution to the ARM fund for this purpose was included in the DES permit, which was adopted as a condition by the Subcommittee.

Durham recently learned that the Army Corps of Engineers and DES are now saying that these funds cannot be earmarked for Wagon Hill Farm shoreline restoration by the SEC, though Durham can apply for funding in 2019 and compete against others for this funding. In Durham's opinion the uncertainty of this funding significantly jeopardizes restoration efforts that would affect the shoreline grasses, ecology, siltation and water column clarity in the estuary at the base of Wagon Hill, directly adjacent to the Town of Durham. More broadly, the anticipated restoration efforts that the monies in question would have supported, and upon which the Subcommittee conditioned this Project, are of substantial importance to Durham and other communities that are concerned about and are heavily invested in improving the health of Little Bay. Based on a fair reading of the Order it appears that the Subcommittee relied upon these

[5] If there were any doubt in the minds of the Subcommittee members about the disparate and inconsistent treatment of the two applications, that doubt should be dispelled by the fact that Eversource, in its recent brief to the New Hampshire Supreme Court challenging the Northern Pass Order, relied extensively upon the Subcommittee's decision *in this case* to suggest that the Subcommittee unreasonably rendered its decision in that one. *See* Brief of Appellant, N.H. Sup. Ct. Docket No. 2018-0468, at e.g, 11, 17, 21, 32. Of course, the use by Eversource of the Subcommittee's order in this matter as if it were part of the Northern Pass record is entirely consistent with the approach Eversource took throughout this process—modifying the application on an ongoing basis and creating new facts on the ground without notice to the other parties. This order was not in existence at the time that the Northern Pass Order was issued, so it was improper for Eversource to rely upon it in regard to its appeal of the Northern Pass Order. However, the Northern Pass Order was part of the public record at the time this matter was considered, and the principles applied in it—and the conclusions drawn based upon those principles—should consistently animate the analysis in this case. The failure of the Subcommittee to do so was an error.

funds being provided to Durham for this purpose in reaching its determination that the Project will not have an unreasonable adverse effect on water quality and the natural environment and its ultimate decision to grant a Certificate. The Subcommittee should reconsider the granting of the Certificate based on this and other issues raised in this Motion.

CONCURRENCE WITH MOTION

Pursuant to N.H. Code Admin. Rules Site 202.14, Durham has made a good faith effort to obtain concurrence from the other parties. The following parties concur with the relief requested in this Motion: the Smith Family; Jeffrey and Vivian Miller; Helen Frink; Regis and Greg Miller; Donna Heald; Matthew and Amanda Fitch; Anne Darragh and Larry Gans; the Durham Historic Association; the Conservation Law Foundation. Counsel for the Public takes no position on the Motion. Eversource objects to the Motion. Other parties have not responded despite a good faith effort to reach them.

CONCLUSION

For the foregoing reasons, Durham respectfully requests that the Subcommittee:

A. Reconsider the January 31, 2019 Order and Certificate of Site and Facility with Conditions;

B. Issue an order denying a certificate of site and facility; and

C. Grant other relief that may be just and equitable.

Respectfully submitted,

TOWN OF DURHAM
By Its Attorneys,

Dated: March 4, 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing post-hearing brief has on this 4th day of March 2019 been sent by email to the service list in SEC Docket No. 2015-04.

Dated: March 4, 2019

Douglas L. Patch

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