THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0468

APPEAL OF NORTHERN PASS TRANSMISSION, LLC ET AL.

(New Hampshire Site Evaluation Committee)

Opposition Brief of the Intervenor McKenna's Purchase Unit Owners Association In this Appeal from the New Hampshire Site Evaluation Committee

Counsel for McKenna's Purchase Unit Owners Association:

Stephen J. Judge, Esq., #1292
Jeffrey Karlin, Esq., #1311
Stephen Zaharias, Esq., #265814
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, NH 03101
603-669-4140

Oral Argument Requested to be Argued by Stephen J. Judge, Esq.

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QUESTIONS PRESENTED

1. Although Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the "Applicants") attempt to present several questions for review in their Notice of Appeal, all such questions are simply variations of whether the New Hampshire Site Evaluation Committee properly declined to issue a certificate of site and facility. Additionally, and as explained in more detail below, many of the issues that the Applicants have raised in this appeal have not been properly preserved.

TEXT OF APPLICABLE STATUTES/RULES

Please see addendum attached hereto.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The evidentiary record in this matter closed on December 22, 2017. See DK-tab-1347 at p. 164-65; Appx. to Notice of Appeal, Part 1, at p. 14. After the record closed and final briefs were filed, the Applicants' position was that there was no basis to expect that the Project would have a discernible effect on property values in the local and regional markets and, because there would be no effect, there was no developed mechanism to compensate property owners who suffered a loss of property value. As discussed below, the so-called property value guarantee ("PVG") did not and does not exist.

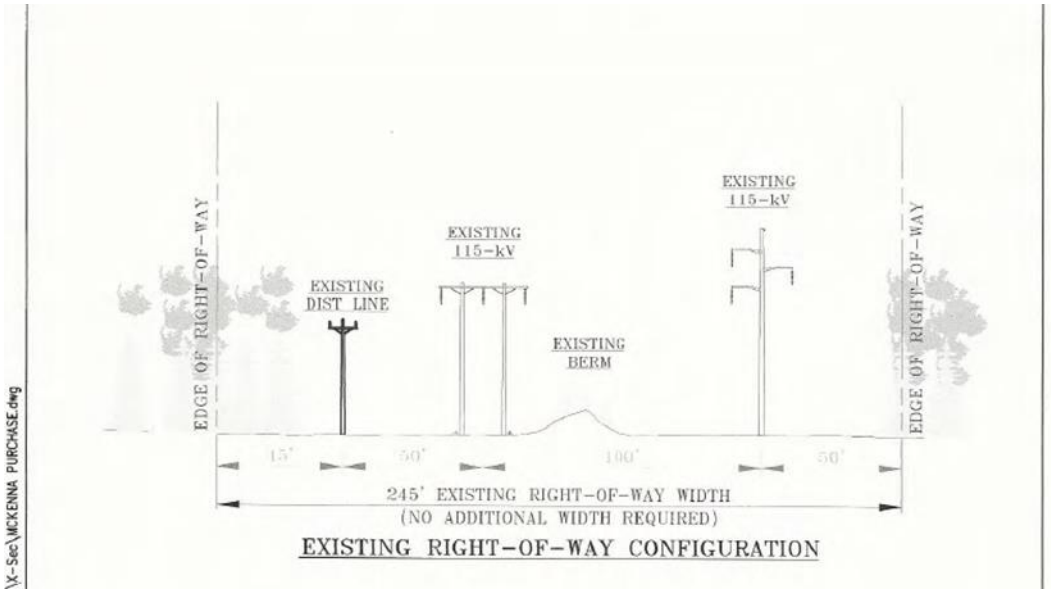
In the beginning, the Applicants, Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy, filed a Joint Application for a Certificate of Site and Facility (the "Application") on or about October 19, 2015 in order to build a 192-mile high voltage transmission line ("HVTL") from Pittsburg, New Hampshire to Deerfield, New Hampshire (the "Project"). See Appx. to Notice of Appeal, Part 1, at p. 14; see generally DK-tab-1. Pursuant to RSA Chapter 162-H and administrative rules governing the Site Evaluation Committee (the "SEC"), the SEC received testimony from over 150 witnesses, reviewed over 2,000 exhibits, and held 70 days of adjudicative hearings concerning the Project. See Appx. to Notice of Appeal, Part 1, at p. 14.

As stated previously, the evidentiary record in this matter closed on December 22, 2017. The Applicants neither requested the record to be left open nor did they ever request the SEC to re-open the record.

Significantly, the Applicants failed to file with the SEC any requests for findings of fact. The Applicants also failed to identify any errors of fact or proposed factual findings in their Motion for Rehearing as required by Site 202.29. See N.H. Code Admin. R. Site 202.29(d).

Thus, the following facts have effectively been admitted. See Barlow v. Verrill, 88 N.H. 25, 183 A. 857, 858 (1936) (explaining that "relevant evidence received without objection may properly be considered by the trier of fact").

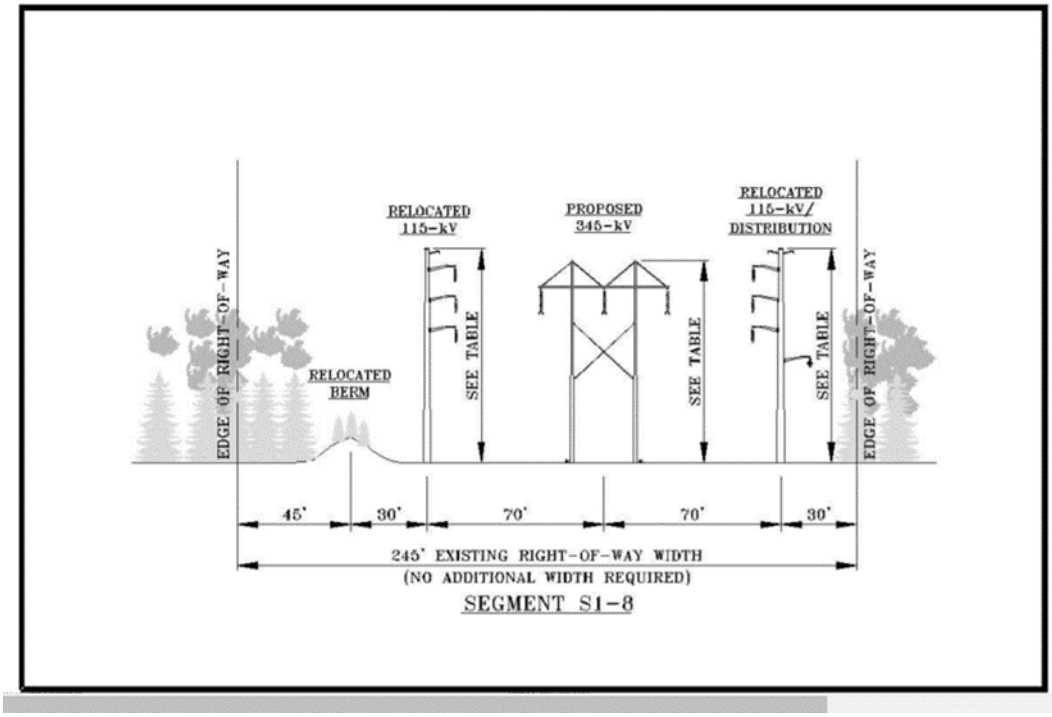
McKenna is a condominium association located at 84 Branch Turnpike in Concord, New Hampshire, and it consists of 148 townhomes. On October 3, 2017, the SEC conducted a site visit to McKenna and toured the property. See DK-tab-1191. The 245-foot-wide, 1100-foot-long right of way ("ROW") for the Project encumbers the southeast side of McKenna's property. It currently contains 115-kV lines as shown below. McKenna owns the property under the ROW and the property to the left of these diagrams.



APP. Ex. 104, attachment 4.3 (pre-filed supplemental testimony of Chalmers, April 17, 2017).

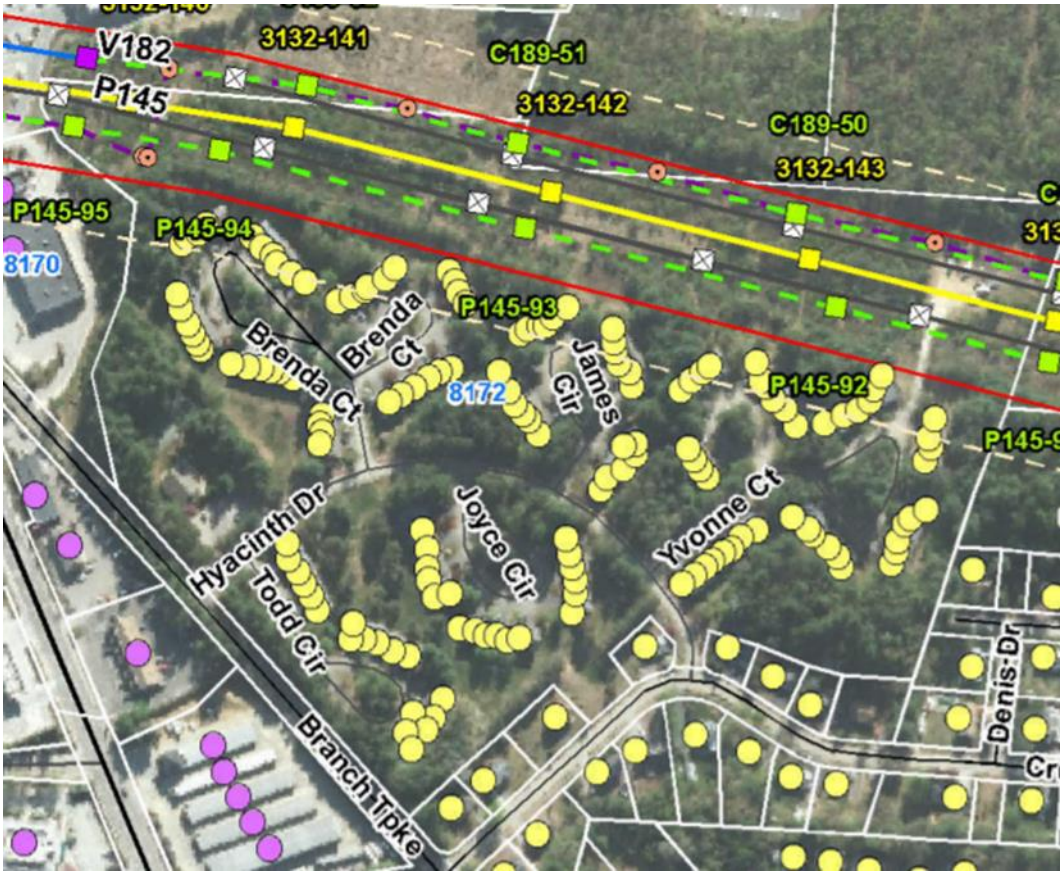
The Project would significantly increase the minimum size of towers within the ROW from approximately 40 feet high to between 70 to 95 feet high. See Appx. to Notice of Appeal, Part 1, p. 180.[1] The new 345-kV structure is more of an eye sore than the existing structures.

[1] Note, though, that all of the plans for the Project are preliminary in nature, as the exact structure heights and placement are all subject to change based on detail design per the Applicants' submission. See APP. Ex. 201, part 1, Aug. 25, 2017.



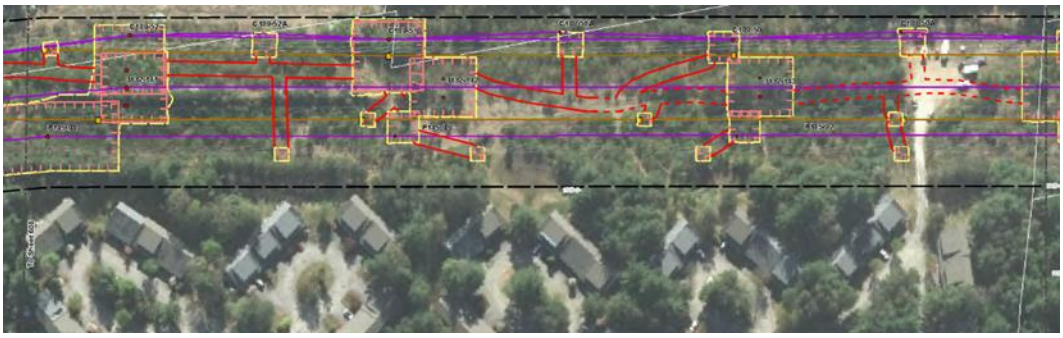
APP Exh. 201 (Project Maps, sheet 162 APP 68080.

In the Applicants' aerial view below, McKenna is identified in blue by its Concord tax number 8172. The townhomes are approximated by yellow circles. The ROW is designated by solid red lines. The solid yellow line marked P145 is the proposed new 345-kV HVTL. The yellow and light green squares are new towers.



APP Exh. 201 (Project Maps, sheet 162 APP 68081).

Due to the Project, McKenna would lose a substantial vegetative and earthen buffer that would increase the towers' visibility to the units. See id. at 287. Many units are within 100 feet of the ROW. See id. at 180-81. Moreover, as demonstrated in the diagram below (in which construction pads are in yellow and access routes are in red), the Project construction itself would have a negative impact on McKenna:



APP Exh. 199 (Part 27, APP 67109).

Michelle Kleindienst filed direct testimony regarding McKenna. See ASHLAND-CONCORD-ABTR Exh. 5. The median age of the members is 68 and many of them are retired ("Owners"). 96% of the homes are owner occupied and represent a major investment for them. The Owners believe that the Project will have a disastrous effect on the character, scenic beauty and quiet enjoyment of their property. The Owners own an undivided interest in the entire property. See Hobson v. Hilltop Place Cmty. Ass'n, 122 N.H. 1023, 1026 (1982) (noting that each unit owner in a condominium "shall be entitled to an undivided interest in the 'common areas' of the condominium according to his ownership percentage"); see also generally RSA 356-B. They believe that the Project will cause property values to plummet by 30-50% for all owners, not just those nearest the ROW.

The Applicants produced James Chalmers as a purported expert witness on the effect of the Project on real estate values. His testimony was both insulting and eventually devastating for the 148 Owners. In his initial testimony, Chalmers omitted any reference to McKenna and its Owners. See APP. Ex. 30 (pre-filed testimony of Chalmers). In fact, his 1,769-page report contained not one word about McKenna. The Owners were ignored because Chalmers determined that he would only consider single family

detached residences because, according to him, reaching his opinion is "an expensive, difficult procedure." DK-tab-1104 at p. 93 lines 1-24 (Chalmers' cross examination). He conceded on cross that an opinion needed to be based on the entire real estate market and that it is "well worthwhile looking at condominiums." Id.

He testified as follows:

Q Who decided that your project did not address condominium projects?

A I did.

Q Were you aware of the condominium projects when you made that decision?

A Certainly. I was aware that there were condominium projects in New Hampshire that would be perhaps adjacent to or, well, that would be either encumbered or abutting or close to the transmission lines we were studying. Yes.

Id. at p. 65.

He invariably testified under oath that the Project would have no discernable effect on property values in the local and regional markets, including for McKenna. Id. at p. 84-85.

The Applicants set forth in the SEC record the City of Concord tax card 8172 for McKenna, as required by RSA 162-H. This was the wrong card for McKenna as it placed the appraised value at $0.[2] This error was never corrected even though there was undisputed testimony that McKenna

[2] Available at https://www.nhsec.nh.gov/projects/2015-06/application/assessor_cards/concord-all.pdf (last accessed March 5, 2019).

was in fact valued at $27,000,000. See Transcript DK-tab-1349 Dec. 21, 2017, at p.140-41.

Chalmers used a "multiple regression analysis" on McKenna, a different process than the one he used for single family residences along the entire 192-mile Project. The McKenna "analysis" consisted of 3 pages of supplemental testimony and one chart. Chalmers described this "analysis" as follows:

> The most telling indicator of whether the addition of NPT to the corridor will have property value effects is to look carefully at the influence of the existing corridor on units closer to the ROW and/or closer to the transmission structures. . . . I performed this statistical test of [the 30-50% predicted loss of property value] by examining the relationship of sale price to unit location relative to the ROW controlling for unit type, year built and year of sale. The second specification uses the distance of each individual unit to the ROW as a more precise measure of proximity and again there is no statistically significant relationship of sale price to distance. The third specification looks at both distance of the unit from the ROW and at distance to the nearest transmission structure. That also shows no relationship of sale price to the two distance measures.

APP Exh. 104, at p. 9 (supplemental pre-filed testimony of Chalmers) (emphases added).

As discussed below, Chalmers' opinion is based on the data he selected. As he testified: "Q. And I think we've agreed that it's important for empirical data provided to this Commission to be complete and accurate, is that right? A That's right." Chalmers' cross examination at p. 99. Specifically, he was asked about his calculation of distance to the right-of-way provided in his Att. 4.2: "Q Is it important for that information to be accurate? A Yes." Id. at p. 102.

Chalmers relied on three data points: a comparison of sale price between comparable units; unit distance from the ROW; and, unit distance from transmission structures.

The balance of Chalmers' data regarding McKenna is inaccurate.

As Chalmers testified, the distance of each unit from the ROW is "a more precise measure." Remarkably, however, Chalmers threw precision out the window and intentionally moved the McKenna units 40 feet away from the ROW. He increased the distance of each unit from the ROW and from the transmission structures. He did this by measuring from the front door facing away from the ROW, the point on the unit furthest from the ROW. To be clear, he abandoned the more accurate measurement point he used with single family residences from the back, closest portion of a structure to the ROW and, instead, without any explanation, produced a chart measuring from the portion of the McKenna units furthest from the ROW. The effect was to move each of the units 40 feet away from the ROW. For example, in reality, unit 71 is located 2 feet within the ROW. In Chalmers' Attachment 4.2 to his supplemental testimony, however, unit 71 is 42 feet away from the edge of the ROW. See APP Exh. 104; Chalmers' cross examination at p. 110.

He also failed to identify the most basic information used to evaluate property value loss: comparables. A comparable is a similar property that is not encumbered by a HVTL. He testified:

> A. Ultimately, the only practical way in which HVTL effects on the value of nearby properties can be studied is by looking at fair market sales of properties potentially influenced by HVTL and comparing them to the sales of otherwise similar properties without HVTL influence.

APP Exh. 104 at p. 13 (supplemental pre-filed testimony of Chalmers). He also testified:

> Q And the appraisal value is as of the date of the sale based on comparable sales with no HVTL influence; is that right?
>
> A That's what you're trying to do, yes.
>
> Q Well, that's what you have to do, right? A comparable has to have no HVTL influence.
>
> A Yeah. You're doing that to the best extent you can.

Chalmers' cross examination at p. 81.

> Q If you fail to do that, you're not following the instructions that you put in the report?
>
> A Yeah, it's not a zero one though. You've got comparables. You don't always have the perfect comps, but in any event, that's the objective, that's the objective, and you do it as best you can.

Id. at p. 82.

He used McKenna sales as comparables, not a condo unit unencumbered by a HVTL. The Applicants failed to instruct him that the owners of a condominium association own an undivided interest in the entire property. Each Owner's unit is encumbered by the HVTL.

He admitted:

> Q You didn't answer the question as to whether or not sales of condominiums would be affected by a high voltage transmission line by comparing sales of properties that are encumbered by it with sales of properties that are not encumbered, that happened to be in the same city. You did not do that.
>
> A That's correct.

Id. at p. 119. The McKenna sales data is useless as a comparable.

Moreover, he listed 358 unit sales from the inception of McKenna in 1988 but failed to focus on the 56 sales that occurred after the Project was announced in 2010.

Significantly, assuming that he followed his own requirements, which he did not, he provided the SEC with no worthwhile information on the effect of the 192-mile Project on the property value of condominiums in the affected communities or in the region. Instead, he applied a flawed analysis and inaccurate data to produce no worthwhile information regarding one condominium association.

To repeat for emphasis, the evidentiary record closed on December 22, 2017, and the Applicants neither requested the record to be left open nor did they ever request the SEC to re-open the record. See Transcript from Afternoon of Dec. 21, 2017, at p. 164-65; DK-tab-1347; Appx. to Notice of Appeal, Part 1, at p. 14.

In its written decision on March 30, 2018, which spanned nearly 300 pages in length, the SEC thoroughly detailed why it denied the Application. It explained in part that it rejected – as being not credible – Chalmers' opinion that:

> [T]here is no basis in the published literature or in the New Hampshire specific research initiatives as described in the Research Report to expect that the Project would have a discernible effect on property values or marketing times in local or regional real estate markets.

APP Exh. 30 at 14; see Appx. to Notice of Appeal, Part 1, at p. 205; see also Appeal of New Hampshire Elec. Coop., Inc., 170 N.H. 66, 74 (2017) (explaining that the "trier of fact is free to accept or reject an expert's

testimony, in whole or in part"); Appeal of Lambrou, 136 N.H. 18, 20 (1992) (explaining that, even if "expert testimony is uncontradicted," such "does not mean that the factfinder is bound to accept it").[3]

Note again that the opinion is only as good as the data upon which Chalmers relied, and that the Applicants used Chalmers to define "affected communities" and "the region" as "local and regional markets" along the length and breadth of the 192-mile corridor for the Project.

As stated above, the data Chalmers used for McKenna was fatally flawed and he provided no data regarding other condominium associations.

In addition, the Applicants chose to use Chalmers' definition of the area to be examined. He chose "local or regional real estate markets." If the Applicants choose to challenge their own expert's opinion of the appropriate scope, and sought to adjust the area Chalmers used, it would

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[3] Chalmers did agree that there might be a decrease in value for 6-9 properties that were single-family detached residences encumbered by the ROW and partially located within 100 feet from the ROW. However, his testimony was ultimately rejected because it was unreliable, unsupported, shallow, unpersuasive, and, no more than merely a guess. See In re Aube, 158 N.H. 459, 465-66 (2009) (stating that the Supreme Court defers to the trier of fact's "judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence," and explaining that the "fact finder may accept or reject, in whole or in part, the testimony of any witness or party, and is not required to believe even uncontroverted evidence"). Chalmers' testimony and evidence contained uncorrected errors, and little, if any, consideration to condominiums. See Appx. to Notice of Appeal, Part 1, at p. 202-07. In sum, the SEC determined that "the Applicant did not meet its burden [of] demonstrating that the Project's impact on property values will not unduly interfere with the orderly development of the region." Id. at p. 207.

not lead to a different result. In other words, the SEC did not reject Chalmers' opinion because he analyzed the wrong area; it was rejected because it was not believable.

The Applicants also chose to provide an imaginary panacea in the face of volumes of testimony that there will be a discernable negative effect on property values. Chairman Honigberg accurately described the imaginary nature of the "property value guarantee" ("PVG"): "there's no firm legal document right now binding the Company to do that." DK-tab-949 at p. 84-85 (Quinlan testimony). Mr. Quinlan, the President of Eversource, agreed that the PVG "may need some refinement before it can be rolled out and implemented." Id.

On cross, he conceded: "Q. It's only an overview. Is there a final document? A. Not at this point. This is not something we've had any experience with. We developed a program that is still kind of in development, if you will." DK-tab-947 at p. 170-71.

Within the first two days of the hearing, when these exchanges took place, **AND AT ALL TIMES DURING THIS MATTER INCLUDING THIS APPEAL**, the PVG was something the Applicants had no experience with, and it remained "a concept . . . a framework of a program . . . that probably could use some further development before it's ready for execution." DK-tab-949 at p. 84-85.

The PVG was never developed. There is no firm legal document binding the company. It was never implemented.

Based upon all of this, the SEC explained that the Applicants failed to demonstrate by a preponderance of the evidence that the Project will not unduly interfere with the orderly development of the region, as required by

RSA 162-H:16, IV(b). In reaching this conclusion, the SEC considered the various elements set forth in Site 301.09 and 301.15, which contain criteria relative to the effects on the orderly development of the region and finding undue influence. See N.H. Code Admin. R. Site 301.09, 301.15.

According to the SEC:

> As for the potential harms of construction and operation of the Project, the Applicant failed to provide credible evidence regarding the negative impacts on tourism and real estate values. The Applicant also failed to provide a plan for construction of the Project that appropriately considered the Project's effects on municipal roads and businesses in the northern part of the State.
>
> . . . .
>
> In considering whether the Applicant met its burden under RSA 162-H:16, IV(b) we considered all the relevant evidence and information regarding the proposed route of the Project and its potential impacts and benefits on the orderly development of the region. Having found the Applicant failed to meet the requirements of RSA 162-H:16, IV(b), the Subcommittee voted unanimously to deny the Application. The Subcommittee decided, by a vote of five to two, not to continue deliberations on the other requirements of RSA 162-H:16, IV.

Appx. to Notice of Appeal, Part 1, at p. 14-15 (emphasis added).

The SEC continued:

> [T]he orderly development prong of the Site Evaluation Committee's review has a number of elements. Those elements are set out in the Committee's rules, which require consideration of a proposed project's effects . . . and the economy of the region . . . . See N.H. Code Admin. Rules Site 301.15.
>
> . . . .

> More specific guidance for reviewing those elements is set forth in Site 301.09. Relevant considerations concerning a project's effects on the economy include: . . . (4) The effect of the proposed facility on real estate values in the affected communities . . . . N.H. Code Admin. Rules Site 301.09(b).
>
> . . . .
>
> Regarding property values, we similarly did not find credible the Applicant's expert's opinion that there would be no discernable effect on property value. The Applicant's proposed compensation plan was, quite plainly, inadequate, but because the Applicant's analysis of the effects was also inadequate, it was impossible for us to even begin to consider what an appropriate compensation plan might require.
>
> . . . .
>
> Based on the testimony and evidence presented, and after due consideration has been given to views of municipal and regional planning commissions and municipal bodies, we find that the Applicant failed to carry its burden of proof and failed to demonstrate by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region.

Appx. to Notice of Appeal, Part 1, at p. 291-93 (emphasis added).

Appropriately, the SEC denied the Application and explained that there was no need to "go further" and address the remaining elements of RSA 162-H:16, IV because, given the language of the statute, the SEC "could not grant a Certificate even if the Subcommittee were to find in favor of the Applicant on the remaining three prongs." Id. at p. 294. Thereafter, the Applicants filed a Motion for Rehearing. See id. at p. 299.

The Motion for Rehearing contained Attachments A, B and C – 27 pages of new conditions proposed on February 28th and March 9th of 2018,

long after the record closed and after the SEC voted to deny the Application. Page 5 of Attachment C in fact contains the following "additional conditions" in an impermissible attempt to expand the record to "earmark" $25,000,000 for tax abatements and loss of property value coupled with an expansion of the non-existent PVG:

> 22. ***Property Value.*** Further Ordered that, in order to address potential property value impacts of the Project in communities where overhead construction is anticipated, the Applicants shall condition their funding commitment with the FNH Fund on earmarking $25 million to address property value impacts in these communities during the first five years following commencement of commercial operation, as follows: (i) to authorize the Independent Administrator to draw on these earmarked funds to fund the Property Value Guaranty; and (ii) to provide an offset for municipal property tax abatements attributable to Northern Pass. To the extent that the earmarked funds are not fully distributed on expiration of the five-year period, all remaining funds shall be available for distribution by the FNH Fund for the purpose of community investment in impacted municipalities.
>
> 23. ***Property Value Guaranty***. Further Ordered that the Applicants shall expand eligibility for the Property Value Guaranty Program described in Attachment L to the March 24, 2017 Supplemental Testimony of William J. Quinlan to include any detached residence or condominium unit located within 200 feet of the Project right-of-way along the overhead segments of the route, and including all transition stations, substation expansions, and the AC-DC converter terminal.

These paragraphs are an admission that the initially described PVG, if it had been implemented, was inadequate.

Moreover, certain Intervenors filed a Motion to Strike the Attachments as a violation of Site 202.26(a), which states in part that at "the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record." The Motion to Strike was unopposed. As a result, the SEC granted said Motion and struck the Attachments from the record. See Appx. to Notice of Appeal, Part 1, at p. 362-63.

After conducting deliberations on the Motion for Rehearing, the SEC denied the Motion in a 68-page written decision, concluding that the Applicants failed to state a good cause for rehearing. See id. at p. 363. The SEC also denied the Applicants' request to resume deliberations on the Project. See id. The SEC did rule on findings of fact requested by the City of Berlin in its final brief. This appeal followed.

SUMMARY OF THE ARGUMENT

The arguments in the Applicants' brief rest on a number of fallacies. First, their brief is premised upon the erroneous assertion that they did not have the burden of proof in this case. In fact, incredibly, the Applicants attempt to shift the burden upon the SEC to devise a proper mitigation plan, while at the same time they do nothing to address the factual void in the record below concerning appropriate mitigation. Simply put, the Applicants relied exclusively on the opinion of Chalmers to contend that the Project will have no discernable effect on property values and will, therefore, not unduly interfere with the orderly development of the region. Based upon this assumption, the only compensation plan even remotely considered by the Applicants was to create a PVG to compensate the 6-9 property owners of single-family detached residences who, according to Chalmers, might have their properties suffer a decrease in value from the Project.

In the end, according to the Applicants, no mitigation plan was necessary and none was proposed prior to the close of the record. Although the Applicants made reference to other possible mitigation plans in certain attachments to their Motion for Rehearing, this "evidence" was very general in nature and, more importantly, was stricken from the record by the SEC after the Applicants failed to object to the Motion to Strike. Accordingly, as far as mitigation plans are concerned, there were none. The SEC was left with only the undeveloped notion that a PVG could perhaps be used to address a few potentially impacted properties.

The SEC found that Chalmers' opinion – the basis for there being no need for a mitigation plan – lacked credibility. In light of the Applicants' failure to submit a reliable expert opinion on the effects of the Project, the SEC found that it was unable to determine whether the Project would unduly impact property values and "because the Applicant's analysis of the effects was also inadequate, it was impossible for us to even begin to consider what an appropriate compensation plan might require." Appx. to Notice of Appeal, Part 1, at p. 293.

In their Motion for Rehearing, the Applicants did not claim as grounds for error that the SEC should have considered the opinions of other experts, such as Kavet, Rockler & Associates ("KRA"), who testified that the Project might have a significant impact on property values in the region. The Applicants continued to rely on Chalmers' "no basis for a discernible effect" theory yet insisted paradoxically that there was some basis in the record for the SEC to design a mitigation plan. The Applicants even suggested that the SEC could and should have given life to the PVG notion in order to reimburse those property owners whom Chalmers insisted would suffer no effect. Tellingly, however, the Applicants failed to identify the evidence in the record that would have permitted such mitigation.

The SEC was entitled to reject the opinion of the Applicants' property value expert, Chalmers. Having failed to provide the evidence required for the SEC to properly evaluate and mitigate the Project's impact on property values in the region, the Applicants in this appeal attempt to shift the burden of proof onto the SEC. The burden, however, was on the Applicants, not the SEC, to provide all relevant information necessary to prove that the Project would not unduly interfere with the orderly

development of the region. The record supports the SEC's finding that the Applicants failed to meet their burden.

The SEC was not obligated to rely on the opinions of other experts - whom the Applicants expressly urged the SEC to disregard as unreliable - to compensate for the deficiency in the Applicants' submission. KRA, the expert who the Applicants now contend the SEC should have considered, provided only a very general projection of the Project's possible impact. KRA did not provide a detailed assessment of which properties would be affected and the extent of the impact. Instead, it criticized Chalmers for failing to include condominiums, commercial properties, hotels, motels, etc. in his analysis. Given the dearth of reliable evidence in the record, it was not the SEC's burden to speculate about how to create a PVG to mitigate the effect of the Project on the numerous other impacted properties not addressed by the Applicants.

Moreover, many of the issues raised by Applicants in this appeal were not properly preserved in the record below. It was not until the Applicants filed their Notice of Appeal that they for the first time claimed that the SEC should have considered the opinion of KRA, and even in their appellate brief the Applicants have still not described with any specificity the evidence in the record that the SEC might have relied upon to create the PVG. The Applicants had ample opportunity before the record was closed (especially given that there were several opportunities to provide testimony and/or exhibits) to submit evidence to address these issues. Having failed in their burden, the Applicants are not entitled now to reopen the record to raise new issues and submit new evidence.

In fact, since two of the panel members who heard this matter will no longer be available for further hearings[4], the practical effect of remanding the matter to the SEC would be to require a new hearing before a different panel, which will then almost certainly mutate into a request by the Applicants to submit new evidence. Since the record has been closed with respect to the pending Application, the more appropriate course of action is for this Court to affirm the decision of the SEC and leave it to the Applicants to decide whether to submit a materially different application.

The Applicants' argument that the SEC refused to consider mitigating measures and failed to consider all evidence and weigh the impacts and benefits, misconstrues the SEC's decision and the applicable statutes. The SEC found that the "Applicant's proposed compensation plan was, quite plainly, inadequate, but because the Applicant's analysis of the effects was also inadequate, it was impossible for us to even begin to consider what an appropriate compensation plan might require." Appx. to Notice of Appeal, Part 1, at p. 293.

In other words, due to the deficiency of the Applicants' submission, there was insufficient evidence in the record for the SEC to determine how to devise a mitigation plan to ensure that the Project would not unduly interfere with the orderly development of the region. Given this finding, further deliberation was pointless - because the Project's impacts were undetermined and undeterminable, it was impossible for the SEC to weigh the Project's benefits against its impacts or to develop a mitigation plan.

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[4] The two sitting public members' terms ended and new members were appointed. See https://www.nhsec.nh.gov/members/index.htm (last accessed on March 18, 2019).

The Applicants took a gamble and lost. They relied exclusively on Chalmers in a bid to limit their mitigation costs. The Applicants played this hand throughout the hearing, and did not change their strategy until after the SEC rejected their position and the record was closed. By offering new proposals (not previously mentioned in the Application) to mitigate the effects of the Project on property values in their Motion for Rehearing, the Applicants tacitly acknowledged that there was a factual basis for the SEC's finding that the Applicants had failed to prove that the Project as proposed in the Application would not unduly interfere with the orderly development of the region. The SEC denied the Applicants' attempt to expand the record. Having lost the gamble, the Applicants should not be allowed to resurrect their Application through this appeal by offering new evidence at a new hearing on remand. Should the Applicants wish to pursue the Project, they should file a new and materially different application.

ARGUMENT

I. The Applicants failed to preserve, and/or should be estopped from asserting, several of their arguments.

As an initial matter, this Court should refuse to entertain the arguments set forth by the Applicants because they are estopped from making those arguments and/or they failed to properly preserve them for this Court's review.

Throughout their time before the SEC, the Applicants relied exclusively upon the opinion of Chalmers that the Project would have no discernable effect on property values. In their Motion for Rehearing, the Applicants continued to rely solely upon the opinion of Chalmers even though the SEC had rejected his opinion as not being credible. The Applicants did not claim as a basis for error, as they now claim in this appeal, that the SEC should have considered and relied upon the opinions of other experts, such as KRA, who, contrary to Chalmers, testified about the potential negative effects that the Project would have on property values in the region.

The Applicants did suggest in their Motion for Rehearing that "imposition of an expanded [PVG] might have addressed" the SEC's concerns about the negative effect on property values. Appx. to Notice of Appeal, Part 2, at p. 376. The Applicants also asserted that the SEC had "sufficient evidence" to impose the PVG condition to mitigate impacts caused by the Project and if the SEC determined that the PVG was insufficient it could and should have expanded it to cover more homeowners. See Appx. to Notice of Appeal, Part 2, at p. 570-71. Significantly, the Applicants failed to describe the content of the

purportedly "sufficient evidence" or what additional evidence might be required to create an "expanded PVG." See id. In fact, as explained above, there was no PVG and there was no credible expert opinion on record to create the mitigation plan.

It was not until the Applicants filed their NOA that they, for the first time, argued that the SEC should have relied on the property value opinions of experts other than Chalmers, like KRA, and that the SEC committed error in failing to do so. See generally NOA. Remarkably, the Applicants based this argument on KRA's testimony that "it is difficult to estimate property value losses…." NOA at p. 65 (emphasis in NOA). In a logical whipsaw, the Applicants then abandoned KRA as a reliable expert and parenthetically noted that it disputed KRA's evidence on the negative effect on tourism. See id. at p. 77 (stating that the "Applicants disputed" KRA's assessment).

Given this record, the Applicants should be estopped from taking positions in this appeal that directly contradict the position that they firmly established before the SEC, in which they relied solely upon Chalmers. To allow the Applicants to take a contradictory position now would not only unfairly prejudice the opponents of the Project, but it would also undermine the integrity of the process before the SEC. Such should be avoided. See Kelleher v. Marvin Lumber & Cedar Co., 152 N.H. 813, 848 (2005) (explaining that the purpose of judicial estoppel is "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment," and that when "a party assumes a certain position in a legal proceeding . . . it may not thereafter, simply because its interests have changed, assume a contrary

position"; thus, the judicial estoppel doctrine applies flexibly and the court will consider several factors, including "whether the party's later position is clearly inconsistent with its earlier position" and "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" (quotations and brackets omitted)).

Further, the Applicants should not be allowed to raise issues in this appeal that were not properly preserved in the record below. As this Court has explained, it is "well established" that this Court "will not consider issues raised on appeal that were not presented" below, and there is no reason to deviate from that preservation requirement now. Sullivan v. Town of Hampton Bd. of Selectmen, 153 N.H. 690, 695 (2006); see also In re Rupa, 161 N.H. 311, 314 (2010) ("This court has consistently held that we will not consider issues raised on appeal that were not presented in the lower court." . . . "We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance." (Quotations omitted.)).

Apart from a limited number of potentially affected properties, the Applicants provided no evidence of how mitigation related to the Project should be accomplished. It was too late for the Applicants to state in their Motion for Rehearing that a non-existent PVG could and should have been created to reimburse affected property owners, especially when the Applicants failed to request before the SEC either that the record be left open or that the record be re-opened to present additional evidence. See N.H. Code Admin. R. Site 202.26 (explaining that, unless a party requests

otherwise, at the conclusion of the hearing, the "record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record"); N.H. Code Admin. R. Site 202.27(a) (providing that a "party may request by written motion that the record in any proceeding be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument").

As noted, during the hearing the Applicants did not rely on property value experts apart from Chalmers and did not submit adequate evidence of how a PVG could be used to mitigate the adverse effects of its Project on property values. The Applicants were given ample opportunity to present all evidence they deemed to be relevant to their application. The record was closed without such evidence after pre-filed testimony, supplemental testimony and multiple exhibits. See N.H. Code Admin. R. Site 202.26(a)-(b) (explaining that, unless a party requests that the record be left open, at the "conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record").

In their Motion for Rehearing, the Applicants did not claim that the SEC had committed error by failing to consider the opinion of KRA (which was almost certainly considered by the SEC in its rejection of Chalmers' opinion). The Applicants continued to insist that Chalmers had provided the only credible opinion on the subject. Cf. 93 Clearing House, Inc. v. Khoury, 120 N.H. 346, 350 (1980) (providing that the "trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses"). The Applicants also failed to describe the evidence on record that would have purportedly enabled the SEC to determine which

properties to include in a newly created PVG and the extent of the remuneration to affected owners.[5] They did not explain how the SEC was supposed to create a PVG to cover those homeowners, business owners, etc. who were not covered in Chalmers' deficient and unreliable report. The Applicants essentially asked the SEC to reconsider its decision in a vacuum and to ignore its position throughout the hearing. See generally Appx. to Notice of Appeal, Part 2, at p. 557-657.

This Court should not entertain such arguments on appeal. See Thompson v. D'Errico, 163 N.H. 20, 22 (2011) (explaining that "it is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial" and that the appealing party has the burden to demonstrate that it "specifically raised the arguments articulated in [its] brief before the trial court"); see also In re Mannion, 155 N.H. 52, 54 (2007) (stating that parties "are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected," and noting that the preservation requirement, "grounded in common sense and judicial economy, affords the trial court an opportunity to correct an error it may have made" (quotations omitted)).

II. The Applicants have impermissibly attempted to shift the burden of proof, and they misconstrue the SEC's conclusions.

Although the Applicants failed to preserve and/or should be estopped from making their appellate arguments, this Court could, nevertheless, still address their arguments. See, e.g., JMJ Properties, LLC

[5] In fact, footnote 4 of the Applicants' brief cites to DK-tab-1386, their final brief submitted after the record was closed.

v. Town of Auburn, 168 N.H. 127, 130 (2015) (explaining that "[p]reservation is a limitation on the parties to an appeal and not the reviewing court"); but see RSA 541:4 (providing that "[n]o appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds"). If this Court does address the Applicants' appellate arguments, then we must turn to the same.[6]

The parties fundamentally disagree as to which party has the burden of proof. According to the Applicants, they do not have the burden. They assert in their brief that the SEC "erred in imposing burdens of proof on the Applicants . . . when no such burdens exist." Applicants' brief at p. 28-29. The Applicants further claim that "[a]part from the Applicants having had

[6] Note that, pursuant to RSA 162-H:11, SEC decisions are "reviewable in accordance with RSA 541." See In re Campaign for Ratepayers' Rights, 162 N.H. 245, 249 (2011). The proper standard of review is set forth in RSA 541:13, which provides that the "burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." To the extent that the issues on appeal involve the interpretation of statutes and administrative regulations, this Court's review is de novo. See, e.g., Appeal of Cook, 170 N.H. 746, 749 (2018).

no such burden, the [SEC] makes no findings of fact supporting" the SEC's conclusion that the Applicants failed to meet their burden of demonstrating that the Project would not unduly interfere with the orderly development of the region. Id. at p. 48; see RSA 162-H:16, IV(b). The Applicants' brief is fundamentally premised upon these arguments.

The Applicants are simply incorrect. The statutory scheme and applicable administrative rules clearly put the burden of proof on any applicant to show sufficient facts necessary for the SEC to find the required elements of RSA 162-H:16, IV prior to the issuance of a certificate. To read the statutory scheme and applicable administrative rules in any other manner would violate several rules of statutory construction. See, e.g., In re Town of Seabrook, 163 N.H. 635, 653 (2012) (explaining that statutory language is accorded "its plain and ordinary meaning" and that courts "will not add words the legislature did not see fit to include"); In re Town of Bethlehem, 154 N.H. 314, 319 (2006) (explaining that courts "will not consider what the legislature might have said or add words that the legislature did not include").

The plain language of the applicable statutes, for example, demonstrates that the Applicants had the burden to provide "all relevant information" to prove by a preponderance of the evidence that the Project "will not unduly interfere with the orderly development of the region." See, e.g., RSAs 162-H:7, IV; :10, IV; :16, II, IV. Moreover, the Applicants do not dispute the fact that a material element of that determination included an assessment by the SEC of whether the Project would adversely impact property values in the region. See N.H. Code Admin. Rules Site 301.09, 301.15; see also New Hampshire Resident Partners of Lyme

Timber Co. v. New Hampshire Dep't of Revenue Admin., 162 N.H. 98, 101 (2011) (explaining that an "administrative regulation adopted by an agency pursuant to a statute is prima facie evidence of the proper interpretation of the statute" (quotation, emphasis and ellipsis omitted)).

The Applicants, thus, carried the burden to submit sufficient evidence into the record during the hearing to allow the SEC to determine which properties were impacted by the Project, whether such impacts unduly interfered with the development of the region, and, if so, whether the impact could be mitigated. In other words, the Applicants were required to provide sufficient evidence for the SEC to properly evaluate and, if necessary, approve a plan to mitigate the Project's impact on property values in the region. See RSA 162-H:16, IV (requiring that an applicant provide "all relevant information" necessary for the SEC to issue a certificate). This they failed to do, and, instead, the Applicants now erroneously attempt to shift the burden of proof onto the SEC. In fact, the burden was, and always has been, on the Applicants, not the SEC, to provide all relevant information necessary to prove that the Project would not unduly interfere with the orderly development of the region. See id. Without the required evidence, the SEC understandably declined to issue a certificate and denied the Motion for Rehearing.[7]

[7] Stated differently, the Applicants now ask this Court, after the record has been closed, to reverse a factual finding by the SEC based on evidence and assertions that it did not present to the SEC in the proceedings below. In this regard, the Applicants ask the Court to find error in the SEC's failure to consider opinions concerning the impact on property values that they did not rely on and that they asked the SEC to disregard. See Vention Med. Advanced Components, Inc. v. Pappas, 171 N.H. 13, 27 (2018), as

Having failed to meet their burden below, the Applicants cannot meet their burden with respect to this appeal. Given the evidence before the SEC – or, in actuality, the lack of evidence in support of the Applicants' position – there is no valid basis upon which to overturn the SEC's decision. The Applicants simply cannot show that the "order is contrary to law or, by a clear preponderance of the evidence, is unjust or unreasonable." Appeal of Lakes Region Water Co., Inc. (New Hampshire Pub. Utilities Comm'n), 198 A.3d 898, 900 (N.H. 2018); see RSA 541:13.

Indeed, rather than cite to evidence in the record, the Applicants instead rely in their brief upon evidence and arguments concerning certain mitigation plans that were stricken from the record without opposition by the Applicants. For example, on p. 29 of their brief the Applicants claim that the SEC "could—and should—have evaluated multiple mitigation measures offered by the Applicants and others to alleviate potential impacts which, in permitting proceedings, are an essential element of the burden of proof." The Applicants go so far as to claim that the "failure to consider mitigation measures and conditions in this proceeding is arbitrary and is, standing alone, a sufficient basis to vacate the Orders." Applicants' brief at p. 38.

The Applicants' mitigation measures referred to here, however, are those contained in Attachments A, B and C to the Applicants' Motion for

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amended (Oct. 23, 2018) (explaining that the preservation requirement "is designed to discourage parties unhappy with the trial result from combing the record, endeavoring to find some alleged error never addressed by the trial judge that could be used to set aside the verdict" (quotation and brackets omitted)).

Rehearing, which, as noted, were stricken from the record by the SEC without objection by the Applicants. The Applicants should not now be entitled to rely upon such "evidence" as this evidence is not appropriately part of the record.

The state of the record therefore is that the Applicants failed at the hearing before the SEC to offer any mitigation plan beyond the idea of a very limited PVG, which the SEC found to be lacking. The inadequacy of the PVG is confirmed in the Applicants' brief. They point out that the president of Eversource testified that he agreed that the PVG "as it currently exists . . . may need some refinement before it can be rolled out and implemented" since "right now it's a concept. I think we have the framework of a program . . . that probably could use some further development before it's ready for execution." Applicants' brief at p. 36 n.26 (quotation omitted). Because the PVG was only a "concept" that needed to be further developed, the SEC understandably concluded that the "evidence presented by the Applicant[s] is inadequate for the Subcommittee to determine which properties should actually be included in the [PVG] program and the extent of remuneration that should be available." Appx. to Notice of Appeal, Part 1, at p. 206-07. Additionally, the fact that in their Motion for Rehearing the Applicants tried to argue that the PVG needed to be increased significantly to $25,000,000 was at least a tacit admission that the initial version of the PVG as presented to the SEC was inadequate to say the least.

Thus, the SEC explained that the Applicants' "proposed compensation plan was, quite plainly, inadequate, but because the Applicant's analysis of the effects was also inadequate, it was impossible

for us to even begin to consider what an appropriate compensation plan might require." Id. at p. 293. Given such findings, the SEC had no choice but to conclude that the Applicants had failed to meet their burden to prove that the Project would not unduly interfere with the orderly development of the region. Further, given that the burden of proof was and remained on the Applicants, it was not the SEC's burden to speculate about how to potentially create a PVG to mitigate the effect of the Project on the numerous impacted properties not addressed by the Applicants.

In other words, the SEC made a reasonable determination based upon the evidence presented – particularly in regard to the lack of reliable evidence concerning mitigation plans – that the Applicants failed to meet their burden to demonstrate by a preponderance of the evidence that the Project will not unduly interfere with the orderly development of the region. Such a decision was explained in a very lengthy, thorough, and persuasive SEC order made after several months of hearings, digesting the testimony of dozens of witnesses, and reviewing thousands of exhibits. The SEC's decision must be upheld. See Appeal of Peirce, 122 N.H. 762, 765 (1982) (explaining that when "reviewing an administrative decision, we will treat the agency's findings of fact as prima facie lawful and reasonable" and "will not substitute our judgment for that of the agency").

III. This Court must defer to the SEC's reasonable determination that Chalmers and his opinions were not credible.

The SEC determined that the experts relied upon by the Applicants, such as Chalmers, were not credible and did not provide reliable information necessary to make the findings required pursuant to RSA 162-

H:16, IV. Those credibility determinations[8] were for the SEC – and the SEC alone – to make as the trier of fact. Such determinations must be upheld by this Court if there is any evidence in the record to support them. See In re Aube, 158 N.H. 459, 465-66 (2009) (stating that the Supreme Court defers to the trier of fact's "judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence," and explaining that the "fact finder may accept or reject, in whole or in part, the testimony of any witness or party, and is not required to believe even uncontroverted evidence"); Appeal of Mary Allen, 170 N.H. 754, 762 (2018) ("When reviewing the subcommittee's decision, it is not our task to determine whether we would have credited one expert over another, or to reweigh the evidence, but rather to determine whether its findings are supported by competent evidence in the record.").

The Applicants commissioned Chalmers as an expert to address the issue of whether the Project would adversely impact property values in the region. Chalmers concluded that apart from possibly 6-9 single-family detached residential properties partially located within 100 feet of the ROW (McKenna's Purchase and all business structures do not meet the first prong of this standard), the Project would have no discernable effect on real estate values in the region or in the community of Concord. See Appx. to Notice of Appeal, Part 1, at p. 206. In contrast to the opinion of Chalmers, Counsel for the Public submitted testimony from KRA, which estimated

[8] The opinions provided by the Applicants were worthless whether measured as credible or reliable.

that the present day value of the residential impacts of the Project over 60 years "could exceed $10 million and possibly be as high as $30 million." See KRA Report filed 12/30/16, at p. 2; see also CFP Ex. 146; CFP Ex. 147 (emphases added).

Relying exclusively on the opinion of Chalmers, the Applicants asserted at the hearing before the SEC that the Project would have "no discernable effect on property values" and, thus, the Project would not unduly interfere with the orderly development of the region. See APP. Ex. 30, at p. 14, lines 1-4 (Oct. 16, 2015) (pre-filed testimony of Chalmers). The Applicants also asserted that Chalmers had provided the only credible opinion on the issue and that the contrary opinion offered by KRA, "that purports to be an opinion of property value impact, then, should be disregarded." DK-tab-1386 at p. 116 (Applicant's Final Brief - KRA Offers a Computational Exercise that Has No Relevance to the Property Value Implications of the Project). Perhaps this position derived as a function of the fact that earlier, on page 19 of his supplemental testimony, Chalmers testified that he did not find KRA's methodology and analysis a "useful contribution to the property value issues before the SEC in this matter" because, according to Chalmers, KRA's analysis suffered from several "major shortcomings" including the misrepresentation of certain literature and reliance upon inappropriate literature. APP. Ex. 104 at p. 19 (supplemental pre-filed testimony of Chalmers).

As described in their brief, the Applicants then "offered the PVG to 'ensure that the owners of those properties Mr. Chalmers identified as most likely to see property value impacts do not incur an economic loss in the event of a sale within 5 years after construction begins.'" Applicants' Brief

at p. 36 (emphasis added). That is to say, the only hint of a compensation plan proposed by the Applicants was to use the non-binding idea of a PVG to compensate the 6-9 property owners of single family detached residences located within 100 feet of the ROW who, according to Chalmers, might have their properties suffer a decrease in value from the Project.

The SEC found – as it was entitled to find – that Chalmers' opinion lacked credibility. See DeLucca v. DeLucca, 152 N.H. 100, 102 (2005) (explaining that the "trier of fact is in the best position to measure the persuasiveness and credibility of evidence and is not compelled to believe even uncontroverted evidence," and that the trier of fact "resolve[s] conflicts in the evidence" and can "accept or reject such portions of the evidence presented as [it] found proper, including that of the expert witnesses"; "Thus, we defer to the [trier of fact's] resolution of conflicts in the testimony, the credibility of witnesses, and the weight to be given evidence." (Quotations omitted)). Absent a reliable expert opinion, the SEC properly concluded that it was unable to determine whether the Project would unduly impact property values.

The SEC was not obligated to accept Chalmers' opinion. Nor was it obligated to rely on the opinions of other experts (like KRA) - who the Applicants expressly urged the SEC to disregard as unreliable - to compensate for the deficiency in the Applicants' submission. See, e.g., Appeal of Mary Allen, 170 N.H. at 762 (explaining that the "trier of fact is free to accept or reject an expert's testimony, in whole or in part" (quotation omitted)). In point of fact, KRA's opinion, which the Applicants now contend the SEC should have considered, was very general in nature and did not provide a detailed analysis of which properties would be

affected by the Project or the extent of the impact. Even with the opinion of KRA, there was simply no reliable evidence in the record on this subject.

The Applicants in their brief seem to suggest that the SEC was required, as a matter of law, to find Chalmers credible in this case because a different SEC panel may have found him to be credible in different matters before the SEC. Of course this is incorrect as such a principle would effectively usurp the trier of fact's role by rendering the SEC unable to make credibility determinations on a specific case-by-case basis. Cf. 93 Clearing House, Inc., 120 N.H. at 350 (explaining that the "trier of fact is in the best position to measure the persuasiveness of evidence and the credibility of witnesses"). Moreover, according to statute, the SEC only needs to "consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby." RSA 162-H:10, III. Further, many courts throughout the country are in agreement that the doctrine of stare decisis does not apply to the decisions of administrative agencies. See, e.g., Ex parte Shelby Med. Ctr., Inc., 564 So. 2d 63, 68 (Ala. 1990) ("Because there is need for flexibility in administrative decisionmaking, the doctrine of stare decisis generally does not bind administrative agencies to their prior decisions."); Appeal of K-Mart Corp., 710 P.2d 1304, 1307 (Kan. 1985) (explaining that the "doctrine of stare decisis is inapplicable to decisions of administrative tribunals"); Kentucky Broad. Corp. v. F.C.C., 174 F.2d 38, 40 (D.C. Cir. 1949) (same); Courtesy Motors, Inc. v. Ford Motor Co., 384 S.E.2d 118, 120 (Va. App. Ct. 1989) (same).

Accordingly, simply because the SEC may have found Chalmers to be credible with respect to his specific opinions and analyses under the

particular circumstances of a different case, did not preclude the SEC from rejecting the opinions of Chalmers under the specific circumstances of the present case.

IV. The SEC was not required in this case to deliberate upon or make findings concerning each element of RSA 162-H:16, IV.

The Applicants assert that the statutory and regulatory scheme required the SEC in this case to deliberate upon and make findings relative to each of the criteria set forth in RSA 162-H:16, IV. This is wrong. Pursuant to the plain language of RSA 162-H:16, IV, the SEC must find that multiple elements are met before it can issue a certificate. The statute provides that "[i]n order to issue a certificate, the committee shall find" several conditions that need to be met. RSA 162-H:16, IV. If any of those elements are not met, the statute is explicit that a certificate cannot issue. See Appeal of Mary Allen, 170 N.H. at 762 (explaining that the "legislature has delegated broad authority to the Committee to consider the potential significant impacts and benefits of a project, and to make findings on various objectives before ultimately determining whether to grant an application" (emphasis added, quotation omitted)).

In contrast to the process of issuing a certificate, the statute does not require that the SEC consider every condition before denying an application. Had the legislature wanted to impose the same requirements upon the SEC when denying an application for a certificate as when issuing one, the legislature could have easily stated as much in the statute. See Petition of Malisos, 166 N.H. 726, 730 (2014) (concluding that, when interpreting a certain statute, had the "legislature intended the term 'spouse' to exclude from retirement benefits a legally separated spouse, it could have

said so"). However, the legislature did not do so, and, therefore, we are left with the plain language of the statute, which requires the SEC to make findings on each criteria set forth in RSA 162-H:16, IV only if it issues a certificate – circumstances not present here.[9]

That being so, here, where the Applicants failed to provide sufficient credible evidence that the "site and facility will not unduly interfere with the orderly development of the region," RSA 162-H:16, IV(b), there was no need – contrary to the Applicants' assertions – for the SEC to deliberate upon any other criteria set forth in RSA 162-H:16, IV. Such deliberation and findings upon all of the criteria in RSA 162-H:16, IV would have only been necessary if the SEC had decided to issue a certificate, rather than deny it as occurred in this case.[10]

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[9] The notion that the SEC must consider every criterion before denying an application would lead to absurd results. If, for example, the SEC determined that an applicant was financially unable to undertake a specific project, it would nevertheless, according to the Applicants' rationale, still be required to consider whether the project satisfies every other criteria. As this Court has stated, it will not construe statutes in such a way that "would lead to an absurd or unjust result." Wolfgram v. New Hampshire Dep't of Safety, 169 N.H. 32, 36 (2016) (quotation omitted).

[10] Even assuming that it was error for the SEC not to have deliberated upon the other criteria contained in RSA 162-H:16, IV, such was harmless. See McIntire v. Lee, 149 N.H. 160, 167 (2003) (explaining that an "error is considered harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party asserting it"). As explained throughout this brief, the Applicants failed to satisfy their burden to show that the "site and facility will not unduly interfere with the orderly development of the region," and, as such, a certificate could not issue without that required element. RSA 162-H:16, IV. Thus, even if the SEC committed an error by failing to deliberate upon the other elements of RSA 162-H:16, IV, the outcome here would remain unchanged, in that the

To the extent that the Applicants separately assert that certain administrative regulations require the SEC in this case to examine, deliberate upon, and/or make findings relative to each of the statutory criteria set forth in RSA 162-H, or require the SEC to consider certain conditions, they are mistaken. As this Court has explained, although it "is well settled that the legislature may delegate to administrative agencies the power to promulgate rules necessary for the proper execution of the laws, the authority to promulgate rules and regulations is designed only to permit the [agency] to fill in the details to effectuate the purpose of the statute." Bach v. New Hampshire Dep't of Safety, 169 N.H. 87, 92 (2016) (quotations omitted). Accordingly, "administrative rules may not add to, detract from, or modify the statute which they are intended to implement." Id. (quotation omitted). "Moreover, agency regulations that contradict the terms of a governing statute exceed the agency's authority." In re Wilson, 161 N.H. 659, 662 (2011).

Thus, here, where RSA 162-H:16 requires the SEC to consider all of the statutory criteria and certain conditions only when issuing a certificate, any interpretation of the regulations set forth by the Applicants that purports to change or add to the statutory requirements is simply an untenable argument. See Bach, 169 N.H. at 94 (concluding that administrative rules were ultra vires and invalid when they added to, detracted from, or modified the statute at issue); see also N.H. Code Admin.

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certificate must be denied. See McIntire, 149 N.H. at 167 (providing that where it "appears that an error did not affect the outcome below, or where the court can see from the entire record that no injury has been done, the judgment will not be disturbed" (quotation omitted)).

R. Site 301.17 (providing that the committee shall consider conditions to be included in the certificate only when a certificate is to be issued, "in order to meet the objectives of RSA 162-H").

V. The SEC was not required to explicitly define the region here.

The Applicants also argue in their brief that the SEC erred because it did not adequately define certain statutory or regulatory terms, including what constituted the "region" at issue. This argument, however, ignores a couple of obvious facts.[11] First, not every term in a statute or regulation needs to be defined because terms that are left undefined are simply accorded their common usage. See Appeal of Michele, 168 N.H. 98, 102 (2015) (explaining that when "a term is not defined in the statute, we look to its common usage, using the dictionary for guidance" (quotation omitted)). As explained by the Supreme Court of Vermont, "[r]equiring that every term in a statute be defined would be an impossible burden. A regulation need not define a given term or detail every nuance of its meaning in order to comply with constitutional requirements." Kimbell v. Hooper, 665 A.2d 44, 50 (Vt. 1995); see also Brown v. Chicago Bd. of Educ., 824 F.3d 713, 717 (7th Cir. 2016) ("A statute need not define every

[11] It also ignores statutory definitions. RSA 162-H:2, I-b defines "[a]ffected municipality" as "any municipality or unincorporated place in which any part of an energy facility is proposed to be located and any municipality or unincorporated place from which any part of the proposed energy facility will be visible or audible." Additionally, RSA 162-H:7, V(f) provides in part that the "application shall include a list of the affected municipalities," thereby placing the burden upon the Applicants to delineate the affected municipalities, or, in other words, to delineate the region at issue.

term to survive a vagueness challenge."); State v. Trull, 136 P.3d 551, 558 (Mont. 2006) (explaining that the "Legislature need not define every term it employs when constructing a statute. If a term is one of common usage and is readily understood, it is presumed that a reasonable person of average intelligence can comprehend it."); Wilfong v. Com., 175 S.W.3d 84, 96 (Ky. Ct. App. 2004) (providing that the "legislature need not define every term or factual situation in a statute, and terms left undefined are to be accorded their common, everyday meaning. Absolute or exact precision is not required since flexibility and reasonable breadth in the language chosen is constitutionally acceptable." (Quotation and footnote omitted)). Thus, contrary to the Applicants' argument, there was no need to explicitly define certain terms in order to render a proper decision in this case.

Moreover, no precise definition of the "region" was necessary here because such term as applied in this case necessarily included the areas and properties that Chalmers analyzed. However, as explained above, the SEC determined that Chalmers' opinions concerning the effects of the Project on property values in the region – and thus the Project's effects on the orderly development of the region – were simply not credible. Consequently, even assuming that the "region" in this case constituted only those specific areas and properties that Chalmers reviewed, the Applicants still failed to meet their burden of demonstrating by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region, given the SEC's reasonable and supportable determination that Chalmers was not credible. In other words, as the SEC explained, it was "not necessary to specifically define" the "region" because the Application

was denied "based upon the record" presented. Appx. to Notice of Appeal at p. 326.

Finally, if it was in fact vital to the Applicants to have some region other than Chalmers' region defined – or have any other statutory or regulatory term defined – they should have raised this issue at some point during the 70 days of adjudicative hearings, rather than wait to raise the issue for the first time in their Motion for Rehearing. If the Applicants had done so, the SEC could have addressed and potentially rectified any errors that the Applicants now complain about. See, e.g., State v. Town, 163 N.H. 790, 792 (2012) (explaining that the "purpose underlying our preservation rule is to afford the trial court an opportunity to correct any error it may have made before those issues are presented for appellate review").

VI. If the Applicants want the SEC to revisit their Application, they can file a materially different application.

In their appellate brief, the Applicants fail to describe the specific evidence that the SEC overlooked in its determination of property value impact and how that evidence would have changed the outcome. As things currently stand, the Applicants have cited no evidence to explain how, if at all, the PVG could be created so that McKenna and many other property owners would be compensated for the devaluation of their properties. Additional evidentiary hearings would be required to resolve this critical issue and gather the information that the Applicants failed to provide yet claim the SEC should have considered.

It follows, therefore, that to grant the relief requested by the Applicants in this appeal would by necessity require the Court to remand and reopen the record so that the Applicants can present additional evidence

that they failed to present at the first hearing, even though they had ample opportunity to do so before the record was closed after 70 days of adjudicative hearings. Having failed to satisfy their burden, the Applicants should not be entitled now to reopen the record to raise new issues and submit new evidence, particularly when they failed to request that the SEC keep the record open or to reopen it. See N.H. Code Admin. R. Site 202.26(a) (providing in part that "[a]t the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record"). In fact, the Applicants expressly stated in their Motion for Rehearing that "to be clear, the Applicants are not seeking to reopen the record." See Appx. to Notice of Appeal, Part 2, at p. 558, footnote 1.

This Court should not accommodate the Applicants in the relief that they now request on appeal. This is especially so because to do so, the Court would not only have to contravene administrative regulations and ignore the Applicants' declaration in their Motion for Rehearing that they are not seeking to reopen the record, but the Court would also have to ignore the practical reality that the Applicants have no evidence that a 192-mile high voltage transmission line will not unduly interfere with the orderly development of the region.

Moreover, because the SEC members who heard this matter are no longer available for further hearings, the practical effect of the Applicants' request to remand the matter to the SEC will necessarily require a new hearing before a different panel, which will, of course, require the review of evidence as well as include an attempt by the Applicants to submit new evidence. The Applicants should not be rewarded with multiple bites at the

proverbial apple, especially given that the record has been closed for some time now with respect to the present Application.

Rather, if the Applicants truly want their Application revisited, the more appropriate course of action would be for this Court to affirm the decision of the SEC and leave it to the Applicants to decide whether to submit a new Application that materially differs from the present Application. See, e.g., Fisher v. City of Dover, 120 N.H. 187, 190 (1980) (explaining the so-called "subsequent application doctrine" in the zoning context, stating that when "a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board . . . may not lawfully reach the merits of the petition" because if "it were otherwise, there would be no finality to proceedings . . . , the integrity of the [process] would be threatened, and an undue burden would be placed on property owners seeking to uphold the [decision]").

CONCLUSION

In the end, the Applicants played a cynical game of dice and lost. In an effort to minimize their mitigation costs, they bet that the SEC would accept the opinion of Chalmers that the Project would have no discernable effect on property values. The SEC did not find Chalmers' opinion to be credible. This created a void since the Applicants had relied exclusively on Chalmers and had not proposed or created a record necessary to fashion an alternative mitigation plan. It was not until after the record was closed that the Applicants in their Motion for Rehearing first proposed that the SEC could expand the mitigation plan. But even then, the Applicants continued

to insist that Chalmers' opinion should be accepted as reliable, and the Applicants failed to specify the evidence in the record (none exists) that would serve as a basis for the new mitigation plan. It is no wonder that the SEC denied the Applicants' Motion for Rehearing and attempt to expand the record.

Now, through this appeal, the Applicants are again effectively seeking to reopen the record to introduce new evidence to compensate for the deficiencies in their Application before the SEC. The SEC did not buy it and neither should this Court. In reality, the Applicants' proposal in their Motion for Rehearing to expand the record with a new mitigation plan was a tacit acknowledgment that there was a sufficient factual basis for the SEC's finding that the Applicants had failed to prove that the Project would not unduly interfere with the orderly development of the region. If the Applicants are serious about this Project they should submit a new and materially different application with a plausible assessment of the effect of the Project on property values and a credible mitigation plan.

There is no valid basis upon which to reverse, or even vacate, the SEC's decision in this case. This Court should, therefore, affirm the SEC's decision to deny the Application.[12] See In re Town of Newington, 149 N.H. 347, 350 (2003) (explaining that the administrative agency, "not the court, sits as the trier of fact and evaluates the competing evidence . . . . We

[12] For the sake of brevity and to avoid repetition, McKenna's Purchase incorporates by reference and reiterates herein all arguments set forth in its Motion for Summary Affirmance and Memorandum of Law in Support thereof previously filed with this Court, which pleadings contain additional reasoning and explanation as to why this Court should affirm the SEC's decision in this case.

are reluctant to substitute our judgment for the expertise of administrative agencies. . . . The finding[s] at issue are supported by the record, and we are not persuaded by a clear preponderance of the evidence that [the administrative agency's] decision was unreasonable, unjust or unlawful.").

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16, McKenna's Purchase requests 15 minutes of oral argument to be presented by Stephen J. Judge, Esq.

DECISION APPEALED

The decision appealed is in writing and is included within the appendix to the Notice of Appeal filed by the Applicants. Given the sheer volume of said decision, it has not been reproduced here.

Respectfully Submitted,

MCKENNA'S PURCHASE UNIT OWNER'S ASSOCIATION

By its attorneys,

WADLEIGH, STARR & PETERS, PLLC

/s/ Stephen J. Judge, Esq.
Stephen J. Judge, Esq., #1292
Jeffrey Karlin, Esq., #1311
Stephen Zaharias, Esq., #265814
95 Market Street
Manchester, N.H. 03101
603-669-4140

Dated: March 20, 2019

CERTIFICATION

I hereby certify that a copy of this brief has this 20th day of March 2019 been served by e-filing with this Court, by email to all parties on the electronic service list, and via first class mail to parties without email addresses. I further certify that this brief complies with the word limitations set forth in this Court's Order dated January 23, 2019 (increasing the word limitations set forth in Rule 16), as there are 13,363 words in this brief, exclusive of any pages containing the table of contents, tables of citations, pertinent texts of statutes, rules, regulations, and other such matters.

/s/ Stephen Zaharias, Esq.
Stephen Zaharias, Esq.

ADDENDUM –
TEXT OF APPLICABLE STATUTES/RULES

RSA 162-H:2 Definitions. –

I. "Acceptance" means a determination by the committee that it finds that the application is complete and ready for consideration.

I-a. "Administrator" means the administrator of the committee established by this chapter.

I-b. "Affected municipality" means any municipality or unincorporated place in which any part of an energy facility is proposed to be located and any municipality or unincorporated place from which any part of the proposed energy facility will be visible or audible.

II. [Repealed.]

II-a. "Certificate" or "certificate of site and facility" means the document issued by the committee, containing such terms and conditions as the committee deems appropriate, that authorizes the applicant to proceed with the proposed site and facility.

III. "Commencement of construction" means any clearing of the land, excavation or other substantial action that would adversely affect the natural environment of the site of the proposed facility, but does not include land surveying, optioning or acquiring land or rights in land, changes desirable for temporary use of the land for public recreational uses, or necessary borings to determine foundation conditions, or other preconstruction monitoring to establish background information related to the suitability of the site or to the protection of environmental use and values.

IV. [Repealed.]

V. "Committee" means the site evaluation committee established by this chapter.

VI. "Energy" means power, including mechanical power, useful heat, or electricity derived from any resource, including, but not limited to, oil, coal, and gas.

VII. "Energy facility" means:

(a) Any industrial structure that may be used substantially to extract, produce, manufacture, transport or refine sources of energy, including ancillary facilities as may be used or useful in transporting, storing or otherwise providing for the raw materials or products of any such industrial structure. This shall include but not be limited to

industrial structures such as oil refineries, gas plants, equipment and associated facilities designed to use any, or a combination of, natural gas, propane gas and liquefied natural gas, which store on site a quantity to provide 7 days of continuous operation at a rate equivalent to the energy requirements of a 30 megawatt electric generating station and its associated facilities, plants for coal conversion, onshore and offshore loading and unloading facilities for energy sources and energy transmission pipelines that are not considered part of a local distribution network.

(b) Electric generating station equipment and associated facilities designed for, or capable of, operation at any capacity of 30 megawatts or more.

(c) An electric transmission line of design rating of 100 kilovolts or more, associated with a generating facility under subparagraph (b), over a route not already occupied by a transmission line or lines.

(d) An electric transmission line of a design rating in excess of 100 kilovolts that is in excess of 10 miles in length, over a route not already occupied by a transmission line.

(e) A new electric transmission line of design rating in excess of 200 kilovolts.

(f) A renewable energy facility.

(g) Any other facility and associated equipment that the committee determines requires a certificate, consistent with the findings and purposes of RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.

VII-a. "Energy facility proceeding time and expenses" means time spent in hearings, meetings, preparation, and travel related to any application or other proceeding before the committee concerning an energy facility, either existing or proposed, and related reasonable out-of-pocket expenses.

VIII. "Filing" means the date on which the application is first submitted to the committee.

IX. "Person" means any individual, group, firm, partnership, corporation, cooperative, municipality, political subdivision, government agency or other organization.

X. [Repealed.]

X-a. [Repealed.]

XI. "Petitioner" means a person filing a petition meeting any of the following conditions:

(a) A petition endorsed by 100 or more registered voters in the host community or host communities.

(b) A petition endorsed by 100 or more registered voters from abutting communities.

(c) A petition endorsed by the governing body of a host community or 2 or more governing bodies of abutting communities.

(d) A petition filed by the potential applicant.

XII. "Renewable energy facility" means electric generating station equipment and associated facilities designed for, or capable of, operation at a nameplate capacity of greater than 30 megawatts and powered by wind energy, geothermal energy, hydrogen derived from biomass fuels or methane gas, ocean thermal, wave, current, or tidal energy, methane gas, biomass technologies, solar technologies, or hydroelectric energy. "Renewable energy facility" shall also include electric generating station equipment and associated facilities of 30 megawatts or less nameplate capacity but at least 5 megawatts which the committee determines requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1, either on its own motion or by petition of the applicant or 2 or more petitioners as defined in RSA 162-H:2, XI.

Source. 1991, 295:1. 1997, 298:21-24. 1998, 264:2. 2007, 25:1; 364:3. 2008, 348:8. 2009, 65:2-4, 24, I-IV, eff. Aug. 8, 2009. 2014, 217:2-5, eff. July 1, 2014. 2015, 219:4, eff. July 8, 2015. 2017, 115:1, eff. Aug. 14, 2017.

RSA 162-H:7 Application for Certificate. –

I. [Repealed.]

II. All applications for a certificate for an energy facility shall be filed with the chairperson of the site evaluation committee.

III. Upon filing of an application, the committee shall expeditiously conduct a preliminary review to ascertain if the application contains sufficient information to carry out the purposes of this chapter. If the application does not contain such sufficient information, the committee

shall, in writing, expeditiously notify the applicant of that fact and specify what information the applicant must supply.

IV. Each application shall 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. Upon the filing of an application, the committee shall expeditiously forward a copy to the state agencies having permitting or other regulatory authority and to other state agencies identified in administrative rules. Upon receipt of a copy, each agency shall conduct a preliminary review to ascertain if the application contains sufficient information for its purposes. If the application does not contain sufficient information for the purposes of any of the state agencies having permitting or other regulatory authority, that agency shall, in writing, notify the committee of that fact and specify what information the applicant must supply; thereupon the committee shall provide the applicant with a copy of such notification and specification. Notwithstanding any other provision of law, for purposes of the time limitations imposed by this section, any application made under this section shall be deemed not accepted either by the committee or by any of the state agencies having permitting or other regulatory authority if the applicant is reasonably notified that it has not supplied sufficient information for any of the state agencies having permitting or other regulatory authority in accordance with this paragraph.

V. Each application shall also:

(a) Describe in reasonable detail the type and size of each major part of the proposed facility.

(b) Identify both the applicant's preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant's preferred choice.

(c) Describe in reasonable detail the impact of each major part of the proposed facility on the environment for each site proposed.

(d) Describe in reasonable detail the applicant's proposals for studying and solving environmental problems.

(e) Describe in reasonable detail the applicant's financial, technical, and managerial capability for construction and operation of the proposed facility.

(f) Document that written notification of the proposed project, including appropriate copies of the application, has been given to the appropriate governing body of each affected municipality, as defined in RSA 162-H:2, I-b. The application shall include a list of the affected municipalities.

(g) Describe in reasonable detail the elements of and financial assurances for a facility decommissioning plan.

(h) Provide such additional information as the committee may require to carry out the purposes of this chapter.

VI. The committee shall decide whether or not to accept the application within 60 days of filing. If the committee rejects an application because it determines it to be administratively incomplete, the applicant may choose to file a new and more complete application or cure the defects in the rejected application within 10 days of receipt of notification of rejection.

VI-a. Public information sessions shall be held in accordance with RSA 162-H:10.

VI-b. All state agencies having permitting or other regulatory authority shall report their progress to the committee within 150 days of the acceptance of the application, outlining draft permit conditions and specifying additional data requirements necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority.

VI-c. 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.

VI-d. Within 365 days of the acceptance of an application, the committee shall issue or deny a certificate for an energy facility.

VI-e. [Repealed.]

VII. Notwithstanding any other provision of law, the application shall be in lieu of separate applications that may be required by any other state agencies.

VIII. This chapter shall not preclude an agency from imposing its usual statutory fees.

IX. The applicant shall immediately inform the committee of any substantive modification to its application.

Source. 1991, 295:1. 2009, 65:11-13, 24, VII, eff. Aug. 8, 2009. 2014, 217:12-14, 28, III, eff. July 1, 2014. 2017, 115:2, eff. Aug. 14, 2017.

RSA 162-H:10 Public Hearing; Studies; Rules. –

I. At least 30 days prior to filing an application for a certificate, an applicant shall hold at least one public information session in each county where the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before such session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall also send a copy of the public notice, not less than 14 days before the session, by first class mail to the governing body of each affected municipality. At such session, the applicant shall present information regarding the project and provide an opportunity for comments and questions from the public to be addressed by the applicant. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the chairperson of the committee. The applicant shall arrange for a transcript of such session to be prepared and shall include the transcript in its application for a certificate.

I-a. Within 45 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the applicant shall hold at least one public information session as described in paragraph I in each county in which the proposed facility is to be located and shall, at a minimum, publish a public notice not less than 14 days before said session in one or more newspapers having a regular circulation in the county in which the session is to be held, describing the nature and location of the proposed facility. The applicant shall also send a copy of the public notice, not less than 14 days before the session, by first class mail to the governing body of each affected municipality. Not less than 10 days before such session, the applicant shall provide a copy of the public notice to the presiding officer of the committee. The administrator, or a designee of the presiding officer of the committee, shall act as presiding officer of the information session. The session shall be for public information on the proposed facility with the applicant presenting the information to the public. The presiding officer shall also explain to the public the process the committee will use to review the application for the proposed facility.

I-b. Upon request of the governing body of a municipality or unincorporated place in which any part of the proposed facility is to be located, or on the committee's own motion, the committee may order the applicant to provide such additional public information sessions as described in paragraph I as are reasonable to inform the public of the proposed project.

I-c. Within 90 days after acceptance of an application for a certificate, pursuant to RSA 162-H:7, the site evaluation committee shall hold at least one public hearing in each county in which the proposed facility is to be located and the applicant shall publish a public notice not less than 14 days before such hearing in one or more newspapers having a regular circulation in the county in which the hearing is to be held, describing the nature and location of the proposed facilities. Not fewer than 10 days before such session, the applicant shall provide a copy of the public notice to the presiding officer of the committee. The applicant shall arrange for a transcript of such session to be prepared. The committee shall also send a copy of the public notice, not less than 14 days before the hearing, by first class mail to the governing body of each affected municipality. The public hearings shall be joint hearings, with representatives of the agencies that have permitting or other regulatory authority over the subject matter and shall be deemed to satisfy all initial requirements for public hearings under statutes requiring permits relative to environmental impact. Notwithstanding any other provision of law, the hearing shall be a joint hearing with the other state agencies and shall be in lieu of all hearings otherwise required by any of the other state agencies; provided, however, if any of such other state agencies does not otherwise have authority to conduct hearings, it may not join in the hearing under this chapter; provided further, however, the ability or inability of any of the other state agencies to join shall not affect the composition of the committee under RSA 162-H:3 nor the ability of any member of the committee to act in accordance with this chapter.

II. Subsequent public hearings shall be in the nature of adjudicative proceedings under RSA 541-A and shall be held in the county or one of the counties in which the proposed facility is to be located or in Concord, New Hampshire, as determined by the site evaluation committee. The committee shall give adequate public notice of the time and place of each subsequent hearing.

III. The site evaluation committee 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 committee shall provide an opportunity at one or more public hearings for comments from the governing body of each affected municipality and residents of each affected municipality. The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.

IV. The site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.

V. The 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 and may employ a consultant or consultants, legal counsel and other staff in furtherance of the duties imposed by this chapter, the cost of which shall be borne by the applicant in such amount as may be approved by the committee. The site evaluation committee and counsel for the public are further authorized to assess the applicant for all travel and related expenses associated with the processing of an application under this chapter.

VI. The site evaluation committee shall issue such rules to administer this chapter, pursuant to RSA 541-A, after public notice and hearing, as may from time to time be required.

VII. As soon as practicable but no later than November 1, 2015, the committee shall adopt rules, pursuant to RSA 541-A, relative to the organization, practices, and procedures of the committee and criteria for the siting of energy facilities, including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met by the applicant for a certificate of site and facility. Prior to the adoption of such rules, the office of strategic initiatives shall hire and manage one or more consultants to conduct a public stakeholder process to develop recommended regulatory criteria, which may include consideration of issues identified in attachment C of the 2008 final report of the state energy policy commission, as well as others that may be identified during the

stakeholder process. Except for the cases where the adjudicatory hearing has commenced, applications pending on the date rules adopted under this paragraph take effect shall be subject to such rules. Prior to the adoption of rules under this paragraph, applications shall be continuously processed pursuant to the rules in effect upon the date of filing. If the rules require the submission of additional information by an applicant, such applicant shall be afforded a reasonable opportunity to provide that information while the processing of the application continues.

Source. 1991, 295:1. 1997, 298:27. 2007, 364:7. 2009, 65:14. 2013, 134:2, eff. June 26, 2013. 2014, 217:16, eff. July 1, 2014. 2015, 219:11, eff. July 8, 2015; 268:3, eff. July 20, 2015. 2017, 115:3, 4, eff. Aug. 14, 2017; 156:64, eff. July 1, 2017. 2018, 216:4, eff. Aug. 7, 2018.

RSA 162-H:11 Judicial Review. – Decisions made pursuant to this chapter shall be reviewable in accordance with RSA 541.

Source. 1991, 295:1, eff. Jan. 1, 1992.

RSA 162-H:16 Findings and Certificate Issuance. –

I. The committee shall incorporate in any certificate 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; provided, however, the committee shall not issue any certificate under this chapter if any of the state agencies denies authorization for the proposed activity over which it has permitting or other regulatory authority. The denial of any such authorization shall be based on the record and explained in reasonable detail by the denying agency.

II. Any certificate issued by the site evaluation committee shall be based on the record. The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership. A certificate shall be conclusive on all questions of siting, land use, air and water quality.

III. The committee may consult with interested regional agencies and agencies of border states in the consideration of certificates.

IV. After 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. In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

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

V. [Repealed.]

VI. A certificate of site and facility may contain such reasonable terms and conditions, including but not limited to the authority to require bonding, as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary. Such certificates, when issued, shall be final and subject only to judicial review.

VII. The committee may condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period.

Source. 1991, 295:1. 2009, 65:18-21, 24, IX, eff. Aug. 8, 2009. 2014, 217:20-22, eff. July 1, 2014. 2015, 264:2, eff. July 20, 2015.

RSA 541:4 Specifications. – Such motion shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable. No appeal from any order or decision of the commission shall be taken unless the appellant shall have made application for rehearing as herein provided, and when such application shall have been

made, no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.

Source. 1913, 145:18. PL 239:2. 1937, 107:15; 133:76. RL 414:4.

RSA 541:13 Burden of Proof. – Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

Source. 1913, 145:18. PL 239:11. 1937, 107:24; 133:85. RL 414:13.

Site 202.26 Closing the Record.

(a) At the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by (b) below.

(b) Prior to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing.

(c) If the other parties in the proceeding do not object, or if the presiding officer determines that such evidence, exhibits or arguments are necessary for a full consideration of the issues raised in the proceeding, the presiding officer shall specify a date no later than 30 days after the conclusion of the hearing for the record to remain open to receive the evidence, exhibits or arguments.

(d) If any other party in the proceeding requests time to respond to the evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for the filing of a response.

(e) If any other party in the proceeding requests the opportunity to cross-examine on the additional evidence, exhibits or arguments submitted, the presiding officer shall specify a date no later than 30 days following the submission for a hearing at which cross-examination on the additional evidence, exhibits or arguments submitted shall be allowed.

Source. *#9183-A, eff 6-17-08; ss by #10993, eff 12-16-15*

Site 202.27 Reopening the Record.

(a) A party may request by written motion that the record in any proceeding be re-opened to receive relevant, material and non-duplicative testimony, evidence or argument.

(b) If the presiding officer determines that additional testimony, evidence or argument is necessary for a full consideration of the issues presented in the proceeding, the record shall be reopened to accept the offered testimony, evidence or argument.

(c) The presiding officer shall specify a date no later than 30 days from the date of receiving the additional testimony, evidence or argument by which other parties shall respond to or rebut the newly submitted testimony, evidence or argument.

Source. *#9183-A, eff 6-17-08; ss by #10993, eff 12-16-15*

Site 202.29 Rehearing.

(a) The rules in this section are intended to supplement RSA 541, which requires or allows a person to request rehearing of an order or decision of the committee prior to appealing the order or decision.

(b) The rules in this section shall apply whenever any person has a right under applicable law to request a rehearing of an order or decision prior to filing an appeal of the order or decision with the court having appellate jurisdiction.

(c) A motion for rehearing shall be filed within 30 days of the date of a committee decision or order.

(d) A motion for rehearing shall:

(1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;

(2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable;

(3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and

(4) Include any argument or memorandum of law the moving party wishes to file.

(e) The committee shall grant or deny a motion for rehearing, or suspend the order or decision pending further consideration, within 10 days of the filing of the motion for rehearing.

Source. *#9183-A, eff 6-17-08; ss by #10993, eff 12-16-15*

Site 301.09 Effects on Orderly Development of Region. Each application shall include 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.

Source. #10994, eff 12-16-15

Site 301.15 Criteria Relative to a Finding of Undue Interference. In determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider:

(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.

Source. #10994, eff 12-16-15

Site 301.17 Conditions of Certificate. In determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H:

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

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

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

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

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

(f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;

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

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

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

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