THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0468

NORTHERN PASS TRANSMISSION LLC
AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Appeal from Orders of the Site Evaluation Committee
Dated March 30, 2018 and July 12, 2018

BRIEF OF NORTHERN PASS TRANSMISSION LLC AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

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Oral Argument Requested. Mr. Glahn will argue.

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QUESTIONS PRESENTED

1. RSA chapter 162-H ("Statute") requires a subcommittee ("SC") of the Site Evaluation Committee ("SEC") to "consider and weigh all evidence," including "potential significant impacts and benefits" of energy projects when deciding an application and determining whether a project "unduly interferes with the orderly development of the region" ("ODR"). RSA 162-H: 10, III and 16, IV. That determination requires a subcommittee to consider whether the degree of such interference is so excessive that it warrants imposing conditions that mitigate potential impacts. In finding that the Applicants did not meet their burden of proof, this SC failed to consider all evidence, refused to consider mitigating measures and conditions, did not weigh the Project's benefits and impacts, and did not make all the required findings under RSA 162-H:16. Are the SC's Orders unlawful and unreasonable? [Raised in Applicants' April 27, 2018 Motion for Rehearing (DK-tab-1435)].
2. The SC imposed a burden of proof the Applicants did not have, required an unspecified quantum of evidence to meet that burden, applied arbitrary standards found nowhere in the SEC Rules ("Rules"), and thus failed to articulate for this Court the bases for the decision. Are the SC's Orders unlawful and unreasonable? [Id.]
3. RSA 162-H:16 and the Rules do not define "undue interference with [ODR]" or describe how a subcommittee will apply those vague terms. Statutes and rules are unduly or impermissibly vague and thus violate due process if, as applied, they fail to provide the

average person with a reasonable understanding as to what the law requires, or if they authorize or allow for arbitrary enforcement. Here, the subcommittee did not define the vague standards in RSA 162-H:16, IV or the Rules, failed to make findings of fact supporting its rulings, and applied the Statute and Rules in an arbitrary and therefore erroneous manner. Are the SC's Orders unlawful and unreasonable? [Id.]

PROVISIONS OF CONSTITUTION, STATUTES, ORDINANCES, RULES AND REGULATIONS

The applicable constitutional provisions, statutes and rules are set out in the Addendum to this Brief.

STATEMENT OF THE CASE

This appeal follows the SC's arbitrary denial of an application for a Certificate of Site and Facility ("Application"). The SC denied the Application after abruptly stopping deliberations without having fully considered the statutory criteria for approval, relevant evidence, benefits and impacts, mitigating measures and potential conditions, and without making the findings required by law.

In October 2015, Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire ("PSNH")("Applicants") filed the Application, which proposed to construct a 192-mile high voltage electric transmission line between Pittsburg and Deerfield, New Hampshire (the "Project"). The Project would transmit 1,090 megawatts of renewable power from hydroelectric facilities operated by Hydro-Québec, a Québec crown corporation.

As shown on the attached map (Addendum at 60), 160 miles (approximately 83% of the 192-mile Project) would be constructed in existing transmission rights-of-way ("ROW") (100 miles), or installed underground (60 miles) in public highways. DK-tab-1-Appendix.41-at-1.[1] Of the remaining 32 miles, 24 would be in a new ROW on forestry land the Applicants leased, and eight miles would cross other land owned by an NPT affiliate. DK-tab-1-Vol.2-at-424-25. The Project was expected to provide $3.8 billion in benefits to the State economy. DK-tab-1-at-ES6.

In December 2015, the SC accepted the Application pursuant to RSA 162-H:7. DK-tab-1432-at-9. An Assistant Attorney General, aided by outside attorneys, was appointed as Counsel for the Public ("CFP"), and 160 parties intervened. Id.-at-10-14. Seventy days of adjudicative hearings were held between April and December 2017. The SC began deliberations on January 30, 2018.

The Statute and the Rules required the SC to make four findings. RSA 162-H:16, IV, Site 301.01-301.18. The SC deliberated for only 2½ of 12 scheduled days before denying the Application. It considered the Applicants' financial, technical and managerial capability (for a half day), concluding, without finding, that the Applicants appeared to satisfy this criterion. DK-tab-1398-at-103-105. It then spent approximately 1½ days deliberating over whether the Project would "unduly interfere with the orderly development of the region" before the Chair asked for a "sense of

[1] This brief will cite documents as follows: the SC's March 30, 2018 Order as the "Order," the SC's July 12, 2018 Order on Rehearing as the "RHO," the Order and RHO sometimes collectively as the "Orders," and the Appendix to this Brief as "BA." The Appendix to the Notice of Appeal is cited as "NOA-Appendix." Record references follow the guidelines in the Court's December 20th Order.

the [SC]" and a discussion of the members' views on ODR. DK-tab-1402-at-5. That discussion lasted approximately 40 minutes, after which the Chairman indicated the SC would discuss the remaining findings and that "until a vote is taken, everything is open for discussion." Id.-at-5-33.

But shortly thereafter, Commissioner Bailey moved to deny the Application based on the Applicants' alleged failure to satisfy their burden of proof on ODR, stating: "[b]y statute…we have to make four findings in order to grant the Certificate," but "it may be better for us just to stop now." DK-tab-at-1403-at-4. Among the reasons for halting deliberations mid-stream, her view was that continued negotiations would require the SC to address mitigating conditions relating to ODR. She felt that as things stood, there was a good record for appeal. DK-tab-1403-at-8. Conversely, another member stated that "[he could] hear Bill Belichick saying 'do [your] job and finish what you started.'" Id.-at-8-9. But the SC voted 5-2 (with both lawyers, including the Chair, dissenting) to stop deliberations without consideration of all of the required findings in RSA 162-H:16, IV or of mitigating measures and conditions. It then voted unanimously to deny the Application. Its March 30, 2018 Order concluded as follows:

> Based on the testimony and evidence presented, and after due consideration has been given to the 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 [ODR].

DK-tab-1432-at-285. This finding is unprecedented: neither the SEC nor a subcommittee has ever denied an application based on a failure to satisfy the burden of proof or failed to consider mitigating conditions.

After the Applicants sought rehearing, the SC deliberated on the motion for less than two hours. DK-tab-1474-at-4-96. Commissioner Bailey reversed course, stating that "in the interest of fairness, we probably should go through each one of the criteria in the statute." The SC rejected her position, and subsequently denied the Applicants' motion. The RHO then affirmed the Order. DK-tab-1474-at-23; DK-tab-1475-at-6-7; DK-tab-1478.

STATEMENT OF THE FACTS

The Order found that the Applicants did not meet their burden of proof on ODR because they allegedly failed to demonstrate the "nature and extent" of the Project's impact on land use, property values and tourism. But the Applicants and CFP both provided substantial expert testimony estimating those impacts, with each drawing different conclusions. The Statute mandates that the SC consider all evidence and relevant information, yet it never decided whether the benefits and impacts, taken as a whole, demonstrate that the Project would interfere with ODR, and, if so, whether that interference was "undue."[2]

The SC seemingly gave equal weight and importance to the estimates for each subpart of Site 301.09, and then concluded that since the Applicants had not provided some unspecified proof allowing it to know with certainty the extent of each impact it need go no further. Based on that conclusion, it found it had no obligation to analyze ODR any further, even if the uncontested Project benefits were substantial and might offset any

[2] In a current SEC matter, a subcommittee member emphasized that finding interference to be "undue" is a high bar. Seacoast Reliability Project, Docket No. 2015-04 ("SRP"), BA.19.

impacts.[3] In another departure from the Statute and SEC precedent, the SC also refused to consider whether proposed conditions offered by the state agencies, Applicants and CFP would adequately mitigate any impacts.[4] This arbitrary decision making was neither lawful nor reasonable.

Project Benefits: Employment and the Economy

The Applicants offered testimony from Julia Frayer, Managing Director, London Economics International, LLC ("LEI") and Dr. Lisa Shapiro, demonstrating the Project would generate over $3 billion in benefits. This included assessments of the economic effect of the Applicants' proposed $200 million Forward NH Fund ("FNHF")(a commitment to invest $10 million in host communities and the State each year for the first 20 years of operation) and the North Country Job Creation Fund ("NCJCF")(a $7.5 million commitment). CFP's experts, including Kavet Rockler & Associates ("KRA") provided estimates which, although lower than Applicants' estimates, established that the Project would still generate significant benefits. The combination of the uncontested benefits put forward by the Applicants and the estimates by CFP's experts is as follows:

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[3] The Order minimizes or ignores the Project's benefits, affording them less than four pages, while describing the impacts as "profound problems." DK-tab-1432-at-284. Only two paragraphs of the Order even attempt to compare benefits against these "problems." Id.

[4] Conditions offered by the Applicants are at DK-tab-1836-Ex.E and by CFP at DK-tab-1373-at-163. For examples of conditions offered by state departments see DK-tab-831 (Environmental Services) and DK-tab-909 (Transportation).

ECONOMIC BENEFITS			
Direct Expenditures	Construction	Operation Years 1-10	Operation Years 11-20
FNHF $10 million/yr. for 20 yrs. (DK-tab-1432-at-134)	---	$100 million	$100 million
NCJCF (Id.-at-123)	---	$7.5 million	---
Taxes $564 to $692 million over 20 yrs. (av. $31 million/yr.) (Id.-at-139)	---	$310 million	$310 million
Economic Effects			
FNHF and NCJCF $15 million/yr. GSP (Id.-at-125)	---	$150 million	---
Taxes $19 million/yr. Gross State Product ("GSP") (Id.-at-147)	---	$190 million	---
Construction Jobs $93.6 million/yr. GSP for three yrs. (Id.-at-146)	$280 million	---	---
Operations $4.8 million/yr. GSP (Id.-at-147)	---	$48 million	---
Electricity Cost Savings $5.8 million/yr. (Id.-at-160)	---	$58 million	---
TOTAL $1.553 Billion	**$280 million**	**$863.5 million**	**$410 million**

In addition to these uncontested $1.5 billion in benefits, the SC failed to decide whether electric capacity market benefits would accrue. Infra at 35.[5] Based on KRA's testimony, capacity market benefits could be

[5] NPT will transmit low-cost hydro power that will reduce the electricity costs as measured in separate markets for energy and capacity. Energy is priced in terms of the amount of electricity produced over a specific time period (e.g., kilowatts hours), and capacity is priced in terms of the maximum output (e.g., megawatts) generators make available at a given time.

$440 million over the first ten years of commercial operations which, together with the $1.5 billion in benefits, totals nearly $2 billion.[6] Furthermore, KRA estimated significant employment from the Project, a total of 3,945 jobs over the three-year construction period. DK-tab-1432-at-126. It also estimated that expenditures from the FNHF and NCJCF would create 150 jobs annually over 20 years (3,000 jobs total) and that tax expenditures would create 249 jobs annually over 11 years (2,739 jobs total). Id.-at-125;147.[7]

The SC failed to consider or weigh these significant potential benefits against the potential impacts, as required by law. It found that it was "undisputed that construction of the Project would generate a significant number of new jobs" (Id.-at-127) and the Project "would have a somewhat positive effect on the regional economy, employment and real estate taxes." Id.-at-284. Yet the SC failed to explain why $600 million in real estate tax benefits was just "somewhat positive," why it ignored CFP's experts' acknowledgment of very substantial benefits,[8] or dismissed the potential capacity market benefits, which it acknowledged "could be outcome determinative." Id.-at-161.

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[6] This combines the direct capacity market benefits of $110 million and the indirect GSP benefits of $330 million that KRA calculated assuming a reasonable intermediate impact. DK-tab-1432-at-147. This KRA assumption is reasonable given that CFP's separate energy market expert modeled four scenarios while expressing no view as to the likelihood of occurrence of any one scenario.

[7] The Applicants believe CFP's experts generally overstated impacts and understated benefits. But the SC's deliberations and Orders accepted CFP expert testimony without criticism, and the SC was therefore, obligated to consider it.

[8] The SC stated that it was "undisputed that, if constructed, the Project would pay substantial property taxes to the communities where it would operate." DK-tab-1432-at-162. In fact, NPT would be one of the largest taxpayers in most host communities. DK-tab-1-Appendix-44-at-2.

Project Impacts: Tourism, Property Values and Land Use

The SC found the Applicants' proof of Project impacts to be inadequate in three areas: tourism, property values, and land use (the latter conflated with municipal and regional planning group views).

Tourism

Mitch Nichols of Nichols Tourism Group provided the Applicants' estimate of tourism impacts. Based on more than 20 years of experience, an extensive literature search, data from Plymouth State University and the Bureau of Labor Statistics, listening sessions and an electronic survey, he concluded that the Project "will not affect regional travel demand and will not have a measurable effect on New Hampshire's tourism industry." DK-tab-1-Appendix-45-at-5-6,8.

Nichols also analyzed the impact of similar projects in New Hampshire and Maine, concluding that during and after construction, "tourism establishments and employees continued to expand and grow." Id.-at-19-22. He opined that the "collective mix of destination attributes…influence most visitors' choice of destination," not simply one factor like the view of an additional transmission line. Id.-at-28, APP-Ex-105-at-5. This view was shared by independent experts who prepared the U.S Department of Energy's Environmental Impact Study ("EIS"), a comprehensive analysis which found that tourism impacts "are not quantifiable" and "appear to be more affected by macroeconomic factors such as the stability of the national economy and gasoline prices more than site specific changes." APP-Ex-205-at-S24.

Regarding underground construction, Nichols testified that while traffic delays could be a factor for prospective visitors, they would still

come to the State "because of the great offerings the region provides." DK-tab-1087-at-31. He referenced examples of tourist events (such as the Loudon NASCAR race) that created significant traffic delays yet did not deter attendance "because the experience is great." Id.

KRA concluded that tourism impacts were "difficult to quantify" but "unlikely to be nonexistent." CFP-Ex-147-at-8, CFP-Ex-148 (Att. B, p. 40). KRA also concluded that the impact of underground construction would be "short-lived." DK-tab-1232-at-139-40. It estimated the Project's impact as 9% in areas with hypothetical (not actual) visibility, which translated into direct spending losses of about $10 million per year (in current dollars), further secondary effects approaching $13 million in GSP, and the loss of nearly 190 jobs over eleven years from 2020-2030. DK-tab-1232-at-92-97, CFP-Ex-147-at-8-9. It acknowledged there would be some "incremental degradation of the scenic landscape that would matter to a small, very small number of tourists" but it would affect only a "teeny tiny percentage" of tourism estimated as a "15 hundredths of one percent. 000.15 [sic] percent change in the tourism activity in the affected areas." DK-tab-1233-at-13-14;17-18.

Nichols, KRA and the EIS all stated that no empirical study existed assessing tourism effects of high voltage transmission lines ("HVTL") and that "actual tourism impacts as a consequence of a transmission line being built … [are] virtually impossible to measure." APP-Ex-1-Appendix.45-at-9, APP-Ex-205-at-S-24; DK-tab-1232-at-80,82-83,98-99,117-119. Nevertheless, the SC found that the Applicants had failed to meet their burden.

The Order devotes 20 pages to critiquing Nichols' report and testimony, identifying issues he did not cover (none of which the Rules require), and finding him not to be credible.[9] DK-tab-1432-at-199-218, 225-27. It then concluded that "the Project may have a negative impact on tourism or it may not," but that "without credible and reliable reports" it could not "make a reasoned decision" or "consider conditions that might mitigate or abrogate negative impacts on tourism." Id.-at-225-27.

This conclusion did not stop the SC from making a finding on tourism impacts. Noting that intervenors had provided "a worthwhile view and assessment of the impact that the Project may have on tourism," even though "not provid[ing] any analysis or scientific evidence to substantiate their opinions," the SC stated, without making findings of fact, that "there are valid reasons to believe that the Project would hurt tourism if it were built." DK-tab-1432-at-226-227. And although the SC had evidence of tourism impacts from KRA, it ignored KRA's assessment. It also ignored proposed mitigating conditions the Applicants offered through, for example, a business claims process and the FNHF. DK-tab-1432-at-284-285; DK-tab-1478-at-22; DK-tab-1233-at 65-67. As one SC member stated: "I don't feel as though we're required to do that." DK-tab-1474-at-37.[10]

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[9] The SC clarified that references to "credibility" were intended to address reliability, i.e., to convey a "problem with their underlying work," a "logic flaw," or an "inadequate basis." DK-tab-1474-at-76-78.

[10] By contrast, in SRP, the subcommittee's deliberations included mitigating conditions that would ensure no undue interference, and the SEC's legal counsel explained: "The ultimate determination that the Committee must make is whether or not the Application as proposed with whatever amendments that have been made and any conditions that you find, whether or not the siting, construction and operation of the facility will unduly interfere with the orderly development of the region." BA.33 (emphasis added).

Real Estate Values

James Chalmers, Ph.D., presented expert testimony on potential impacts to "real estate values in the affected communities," and the proposed "property value guarantee program" ("PVG") designed to mitigate such effects. KRA also offered estimates of these effects which, once again, the SC ignored along with the Applicants' offer of the PVG. Rather, as it did with tourism, the SC criticized the Applicants' estimates and then concluded, using the wrong standard, that they had not met their "burden in demonstrating that the Project's impact on property values will not unduly interfere with the orderly development of the region." DK-tab-1432-at-199.[11]

Chalmers has more than 40 years of experience in assessing potential impacts to real estate values from various causes, including HVTLs. Here, he produced a comprehensive study of the likely property value impacts in affected communities. DK-tab-1-App.46. The report summarized the professional literature, noting that while half the studies showed some negative effect on residential property value, the other half found none. The literature also showed a rapid decrease in effects on residential properties with distance, and that commercial properties suffered no effect unless development was physically constrained by the corridor so as to reduce future income. APP-Ex-30-at-3.

The report included three studies specific to New Hampshire: "case studies" of 58 residential sales of properties crossed or bordered by HVTL

[11] By contrast, Site 301.09(b)(4) requires an "assessment of the effect" of a project on real estate values in the "affected communities," not whether the effect may unduly interfere with development of an undefined "region."

corridors; "subdivision studies" analyzing the timing and pricing of lot sales in proximity to HVTL corridors; and "market activity research," reviewing sale to list price ratios and the timing of sales based on proximity to corridors. DK-tab-1432-at-164-65. Chalmers concluded that some properties within 100 feet of the ROW were more likely to have a negative value impact if, after construction, transmission structures were newly visible from those properties. APP-Ex-30-at-12. Yet because the Project would be constructed in an existing ROW, he also concluded that any impact would be incremental. APP-Ex-30-at-14; APP-Ex-104-at-20.

Chalmers' studies were consistent with the literature. There is no evidence that HVTLs cause consistent measurable effects on property values, and where there are impacts, they are small and decrease rapidly with distance from a ROW. APP-Ex-30-at-10. He thus concluded that the Project would not have a discernable effect on real estate values or marketing times in local or regional real estate markets.[12] Nonetheless, the proposed PVG was designed to compensate owners for any resulting property value losses. APP-Ex-6-at-9. The Applicants also testified to their willingness to have the program revised or expanded as the SC deemed appropriate. DK-Tab-949-at-85.

KRA acknowledged that "it is difficult to estimate property valuation change effects on the state economy with precision or certainty." CFP-Ex-146-at-56. Nevertheless, it estimated the present value of

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[12] APP-Ex-30-at-14. In the "Phase II" proceeding, the SEC found that project would not unduly interfere with ODR, relying on a similar study that concluded the addition of that HVTL line in an existing corridor would not have a detrimental effect on property values. SEC Docket No. DSF-85-155, NOA-Appendix-at-1805; App-Ex-104-at-14.

residential property impacts over 60 years "could exceed $10 million and possibly be as high as $30 million." Id.-at-62. Based on published studies, the EIS noted that properties within 100 feet of the transmission line might experience a 15 percent loss, with that impact nearly zero at approximately 500 feet. APP-Ex-205.13-at-25. It estimated that the overall effect could be $11.8 million, but cautioned this "likely overstate[d] the adverse impact for segments of the Project that would parallel existing transmission lines." Id.-at-27. The SC found Chalmers' report and testimony unreliable, notwithstanding that Chalmers used the exact same methodology and study just two years earlier in a different docket, which also involved construction of an HVTL line in an existing ROW. Decision and Order Granting Certificate of Site and Facility, SEC Docket No. 2015-05 (October 4, 2016) ("MVRP"); NOA-Appendix-at-2058. There, the SEC unanimously accepted Chalmers' methodology and conclusions. Id. NOA-Appendix-at-2016.[13]

Here, without considering KRA's assessment, the SC found that because Chalmers' analysis of the "effects was…inadequate, it was impossible…to even begin to consider what an appropriate compensation

[13] Unlike in MVRP, the SC found Chalmers' estimates of property value impacts unreliable due to "significant gaps" in his research, finding that Chalmers gave "little, if any" consideration to commercial property, condominiums, second homes, and properties along the underground portion of the route. DK-tab-1432-at-197. In fact, Chalmers addressed each of these "gaps" in a supplemental report and hearing testimony. Chalmers analyzed sales in a Concord condominium complex that abuts the Project corridor, and the results supported his opinion of no price effect. See APP-Ex-104-at-8-12;Attach-4. No evidence rebutted that conclusion. Chalmers testified there would be no impact to commercial properties unless development was physically constrained by the corridor so as to reduce future income. APP-Ex-30-at-3, APP-Ex-104-at-12. Chalmers also addressed second homes, APP-Ex-104-at-4; Attach-1. Lastly, since visibility is the controlling factor regarding potential effects, he found no impact to properties where the Project was underground. DK-tab-1106-at-119; DK-tab-1100-at-46-51; APP-Ex-30-at-12; App-Ex-104-at-3.

plan might look like." DK-tab-1432-at-285.[14] As it did with tourism, the SC denied that it had sufficient information to determine these effects, while stating its "belie[f]" that other properties "will be affected by the Project." Id.-at-199. It made no findings supporting that conclusion.

Land Use and Municipal Views

The SC took a different approach to land use, faulting Robert Varney, the Applicants' expert (without any opposing expert testimony), for relying on past SEC precedent regarding land use, and by doing so, failing to address standards that the SC had never before used. Site 301.09(a) requires an applicant's "estimate of the effects" of a project on "[l]and use in the region," including "a description of the prevailing land uses in the affected communities" and of how the Project would be "consistent" and "inconsistent" with such uses. Prior SEC decisions consistently found that construction of a "Project within the existing right-of-way that, for years, has been used to transmit electricity and is encumbered by associated structures and equipment," is "consistent with the [ODR]." MVRP, supra. NOA-Appendix-at-2115.

Varney's testimony and extensive report described the prevailing land uses in each "Affected Community," and explained that these uses had coexisted with existing electric utility and roadway corridors "as part of the fabric of local and regional development." DK-tab-1-Appendix.46-at-5-11; Attach.A. A separate report also reviewed the master plans for the 52 Affected Communities along the route. DK-tab-1184-at-33-36; APP-Ex-

[14] In fact, in SRP, the subcommittee considered a similar mitigation program to address property value impacts. See BA.32.

123. He concluded that construction in existing transmission or transportation corridors would not change prevailing land uses (many developed after the existing corridor was in place), would reinforce local development patterns, and would place no additional demands on local or regional government services. DK-tab-1-Appendix.41-at-11; DK-tab-1432-at-236-37.

In addition to his report reviewing local, regional, state and federal long-range planning documents, Varney considered comments from the community and local and regional planners, including the draft EIS. APP-Ex-20-at-3-4; APP-Ex-121; DK-tab-1174-at-26-40,78. No local master plans (including those in towns with existing ROWs) stated that HVTLs were inconsistent with those plans or local zoning or interfered with "rural character." Many such plans highlighted utility corridors as important to open space planning, conservation and recreational opportunities. DK-tab-1-Appendix.41-Attach-A; APP-Ex-96-at-6; Attach-A-at-35-36. He concluded the Project was consistent with these plans. DK-tab-1-Appendix.41-at-30. Addressing claims that the Project would hurt future economic development, Varney evaluated other HVTL corridors in New Hampshire, focusing on three communities where new lines (visible to the public) were constructed within an existing ROW. Review of Land Use Development Along Transmission Line Corridors in Bedford, Londonderry, and Concord, NH, APP-Ex-96-Attach.A-at-12-34. This report concluded that locating a new HVTL in an existing corridor did not adversely affect economic development, population, tax base or income growth. APP-Ex-96-Attach.A-at-37.

CFP and intervenors offered no expert testimony countering Varney's opinions, although municipal officials testified on land use and master plans. DK-tab-1432-at-245-275. This testimony largely addressed Project aesthetics rather than consistency with prevailing land uses, and asserted the Project would be inconsistent with master plan statements concerning "rural quality, landscape or character," "scenic beauty or views," or "historic and cultural heritage." Id. But it did not explain why adding another line to an existing ROW containing one or more existing lines would be inconsistent with these concepts. Instead of evidence showing the Project would actually be inconsistent with prevailing land uses (as opposed to aesthetics), the SC relied on "assertions," "claims," "arguments," "concern," and "opinions." Id.

Varney's independent conclusions were consistent with SEC precedent, yet the SC faulted him for that. While conceding that construction in an existing ROW was a "sound planning principle," the SC found "that it is not the only principle of sound planning, nor is it a principle to be applied in every case." DK-tab-1432-at-277; DK-tab-1474-at-68-69. But it never identified the other principles or explained why this principle suddenly did not apply here. And it made no findings establishing why this Project was different, stating only that "contrary to [Varney's] claim, it is possible for a transmission project constructed within an existing ROW to impact existing land uses," and it "must consider all the facts and circumstances in making its determination." DK-tab-1478-at-40,51. The "circumstances" the SC considered relevant are reflected in its conclusion:

> [T]he Applicant failed to demonstrate by a preponderance of the evidence that the Project would not overburden existing

> land uses within and surrounding the [ROW] and would not substantially change the impact of the [ROW] on surrounding properties and land use.

DK-tab-1432-at-285. Because Varney did not consider these possibilities, the SC concluded that:

> [T]he report and…expert testimony were not credible and could not be relied upon in ascertaining the impact of the Project on land use**.**

DK-tab-1478-at-34.

The "overburdening" standard was based on the SC's unsupported belief in a "tipping point" where a ROW becomes unacceptably over-developed. The SC criticized Varney for disagreeing with this new test: "Mr. Varney suggests that as long a corridor is used for transmission lines, there can never be a 'tipping point' where the effect of transmission infrastructure on the land becomes too intense. We disagree."[15] DK-tab-1432-at-277-78. Instead of making findings to identify this "tipping point," the SC claimed that:

> overdevelopment of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the [ODR];" "[u]nsightly transmission corridors or infrastructure within corridors can impact real estate development in the surrounding area;" and "[a] highly developed corridor may discourage use of the corridor and surrounding lands for recreational purposes.

DK-tab-1432-at-278 (emphasis added).

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[15] In fact, Varney did not say that there was no point at which a project might be inconsistent with prevailing land use. He refused to answer hypotheticals about whether too many structures might "at some point be too much," stating his opinion that this Project was not "too much" and was consistent with prevailing land uses. DK-tab-1174-at-44-47,144.

The SC also found another new standard, the "non-conforming use" test of zoning law, to be "informative in the context of this case," concluding that "[t]here are areas along the route where introduction of the Project with increased tower heights and reconfiguration of existing facilities would create a use that is different in character, nature and kind from the existing use," and would have a "substantially different effect on the neighborhood." Id.-at-278-279; DK-tab-1478-at-54. Six such locations were identified. DK-tab1432-at-279-80. The SC did not explain what this effect was, and the Applicants demonstrated that the SC's findings that the towers were higher in these locations were inaccurate. DK-tab-1435-at-51-52.

On rehearing, the SC disavowed that it had applied the "overburdening" or "non-conforming use" tests. The Order states that "[t]he SC received substantial testimony and evidence that the Project, due to its size and scope, would intensify and overburden the ROW to the extent that it would render it inconsistent with existing land uses in the region." DK-tab-1478-at-39-40. But the RHO states that the SC "did not find that the Project would have a negative effect on land use because it would overburden the [ROW]"… only that it was "possible" and "… that the Applicant failed to provide sufficient credible evidence to determine the impact on land in this case." DK-tab-1478-at-40 (emphasis added).[16] According to the SC, the "overburden" and "tipping point" tests were

[16] During deliberations, the SC applied several new tests unrelated to "consistency with land use," including whether the Project would have an "adverse effect" "unduly affect," or "impact," land use. See Addendum C to the Applicants' Notice of Appeal at 131; DK-tab-1398-at-124, DK-tab-1400-at-33,44,48-49, DK-tab-1402-at-9,12,19.

simply "descriptors to contextualize the arguments made by the parties in this docket." DK-tab-1478-at-40.

Likewise, the RHO denied that the SC applied the "non-conforming use" test, asserting again it was used only for "guidance" and as "a tool to assist it with understanding of potential impacts of the Project on land uses." Id.-at-52-53 (emphasis added). The RHO further denied any finding "that the Project would be inconsistent with land uses at a few specific locations, finding instead that there "could be a significant impact" at "various places" and that it "might find that the Project was or was not consistent with existing land uses at these locations, if the Applicant had actually addressed the impacts." Id.-at-54-55 (emphasis added).

Ultimately, the SC found Varney not credible because he relied on SEC precedent and because he did not address the new standards the SC articulated for the first time in this docket.[17] Yet it made no factual findings justifying its departure from precedent, showing how this Project failed any of its newly-minted tests, or explaining how an applicant could have foreseen them.

The SC considered the views of municipalities as part of the Applicants' burden of proof on land use, as if this burden was a separate requirement of Site 301.09(a), and one that could outweigh expert testimony on that issue. DK-tab-1432-at-275-82. The Order states that 30 of 32 communities had "in one way or another" expressed an opinion that the Project would interfere with ODR, that 22 had "intervened and

[17] As discussed infra, in the MVRP docket, Varney applied the same methodology and that subcommittee found him reliable.

presented evidence and cogent arguments" to that effect, and that these "comments were relevant…thoughtful and consistent." Id.-at-276, 285. Without making findings, the SC simply accepted the arguments of the post-hearing memo of a municipal group—without assessment—and incorporated them wholesale into its Order. DK-tab-1432-at-247-273,281. None of these arguments provided evidence that the Project was, in fact, inconsistent with prevailing land uses. Yet the SC concluded: "[g]iven the nature of the master plans and local ordinances along the Project's route, the Project would have a large and negative impact on land uses in many communities that make up the region affected by the Project." DK-tab-1432-at-281; DK-tab-1478-at-55. But it made no findings as to where (or whether) these "impacts" had occurred, or why the master plans were controlling.

Noting that it was not required to find municipal views dispositive, and that "if it were up to the municipalities, nothing would happen in large infrastructure projects like this," the SC nevertheless faulted the Applicants for failing to "adequately anticipate and account for the almost uniform view of those groups" that the Project would unduly interfere with ODR. DK-tab-1432-at-7. It did not explain how such views might have been satisfactorily accounted for. As with its findings on land use, on rehearing the SC affirmed its denial of the Application because "the Applicant failed to provide credible information addressing the impact of the Project on land use (among other factors)." DK-tab-1478-at-55-56. What that "credible information" might be was left unsaid.

SUMMARY OF ARGUMENT

The Statute and Rules impose three requirements essential to deciding an application. First, a subcommittee must consider and weigh all evidence and all relevant information. RSA 162-H:10, III and 16, IV. Second, it must consider whether the degree of impact is so excessive that it warrants mitigating measures or conditions, or denial of the certificate. Third, it must give due consideration to all of a project's significant potential benefits and impacts to determine whether there is undue interference with ODR, and whether that interference may be mitigated so that it is not "undue." Here, the SC failed to satisfy any of these requirements. Instead, in its haste to be done, it elected to cut short deliberations, seize on the Applicants' purported failures to satisfy hitherto nonexistent burdens of proof, and concluded that it had no obligation to go further. This resulted in an unlawful, arbitrary and unreasonable decision.

Key to its failure is the SC's misapplication of elements of the ODR criterion. RSA 162-H:16, IV(b). The Statute and Rules do not define undue interference with ODR or the specific types of information needed to support a decision on ODR, and neither did the SC. The Rules require the SC to consider "the extent to which" a project "will affect land use, employment and the economy." They require applicants to provide estimates or assessments of effects on these elements, but are silent as to what they must contain. Site 301.09. The SC did nothing to address this definitional vacuum, and turned, instead, to ad hoc and arbitrary bases for denying the Application. Specifically, it erred in imposing burdens of proof on the Applicants for each subpart of Rule 301.09 when no such

burdens exist. The Rules require applicants to provide these estimates so that a subcommittee can weigh all estimates of effects and determine whether, taken together, they amount to undue interference with ODR.

The SC concluded it needed to go no further once it rejected the impacts of the Project on tourism and property values, and that the Applicants had failed to meet their burden on land use and consideration of municipal views. Yet in each area, even as it dismissed entirely testimony and substantial reports from Applicants' experts, it failed to consider other relevant evidence in the record—principally that offered by CFP—that would have allowed an assessment of the Project's impacts. The only plausible excuse for this failure is the SC had tired of its task. Had it considered that evidence, it 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. Equally important, it was required to weigh the significant benefits of more than $1.5 billion offered by this Project against those impacts. Instead, "burden of proof" became a convenient substitute for the hard work of fully assessing the evidence and weighing the Project's benefits and impacts.

Just as arbitrary, unlawful and unreasonable as the SC's failure to perform its statutory duties, was its application of a burden of proof untethered from the Statute or Rules. The SC applied no objective standard to assist in interpreting the otherwise vague Statute and Rules, imposed a burden that does not exist, and criticized the Applicants for what they did not provide—while never explaining what would have been sufficient. It also applied purely ad hoc, subjective tests never before employed, failed to

follow precedent that otherwise offered guidance to an applicant, and made findings based on the personal beliefs of the SC. As a result, this Court is left to guess at what was required or how the SC measured each burden of proof because only the SC knows what it required. No applicant could know the SC's target for "sufficient" evidence when the target was both unknown and applied solely for this case. This is purely arbitrary decision making and a violation of due process. As a result, this Court should vacate the Orders.

STANDARD OF REVIEW

SEC decisions are reviewed under RSA 541:13 and RSA 162-H:11. The Court will not set aside a subcommittee's order except for errors of law unless it is satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. RSA 541:13. Findings of fact are presumed prima facie lawful absent unreasonableness or an identified error of law, and the Court determines whether they are supported by competent evidence in the record. Id. Appeal of Mary Allen, 170 N.H. 754, 757-758 (2018). The Court reviews a subcommittee's rulings on issues of law de novo. Id.

ARGUMENT

I. The SC Violated RSA 162-H By Failing to Consider all Relevant Information, Including Mitigating Measures and Conditions and By Failing to Weigh Potential Impacts and Benefits.

The SC ruled that once it determined the Applicants had not met their burden of proof, it did not have to consider any other record evidence of estimated impacts or mitigating conditions addressing such impacts. By ignoring relevant information and mitigating measures, the SC sought to excuse its failure to weigh benefits and impacts. This approach is contrary

to the Statute and Rules, to the way permitting proceedings operate, and to common sense.

A. Contrary to its statutory obligations, the SC failed to consider all relevant information.

The Statute requires a subcommittee to "consider and weigh all evidence presented" at public and adjudicative hearings, and to consider "all relevant information." RSA 162-H:10, III and 16, IV. The SC failed to do so. In fact, it failed both to deliberate on—and to make—all statutory findings in RSA 162-H:16, IV and to consider highly relevant information on ODR.

The SC made clear its reasons for stopping its deliberations. When Commissioner Bailey moved to stop, a member questioned whether they were "doing diligence to the rest of the information we've had presented before us over the course of 70 days of hearings." DK-tab-1403-at-5. Another said: "I'd love to be done. I think everyone here would love to have this – a final decision on this. But the lawyer in me says we should be sure to dot all our i's and cross all our t's…[i]f expediency is at all a rationale for stopping now, I think that without too many more days we can be done and have addressed all of the topics." Id.-at-6-7. Commissioner Bailey explained:

> I'm worried that if we continue with our deliberations, we will really need to figure out what conditions we would impose on a lot of things. And that's not—that's not going to be simple and it's not going to be fast. And there's going to be a lot more things to appeal. And I think we have a pretty good record right now...let's just keep it simple and stop here.

Id.-at-8 (emphasis added). The Chair agreed that "[j]ust dealing with the issue as it stands now that's a much simpler case to bring to the Supreme Court." Id.-at-13-14. After investing hundreds of millions of dollars in this Project, the Applicants were entitled to consideration of all statutory findings and to a completed process-not one designed to make an appeal to this Court simpler.

By stopping, the SC ignored the Legislature's mandate that "all environmental, economic and technical issues [b]e resolved in an integrated fashion." RSA 162-H:1. For example, the Order focuses on the Project's "impacts on aesthetics," particularly in its consideration of land use. DK-tab-1478-at-53. But the SC never deliberated on or decided aesthetic effects, or whether they were "unreasonably adverse," as required by RSA 162-H:16, IV(c). DK-tab-1474-at-86-87. One member noted that these findings were "intertwined" and that "the more we would have gotten into this, the more that intertwining would…have faded." Id. The SC would therefore have been well served by taking an integrated approach to all the required findings as the SRP subcommittee did, noting the benefits of having reviewed aesthetics before assessing ODR. BA.23-25.[18]

Had the SC not been focused on expediency, it would have considered all evidence, all relevant information, the required Statutory findings and the conditions "they could impose on a lot of things." DK-tab-1403-at-8. The Statute's requirement to consider all evidence recognizes that permitting proceedings are different; the rules of evidence do not

[18] The SC also deprived the Applicants of information as to how they might revise the Project to address bases for denial and thus avoid both piecemeal proceedings and appeals to this Court. See DK-tab-1426-at-12; DK-tab-1474-at-19.

apply, and unlike civil litigation (where the evidence largely involves past events, or projections of damages involving a single business), permitting proceedings involve the public interest, and the estimated future impacts that cannot be calculated with precision. If a civil trial is "essentially a search for the truth," Fenlon v. Thayer, 127 N.H. 702, 705 (1986), in which relevant evidence is to be considered, even if offered by the other side's witness, then where strict evidentiary rules do not apply, and public interests are at stake, it was even more important that the SC consider all evidence, including evidence that would have allowed it to "bookend" estimated impacts and potential mitigation.

In contrast to the extensive critiques of the Applicants' experts (DK-tab-1432-at-163-77,194-218,225-227), the Order did not criticize CFP's experts. Why not then look to their estimated impacts, which were based on extensive analysis at a cost to the Applicants of over $2 million? The SC's explanation was that CFP had no burden of proof. This is true, but irrelevant.[19] The SC was obligated to consider the relevant evidence it received from experts retained by the Attorney General.

KRA estimated that the present value of residential property impacts over 60 years of potential Project visibility "could exceed $10 million and possibly be as high as $30 million." It opined that its approach "allow[ed] the SEC to see how much loss is at risk, and what that represents to the state economy, using standard impact estimation techniques." CFP-Ex-146-at-56. Likewise, KRA estimated tourism impacts of $10 million per

[19] Parties in judicial proceedings can rely on opposing parties' experts to meet their burden of proof, even if their own experts' testimony is rejected in part or in whole. See, e.g., IBEW Local 98 Pension Fund v. Best Buy Co., 818 F.3d 775, 771-83 (8th Cir. 2006).

year (in current dollars), further secondary effects approaching $13 million in GSP and the loss of nearly 190 jobs over eleven years from 2020-2030, and described the nature of this impact. Supra at 10. Why would any administrative agency ignore testimony that offered an estimate of property value and tourism impacts and that would have been useful in assessing undue interference with ODR?

B. The SC failed to consider mitigating measures and conditions that could have reduced or eliminated Project impacts.

Consideration of all evidence and relevant information includes "whether the degree of interference is so excessive that it warrants mitigation." Decision Granting Certificate of Site and Facility, Groton Wind, Docket No. 2010, ("Groton") at 38 (May 6, 2011). NOA-Appendix-at-1991. Here, the SC had available to it extensive conditions that would have addressed impacts and concerns raised by the SC. See fn.4 supra. But the SC stated:

> [W]e conclude that we are not required to address conditions when a certificate is denied…To read the rule and statute as proposed by the Applicant would mean that the SC cannot deny a certificate after it finds that an applicant did not satisfy the requirements of RSA 162-H:16, IV and, instead, should proceed to considering conditions that would render a project certifiable under RSA 162-H:16.

DK-tab-1478-at-21.[20]

[20] SC members several times raised the topic of conditions, but never actually deliberated on them, and thus did not consider their potential to address concerns regarding "undue interference." See e.g., DK-tab-1399-at-43,104-106.

The SC's reasoning is based on two false premises. First, it contends that this would "requir[e] the [SC] to draft and consider conditions that could cure the Applicants' failure to carry its burden of proof."[21] Id. Second, it claims that the Applicants argue for an "absurd result," where the SC must consider conditions after finding that their burden had not been met. Id. On the contrary, in permitting proceedings (like this one), mitigating measures and conditions are an integral part of the burden of proof, and cannot be divorced from it.[22] The SC posits a counter-intuitive paradigm where mitigation is considered only after an applicant first demonstrates that a project would not unduly interfere with ODR, independent of mitigation. Id. If this were true, no energy project requiring mitigation could be built—and every project requires mitigation.[23]

With its "undue interference" standard and requirement that benefits and impacts be weighed, the Statute presumes, almost as an imperative, that any certificate will contain conditions. Mitigation is an inseparable part of that weighing. The Rules also specifically require consideration of "[a]ny other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16." Site 301.17(i).[24]

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[21] In fact, that is precisely what the SEC just did in December 2018 in the SRP docket. See BA.5,6-16.

[22] The terms "conditions" and "mitigation" are used interchangeably herein to mean measures intended to avoid, minimize and mitigate impacts.

[23] See, e.g., Appeal of Mary Allen, 170 N.H.754, 762-763 (2018) (where mitigation offered by applicant prevented wind project from exceeding SEC standards.). Applying this SC's analysis, that project could not have been approved since the Antrim subcommittee would not have considered mitigation.

[24] See also Site 301.14. Each subsection of that rule, which addresses the "Criteria Relative to Findings of Unreasonable Adverse Effects," provides that the SEC shall consider "the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures."

Mitigation is one way to ensure that the interference does not become "undue."

The SC's conclusion is also inconsistent with the statutory framework and SEC practice. The Statute contemplates two types of conditions: Conditions offered by agencies with specific expertise and permitting responsibility "necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority," 162-H:7,VI-b and 7-a, I(b), and conditions proposed by applicants, parties or the SEC itself and unrelated to the specific requirements of the state permitting agencies. RSA 162-H:16, VI. Both types of conditions are longstanding core elements of the SEC process. As illustrated above, conditions render potentially unacceptable impacts acceptable, and the SC's refusal to even consider them was unreasonable, arbitrary, and unlawful.[25]

With respect to property values, the Applicants offered the PVG to "ensure that 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." APP-Ex-6-at-9.[26]

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[25] See generally, Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1015 (9th Cir. 2006) (it was proper for agency to incorporate mitigating measures through its plan of action, analyzing the effects with the measures in place, rather than first determining the potential impacts and then developing a plan to mitigate those effects).

[26] Chairman Honigberg questioned Mr. Quinlan about the PVG as follows: "Q. To the extent that, as it currently exists, like the work-in-progress Guarantee Program, that may need some refinement before it can be rolled out and implemented. Would you agree? A. Yes, if you're referring to the property value...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. Q. And since we're not going to be done here tomorrow, there's time even through these proceedings and then through deliberations to work through how that might get improved or how other commitments might be refined and make their way into conditions. Would you agree with that?" A: Yes." DK-tab-949-at-85.

The SC expressed some concerns about the PVG. DK-tab-1432-at-198. But it never even considered it, let alone considered expanding it to include additional properties, for example, properties KRA estimated to be impacted, or all properties within a specified distance of the ROW. And KRA believed this issue could be fully addressed by another mitigation option, testifying that the $200 million FNHF "would be more than adequate to compensate affected parties regarding property value effects" and provided "a substantial amount of money that could be directed in different ways." DK-tab-1233-at-67. The SC Chair also observed that the PVG "is a proposal and the Company would be open to revisions or expansions if the Committee felt it was important to do so." DK-tab-1400-at-110.

The treatment of a similar proposal in SRP, where Dr. Chalmers also testified, illustrates the necessity of considering mitigation measures and extent to which the SC here departed from established and proper practice. Although questioning Chalmers' conclusions, multiple SRP subcommittee members believed that proposal would adequately address potential impacts, with the Chair (also a member of this SC), stating: "I didn't find his conclusions very reliable. But the Dispute Resolution Process kind of saves the day because if he is wrong there is a way for folks to get compensated." BA.28-31. Remarkably, the SRP subcommittee reached that conclusion after spending considerable time revising the proposed program to address perceived deficiencies. Yet in this case, the SC refused to take such an approach.

If the SC had considered KRA's estimated tourism impacts, it could have imposed a condition requiring the Applicants to offset such losses.

Apart from the FNHF, the Applicants had proposed a business claims process that KRA stated could address business losses.[27] DK-tab-1233-at 65-67. Chairman Honigberg acknowledged this, saying: "I would be willing to bet that if we granted a Certificate and put in a condition or insisted on a beefed-up claims process for business losses that would be a fairly easy thing to develop." DK-tab-1401-at-51. The failure to consider mitigation measures and conditions in this proceeding is arbitrary and is, standing alone, a sufficient basis to vacate the Orders.

C. The SC failed to resolve the capacity market benefits or to weigh the benefits and impacts of the Project.

Despite finding both Applicants' and CFP's economic experts reliable,[28] the SC failed to decide the extent of capacity market benefits and how they would affect the region's economy. DK-tab-1400-at-89-90. The Applicants' expert found the Project would provide energy market benefits of $60 million annually. Although declining to opine on which was more likely to occur, CFP's experts modeled four scenarios, two that would have produced benefits of $28 million and $14 million annually, one that would have produced no benefits, and a final one that the SC determined to be moot. Id.-at-100.

The SC said: "In the overall analysis of impact on the economy, savings from the Capacity Market could be outcome determinative." DK-tab-1432-at-161. But it failed to address that outcome, stating: "Based on

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[27] The claims process and the PVG were funded separately from the FNHF.
[28] During deliberations an SC member described LEI and Brattle as being "on top of their game," and the Chair described CFP's expert as "talking the same language as Ms. Frayer of LEI. DK-tab-1400-at-89-90,94.

the record before us, and the Applicant's admission that qualifying and clearing the Capacity Market is merely an intellectual exercise, we cannot conclude there will be savings from the Capacity Market." Id. The SC's job was to weigh the expert evidence and make a decision on this issue. Its failure to do so is inexplicable and wrong.

The SC pointed to nothing in the record supporting this conclusion. Rather, it mischaracterized the Applicants' position and thus avoided weighing highly relevant evidence.[29] The Applicants did not suggest that the SC forgo its obligation to reconcile the competing expert opinions. The Applicants' point was that the dispute among the experts was essentially over whether the likely benefits would be enormous or gigantic. The time and expense associated with creating and presenting the reports and testimony regarding capacity market savings were substantial. During the proceedings, the SC ordered the Applicants' expert to update her report, at considerable expense and delay. Yet, after all this effort assessing the

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[29] The Applicants' alleged "admission" was:

> It is beyond question that Northern Pass will generate significant benefits for the State of New Hampshire and New England. The sub-issues in dispute relate only to the magnitude of the economic benefits to New Hampshire and the region. Testimony and evidence submitted by experts for CFP tend to agree with the Applicants' approach but they quibble over the level of uncertainty regarding LEI's conclusions or the reliability of the modelling results. For purposes of the [SC]'s finding that the Project will not unduly interfere with the orderly development of the region, however, the critical point is the underlying agreement among the experts for the Applicants and CFP that significant benefits will accrue from the Project. Consequently, exploring the differing analyses relative to the capacity market may be intellectually stimulating but ultimately, the analyses do not need to be finely reconciled because such a reconciliation is not outcome determinative for the [SC]'s finding.

DK-tab-1386-at-69.

Project's single largest potential benefit, the SC suggests the Applicants simply said "never mind."

The SC also failed to undertake its ultimate task: weighing all impacts and benefits to determine whether the Applicants had proved facts sufficient for a finding that the Project would not unduly interfere with ODR. Site 202.19 (b). Even applying CFP's lower estimates, the record demonstrated approximately $1.5 billion in benefits. Supra at 10. There is no weighing of these benefits in the Order, and they are notably absent in the SC's summary of its findings. DK-tab-1432-at-283-85. Instead, the SC vaguely notes that "the Project would have a somewhat positive effect on the regional economy, employment, and real estate taxes" while highlighting "uncertainty regarding Capacity Market savings." DK-tab-1432-at-284.

Significantly, the $1.5 billion in benefits will accrue <u>regardless of any capacity market savings</u>. They include direct expenditures on taxes and the FNHF, as well as GSP, from those and other expenditures and construction jobs. Had the SC weighed the undisputed Project benefits against potential property value and tourism impacts, it could have readily found the Project would not unduly interfere with ODR. CFP's experts estimated $10-$30 million of total property value impact and tourism impacts of $10 million per year plus secondary effects approaching $13 million in GSP from 2020-2030. The uncontested benefits dwarf such impacts even before considering mitigation. Instead of performing this basic assessment, the SC "punted," relying on the burden of proof as an escape valve.

Although contending that there were problems with the "effect of the proposed facility on real estate values, on tourism and recreation, and on community services and infrastructure," even the Chair recognized that "if things were overwhelming in another direction, maybe those could be overcome." DK-tab-1402-at-30-31. In fact, things were "overwhelming in another direction." Had the SC done its job, it is difficult to fathom how it could have found undue interference with ODR.

II. The SC's Flawed Application of the Burden of Proof was Improper Ad Hoc Decision Making

In addition to employing the burden of proof as a vehicle for avoiding its statutory obligation to consider and weigh all evidence and relevant information, the SC applied that burden using criteria that appear nowhere in the Statute or Rules, without explaining what it required to meet that burden, and also requiring the Applicants to show the "nature and extent" of this unknown burden. Put simply, it imposed a burden that amounts to "we know it when we see it."

Courts should not "be compelled to guess at the theory underlying [an] agency's actions," nor should they "be expected to chisel that which must be precise from what the agency has left vague and indecisive." SEC v. Chenery Corp., 332 U.S. 194, 196–97 (1947). A reviewing court "must know what a decision means before the duty becomes [its] to say whether it is right or wrong." Id. 197 (quotation omitted); see Philadelphia Gas Works v. F.E.R.C., 989 F.2d 1246, 1251 (D.C. Cir. 1993)(recognizing that it is imperative for an agency to articulate clearly delineated standards so that "[r]egulated parties and their counsel can then, as lawyers do, seek to

measure the scope of the ratio decidendi, so as to predict how future cases will be decided, and therefore how behavior should be shaped").

As the SC acknowledged, consistent with due process, statutes and rules must "provide reasonable notice to the party to form an understanding of what the law requires." DK-tab-1478-at-23. Here, the vague Statute and Rules were applied in such an arbitrary manner as to violate the Applicants' right to due process under the New Hampshire Constitution Part 1, Articles 12 and 15. In re Jean-Guy's Used Cars & Parts, Inc., 159 N.H. 38, 42 (2009)(reversing agency decision because its interpretation of an undefined term in the statute "was clearly unreasonable or unlawful."); In re Flynn, 145 N.H. 422, 424 (2000)(reversing agency decision as unreasonable because "no reasonable person would anticipate" the application of this regulation in the manner agency applied it).

Starting with the Statute, the SC left key terms undefined. For example, it never explained what "region" it used to find the Applicants' evidence insufficient relative to anything regional in nature. Deliberations reflected the SC members' confusion over the meaning of "region:"

> I'm still interested, and I brought this up yesterday, this idea of the "region" everything being measured by the region. And I understand that we say "region" in the rules and in the statute. But what constitutes that region? ... So I think there's got to be more discussion about, are we looking at this project in chunks, in regions? Is it the sum of its parts? I'm not clear on that yet.

DK-tab-1400-at-30-31; DK-tab-1399-at-90-91.[30] The Chair suggested that the matter be discussed with counsel, but the SC never resolved the issue or

[30] Addendum B to the Applicants' Notice of Appeal sets out the statements of SC members evidencing confusion on this issue. Notice of Appeal at 129-130.

defined it in the Orders, contending only that "[t]he words in the statute are all understood to have a common meaning." DK-tab-1478-at-31.[31] And not once in the Orders does the SC explain how various impacts affected "development."

A prior SEC decision highlights the significance of the SC's failure to define these terms:

> In considering whether the Project will unduly interfere with the orderly development of the region, the Subcommittee must first determine whether such interference impacts the entire region, as opposed to a limited number of residences. Thereafter, the Subcommittee must consider whether the degree of such interference is so excessive that it warrants mitigation or denial of the Certificate.

Groton, supra, NOA-Appendix-at-1991. Without first defining statutory terms, this analysis is impossible.[32]

RSA 162-H:10, VII requires the SEC to adopt rules "including specific criteria to be applied in determining if the requirements of RSA 162-H:16, IV have been met." For some of the required findings, like aesthetics, historic sites, and the environment, the SEC has adopted specific

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[31] That contention is belied by its own confusion and by the dictionary definition of "region:" "an administrative area, division or district;" "a major indeterminate division of inanimate creation;" "a particular part of the world or universe…as an indefinite area of land." Merriam-Webster Dictionary, 1912 (Third Ed. 2002).

[32] Without defined terms and uniformly applied standards, how could the SC make findings, or an applicant offer proof, on anything? For example, while Site 301.09 (b)(4) calls for an estimate of the effects on real estate values in the "Affected Communities," the SC found that the Applicants "did not meet their burden in demonstrating that the Project's impact on property values will not unduly interfere with [ODR]." DK-tab-1432-at-199. The SC abandoned its past land use precedent and adopted a new, still undefined, "standard" saying "overdevelopment of an existing ROW "can…unduly interfere with [ODR]." Id.-at-278.

and objective criteria. 162-H:16, IV (a)-(c); Site 301.04-08 and 13-14. It did not adopt such criteria for ODR.

Site 301.15 and 301.09 inform an applicant of the general topics a subcommittee will consider for ODR, but they provide no guidance as to "the information that will be considered when determining whether the Applicant[s] satisfied [their] burden of proof." DK-tab-1478-at-30. Site 301.09(b) requires "an estimate" or an "assessment" of potential effects of a project on elements of the "economy" and Site 301.09 (a) calls for a description of the project's consistency, and identification of its inconsistency, with land use. The Orders mistakenly hinged on the SC's finding that the Applicants had to meet a burden of proof on each subsection of Site 301.09, and then required a showing of the "type and extent of impacts" and "the extent and nature of such interference" for each of those subsections. Id.-at-18,22. It appeared to treat each subpart as of equal importance, and apparently concluded that a lack of evidence on any of them was fatal.

But the Applicants had no burden of proof to make out a "prima facie" showing on each 301.09 factor. Instead, they were only obligated to provide "estimates" of the effects in each area for the SC to use in deciding whether those effects, taken together, amounted to undue interference with ODR. Site 301.09 provides no greater specificity than this, yet the SC required the Applicants to meet some undefined burden of proof.

The SC's approach raises a common concern regarding any administrative agency proceeding. For example:

> When FERC chooses to rely on the mechanism of a prima facie case, it must have a theory of what a prima facie case is before

> it rejects claims for failure to meet that standard. It may not, as it has here, use the traditional legal phrase merely as a shadowy deus ex machina. FERC must say what elements are necessary and sufficient to make a prima facie case, instead of merely noting the absence of particular elements that may or may not be part of a prima facie case. Otherwise we must guess at the theory underlying the agency's action.
>
> ….
>
> FERC has ample latitude, within the constraints of due process, to establish procedures for presenting and rebutting a prima facie case, but if it requires the establishment of a prima facie case, it must explain the threshold it has set.

City of Vernon, Cal. v. FERC, 845 F.2d 1042, 1048 (D.C. Cir. 2014) (quotations omitted); see also In Re Petition of Support Officers I & II, 147 N.H. 1, 9 (2001) (findings of fact and conclusions of law are required to provide the Court with an adequate basis to review agency decisions). Here, the Order describes how the expert testimony of Nichols, Chalmers and Varney failed to measure up, but never explained what was required or made findings to that effect. An applicant might reason that if these experts had included the various items the SC found lacking in their reports, it would have found them reliable and thus, that the burden of proof had been met.[33] But there was no way in advance to know that, or whether that would have been sufficient.

The Applicants had every reason to believe that their expert proof would be sufficient. The SEC previously relied on reports from Chalmers

[33] The Orders use the terms "credible" and "reliable" 70 times, as if such repetition would provide an understanding of what the SC deemed sufficient to prove a prima facie case, or would provide a basis to uphold the Orders.

and Varney virtually identical in substance and nature, citing the same studies and using the same methods to assess effects of an HVTL. See reports of Chalmers and Varney in MVRP, supra, at NOA-Appendix-at-2258-2522. The SC does not explain why those reports were acceptable in MVRP but not here, and it effectively imposed new standards for these experts (and for Nichols). The imposition of all these new requirements was arbitrary and amounts to prohibited ad hoc rulemaking solely for this case. Metromedia, Inc. v. Dir., Div. of Taxation, 478 A.2d 742, 751 (N.J. 1984)(holding that an agency action must be considered rulemaking if it, singly or in combination, prescribes a legal standard that is not otherwise expressly provided by or obviously inferable from the enabling statutory authorization; and reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy).

The SC used the burden of proof issue as a convenient tool—its deus ex machina—for avoiding the hard work of defining terms, considering all evidence and ruling on undue interference with ODR. DK-tab-1478-at-35. Effectively, and conveniently, "we don't have to make a decision on ODR, because we didn't have enough information, yet we will refuse to say what would have been enough."

Compounding this problem, in assessing the Applicants' burden, the SC referenced terms that appear nowhere in the Rules and were simply the members' personal opinions as to why the burden had not been met.

During the initial deliberations, the SC members' statements demonstrated that their understanding of what the Applicants must prove was a virtual Tower of Babel and contrary to the Statute and the Rules. The members described their concerns over the Applicants' estimates regarding land use, tourism and property values by using an array of descriptors that were completely untethered to the required "estimates" in the Rules. For example, they spoke in terms of whether the Project—or aspects of it—would have "an impact on land use," "no impact on tourism," "an impact on property values," whether the impact on property values would be "none," or whether there "could not be an impact" on regional plans. See Addendum C to the Applicants' Notice of Appeal at 131-134, 136-137. Such showings are fundamentally inconsistent with the Legislature's unequivocal recognition that energy facilities would likely have negative effects which were not, by themselves, sufficient reason to deny a Certificate. The Statute plainly contemplates that projects will have "impacts." RSA 162-H:1. The issue is whether those "impacts" rise to the "high bar" of undue interference, a decision the SC never made. See fn. 2, supra.

The SC disagrees that it measured the burden using these criteria, claiming that these were just "isolated statements." DK-tab-1478-at-35-36; 38. Yet these descriptors appear in the Order and the RHO: "The [SC] weighed the evidence and testimony that the Project would have some impact on property values[,]" id.-at-22 (emphasis added); the Applicants' expert testimony "did not even contemplate that there may be some impact[,]" id. (emphasis added); and "[t]he [SC] determined that the Applicants' assessment of the impacts on the economy and employment

failed to account for the negative impacts on local businesses." Id.-at-34 (emphasis added).

The SC improperly evaluated each subsection of Site 301.09 as standalone criteria in its flawed analysis of the Applicants' burden of proof. Regarding tourism, the SC imposed an impossible burden of proof. All experts agreed that the impact of HVTL lines was virtually impossible to measure, yet the SC concluded that it "was left with little understanding as to the type and extent of impacts on tourism." Id.-at-22. But it nevertheless found "valid reasons" to believe that the Project "would hurt tourism," a meaningless (and improper) standard, given that this unknown harm must eventually be part of the weighing of all factors on ODR. DK-tab-1432-at-227. The Applicants were faulted for failing to provide evidence that all experts agreed they could not provide. And their burden was measured against the standard of "hurting tourism" (whatever that means) as determined by the SC members' personal feelings. That empty standard has no basis in the record (certainly not from the alleged "worthwhile view and assessment of the impact" of intervenors who did "not provide any analysis or scientific evidence.") DK-tab-1432-at-226-27.

The SC's treatment of property values was no less arbitrary. It stated its "belie[f] that properties encumbered by the [ROW] and properties that are not encumbered by the ROW will be affected by the Project," and concluded that the Applicants "did not meet [their] burden in demonstrating that the Project's impact on property values will not unduly interfere with the [ODR]." Id.-at-199. Apart from the Applicants having had no such burden, the SC makes no findings of fact supporting this "belief." It seemingly requires the Applicants to prove no "effect" at all. The SC

cannot have it both ways, first claiming it lacks sufficient evidence to determine the Project's impacts on tourism and property values, but then making findings about the extent of those impacts.

Although acknowledging that its Rules do not define "land use," the SC asserted that the "specificity required by due process" may be supplied by, among other factors, prior SEC decisions. DK-tab-1478-at-23. It then refused to apply the only precedent providing guidance on this issue. Thus, prior precedent apparently serves to provide due process, but Varney was faulted for using that guidance in formulating his opinions.

MVRP is only the most recent in 36 years of rulings where "the single most important fact bearing on" ODR was found to be that the proposed line is constructed in an existing, occupied utility corridor.[34] Decisions like MVRP provide an administrative gloss on the SEC's land use rule by interpreting the issue "in a consistent manner and apply[ing] it to similarly situated applicants over a period of years without legislative interference." Appeal of N. Miles Cook, III, 170 N.H. 746, 752-53, (2018); Com. of Mass. Dep't of Educ. v. U.S. Dep't of Educ., 837 F.2d 536, 544 (1st Cir. 1988)("[W]hen an agency fills a quasi-judicial role, it builds a body of precedent which it cannot thereafter lightly disregard … [and] like courts, agencies have an obligation to render consistent opinions and to either follow, distinguish or overrule their own earlier pronouncements.")(quotations omitted). Northern Pass and MVRP offer

[34] Docket No. DSF 81-349, Re New England Electric Transmission Corporation, Order No. 16,060, (December 17, 1982); Docket DSF 85-155, Re New England Hydro-Transmission Corporation (Hydro Quebec Phase II), Order No. 18,499 (December 8, 1986). NOA-Appendix-at-1782-1953.

very similar facts. The land uses along the corridors were nearly identical. NOA-Appendix-at-2107. Structure heights in MVRP were approximately 40 to 50 feet taller than the nearest existing structures and relocated structures ranged from three to 30 feet taller. See Id. A.2064-2065. Yet the MVRP subcommittee did not find that the addition of the new 345-kV transmission line would negatively impact land use, or interfere with development patterns along the corridor, nor did it discuss the notions of nonconforming use, or overburdening.

Here, the SC said only that the principle that construction in an existing ROW was consistent with land uses is "not…to be applied in every case." DK-tab-1432-at-277. But it made no findings of fact explaining why it should not be applied in this case. One SC member stated that the Project was "completely different" because "it's not entirely in the existing right-of-way." DK-tab-1474-at-69. But the SC itself made no such finding, and this would not justify ignoring past precedent. Only 32 of the 192 miles are in a new ROW. Twenty-four of those 32 miles are privately owned by Bayroot LLC, which supported the Project and expressly preferred overhead construction. The SC deferred to that preference. DK-tab-1432-at-280-284. The remaining eight miles are also privately owned, by NPT's affiliate. The preference on that land was also for overhead construction. The SC ignored that, and failed to explain why construction on that private land might be inconsistent with prevailing land uses. DK-tab-1400-at-68-72; see also DK-tab-1432-at-281-282. The Order never says where this line, mostly located in existing corridors, actually impacts prevailing land uses in a manner that would justify jettisoning precedent. Instead, it claims that this line "can," or "may" or "could" impact land uses.

Supra at 19-21. But that does not explain why other lines built in existing ROW did not, or why this case is different.

The SC faulted Varney for opinions consistent with precedent and for failing to consider that there was a possible "tipping point" within the ROW where it could be "overburdened," or where the use of an existing transmission corridor might be a non-conforming use under zoning laws. Supra. at 19-21. On rehearing, it claimed that these tests were used only to "illustrate and contextualize the common sense recognition that the addition of new transmission lines in an existing corridor can negatively impact land use in and around the corridor." DK-tab-1478-at-52. But if Varney's failure to consider these issues was not the basis of the burden of proof finding, the SC does not explain what was, where this "common sense recognition" comes from, or why these "illustrations" were not applicable in other dockets.

These new tests appear nowhere in the Rules, and both are flawed. Whether a transmission line overburdens an easement depends on the terms of each easement grant and is a matter of real estate law for the Superior Courts. The PUC so found in considering whether PSNH's ROWs could be leased to NPT. Docket No. DE 15-464, Petition to Lease Rights-of-Way to NPT, Order No. 26,001 (April 4, 2017) NOA-Appendix-at-1937,1949; see also, Lussier v. New England Power, Co., 133 N.H. 753 (1990). The SC also never explains how application of the non-conforming use doctrine, which exists solely in the context of local zoning, can be reconciled with the Statute, since the doctrine is squarely at odds with the Statute, which preempts all local zoning and expressly provides for the permitting of altogether new energy facilities.

Finally, although RSA 162-H:16, IV(b) requires a subcommittee to give "due consideration to the views of municipal and regional planning commissions and municipal governing bodies," here, for the first time, the SC imposed an affirmative burden on the Applicants to address and resolve those views or concerns. The new burden to "adequately anticipate and account for" those views, or give "more consideration" to master plans and ordinances is so amorphous that no applicant could meet it, and no court could determine what was necessary to satisfy it. DK-tab-1432-at-7,281; DK-tab-1478-at-55-56. The Rules require an applicant to include municipal views in the "information regarding the effect of the Project on [ODR]" (Site 301.09) but do not place a burden on the Applicants regarding them, tie consideration of them only to land use, or create some sliding scale directing applicants to give more or less consideration in proportion to a given number of objections. Yet the SC found that the Applicants' burden of proof had not been met because the "overwhelming majority" of municipalities were "vehemently" opposed to the Project. DK-tab-1432-at-285.[35] This finding is flawed.

First, if "due consideration" is to be judged on the relative "vehemence" of municipal opinions and assertions, however that might be measured, no project would ever be built, as the SC Chair recognized. DK-tab-1474-at-64-65.[36]

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[35] During deliberations, Commissioner Bailey stated: "we really do have to take into account the views of municipal officials, and those have all been very negative and have in many cases demonstrated their belief that this is not consistent with their master plans, their zoning ordinances. So, therefore, I don't think that the Applicant has met is burden of proof with respect to that either." DK-tab-1402-at-28 (emphasis added).

[36] The Vermont Supreme Court is the only court to interpret "due consideration" in relation to ODR. Vermont's siting statute has language nearly identical to RSA 162-H:16, IV (b). The Court

Second, the SC found the Project to be inconsistent with master plans and zoning ordinances. Yet absent the adoption of ordinances implementing them, master plans are merely aspirational guides without the force of law. Rancourt v. Town of Barnstead, 129 N.H. 45, 48-49 (1986). Any violation of zoning ordinances would be irrelevant, given the SEC's preemptive jurisdiction.

Third, the burden to "do more" was impossible to meet. As Chairman Honigberg explained during deliberations, the Applicants "want to be able to work with the towns. The towns are stiff-arming them … so they're not able to make any kind of agreements right now." DK-tab-1399-at-42-43. Another SC member noted that "some communities have played a big game of chicken…just holding out on the discussion…[a]nd maybe it's working." DK-tab-1399-at-102-103.[37] As one example, Plymouth complained about construction in its downtown but refused to negotiate with the Applicants to move the Project to a different location.[38] Under the

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found "due consideration" to "at least impliedly postulates that municipal enactments, in the specific area, are advisory rather than controlling." City of South Burlington v. Vt. Elec. Power Co., 344 A.2d 19, 25 (Vt. 1975). A recent concurring opinion explained that the statute's "admonition that the Board must afford [a]…[t]own's standards 'due consideration' is reminiscent of the phrase, 'with all due respect,' which invariably precedes and qualifies a statement evincing little to no respect at all." In re Rutland Renewable Energy, 147 A.3d 621, 632-33 (Vt. 2016) (Robinson, J., concurring)(the permitting process "preempts municipal zoning altogether – an aspect of the statutory structure that further undermines any suggestion that the Board owes deference to the Town's solar siting standards").

[37] See, e.g., DK-tab-1341-at-43-46; APP-Ex-359 (town refusing to have "any kind of agreement with Northern Pass"); DK-tab-1326-at-105-107 (town rejected agreeing to any stipulation to mitigate construction); DK-tab-1337-at-74-81, APP-Ex-148 (town refused to discuss MOU for fear that "it would give the impression that we're willing to negotiate.").

[38] The Plymouth Select Board refused to work with the Applicants, saying it would not "talk with [them] about an alternative route or anything else. We are just going to deal with it as-is. We are going to participate in our Intervenor Group and do what we can to shoo them away." See video, DK-tab-1350-at-42-Time 5:30-56:33.

SC's reasoning, the Applicants failed to meet their burden because they needed to do more work with unwilling towns.

In sum, the SC, in its desire for a simple and quick end, relied on the empty mantra of "failure to meet burdens of proof" as a convenient substitute for doing its job to define key terms, consider significant impacts and benefits, consider all evidence, and weigh all issues. It may have saved itself from having to properly explain anything, including how to satisfy various newly-fashioned burdens of proof, but it leaves this Court having to guess at what the SC did. The SC applied "we know it when we see it" standards that are contrary to its Rules, were adopted solely for this case and are so arbitrary, unreasonable and unlawful as to violate the federal and State constitutions.

III. The SC's Sole Finding that the Project Would Unduly Interfere With ODR is Arbitrary and Unsupported

The SC devoted nearly a fifth of the Order to whether the short-term and temporary effects of construction would unduly interfere with ODR. DK-tab-1432-at-73-120. When "sugared-off," the Order on this issue may be summarized as follows: The State Department of Transportation ("DOT") can adequately manage construction to address impacts (above and underground) in State roads (DK-tab-1432-at-115), but the Applicants' "failure" to offer an adequate plan for delegation of authority over local roads would unduly interfere with ODR. This is the sole instance where the SC actually found undue interference.

The local road issue involved construction under approximately four miles of roads in Stewartstown and Clarksville. DK-tab-1432-at-103-106; DK-tab-1212-at-7. The Applicants proposed that the SC delegate

management to the DOT but on the day the record closed, the DOT declined that delegation. DK-tab-1432-at-101-102. The Applicants then proposed that the SC appoint a consultant (at Applicants' expense) to monitor construction, which had been discussed months earlier. DK-tab-1212-at-120-24. While acknowledging its power to do so, the SC refused that proposal and then found either option would unduly interfere with ODR. DK-tab-1432-at-283.

This finding appeared from thin air. The DOT's representative to the SC (William Oldenburg) concluded that this construction would not unduly interfere with ODR, stating "I didn't think it would affect the region more than any other roadway project." DK-tab-1474-at-84-85. No SC member disagreed. How is it possible that construction involving approximately four miles of locally maintained unpaved roads could possibly interfere with ODR? And one might ask: in which "region?" And how does this make any interference "undue"? Consistent with the rest of the Orders, the SC provides no answer.

The SC left the Applicants in this position: the DOT refused any delegation of authority, and the SC refused to consider the Applicants' options or to exercise its authority. Put differently, the SC's unwillingness to resolve this issue was converted into the Applicants' failure and then said to constitute undue interference with ODR. DK-tab-1432-at-283. This finding alone demonstrates the wholly arbitrary nature of the Orders.

CONCLUSION

This proceeding is a textbook case of arbitrary administrative decision making that violated RSA chapter 162-H and the Applicants' due process rights. The SC's deliberations occurred more than two years after the Application was filed. Until then, expediency was not a concern. Yet during deliberations, and after what is likely the longest and costliest administrative proceeding in the State's history, expediency took center stage. Principles of law, of precedent, of fairness and reasonableness were all casualties.

Based on this process, and these Orders, future SEC applicants considering whether to invest millions of dollars developing an energy project would be compelled to consider the following: Future applicants will need to prepare and present their applications in a regulatory vacuum where key terms are undefined, and where the Rules offer no guide. Past precedent is of variable value, with applicants having to wait until deliberations to learn if any precedent governs or if something new emerges from whole cloth. Experts and methodologies accepted and relied upon in one case may be summarily rejected in the next. Relevant information may be entirely ignored. Applicants will not be able to rely on conditions to mitigate impacts. There is no certainty that subcommittees will evaluate an application against all statutory standards. All an applicant will know is that "every case is different." Given this uncertain and shifting landscape, no reasonable person would invest the resources to develop much-needed energy infrastructure in New Hampshire.

For these reasons, and those set forth herein, the Applicants request that the Court vacate the Orders and remand the matter to the SEC with

instructions to make all the statutory findings, apply clear standards, consider all evidence and mitigating measures, and weigh the benefits and impacts of the Project.

Respectfully submitted,

NORTHERN PASS TRANSMISSION LLC
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a EVERSOURCE INC.

By their attorneys,

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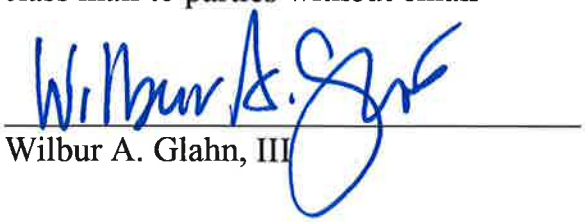
ORAL ARGUMENT

Oral argument requested. Mr. Glahn will argue.

CERTIFICATE OF SERVICE

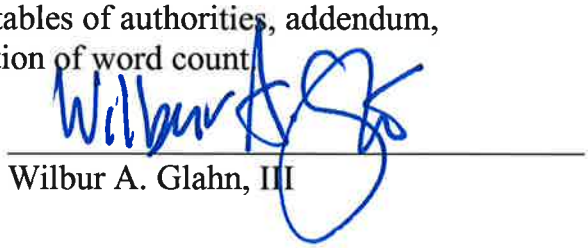
I hereby certify that on February 4, 2019, I served the foregoing Brief and the Addendum and Appendix by email to the parties on the electronic service list, and by first class mail to parties without email addresses.



Wilbur A. Glahn, III

CERTIFICATION OF WORD COUNT

I hereby certify that this brief contains 13,867 words, exclusive of the cover page, table of contents, tables of authorities, addendum, certificate of service and certification of word count.



Wilbur A. Glahn, III

ADDENDUM

Description		Site Acreage
OH Transmission - Existing ROW	2,520.0	574.6
OH Transmission - New ROW	465.1	169.0
UG Transmission	175.9	68.9
Converter Terminal	118.5	15.9
Transition Stations (6)	406.7	11.8
Deerfield and Scobie Pond Substations	125.8	11.6

Legend

Existing ROW*
New ROW*
UG Route*
AC Support Upgrades
Converter Terminal
Transition Station
Existing Substation to be Upgraded
Town Boundary
County Boundary

* ROW not shown as actual width

Date: 10/9/2015
Sources : Burns & McDonnell, ESRI

10 Miles

The Northern Pass Transmission Line Project Route
Project Overview USGS Map
Site 301.03(a)(2)

THE NORTHERN PASS

State Constitution - Bill of Rights

Part 1, Bill of Rights, of the New Hampshire State Constitution.

[Art.] 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this State controllable by any other laws than those to which they, or their representative body, have given their consent.

June 2, 1784

Amended 1964 by striking out reference to buying one's way out of military service.

[Art.] 15. [Right of Accused.] No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

June 2, 1784

Amended 1966 to provide the right to counsel at state expense if the need is shown.
Amended 1984 reducing legal requirement proof beyond a reasonable doubt to clear and convincing evidence in insanity hearings.

Referenced from the N.H. Manual for the General Court No.65 2017

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 162-H
ENERGY FACILITY EVALUATION, SITING, CONSTRUCTION AND OPERATION

Section 162-H:1

162-H:1 Declaration of Purpose. – The legislature recognizes that the selection of sites for energy facilities may have significant impacts on and benefits to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety. Accordingly, the legislature finds that it is in the public interest to maintain a balance among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities in the state be required to provide full and complete disclosure to the public of such plans; and that the state ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion. In furtherance of these objectives, the legislature hereby establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities.

Source. 1991, 295:1. 1998, 264:1. 2009, 65:1, eff. Aug. 8, 2009. 2014, 217:1, eff. July 1, 2014.

Section 162-H:2

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.

Section 162-H:3

162-H:3 Site Evaluation Committee Established. –
I. There is hereby established a committee to be known as the New Hampshire site evaluation committee consisting of 9 members, as follows:
(a) The commissioners of the public utilities commission, the chairperson of which shall be the chairperson of the committee;
(b) The commissioner of the department of environmental services, who shall be the vice-chairperson of the

committee;
(c) The commissioner of the department of business and economic affairs or designee;
(d) The commissioner of the department of transportation;
(e) The commissioner of the department of natural and cultural resources, the director of the division of historical resources, or designee; and
(f) Two members of the public, appointed by the governor, with the consent of the council, at least one of whom shall be a member in good standing of the New Hampshire Bar Association, and both of whom shall be residents of the state of New Hampshire with expertise or experience in one or more of the following areas: public deliberative or adjudicative proceedings; business management; environmental protection; natural resource protection; energy facility design, construction, operation, or management; or community and regional planning or economic development.
II. The public members shall serve 4-year terms and until their successors are appointed and qualified. The initial term of one member shall be 2 years. Any public member chosen to fill a vacancy occurring other than by expiration of term shall be appointed for the unexpired term of the member who is to be succeeded.
III. No public member nor any member of his or her family shall receive income from energy facilities within the jurisdiction of the committee. The public members shall comply with RSA 15-A and RSA 15-B.
IV. All members shall refrain from ex parte communications regarding any matter pending before the committee.
V. Seven members of the committee shall constitute a quorum for the purpose of conducting the committee's business.
VI. Any public member of the committee may be removed by the governor and council for inefficiency, neglect of duty, or misconduct or malfeasance in office, after being given a written statement of the charges and an opportunity to be heard.
VII. The committee shall be administratively attached to the public utilities commission pursuant to RSA 21-G:10.
VIII. [Repealed.]
IX. The chairperson shall serve as the chief executive of the committee and may:
(a) Delegate to other members the duties of presiding officer, as appropriate.
(b) Perform administrative actions for the committee, as may a presiding officer.
(c) Establish, with the consent of the committee, the budgetary requirements of the committee.
(d) Engage personnel in accordance with this chapter.
(e) Form subcommittees pursuant to RSA 162-H:4-a.
X. An alternate public member who satisfies the qualification requirements of subparagraph I(f), excluding the New Hampshire Bar membership requirement, shall be appointed by the governor, with consent of the council. The alternate public member shall only sit on the committee or a subcommittee as provided for in paragraph XI.
XI. If at any time a member must recuse himself or herself on a matter or is not otherwise available for good reason, such person, if a state employee, may designate a senior administrative employee or a staff attorney from his or her agency to sit on the committee. In the case of a public member, the chairperson shall appoint the alternate public member, or if such member is not available, the governor and council shall appoint a replacement upon petition of the chairperson. The replacement process under this paragraph shall also be applicable to subcommittee members under RSA 162-H:4-a.

Source. 1991, 295:1. 1995, 310:182. 1996, 228:41. 1997, 298:25. 2002, 247:2. 2003, 319:9. 2004, 257:44. 2007, 364:4. 2009, 65:5, eff. Aug. 8, 2009. 2014, 217:6, eff. July 1, 2014. 2015, 219:2, eff. July 8, 2015. 2017, 156:61, eff. July 1, 2017.

Section 162-H:3-a

162-H:3-a Administrator and Other Committee Support. – There is hereby established within the site evaluation committee the position of administrator who shall be an unclassified state employee. In the alternative, the position may be filled by an independent contractor. The administrator shall be hired by and under the supervision of the chairperson. The administrator, or chairperson in the absence of an administrator, with committee approval, may engage additional technical, legal, or administrative support to fulfill the functions of the committee as necessary. Any person to be hired by the administrator shall be approved by the chairperson.

Source. 2014, 217:7, eff. July 1, 2014. 2015, 219:3, eff. July 8, 2015.

Section 162-H:4

162-H:4 Powers and Duties of the Committee. –

I. The committee shall:

(a) Evaluate and issue any certificate under this chapter for an energy facility.

(b) Determine the terms and conditions of any certificate issued under this chapter.

(c) Monitor the construction and operation of any energy facility granted a certificate under this chapter to ensure compliance with such certificate.

(d) Enforce the terms and conditions of any certificate issued under this chapter.

(e) Assist the public in understanding the requirements of this chapter.

II. The committee shall hold hearings as required by this chapter and such additional hearings as it deems necessary and appropriate.

III. The committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met. Any authorized representative or delegate of the committee shall have a right of entry onto the premises of any part of the energy facility to ascertain if the facility is being constructed or operated in continuing compliance with the terms and conditions of the certificate. During normal hours of business administration and on the premises of the facility, such a representative or delegate shall also have a right to inspect such records of the certificate-holder as are relevant to the terms or conditions of the certificate.

III-a. The committee may delegate to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate.

III-b. The committee may not delegate its authority or duties, except as provided under this chapter.

IV. In cases where the committee determines that other existing statutes provide adequate protection of the objectives of RSA 162-H:1, the committee may, within 60 days of acceptance of the application, or filing of a request for exemption with sufficient information to enable the committee to determine whether the proposal meets the requirements set forth below, and after holding a public hearing in a county where the energy facility is proposed, exempt the applicant from the approval and certificate provisions of this chapter, provided that the following requirements are met:

(a) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives of RSA 162-H:1;

(b) A review of the application or request for exemption reveals that consideration of the proposal by only selected agencies represented on the committee is required and that the objectives of RSA 162-H:1 can be met by those agencies without exercising the provisions of RSA 162-H;

(c) Response to the application or request for exemption from the general public indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(d) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

V. In any matter before the committee, the presiding officer, or a hearing officer designated by the presiding officer, may hear and decide procedural matters that are before the committee, including procedural schedules, consolidation of parties with substantially similar interests, discovery schedules and motions, and identification of significant disputed issues for hearing and decision by the committee. Undisputed petitions for intervention may be decided by the hearing officer and disputed petitions shall be decided by the presiding officer. Any party aggrieved by a decision on a petition to intervene may within 10 calendar days request that the committee review such decision. Other procedural decisions may be reviewed by the committee at its discretion.

Source. 1991, 295:1. 1997, 298:26. 2007, 364:5. 2008, 348:7. 2009, 65:6-8, eff. Aug. 8, 2009. 2014, 217:8-10, eff. July 1, 2014.

Section 162-H:4-a

162-H:4-a Subcommittees. –
I. The chairperson may establish subcommittees to consider and make decisions on applications, including the issuance of certificates, or to exercise any other authority or perform any other duty of the committee under this chapter, except that no subcommittee may approve the budgetary requirements of the committee, approve any support staff positions, or adopt initial or final rulemaking proposals. For purposes of statutory interpretation and executing the regulatory functions of this chapter, the subcommittee shall assume the role of and be considered the committee, with all of its associated powers and duties in order to execute the charge given it by the chairperson.
II. When considering the issuance of a certificate or a petition of jurisdiction, a subcommittee shall have no fewer than 7 members. The 2 public members shall serve on each subcommittee with the remaining 5 or more members selected by the chairperson from among the state agency members of the committee. Each selected member may designate a senior administrative employee or staff attorney from his or her respective agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Five members of the subcommittee shall constitute a quorum for the purpose of conducting the subcommittee's business.
III. In any matter not covered under paragraph II, the chairperson may establish subcommittees of 3 members, consisting of 2 state agency members and one public member. Each state agency member may designate a senior administrative employee or staff attorney from his or her agency to sit in his or her place on the subcommittee. The chairperson shall designate one member or designee to be the presiding officer who shall be an attorney whenever possible. Two members of the subcommittee shall constitute a quorum. Any party whose interests may be affected may object to the matter being assigned to a 3-person subcommittee no less than 14 days before the first hearing. If objection is received, the chairperson shall remove the matter from the 3-person subcommittee and either assign it to a subcommittee formed under paragraph II or have the full committee decide the matter.

Source. 2014, 217:11, eff. July 1, 2014. 2015, 219:9, eff. July 8, 2015.

Section 162-H:5

162-H:5 Prohibitions and Restrictions. –
I. No person shall commence to construct any energy facility within the state unless it has obtained a certificate pursuant to this chapter. Such facilities shall be constructed, operated and maintained in accordance with the terms of the certificate. Such certificates are required for sizeable changes or additions to existing facilities. Such a certificate shall not be transferred or assigned without approval of the committee.
II. Facilities certified pursuant to RSA 162-F or RSA 162-H prior to January 1, 1992, shall be subject to the provisions of those chapters; however, sizable changes or additions to such facilities shall be certified pursuant to this chapter.
III. The applications shall be governed by the applicable laws, rules and regulations of the agencies and shall be subject to the provisions of RSA 162-F or RSA 162-H in effect on the date of filing. Notwithstanding the foregoing, an applicant may request the site evaluation committee to assume jurisdiction and in the event that the site evaluation committee agrees to assert jurisdiction, the facility shall be subject to the provisions of this chapter.
IV. [Repealed.]

Source. 1991, 295:1. 1998, 264:3. 2009, 65:9, 24, V, eff. Aug. 8, 2009.

Section 162-H:6

162-H:6 Time Frames. – [Repealed 2009, 65:24, VI, eff. Aug. 8, 2009.]

Section 162-H:6-a

162-H:6-a Time Frames for Review of Renewable Energy Facilities. – [Repealed 2014, 217:28, II, eff. July 1, 2014.]

Section 162-H:7

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.

Section 162-H:7-a

162-H:7-a Role of State Agencies. –
I. State agencies having permitting or other regulatory authority may participate in committee proceedings as follows:
(a) Receive proposals or permit requests within the agency's permitting or other regulatory authority, expertise, or both; determine completeness of elements required for such agency's permitting or other programs; and report on such issues to the committee;
(b) Review proposals or permit requests and submit recommended draft permit terms and conditions to the committee;
(c) Identify issues of concern on the proposal or permit request or notify the committee that the application raises no issues of concern;
(d) When issues of concern are identified by the agency or committee, designate one or more witnesses to appear before the committee at a hearing to provide input and answer questions of parties and committee members; and
(e) If the committee intends to impose certificate conditions that are different than those proposed by state agencies having permitting or other regulatory authority, the committee shall promptly notify the agency or agencies in writing to seek confirmation that such conditions or rulings are in conformity with the laws and regulations applicable to the project and state whether the conditions or rulings are appropriate in light of the agency's statutory responsibilities. The notified state agencies shall respond to the committee's request for confirmation as soon as possible, but no later than 10 calendar days from the date the agency or agencies receive the notification described above.
II. When initiating a proceeding for a committee matter, the committee shall expeditiously notify state agencies having permitting or other regulatory authority or that are identified in administrative rules.
III. Within 30 days of receipt of a notification of proceeding, a state agency not having permitting or other regulatory authority but wishing to participate in the proceeding shall advise the presiding officer of the committee in writing of such desire and be allowed to do so provided that the presiding officer determines that a material interest in the proceeding is demonstrated and such participation conforms with the normal procedural rules of the committee.
IV. The commissioner or director of each state agency that intends to participate in a committee proceeding shall advise the presiding officer of the name of the individual on the agency's staff designated to be the agency liaison for the proceeding. The presiding officer may request the attendance of an agency's designated liaison at a session of the committee if that person could materially assist the committee in its examination or consideration of a matter.
V. All communications between the committee and agencies regarding a pending committee matter shall be included in the official record and be publicly available.
VI. A state agency may intervene as a party in any committee proceeding in the same manner as other persons under RSA 541-A. An intervening agency shall have the right to rehearing and appeal of a certificate or other decision of the committee.

Source. 2014, 217:15, eff. July 1, 2014.

Section 162-H:8

162-H:8 Disclosure of Ownership. –
Any application for a certificate shall be signed and sworn to by the person or executive officer of the association or corporation making such application and shall contain the following information:
I. Full name and address of the person, association, or corporation.
II. If an association, the names and residences of the members of the association.
III. If a corporation, the name of the state under which it is incorporated with its principal place of business and the names and addresses of its directors, officers and stockholders.
IV. The location or locations where an applicant is to conduct its business.
V. A statement of assets and liabilities of the applicant and other relevant financial information of such applicant.

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

Section 162-H:8-a

162-H:8-a Application and Filing Fees. –
I. Except as provided in paragraph IV, a person filing with the committee an application for a certificate for an energy facility, a petition for jurisdiction, a request for exemption, or any other petition or request for the committee to take action, shall pay to the committee at the time of filing a fee determined in accordance with the fee schedule described in paragraph II. If an application for a certificate for an energy facility is deemed incomplete pursuant to RSA 162-H:7, VI, and a new application is submitted thereunder, the unearned portion of the initial application fee shall be refunded to the applicant or credited to the filing of the new application. The committee may in its discretion provide for a credit or refund in other circumstances that are unforeseen by the applicant.
II. The fees under paragraph I shall be determined in accordance with a fee schedule posted by the committee on its website, which shall include the following amounts, subject to subsequent modification under paragraph III:
(a) Application fee for electric generation facilities: $50,000 base charge, plus:
(1) $1,000 per megawatt for the first 40 megawatts, and $1,500 per megawatt for each megawatt in excess of 40 megawatts, for any wind energy system.
(2) $100 per megawatt, for any natural gas or biomass fueled facility.
(3) $150 per megawatt, for any coal or oil fueled facility.
(4) $200 per megawatt, for any nuclear generation facility.
(b) Application fee for transmission facilities: $50,000 base charge, plus:
(1) $3,000 per mile, for any electric transmission facility.
(2) $1,500 per mile, for any natural gas pipeline.
(c) Application fee for other energy facilities: $50,000 fee.
(d) Filing fees for administrative proceedings:
(1) Petition for committee jurisdiction: $10,500.
(2) Petition for declaratory ruling: $10,500, or $3,000 if heard by a 3-member subcommittee.
(3) Certificate transfer of ownership: $10,500, or $3,000 if heard by a 3-member subcommittee.
(4) Request for exemption: $10,500, or $3,000 if heard by a 3-member subcommittee.
(5) Request to modify a certificate: $10,500, or $3,000 if heard by a 3-member subcommittee.
III. The committee shall review and evaluate the application fees and filing fees in the fee schedule in paragraph II at least once each year. The committee may increase or decrease any amount in the fee schedule by up to 20 percent with prior approval of the fiscal committee of the general court, provided that any such increase or decrease shall occur not more frequently than once during any 12-month period. Modifications to the fee schedule shall be posted on the committee website, with a link prominently displayed on the home page.
IV. Notwithstanding paragraph I, a petition for committee jurisdiction filed by a petitioner as defined in RSA 162-H:2, XI(a), (b), or (c) for a certificate for an energy facility shall not be subject to a filing fee. If the committee determines that it has jurisdiction over a proposed energy facility subject to any such petition, then the owner of the proposed energy facility shall be required to pay to the committee the petition for jurisdiction fee, in addition to the application fee determined in accordance with paragraph II for the type and size of the proposed energy facility.

Source. 2015, 219:8, eff. July 8, 2015.

Section 162-H:9

162-H:9 Counsel for the Public. –
I. Upon notification that an application for a certificate has been filed with the committee in accordance with RSA 162-H:7, the attorney general shall appoint an assistant attorney general as a counsel for the public. The counsel shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy. The counsel shall be accorded all the rights and privileges, and responsibilities of an attorney representing a party in formal action and shall serve until the decision to issue or deny a certificate is final.
II. This section shall not be construed to prevent any person from being heard or represented by counsel; provided, however, the committee may compel consolidation of representation for such persons as have, in the committee's reasonable judgment, substantially identical interests.

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

Section 162-H:10

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 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. 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.

Section 162-H:10-a

162-H:10-a Wind Energy Systems. –
I. To meet the objectives of this chapter, and with due regard for the renewable energy goals of RSA 362-F, including promoting the use of renewable resources, reducing greenhouse gas and other air pollutant emissions, and addressing dependence on imported fuels, the general court finds that appropriately sited and conditioned wind energy systems subject to committee approval have the potential to assist the state in accomplishing these goals. Accordingly, the general court finds that it is in the public interest for the site evaluation committee to establish criteria or standards governing the siting of wind energy systems in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided through a comprehensive, transparent, and predictable process. When establishing any criteria, standard, or rule for a wind

energy system or when specifying the type of information that a wind energy applicant shall provide to the committee for its decision-making, the committee shall rely upon the best available evidence.
II. For the adoption of rules, pursuant to RSA 541-A, relative to the siting of wind energy systems, the committee shall address the following:
(1) Visual impacts as evaluated through a visual impact assessment prepared in accordance with professional standards by an expert in the field.
(2) Cumulative impacts to natural, scenic, recreational, and cultural resources from multiple towers or projects, or both.
(3) Health and safety impacts, including but not limited to, shadow flicker caused by the interruption of sunlight passing through turbine blades and ice thrown from blades.
(4) Project-related sound impact assessment prepared in accordance with professional standards by an expert in the field.
(5) Impacts to the environment, air and water quality, plants, animals and natural communities.
(6) Site fire protection plan requirements.
(7) Site decommissioning, including sufficient and secure funding, removal of structures, and site restoration.
(8) Best practical measures to avoid, minimize, or mitigate adverse effects.

Source. 2014, 310:5, eff. Aug. 1, 2014.

Section 162-H:10-b

162-H:10-b Siting of High Pressure Gas Pipelines; Rulemaking; Intervention. –
I. To meet the objectives of this chapter, and with due regard to meeting the energy needs of the residents and businesses of New Hampshire, the general court finds that appropriately sited high pressure gas pipelines subject to committee approval have the potential to assist the state in accomplishing these goals. Accordingly, the general court finds that it is in the public interest for the site evaluation committee to establish criteria or standards governing the siting of high pressure gas pipelines in order to ensure that the potential benefits of such systems are appropriately considered and unreasonable adverse effects avoided through a comprehensive, transparent, and predictable process. When establishing any criteria, standard, or rule for a high pressure gas pipeline or when specifying the type of information that a high pressure gas pipeline applicant shall provide to the committee for its decision-making, the committee shall rely upon the best available evidence.
II. For the adoption of rules, pursuant to RSA 541-A, relative to the siting of high pressure gas pipelines, the committee shall address the following:
(a) Impacts to natural, scenic, recreational, visual, and cultural resources.
(b) Health and safety impacts, including but not limited to, proximity to high pressure gas pipelines that could be mitigated by appropriate setbacks from any high pressure gas pipeline.
(c) Project-related sound and vibration impact assessment prepared in accordance with professional standards by an expert in the field.
(d) Impacts to the environment, air and water quality, plants, animals, and natural communities.
(e) Site fire protection plan requirements.
(f) Best practical measures to ensure quality construction that minimizes safety issues.
(g) Best practical measures to avoid, minimize, or mitigate adverse effects.
(h) Criteria to maintain property owners' ability to use and enjoy their property.
III. As soon as practicable, but no later than one year from the effective date of this section, the committee shall adopt rules, pursuant to RSA 541-A, consistent with paragraphs I and II of this section.
IV. The committee shall consider intervention in Federal Energy Regulatory Commission proceedings involving the siting of high pressure gas pipelines in order to protect the interest of the state of New Hampshire.

Source. 2015, 264:1, eff. July 20, 2015.

Section 162-H:11

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.

Section 162-H:12

162-H:12 Enforcement. –
I. Whenever the committee, or the administrator as designee, determines that any term or condition of any certificate issued under this chapter is being violated, it shall, in writing, notify the person holding the certificate of the specific violation and order the person to immediately terminate the violation. If, 15 days after receipt of the order, the person has failed or neglected to terminate the violation, the committee may suspend the person's certificate. Except for emergencies, prior to any suspension, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide opportunity for a prompt hearing.
II. The committee may suspend a person's certificate if the committee determines that the person has made a material misrepresentation in the application or, in the supplemental or additional statements of fact or studies required of the applicant, or if the committee determines that the person has violated the provisions of this chapter or any rule adopted under this chapter. Except for emergencies, prior to any suspension, the committee shall give written notice of its consideration of suspension and of its reasons therefor and shall provide an opportunity for a prompt hearing.
III. The committee may revoke any certificate that is suspended after the person holding the suspended certificate has been given at least 90 days' written notice of the committee's consideration of revocation and of its reasons therefor and has been provided an opportunity for a full hearing.
IV. Notwithstanding any other provision of this chapter, each of the other state agencies having permitting or other regulatory authority shall retain all of its powers and duties of enforcement.
V. The full amount of costs and expenses incurred by the committee in connection with any enforcement action against a person holding a certificate, including any action under this section and any action under RSA 162-H:19, in which the person is determined to have violated any provision of this chapter, any rule adopted by the committee, or any of the terms and conditions of the issued certificate, shall be assessed to the person and shall be paid by the person to the committee. Any amounts paid by a person to the committee pursuant to this paragraph shall be deposited in the site evaluation committee fund established in RSA 162-H:21.

Source. 1991, 295:1. 2009, 65:15, eff. Aug. 8, 2009. 2014, 217:17, 18, eff. July 1, 2014. 2015, 219:6, eff. July 8, 2015.

Section 162-H:13

162-H:13 Records. – Complete verbatim records shall be kept by the committee of all hearings, and records of all other actions, proceedings, and correspondence of the committee, including submittals of information and reports by members of the public, shall be maintained, all of which records shall be open to the public inspection and copying as provided for under RSA 91-A. Records regarding pending applications for a certificate shall also be made available on a website.

Source. 1991, 295:1, eff. Jan. 1, 1992. 2014, 217:19, eff. July 1, 2014.

Section 162-H:14

162-H:14 Temporary Suspension of Deliberations. –
I. If the site evaluation committee, at any time while an application for a certificate is before it, deems it to be in the public interest, it may temporarily suspend its deliberations and time frame established under RSA 162-H:7.
II. [Repealed.]

Source. 1991, 295:1. 2009, 65:16, 24, VIII, eff. Aug. 8, 2009. 2014, 217:19, eff. July 1, 2014.

Section 162-H:15

162-H:15 Informational Meetings. – [Repealed 2014, 217:28, IV, eff. July 1, 2014.]

Section 162-H:16

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.

Section 162-H:17

162-H:17 Bulk Power Facility Plans. – [Repealed 2009, 65:24, X, eff. Aug. 8, 2009.]

Section 162-H:18

162-H:18 Review; Hearing. – [Repealed 2009, 65:24, XI, eff. Aug. 8, 2009.]

Section 162-H:19

162-H:19 Penalties. –

I. The superior court, in term time or in vacation, may enjoin any act in violation of this chapter.

II. Any construction or operation of energy facilities in violation of this chapter, or in material violation of the

amount of compensation or reimbursement. The chairperson or administrator shall develop a recordkeeping system and accounting and payment procedures.
V. Funding for all compensation and reimbursement under this section shall be as provided in RSA 162-H:21.

Source. 2015, 219:5, eff. July 8, 2015.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4. 2001, 223:1. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008.

Section 91-A:2

91-A:2 Meetings Open to Public. –

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

(a) Strategy or negotiations with respect to collective bargaining;

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including nonpublic sessions, shall include the names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions. Subject to the provisions of RSA 91-A:3, minutes shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

II-a. If a member of the public body believes that any discussion in a meeting of the body, including in a nonpublic session, violates this chapter, the member may object to the discussion. If the public body continues the discussion despite the objection, the objecting member may request that his or her objection be recorded in the minutes and may then continue to participate in the discussion without being subject to the penalties of RSA 91-A:8, IV or V. Upon such a request, the public body shall record the member's objection in its minutes of the meeting. If the objection is to a discussion in nonpublic session, the objection shall also be recorded in the public minutes, but the notation in the public minutes shall include only the member's name, a statement that he or she objected to the discussion in nonpublic session, and a reference to the provision of RSA 91-A:3, II, that was the

basis for the discussion.
II-b. (a) If a public body maintains an Internet website or contracts with a third party to maintain an Internet website on its behalf, it shall either post its approved minutes in a consistent and reasonably accessible location on the website or post and maintain a notice on the website stating where the minutes may be reviewed and copies requested.
(b) If a public body chooses to post meeting notices on the body's Internet website, it shall do so in a consistent and reasonably accessible location on the website. If it does not post notices on the website, it shall post and maintain a notice on the website stating where meeting notices are posted.
III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.
(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.
(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.
(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.
(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.
(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2. 2003, 287:7. 2007, 59:2. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008. 2016, 29:1, eff. Jan. 1, 2017. 2017, 165:1, eff. Jan. 1, 2018; 234:1, eff. Jan. 1, 2018.

Section 91-A:2-b

91-A:2-b Meetings of the Economic Strategic Commission to Study the Relationship Between New Hampshire Businesses and State Government by Open Blogging Permitted. – [Repealed 2012, 232:14, eff.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:22

541-A:22 Validity of Rules. –

I. No agency rule is valid or effective against any person or party, nor may it be enforced by the state for any purpose, until it has been filed as required in this chapter and has not expired.

II. Rules shall be valid and binding on persons they affect, and shall have the force of law unless they have expired or have been amended or revised or unless a court of competent jurisdiction determines otherwise. Except as provided by RSA 541-A:13, VI, rules shall be prima facie evidence of the proper interpretation of the matter that they refer to.

III. An agency shall not by rule:

(a) Provide for penalties or fines unless specifically authorized by statute.

(b) Require licensing, as defined in RSA 541-A:1, IX, unless authorized by a law which uses one of the specific terms listed in RSA 541-A:1, VIII.

(c) Require fees unless specifically authorized by a statute enforced or administered by an agency. Specific authorization shall not include the designation of agency fee income in the operating budget when no other statutory authorization exists.

(d) Provide for non-consensual inspections of private property, unless the statute enforced or administered by the agency specifically grants inspection authority.

(e) Delegate its rulemaking authority to anyone other than the agency named in the statute delegating authority.

(f) Adopt rules under another agency's authority.

(g) Expand or limit a statutory definition affecting the scope of who may practice a profession.

(h) Require a submission of a social security number unless mandated by state or federal law.

IV. No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

Source. 1994, 412:1. 2003, 309:2, eff. July 1, 2004. 2015, 234:8, eff. Sept. 11, 2015.

TITLE LV
PROCEEDINGS IN SPECIAL CASES

CHAPTER 541-A
ADMINISTRATIVE PROCEDURE ACT

Section 541-A:35

541-A:35 Decisions and Orders. – A final decision or order adverse to a party in a contested case shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

Source. 1994, 412:1. 2000, 288:21, eff. July 1, 2000.

Site 202.19 Burden and Standard of Proof.

(a) The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.

(b) An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.

(c) In a hearing held to determine whether a certificate, license, permit or other approval that has already been issued should be suspended, revoked or not renewed, the committee or subcommittee, as applicable, shall make its decision based on a preponderance of the evidence in the record.

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

Site 202.28 Issuance or Denial of Certificate.

(a) The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

(b) The committee shall keep a written decision or order and all filings related to an application on file in its public records for not less than 5 years following the date of the final decision or order or the date of the decision on any appeal, unless the director of the division of records management and archives of the department of state sets a different retention period pursuant to a uniform procedures manual adopted under RSA 5:40.

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

CHAPTER Site 300 CERTIFICATES OF SITE AND FACILITY

PART Site 301 REQUIREMENTS FOR APPLICATIONS FOR CERTIFICATES

Site 301.01 Filing.

(a) Each applicant for a certificate for an energy facility shall file with the committee one original and 15 paper copies of its application and an electronic version of its application in PDF format, unless otherwise directed by the chairperson or the administrator, after consultation by the chairperson or administrator with state agencies that are required to be provided a copy of the application under this chapter, in order to permit the timely and efficient review and adjudication of the application.

(b) The committee or the administrator shall:

(1) Acknowledge receipt of an application filed under Site 301.01(a) in writing directed to the applicant;

(2) Forward a copy of the application and acknowledgment to each member of the committee;

(3) Forward a copy of the application to each state agency required to receive a copy under Site 301.10(a) and (b); and

(4) Post a copy of each application on the committee's website.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.02 Format of Application.

(a) Paper copies of applications shall be prepared on standard 8 ½ x 11 inch sheets, and plans, maps, photosimulations, and other oversized documents shall be folded to that size or rolled and provided in protective tubes. Electronic copies of applications shall be submitted through electronic mail, on compact discs, or in an electronic file format compatible with the computer system of the commission.

(b) Each application shall contain a table of contents.

(c) All information furnished shall appear in the same order as the requirements to provide that information appear in Site 301.03 through 301.09.

(d) If any numbered item is not applicable or the information is not available, an appropriate comment shall be made so that no numbered item shall remain unanswered.

(e) To the extent practicable, copies of applications shall be double-sided.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.03 Contents of Application.

(a) Each application for a certificate of site and facility for an energy facility shall be signed and sworn to by the person, or by an authorized executive officer of the corporation, company, association, or other organization making such application.

(b) Each application shall include the information contained in this paragraph,and in (c) through (h) below, as follows:

(1) The name of the applicant;

(2) The applicant's mailing address, telephone and fax numbers, and e-mail address;

(3) The name and address of the applicant's parent company, association, or corporation, if the applicant is a subsidiary;

(4) If the applicant is a corporation:

a. The state of incorporation;

b. The corporation's principal place of business; and

c. The names and addresses of the corporation's directors, officers, and stockholders;

(5) If the applicant is a limited liability company:

a. The state of the company's organization;

b. The company's principal place of business; and

c. The names and addresses of the company's members, managers, and officers;

(6) If the applicant is an association, the names and addresses of the residences of the members of the association; and

(7) Whether the applicant is or will be the owner or lessee of the proposed facility or has or will have some other legal or business relationship to the proposed facility, including a description of that relationship.

(c) Each application shall contain the following information with respect to the site of the proposed energy facility and alternative locations the applicant considers available for the proposed facility:

(1) The location and address of the site of the proposed facility;

(2) Site acreage, shown on an attached property map and located by scale on a U.S. Geological Survey or GIS map;

(3) The location, shown on a map, of property lines, residences, industrial buildings, and other structures and improvements within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property;

(4) Identification of wetlands and surface waters of the state within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(5) Identification of natural, historic, cultural, and other resources at or within the site, on abutting property with respect to the site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified;

(6) Evidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of:

a. Ownership, ground lease, easement, or other contractual right or interest;

b. A license, permit, easement, or other permission from a federal, state, or local government agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application; or

c. The simultaneous filing of a federal regulatory proceeding or taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing, operating, and maintaining the facility thereon; and

(7) Evidence that the applicant has a current or conditional right of access to private property within the boundaries of the proposed energy facility site sufficient to accommodate a site visit by the committee, which private property, with respect to energy transmission pipelines under the jurisdiction of the Federal Energy Regulatory Commission, may be limited to the proposed locations of all above-ground structures and a representative sample of the proposed locations of underground structures or facilities.

(d) Each application shall include information about other required applications and permits as follows:

(1) Identification of all other federal and state government agencies having permitting or other regulatory authority, under federal or state law, to regulate any aspect of the construction or operation of the proposed energy facility;

(2) Documentation that demonstrates compliance with the application requirements of all such agencies;

(3) A copy of the completed application form for each such agency; and

(4) Identification of any requests for waivers from the information requirements of any state agency or department having permitting or other regulatory authority whether or not such agency or department is represented on the committee.

(e) If the application is for an energy facility, including an energy transmission pipeline, that is not an electric generating facility or an electric transmission line, the application shall include:

(1) The type of facility being proposed;

(2) A description of the process to extract, produce, manufacture, transport or refine the source of energy;

(3) The facility's size and configuration;

(4) The ability to increase the capacity of the facility in the future;

(5) Raw materials used or transported, as follows:

a. An inventory, including amounts and specifications;

b. A plan for procurement, describing sources and availability; and

c. A description of the means of transportation;

(6) Production information, as follows:

a. An inventory of products and waste streams, including blowdownemissions from a high pressure gas pipeline;

b. The quantities and specifications of hazardous materials; and

c. Waste management plans;

(7) A map showing the entire energy facility, including, in the case of an energy transmission pipeline, the location of each compressor station, pumping station, storage facility, and other ancillary facilities associated with the energy facility, and the corridor width and length in the case of a proposed new route or widening along an existing route; and

(8) For a high pressure gas pipeline, the following information:

a. Construction information, including a description of the pipe to be used, depth of pipeline placement, type of fuel to be used to power any associated compressor station, and a description of any compressor station emergency shutdown system;

b. Proposed construction schedule, including start date and scheduled completion date;

c. Operation and maintenance information, including a description of measures to be taken to notify adjacent landowners and minimize sound during blowdown events;

d. Copy of any proposed plan application or other documentation required to be submitted to the Federal Energy Regulatory Commission in connection with construction and operation of the proposed facility; and

e. Copy of any environmental report, assessment or impact statement prepared by or on behalf of the Federal Energy Regulatory Commission when it becomes available.

(f) If the application is for an electric generating facility, the application shall include the following information:

(1) Make, model, and manufacturer of each turbine and generator unit;

(2) Capacity in megawatts, as designed and as intended for operation;

(3) Type of turbine and generator unit, including:

a. Fuel utilized;

b. Method of cooling condenser discharge; and

c. Unit efficiency;

(4) Any associated new substations, generator interconnection lines, and electric transmission lines, whether identified by the applicant or through a system impact study conducted by or on behalf of the interconnecting utility or ISO New England, Inc.;

(5) Copy of system impact study report for interconnection of the facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application;

(6) Construction schedule, including start date and scheduled completion date; and

(7) Description of anticipated mode and frequency of operation of the facility.

(g) If the application is for an electric transmission line or an electric generating facility with an associated electric transmission or distribution line, the application shall include the following information:

(1) Location shown on U.S. Geological Survey Map;

(2) A map showing the entire electric transmission or distribution line project, including the height and location of each pole or tower, the distance between each pole or tower, and the location of each substation, switchyard, converter station, and other ancillary facilities associated with the project;

(3) Corridor width for:

a. New route; or

b. Widening along existing route;

(4) Length of line;

(5) Distance along new route;

(6) Distance along existing route;

(7) Voltage design rating;

(8) Any associated new electric generating unit or units;

(9) Type of construction described in detail;

(10) Construction schedule, including start date and scheduled completion date;

(11) Copy of any proposed plan application or other system study request documentation required to be submitted to ISO New England, Inc. in connection with construction and operation of the proposed facility; and

(12) Copy of system impact study report for the proposed electric transmission facility as prepared by or on behalf of ISO New England, Inc. or the interconnecting utility, if available at the time of application.

(h) Each application for a certificate for an energy facility shall include the following:

(1) A detailed description of the type and size of each major part of the proposed facility;

(2) Identification of 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 preferred choice;

(3) Documentation that the applicant has held at least one public information session in each county where the proposed facility is to be located at least 30 days prior to filing its application, pursuant to RSA 162-H:10, I and Site 201.01;

(4) Documentation that written notification of the proposed facility, including copies of the application, has been given to the governing body of each municipality in which the facility is proposed to be located, and that

written notification of the application filing, including information regarding means to obtain an electronic or paper version of the application, has been sent by first class mail to the governing body of each of the other affected communities;

(5) The information described in Sections 301.04 through 301.09;

(6) For a proposed wind energy facility, information regarding the cumulative impacts of the proposed facility on natural, wildlife, habitat, scenic, recreational, historic, and cultural resources, including, with respect to aesthetics, the potential impacts of combined observation, successive observation, and sequential observation of wind energy facilities by the viewer;

(7) Information describing how the proposed facility will be consistent with the public interest, including the specific criteria set forth in Site 301.16(a)-(j); and

(8) Pre-filed testimony and exhibits supporting the application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15; amd by #11156, eff 8-16-16

Site 301.04 Financial, Technical and Managerial Capability. Each application shall include a detailed description of the applicant's financial, technical, and managerial capability to construct and operate the proposed energy facility, as follows:

(a) Financial information shall include:

(1) A description of the applicant's experience financing other energy facilities;

(2) A description of the corporate structure of the applicant, including a chart showing the direct and indirect ownership of the applicant;

(3) A description of the applicant's financing plan for the proposed facility, including the amounts and sources of funds required for the construction and operation of the proposed facility;

(4) An explanation of how the applicant's financing plan compares with financing plans employed by the applicant or its affiliates, or, if no such plans have been employed by the applicant or its affiliates, then by unaffiliated project developers if and to the extent such information is publicly available, for energy facilities that are similar in size and type to the proposed facility, including any increased risks or costs associated with the applicant's financing plan; and

(5) Current and pro forma statements of assets and liabilities of the applicant;

(b) Technical information shall include:

(1) A description of the applicant's qualifications and experience in constructing and operating energy facilities, including projects similar to the proposed facility; and

(2) A description of the experience and qualifications of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time of application;

(c) Managerial information shall include:

(1) A description of the applicant's management structure for the construction and operation of the proposed facility, including an organizational chart for the applicant;

(2) A description of the qualifications of the applicant and its executive personnel to manage the construction and operation of the proposed facility; and

(3) To the extent the applicant plans to rely on contractors or consultants for the construction and operation of the proposed facility, a description of the experience and qualifications of the contractors and consultants, if

known at the time of application.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.05 Effects on Aesthetics.

(a) Each application shall include a visual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.

(b) The visual impact assessment shall contain the following components:

(1) A description and map depicting the locations of the proposed facility and all associated buildings, structures, roads, and other ancillary components, and all areas to be cleared and graded, that would be visible from any scenic resources, based on both bare ground conditions using topographic screening only and with consideration of screening by vegetation or other factors;

(2) A description of how the applicant identified and evaluated the scenic quality of the landscape and potential visual impacts;

(3) A narrative and graphic description, including maps and photographs, of the physiographic, historical and cultural features of the landscape surrounding the proposed facility to provide the context for evaluating any visual impacts;

(4) A computer-based visibility analysis to determine the area of potential visual impact, which, for proposed:

a. Wind energy systems shall extend to a minimum of a 10-mile radius from each wind turbine in the proposed facility;

b. Electric transmission lines longer than 1 mile shall extend to a ½ mile radius if located within any urbanized area;

c. Electric transmission lines longer than 1 mile shall extend to a 2 mile radius if located within any urban cluster;

d. Electric transmission lines longer than 1 mile if located within any rural area shall extend to:

1. A radius of 3 miles if the line would be located within an existing transmission corridor and neither the width of the corridor nor the height of any towers, poles, or other supporting structures would be increased; or

2. A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased;

(5) An identification of all scenic resources within the area of potential visual impact and a description of those scenic resources from which the proposed facility would be visible;

(6) A characterization of the potential visual impacts of the proposed facility, and of any visible plume that would emanate from the proposed facility, on identified scenic resources as high, medium, or low, based on consideration of the following factors:

a. The expectations of the typical viewer;

b. The effect on future use and enjoyment of the scenic resource;

c. The extent of the proposed facility, including all structures and disturbed areas, visible from the scenic resource;

d. The distance of the proposed facility from the scenic resource;

e. The horizontal breadth or visual arc of the visible elements of the proposed facility;

f. The scale, elevation, and nature of the proposed facility relative to surrounding topography and existing structures;

g. The duration and direction of the typical view of elements of the proposed facility; and

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

(7) Photosimulations from representative key observation points, from other scenic resources for which the potential visual impacts are characterized as "high" pursuant to (6) above, and, to the extent feasible, from a sample of private property observation points within the area of potential visual impact, to illustrate the potential change in the landscape that would result from construction of the proposed facility and associated infrastructure, including land clearing and grading and road construction, and from any visible plume that would emanate from the proposed facility;

(8) Photosimulations shall meet the following additional requirements:

a. Photographs used in the simulation shall be taken at high resolution and contrast, using a full frame digital camera with a 50 millimeter fixed focal length lens or digital equivalent that creates an angle of view that closely matches human visual perception, under clear weather conditions and at a time of day that provides optimal clarity and contrast, and shall avoid if feasible showing any utility poles, fences, walls, trees, shrubs, foliage, and other foreground objects and obstructions;

b. Photosimulations shall be printed at high resolution at 15.3 inches by10.2 inches, or 390 millimeters by 260 millimeters;

c. At least one set of photosimulations shall represent winter season conditions without the presence of foliage typical of other seasons;

d. Field conditions in which a viewpoint is photographed shall be recorded including:

1. Global Position System (GPS) location points with an accuracy of at least 3 meters for each simulation viewpoint to ensure repeatability;

2. Camera make and model and lens focal length;

3. All camera settings at the time the photograph is taken; and

4. Date, time and weather conditions at the time the photograph is taken; and

e. When simulating the presence of proposed wind turbines, the following shall apply:

1. Turbines shall be placed with full frontal views and no haze or fog effect applied;

2. Turbines shall reasonably represent the shape of the intended turbines for a project including the correct hub height and rotor diameter;

3. Turbine blades shall be set at random angles with some turbines showing a blade in the 12 o'clock position; and

4. The lighting model used to render wind turbine elements shall correspond to the lighting visible in the base photograph;

(9) If the proposed facility is required by Federal Aviation Administration regulations to install aircraft warning lighting or if the proposed facility would include other nighttime lighting, a description and characterization of the potential visual impacts of this lighting, including the number of lights visible and their distance from key observation points; and

(10) A description of the measures planned to avoid, minimize, or mitigate potential adverse effects of the proposed facility, and of any visible plume that would emanate from the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #9183-B, eff 6-17-08; ss by #10994, eff 12-16-15

Site 301.06 Effects on Historic Sites. Each application shall include the following information regarding the identification of historic sites and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on historic sites:

(a) Demonstration that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9, as applicable;

(b) Identification of all historic sites and areas of potential archaeological sensitivity located within the area of potential effects, as defined in 36 C.F.R. §800.16(d), available as noted in Appendix B;

(c) Finding or determination by the division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, that no historic properties would be affected, that there would be no adverse effects, or that there would be adverse effects to historic properties, if such a finding or determination has been made prior to the time of application;

(d) Description of the measures planned to avoid, minimize, or mitigate potential adverse effects on historic sites and archaeological resources, and the alternative measures considered but rejected by the applicant; and

(e) Description of the status of the applicant's consultations with the division of historical resources of the department of cultural resources, and, if applicable, with the lead federal agency, and, to the extent known to the applicant, any consulting parties, as defined in 36 C.F.R. §800.2(c), available as noted in Appendix B.

Source. #10994, eff 12-16-15

Site 301.07 Effects on Environment. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on air quality, water quality, and the natural environment:

(a) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of air quality;

(b) Information including the applications and permits filed pursuant to Site 301.03(d) regarding issues of water quality;

(c) Information regarding the natural environment, including the following:

(1) Description of how the applicant identified significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility, including communications with and documentation received from the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources;

(2) Identification of significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities potentially affected by construction and operation of the proposed facility;

(3) Identification of critical wildlife habitat and significant habitat resources potentially affected by construction and operation of the proposed facility;

(4) Assessment of potential impacts of construction and operation of the proposed facility on significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, including fragmentation or other alteration of terrestrial or aquatic significant habitat resources;

(5) Description of the measures planned to avoid, minimize, or mitigate potential adverse impacts of construction and operation of the proposed facility on wildlife species, rare plants, rare natural communities, and other exemplary natural communities, and on critical wildlife habitat and significant habitat resources, and the alternative measures considered but rejected by the applicant; and

(6) Description of the status of the applicant's discussions with the New Hampshire department of fish and game, the New Hampshire natural heritage bureau, the United States Fish and Wildlife Service, and any other federal or state agencies having permitting or other regulatory authority over fish, wildlife, and other natural resources.

Source. #10994, eff 12-16-15

Site 301.08 Effects on Public Health and Safety. Each application shall include the following information regarding the effects of, and plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed energy facility on public health and safety:

(a) For proposed wind energy systems:

(1) A sound impact assessment prepared in accordance with professional standards by an expert in the field, which assessment shall include the reports of a preconstruction sound background study and a sound modeling study, as specified in Site 301.18;

(2) An assessment that identifies the astronomical maximum as well as the anticipated hours per year of shadow flicker expected to be perceived at each residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, other occupied building, and roadway, within a minimum of 1 mile of any turbine, based on shadow flicker modeling that assumes an impact distance of at least 1 mile from each of the turbines;

(3) Description of planned setbacks that indicate the distance between each wind turbine and the nearest landowner's existing building and property line, and between each wind turbine and the nearest public road and overhead or underground energy infrastructure or energy transmission pipeline within 2 miles of such wind turbine, and explain why the indicated distances are adequate to protect the public from risks associated with the operation of the proposed wind energy facility;

(4) An assessment of the risks of ice throw, blade shear, and tower collapse on public safety, including a description of the measures taken or planned to avoid or minimize the occurrence of such events, if necessary, and the alternative measures considered but rejected by the applicant;

(5) Description of the lightning protection system planned for the proposed facility;

(6) Description of any determination made by the Federal Aviation Administration regarding whether any hazard to aviation is expected from any of the wind turbines included in the proposed facility, and describe the Federal Aviation Administration's lighting, turbine color, and other requirements for the wind turbines;

(7) A decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in wind generation projects and cost estimates, which plan shall provide for removal of all structures and restoration of the facility site;

(8) The decommissioning plan required under (7) above shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All turbines, including the blades, nacelles and towers, shall be disassembled and transported off-site;

d. All transformers shall be transported off-site;

e. The overhead power collection conductors and the power poles shall be removed from the site;

f. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place; and

g. Areas where subsurface components are removed shall be filled, graded to match adjacent contours, reseeded, stabilized with an appropriate seed and allowed to re-vegetate naturally;

(9) A plan for fire protection for the proposed facility prepared by or in consultation with a fire safety expert; and

(10) An assessment of the risks that the proposed facility will interfere with the weather radars used for severe storm warning or any local weather radars.

(b) For electric transmission facilities, an assessment of electric and magnetic fields generated by the proposed facility and the potential impacts of such fields on public health and safety, based on established scientific knowledge, and an assessment of the risks of collapse of the towers, poles, or other supporting structures, and the potential adverse effects of any such collapse.

(c) For high pressure gas pipelines:

(1) A comprehensive health impact assessment prepared by an independent health and safety expert in accordance with nationally recognized standards, and specifically designed to identify and evaluate potential short-term and long-term human health impacts by identifying potential pathways for facility-related contaminants to harm human health, quantifying the cumulative risks posed by any contaminants, and recommending necessary avoidance, minimization, or mitigation;

(2) A sound and vibration impact assessment prepared by an independent expert in the field, in accordance with ANSI/ASA S12.9-2013 Part 3 for short-term monitoring and with ANSI S12.9-1992 2013 Part 2 for long-term monitoring, including the reports of a preconstruction sound and vibration background study and a sound and vibration modeling study;

(3) A description of planned setbacks that indicate the distance between:

a. The proposed high pressure gas pipeline and existing buildings on, and the boundaries of, abutting properties;

b. Any associated compressor station and schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms within a one mile radius;and

c. The proposed high pressure gas pipeline and any overhead or underground electric transmission line within 1/2 mile;

(4) An explanation of why the setbacks described by the applicant in response to (3), above, are adequate to protect the public from risks associated with the operation of the high pressure gas pipeline; and

(5) A description of all permanently installed exterior lighting at compressor stations and how it complies with Site 301.14(f)(5)c.

(d) For all energy facilities:

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

(2) A facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates; the decommissioning plan shall include each of the following:

a. A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

b. The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

c. All transformers shall be transported off-site; and

d. All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place;

(3) A plan for fire safety prepared by or in consultation with a fire safety expert;

(4) A plan for emergency response to the proposed facility site; and

(5) A description of any additional measures taken or planned to avoid, minimize, or mitigate public health and safety impacts that would result from the construction and operation of the proposed facility, and the alternative measures considered but rejected by the applicant.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

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 301.10 Completeness Review and Acceptance of Applications for Energy Facilities.

(a) Upon the filing of an application for an energy facility, the committee shall forward to each of the other 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, a copy of the application for the agency's review as described in RSA 162-H:7, IV.

(b) The committee also shall forward a copy of the application to the department of fish and game, the department of health and human services, the division of historical resources of the department of cultural resources, the natural

heritage bureau, the governor's office of energy and planning, and the division of fire safety of the department of safety, unless any such agency or office has been forwarded a copy of the application under (a) above.

(c) Upon receiving an application, the committee shall conduct a preliminary review to ascertain if the application contains sufficient information for the committee to review the application under RSA 162-H and these rules.

(d) Each state agency having permitting or other regulatory authority shall have 45 days from the time the committee forwards the application to notify the committee in writing whether the application contains sufficient information for its purposes.

(e) Within 60 days after the filing of the application, the committee shall determine whether the application is administratively complete and has been accepted for review.

(f) If the committee determines that an application is administratively incomplete, it shall notify the applicant in writing, specifying each of the areas in which the application has been deemed incomplete.

(g) If the applicant is notified that its application is administratively incomplete, the applicant may file a new and more complete application or complete the filed application by curing the specified defects within 10 days of the applicant's receipt of notification of incompleteness.

(h) If, within the 10-day time frame, the applicant files a new and more complete application or completes the filed application, in either case curing the defects specified in the notification of incompleteness, the committee shall, no later than 14 days after receipt of the new or completed application, accept the new or completed application.

(i) If the new application is not complete or the specified defects in the filed application remain uncured, the committee shall notify the applicant in writing of its rejection of the application and instruct the applicant to file a new application.

Source. #10994, eff 12-16-15

Site 301.11 Exemption Determination.

(a) Within 60 days of acceptance of an application or the filing of a petition for exemption, the committee shall exempt the applicant from the approval and certificate provisions of RSA 162-H and these rules, if the committee finds that:

(1) Existing state or federal statutes, state or federal agency rules or municipal ordinances provide adequate protection of the objectives set forth in RSA 162-H:1;

(2) Consideration of the proposed energy facility by only selected agencies represented on the committee is required and the objectives of RSA 162-H:1can be met by those agencies without exercising the provisions of RSA 162-H;

(3) Response to the application or request for exemption from the general public, provided through written submissions or in the adjudicative proceeding provided for in (b) below, indicates that the objectives of RSA 162-H:1 are met through the individual review processes of the participating agencies; and

(4) All environmental impacts or effects are adequately regulated by other federal, state, or local statutes, rules, or ordinances.

(b) The committee shall make the determination described in (a) above after conducting an adjudicative proceeding that includes a public hearing held in a county where the energy facility is proposed to be located.

Source. #10994, eff 12-16-15

Site 301.12 Timeframe for Application Review.

(a) Pursuant to RSA 162-H:7, VI-b, each state agency having permitting or other regulatory authority over the proposed energy facility shall report its progress to the committee within 150 days after application acceptance, 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.

(b) Pursuant to RSA 162-H:7, VI-c, each state agency having permitting or other regulatory authority over the proposed energy facility 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 application acceptance.

(c) Pursuant to RSA 162-H:7, VI-d, the committee shall issue or deny a certificate for an energy facility within 365 days after application acceptance.

(d) Pursuant to RSA 162-H:14, I, the committee shall temporarily suspend its deliberations and the time frames set forth in this section at any time while an application is pending before the committee, if it finds that such suspension is in the public interest.

Source. #10994, eff 12-16-15

Site 301.13 Criteria Relative to Findings of Financial, Technical, and Managerial Capability.

(a) In determining whether an applicant has the financial capability to construct and operate the proposed energy facility, the committee shall consider:

(1) The applicant's experience in securing funding to construct and operate energy facilities similar to the proposed facility;

(2) The experience and expertise of the applicant and its advisors, to the extent the applicant is relying on advisors;

(3) The applicant's statements of current and pro forma assets and liabilities; and

(4) Financial commitments the applicant has obtained or made in support of the construction and operation of the proposed facility.

(b) In determining whether an applicant has the technical capability to construct and operate the proposed facility, the committee shall consider:

(1) The applicant's experience in designing, constructing, and operating energy facilities similar to the proposed facility; and

(2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide technical support for the construction and operation of the proposed facility, if known at the time.

(c) In determining whether an applicant has the managerial capability to construct and operate the proposed facility, the committee shall consider:

(1) The applicant's experience in managing the construction and operation of energy facilities similar to the proposed facility; and

(2) The experience and expertise of any contractors or consultants engaged or to be engaged by the applicant to provide managerial support for the construction and operation of the proposed facility, if known at the time.

Source. #10994, eff 12-16-15

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

(1) The existing character of the area of potential visual impact;

(2) The significance of affected scenic resources and their distance from the proposed facility;

(3) The extent, nature, and duration of public uses of affected scenic resources;

(4) The scope and scale of the change in the landscape visible from affected scenic resources;

(5) The evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24;

(6) The extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity; and

(7) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures.

(b) In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall consider:

(1) All of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;

(2) The number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;

(3) The extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;

(4) Findings and determinations by the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and

(5) The effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

(c) In determining whether a proposed energy facility will have an unreasonable adverse effect on air quality, the committee shall consider the determinations of the New Hampshire department of environmental services with respect to applications or permits identified in Site 301.03(d) and other relevant evidence submitted pursuant to Site 202.24.

(d) In determining whether a proposed energy facility will have an unreasonable adverse effect on water quality, the committee shall consider the determinations of the New Hampshire department of environmental services, the United States Army Corps of Engineers, and other state or federal 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, with respect to applications and permits identified in Site 301.03(d), and other relevant evidence submitted pursuant to Site 202.24.

(e) In determining whether construction and operation of a proposed energy facility will have an unreasonable adverse effect on the natural environment, including wildlife species, rare plants, rare natural communities, and other exemplary natural communities, the committee shall consider:

(1) The significance of the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities, including the size, prevalence, dispersal, migration, and viability of the populations in or using the area;

(2) The nature, extent, and duration of the potential effects on the affected resident and migratory fish and wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

(3) The nature, extent, and duration of the potential fragmentation or other alteration of terrestrial or aquatic significant habitat resources or migration corridors;

(4) The analyses and recommendations, if any, of the department of fish and game, the natural heritage bureau, the United States Fish and Wildlife Service, and other agencies authorized to identify and manage significant wildlife species, rare plants, rare natural communities, and other exemplary natural communities;

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

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

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

(f) In determining whether a proposed energy facility will have an unreasonable adverse effect on public health and safety, the committee shall:

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

(2) For wind energy systems, apply the following standards:

a. With respect to sound standards, the A-weighted equivalent sound levels produced by the applicant's energy facility during operations shall not exceed the greater of 45 dBA or 5 dBA above background levels, measured at the L-90 sound level, between the hours of 8:00 a.m. and 8:00 p.m. each day, and the greater of 40 dBA or 5 dBAabove background levels, measured at the L-90 sound level, at all other times during each day, as measured using microphone placement at least 7.5 meters from any surface where reflections may influence measured sound pressure levels, on property that is used in whole or in part for permanent or temporary residential purposes, at a location between the nearest building on the property used for such purposes and the closest wind turbine; and

b. With respect to shadow flicker, the shadow flicker created by the applicant's energy facility during operations shall not occur more than 8 hours per year at or within any residence, learning space, workplace, health care setting, outdoor or indoor public gathering area, or other occupied building;

(3) For wind energy systems, consider the proximity and use of buildings, property lines, public roads, and overhead and underground energy infrastructure and energy transmission pipelines, the risks of ice throw, blade shear, tower collapse, and other potential adverse effects of facility operation, and the effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects, and the extent to which such measures represent best practical measures;

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

(5) For high pressure gas pipelines, apply the following standards:

a. With respect to sound standards for interstate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed a day-night sound level (Ldn) of 55 dBA at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B;

b. With respect to sound standards for intrastate pipelines, the noise attributable to any new compressor station, compression added to an existing station, or any modification, upgrade or update of an existing station, shall not exceed the standards set forth in (2)a., above, regarding wind energy systems;

c. With respect to vibration, compressor stations or modifications of existing compressor stations shall not result in a perceptible increase in vibration at any pre-existing noise-sensitive area, such as schools, hospitals, or residences, as provided in 18 CFR §380.12(k), available as noted in Appendix B, or a level of 2.0 peak particle velocity, whichever is less;

d. With respect to exterior lighting at compressor stations, no light shall be projected above the horizontal plane or projected beyond the property lines;

e. With respect to pipeline construction and safety, the requirements in Puc 506 and Puc 508 for a class 4 location in a high consequence area, as those terms are defined in 49 CFR §192.5(b)(4) and 49 CFR §192.903, available as noted in Appendix B, respectively; and

(6) For high pressure gas pipelines, consider:

a. The results of the comprehensive health impact assessment;

b. The proximity of electric transmission lines to the high pressure gas pipeline;

c. The proximity of any compressor station to schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, elderly care facilities, and farms;

d. The effectiveness of measures undertaken or planned to avoid, minimize, or mitigate such potential adverse effects; and

e. The extent to which the measures in d. represent best practical measures.

Source. #10994, eff 12-16-15; amd by #11156, eff 8-16-16

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 301.16 Criteria Relative to Finding of Public Interest. In determining whether a proposed energy facility will serve the public interest, the committee shall consider:

(a) The welfare of the population;

(b) Private property;

(c) The location and growth of industry;

(d) The overall economic growth of the state;

(e) The environment of the state;

(f) Historic sites;

(g) Aesthetics;

(h) Air and water quality;

(i) The use of natural resources; and

(j) Public health and safety.

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.

Source. #10994, eff 12-16-15

Site 301.18 Sound Study Methodology.

(a) The methodology for conducting a preconstruction sound background study for a wind energy system shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, a standard that requires short-term attended measurements;

(2) Long-term unattended monitoring shall be conducted in accordance with the standard of ANSI S12.9-1992 2013 Part 2, available as noted in Appendix B, provided that audio recordings are taken in order to clearly identify and remove transient noises from the data, with frequencies above 1250 hertz 1/3 octave band to be filtered out of the data;

(3) Measurements shall be conducted at the nearest properties from the proposed wind turbines that are representative of all residential properties within 2 miles of any turbine; and

(4) Sound measurements shall be omitted when the wind velocity is greater than 4 meters per second at the microphone position, when there is rain, or with temperatures below instrumentation minima; following the protocol of ANSI S12.9-2013 Part 3, available as noted in Appendix B:

a. Microphones shall be placed 1 to 2 meters above ground level, and at least 7.5 meters from any reflective surface;

b. A windscreen of the type recommended by the monitoring instrument's manufacturer must be used for all data collection;

c. Microphones should be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone.

(b) Pre-construction sound reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points;

(3) Distance between any sound measurement point and the nearest wind turbine;

(4) Location of significant local non-turbine sound and vibration sources;

(5) Distance between all sound measurement points and significant local sound sources;

(6) Location of all sensitive receptors including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities;

(7) Indication of temperature, weather conditions, sources of ambient sound, and prevailing wind direction and speed for the monitoring period; and

(8) Final report shall provide A-weighted and C-weighted sound levels for L-10, Leq, and L-90.

(c) The predictive sound modeling study shall:

(1) Be conducted in accordance with the standards and specifications of ISO 9613-2 1996-12-15, available as noted in Appendix B;

(2) Include an adjustment to the Leq sound level produced by the model applied in order to adjust for turbine manufacturer uncertainty, such adjustment to be determined in accordance with the most recent release of the IEC 61400 Part 11 standard (Edition 3.0 2012-11), available as noted in Appendix B;

(3) Include predictions to be made at all properties within 2 miles from the project wind turbines for the wind speed and operating mode that would result in the worst case wind turbine sound emissions during the hours before 8:00 a.m. and after 8:00 p.m. each day; and

(4) Incorporate other corrections for model algorithm error to be disclosed and accounted for in the model.

(d) The predictive sound modeling study report shall:

(1) Include the results of the modeling described in (c)(3) above as well as a map with sound contour lines showing dBA sound emitted from the proposed wind energy system at 5 dBA intervals;

(2) Include locations out to 2 miles from any wind turbine included in the proposed facility; and

(3) Show proposed wind turbine locations and the location of all sensitive receptors, including schools, day-care centers, health care facilities, residences, residential neighborhoods, places of worship, and elderly care facilities.

(e) Post-construction noise compliance monitoring shall include:

(1) Adherence to the standard of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B, that requires short-term attended measurements to ensure transient noises are removed from the data, and measurements shall include at least one nighttime hour where turbines are operating at full sound power with winds less than 3 meters per second at the microphone;

(2) Unattended long-term monitoring shall also be conducted;

(3) Sound measurements shall be omitted when there is rain, or when temperatures are below instrumentation minima, and shall comply with the following additional specifications:

a. Microphones shall be placed 1 to 2 meters above ground level and at least 7.5 meters from any reflective surface, following the protocols of ANSI/ASA S12.9-2013 Part 3, available as noted in Appendix B;

b. Proper microphone screens shall be required;

c. Microphones shall be field-calibrated before and after measurements; and

d. An anemometer shall be located within close proximity to each microphone;

(4) Monitoring shall involve measurements being made with the turbines in both operating and non-operating modes, and supervisory control and data acquisition system data shall be used to record hub height wind speed and turbine power output;

(5) Locations shall be pre-selected where noise measurements will be taken that shall be the same locations at which predictive sound modeling study measurements were taken pursuant to subsection (c) above, and the measurements shall be performed at night with winds above 4.5 meters per second at hub height and less than 3 meters per second at ground level;

(6) All sound measurements during post-construction monitoring shall be taken at 0.125-second intervals measuring both fast response and Leqmetrics; and

(7) Post-construction monitoring surveys shall be conducted once within 3 months of commissioning and once during each season thereafter for the first year, provided that:

a. Additional surveys shall be conducted at the request of the committee or the administrator; and

b. Adjustments to this schedule shall be permitted, subject to review by the committee or the administrator.

(f) Post-construction sound monitoring reports shall include a map or diagram clearly showing the following:

(1) Layout of the project area, including topography, project boundary lines, and property lines;

(2) Locations of the sound measurement points; and

(3) Distance between any sound measurement point and the nearest wind turbine.

(g) For each sound measurement period during post-construction monitoring, reports shall include each of the following measurements:

(1) LAeq, LA-10, and LA-90; and

(2) LCeq, LC-10, and LC-90.

(h) Noise emissions shall be free of audible tones, and if the presence of a pure tone frequency is detected, a 5 dB penalty shall be added to the measured dBA sound level.

(i) Validation of noise complaints submitted to the committee shall require field sound surveys, except as determined by the administrator to be unwarranted, which field studies shall be conducted under the same meteorological conditions as occurred at the time of the alleged exceedance that is the subject of the complaint.

Source. #10994, eff 12-16-15