

**State of New Hampshire
Supreme Court**

No. 2018-0468

NORTHERN PASS, LLC, *et al*

Appeal from Order of Site Evaluation Commission

Memorandum of Law

Now come the Intervenors, Daryl and Bradley Thompson of Stewartstown and Jeanne Menard, Erick and Kathy Burglund, Robert Cote, Bruce Adami, and Jo Anne Bradbury, Deerfield Abutters, and submit this Memorandum of Law in support of affirmance of the Site Evaluation Commission (SEC) order that denied a certificate to Northern Pass, LLC and its parent organizations (collectively referred to as NP).

Facts

NP filed an application on October 19, 2015 to construct a 192 mile transmission line from the Canadian border to Deerfield, New Hampshire. DK-tab-1432-at-8. The project's transmission corridor encompasses 3,161 acres, including 465.1 acres of overhead transmission lines in new rights of way, 2520 acres in existing rights of way, and 175.9 acres of buried lines. DK-tab-1432-at-15. The purpose of the project is to transmit Quebec hydroelectric power to Massachusetts. See <https://www.wbur.org/bostonmix/2018/01/25/hydropower->

[massachusetts-eversource](#) (last viewed March 12, 2019) and APP-Ex.4-at-2-3, 5-6-Fortier.

The SEC worked diligently to analyze the project’s application, specifically asserting that it considered all relevant evidence and information. DK-tab-1432-at-7(“[W]e considered all the relevant evidence and information....”). The SEC conducted seven days of site visits, DK-tab-1432-at-18, held seven public hearings, *Id.*, and conducted 70 days of adjudicative hearings during which 154 witnesses testified and 2176 exhibits were received. DK-tab-1432-at-6.

The SEC’s Order includes preliminary findings on criteria specified in R.S.A. 162-H:16, IV that must be proven to site a proposed energy facility. The Order also comments upon the discretionary allowance of reasonable conditions. R.S.A. 162-H:16, I. Ultimately, the SEC denied the application because NP failed to establish that its transmission project would “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.” R.S.A. 162-H:16, IV(b). DK-tab-1432-at-6.

As part of its consideration of the first statutorily specified criteria—adequate financial, technical, and managerial capability to construct and operate the project¹—the SEC tentatively concluded that the NP contractors and sub-

¹R.S.A. 162-H:16, IV(a).

contractors have sufficient experience to construct above-ground and underground transmission projects. DK-tab-1432-at-63. The SEC considered, but stopped short of preliminarily concluding that NP was capable of managing the construction project, DK-tab-1432-at-64, noting the difficulty of managing a project that was not fully defined. *Id.* (“Many construction details have not been completed, including a Traffic Management Plan, the specific location of the underground portion of the Project and associated facilities and locations of laydown areas and marshaling yards....”). NP also failed to submit final plans showing accurate boundaries of the rights of way in which it intended to construct the transmission lines. See DK-tab-1432-at-96. “When we closed the record, we did not have a final survey of the right-of-way that was deemed acceptable to the DOT.” DK-tab-1432-at-114.²

The SEC tentatively concluded that NP likely had “sufficient financial capability...” DK-tab-1432-at-72.

With respect to the discretionary requirement that the SEC consider reasonable conditions pursuant to R.S.A. 162-H:16, I, NP failed to conclusively propose and carefully support mitigating conditions. As an example, the SEC noted, “Originally, the Applicant requested that the Subcommittee delegate to DES the authority required to approve of marshaling yards, laydown areas, storage

²The SEC also noted the failure of NP contractors to follow best construction practices in the past. DK-tab-1432-at-64.

areas...*That condition, however was not identified or proposed by the Applicant in the Post-Hearing Memorandum....*” DK-tab-1432-at-98 (emphasis added).

Another incompletely proposed condition require the SEC delegate to private consultants the duty to conduct construction in and around locally maintained roads. DK-tab-1432-at-115. This included roads in Stewartstown, where the Thompsons live.

“Apart from posing these conditions in its Final Brief, the Applicant failed to provide testimony or evidence demonstrating how the conditions should be implemented. The DOT raised significant concerns about usurping the authority of municipalities over locally-maintained roads. The Applicant acknowledged the concerns raised by DOT. The Applicant ultimately did not request that the Subcommittee delegate its authority to regulate construction under locally-maintained roads to DOT, but offered the conditions referenced above...*The Applicant failed to provide testimony or evidence explaining how the Administrator or consultant could avoid the same concerns expressed by DOT.*” DK-tab-1432-at-116 (emphasis added, internal citation omitted).

The SEC carefully considered the experts presented by NP to support its application, including, Robert Varney, NP’s expert on orderly development. DK-tab-1432-at-100. He testified that the “Project would have no adverse effect on local land use.” DK-tab-1432-at-231 (no impact on residences, DK-tab-1432-at-

233, and no adverse effects resulting from the construction of the underground portions of the corridor. DK-tab-1432-at-235).³ Varney “did not find a single location along the 192 miles of the Project where siting the project would be inconsistent with local land use.” DK-tab-1432-at-237-38. Varney also ignored the impact of construction. DK-tab-1432-at-238.

Rejecting Varney’s contentions, the SEC, factually found that 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. Related to Stewartstown and surrounding areas, the SEC expressly found that “the Applicant has failed to establish that the Project would be consistent with the land use in the area.” DK-tab-1432-at-280-81. Further, the SEC found that construction under “extremely narrow” unpaved roads was “problematic” and damaging to recreational, agricultural and commercial pursuits. *Id.*

Mitch Nichols, who testified about tourism, opined that the Project would have “absolutely no adverse impact....” DK-tab-1432-at-199. Nichols’s assessment was based on untested methods. DK-tab-1432-at-201. The SEC’s description of Nichols’s testimony and methodology is extensive. See DK-tab-1432-at-207-218. The SEC found, “Regarding tourism, we did not find the

³ The SEC factually found Varney was not forthright in failing to share concerns expressed to him by municipalities and regional planning commissions. DK-tab-1432-at-238-40; 276-77.

Applicant's witness regarding the effects of the Project to be credible. His report and testimony provided us with no way to evaluate the Project's tourism effects and no way to fashion conditions that might mitigate those effects." DK-tab-1432-at-84-85.

James Chalmers was the NP expert on property valuation. He too adopted an unproven approach. DK-tab-1432-at-166. Chalmers concluded that high voltage power lines generally have no impact on commercial or industrial property values and very minimal impact on residential properties. DK-tab-1432-at-164.

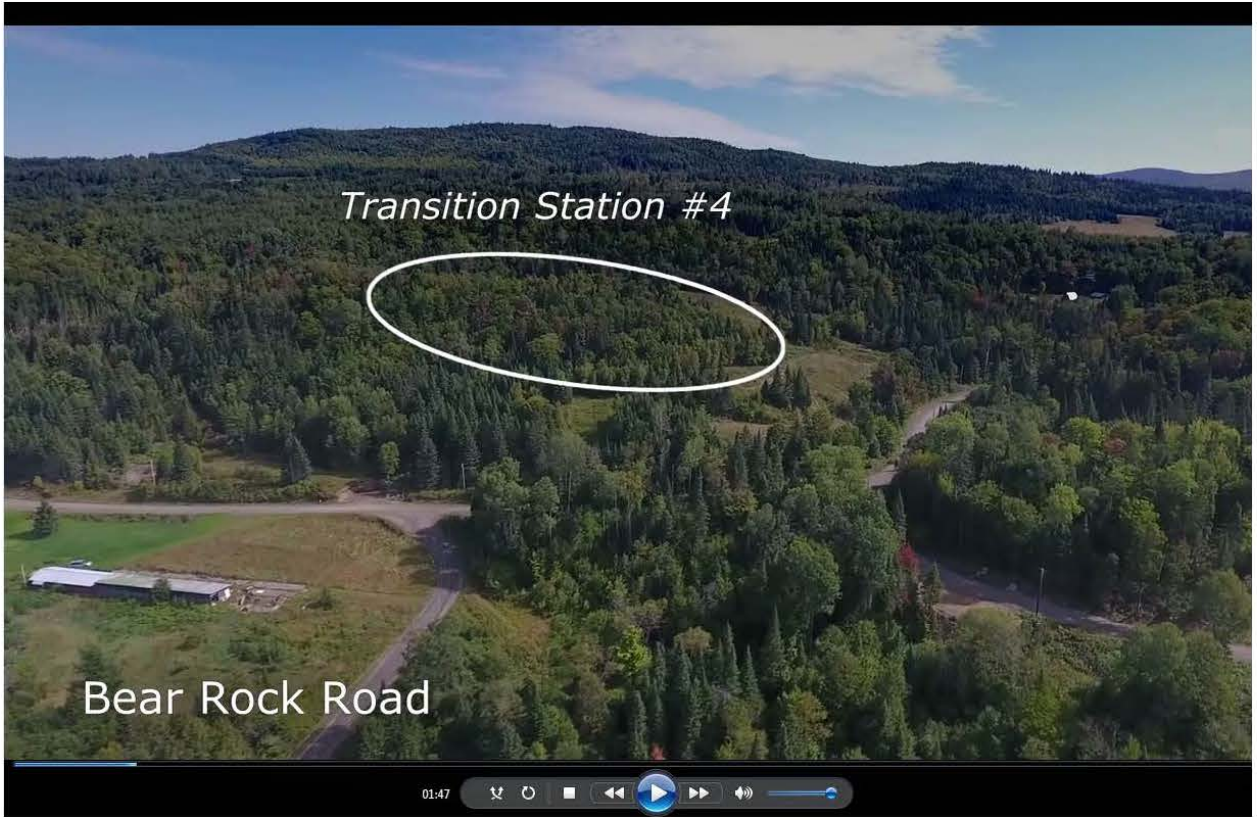
The SEC's analysis of Mr. Chalmers's opinions was both detailed and devastating. The SEC found "Chalmers's testimony and his report to be shallow and not supported by data." DK-tab-1432-at-194. His "literature review did not support his [own] ultimate conclusions." *Id.* The SEC cited a Chalmers study that indicated the negative impact on residential property in rural areas could be as high as 20-25%. DK-tab-1432-at-195. The SEC found that Chalmers case study conclusions were "unreliable." DK-tab-1432-at-195-96.

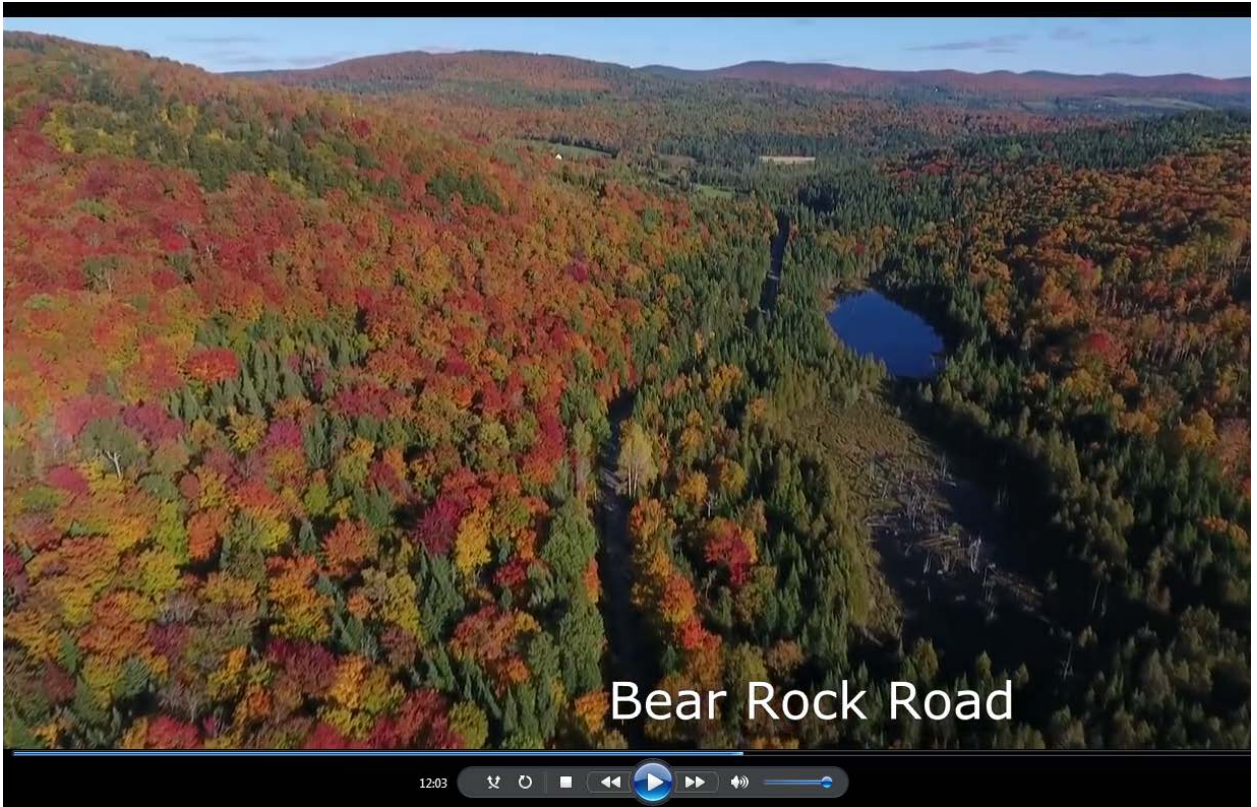
The weaknesses in Chalmers's presentation also doomed the SEC's consideration of conditions because NP's property value guaranty program was based on Chalmers's assessment of what properties were affected. DK-tab-1432-at-198. NP estimated that only 6-9 properties along the 192 mile corridor would be

eligible for the guaranties. *Id.* Chalmers’s conclusion in this regard was not considered reliable. DK-tab-1432-at-170.n70.

Intervenors Daryl and Bradley Thompson reside at 599 Noyes Road, Stewartstown. Prefiled Testimony of Bradley Thompson on behalf of Abutters and Non-Abutters Group I North of Pittsburg, Clarksville and Stewartstown regarding Underground Construction, December 30, 2016 at 1 (Dec. 30, 2016 testimony). Mr. Thompson has 45 years of experience in the construction industry and recently retired as the owner of Northern Design Precast, Inc., an architectural precast manufacturing concern. *Id.* at 1-2. The Thompsons own 366 acres along Noyes and Bear Rock Roads, a 100 acre portion of which was first purchased in 2007. See *Id.* at 4. Mr. Thompson testified that their property values “would be greatly diminished” by the construction of the project. *Id.* “Instead of the scenic view that we are surrounded by now—which is the essence of the property value here at Bear Rock—we would be looking at a 3-acre Transition Station (#4), directly across from us, on the other side of our road, from our living room windows.” *Id.* Mr. Thompson submitted a short video with his testimony. Clarksville-Stewartstown Ex. 3. The Intervenors include screen shots from the video in this Memorandum.⁴

⁴ Designations in the video, such as that of “Transition Station #4,” are as they appear in the video. The Court is encouraged to view the video in the record. It is available here: <https://www.nhsec.nh.gov/media/pft-video.htm>

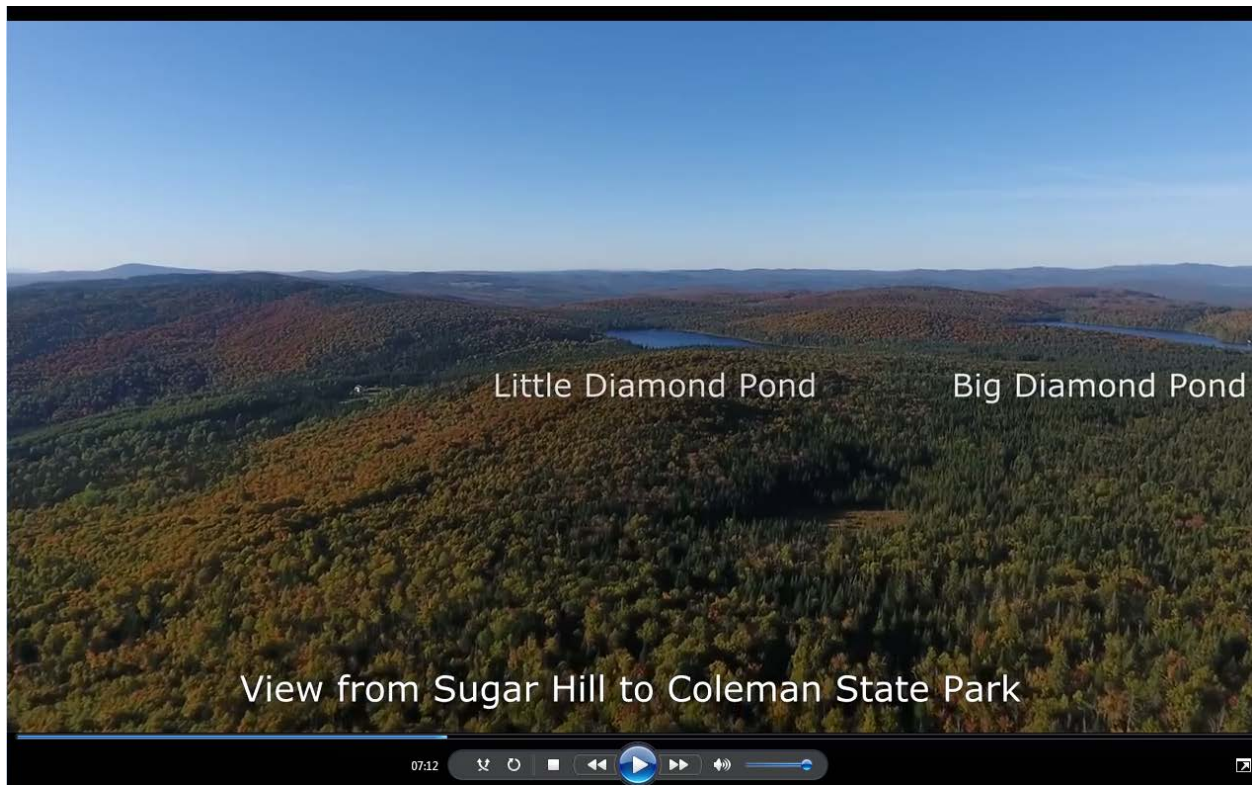




The proposed Transition Station #4, according to Mr. Thompson, “is carved out of the mountain side.” Prefiled Supp. Testimony of Bradley Thompson, Spokesperson, Abutters and Non-Abutters, Group I North, Pittsburg, Clarksville and Stewartstown, March 26, 2017 at 2. The location is “directly adjacent to the intersection of Bear Rock Road and Holden [Hill] Road. One side of the 8’ high metal-woven fence, topped off with three strands of barbed wire, which encloses the site, scales to be 70 feet from the right of way on Holden Hill Road. There would be no vegetation screening possible to hide the site. You could not create a more damaging eyesore to our natural resources.” *Id.* “The finished construction site is highly exposed and very offensive, looking like a gigantic erector set.” *Id.*

Mr. Thompson also testified about the hazards of construction on unpaved and narrow roads in the area. Transition Station #4 requires the blasting and removal of 30,000 cubic yards of rock. The full capacity of a dump truck is 15 cubic yards, thus, requiring 2000 full dump truck trips to remove the blasted rock. *Id.* at 2-3. The construction of Transition Station #4 also raised concern for emergency and non-emergency road access during the construction. *Id.* at 3. Finally, Mr. Thompson's land includes three glacial spring wells that the extensive blasting will endanger. *Id.* at 4 and Dec. 30, 2016 testimony at 5.

Mr. Thompson testified about damage to the tranquility experienced by visitors to the Great North Woods, "To stretch an overhead powerline over Big Diamond Pond Road with tainted views east and west looking out at 5-15 towers is not the welcome mat we should offer for owners of the many camps on Big Diamond Pond...or the 800 different campers that spent time at Coleman State Park in 2015." Prefiled Testimony of Bradley Thompson on behalf of Abutters and Non-Abutters Northern Coos County, November 15, 2016 at 3. See also, DK-tab-1432-at-223 (destruction of quietude and beauty in the region surrounding Coleman State Park, Lake Francis State Park, Connecticut River State Forest, and in the area of Bear Rock Road).



Mrs. Thompson offered prefiled testimony about her operation of a retreat and spa. Prefiled Direct Testimony of Daryl D. Thompson d/b/a At the Bear’s Den of November 15, 2016 at 1. “Our property offers amazing views of the neighboring hills and mountains. We have a view of the Balsams and Dixville Notch. This is a serene, peaceful place.” *Id.* at 2.⁵

Intervenor Jeanne Menard was also a member of the Deerfield Abutter Group. She is the broker/owner of Parade Properties, a real estate company

⁵ Residents in the Bear Rock Road area would also be subject to extensive construction-related detours. DK-tab-1432-at-79-83 (16 miles between Colebrook and Bear Rock, including Class VI, unpaved roads). Mrs. Thompson ultimately did not testify because she was called away to attend to the birth of her grandbaby.

located in Deerfield. Prefiled testimony of Jeanne Menard, December 30, 2016 at 1. (Menard, Dec. 30, 2016). In addition to raising concerns about failures to respect existing rights-of-way and view issues, *Id.* at 1-2, Ms. Menard raised concerns about degradation of the conserved 229 acre Menard Family Forest which is conserved and contiguous to other conserved land. DK-tab-1432-at-189. Ms. Menard also challenged the opinion testimony of Mr. Chalmers in process and substance. Menard, Dec 30, 2016 at 2 (properties unrepresentative and regional differences ignored).

The SEC cited Ms. Menard's concerns, *inter alia*, that Chalmers, in concluding no impact on real estate values, considered property sales that were not at fair market, DK-tab-1432-at-191, criticized Chalmers for not including in his studies condominiums, second homes, waterfront properties, off-grid residential properties, conservation land, *Id.*, and challenged Chalmers because he attributed value to landowners who transferred rights of way for utility use when many of those transfers were for \$1.00. DK-tab-1432-at-191.

Another Deerfield Abutter, Jo Anne Bradbury, owner of an off-grid solar home on 133 acres, also testified that "the presence of the Project on her property and its visibility would destroy both the property's character and its appeal to potential buyers and, consequently, would have a negative impact on the value of her property." DK-tab-1432-at-189.

Argument

NP's complaints about vagueness⁶ must be viewed in the context of the SEC's findings that NP's experts were not credible and that NP failed to follow through and fully develop mitigating conditions. The SEC did not find that NP's proof was misdirected or irrelevant. The proof simply was not competent. The SEC approval process did not cause NP to fail. The denial of the application was the product of NP's own failures and shortcomings.

R.S.A. ch. 162-H was amended in 2014, the year before the application was filed. See *Appeal of Mary Allen*, 170 N.H. 754, 756 (2018). In 2014, NP, a special purpose LLC devoted to the transmission line project, spent \$245,503 on lobbyists. https://www.opendemocracynh.org/odi_lobbying_government (last viewed on March 16, 2019).⁷ As privately owned utilities must act in the interests of their shareholders, see *Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18, 31 (2010) (investor-owned utilities act in interest of shareholders), the Court may reasonably conclude that the money NP spent on lobbyists in 2014 was related to making the

⁶ See e.g., NP Brief at 28 (“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.”),

⁷ NP and its parent, Eversource, in combination, spent \$586,096 on lobbyists in 2014, the highest spending enterprise in the entire state. *Id.*

SEC siting process as hospitable to NP's interests as possible. See also DK-Tr.4/14/17-Day2-afternoon-at-39-40.

The authorizing statutes, R.S.A. ch. 162-H, and the related regulations, implement a statutory scheme by an agency with technical expertise that is charged with balancing competing concerns in the public interest. See *Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18 (2010) (regarding the PUC). Technical agencies charged with this careful balancing are due great deference. *Id.* 160 N.H. at 26.

Void for vagueness arguments, as raised by NP, generally claim that a statute does not provide sufficient information to allow an ordinary person to conform her conduct or that a decision maker is not provided with standards leading to arbitrary or discriminatory enforcement. See *Bleiler v. Chief, Dover Police Department*, 155 NH 693 (2007) (revocation of concealed gun permit). With either form of challenge, the party challenging the statute “bears a heavy burden of proof in view of the strong presumption favoring a statute’s constitutionality.” *Id.*, 160 N.H. at 701 *citing State v. MacElman*, 154 N.H. 304, 307 (2006). “Moreover, the specificity required by due process ‘need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage.’” *Id. citing Justin D.*, 144 N.H. 450, 453-54 (1999).

In *Webster v. Town of Candia*, 146 N.H. 430, (2001), the Court considered a vagueness challenge against the scenic byways statute, R.S.A. 231:158, which grants planning boards discretion to permit the cutting of trees in designated scenic areas. The statute in *Webster* was upheld even though it lacked standards.

R.S.A. 231:158 does not define “scenic” or spell out the standards a planning board must employ.⁸ The Court upheld the planning board’s denial of a permit because it considered the standards to be “implied” and that was all that was necessary. 160 N.H. at 435. The *Webster* Court relied upon *Town of Freedom v. Gillespie*, 120 NH 576 (1980) (septic variances) and *Derry Sand & Gravel, Inc. v. Town of Londonderry*, 121 N.H. 501 (1981) (junkyard licenses). Both cases involved challenged ordinances that lacked explicit standards. All three vagueness challenges were rejected because the decision makers were held to have exercised their discretion consistent with the relevant purpose of the matter at issue.

In *Derry Sand and Gravel*, the Court referenced the statement of purpose in the ordinance which was used to define its terms. 121 N.H. at 505. The purpose was to promote the “orderly” and “sanitary” disposal of garbage and waste....” *Id.* See also R.S.A. 162-H:16, IV (b) (“orderly development of the region”).

⁸ R.S.A. 231:157 describes the process by which a road is designated as “scenic,” but is silent on the standards to be used.

In explaining that a purpose to protect “scenic beauty” was enough to defeat a vagueness challenge, the *Webster* Court cited an important New Jersey opinion worth considering here:

“The Act contemplates that there is a certain basic beauty in natural terrain and vegetation unspoiled by the hands of man, which it proposes to recapture or maintain. Although the extent to which each individual finds a specific landscape beautiful must be determined by a subjective test, this does not denote that there is no catholic criterion for the ascertainment of whether *any scenic beauty* exists in a given panorama. ‘Scenic beauty’ is concerned with such manifold possible situations that it does not lend itself to a more specifically detailed descriptive statement. A tabulation of the various possible elements constituting scenic beauty is well-nigh impossible.”

Id. (quoting *Wes Outdoor Advertising Company v. Goldberg*, 55 N.J. 347, 262 A.2d 199, 202 (1970)).

146 N.H. at 436 (further citation omitted, emphasis in original). *Webster* also makes clear that the incorporation of subjective standards does not run afoul of the Constitution. See also *Durant v. Town of Dunbarton*, 121 N.H. 352, 355-56 (1981) (ordinance prohibiting subdivision on land that cannot safely be used for building purposes because of “exceptional danger to health” or “other menace”) and *Bethlehem v. Robie*, 111 N.H. 186, 187 (ordinance that prohibited uses “detrimental or injurious” to adjoining properties).

The Declaration of Purpose provides guidance to the SEC when interpreting the applicable statutes. R.S.A. 162-H:1. The designation of the SEC members based on their positions in state government makes clear that the SEC is populated

by members of exceptionally high technical expertise. See e.g., R.S.A. 162-H:3, I (SEC members to include: commissioners of the public utilities commission, the department of environmental services....). Even the public members must be selected based upon expertise in specified areas. R.S.A. 162-H: 4-b, I (“public deliberative or adjudicative proceedings; business management; environmental protection....”).

When technical agencies are charged with carefully balancing competing concerns, their decisions are due a very high degree of deference. See *Pennichuck*, 160 N.H. at 26 citing *Appeal of Verizon New England*, 158 N.H. 693, 698 (2009). (“The statutory presumption, and the corresponding obligation of judicial deference are the more acute when we recognize that discretionary choices of policy necessarily affect such decisions, and that the legislature has entrusted such policy to the informed judgment of the [PUC] and not to the preference of reviewing courts.”) (further citation omitted). This high degree of deference also makes clear that a claim of vagueness should not be used as a backdoor means of undermining required judicial deference.⁹

NP was not denied its certificate because NP could not understand the quantum or type of proof required. NP was denied relief because its absolutist

⁹ The Court’s review of the SEC’s factual findings is limited to a determination of whether the factual findings enjoy any support in the record. *Appeal of Mary Allen*, 170 N.H. 754, 758 (2018). The Court may not substitute its own factual findings for that of the SEC. *Id.*

proof was not credible. The SEC rejected the opinions of Mr. Varney, the NP expert on orderly development, DK-tab-1432-at-100 and 281, who testified the “Project would have no adverse effect on local land use, *Id.* at 231, and who did not find a single instance “along the 192 miles of the Project where siting...would be inconsistent with local land use.” *Id.* at 237-38.

Mitch Nichols testified to “absolutely no adverse impact on tourism in the region. *Id.* at 199.

James Chalmers, the NP property value expert, lacked knowledge specific to the New Hampshire market under consideration, *Id.* at 163, and his methodology was unreliable. *Id.* at 166 The SEC, as a finding of fact, concluded that Chalmers’s opinions were “shallow and not supported by data.” *Id.* at 194.¹⁰ The SEC also had the discretion to consider mitigating conditions, R.S.A. 162-H:16,I, but NP failed to follow through and provide supportive evidence for haphazardly proposed conditions. See e.g., DK-tab-1432-at-96 (delegation to DES) and 118 (use of private road consultants).

¹⁰ A technical factfinder considering opinion testimony is not bound to accept even uncontroverted testimony that, based on its own expertise, is not considered credible. See *Pennichuck*, 160 N.H. at 41.

Conclusion¹¹

The Intervenors request the Court affirm the decision of the SEC that denied a certificate and for such other relief as is just and proper.

Respectfully submitted,
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CERTIFICATE

I hereby certify that on March 19, 2019, I served the foregoing Memorandum of Law by service through the Court's e-filing system to registered counsel of record, by email to the non-attorney parties, and by first class mail to parties without email addresses. I further certify that the word count in this document is 3607 words using MS Office Pro Plus 2010.

/s/ Andru Volinsky
Andru Volinsky

¹¹ The Intervenors acknowledge that the submission of a Memorandum constitutes a waiver of oral argument on their behalf. N.H. Supreme Ct. Rule. 16(4)(b).

