

ATTORNEYS
AT LAW

PRIMMER PIPER
EGGLESTON &
CRAMER PC

THOMAS J. PAPPAS
ADMITTED IN NH AND DC
tpappas@primmer.com
TEL: 603-626-3301
FAX: 603-626-0997

900 Elm Street, 19th Fl. | P.O. Box 3600 | Manchester, NH 03105-3600

May 7, 2018

By E-Mail & U.S. Mail

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
pamela.monroe@sec.nh.gov

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

Dear Ms. Monroe:

Enclosed for filing in the above-referenced matter is Counsel for the Public's Response to Applicants' Motion for Rehearing of Decision and Order.

Thank you.

Sincerely,



Thomas J. Pappas

TJP/scm - 3353234_1

Enclosure

cc: Distribution List

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-06

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility

**COUNSEL FOR THE PUBLIC'S RESPONSE TO APPLICANTS'
MOTION FOR REHEARING OF DECISION AND ORDER**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby responds to Applicants' April 27, 2018 Motion for Rehearing of Decision and Order Denying Application (the "Motion").

INTRODUCTION

Applicants' Motion challenges the Subcommittee's decisions to end deliberations and to deny a Certificate of Site and Facility on both procedural and substantive grounds, reiterating arguments raised in Applicants' February 28, 2018 Motion for Rehearing and Request to Vacate Decision (the "Feb. 28 Motion") and raising new claims that the Order is "unlawful, unjust and unreasonable," that Site 301.15 is unconstitutionally vague as applied, and that the Subcommittee overlooked and misconceived evidence in the record. However, many of the Applicants' arguments are based on a continued misapprehension that the Subcommittee made an affirmative finding that the Project would unduly interfere with the orderly development of the region, when the Subcommittee's actual finding was that Applicants failed to present sufficient credible and reliable evidence to allow the Subcommittee to make the required statutory findings for issuance of a Certificate.

Counsel for the Public addresses each of Applicants' claims below, concluding that the Subcommittee's deliberations were lawfully conducted and that the Order is lawful, reasonable and adequately supported by factual findings and the evidence in the record. Accordingly,

Counsel for the Public submits that the Applicants have not met their burden to demonstrate that the Order was unlawful or unreasonable, and the Motion should be denied.

STANDARD OF REVIEW

Under RSA 541:3 (*Motion for Hearing*), the Subcommittee may grant Applicants a rehearing “if in [the Subcommittee’s] opinion good reason for the rehearing is stated in the [Applicants’] motion.” The Motion must set forth each ground upon which the Subcommittee’s Order is “unlawful or unreasonable.” RSA 541:4. A rehearing is not generally warranted based on the submission of “new evidence” that could “have been presented at the original hearing.” *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).¹

On appeal to the New Hampshire Supreme Court pursuant to RSA 541, the Court has explained the applicable standard of review for administrative decisions as follows:

Findings of fact by the PUC are presumed *prima facie* lawful and reasonable. RSA 541:13; *see Appeal of Verizon New England*, 153 N.H. at 56, 889 A.2d 1027. The appealing party may overcome this presumption only by showing that there was no evidence from which the PUC could conclude as it did. *Legislative Utility Consumers’ Council v. Public Utilities Comm’n*, 118 N.H. 93, 99, 383 A.2d 89 (1978); *see Appeal of Basani*, 149 N.H. 259, 262, 817 A.2d 957 (2003). Further, because the PUC is not bound by the technical rules of evidence, the admission of hearsay or technically irrelevant or immaterial evidence is insufficient to render its order unjust, unreasonable, or unlawful. *Appeal of McKenney*, 120 N.H. 77, 81, 412 A.2d 116 (1980); *see RSA 541:17 (2007)*.

In re Pennichuck Water Works, Inc., 160 N.H. 18, 26 (2010). Specific to review of decisions of the Site Evaluation Committee or a subcommittee, the Supreme Court set forth the following standards of review in *In re: Campaign for Ratepayers’ Rights*, 162 N.H. 245, 249 (2011):

¹ In *Appeal of Gas Service, Inc.*, 121 N.H. 797 (1981), the New Hampshire Supreme Court upheld the PUC’s denial of a motion for rehearing, stating “Based on the motion for rehearing before it, “(t)he commission could properly have found that no good cause was shown by the motion; (Gas Service, Inc.) failed to explain why the ‘new evidence’ (it) wished to present at a rehearing could not have been presented at the original hearing.” *Id.* at 801.

Decisions of the committee are “reviewable in accordance with RSA 541.” RSA 162—H:11 (2002). Accordingly, our standard of review is set forth in RSA 541:13:

[A]ll findings of the [committee] upon all questions of fact properly before it shall be deemed to be *prima facie* lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

RSA 541:13 (2007). The appellants, as the parties seeking to set aside the committee’s order, bear the burden of proof “to show that the same is clearly unreasonable or unlawful.” *Id.*

ARGUMENT

I. The Subcommittee Was Not Legally Required to Deliberate on All of Applicants’ Required Statutory Burdens When Denying a Certificate, But Good Practice Generally Counsels for Deliberation on All Four Findings.

Applicants incorporate the arguments set forth in the Feb. 28 Motion regarding the Subcommittee’s vote to end deliberations without reaching two of the four statutory criteria for issuance of a Certificate. Counsel for the Public previously responded to these arguments in Part II of his March 9, 2018 Response to Applicants’ Motion for Rehearing and Request to Vacate (the “CFP Response”), and incorporates those arguments into this response by reference. As previously stated, Counsel for the Public submits that the Subcommittee was not legally required to deliberate on all four of the required statutory findings for issuing a Certificate when the Subcommittee found that it could not make one of the required findings. Nevertheless, Counsel for the Public asserts that deliberation of all four statutory findings is good practice.

II. The Subcommittee Was Not Legally Required to Consider Mitigating Conditions When Finding Applicants Failed to Sustain Their Burden to Prove One or More of the Statutory Findings Under RSA 162-H:16, IV, Nor Were the Proposed Conditions or Supporting Facts Part of the Record.

With regard to mitigating conditions, Applicants substantially restate the argument previously set forth in Section III, A of the Feb. 28 Motion. Counsel for the Public has already

responded to Applicants' argument regarding an alleged failure by the Subcommittee to consider conditions, and incorporates by reference herein Counsel for the Public's analysis in Sections II, D, III, IV and V of the CFP Response.

As set forth in more detail in the CFP Response, the Subcommittee was not required to overcome insufficiencies in Applicants' case by creating mitigating conditions, particularly where Applicants did not propose adequate mitigating conditions, or accede to mitigating conditions proposed by other parties,² prior to the Subcommittee's deliberations. The Subcommittee cannot be faulted for failing to consider conditions that were not part of the record and that were not adequately supported by factual evidence in the record. To the extent Applicants now argue that their recently proposed additional conditions are critical to meeting their burden of proof, Applicants could have requested leave to reopen the record to submit the proposed additional conditions and supporting evidence.³

In addition, contrary to Applicants' argument, the Subcommittee did consider proposed conditions to the extent possible on the record before it. Throughout the Order the Subcommittee refers to and discusses at length the conditions proposed by the various parties, including Applicants. *See, e.g.*, Order at 98-102, 107-108, 115-16, 135, 137, 149-150, 175-77 and 198-99. Critically, it was the insufficiency of the record that prevented the Subcommittee from going further – without sufficient evidence of the extent of the Project's effect on tourism

² While the Applicants later agreed to the conditions proposed by Counsel for the Public, such agreement came only *after* the close of the record and an oral decision by the Subcommittee to deny a Certificate. Indeed, in their closing brief the Applicants expressly objected to the bulk of Counsel for the Public's proposed conditions. *See* Applicant's Post-Hearing Memorandum at 404-415.

³ Applicants argue in the Motion that “[t]he proposed conditions were an integral element of the evidence the Applicants presented to meet their burden of proof” Motion at 5. However, the “Potential Additional Conditions” dated February 28, 2018, were not part of the record, and the Subcommittee is statutorily barred from considering any new evidence or information submitted after the close of the record.

and property values the Subcommittee had insufficient evidence from which to even attempt to craft appropriate mitigating conditions. As the Subcommittee explained:

Regarding tourism, we did not find the Applicant’s witness regarding the effects of the Project to be credible. *His report and his testimony provided us with no way to evaluate the Project’s tourism effects and no way to fashion conditions that might mitigate those effects.* Regarding property values, we similarly did not find credible the Applicant’s expert’s opinion that there would be no discernible effect on property value. The Applicant’s proposed compensation plan was, quite plainly, inadequate, but *because the Applicant’s analysis of the effects was also inadequate, it was impossible for us to even begin to consider what an appropriate compensation plan might require.*

Order at 284-85 (emphases added). Because of the lack of credible and reliable evidence of the effects of the Project on tourism and property values – key aspects of the Subcommittee’s required consideration of the effects of the Project on the economy of the region – the Subcommittee was unable to assess the efficacy of potential mitigating conditions. Accordingly, even if the Subcommittee were legally required to consider mitigating conditions, which Counsel for the Public disputes, the Subcommittee committed no error by declining to consider adoption of factually unsupported conditions whose efficacy would be at best speculative.⁴

Moreover, the Applicants advocate a responsibility to impose conditions that exceeds what is authorized under the law. The essentially unbridled authority to impose conditions now espoused by Applicants could lead to the issuance of unreasonable and factually unsupported conditions beyond the reasonable expectations of an applicant. For instance, if the Subcommittee were to find that the Project as proposed would have an unreasonable adverse effect on aesthetics, under the Applicant’s approach the Subcommittee could impose a condition requiring that the entire transmission line be buried underground. Such a condition could

⁴ The fact that a Subcommittee member felt that one of many reasons articulated to end deliberations was to avoid the procedural need to consider potential conditions is not sufficient to grant rehearing where the evidence in the record, upon which the Subcommittee must rely to render its decision, does not support a finding on orderly development.

“alleviate or mitigate the Subcommittee’s concerns,” Motion at 5, about aesthetics, but it would alter the fundamental nature and/or economics of the Project, as the Applicants vehemently argued throughout the proceedings. *See, e.g.*, Applicant’s Post-Hearing Memorandum at 204-206. This is not the process envisioned by the General Court and would not result in a workable or fair permitting process.

III. Neither the Subcommittee’s Decision nor Site 301.15 as Applied Is Unconstitutionally Vague and the Subcommittee’s Conclusion That Applicants Failed to Sustain Their Burden of Proof Was Adequately Supported by Factual Findings and the Record.

A. Applicants’ Argument Is Based on a Mischaracterization of the Subcommittee’s Decision and the Applicable Burden of Proof.

RSA 162-H:16, IV requires the Subcommittee to make four specific findings,⁵ “[i]n order to issue a certificate.” Of relevance to the Motion and the Subcommittee’s decision, the Subcommittee was required to find that “[t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies” before it could issue a certificate. RSA 162-H:16, IV(b). In addition to the statutory requirements, the Subcommittee’s review is governed and guided by the SEC’s administrative rules adopted pursuant to RSA 162-H:10, VI.

With respect to all of the requirements and findings that must be met under the statute or the Site rules, the burden is on Applicants to make the necessary showings for a certificate to issue. *See* Site 202.19(b) (“An applicant for a certificate of site and facility shall bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the

⁵ See RSA 162-H:16, IV (“In order to issue a certificate, the committee *shall* find that”); *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) (finding use of the word “shall” unambiguously “mandatory, not permissive language”).

findings required by RSA 162-H:16.”); *see also* Site 202.19(a) (“The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.”). That burden required Applicants to prove facts sufficient for the Subcommittee to make the required finding that “the site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.” RSA 162-H:16, IV(b).

Following 70 days of hearings and the close of evidence in this proceeding, the Subcommittee deliberated and ultimately found that the evidence submitted with respect to RSA 162-H:16, IV(b) was insufficient for the Subcommittee to make the requisite finding on this record. *See, e.g.*, Order at 194. Applicants provided expert testimony on required issues that the Subcommittee found was simply not credible or reliable. *See id.* (“We find much of Dr. Chalmers’ testimony and his report to be shallow and not supported by the data.”). Bereft of sufficient facts to make the required finding under RSA 162-H:16, IV(b), and mindful of Applicants’ burden of proof on the issue, the Subcommittee found that Applicants failed to meet their burden of proof with respect to RSA 162-H:16, IV(b) and denied the Application accordingly. *See, e.g.*, Order at 199, 226-27, 285-86.

The Subcommittee did not find undue interference with the orderly development of the region, but instead found some of Applicants’ proffered evidence not to be credible and that Applicants’ failure to provide sufficient evidence to support the requisite finding under RSA 162-H:16, IV(b) required denial of the certificate. *See, e.g.*, Order at 199, 226-27, 285-86. Nonetheless, Applicants repeatedly confuse the issue by mischaracterizing the Subcommittee’s Order as including a finding of undue interference with the orderly development of the region. Motion at 10, 27, 29, 36, 38-39. Much of the Applicants’ argument is based on this incorrect

characterization of the Order. Applicants presented experts who took positions on relevant issues, including their opinion that there would be no discernible effects on property values and tourism, and that the Project would not adversely affect local land use. *See, e.g.*, Order at 199-286. When the Subcommittee ultimately found Applicants' experts to be lacking in credibility and necessary data, the result was that Applicants had no sufficiently credible or reliable evidence to "prov[e] facts sufficient for the ... subcommittee ... to make the findings required by RSA 162-H:16" and meet their burden. Site 202.19(b); *see, e.g.*, Order at 199, 226-27, 285-86.

As the finder of fact, the Subcommittee's credibility determinations are entitled to deference where, as here, they are supported by the record. *See Appeal of N.H. Elec. Coop.*, 170 N.H. 66, 77 (2017) ("Because there is support in the record for the BTLA's credibility determination, we cannot find as a matter of law that the BTLA erred by rejecting Dickman's appraisal.") (citations omitted); *In re Bloomfield*, 166 N.H. 475, 479 (2014) ("We will not disturb the board's credibility determinations on appeal. Weighing testimony and assessing its credibility are solely the province of the board.") (quoting *Appeal of Huston*, 150 N.H. 410, 414 (2003)); *ACAS Acquisitions (Precitech), Inc. v. Hobert*, 155 N.H. 381, 391 (2007) ("We defer to the trial court's determinations of credibility unless no reasonable person could have come to the same conclusion after weighing the testimony.") (citations omitted).

B. Applicants' Claim of Unconstitutional Vagueness "As Applied" Is Not Supported by the Applicable Law or the Record.

Applicants argue that the Subcommittee's decision and application of its regulations was "void for vagueness" because the Subcommittee "applied such a vague and undefined construction of Site 301.15 that no such reasonable person could understand or meet." Motion at 22, n. 23. Vagueness can only invalidate a statute where: (1) it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits"; or (2) it

“authorize[s] and even encourage[s] arbitrary and discriminatory enforcement.” *Bleiler v. Chief, Dover Police Dept.*, 155 N.H. 693, 701 (2007) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). Importantly, however, “[a] party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute’s constitutionality.”⁶ *Id.* (quoting *State v. MacElman*, 154 N.H. 304, 307 (2006)).

The prohibition on vagueness does not invalidate a statute simply because “a reviewing court believes [it] could have been drafted with greater precision. Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties.” *Id.* (quoting *Rose v. Locke*, 423 U.S. 48, 49-50 (1975)). Additionally, “mathematical certainty” is not required. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). “The necessary specificity … 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.” *Webster v. Town of Candia*, 146 N.H. 430, 434 (2001) (quoting *In re Justin D.*, 144 N.H. 450, 453 (1999)).

RSA 162-H and its associated regulations (including Site 301.09 and 301.15) far exceed the relevant standards of clarity set forth by the New Hampshire Supreme Court. As the Court explained in *Webster*, a statute is sufficiently clear if it warns the average person of prohibited conduct absent planning board consent. *See Webster*, 146 N.H. at 435. Here Applicants knew, as any average person would, that they cannot proceed with their proposed facility without first

⁶ Counsel for the Public notes that the constitutionality of Site 301.15, as applied, is ultimately a question for the courts to decide. RSA 162-H:11; RSA 541:6. *See also* RSA 541-A:24. On a motion for rehearing, the fundamental question is whether the Applicants have presented good reason, in the Subcommittee’s opinion, to justify a rehearing to give the Subcommittee an opportunity to provide additional clarification of the Subcommittee’s application of Site 301.15. To assist the Subcommittee’s review, Counsel for the Public provides an analysis of the merits of Applicants’ constitutional claim.

obtaining a Certificate from the Site Evaluation Committee. That alone is sufficient to render RSA 162-H “not unconstitutionally vague.” *Id.*

Applicants now claim that the statute and regulations as applied to them are void for unconstitutional vagueness.⁷ Even taken at face value, Applicants’ contention that the statute and regulations applied to them did not sufficiently apprise Applicants of the relevant standards for the Subcommittee’s decision is legally insufficient for the challenge Applicants now mount. The New Hampshire Supreme Court has consistently held that “a law is not necessarily vague because it does not precisely apprise an individual of the standards by which a permitting authority will make its decision.” *Bleiler*, 155 N.H. at 702 (quoting *Webster*, 146 N.H. at 435) (alterations omitted). Several decisions have been issued upholding ordinances, statutes and regulations that provide far less guidance than what RSA 162-H, Site 301.09 and Site 301.15 provide here. *See, e.g., Bleiler*, 155 N.H. at 702-03; *Webster*, 146 N.H. at 435-37; *Durant v. Town of Dunbarton*, 121 N.H. 352, 355-56 (1981); *Derry Sand & Gravel, Inc. v. Town of Londonderry*, 121 N.H. 501, 502-05 (1981).

For example, in *Derry Sand & Gravel*, the plaintiffs “argue[d] that the ordinance [wa]s unconstitutionally vague because it fail[ed] to provide standards governing the selectmen’s

⁷ Applicants make clear that they are not raising a facial challenge, Motion at 22, likely because Applicants recognize that RSA 162-H “does not implicate a fundamental right” and therefore cannot be facially challenged by Applicants. *Bleiler*, 155 N.H. at 702 (citing *State v. MacElman*, 154 N.H. 304, 307 (2006)). Relevant case law suggests that the as-applied challenge raised by Applicants is even narrower than that discussed above, but for the sake of comprehensiveness this response addresses the full analysis. *See MacElman*, 154 N.H. at 309 (“We now turn to the defendant’s as-applied challenge and determine whether the statute provided her with a reasonable opportunity to know that her particular conduct was proscribed by the statute.”).

decision to issue a license to operate a private dump.” 121 N.H. at 504.⁸ The Court held it would not “strike down an ordinance as unconstitutionally vague simply because it does not precisely apprise an applicant of the standards by which the selectmen will make their decision” and ultimately held that the standards set out in the dump ordinance permitting the selectmen to issue a license “for good cause and sufficient reason” provided “adequate criteria to guide a governmental body, such as a board of selectmen, in the exercise of its discretion.” *Id.* at 505.

The Court also noted that “[i]n this case, the ordinance contains a statement of purpose which further defines the terms of the ordinance.” *Id.* Given the statement of purpose, “good cause and sufficient reason” were held to be “any circumstances that further the ordinance’s stated goals of establishing provisions for the ‘orderly’ and ‘sanitary’ disposal of garbage and waste in the town.” *Id.*⁹ The Court acknowledged that the ordinance in question was “not a model to be emulated,” but it nevertheless did “find the ordinance adequate to inform an

⁸ The dump ordinance in question provided in relevant part:

A. PURPOSE.

To provide for orderly, sanitary and reasonable provisions for the disposal of garbage and waste in the Town of Londonderry, New Hampshire.

C. PRIVATE DUMPS.

No private dump or junk yard as defined by statute or the provisions of this ordinance, whichever is more restrictive shall be maintained within the Town of Londonderry except by license issued by the Board of Selectmen, after a public hearing at which time good cause and sufficient reason must be shown, justifying, in the opinion of the Selectmen, the issuance of such a license.

Id. at 504-05.

⁹ Other cases have reached similar results. *See, e.g., Dow v. Town of Effingham*, 148 N.H. 121, 132-33 (2002) (race track ordinance is not void for vagueness because it does not specify the exact standards required by the selectmen in assessing a request for a race track permit; it is implied that the selectmen will exercise their discretion consistent with the purpose of the race track ordinance); *Bleiler*, 155 N.H. at 703 (upholding weapon license revocation and citing cases).

applicant of what facts he must establish in order to obtain a license.” *Id.* RSA 162-H and its accompanying regulations significantly exceed the bare guidance provided by the dump ordinance in *Derry Sand & Gravel*.

RSA 162-H:16, IV specifically directs the Subcommittee to “determine if issuance of a certificate will serve the objectives of this chapter” and in connection with that determination RSA 162-H:16, IV(b) requires the Subcommittee to find that “[t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.” The objectives are specifically set forth in RSA 162-H:1. Additionally, SEC regulations provide further detailed guidance in Sites 202.19, 301.09 and 301.15. Unlike in *Derry Sand & Gravel*, the relevant statutory provisions and detailed regulations here are “a model to be emulated.” *Derry Sand & Gravel*, 121 N.H. at 505. They are “adequate to inform an applicant of what facts [it] must establish in order to obtain” a Certificate of Site and Facility, and that is all that is required to defeat Applicants’ present challenge.¹⁰ *Id.*

Even viewing Applicants’ position in the light most favorable to Applicants their challenge must fail. Whatever their issue with Site 301.09 and 301.15, Applicants do not dispute (nor can they) that RSA 162-H:16, IV(b) requires the Subcommittee to make a specific finding, and Site 202.19(b) requires Applicants to “bear the burden of proving facts sufficient for the

¹⁰ Likewise, in *Durant* the Court considered the constitutionality of a broad regulation of septic tanks and sewage systems. *Durant v. Town of Dunbarton*, 121 N.H. at 355. The plaintiff argued that the regulations were “impermissibly vague because they d[id] not contain standards for the evaluation of on-site septic systems.” *Id.* The Court again emphasized that “broad regulations are not necessarily vague even if they do not ‘precisely apprise one of the standards by which an administrative board will make its decision.’” *Id.* at 356 (quoting *Town of Freedom v. Gillespie*, 120 N.H. 576 (1980)). The Court held that the regulations were not void for vagueness because when read as a whole they “inform a subdivider that his plan must provide adequate information to enable the board to conclude that future development of the land will not pose an exceptional danger to health.” *Id.* The Court held that “this language provides sufficient notice to developers of what is expected of them.” *Id.*

committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16.” Applicants complain that the statute and regulations do not spell out for them precisely how to meet their burden. However, the statute and regulations inform Applicants that they “must provide adequate information to enable the [Subcommittee] to conclude” that “[t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies,” and the regulations list the specific issues to be addressed. *See Durant*, 121 N.H. at 356; RSA 162-H:16, IV(b). Under New Hampshire law, the language of the statute and regulations here “provides sufficient notice to developers of what is expected of them.” *Durant*, 121 N.H. at 356. The Subcommittee found that Applicants failed to provide adequate information for the Subcommittee to make its required finding and accordingly it denied the Application. *See, e.g.*, Order at 199, 226-27, 285-86. The Subcommittee cannot be faulted for Applicants’ failure to provide what was expected of them.

C. The Applicable Administrative Rules are Clear and the Subcommittee Applied the Rules Consistently.

As discussed above, even read most favorably to Applicants the statute and rules are nevertheless sufficiently clear to withstand constitutional challenge. There is no requirement for such a favorable read, however, and arguably the opposite is true. *See Bleiler*, 155 N.H. at 701 (“A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute’s constitutionality.”). Ultimately, Applicants’ Motion notwithstanding, the relevant statutory provisions and regulations clearly set forth the requirements for Applicants to sustain their burden of proof.

As noted, RSA 162-H:16, IV(b) requires the Subcommittee to find that “[t]he site and facility will not unduly interfere with the orderly development of the region with due

consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.” Site 202.19(b) in turn makes clear to Applicants that they “bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16,” including RSA 162-H:16, IV(b). Site 301.15 provides further clarity by setting forth issues the Subcommittee must consider in determining whether Applicants made an adequate showing that the Project will not unduly interfere with the orderly development of the region – namely the effect of the Project on land use, employment, and the economy of the region, as well as views of municipal governing bodies.

Site 301.09 further establishes categories of evidence Applicants were required to submit for the Subcommittee’s consideration of the effect of the Project on land use, employment, and the economy of the region. Site 301.09 is organized by the areas of consideration under Site 301.15 – land use, economy and employment, with subcategories listed for each. The regulations demonstrate on their face that they are structured to show subcategories the Subcommittee must consider in making its finding on orderly development of the region, including property values and tourism as subcategories of the effect of the Project on the economy of the region consideration. Applicants were required to submit, and the Subcommittee to consider, evidence in each subcategory in order to consider the effects of the Project on land use, employment and the economy of the region.

Ultimately, the Subcommittee considered evidence presented in each subcategory and found it lacking credibility and/or reliability in the areas of the effects on land use, property values and tourism. *See, e.g.*, Order at 199-286. As noted above, without sufficiently credible and reliable evidence to consider, the Subcommittee was simply unable to make the statutory findings required for issuance of a Certificate. *See, e.g.*, Order at 199, 226-27, 285-86. It was

not a lack of clarity that doomed the Application here, it was a lack of sufficiently credible and reliable evidence submitted by Applicants. *See, e.g.*, Order at 199, 226-27, 285-86.

D. The Subcommittee Members’ Comments During Deliberations Did Not Create or Apply Ultra Vires Standards.

Capitalizing on the uniquely open nature of the Subcommittee’s deliberations, Applicants focus on isolated comments to support their assertion that the Subcommittee employed shifting standards. Applicants are incorrect, as the comments by the Subcommittee members during deliberations did not amount to the application of new standards but were instead merely a frank discussion of issues and evidence. Referencing quotes out of context, Applicants ascribe beliefs and intent to individual Subcommittee members that have no support in the record. Most notably, many of the quotes taken out of context were not a discussion of the applicable legal standard, but rather an attempt by the Subcommittee to address Applicants’ experts’ opinions as to the expected interference by the Project on the orderly development of the region. *See, e.g.*, Order at 195 (stating that Applicants’ expert “did not persuade us that there would be no discernible decrease in property values attributable to the Project” because that is the position Applicants’ expert maintained in the face of contrary evidence). The Subcommittee ultimately employed the correct standard in denying the Application and its statements during deliberations addressing Applicants’ unpersuasive positions did nothing to alter that correct application. *See, e.g.*, Order at 199, 226-27, 285-86.

E. The Subcommittee’s Conclusion that Applicants Failed to Sustain Their Burden of Proof to Produce Credible Evidence Sufficient to Support a Finding of No Undue Interference with the Orderly Development of the Region Was Amply Supported by Factual Findings.

In both its oral deliberations as well as its written Order, the Subcommittee provides substantial findings that the expert testimony and reports offered by Applicants on the issues of

property values, tourism and land use were simply not sufficient or credible and their methods were not reliable. *See* Order at 199-286. Notwithstanding Applicants' assertion to the contrary, factual findings on the sufficiency of evidence presented and the credibility of that evidence do satisfy the requirements of RSA 541-A:35 because they provide a substantial basis for the Subcommittee's ultimate conclusion that Applicants failed to meet their burden of proof. *See, e.g.*, Order at 199, 226-27, 285-86. The cases cited by Applicants are inapposite on this point.

For example, the *Soc'y for the Prot. of New Hampshire Forests v. Site Evaluation Comm.* opinion involved a decision by the Site Evaluation Committee that granted a Certificate but offered no explanation of facts that supported its required statutory findings. 115 N.H. 163, 173-74 (1975). Here the Subcommittee denied the Certificate, obviating the need for any factual findings on the statutory criteria. *See, e.g.*, Order at 285-86. With respect to the basis for the denial of the Certificate, the Subcommittee addressed Applicants' proffered evidence on RSA 162-H:16, IV(b) and made factual findings that the evidence presented was not credible and that Applicants' experts' methods were not reliable. *See, e.g.*, Order at 199, 226-27, 285-86.

With respect to Applicants' RSA 91-A argument, that argument is unsupported by any evidence or even allegation as Applicants fail to identify a single portion of the Order that went beyond the scope of the oral deliberations. Accordingly, Applicants have failed to show any violation of RSA 91-A based on the Subcommittee's actions here. Nevertheless, the Subcommittee itself knows whether it held non-public meetings outside of the exemption under RSA 91-A:5 for exchanges of draft documents and can assess whether rehearing is necessary or appropriate with respect to any such issues.

IV. The Subcommittee's Application of the Criteria Set Forth in Site 301.15 and its Analysis of the Information Supplied under Site 301.09 Was Supported by the Record.

A. Land Use and Municipal Views.

1. The Subcommittee Acknowledged Past Precedent Regarding the Construction of New Transmission Lines in Existing Corridors and Utilized it Appropriately Given the Context of the Project.

Applicants argue that the Subcommittee erred by ignoring past precedent that new transmission lines built in existing corridors would not unduly interfere with the orderly development of the region, claiming that the Subcommittee departed from this long-held precedent without explaining why. Applicants are incorrect. The Subcommittee directly acknowledged the precedent, stating that it was not “the only principle of sound planning nor is it a principle to be applied in every case,” explaining why it did not apply here:

Over-development of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the orderly development of the region. Increases in the use of a transmission corridor require increased maintenance requirements, increased access requirements, and increased readiness of emergency response personnel. Access to transmission corridors is ultimately obtained from publicly maintained roads and thoroughfares. Unsightly transmission corridors or infrastructure within corridors can impact real estate development in the surrounding area. Increased maintenance, repair and emergency operations require the use of heavy machinery and trucks placing the continued use of lands for agricultural purposes at risk. A highly developed corridor may discourage use of the corridor and surrounding lands for recreational purposes.

Order at 278. The Subcommittee explained further:

There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would create a use that is different in character, nature and kind from the existing use. There are places along the route where the Project would have a substantially different effect on the neighborhood than does the existing transmission facilities.

Order at 279.

In its Order, the Subcommittee addressed at length the testimony of Robert Varney, Applicants' main witness on orderly development, and the reasons why Mr. Varney's testimony failed to meet Applicants' burden of proof. The Subcommittee found that Mr. Varney had not analyzed the substantial increase in height of structures for the new and existing lines. It also discussed how Mr. Varney did not evaluate the amount or impact of vegetative clearing for construction of the Project. Order at 237. The Subcommittee noted that Mr. Varney's testimony "made no accommodation for differences between communities along the proposed route," Order at 278, and that Mr. Varney "made no effort to identify where the impacts of the Project may be small or large. The only criteria he appears to have applied is whether the Project is to be located in an existing transmission corridor." Order 278. The Subcommittee also noted that although Mr. Varney reviewed master plans and some local ordinances, "he did little in the way of applying the details of the Project to the plans and ordinances." Order at 280. The Subcommittee noted that "the Applicant did not sufficiently address the impact on land use in the underground portion of the proposed route," Order at 281, and that "[t]he Applicant has failed to establish that the Project would be consistent with land use" in Pittsburg, Clarksville and Stewartstown, where there would be "a combination of overhead and underground transmission line installation." Order at 218. The Subcommittee also considered substantial other evidence on this issue and took several site visits of the proposed route. Given the Subcommittee's analysis and the discussion in the Subcommittee's deliberations section, it is clear that the Subcommittee acknowledged the past precedent but found that it did not equate to an unlimited rule. Because Applicants failed to provide sufficient evidence to find that the increased structure heights, clearing and other associated impacts would not exceed the limit to this precedent, the Subcommittee appropriately concluded Applicants have not met the evidentiary burden.

2. The Subcommittee Did Not Improperly Rely on New Tests.

Applicants' argue that the Subcommittee applied two "entirely new tests" when making its findings on orderly development of the region. They claim that the potential over-development of an existing transmission corridor is a new and inappropriate test, and they claim that the Subcommittee inappropriately applied zoning criteria. Motion at 47.

Starting with the second "new test," the Applicants argue that the Subcommittee relied on a non-conforming use test from zoning laws, partially quoting from the Order. Motion at 51-52. The Subcommittee explained, "While not legally required to apply the three prong [nonconforming use] analysis, *we find it to be informative in the context of this case.*" Order at 279 (emphasis added). The Order makes clear that the Subcommittee did not use the nonconforming use analysis as a new test, but rather as an analytical tool appropriate in this context, where the evidence demonstrated that the Project's proposed land use would change the existing transmission corridor in "nature and intensity." Order at 278.

Applicants then criticize the Subcommittee for reducing the scope of its analysis to "purely local impact, ignoring the required 'regional' focus of the statutory criteria." Motion at 50. They do this by pointing to examples that the Subcommittee provides of impacts to specific communities along the proposed route. Applicants ignore two fundamental issues. First, the use of specific local examples is exactly how one might go about analyzing and determining whether there is a region-wide impact. Second, and more importantly, the Subcommittee did not find that the Project would unduly interfere with the orderly development of region. The Subcommittee concluded that Applicants failed to provide sufficiently credible and reliable evidence to meet Applicants' burden of proving that the Project would not unduly interfere with orderly

development of the region. The examples provided by the Subcommittee illustrated the gaps in the record.

Applicants also criticized the Subcommittee for considering issues related to aesthetics and the natural environment in its evaluation of orderly development. In making this argument, the Applicants make the same mistake that Mr. Varney made in his evaluation of orderly development. The Subcommittee, based on the evidence presented by the parties in this proceeding, looked in detail at the various master plans and other local planning documents. The Subcommittee understood that aesthetics and the natural environment were critical factors in those communities' planning initiatives. It would be inappropriate to ignore those impacts when determining whether the Project will or will not interfere with orderly development.

Finally, the Applicants argue that the Subcommittee applied a new "over-development" test. Applicants cite to a number of past decisions where the SEC determined that building a new transmission line in an existing corridor was an important factor in concluding there was no undue interference with orderly development. Applicants appear to argue that past precedent created a *per se* rule, claiming that this past precedent means that there is no limit to how much development can be forced into an existing utility corridor regardless of what type or size infrastructure is currently in a corridor, without considering the substantive differences among the projects and their contexts. The Subcommittee did not create a new rule. It applied an obvious and reasonable limitation to an existing precedent, based upon the extensive record in this case, including the Subcommittee's many site visits.

3. The Subcommittee Considered Municipal Views Appropriately.

Applicants assert that the Subcommittee gave inappropriate weight to the views of municipalities when making its finding regarding orderly development, stating, "[i]n this

instance, however, the Subcommittee went beyond considering municipal views, instead giving them dispositive consideration.” Motion at 54. Applicants are mistaken. First, the Subcommittee did not determine whether there would be undue interference with orderly development. Therefore, there can be no “dispositive consideration” if the Subcommittee did not make a finding on the orderly development criteria. What the Subcommittee did – which Applicants seemingly overlook in the Motion – is evaluate and weigh the overwhelming amount of evidence submitted by the municipalities. As indicated, it was the Applicants’ burden to prove that there would be no undue interference with orderly development. The Subcommittee concluded that Applicants failed to provide sufficient evidence to meet this burden. The views of municipal officials was some of the evidence the Subcommittee considered to determine whether the Applicants satisfied their burden to allow the Subcommittee to make the statutory finding.

Applicants’ argument also seems to confuse the decision-making authority of the site evaluation process (where localities are preempted from making decisions) and the importance of the views of municipal officials (where they are statutorily given due consideration). While a local zoning board does not get to make a decision on conformity with its rules for projects under the jurisdiction of the SEC, the Subcommittee must give due consideration to the views of local and regional bodies when assessing an application for a Certificate of Site and Facility. An overwhelming majority opposed the Project and testified how it would interfere with the orderly development of the region.

B. Property Values.

Applicants argue that the Subcommittee “misconceived Dr. Chalmers’ studies and certain key findings, and these misconceptions led to the determination that his conclusions were

unreliable.” Motion at 57-58. Applicants also argue “[m]any of the Subcommittee’s conclusions on property value effects lack any basis in the record.” Motion at 63. The Subcommittee considered at length all of the evidence submitted on property values and weighed its reliability based on the documentary evidence and the testimony of the relevant witnesses. Applicants simply disagree with the Subcommittee’s conclusions, and in the Motion seek to reargue the reliability of the witnesses and the sufficiency of the evidence.

Applicants first argue that the Subcommittee misunderstood Dr. Chalmers’ opinion to be that there would be no impact to property values, by selectively quoting some of the Subcommittee member’s statements during deliberations. Applicants ignore the Order, which clearly demonstrates that the Subcommittee understood Dr. Chalmers’ opinion to be that the Project could affect encumbered properties.¹¹ The Order carefully reviews and analyzes the statements and opinions of Mr. Chalmers, over 14 pages (Order at 163-177), identifying areas where the Subcommittee found flaws in his methodology and work.

Overall, the Subcommittee dedicated 31 pages of the Order to the evaluation of the evidence presented on property values. It thoroughly discussed the evidence and the various opinions regarding the Project’s impact on property values. In the deliberations section, the Subcommittee goes to great length to identify the specific areas where it concluded that evidence presented by Dr. Chalmers did not match his conclusions. Again, Applicants misapprehend the reason for the Subcommittee’s denial of their application. It was not because the Subcommittee affirmatively found that the Project would have negative effects on property values. It was because the Applicants failed to provide sufficient credible and reliable evidence to support a

¹¹ Order at 168 (“Dr. Chalmers opined that the properties that could be affected are homes very close to the right-of-way that presently do not have clear visibility of the existing line, but would have clear visibility of the existing line or the Project after construction of the Project.”).

finding that the Project will not unduly interfere with the orderly development of the region, with consideration given to the “effect of the proposed facility on real estate values in the affected communities.” Site 301.09 (b)(4).¹²

Applicants criticize the Subcommittee’s conclusion that Dr. Chalmers’ research and conclusions contained significant gaps. Motion at 61. Again, Applicants misapprehend the Subcommittee’s conclusion. Applicants state, “Basing a finding of property value effect (and, thus, some interference with ODR) on these perceived ‘gaps’ is an error of fact and reasoning.” As indicated, the Subcommittee did not conclude that there would be property value effects; rather, the Subcommittee concluded, “[t]he Applicant did not meet its burden in demonstrating that the Project’s impact on property values will not unduly interfere with the orderly development of the region.” Order at 199. The Subcommittee discussed in detail the basis for its conclusion that the Applicants had not met their burden.

C. Tourism.

Regarding tourism, Applicants argue that: (1) the Order has significant factual errors and (2) the Subcommittee failed to consider evidence presented in the cross-examination of Counsel for the Public’s witnesses. Applicants again focus on a few distinct areas while ignoring the extensive evidence discussed and analyzed in the Subcommittee’s Order. The Subcommittee’s evaluation of the evidence on tourism spans 26 pages of the Order. Order at 199-225. The Order provides many examples of gaps in Applicants’ case and numerous instances where the

¹² Applicants criticize the Subcommittee’s use of the term “windshield analysis” to describe Dr. Chalmers’ method of evaluating individual properties. Motion at 59. This is an argument of semantics. Dr. Chalmers made a subjective decision about the potential visual impact of structures only on certain property without actually viewing the location of the Project from the subject property and without photo simulations or other aides. Regardless of how the Subcommittee described this effort, the Subcommittee found it deficient for determining the visual impact on the subject property.

Subcommittee found the Applicants' expert's (Mitch Nichols) methodology, work and testimony to be unreliable. Order at 225.

The specific examples cited by Applicants do not warrant a rehearing. They criticize the Subcommittee's rejection of the comparison of the Project to the Phase II line because it "does not cite any factual support or evidence substantiating these statements." Motion at 67. Applicants also identify locations in the record, such as Estes Park and North Cascades National Park and the North Cascades Scenic Byway, arguing that the Subcommittee's factual findings were incorrect or not supported by the record. Applicants disagree with the Subcommittee's analysis of the evidence and the Subcommittee's factual findings from the record. Applicants do not set forth any evidence that the Subcommittee "overlooked" or "misapprehended" to justify rehearing.

D. Construction.

Applicants first argue that the Subcommittee erred by considering issues related to traffic management and the crossing of public highways in the context of orderly development. They argue that those issues "primarily" concern effects of the Project on public health and safety. Motion at 71. Applicants ignore the substantial amount of evidence presented over several days of hearings, which demonstrated that traffic from construction of the Project would have a large impact on local business and the economy. The Subcommittee properly included this discussion in its orderly development deliberations, even though it also related to the Subcommittee's analysis of public health and safety. Moreover, the evidence on traffic and construction related to "[t]he effect of the proposed facility on community services and infrastructure," which is a specific subcategory in the Subcommittee's consideration of the Project's effect on orderly development of the region. Site 301.09(b)(6). Finally, Applicants criticize the Subcommittee for

not identifying an exhibit that describes local road crossings. The Order specifically discusses the evidence regarding local road crossings and fully explains the Subcommittee's rationale for its finding. Order at 46, 117-118.

V. Conclusion.

The Subcommittee's deliberations were carefully conducted and the Order is lawful, just and reasonable because the Subcommittee properly applied RSA 162:H:16, IV and the applicable regulations when it determined, based upon the Subcommittee's credibility assessments and factual findings supported by the evidence in the record, that Applicants failed to meet their burden of proof to provide sufficient credible and reliable evidence to support a finding that the 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." RSA 162-H:16, IV(b). The Applicants have not demonstrated any errors of fact or law by the Subcommittee or areas that the Subcommittee overlooked or misconceived. Accordingly, the Motion should be denied.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorney.

Dated: May 7, 2018

By:



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

PRIMMER PIPER EGGLESTON & CRAMER PC,

Dated: May 7, 2018

By: 

Thomas J. Pappas, Esq. (N.H. Bar No. 4111)
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
tpappas@primmer.com

-and-

Elijah D. Emerson, Esq. (N.H. Bar No. 19358)
PRIMMER PIPER EGGLESTON & CRAMER PC
P.O. Box 349
Littleton, NH 03561-0349
(603) 444-4008
eemerson@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing RESPONSE TO APPLICANTS' MOTION FOR REHEARING has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: May 7, 2018

By: 

Thomas J. Pappas, Esq. (N.H. Bar No. 4111)