

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

OBJECTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS TO APPLICANT'S MOTION FOR REHEARING OF DECISION AND ORDER DENYING APPLICATION

The Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully requests that the Subcommittee of the Site Evaluation Committee (the “SEC” or “Subcommittee”) deny the Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy’s (collectively, the “Applicant”) Motion for Rehearing of the Decision and Order Denying Application (the “Motion for Rehearing”), stating as follows:

SUMMARY

1. Now with the benefit of the Subcommittee’s written decision, Applicant submits this second motion to rehear the Subcommittee’s decision to deny the Application. Ultimately, the Applicant makes many of the same overall flawed arguments it made with its first motion for rehearing and request to resume deliberations.¹ The Applicant fails to identify errors of fact, reasoning, or law sufficient to cause the Subcommittee’s decision to deny the Application to be unlawful, unjust, or unreasonable. There is no good reason or good cause to grant a rehearing or continue deliberations.

¹ The Forest Society hereby incorporates by reference all the arguments in its Objection to Applicant’s *Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*. In that Objection, the Forest Society argued, *inter alia*, that the Applicant’s Motion for Rehearing was premature and was an improper attempt to introduce new evidence, as well as that, per the plain language of RSA 162-H:16, IV, the SEC is required to deliberate and make findings on all of the statutory requirements only when the SEC decides to issue a certificate.

2. First, the Applicant incorrectly argues the Subcommittee failed to assess the conditions proposed by the Applicant. The Subcommittee lawfully and reasonably considered proposed or possible conditions for portions of the Application where the Applicant satisfied its burdens of proof and production sufficient to make consideration of conditions relevant and fruitful.

3. Second, the Applicant's argument that the Subcommittee arbitrarily applied Site 301.15 and 301.09 such that the rules are unconstitutional as applied is without merit. The Subcommittee reasonably, methodically, and lawfully applied the standard as it is articulated by the statute and rules. In doing so, it made all factual findings it was lawfully required to make.

4. Third, the Applicant claims the Subcommittee failed to adequately explain how the Applicant did not meet its burden on the orderly development standard. The Applicant also claims that in arriving at its decision, the Subcommittee ignored SEC precedent, misapplied SEC rules, misconstrued Applicant's evidence, and did not consider other evidence in the record that were supportive of Applicant's arguments. All of these assorted arguments do little more than attack the weight the Subcommittee placed on certain evidence. Reasonable decision-makers could disagree about the credibility, reliability, or weight that should be afforded to certain evidence. But, such determinations are soundly within the discretion of the Subcommittee, as the trier-of-fact. Furthermore, in arguing that the Subcommittee should look to other parties' evidence or craft its own conditions, the Applicant ignores the plain reality that it had the burden to submit sufficient evidence to persuade the Subcommittee to make the requisite findings of RSA 162-H:16, IV. It is not the Subcommittee's or other parties' burden to fill in the gaps in the Applicant's Application. Despite the voluminous pages devoted to these arguments, the Applicant fails to put forth good reason or good cause to warrant rehearing. Therefore, the Subcommittee should deny the Motion for Rehearing.

REHEARING STANDARD

5. A party may request rehearing by “specifying in the motion all grounds for rehearing,” RSA 541:3, and “set[ting] forth fully every ground upon which it is claimed that the decision or order complained of is unlawful and unreasonable.” RSA 541:4.

6. The SEC rule on rehearings further provides that a motion for rehearing shall: “(1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered; (2) Describe how each error causes the committee’s order or decision to be unlawful, unjust or unreasonable; (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and (4) Include any argument or memorandum of law the moving party wishes to file.” N.H. CODE ADMIN. RULES Site 202.29(d).

7. Ultimately, a rehearing may be granted only if the Subcommittee finds the moving party has demonstrated “good reason” or “good cause.” *See O’Loughlin v. N.H. Pers. Comm.*, 117 N.H. 999, 1004 (1977). “The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invites reconsideration upon the record upon which that decision rested.” *Dumais v. State Pers. Comm’n*, 118 N.H. 309, 311 (1978) (internal quotation marks and citations omitted).

ANALYSIS

I. The Subcommittee Did Not Unlawfully or Unreasonably Fail to Consider Conditions that Might Have Resulted in a Different Finding on the Orderly Development Standard

8. Applicant argues that the Subcommittee erred because it failed to consider conditions that the Applicant contends might have resulted in different findings on the orderly development standard. This argument is not grounded in law and is supported only by the false premise that the Subcommittee did not in fact consider conditions. The SEC is not legally required to consider mitigating conditions when it determines an applicant has failed to sustain

its burden to prove any given standard of RSA 162-H:16, IV. Moreover, it is clear from the written decision and preceding deliberations that the Subcommittee did in fact lawfully and reasonably consider proposed or possible conditions where Applicant satisfied its burden of production sufficient to make consideration of the conditions relevant and fruitful.

A. Subcommittee is Not Legally Required to Explicitly and Verbally Consider and Make Factual Findings on Every Proposed Condition When Finding the Applicant Failed to Sustain its Burden on the Orderly Development Standard

9. As a matter of law, upon consideration of an application, the SEC is under no mandatory obligation to explicitly and verbally consider each condition in determining whether the applicant has satisfied its burden. The Applicant specifically relies on RSA 162-H:16, IV, Site 202.28(a), and Site 301.17 as authority for its arguments. These authorities do not support the Applicant's position.

10. RSA 162-H:16, IV requires the SEC give "*due* consideration" to all *relevant* information before it determines if issuance of a certificate will serve the objectives of the chapter (emphasis added). The modifier "due" demonstrates that the SEC has, by legislative design, considerable discretion as to how much and in what manner it considers the evidence and applies the criteria.

11. Site 202.28(a) does not require the SEC to consider conditions. Site 202.28(a) makes no explicit mention of conditions. Site 202.28(a) does provide that the SEC shall make findings regarding the criteria stated in, amongst other provisions, Site 301.17, which concerns specific conditions of certificate the SEC shall consider. However, none of the enumerated conditions concern mitigating the impacts of the proposed project; the first eight relate to specifically procedural concerns and "construction and operation" compliance.

12. The final enumerated category in Site 301.17—“Any other condition necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16”—is not the catch-all panacea Applicant claims it to be. Under the statutory canon of construction *ejusdem generis*, the last item of a list is restricted by the specific class of items that precede it. *State v. N.H. Gas & Elec. Co.*, 86 N.H. 16, 25 (1932) (applying and articulating the standard). Thus, while this rule may give the SEC discretion to consider conditions “to support findings made pursuant to RSA 162-H:16,” it is illogical and contrary to the principles of statutory interpretation to read that to require the SEC to consider or craft its own mitigating conditions to allow it to conclude an applicant has satisfied its burden.

13. Moreover, a provision cannot be read to contravene its statutory authority or otherwise be inconsistent with the overall legislative intent that can be gleaned from the statute as a whole. See *In re Appeal of N.H. DOT*, 152 N.H. 565, 571 (2005).

14. It is clear from the statute that the SEC’s authority with respect to considering the wide-ranging conditions urged by the Applicant is a permissive one rather than a mandate for the SEC to craft conditions to prop up an applicant’s burden of proof. RSA 162-H:4 lists the powers of the SEC more or less in the order those powers would be exercised, starting with the directive to “[e]valuate and issue any certificate under this chapter for an energy facility,” followed by the directive to “[d]etermine the terms and conditions of any certificate issued under this chapter.” RSA 162-H:4, I.

15. Similarly, section IV of RSA 162-H:16 requires the SEC to “determine if issuance of a certificate will serve the objectives of the chapter.” It then lists four specific findings the

SEC must make in order to issue a certificate.² *Id.* Section IV is followed by Section VI, which states, “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.” RSA 162-H:16, VI. Any rule requiring consideration of conditions must be read in context with this statutory authority.

16. Because the SEC was under no legal obligation to consider conditions when finding the Applicant failed to sustain its burden to satisfy the orderly development standard, it is reasonable and lawful for certain members of the Subcommittee to reason that the Subcommittee should end deliberations because it would otherwise have to address conditions unrelated to orderly development. *See, e.g.,* Tr. 2/1/2018, Afternoon Session, at 12-18; *Motion for Rehearing,* ¶ 19.

17. And like it did in its premature motion for rehearing that was based only on statements made during deliberations, the Applicant again offers a cluster of unpersuasive points. Of course, the total number of conditions the SEC has issued would total in the hundreds; all but one of the past SEC decisions granted the requested certificate. That is neither a valid reason to grant a certificate nor good cause or reason to warrant a rehearing. Importantly, prior applicants who have obtained certificates had satisfied their burdens of proof on orderly development and, therefore, it was appropriate for the SEC to apply conditions to the certificates.

18. The Applicant continues to draw an unexplained distinction between “discussing” and “considering” a condition, claiming discussion is something less than consideration, and because the Subcommittee merely “discussed” conditions, the Subcommittee failed some

² Again, this section does not say the SEC must explicitly and verbally deliberate and make findings on each of these four criteria before making a determination to issue or not issue the certificate; it merely states the four findings that SEC must make if it does choose to issue a certificate.

obligation. The Applicant's claim is not supported by the statute, rules, or the common understanding of the terms.

B. The Subcommittee Did in Fact Consider Conditions Where Relevant

19. Even though the Subcommittee was not legally required to consider and make factual findings on conditions proposed by the Applicant or that the Subcommittee itself created to fill in gaps for the Applicant, the Subcommittee did in fact consider conditions. It did so while presiding over the 70 days of hearings, during deliberations, and in its written decision, where it was reasonably relevant and fruitful to do so.

1. Property Values

20. Pursuant to Site 301.09(b) and Site 301.15(a), an application must contain and the SEC must consider the potential effect of the proposed project on the property values of the affected communities.

21. The Applicant's claim that it proved by a preponderance of the evidence that the proposed project would have no discernible effect on real estate values relied nearly exclusively on the testimony of Dr. Chalmers. The Subcommittee concluded in its written decision that Dr. Chalmer's testimony was not credible, making the following findings: "the Chalmers literature review did not support his ultimate conclusions"; his case-study analysis was unpersuasive and unreliable and did not show that there would be "no discernible decrease in property values attributable to the Project"; and "Dr. Chalmers presents no cogent explanation [for] why properties beyond 100 feet from the right-of-way that experience a significant change in view would not suffer a drop in value as a result of the Project." *Decision and Order Denying Application for Certificate of Site and Facility*, at 194–97 ("Decision").

22. These findings alone are sufficient to support the conclusion that the Applicant failed to meet its burden with respect to property values as it relates to undue interference. The

Applicant argues the Subcommittee failed to consider as a condition an expanded property value guarantee (PVG) and, if the Subcommittee had considered it, it may have addressed members' concerns about the proposed project's impact on property values. This error, it contends, violates RSA 162-H:16, IV.

23. The Applicant is incorrect. The Subcommittee did consider the PVG throughout the hearing, during deliberations and, most critically, in its written decision. Tr. 1/31/18, Morning Session, at 110; Tr. 1/31/18, Afternoon Session, at 6–7.

24. The written decision follows the summary of the Subcommittee's findings concerning Dr. Chalmers' testimony, with a summary of the Subcommittee's consideration of the PVG. The Subcommittee concluded the PVG is limited to "eligible" property owners, which is a category "conditioned on Dr. Chalmers' criteria and is subject to the same flaws we see in Dr. Chalmers' opinions." *Id.*, at 198. The Subcommittee further concluded that it had "insufficient evidence upon which to structure a broader property value guarantee program [or] determine which properties should actually be included in the program and the extent of remuneration that should be available." *Id.* Put differently, Mr. Chalmers' lack of credibility did not give the SEC a reliable baseline from which to structure an effective PVG condition.

25. This is a reasonable decision. Because the Applicant did not put forth a credible assessment of the properties that may be impacted, the Subcommittee could not evaluate whether the PVG was adequate and would address the impacted properties.

26. The Applicant also argues the Subcommittee erred by not considering "the totality of the evidence from the Applicants and other parties [that] established clear boundaries that could be applied as a condition to address the perceived impacts" after concluding Dr. Chalmers' estimate of the likely property value impacts was unpersuasive. *Motion for Rehearing*, ¶ 29. This is just another way of saying the Subcommittee erred by not looking to other parties' evidence to

fill in the gaps where the Applicant failed to meet its burden.³ This is not good cause or good reason to warrant rehearing because it was the Applicant’s burden to prove by a preponderance of the evidence that the proposed project would not unduly interfere with orderly development, one component of which is the impact on property values.

27. Moreover, in considering this Motion for Rehearing, the Subcommittee should give no weight to the proposed expanded conditions, including a proposed expansion of the PVG, that the Applicant submitted and discusses in its two motions for rehearing.

28. Pursuant to Site 202.26(a), “[a]t the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by [subsection b] . . . ,” a subsection that is not applicable here. The expanded PVG was included in two attachments to the premature motion for rehearing and constitutes inadmissible “other evidence, testimony, exhibits, or arguments.”

29. Further, the Forest Society agrees with Counsel for the Public’s assessment in its response to Applicant’s premature motion for rehearing that there are substantial questions as to whether the record provides a sufficient basis for the Subcommittee to consider the Applicant’s proposed expanded conditions and the suggested new Potential Additional Conditions. *Counsel for the Public’s Response to Applicants’ Motion for Rehearing and Request to Vacate*, at 20–21.

2. Tourism

30. Pursuant to RSA 162-H:16, IV(b) and Site 301.15(a), the Applicant was required to prove by a preponderance of the evidence that the proposed project “[would] not unduly interfere with the orderly development of the region.” As part of this factor, the Subcommittee

³ Notably, the Applicant argues the Subcommittee should have used the testimony of Counsel for the Public’s witness on property values (Kavet and Rockler Associates) to evaluate the PVG. *Motion for Rehearing*, ¶¶ 26, 29, 30. But, the Applicant argued in its post-hearing memorandum that the opinions of Kavet and Rockler Associates were irrelevant to the property value impacts of the project and cannot be considered determinative on the issue. *Applicant’s Post-Hearing Memorandum*, at 116–17. The Applicant cannot have it both ways.

was required to and did consider the following: the extent to which the proposed project would affect the economy and employment of the region; the welfare of the population; the overall economic growth of the state; the environment of the state; historic sites; and aesthetics.

31. The Applicant's claim that it has proved by a preponderance that the proposed project would have no adverse impact on tourism in the region is based primarily on the submitted testimony of Mr. Mitch Nichols of Nichols Tourism Group and his report entitled "Northern Pass Transmission and New Hampshire's Tourism Industry."

32. The Subcommittee "did not find the report and testimony submitted by Mr. Nichols credible." *Decision*, at 225. Specifically, the Subcommittee made the following findings to support this ultimate conclusion on the credibility of Mr. Nichols: the listening sessions were attended by a limited number of people who could not and did not provide a variety of information and views on tourism and concerns of the proposed project's impacts; the electronic surveys did not credibly predict the proposed project's impact on tourism; Mr. Nichols' comparison of the proposed project with the Hydro-Quebec Phase II Project, the Maine Reliability Project, and a project near the Estes North Cascades National Park are not persuasive because those projects are substantially different; and Mr. Nichols failed to address and analyze the impact of the construction work over an extended period of time. *Id.* at 225–26. Because of this flawed report, the Subcommittee concluded "[it is]no better off than we were before the evidentiary hearing" and "[w]ithout credible and reliable reports and expert testimony the Subcommittee cannot make a reasoned determination and cannot consider conditions that might mitigate or abrogate negative impacts on tourism." *Id.*

33. The Applicant argues the Subcommittee violated RSA 162-H:16, IV by not considering all relevant information because it did not consider how conditions could mitigate these impacts to tourism. The Applicant supports this argument with little more than conclusory

statements, such as: “[the Subcommittee] could have made a reasoned determination based on expert testimony and imposed a condition that would have mitigated or abrogated negative impacts on tourism.” *Motion for Rehearing*, ¶ 35.

34. Evading the extensive findings on the lack of credibility and flaws in its own evidence, the Applicant now relies on selected portions of the Counsel for the Public’s witness on tourism, witness testimony it incorrectly claims the Subcommittee ignored.

35. First, the Applicant seems to deem the Subcommittee to have considered only certain evidence if the portion of the written decision summarizing the deliberations explicitly references it.⁴ However, the subsection about tourism that is devoted to the testimony of Dr. Rockler and Mr. Kavet is not, as the Applicant suggests, a mere summation. Rather, it is a distillation of what portions of the testimony, and cross-examination and critique of that testimony, the Subcommittee found relevant. That distillation necessarily requires consideration and analysis as to the testimony’s weight, credibility, and relevance. To the extent the Applicant disagrees with the weight the Subcommittee gave this evidence, that is the Applicant’s right; but, absent more, that is not sufficient good cause or good reason to warrant a rehearing.

36. Second, as the Subcommittee correctly pointed out, the Applicant had the burden of proof. *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 findings required by RSA 162-H:16.”). Therefore, the Subcommittee was under no obligation to look to other witnesses to find the credible and reliable reports it needed to make a reasoned determination on tourism impacts.

⁴ “Although the Order devotes hundreds of pages to summarizing the positions of the parties concerning the various application requirements of Site 301.09, it ultimately concludes, in a very few pages, that the Applicants failed to meet their burden of proof with respect to five elements” *Motion for Rehearing*, ¶ 13.

37. While the Applicant is correct that a burden can shift to other parties pursuant to Site 202.19(a), that only applies where the party is asserting a proposition and the Subcommittee relies on the proposition to reach a RSA 162-H:16, IV finding. *See* Site 202.19(a); RSA 162-H:16, IV. Here, the Subcommittee first analyzed whether Applicant had met its burden. Seeing that it had not, there was no need for the Subcommittee to consider whether another party asserting affirmatively that there would be an undue interference with orderly development because of impacts to tourism satisfied that party's burden of proof. Had the Subcommittee, for example, found that Applicant had produced credible and reliable evidence on tourism impacts but nonetheless concluded there would be undue interference because it was more persuaded by another party's argument, Site 202.19(a) would apply and the Subcommittee would have to determine whether that other party had proven its assertion by a preponderance of the evidence.

38. Finally, because the Subcommittee had insufficient reliable and credible evidence to make a reasonable estimate of the potential tourism impacts, it had no evidentiary basis to consider how the Forward NH Fund could mitigate these impacts. Without this evidentiary basis, the Forward NH Fund is irrelevant, and the Subcommittee need give only due consideration to all relevant evidence, which it did. Notwithstanding Forest Society's argument that the Subcommittee should not even consider it, the same is true of the Applicant's proposed new Potential Additional Condition to earmark \$25 Million of the Forward NH Fund for tourism-related impacts. *Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations*, Attachment C, ¶ 21. Without a reliable baseline on the potential tourism impacts, the Subcommittee is without sufficient information in the record to evaluate if the \$25 million over 20 years would adequately mitigate the unknown impacts to tourism. Because it was submitted after the record closed, this new proposed condition was not subject to the scrutiny required for a full and true disclosure of the facts.

3. Business and Employment Effect

39. In regards to business and employment effects, the Applicant again criticizes the Subcommittee for placing less weight than the Applicant now apparently does on Mr. Kavet's testimony. The weight the Subcommittee determined was warranted for certain evidence is well within the discretion of the Subcommittee and is not a sufficient basis to warrant rehearing.

40. The Applicant faults the Subcommittee for not deliberating on conditions to mitigate construction impacts or crafting its own conditions to the same effect. Again, the Applicant misconstrues the statute.

41. First, many members of the Subcommittee did in fact deliberate on and/or acknowledge that conditions could mitigate construction effects. *See, e.g.,* Tr. 2/1/18, Morning Session, at 22; Tr. 1/31/18, Afternoon Session, at 36–37. Again, Applicant is drawing an unexplained and artificial distinction between discussion and consideration, as well as limiting when the Subcommittee considers evidence to the confines of deliberations. These distinctions are unreasonable and unlawful.

42. Second, for the reasons explained above and in the Forest Society's objection to the Applicant's premature motion for rehearing, the Subcommittee could have but was not required to further deliberate on specific conditions after it concluded the Applicant had not met its burden concerning the orderly development standard.

4. Land Use and Views of the Municipal and Regional Planning Commissions and Municipal Governing Bodies

43. The Subcommittee spent considerable time deliberating on the proposed project's interference with prevailing land uses, giving due consideration to the views of the municipalities. In its written decision, the Subcommittee concluded that it found the views of the

municipalities to be generally persuasive, at the same time it acknowledged it is not bound by those views. *Decision*, at 275–76.

44. As to its consideration of the “extent to which the siting, construction and operation of the proposed facility will affect land use,” the Subcommittee rightfully focused on the testimony of Mr. Robert Varney and found numerous flaws with his analysis that left the Subcommittee with insufficient information to evaluate how the proposed project would interfere with prevailing land uses. *Id.* at 277–81.

45. Beyond Mr. Varney, the Subcommittee found that the Applicant did not provide sufficient information to permit the Subcommittee to evaluate the impact on land use in the underground portions in Clarksville, Pittsburg, and Stewartstown region. *Id.* at 281–82.

46. It also found that the Applicant failed to provide a satisfactory means and method to regulate the construction, maintenance, and operation of the parts of the project proposed to be constructed underneath municipal roads. *Id.* at 282.

47. In short, as the Forest Society argued, the Applicant did not meet its burden of production, let alone its burden of persuasion. The Subcommittee reached these conclusions after a methodical review of the Applicant’s evidence. Absent sufficient information on how the proposed project may affect prevailing land uses, the Subcommittee cannot reasonably draw conclusions on how conditions could have mitigated these effects. The Subcommittee did not err and exercised its discretion reasonably when it declined to consider the conditions in its final decision in regard to this standard.

II. Site 301.15 is Not Unconstitutionally Vague as Applied Because the Subcommittee’s Decision was not Arbitrary or a Product of *Ad Hoc* Decision-Making

A. Standard for Determining a Statute or Regulation is Unconstitutionally Vague as Applied

48. The Applicant’s other primary argument is that the Subcommittee’s oral and written decision was arbitrary and *ad hoc* in nature such that it rendered Site 301.15 unconstitutionally vague as applied. *Motion for Rehearing*, ¶¶ 47 *et seq.* The Applicant specifically contends that no reasonable applicant for a certificate can determine what is required to meet the “undue interference” standard of Site 301.15 because the deliberations and written decision in this case “never provided a definition to Site 301.15, and never explained *how* the regulation was to be applied (specifically, how 301.09 was to be reconciled with 301.15), *how* the Subcommittee actually applied the burden of proof standard in Site 301.15 or *why* the burden of proof had not been met.” *Id.* (emphasis in original).

49. In making this argument, the Applicant makes only a passing reference to the legal standard for unconstitutional vagueness in footnote 23 of its Motion. The full standard, included below, makes clear that Applicant must satisfy a “heavy burden” to succeed on this argument.

50. ““Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis.”” *In re Bloomfield*, 166 N.H. 475, 480 (2014) (quoting *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). ““Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk.”” *Id.*

51. There are two ways a court may determine a statute or regulation is void for vagueness as applied: (1) it “fails to provide people of ordinary intelligence a reasonable

opportunity to understand what conduct it prohibits" or (2) it "authorizes or even encourages arbitrary and discriminatory enforcement." *State v. Porelle*, 149 N.H. 420, 423 (2003); *see also Macpherson v. Weiner*, 158 N.H. 6, 11 (2008).

52. "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." *State v. MacElman*, 154 N.H. 304, 307 (2006).

53. For the reasons that follow, Applicant did not satisfy this "heavy burden."

B. The Presiding Officer's Framing of the Deliberations and the Interplay Between Site 301.15 and Site 301.09 was Consistent With the Procedure Anticipated by the Statutory Scheme

54. The Applicant argues that because the key terms in Site 301.15 have no definition, the Subcommittee could have given definitions and explained how the elements of Site 301.09 were factored or weighed in order to make the undue interference finding. As a result, the Applicant further argues, the resulting decision is based entirely on each of the Subcommittee member's individual interpretations of the elements in Site 301.09 and the application of those elements to Site 301.15. *See Motion for Rehearing*, ¶¶ 52, 55, 57.

55. To the contrary, the presiding officer began the discussion of the orderly development standard on the final day of deliberations by laying out a framework that recognized the reasonable and lawful interplay between Site 301.15 and 301.09.

56. The presiding officer began by explaining how, in order to issue a certificate, the SEC must find "[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." Tr. 2/2/2018, Morning Session, at 3–5; RSA 162-H:16, IV(b).

57. He then explained how there are two rules directly relevant to this criterion: Site 301.15 and Site 301.09. He then read Site 301.15 in its entirety.⁵ *Id.* After this, the Presiding Officer explained that the other rule “that’s directly relevant is Site 301.09, which I will not read in full.” *Id.* He further explained that Site 301.09 “refers to the contents of the Application which directs an Applicant to provide a raft of information that in one way, shape or form is related to the criteria that I read from 301.15, which is the way we’re supposed to get at the finding in 162-H:16. Everybody got that? Good.” *Id.*

58. The Subcommittee laid out this same framework twice in its written decision. *Decision*, at 73; 283–85. It explained RSA 162-H:16, IV(b) requires a specific finding be made on orderly development in order to issue a certificate. *Id.* at 283, second full paragraph. It further explained how it was required to and did arrive at its determination on this finding by considering the three overall elements of Site 301.15. *Id.* at 283, third full paragraph.⁶ It found the Applicant had sufficient resources to assure eventual decommissioning of the proposed project and emphasized it “focused on the other elements of Site 301.15.” *Id.* at 283. It then referenced some of the applicable portions of Site 301.09, deeming them “[m]ore specific guidance for reviewing [the Site 301.15 elements].” *Id.* at 284.

59. This framework is an accurate application of the scheme provided by statute and rules, and it is consistent with past SEC precedent and the legislative intent of the statute and rules. Moreover, it is sufficiently clear and logical such that an applicant of ordinary intelligence

⁵ “Site 301.15 [contains the] Criteria Relative to a Finding of Undue Interference, and it says, ‘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.’” Tr. 2/2/2018, Morning Session, at 4 (quoting N.H. CODE ADMIN. RULES Site 301.15)

⁶ “As set forth in detail in the discussion above, the orderly development prong of the [SEC’s] review has a number of elements. Those elements are set out in the [SEC’s] rules, which require consideration of [a paraphrasing and citations to the three elements of Site 301.15].”

would have a reasonable opportunity to understand what is required of it to meet its burden, and it does not authorize or encourage arbitrary and discriminatory enforcement.

60. The Applicant argues that the Presiding Officer should have laid out a definition of the meaning of the terms of Site 301.15. *Decision*, ¶¶ 50–57. It argues that nothing in the rules provides any guidance for an applicant as to the meaning of the terms used in Site 301.15 and no explanation for how the elements of Site 301.09 shall be taken into account in assessing the criteria of Site 301.15. *Id.*, ¶ 51. This is incorrect. As the Subcommittee’s framework makes clear, the SEC shall make its finding as required by RSA 162-H:16, IV by considering the criteria of Site 301.15 based on the evidence submitted per Site 301.09. The Subcommittee explicitly distinguished the elements of Site 301.09 as applicant requirements and the elements of Site 301.15 as criteria that SEC shall assess to arrive at its statutory finding. *See Tr. 2/2/2018, Morning Session*, at 5.

61. While definitions to the words and phrases of these two rules would provide additional guidance to parties and SEC members, that the Subcommittee did not create definitions was not unreasonable or unconstitutional. The vagueness standard is one of reasonableness, not perfection.

62. The Applicant specifically faults the Subcommittee for not defining “region,” and points to arguably conflicting articulations of what the word means by different members during deliberations. *Motion for Rehearing*, ¶¶ 52–55.

63. However, given the large number of topic areas in which Subcommittee determined the Applicant to have provided such non-credible or insufficient evidence, and given the numerous impacts that the Subcommittee noted throughout nearly the entirety of the proposed project, going through the exercise of creating definitions of “region” or “undue interference” would not have provided the clarity that the Applicant asserts is missing.

64. The Applicant claims this failure to provide definitions to terms like “region” and “undue interference” resulted in *ad hoc* decision-making, contrary to *Derry Sr. Dev., LLC v. Town of Derry*, 157 N.H. 441, 451 (2008). This case is inapposite.

65. In *Derry Sr. Dev., LLC*, at issue was a municipal planning board’s denial of an application for site plan approval due to the board’s concerns that the proposed sewage disposal system was, even though the Department of Environmental Services (DES) approved it and the town had enacted no other standards guiding applications, insufficient to ensure the safety and adequacy of the sewage system. *Id.* at 443.

66. The Court reversed the Superior Court’s decision to affirm the planning board’s denial of the application because, according to the Court’s precedent in a strikingly analogous case, DES approval created a presumption that the proposed septic system was adequate, and that presumption was not rebutted for two reasons. *Id.*

67. First, the town had not enacted prior to the meeting the more stringent and specific requirements that it was entitled to enact under its own regulations and state law. The Court specifically emphasized the only applicable regulation in effect states ““an on-site subsurface sewage disposal system may be designed and constructed *so long as* said design and construction fully complies with all applicable requirements of the New Hampshire Code of Administrative Rules; and the applicant has secured appropriate permits for the same from [DES].”” *Id.* at 450 (emphasis and alterations in original opinion) (quoting town’s regulation). Absent more stringent regulations, this regulation provided “the sole guidance for an applicant concerning the town’s requirements for sewage disposal systems.” *Id.*

68. Second, the planning board relied on its own personal judgment that was informed by past experiences and there was no evidence in the record suggesting the proposed system created an identifiable danger to down-gradient wells. The Court held that “[a]lthough the

board is entitled to rely on its own judgment and experience in acting upon applications for site plan review, the board may not deny approval on an *ad hoc* basis because of vague concerns.” *Id.* at 451. This decision, it reasoned, was *ad hoc* because it was based on personal opinions of the board members, but there were no specific facts to counter the expert agency opinion that under the specific applicable precedent and circumstances of this case created a presumption that the applicant satisfied its burden. *See id.*

69. Here, the Applicant relies on this case to argue the Subcommittee’s decision was *ad hoc* because it did not define the terms of Site 301.15 or reach a common understanding about the meaning of those terms and, therefore, the decision is nothing more than the result of each member’s personal interpretation and conclusions. This is, the Applicant implies, just like the Derry planning board members’ reliance on their own judgment and experience. However, unlike in *Derry Sr. Dev., LLC*, this Applicant had no benefit of a presumption that it would receive approval just because it got DES permitting or submitted evidence required by Site 301.09; the Subcommittee had before it extensive and specific regulations explaining what factors the Subcommittee would consider and what evidence the Applicant must produce to guide to Subcommittee’s consideration; and the Subcommittee’s conclusions on the elements of both Site 301.09 and Site 301.15 was without question based on extensive evidence well beyond the personal opinions formed by the experiences of the Subcommittee members.

70. Therefore, the case law the Applicant relies on does not support its argument that the Subcommittee engaged in arbitrary or *ad hoc* decision-making. The Applicant has not met its heavy burden to show the Subcommittee engaged in arbitrary or *ad hoc* decision making that would rise to the level of a violation of the Applicant’s due process rights.

C. Applicant Relies on Isolated Individual Statements of Members that Were Made During Deliberations to Allege that the Subcommittee Members Concluded if One or More of the Elements of Site 301.09 Demonstrate Some Negative Effect, the Effect Amounts to Undue Interference with Orderly Development

71. The Applicant alleges that because neither the rules nor the written decision explains how the individual components add up to “undue interference,” the members “apparently concluded that if one or more of those elements demonstrated some negative effect, that amounted to undue interference.” *See Motion for Rehearing*, ¶¶ 58–64. This, the Applicant argues, created a requirement for the Applicant to meet its burden of proof by proving “no effect on [orderly development], or a positive effect on [orderly development], as to each of the elements in Site 301.09.”

72. The Subcommittee made no such decision and imposed no such requirement. Applicant arrives at this misunderstanding by again looking to isolated, decontextualized statements of individual members and ignoring the written decision. It is clear from the deliberations as a whole and the written decision, that after finding that the Applicant did not present sufficiently credible or complete information for the Subcommittee to evaluate the undue effect as guided by Site 301.15 and Site 301.09, all members felt they could not begin to assess whether the inference was undue.

73. The analysis for orderly development does not “stand[] in contrast to RSA 162-H:16, IV(c)” (mandating that in order to issue a certificate, the SEC must find that a facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety). Both RSA subsection (c) and subsection (b) mandate specific findings that the SEC shall arrive at by evaluating specific criteria, and those criteria are addressed by the inclusion of certain information the Applicant must provide. In

short, Site 301.09 guided the Subcommittee’s consideration of Site 301.15, which is the criteria it used to arrive at its finding for RSA 162-H:16, IV(b). *See Decision*, 283-84; *see supra* II.B.

74. Looking to the written decision, which ultimately controls, there is no support for the Applicant’s claim that the Subcommittee applied a burden of proof based solely on the elements of Site 301.15. *See id.; Motion for Rehearing*, ¶¶ 62, 80–81. However, there is of course a burden of production for Applicant provided in Site 301.09. *See N.H. CODE ADMIN. RULES* Site 301.09.

75. Applicant did not meet this burden. The Subcommittee did not conclude that the Applicant failed to meet its burden because “Applicant[] failed to show that there would be no impact on land use, property values, and tourism,” *Motion for Rehearing*, ¶ 63. Instead, the Subcommittee found that, for many elements, the evidence Applicant offered lacked credibility or was otherwise inadequate to allow the Subcommittee to consider further analysis such as the imposition of conditions. *Decision*, at 284–85. Ultimately, therefore, it concluded that the Applicant failed to “carry its burden of proof and failed to demonstrate by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region.” *Id.* at 285.

D. The Subcommittee did not Unlawfully Apply Standards Contrary to the Statute or Rules

76. The Applicant next argues a rehearing is warranted because the Subcommittee applied and sometimes created new standards or criteria that are contrary to Site 301.15 and that appear nowhere in the statute or regulations. *Motion for Rehearing*, ¶¶ 65–83. Notwithstanding the Applicant’s continued flawed reliance on the individual statements of Subcommittee members over the plain language of the written decision, these arguments are unpersuasive and do not constitute sufficient good reason or good cause to warrant a rehearing.

77. First, the Applicant argues the Subcommittee created a rule that the Applicant had to “demonstrate for each of the components in Site 301.09 (and which underlie the criteria in Site 301.15) that there was *no negative impact*, or some *positive impact*,” or it otherwise cannot satisfy its burden. *Motion for Rehearing*, ¶¶ 65–74. The argument is supported by no directly relevant case law or other binding precedent and again relies on selected quotes from individual members that were made during deliberations and a partial summation of the written decision.

78. The Applicant is correct that the Subcommittee’s written decision did include findings of “some positive impacts,” “potential harms,” “discernible effect,” and mere “effects.” *Decision*, ¶¶ 284–85. However, the Subcommittee’s ultimate finding of fact is unambiguously and plainly stated: “Based on the testimony and evidence presented, and after due consideration has been given to views of municipal and regional planning commissions and municipal bodies, we find that the Applicant failed to carry its burden of proof and failed to demonstrate by a preponderance of the evidence that the Project would *not unduly interfere* with the orderly development of the region.” *Id.* (emphasis added). This is consistent with the statutory scheme that demands from the Subcommittee one finding concerning orderly development that is made based on the SEC’s consideration of the criteria of Site 301.15, as guided by Site 301.09; there is nothing in the statute prohibiting the individual members of the Subcommittee, or the Subcommittee as a whole, from making individual findings of fact on certain evidence of criteria in order to conduct its analysis and render its final finding that is specifically required by the statute. This is a reasonable and lawful decision-making process.

79. Second, the Applicant argues the Subcommittee erred and unlawfully failed to apply the principle Mr. Varney relied on in his analysis of effects on land use that construction of a transmission line within an existing “right-of-way” is sound planning.

80. The Subcommittee lawfully and reasonably concluded, “[Mr. Varney failed] to note that it is not the only principle of sound planning nor is it a principle to be applied in every case.” *Decision*, at 277. The Subcommittee reasoned that Mr. Varney lacked credibility because he relied on this principle so heavily that, “[i]n essence, Mr. Varney suggest[ed] that as long as corridor is used for transmission lines, there can never be a ‘tipping point’ where the effect of a transmission infrastructure on the land use becomes too intense.” *Id.* at 277–78.

81. The Subcommittee supported its disagreement with Mr. Varney by looking to other sound principles of land use, such as non-conforming use standard that applies in the zoning context. *Id.* at 278–79 (noting that while it is not legally required to apply the three-pronged analysis for determining if an expansion of a non-conforming use is allowable, it found it informative in this case). This was reasonable and lawful.

82. The Subcommittee is required by law to give due consideration to the views of municipalities. N.H. CODE ADMIN. RULES Site 301.09; Site 301.15(c). Further, the Subcommittee did not conclude the proposed project would unduly interfere with prevailing land use simply because it would be considered a non-confirming use under municipal zoning laws. *See Tr. 1/31/18, Morning Session*, at 30, 43–44 (discussing the concept as part of a larger discussion on views of the municipalities). The Subcommittee is well within its discretion to analogize to zoning law.

83. Moreover, it is not bound by past SEC decisions, especially concerning what sources of law or policy to which past SEC members have resorted to aid their analyses—that is a function very much within the discretion of the SEC. *See RSA 162-H:16, IV* (requiring the SEC give *due* consideration to all *relevant information* before it determines if issuance of a certificate will serve the objectives of the chapter). “Relevant information” is far broader than

merely evidence in the record or principles and case law that has been applied by past SEC members only. There is no legitimate argument that such reasoning is *ad hoc*.

84. For the same reasons, the Subcommittee did not err when it stated “[o]ver-development of an existing transmission corridor can impact land uses in the corridor and unduly interfere with the orderly development of the region” and cited the various ways that could happen here and in other contexts. *Decision*, at 278.

85. It is clear from the deliberations that the Subcommittee employed these standards to evaluate the credibility of Mr. Varney’s analysis. In doing so, the Subcommittee did not, like the planning board in *Derry Sen. Dev., LLC*, create a new standard and require the Applicant to satisfy it during deliberations, which would be arbitrary and *ad hoc* decision-making. *See cf.* 157 N.H. at 444–45.

E. The Subcommittee Made All Relevant and Required Findings of Fact

86. Next, mostly within section VI.D. of its Motion, the Applicant argues that the Subcommittee failed to make sufficient findings explaining how it arrived at its determination that the Applicant failed to satisfy its burden. The Applicant even concludes, “there are no findings of fact supporting the Subcommittee’s conclusions of law.” *Motion for Rehearing*, ¶ 84. This argument is absurd.

87. The only specific findings of fact the Subcommittee must make are those required by RSA 162-H:16, IV, which the Subcommittee must only make if it grants a certificate. The Subcommittee made this final conclusion of fact and law in its written decision: “We find that the Applicant failed to establish that the Project would not unduly interfere with the orderly development of the region.” *Decision*, at 285.

88. More broadly, the written decision comports with the general requirements for decisions of administrative agencies. RSA 541-A:35 requires a final order by an administrative agency “include findings of fact and conclusions of law stated separately.”

89. Case law illustrates the practical interpretation and application of this requirement. For example, in *Appeal of Omega Entm’t, LLC (N.H. State Liquor Comm’n)*, the Court found that when the agency denied the application for a liquor license, it complied with RSA 541-A:35 “in all respects” by reciting detailed background information, summarizing the course of a hearing, including procedures and witnesses, detailing its decision and the reasoning behind the decision, including findings of fact and conclusions of law, and responding to requested findings and conclusions. 156 N.H. 282, 290 (2007). It further held that “[o]ur review of the [commission’s] decision . . . reveals a thorough, well-documented analysis that does not comport with [Omega’s] assertions. The [commission’s] analysis of the information presented by the parties can in no way be characterized as a conclusory summary of the evidence In its decision, the board specifically identified strengths and weaknesses in the evidence, and it connected the evidence presented to its findings in every instance.” *Id.* (quoting with alterations *Appeal of City of Nashua*, 138 N.H. 261, 263–64 (1994)).

90. Here, the Applicant dismisses the vast majority of the opinion as a mere summary of positions: “Although the Order devotes hundreds of pages to summarizing the positions of the parties concerning the various application requirements of Site 301.09, it ultimately concludes, in a very few pages, that the Applicants failed to meet their burden of proof” *Motion for Rehearing*, ¶ 13. That is not a fair characterization. The Subcommittee’s summary of the evidence presented by the Applicant and other parties reflects its determinations on weight, credibility, and relevance. Like the boards in *Appeal of City of Nashua* and *Appeal of Omega Entm’t, LLC (N.H. State Liquor Comm’n)*, the Subcommittee’s decision is more than a mere

recitation of conclusions or summary of evidence; the Subcommittee identifies the strengths and weakness of the evidence and connects the evidence to its ultimate findings. The Applicant can of course disagree with the formatting and writing style of the decision, but that criticism does not warrant much attention, let alone a rehearing.

91. Along these same lines, the Applicant also argues the written decision is invalid because the Subcommittee's findings were not made in public session and violate the Right-to-Know law, RSA chapter 91-A. The Subcommittee did conduct its deliberations and make its final decisions in public session. The Applicant does not argue that the votes were not taken publicly and has presented no evidence that the members of the Subcommittee ever met to deliberate outside of the public meetings in violation of RSA 91-A. RSA 91-A does not require the Subcommittee to hold a vote on every finding of fact, specifically discuss every piece of evidence that members of the Subcommittee may have relied on to reach their individual decision, or to enquire into why each member voted how they did. Instead, the deliberations that occurred before the vote on the application and the votes as they occurred are the decisions required to be made in public session. The decision to deny the application and all deliberations took place in public session, so there was no violation of RSA 91-A.

III. In Arguing the Subcommittee Misconstrued and Overlooked Evidence, the Applicant Does Little More Than Relitigate the Weight and Credibility of the Evidence

92. In section VII of its Motion, the Applicant makes a series of arguments, many of which are arguments it raised in previous sections (which have in turn been addressed in previous sections of this Objection), that amount to little more than arguing the weight and credibility of the evidence concerning the land use, property values, tourism effects, and construction. Determining the weight and credibility of the evidence is well within the discretion of decision-making and is not sufficient good cause or good reason to warrant rehearing. As

such, the Forest Society will not relitigate this case now by responding at length to arguments that were or should have been included in the Applicant's final memorandum.

A. Applicable Standard of Review of SEC's Findings of Fact

93. In reviewing an administrative decision, the Supreme Court will treat the agency's findings of fact as *prima facie* lawful and reasonable. RSA 541:13; *Appeal of Peirce*, 122 N.H. 762, 765 (1982) ("In reviewing an administrative decision, we will treat the agency's findings of fact as *prima facie* lawful and reasonable. We will not substitute our judgment for that of the agency." (internal citations and quotations omitted)). "[T]he 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.

94. "Weighing the evidence is a proper function of the factfinder," as the factfinder is in best position to measure the persuasiveness of evidence and the credibility of witnesses. 93 *Clearing House, Inc. v. Khoury*, 120 N.H. 346, 350 (1980). "A fact finder has the discretion to evaluate the credibility of the evidence and may choose to reject that evidence in whole or in part." *State v. Exxon Mobil Corp.*, 168 N.H. 211, 235 (2015) (quoting *Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack*, 139 N.H. 253, 256 (1994)). In short, "[i]n these matters, judgment is the touchstone, and the board has broad discretion in assessing conflicting evidence, its credibility, and the weight to be given the various portions thereof." *Appeal of Pub. Serv. Co.*, 124 N.H. 479, 484 (1984) (quotation marks and internal citations omitted).

B. Land Use and Municipal Views

95. In regards to this topic, the Applicant yet again argues the Subcommittee erred by "ignoring" its past precedent when it stated that "construction of transmission lines in existing corridors is a sound planning principle [but] it is not the only principle of sound planning, nor is

it a principle to be applied in every case.” *Decision*, at 277; *Motion for Rehearing*, ¶¶ 94–95.

The Applicant faults the Subcommittee for not explaining why the principle does not apply in this case. *Motion for Rehearing*, ¶ 95.

1. The Subcommittee Did Not Ignore or Fail to Apply a Principle of Sound Planning that Mr. Varney Heavily Relied on in his Report or Adopt New Standards or Principles

96. In fact, the Subcommittee did not ignore or fail to apply the principle in this case. It simply found that Mr. Varney’s testimony lacked credibility and reliability because, especially through cross-examination, it became clear that to Mr. Varney, no amount of transmission lines or height would unduly interfere with prevailing land uses, so long as the proposed project would be in an existing right-of-way.⁷

97. It would have been unreasonable for the Subcommittee to strictly apply this principle as the Applicant now suggests. If the Subcommittee were to accept Mr. Varney’s conclusion, Site 301.09 would become meaningless with regard to portions of a proposed project that would be built within an existing right-of-way.

98. To further explain why Mr. Varney’s over-reliance on this principle made his report unpersuasive according to the Subcommittee, the Subcommittee reasonably looked to other principles of zoning law. The SEC process takes the place of most municipal zoning, so it is appropriate to look to zoning law for guidance on what constitutes a change in use. The Subcommittee did not adopt an over-burdening doctrine or the principles and tests of non-conforming use in merely looking to these principles to aid its analysis and critique of Mr. Varney’s testimony.

⁷ For example, he stated his opinion that there would be no undue interference even if a cleared right-of-way would have five transmission lines at a height of 300 feet tall and within 10 feet of a residence. Tr. 9/26/17, Morning Session, at 133–34.

99. Further, as stated before, while the SEC may look to its past decisions to guide its decision-making, neither the written decision nor the records of deliberations are binding precedent. *See RSA 162-H:10, III* (“The committee shall consider, as appropriate, prior committee findings and rulings on the same or similar subject matters, but shall not be bound thereby.”).

100. As it did in its post-trial brief, the Applicant relies heavily on past cases of the SEC and PUC that are not binding and not persuasive authority given the vast difference in the scale and scope of this proposed project and the projects in those decisions.

101. For example, the Applicant relies on the Merrimack Valley Reliability Project (MVRP), a docket in which the SEC concluded the project would not unduly interfere with the orderly development of the region because it would be constructed within an already existing and used right-of-way. *Motion for Rehearing*, ¶ 103. This comparison is nonsensical considering the vast difference between the two projects: the proposed project would be 8 to 15 times longer; would not be a reliability project; would have significantly higher maximum tower heights; would have 32 miles of it in a new right-of-way; and would involve a buried portion.⁸

2. Subcommittee Gave Due Consideration, not Dispositive Effect, to the Role of Municipal Views in the Context of the Land Use Criterion

102. The Applicant claims the Subcommittee did not just give the municipalities’ views due consideration, it gave them “dispositive consideration.” *Motion for Rehearing*, ¶ 54.

103. The Subcommittee’s written decision notes that municipal views shall be given due consideration, but that the SEC is not bound by the views of municipal and regional planning bodies. It further acknowledges that while municipal siting authority over the siting of projects

⁸ Tr. 8/2/17, Morning Session, at 4–7 (acknowledging the Merrimack Valley Reliability Project is a 24.4 mile reliability project for a new 345 kV transmission line from Tewksbury, MA to Scobie Pond Substation in Londonderry with tower heights of 75 to 90 feet and no new right-of-way; *id.* at 7–9 (acknowledging the Seacoast Reliability Project is a 12.9 mile reliability project for a new 115 kV transmission line from Madbury Substation to Portsmouth Substation, with tower heights ranging from 55 to 105 feet and the most common height of 84 feet).

like this has been preempted, the SEC must listen and consider the views expressed by municipalities.

104. This is correct. Consideration of the municipal views is one of the factors explicitly referenced in both the statute and Site 301.15. RSA 162-H:16, IV(B); N.H. CODE ADMIN. RULES Site 301.15(c). In *In re Londonderry Neighborhood Coalition*, the Supreme Court explained that the SEC must give due consideration to the views of municipal and regional planning commissions and municipal governing bodies, including relying upon and giving weight to the views of those governing bodies who oppose or support a project. 145 N.H. 201, 206 (2000).

105. The Subcommittee did exactly this: it gave weight to and in part relied on the views of the municipalities in determining if the proposed project unduly interfered with the orderly development of the region. According to the Subcommittee, the views of the municipalities impacted by this project were nearly unanimous in opposition. *Decision*, at 276–77. The Subcommittee found many of the intervening municipalities to have presented “cogent arguments that construction and installation of the Project will unduly interfere with the orderly development of the region.” *Id.* The Subcommittee found “the views expressed by those municipalities to be generally persuasive.” *Id.* Furthermore, the Subcommittee did not impose some sort of illegal “numbers game.” Rather, it reasonably determined the weight and consideration the municipal views were due by making a determination as to the credibility of those views as well as the consistency of those views across a large number of municipalities.

106. It was also reasonable for the Subcommittee to rely on the Municipal Group 1 South, 2, 3 South and 3 North’s brief to aid its analysis and determination of the credibility and accuracy of Mr. Varney’s reports. It is of course within the discretion of the Subcommittee to

find this argument more persuasive than the Applicant's cross-examination of municipal witnesses. *Motion for Rehearing*, ¶ 126, n. 45.

C. Property Values and Tourism

107. As explained above, the Subcommittee was required to consider many factors in evaluating whether the proposed project would unduly interfere with orderly development. This included consideration of property values and tourism. In section VII.B through section VII.C of its Motion, the Applicant does nothing more than relitigate the credibility and reliability of the testimony and reports of Dr. Chalmers and Mr. Nichols. Its arguments could and should have been made in its final memorandum or brought out through the Applicant's redirect of its witnesses.⁹ A mere rehashing of arguments is not good reason or good cause to warrant rehearing. See *O'Loughlin v. N.H. Pers. Comm.*, 117 N.H. 999, 1004 (1977); see also *In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981). Further, determinations of credibility and reliability of testimony and evidence is well within the discretion of this Subcommittee. See *supra* discussion at ¶¶ 93–94.

D. Construction

108. The Applicant's arguments concerning the Subcommittee's findings related to evidence concerning construction are similarly unpersuasive and do not constitute good reason or good cause to warrant rehearing.

109. First, the SEC is not bound by its past decisions. See RSA 162-H:10, III.

110. Second, the Applicant is incorrect to suggest that the Subcommittee, pursuant to its rules, has no authority to consider construction and construction-related traffic concerns under orderly development. Pursuant to Site 301.15, in determining whether the proposed project

⁹ For this reason, the Forest Society will not rehash its own arguments concerning the lack of credibility and unreliability of the testimony and reports of these witnesses. But, by this Objection, it does hereby incorporate by reference those arguments.

would interfere with orderly development, the Subcommittee shall consider the extent to which the siting, *construction*, and operation of the proposed facility would affect land use, employment, and the economy of the region and the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility. N.H. CODE ADMIN. RULES Site 301.15. As many parties, including the Forest Society but especially the municipal parties, pointed out throughout the years of proceedings in this docket, it is difficult if not impossible for the Subcommittee or other parties to evaluate the effects and interference of this project on the elements of orderly development because of the significant volume of missing or incomplete information concerning construction plans.

CONCLUSION

111. For the above reasons, the Applicant has failed to demonstrate good cause or good reason to warrant a rehearing. The Subcommittee's findings of fact and ultimate conclusions were lawful and reasonable. All and all, the primary arguments of Applicant's Motion for Rehearing do little more than attack the Subcommittee's determinations on the credibility and reliability of the evidence. Such determinations are well within the discretion of the members of the Subcommittee that heard from over 154 witnesses and reviewed more than 2000 exhibits over the course of 70 days of hearings.

WHEREFORE, the Forest Society respectfully requests that the Subcommittee:

- A. Deny the Applicant's Motion for Rehearing of Decision and Order Denying Application; and
- B. Grant such further relief as deemed appropriate.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,
BCM Environmental & Land Law, PLLC

Date: May 7, 2018

By: 

Amy Manzelli, Esq. (17128)

Jason Reimers, Esq. (17309)

Elizabeth A. Boepple, Esq. (20218)

Stephen W. Wagner, Esq. (268362)

Kelsey C.R. Peterson, Esq. (268165)

3 Maple Street

Concord, NH 03301

(603) 225-2585

manzelli@nhlandlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, May 7, 2018, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.


Amy Manzelli, Esq.