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 AND REQUEST TO VACATE DECISION OF FEBRUARY 1, 2018 AND TO RESUME INCOMPLETE DELIBERATIONS

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 Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations (the "Motion") filed by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the "Applicant"), stating as follows:

I. Summary

Applicant prematurely moved for rehearing of the Subcommittee's decision before the Subcommittee issued any final written decision. Seeking rehearing for a not-yet-written decision is an appellate procedure not supported by New Hampshire law and contrary to general principles of administrative law. Lacking the Subcommittee's findings of fact and rulings of law that will be contained in the written decision, Applicant has cherry-picked lines from transcripts to support its characterization of the oral decision the Subcommittee reached. The Motion is a thinly veiled attempt to put pressure on the Subcommittee by belatedly sweetening the deal and unlawfully introducing new evidence and arguments concerning conditions, even though the

record is closed and this is material that Applicant could have included before the record closed. As a consequence of electing to seek rehearing prematurely, the Subcommittee should either accept the Motion as Applicant's one and only opportunity to seek rehearing on the final decision or deny the Motion without prejudice and without any consideration of the substantive arguments made therein. Regardless of how it disposes of the Motion, the Subcommittee should not consider any of the new arguments or evidence concerning conditions created or modified after the close of the record and submission of final memoranda.

If the Subcommittee considers the substantive arguments, it should deny the relief sought because Applicant has not proven the Subcommittee made an unlawful or unreasonable decision or mistakenly overlooked matters it should have considered. The Subcommittee acted pragmatically and lawfully when it voted to end deliberations. In the lead up to this vote, the Subcommittee identified and applied the proper standards based on substantial evidence, and reached conclusions reasonably supported by the record. Applicant has not identified good reason or good cause to warrant a rehearing.

II. Applicant Submitted a Procedurally Premature Motion in an Unlawful Attempt to Introduce New Evidence, Arguments, and Conditions After the Record Closed and Before the Subcommittee Issued its Written Decision

1. Applicant's Motion for Rehearing is premature. The Subcommittee has yet to issue its final written decision, and New Hampshire law and common sense dictate that a party to an SEC proceeding cannot file a motion for rehearing of a final SEC decision based upon the transcripts of deliberations alone and then file a second motion for rehearing when the final written decision is issued.

2. The Forest Society objects and requests that the Subcommittee either accept this premature Motion as Applicant's one and only motion for rehearing of the final decision of the Subcommittee to deny the certificate or, in the alternative, deny the Motion without prejudice

and permit Applicant to file a new motion for rehearing after a written decision is issued. In either event, the Subcommittee should not give any consideration to Applicant's new arguments and evidence concerning conditions.

A. The Motion is Premature: Applicant Cannot Move to Rehear the Final Decision to Grant or Deny the Certificate Until the Subcommittee Issues its Written Decision

3. Applicant argues that "[u]nder the law and relevant facts, the Applicant[] is not required to wait until a written order is issued to move for reconsideration of the Subcommittee's decision . . . ." *Motion for Rehearing*, at ¶ 3. In support, Applicant challenges the merits of the decision at the same time it, by footnote, purports to preserve its right to challenge the merits of the Subcommittee's final decision when the written decision is issued. *Id.*, at ¶ 3, n. 6. In short, Applicant is trying to get at least two attempts at moving to rehear the same decision.

4. First, Applicant's interpretation of the procedure for challenging the SEC's final decision on an application is unsupported by the statute and rules governing the SEC, New Hampshire case law, or the principles of administrative law.

5. Applicant identifies no statute or rule explicitly permitting it to effectively appeal a final decision twice: once based on the oral deliberations and once based on the written decision. *See id*, at.¶ 3. Instead, Applicant quotes and emphasizes particular words in RSA 541:3. But even this does not support Applicant's interpretation.

6. RSA 541:3 provides: "Within 30 days after *any* order or *decision* has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order . . . ." (Applicant's emphasis added).

7. Applicant is correct that RSA 541:3 allows a party to file a motion for rehearing after any order or decision. But it does not permit a party to file multiple motions for rehearing of

the same decision. RSA Chapter 162-H and the SEC Rules demonstrate that in this case the final decision is the written decision. The deliberations are merely the process by which this ultimate decision was reached, a decision which the Presiding Officer explained in advance would be in writing and issued by March 31, 2018.

8. The rules further support this conclusion. Site 202.28(a) provides that the SEC "shall make *a* finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and issue *an* order pursuant to RSA 541-A:35 issuing or denying a certificate." The use of the singular suggests the Subcommittee shall make one final decision to deny or grant the certificate.

9. The reference to RSA 541-A:35 means this final decision must be in writing or stated in the record, not both. RSA 541-A:35 ("A final decision or order adverse to a party in a contested case shall be in writing *or* stated in the record." (emphasis added)). RSA 541-A:35 details the structure that final decision must follow: "A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

10. It is clear that the Subcommittee's February 1, 2018, decision is not the final written decision made in accordance with Site 202.28 and RSA 541-A:35. For example, at the time it voted to find the Applicant had not met its burden, the Subcommittee did not explicitly and separately state each finding of fact and the underlying facts supporting it per RSA 541-A:35 immediately prior to taking this vote, although it had touched on these earlier. *See* Tr. 2/1/18, Afternoon Session. Moreover, in the Order establishing the March 31, 2018, deadline by which the Subcommittee must issue a written decision, the Presiding Officer explained that deliberations would be followed by the issuance of a final written decision—he did not provide

for two separate and different decisions, one oral and one written. *See Order Suspending Statutory Timeframe*, at 3 (Sept. 18, 2017).

11. Applicant's interpretation of the procedure for filing motions for rehearing is also inconsistent with the law of this docket. The Subcommittee has taken the position that motions for rehearing of oral decisions made in the midst of the proceedings are procedurally improper and the "proper and procedurally accepted avenue [for such motions] is through filing *a motion for rehearing of the final decision*." *Order on Motion for Rehearing of Rulings from the Bench*, at 2 (emphasis added).

12. Applicant's interpretation is also inconsistent with New Hampshire case law. In *Appeal of Northern New England Telephone Operations, LLC D/B/A Fairpoint Communications – NNE*, the Supreme Court held that a party is not required by RSA Chapter 541 to file a motion for rehearing for every decision in an administrative proceeding in order to preserve that issue for an appeal of the final decision. 165 N.H. 267, at 271– 72 (2013). Therefore, Applicant is not required to file a motion for rehearing of the February 1, 2018, decision and would not have lost any opportunity to challenge any issue raised by that decision by waiting for the final written decision to be issued.

13. The general principles of administrative law similarly do not support Applicant's interpretation. In state and federal courts, in both civil actions and appeals of administrative decisions, it is widely recognized that a motion for rehearing or reconsideration filed after a final oral decision but prior to the entry of the final written decision is premature. *See, e.g., B-3 Props., LLC v. Lasco*, 517 B.R. 889, 894 (N.D. Ind. 2014) ("While a premature motion for reconsideration (e.g. one filed after an oral ruling, but before the Rule 58 written judgment has issued) tolls the timing deadline, this happens only if the motion challenges a final ruling." (emphasis in original)); *In re Estate of Zimbrick*, 453 So. 2d 1155, 1157 (Fla. Dist. Ct. App.

1984) (describing a motion for rehearing filed after an oral decision but before the final written decision as premature and a nullity).

14. Furthermore, it is a general principle of administrative law that premature interruption of the administrative process should be avoided. *See generally* 5-43 Administrative Law § 43.02 (2017) (discussing the principle in the context of the finality, ripeness, and exhaustion doctrines).

15. By filing a motion for rehearing prior to the issuance of the final written decision, Applicant has prematurely interrupted the administrative process. By the same token, it would be premature adjudication for the Subcommittee to consider Applicant's substantive arguments before it issues its written decision.

16. Such a decision could lead to unintended consequences.

17. For example, it could open the door to two appeals: one based on a denial of the motion for rehearing of the final decision as articulated in the transcripts of deliberations and one based on a denial of a motion for rehearing of the final decision as articulated in the written decision. By requiring one final decision, the Legislature intended to avoid this absurd result.

18. Further, such a decision could also have a dangerous chilling effect on future SEC deliberations. As discussed, the merits of Applicant's arguments rely on isolated statements of individual Subcommittee members, usually presented with little or no context. If any statement made by a Subcommittee member during deliberations could be later taken verbatim as an appealable finding of fact, Subcommittee members would understandingly be afraid to honestly and openly wrestle with the application of the law to the facts for fear that any utterance or even a mere question could be characterized as a factual finding and attributed to the Subcommittee as a whole. Surely this is not the process the Legislature intended when it provided for public deliberations prior to a final decision.

B. The Subcommittee Should Treat this Premature Motion as Applicant's One and Only Motion for Rehearing of the Final Decision or, Alternatively, Deny the Motion for Rehearing Without Prejudice

19. Because Applicant's Motion is premature, the Subcommittee should accept this Motion as Applicant's one and only motion for rehearing on the final decision.[1]

20. In deciding this issue in the context of notices of appeal, motions for reconsideration, or motions for rehearing that a party filed after the oral decision but before the final written decision is signed and entered, other courts have held that such a motion is timely but premature and perfected only upon issuance of the final written decision. *See, e.g., In re White*, 587 A.2d 928, 930 (Vt. 991) (a notice of appeal filed after the oral decision but before the written decision is premature and shall be treated as if filed on the day of the entry of judgment); *Reuter v. Citizens & N. Bank*, 599 A.2d 673, 676 (Pa. Super 1991) (even though a party appealed a verdict prior to the entry, and a party in Pennsylvania may not appeal a non-jury verdict until judgment is entered, the court held that its appellate jurisdiction was perfected upon docketing of a final judgment).

21. As such, the party who filed prematurely has preserved its right to appeal, but is precluded from filing another motion challenging the same decision in a different form. *See, e.g., McCulloch Motors Corp. v. Oregon Saw Chain Corp.*, 245 F.Supp. 851, 853 (1963).

22. Alternatively, if the Subcommittee declines to apply this procedure, the Subcommittee should deny the Motion without prejudice because it is procedurally defective. *See, e.g., In re Estate of Zimbrick*, 453 So. 2d at 1157 (treating the premature motion as a nullity).

[1] This would not prohibit the Forest Society or other parties from objecting to this Motion and submitting further substantive arguments when the written decision is issued. This is because the Forest Society is not the party that has prematurely filed; in submitting this Objection, the Forest Society is merely objecting to Applicant's premature filing and arguments made therein. Looking to Site 202.14, the Forest Society and all parties who have not prematurely filed a motion for rehearing should be given 10 days after the Subcommittee issues its written decision to respond to Applicant's substantive arguments with the benefit of the written decision.

III. The Subcommittee Should not Consider any New Arguments or Evidence Concerning Conditions Included in this Motion for Rehearing Because the Record has Closed

23. By its Motion, Applicant attempts to put into the record tens of new proposed conditions of approval, many of which contain material changes to the application, and because the record has closed the Subcommittee should not consider any of them.

24. For examples of material changes to the application, Applicant proposes to rearrange the Forward NH Fund to sweeten the pot for some select stakeholders in hopes of further pressuring the Subcommittee to reconsider. As another example, Applicant proposes now to use horizontal directional drilling (HDD) (rather than trenching) to install the proposed line through portions of Plymouth and Franconia.

25. The Applicant provided two types of newly proposed conditions of approval. First, in Attachment A to the Motion, Applicant proposes a set of conditions of approval which stem from the conditions of approval Counsel for the Public (CFP) proposed originally, but which the Applicant has since revised to its liking. Second, in Attachment B to the Motion, Applicant proposes a different and brand new set of conditions of approval, unbelievingly suggesting that it is not actually proposing the conditions of approval, but instead characterizes them as "examples of additional conditions the Subcommittee could impose, based on the existing record, to address the specific concerns that were raised during deliberations, as well as others that could be raised during [renewed deliberations]." *Motion for Rehearing*, at 2.

26. In footnote three on page two of its Motion, Applicant states it is "not seeking to reopen the record but [is] including these conditions as examples of what the Subcommittee could do, and could have done, based on what is already in the record and the powers it has under the statute and regulations." *Id.* at 2, n. 3.

27. Appreciating now that it made a miscalculation as to meeting its burden of proof, Applicant is trying to get before the Subcommittee new evidence and arguments that it could have and should have introduced prior to the close of record or included in its final memorandum.

28. The closed record is void of evidence supporting the majority of the newly proposed changes to the application and conditions of approval. Applicant did not present before the record closed any information that allocating a certain amount of money would somehow cure the concerns the Subcommittee discussed with respect to the orderly development standard. Moreover, some of the concerns stemmed from a lack of credible information, which cannot be solved with additional and/or re-allocated money. Similarly, Applicant did not present any evidence before the record closed of an alternate route that would use HDD through Plymouth and Franconia.

29. The rules prohibit the Applicant's current approach for a "re-do" with new information after the oral decision. Site 202.26(a) provides that "[a]t the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record, except as allowed by [subsection b] . . . ," a subsection that is not applicable here. The conditions listed in the two attachments and referenced throughout the motion amount to "other evidence, testimony, exhibits, or arguments." Applicant's attempt to dress up this new material as mere suggestions or examples is an unlawful attempt to evade this clear law.

30. As such, regardless of how the Subcommittee rules on the Motion for Rehearing, it should not consider and should strike from the record all attachments and statements containing and any references to any evidence or arguments of new or modified conditions of approval and/or material changes to the application.

IV. The Subcommittee did not Act Unlawfully or Abuse its Discretion by Voting to End Deliberations

31. The Applicant argues the Subcommittee's decision to end deliberations was unlawful, unjust, unreasonable, an error of law contrary to the statute and regulations that govern the SEC, and so arbitrary and capricious as to constitute a denial of due process. *Motion for Rehearing*, at ¶ 10. This argument is meritless.

A. Subcommittee did not Violate the Statute or Rules Governing the SEC

32. The statute and rules governing the SEC do not prohibit the Subcommittee from terminating further deliberations if it determines Applicant has not met its burden.

33. Applicant's argument to the contrary is premised on Applicant's flawed assumption that the Subcommittee may consider evidence only during oral deliberations and only when explicitly and verbally applied to each standard, which in turn must be reviewed independently from the other.

34. Site 202.28(a) is not a requirement for the Subcommittee members to collectively and explicitly verbalize during deliberations all of their factual findings as applied to all of the criteria of in RSA 162-H:16, IV and Site 301.13 through 301.17.

35. Because a rule may not be interpreted to contravene its authorizing statute, *In re Appeal of N.H. DOT*, 152 N.H. 565, 571 (2005), the plain language of Site 202.28 must be read to effectuate the intent of the statutory provisions that authorize it. The statutory authorities listed for Site 202.28 are: RSA 162-H:10,VI and VII[2]; RSA 162-H:16, IV; and RSA 541-A:35. Reading these authorities and Site 202.28(a) together, there is no support for Applicant's position.

[2] Section VII is the mandate for the SEC to adopt rules in accordance with the statute.

36. RSA 162-H:10, IV states, "[the SEC] shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration."

37. Because deliberations generally occur after the close of the record, and no information may be received after the close of the record, this language anticipates a process whereby the SEC considers the evidence and criteria throughout the hearings and requests further information whenever necessary to aid this process. Here, the Subcommittee's extensive questioning of witnesses, including numerous questions about specific conditions and requests for further information, is evidence that the Subcommittee considered and applied all the relevant evidence to all the criteria throughout the hearing.

38. RSA 162-H:16, IV requires only "*due* consideration" from the Subcommittee of all relevant information before it determines if issuance of a certificate will serve the objectives of the chapter. (emphasis added). The inclusion of the modifier "due" demonstrates that the Legislature intended for the Subcommittee to have discretion as to how much and in what manner it considers the evidence and applies it to the statutory criteria.

39. When, as here, a Subcommittee has reasonably found during its deliberations that an applicant has not met its burden of proof with respect to one standard, standards not yet considered during deliberations are not due any consideration.

40. The remaining plain language of RSA 162-H:16, IV provides that if the Subcommittee chooses to "issue a certificate," then it "shall find that":

> (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
> (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to

> the views of municipal and regional planning commissions and municipal governing bodies.
> (c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
> (d) [Repealed.]
> (e) Issuance of a certificate will serve the public interest.

Therefore, the final decision does not need to include specific findings on all criteria if the SEC determines that a certificate should not issue based on its consideration of all relevant information as applied to one of the four required findings.

41. Finally, RSA 541-A:35, as previously discussed, refers to the specific requirements and form of the written decision.

42. Reading these statutory sections and Site 202.28 together, the statute and rules governing the SEC process do not require the Subcommittee to make verbal findings relevant to all criteria before concluding deliberations.

B. Similarly, the Subcommittee did not err by not Explicitly and Verbally Considering during Deliberations how any Given Condition Could Address Concerns as to all Criteria

43. Applicant argues the decision to end deliberations was in error because the Subcommittee did not consider whether the conditions could have addressed issues associated with each of the statutory findings, including orderly development.

44. The Applicant miscomprehends the SEC's authority with respect to conditions. It is a permissive authority, something the SEC may or may not exercise. It is not a mandatory authority. Because the SEC *may* impose conditions of approval means neither that the SEC must consider imposing conditions nor that it must impose them.

45. As discussed above, there is no such requirement to explicitly and verbally consider each piece of evidence, including conditions, as applied to all criteria. The statute and rules do not govern the specific process for deliberations and they do not limit the SEC to

"considering" the evidence only during deliberations. It is clear from the questions Subcommittee members asked during the hearings that the Subcommittee was actively considering conditions proposed or that it could itself propose throughout the entire process.

46. Moreover, it would have been inefficient and illogical for the Subcommittee to discuss all possible conditions during deliberations after it determined part way through its step-by-step application of the criteria that Applicant had not satisfied its burden based on the evidence presented.

47. RSA 162-H:4 supports this reasoning by listing 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," and followed by the directive to "[d]etermine the terms and conditions of any certificate issued under this chapter." RSA 162-H:4, I.

48. 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.[3] *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.

49. Within its specific substantive arguments regarding how conditions could have addressed each of the elements of orderly development (property values, tourism, business and

[3] 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.

employment effects, land use), Applicant repeatedly and curiously draws a distinction between discussing a condition and deliberating about a condition, as well as proposing versus actually discussing or deliberating on conditions. *Motion for Rehearing,* at ¶¶ 14–27. For example, Applicant states, "At several points during those preliminary deliberations, members of the Subcommittee discussed the possible consideration or imposition of conditions relating to the criteria underlying the ODR finding, but never actually deliberated over such conditions". *Id.*, at ¶ 20.

50. Applicant never attempts to explain these distinctions. In listing examples of Subcommittee members *proposing* to *discuss* conditions, Applicant is drawing distinctions between discussion and deliberation that are not supported by the statute, rules, or the common understanding of the terms.

51. The Applicant's citations to the statistics on the number of conditions imposed by the SEC in past decisions are also unpersuasive. *Motion for Rehearing,* at ¶¶ 10–11. 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 certificate. That is neither a valid reason to grant a certificate nor good cause or reason to warrant a rehearing.

52. Ultimately, what Applicant is really doing here is taking issue with how much weight the Subcommittee gave the evidence, including the proposed conditions. Applicant is certainly entitled to do this, and the Forest Society directly addressed these arguments in its final memorandum and does so again in Section V of this Objection. But that is not the same as arguing a motion for rehearing is warranted because the Subcommittee violated the statute and rules and was required to explicitly and verbally consider all conditions as applied to all the criteria during the deliberations.

C. The Subcommittee's Decision to End Deliberations was not Premature

53. The Subcommittee's decision to end deliberations after it determined by vote that Applicant had not met its burden to the orderly development criteria was not premature; it was a reasonable and prudent decision consistent with good judicial practice.

54. The Subcommittee did not abuse its discretion in voting to end the proceedings on February 1, 2018. The statute and rules give the Chairman and the Subcommittee as a whole considerable discretion in conducting the hearing, including deliberations. *See* RSA 162-H:4, V; N.H. CODE ADMIN. RULES Site 202.02

55. The Applicant's frequent citations to how past SEC Chairs conducted the deliberations are not persuasive because the SEC is not bound by past SEC decisions, particularly when the *decision* at issue is how to facilitate the deliberative process. *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.").

56. In a civil action, when applying a multi-part test in which one party bears the burden of satisfying all or some of the conditions to make its claim, it is a common and efficient judicial practice for a judge to decline to consider further factors if he or she concludes that party has met its burden on one of the factors. *See, e.g., Pratt v. Town of Windham*, 2004 DNH 150 ("Because Detective Foley did not interfere with Pratt's relationship with Joey, nor intentionally cause her distress without justification, nor otherwise engage in conduct that shocks the conscience, no substantive due process violation occurred. Therefore, it is not necessary to consider the remaining elements of qualified immunity nor the lack of evidence to support supervisory and municipal liability."); *Jaffe v. Catholic Med. Ctr.*, 2003 DNH 198 ("Because Dr. Jaffe cannot carry his burden of proof to show a material factual dispute as to whether he was disabled, the first element of his ADA claim, it is not necessary to consider the remaining

elements."); *In re Perkins*, 147 N.H. 652, 656, 798 A.2d 596, 601 (2002) ("Because the petitioner's reliance was not reasonable, we need not analyze the remaining elements of estoppel.").

57. Or, as one of the engineers on the Subcommittee more succinctly put it:

> But, also, I'm an engineer, too. I'm a realist. We essentially have a four-legged stool, instead of the proverbial three-legged stool, and we know, as of this morning, I think we all know how we feel on at least one of those legs. And you need four legs to stand up in this case.

Tr. 2/1/18, Afternoon Session, at 9.

58. The Applicant even goes so far as to argue that because the Subcommittee did not deliberate exactly the way the Applicant believed the deliberation should proceed, "the Subcommittee has no ability to make the required findings." *See Motion to Rehear*, ¶ 36. After having presided over 70 hearing days, hearing from scores of witnesses, and reviewing 21 final memoranda consisting of hundreds of pages, it is absurd for the Applicant to suggest the Subcommittee has no ability to make the required findings. And without a final written decision, it is frustrating and inefficient to respond to the Applicant's claim that the Subcommittee failed to provide on the record an adequate basis upon which the Supreme Court could review the Subcommittee's decision. The Supreme Court will have before it the final written decision, which presumably will contain the required factual findings.

V. Applicant's Arguments that the Subcommittee's Decision Lacked Substantive Evidence or Was Based on a Misapplication of the Burdens are Without Merit and not Sufficient Good Reason or Good Cause to Warrant a Rehearing

59. If the Subcommittee does choose to address Applicant's substantive arguments, then it should deny the Motion because Applicant has not demonstrated sufficient good reason or good cause to warrant rehearing.

60. "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 invite reconsideration upon the record to which that decision rested." *Dumais v. State of N.H. Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted upon a finding of "good reason." *See* RSA 541:3. A motion for rehearing must be denied where no "good reason" or "good cause" has been demonstrated. *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).

A. The Subcommittee Properly Allocated the Burdens of Proof

61. Applicant argues the Subcommittee failed to "properly deliberate" with respect to its conclusion that Applicant "had failed to meet [its] burden to show that the facility would not unduly interfere with [the orderly development of the region" because it "misconstrued the standard to which the burden of proof applied." *Motion for Rehearing*, ¶ 44. This argument is simply without proof or support and does not constitute sufficient good cause or reason to warrant a rehearing.

62. Applicant bears the burden of proving facts sufficient for the Subcommittee to make the findings required under RSA 162-H:16 by a preponderance of the evidence. *See* N.H. CODE ADMIN. RULES Site 202.19(a) and (b). The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence. *Id.* at Site 202.19(b). Therefore, Applicant was required to prove it had satisfied the four criteria of RSA 162-H:16, IV. While the Subcommittee could have denied the Application by finding the Intervenors had affirmatively established, for example, that the proposed project unduly interfered with the orderly development of the region, it was just as lawful and permissible for the Subcommittee to have concluded, as it did, that the Applicant had not met its burden to produce sufficient

evidence and prove the proposed project would not unduly interfere with the orderly development of the region.

63. Applicant's argument on this point is rife with *non sequiturs*. The fact that the SEC apparently has never before denied an application based on the orderly development finding is not good cause for a rehearing or even a remotely reasonable reason to conclude the proposed project would not unduly interfere with the region. It should go without saying that the SEC may deny a certificate based on any of the required criteria, so long as the evidence reasonably supports that finding.

64. Applicant also attacks the Subcommittee for not defining during deliberations the term "undue interference" or how the "region" should be viewed.

65. Where the Legislature has chosen not to define a term in statute, it shall be presumed it intended to defer that meaning and application of that term to the agency charged with the administration of the statute; and in exercising this discretion, the agency should be afforded great deference. *See Appeal of Hampton Falls*, 126 N.H. 805, 809 (1985). The only time this deference shall not be afforded is if the agency's interpretation or application is "plainly incorrect" or "clearly conflicts with the express statutory language." *Id.*

66. Moreover, even if the Subcommittee did not articulate a definition of undue influence, it is clear from its deliberations that each Subcommittee member considered all of the criteria stated in the rules to determine as a whole if the Applicant had met its burden to prove there would no undue interference. That reflects a consideration of whether the evidence showing an undue interference or the lack of evidence showing no undue interference for each of the criteria in the rules is excessive or can be overcome. Again, to the extent the ultimate factual findings of the Subcommittee are unclear, that is more reason for all parties to wait for the Subcommittee to state its specific findings in the written decision.

67. Applicant is wrong to suggest that the Subcommittee concluded the Applicant did not meet its burden because it concluded the "Project [did not] show that it will not interfere with orderly development at all . . . ." *Motion for Rehearing*, ¶ 45. The transcript shows that nearly every member of the Subcommittee determined the Applicant had not shown the interference was not undue—the Subcommittee did not merely conclude that there was *some* impact or that the Applicant failed to meet its burden because it did not prove the proposed project had no impact *at all*. *See, e.g.*, Tr. 2/1/18, Morning Session, at 10[4], 14[5], 18[6], 21[7], 25[8], 29[9], and 32.[10]

68. Further, the Applicant's suggested definition of "undue"—apparently meaning the same as extreme or disproportionate in its scale and score—is a definition completely unsupported by the language of the statute and rules. It is not even supported by the dictionary definition that the Applicant cites in its final footnote.

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[4] Subcommittee Member Way stated explicitly that he considered whether the project would *unduly impact* orderly development, not just impact. Specifically, he stated: "So I guess with regards to whether -- my view at this point, without making anything formal, if someone came up to me and said, "Will this project unduly impact orderly development?" I don't think I'd have a clear answer. And to me, that suggests that the burden of proof hasn't been met."

[5] After summarizing her findings on each sub criterion of the orderly development standard, Subcommittee Member Dandeneau summarized her opinion based on her collective consideration of the criteria and explicitly considered whether there was an undue impact or interference, stating as follows: "And so I guess just in summary I would say that I'm in a similar position as Mr. Way, in that I'm not entirely sure that the Applicant has met their burden of proof to show that the Project will not unduly interfere with the orderly development of our region."

[6] Similarly, Subcommittee Member Weathersby stated, "So I also agree with my colleagues that the Applicant has not met its burden to show that the Project will not unduly interfere with the orderly development of the area."

[7] While he may have substituted unreasonable for undue, Subcommittee Member Oldenburg also considered his conclusions as to each criterion collectively and concluded, "I would say that they haven't met their burden of proof overall and that they will -- it will have an unreasonable impact on orderly development."

[8] Subcommittee Member Wright also discussed his conclusions as to each specific criterion and then viewed them all collectively ("take all of that into my mind") and concluded: "I think when I take all of that into my mind, I would feel that the Applicant has not met the burden of proof with respect to unduly interference with orderly development."

[9] In consideration of all the criteria for orderly development "overall," Subcommittee Member Bailey even paused to make sure she articulated her finding using the phrase "unduly interfere," stating, "So, overall, I think that the evidence that we have lacks the information that I would need to make a finding that there is not an undue -- let me get the statute right... that the site and facility will not unduly interfere with the orderly development of the region."

[10] And, like all the Subcommittee Members before him, the Chairman viewed each of the components collectively and concluded and applied the correct standard, stating, "I do not believe the Applicant met its burden to demonstrate that the Project would not unduly interfere with the orderly development of the region."

69. As to its claim that the Subcommittee did not define "region," that allegation is simply not true. For example, Subcommittee member Way made this statement about what he determined to be the "region": "Once again, I see the communities as summing up to the regions." Tr. 2/1/18, Morning Session, at 9. Subcommittee member Wright made this comment, which suggests the Subcommittee did thoroughly consider and debate the meaning of region: "I won't get into town versus region. I think that's already been covered." *Id.* at 24. And finally, Subcommittee member Bailey summarized her understanding, which is consistent with the others, as follows: "And by 'region,' my thoughts would be the region that the transmission line would be constructed through." *Id.* at 29. Yet again, to the extent the collective finding of the Subcommittee members on a certain point—like the definition of region—is unclear from reviewing the individual statements of Subcommittee members, that is exactly the sort of clarification one would expect from the written decision—further underscoring the prematurity of Applicant's Motion.

70. Next, Applicant specifically argues that the Subcommittee "treated the various components of the criteria to be addressed under the undue interference finding in isolation, overlooking the fact that an impact to one or more components does not amount to a finding of *undue* interference." *Motion for Rehearing*, ¶¶ 46, 49–52.

71. No applicable rule or statute requires the Subcommittee to evaluate the criteria of Site 301.15 collectively or in connection with the component parts of the information included in the Application pursuant to Site 301.09.[11]

72. Even if this was required, this Subcommittee did exactly this and the Applicant cannot support its contrary allegation. Applicant has mischaracterized the deliberations by

[11] Site 301.09 describes Applicant's burden of production as to orderly development and Site 301.15 lists criteria relative to the finding the Subcommittee must consider with respect to undue interference with orderly development.

pointing to specific comments or questions of individual Subcommittee members that could possibly support its interpretation of what the Subcommittee concluded. But if one reviews all transcripts of the deliberations, it is clear the Subcommittee did exactly what the Applicant claims it did not: consider all of the components of orderly development listed in Site 301.09 and 301.15 as part of the larger whole with respect to the effect that the proposed project would have on the orderly development of the region.

73. For example, on the morning of day three of the deliberations, after a full day of deliberating exclusively on orderly development, the Chairman opened a discussion about how each Subcommittee member was presently thinking about orderly development by framing it in a way that made sure all members understood the components of Site 301.09 and 301.15 are related and should be considered collectively to guide the Subcommittee in determining if the Applicant satisfied its burden regarding RSA 162-H:16, IV. *See* Tr. 2/1/18, Morning Session, at 3–5.[12] Later, in summarizing his own views, the Chairman explicitly considered and appeared to collectively consider his conclusions on all of the criteria, as evidence by this statement: "Now, those are subcategories of a larger category, and if things were overwhelming in another direction, maybe those could be overcome." Tr. 2/1/18, Morning Session, at 31.

74. The Chairman was not alone in viewing the criteria of Site 301.15 and Site 301.09 collectively. In summarizing her or his findings on orderly development, each member methodically went through each criterion and then made a summary statement of the overall opinion, using the following words or phrases that suggest that each member made an ultimate

[12] The Chairman first read the criterion concerning orderly development found in RSA 162-H:16, IV(b). He then explained there were two rules that are "directly relevant to this criterion." He then read and or referred to those two rules: Site 301.15 and Site 301.09. He then explained how Site 301.09 "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."

conclusion by collectively considering the criteria: “overall,” “all in all,” “take all of that into my mind,” and “in summary.” *See supra* notes 6–12.

75. At no point did any Subcommittee member point to a single impact and conclude, therefore, that the Applicant had not met its burden or that the Intervenors proved the proposed project would cause undue interference. To come even remotely close to supporting its allegation, the Applicant takes individual members’ statements out of context and ignores inconvenient law.

76. For example, in paragraph 55, Applicant provides this quote from one Subcommittee member’s summation of her views of the impact of the proposed project on the economy: “I agree that I think that the Applicant demonstrated that it will have some—the Project will have *some positive effect* on the economy. Therefore it won’t unduly interfere with the orderly development because *it’s not going to be a negative impact on the economy*.” *Motion for Rehearing*, at ¶ 55 (quoting Tr. 2/1/18, Morning Session, at 26). Put in context, it is clear that Subcommittee member Bailey’s second sentence is a summation of the Applicant’s argument, as she saw it. She made this statement as part of her consideration of the evidence the Applicant has produced regarding economic impact against the lack of evidence, as well as the evidence Intervenors introduced; she is not making a final finding on any particular criterion of orderly development.

77. In a footnote to this same paragraph, Applicant claims the Subcommittee misunderstood the weight that should be afforded to the views of municipalities. Putting aside the fact that Applicant again supports this claim by cherry-picking isolated statements, Applicant also ignored the law. RSA 162-H:16, IV(b) specifically requires the Subcommittee give “due consideration” to the views of municipal and regional planning commissions and municipal governing boards. While Applicant made it clear through its cross-examination of the municipal

witnesses its position that the beliefs and views of non-experts are "not evidence," the fact is the statute explicitly requires the Subcommittee consider municipal views and does not require those municipal bodies to hire an expert to articulate their views for them or provide evidence, including expert opinion. *Motion for Rehearing*, at ¶ 55, n. 36. As the Subcommittee is likely to articulate in its written order, it did not simply find that one or two of the municipal views would conflict with the proposed project, it found that the views of a majority of the municipalities would significantly conflict.

B. Applicant's Substantive Arguments Concerning Property Values do not Amount to Sufficient Good Cause or Good Reason to Warrant a Rehearing

78. While Applicant frames them as mere illustrations of why the Subcommittee should have explicitly considered conditions in its deliberations, paragraphs 14 through 27 are really further substantive arguments about how the Subcommittee erred in its deliberations on the components of the orderly development finding. The first of these sections of arguments concerns property value.

79. Applicant argues the Subcommittee erred because the Subcommittee could have and should have considered expanding the property value guaranty and, if it had, it might have recognized that the expansion would address its concerns regarding property values.

80. This speculative argument is not sufficient good cause or good reason to issue a rehearing. Multiple members of the Subcommittee discussed the guarantee, so one can presume they factored this condition into their analyses. *See, e.g.*, Tr. 1/31/18, Morning Session, at 110.

81. Moreover, the fact that this condition was not discussed in a way that meets Applicant's satisfaction goes towards the sufficiency of the evidence and does not rise to the

level of an error that warrants a rehearing. This is just another rehashing of one of many arguments Applicant did, could, or should have included in its final memorandum.[13]

82. Lastly, it is the Applicant's job to present an approvable application. It is not the SEC's job to make an application approvable by crafting elaborate guaranty programs, especially when the Applicant presented no alternatives to the proposed guaranty program. The Applicant could have reacted to Subcommittee questions and cross examination during the hearing by enhancing its guaranty program before the record closed. However, ever-confident in its application, the Applicant chose not to make any changes. Now, it is too late.

C. Applicant's Substantive Arguments Concerning Tourism do not Amount to Sufficient Good Cause or Good Reason to Warrant a Rehearing

83. Applicant repeats the strategy for tourism impacts, but its arguments suffer from the same flaws discussed in the sections above, including that Applicant again selectively quotes from portions of individual statements made by certain Subcommittee members and makes arguments it already did or could or should have made in its final memorandum.

84. Applicant, in effect, primarily argues that the Subcommittee's decision is unreasonable or unlawful because it did not consider how construction impacts on tourism could be mitigated by conditions. In fact, the Subcommittee did discuss how construction impacts could be addressed, in part by imposing conditions. *See generally* Tr. 2/1/18, Morning Session. But Applicant ignores the arguably more significant reason for tourism impacts: impacts on

[13] Applicant's characterization of Mr. Kavet's opinion is also misleading. While Mr. Kavet did state that the guarantee would be enough to compensate affected parties, he also acknowledged shortly thereafter that "who knows how many of those [losses in property value due to aesthetic impact] there might be, but it's inconceivable that there are none." Tr. 10/11/17, Afternoon Session, at 74. Further, CFP ultimately concluded that "no benefits to private property value are anticipated from the Project" and that "[w]hile the extent of negative impacts to property values is difficult to quantify, the evidence supports a finding that property values will be negatively affected by views of the Project in the range of 1-6% or higher for scenic view properties." *Counsel for the Public's Post-Hearing Brief,* at 140.

aesthetics.[14] This is probably because Applicant has not even *suggested* a condition that would even begin to address the aesthetic impact of the proposed project. *See Motion for Rehearing*, Attachment C.

D. Applicant's Substantive Arguments Concerning Business and Employment Effects do not Amount to Sufficient Good Cause or Good Reason to Warrant a Rehearing

85. Regarding its arguments concerning business and employment effects, Applicant again argues the sufficiency of the evidence and supports its arguments with selective quotes and mischaracterizations.

86. The Motion itself cites to two examples where the Subcommittee considered possible conditions in weighing the effects on business and employment. *Motion for Rehearing*, at ¶ 21. As stated before, there is no requirement for the Subcommittee to only consider conditions during deliberations. It is clear from the entire record that the Subcommittee was considering how conditions could impact its findings on each of the criteria throughout the hearing.

E. The Applicant's Substantive Arguments Concerning Land Use do not Amount to Sufficient Good Cause or Good Reason to Warrant a Rehearing

87. Finally, the Applicant turns its attention to the Subcommittee's deliberations on the impact of the proposed project on the prevailing land use of the region.

88. The Subcommittee did not err by discussing the concern of "non-conforming use"—a zoning principle, in determining the impact on land use. 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

[14] This raises a broader point about aesthetics. Throughout this Motion, Applicant implies the Subcommittee did not consider or deliberate on the remaining factors of RSA 162-H:16, IV, such as aesthetics. That is inaccurate. It is clear from the evidence that the aesthetics-related concerns were a primary driver for the concerns regarding tourism, property values, businesses, the views of the municipalities, and the overwhelming opposition to the proposed project from the public.

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). Further, the Subcommittee is well within its discretion to analogize to zoning law.

89. In criticizing the Subcommittee for giving due consideration to the views of municipalities, the Applicant even goes so far as to make this argument: "Surely, RSA 162-H does not exist to limit the scope of energy facility siting or encourage its extinction." *Motion for Rehearing*, ¶ 25. Of course it does; the Act instructs the Subcommittee to deny a certificate if it cannot find there will, by a preponderance of the evidence, be no undue interference with orderly development of the region, considering the prevailing land uses. The denial of the certificate necessarily means the Act exists to, when necessary, limit of the scope or siting of an energy facility as proposed.

90. Applicant again points to past SEC decisions as binding authority. It, in effect, argues that this Subcommittee erred by not adopting the conclusion of the Merrimack Valley Reliability Project ("MVRP") that the placement of new, taller transmission lines in an existing right-of-way did not negatively impact land use or interfere with development patterns along the corridor and did not consider whether this could constitute a non-conforming use. *Id.*, at ¶ 26. Not only is the present SEC not bound by past SEC decisions, this is especially true when the *decision* at issue is a finding of fact or concerns the procedures for deliberations and not a conclusion of law. Moreover, there is no reasonable comparison between the MVRP and the proposed project because of the massive scale and scope of the proposed project.

91. And finally, within this argument, the Applicant again mischaracterizes the Subcommittee's deliberations. It wrongly states that "there was no discussion of specific concerns related to the 8 miles of new overhead right-of-way in Pittsburg, Clarksville and

Stewartstown, or consideration of conditions that would address those concerns." *Motion for Rehearing*, at ¶ 27; *see, e.g.*, Tr. 1/31/18, Morning Session, at 14–15.

92. In summary, notwithstanding its Motion's procedural flaws, Applicant's substantive arguments are not sufficient good cause or reason to warrant a rehearing or an order to resume the deliberations.

WHEREFORE, the Forest Society respectfully requests that the Presiding Officer:

A. Consider Applicant's Motion as premature but timely filed motion for rehearing of the final decision to deny the Application;
B. Grant all other parties 10 days from the date the written decision issued to supplement their responses to Applicant's substantive arguments;
C. Prohibit Applicant from filing any additional motions for rehearing of the final decision; or, alternatively,
D. Deny without prejudice Applicant's Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations; and
E. 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: March 9, 2018

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day, March 9, 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.