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

ORDER ON:

1. **APPLICANT'S MOTION FOR REHEARING OF DECISION AND ORDER DENYING APPLICATION;**

2. **APPLICANT'S MOTION FOR REHEARING OF DECISION AND ORDER DENYING APPLICATION AND REQUEST TO VACATE DECISION OF FEBRUARY 1, 2018 AND TO RESUME INCOMPLETE DELIBERATIONS; and**

3. **INTERVENORS' REQUEST TO STRIKE.**

July 12, 2018

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I. INTRODUCTION

This Order memorializes the deliberations of the Subcommittee to deny a Motion for Rehearing of Decision and Order Denying Application filed by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively Applicant). This Order also memorializes the Subcommittee's decisions to deny the Applicant's request to continue deliberations and to grant the Intervenors' request to strike attachments to the Applicant's Motions for Rehearing.

II. PROCEDURAL HISTORY

On October 19, 2015, the Applicant filed an Application with the Site Evaluation Committee (Committee). The Applicant sought the issuance of a Certificate of Site and Facility approving the siting, construction, and operation of a 192-mile transmission line and associated facilities with a capacity rating of up to 1,090 megawatts (MW) from the Canadian border in Pittsburg in Coos County to Deerfield in Rockingham County (Project). The Applicant supplemented and updated the Application on February 26, May 10, July 11, July 22, and September 29, 2016; and on August 25 and November 20, 2017.

On November 2, 2015, pursuant to RSA 162-H:4-a, the Chair of the Committee appointed a Subcommittee (Subcommittee) in this docket.

During seventy (70) days of adjudicative hearings, the Subcommittee received testimony from 154 witnesses and received and considered 2,176 exhibits. The evidentiary record closed on December 22, 2017. The Subcommittee began public deliberations on January 30, 2018. On February 1, 2018, the Subcommittee concluded deliberations and voted to deny the Application.

On February 28, 2018, the Applicant filed a "Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations."[1] The International Brotherhood of Electrical Workers, the Coos County Business and Employers Group, Dixville Capital, LLC, and Balsams Resort Holdings concurred.

Counsel for the Public filed a response to the Applicant's Motion.

Municipal Groups 1 South, 2, 3 South and 3 North[2] (Municipalities); [3] The Society for Protection of New Hampshire Forests (Forest Society); [4] Non-Governmental Organizations Group of Intervenors[5] (NGOs); [6] McKenna's Purchase Association (McKenna's Purchase)[7]; and Stark to Bethlehem Non-Abutting Property Owners Group of Intervenors objected. Municipal Group 1 North filed a Motion to Strike the Applicant's Motion.[8]

On March 12, 2018, the Subcommittee held a public hearing on the Applicant's Motion. The Subcommittee voted to suspend its oral decision, made during deliberations, to deny the Application, pending issuance of the written decision. On March 13, 2018, the Subcommittee issued a written order memorializing its decision to suspend, and established a schedule for filing motions for rehearing and objections once the written decision was issued.

The written decision (Decision) was issued on March 30, 2018.

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[1] Attachment C filed with the Motion was corrected on March 9, 2018.
[2] City of Concord, Ashland Water & Sewer Department, and Towns of New Hampton, Littleton, Deerfield, Pembroke, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill, and Whitefield.
[3] The Grafton County Commissioners joined the Objection filed by the Municipalities.
[4] The following parties joined the Forest Society's Objection: (i) Dummer to Northumberland Abutting Property Owners Group of Intervenors; and (ii) Historic Organizations Group of Intervenors (the New Hampshire Preservation Alliance, the National Trust for Historic Preservation, the Sugar Hill Historical Museum, and the North Country Scenic Byway Council).
[5] Ammonoosuc Conservation Trust, Appalachian Mountain Club, and Conservation Law Foundation.
[6] The following parties joined the NGOs' Objection: (i) Bethlehem to Plymouth Abutting Property Owners Group of Intervenors; (ii) Whitefield to Bethlehem Abutting Property Owners Group of Intervenors; and (iii) Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors.
[7] The following parties joined the Objection filed by McKenna's Purchase: (i) Deerfield Abutting Property Owners Group of Intervenors; (ii) the Pemigewasset River Local Advisory Committee; and (iii) Mary Lee.
[8] Pittsburg to Stewartstown Abutting and Non-Abutting Property Owners Group of Intervenors and Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors joined the Municipal Group 1 North's request.

On April 27, 2018, the Applicant filed a second Motion for Rehearing of Decision and Order Denying Application.[9] Dixville Capital, LLC and Balsams Resort Holdings, LLC filed a Statement in Support of the Applicant's Motion. The International Brotherhood of Electrical Workers and the Coos County Business and Employers Group joined the Applicant's Motion.

Counsel for the Public filed a response to the Applicant's Motion[10].

The Municipalities [11]; the Forest Society[12]; the NGOs; McKenna's Purchase[13]; Bethlehem to Plymouth Abutting Property Owners Group of Intervenors; Deerfield Abutting Property Owners Group of Intervenors; Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors; Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors; and the Pemigewasset River Local Advisory Committee objected.

On May 7, 2018, the NGOs and the Plymouth to Bethlehem Non-Abutting Property Owners Group of Intervenors filed Motions to Strike attachments that were filed with the Applicant's Motion for Rehearing.

On May 24, 2018, the Subcommittee conducted deliberations on the pending motions. This Order memorializes the deliberations.

III. STANDARD OF REVIEW

RSA 541:2, provides that any order or decision of the Committee may be the subject of a Motion for Rehearing or of an appeal in the manner prescribed by the statute. A request for rehearing may be made by "any party to the action or proceeding before the commission, or any

[9] The Applicant incorporated, by reference, the Motion for Rehearing that was filed on February 28, 2018.
[10] Stark to Bethlehem Non-Abutting Property Owners Group of Intervenors and Mary Lee joined the Counsel for the Public's Response.
[11] Municipal Group 1 North joined the Municipalities' Objection.
[12] The following parties joined the Forest Society's Objection: (i) the Grafton County Commissioners; (ii) Whitefield to Bethlehem Abutting Property Owners Group of Intervenors; (iii) Clarksville to Stewartstown Property Owners Group of Intervenors; (iv) Dummer to Northumberland Abutting Property Owners Group of Intervenors; and (v) the Historic Organizations Group of Intervenors.
[13] Deerfield Abutting Property Owners Group of Intervenors joined the Objection filed by McKenna's Purchase.

person directly affected thereby." RSA 541:3. The Motion for Rehearing must specify "all grounds for rehearing, and the commission may grant such rehearing if, in its opinion, good reason for the rehearing is stated in the motion." *Id*. Any such motion for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 541:4.

"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 New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted if the Committee finds "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. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

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.

IV. APPLICANT'S MOTION FOR REHEARING[14]

A. Whether the Subcommittee Erred by not Deliberating on all Four Statutory Criteria

1. Positions of the Parties

a. Applicant

The Applicant argues that the Subcommittee committed an error of law when it stopped deliberations without discussing all of the factors enumerated in RSA 162-H:16, IV. The Applicant asserts that the Subcommittee was required to consider all factors of RSA 162-H:16, IV pursuant to: (i) RSA 162-H:16, IV; (ii) Site 202.28(a); (iii) Site 301.17; and (iv) the Committee's prior precedent.

The Applicant asserts that RSA 162-H:16, IV requires the Subcommittee to consider "all relevant information" prior to making its decision and that the Subcommittee acted contrary to RSA 162-H:16, IV, when it stopped deliberations without discussing the evidence specifically relevant to the criteria regarding the public interest and the impact of the Project on aesthetics, historic sites, air and water quality, and public health and safety.

The Applicant argues that Site 202.28(a) requires the Subcommittee to "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." *See* Site 202.28(a). Site 301.17, in turn, requires the Subcommittee to "consider whether . . . conditions should be included in the certificate in order to meet the objectives of RSA 162-H." *See* N.H. Code Admin. Rules, Site 301.17. The Applicant argues that the decision to stop deliberations without

[14] This Order addresses the Applicant's claims of error in the Decision in which they appear in the Motion for Rehearing.

discussing all potential conditions and relevant information is contrary to Site 202.28(a) and Site 301.17.

The Applicant argues that the decision not to continue deliberations is contrary to prior precedent. In *Antrim Wind I* docket (SEC Docket No. 2012-01), the subcommittee appointed in that docket decided the proposed wind project would have an unreasonable effect on aesthetics. The *Antrim Wind I* subcommittee, however, continued deliberations and addressed other criteria enumerated in RSA 162-H:16, IV. The Applicant concludes that the Subcommittee's decision not to continue deliberations in this docket is contrary to its prior precedent and is unreasonable, unlawful, and unjust.

b. Counsel for the Public and Intervenors

Counsel for the Public, NGOs, McKenna's Purchase and the Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors assert that the Subcommittee was not legally required to continue deliberations once it decided that the Applicant failed to demonstrate that the Project would not unduly interfere with the orderly development of the region. Counsel for the Public, NGOs, and McKenna's Purchase argue that RSA 162-H:16, IV requires the Subcommittee to consider all four requirements of RSA 162-H:16, IV "[i]in order to issue a certificate." *See* RSA 162-H:16, IV. They argue that the clear language of RSA 162-H:16, IV requires the Subcommittee to continue deliberations and address all criteria of RSA 162-H:16, IV only if it decides to grant the Certificate and that nothing in RSA 162-H requires the Subcommittee to deliberate and address all the requirements of RSA 162-H:16, IV in order to deny a Certificate.

Counsel for the Public argues that when the Subcommittee determined that the Applicant failed to meet its burden of proof on any one of the required findings of RSA 162-H:16, IV, consideration of the remaining criteria was legally unnecessary because the certificate could not

issue in the absence of any one of the required findings. The Subcommittee's finding that the Applicant failed to meet its burden of proof and failed to demonstrate that the Project would not unduly interfere with the orderly development of the region rendered information relative to other statutory criteria irrelevant. The Subcommittee was not legally required to continue deliberations and discuss irrelevant information. While opining that it would be a better practice to discuss specifically all of the statutory requirements of RSA 162-H:16, IV, Counsel for the Public nevertheless concludes that the Subcommittee's decision not to continue its deliberations was consistent with the law.

Counsel for the Public and NGOs argue that Site 202.28(a) does not require the Subcommittee to deliberate and make findings regarding each statutory criterion of RSA 162-H:16, IV. Instead, it requires the Subcommittee to "make a finding" and "issue an order pursuant to RSA 541-A:35 issuing or denying a certificate." Counsel for the Public and NGOs assert that the Subcommittee acted within its authority and consistent with requirements of Site 202.28(a) when it made its finding that the Applicant failed to carry its burden of proof on the orderly development issue and denied the Application.

Counsel for the Public acknowledges that Site 301.17 requires the Subcommittee to consider certain conditions. [15] Counsel for the Public argues that the rule does not require the Subcommittee, however, to continue deliberations and discuss all provisions of RSA 162-H:16, IV.

Counsel for the Public also argues that the Subcommittee is not required to conduct its deliberations in the same manner as *Antrim Wind I* and that the decision in that docket is neither binding precedent nor particularly relevant.

[15] The Applicant's argument that the Subcommittee violated Site 301.17, by not considering all available conditions is addressed in detail in Section IV, B, below.

2. Analysis and Findings

Rules of statutory interpretation are well-settled in New Hampshire:

> When construing statutes and administrative regulations, we first examine the language used, and, where possible, we ascribe the plain and ordinary meanings to words used. Words and phrases in a statute are construed according to the common and approved usage of the language unless from the statute it appears that a different meaning was intended. Additionally, we interpret disputed language of a statute or regulation in the context of the overall statutory or regulatory scheme and not in isolation. We seek to effectuate the overall legislative purpose and to avoid an absurd or unjust result. We can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.

Bovaird v. N.H. Dep't of Admin. Servs., 166 N.H. 755, 758-759 (2014) (citations and quotations omitted). The New Hampshire Supreme Court will generally give deference to agency interpretations of statutes and rules, but has cautioned that an agency interpretation is not necessarily controlling. *See N.H. Dep't of Revenue Admin. v. Pub. Emp. Labor Relations Bd.*, 117 N.H. 976, 977-978 (1977).

a. Requirements of RSA 162-H:16, IV

RSA 162-H:16, IV states as follows:

> After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter. *In order to issue a certificate,* the committee shall find that:
>
> (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
>
> (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been

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

RSA 162-H:16, IV (emphasis added).

The language of RSA 162-H:16, IV is clear - the Subcommittee is required to deliberate on all criteria enumerated in RSA 162-H:16, IV "in order to issue a certificate." The plain language of the statute does not require continuation of deliberations and consideration of all the statutory criteria after a decision is made that an Applicant has not sustained its burden of proof and a certificate cannot be issued. The Legislature did not use language requiring the Subcommittee to consider all of the statutory criteria in RSA 162-H:16, IV in order to make a determination to grant or deny a certificate - something it could have done. The Subcommittee did not act unlawfully, unjustly, and unreasonably, and did not act contrary to requirements of RSA 162-H:16, IV when it decided to end deliberations after making a determination that it could not issue the Certificate.

b. Requirements of Site 202.28(a) and Site 301.17

Site 202.28(a) requires the Subcommittee to "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." Site 202.28(a) (emphasis added). The rule does not state that the Subcommittee must make a finding regarding *each of* the criteria, or that it must continue deliberations after it determines that the Certificate cannot be issued. It requires the Subcommittee to: (i) make a finding regarding the criteria stated in RSA 162-H:16, IV, and

Site 301.13 through 301.17; and (ii) issue an order pursuant to RSA 541-A:35 issuing or denying a certificate. The Subcommittee did precisely what the rule requires it to do and found that the Applicant failed to carry its burden of proof and failed to demonstrate that the Project will not unduly interfere with the orderly development of the region.

The Subcommittee considered the criteria of RSA 162-H:16, IV and determined that: (i) it did not have sufficient information to determine whether the Project would unduly interfere with the orderly development of the region; and (ii) the Certificate could not be issued even if it found that the Applicant satisfied the other criteria of RSA 162-H:16, IV. The Subcommittee also determined that, without having information demonstrating the extent and nature of the Project's interference with the orderly development of the region, it could not decide which conditions would address such interference. Specific conditions contained in Site 301.17 became irrelevant in light of the fact that the Certificate could not be issued. In light of these findings, the Subcommittee issued the Decision denying the Certificate.

Site 301.17 also does not require the Subcommittee to continue deliberations. It provides that "in determining whether a certificate shall be issued for a proposed energy facility, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H." (emphasis added). This rule mirrors the language of the statute. The Subcommittee did not violate Site 301.17 when it decided to stop deliberations.

c. Prior Precedent

The relevant provision of the law states that: "The committee shall consider, *as appropriate*, prior committee findings and rulings on the same or similar subject matters, *but shall not be bound thereby*." RSA 162-H:10, III (emphasis added). Other than referencing the

Antrim Wind I Order, the Applicant does not explain why it is appropriate to consider that earlier order.

Even if the Subcommittee were to consider what happened in *Antrim Wind I*, such a comparison would be unavailing. The Antrim Wind project, as originally proposed and as recently approved, is substantially different from the Project in this docket. There is no reason to consider *Antrim Wind I* as binding precedent. A prior committee's exercise of its discretion does not compel this Subcommittee to expend additional time and resources deliberating on criteria that could not legally alter the outcome. The Subcommittee did not commit an error of law and did not act unlawfully, unjustly and unreasonably when it decided to end deliberations after it determined that the Certificate could not be issued. The Applicant failed to state good cause warranting a rehearing.

B. Consideration of Conditions

1. Positions of the Parties

a. Applicant

The Applicant argues that the Subcommittee committed an error of law when it did not consider whether conditions could have been imposed that addressed the impacts of the Project on the region. The Applicant argues that, if the Subcommittee continued deliberations and considered all proposed mitigation measures/conditions, it would change its finding that the Applicant failed to carry its burden of proof.

The Applicant asserts that concerns about the impacts of the Project on: (i) property values - could have been addressed by imposition of a property value guarantee program; (ii) tourism - could have been determined by considering testimony and a report filed by Counsel for the Public's experts ("Economic Impact Analysis and Review of the Proposed Northern Pass Transmission Project") and could have been addressed by distributions from the Forward New

Hampshire Fund; (iii) business and employment - could have been determined by considering testimony of Counsel for the Public's experts and could have been addressed through implementation of a business loss program and/or distributions from the Forward New Hampshire Fund and the North Country Job Creation Fund; (iv) land use - could have been addressed by distributions from the Forward New Hampshire Fund.

b. Counsel for the Public

Counsel for the Public asserts that RSA 162-H:16 requires only that the Subcommittee give due consideration to "all relevant information." The Subcommittee did not overlook and did not fail to consider relevant conditions. The conditions referenced by the Applicant in its Motions for Rehearing were not part of the record and were not before the Subcommittee at the time of deliberations. The Subcommittee did not act unreasonably or arbitrarily when it did not consider conditions that were not in the record.

As to the conditions that were actually proposed by the parties, Counsel for the Public asserts that the Subcommittee properly considered the relevant conditions during deliberations. The Subcommittee determined that, based on the evidence before it, it could not determine the extent of the Project's interference with the orderly development of the region. Without knowing the extent and nature of such interference, the Subcommittee did not act unreasonably when it found that it could not articulate conditions that would address the Project's potential interference with the orderly development of the region.

Counsel for the Public asserts that the record does not support the Applicant's argument that conditions the Applicant proposed after the deliberations concluded would be sufficient to address the potential interference of the Project with the orderly development of the region. Counsel for the Public argues that, as a matter of policy, the Applicant's position that the

Subcommittee could and should have developed conditions that are not in the record could lead to the issuance of unreasonable and factually unsupported conditions beyond the reasonable expectations of the parties and beyond the authority of the Subcommittee.

c. Intervenors

The Municipalities argue that the Subcommittee is not required to consider conditions that were introduced after the close of the record and were not before it at the time of deliberations. The Municipalities also argue that conditions identified by the Applicant in its Motions to Reconsider are not adequate to resolve concerns raised by the Subcommittee.

The Forest Society, NGOs, and the Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors argue that RSA 162-H:16, IV, Site 202.28(a), and Site 301.17 do not require the Subcommittee to consider every potential condition. The Forest Society asserts that RSA 162-H:16, IV requires the Subcommittee to give "due consideration" to all relevant information, and that the modifier "due" demonstrates that the Legislature specifically authorized the Subcommittee to use its discretion in determining how much and in what manner it considers the evidence and applies the criteria.

The Forest Society acknowledges that Site 301.17 states that the Subcommittee should consider "[a]ny other condition necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16." The Forest Society argues, however, that under the canon of statutory construction, the last item on the list is restricted by the specific class of items that precede it. *See State v. N.H. Gas & Elec. Co.*, 86 N.H. 16, 25 (1932). The Forest Society concludes that while the rules 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 construction to read the rule as requiring the Subcommittee to craft its own mitigating conditions.

The Forest Society states that the Subcommittee considered relevant conditions proposed by the parties. The Applicant acknowledged that the Subcommittee discussed the property value guaranty program and the business reimbursement program and decided that the conditions addressing the Project's impacts on property values and local business could not be drafted in absence of evidence demonstrating the extent and nature of such impacts.

The Forest Society claims that the Applicant's argument that the Subcommittee should have relied on evidence submitted by other parties in this docket to ascertain the nature and extent of the Project's impact is misplaced. The Forest Society asserts that the Applicant bears the burden of proof demonstrating the extent of the Project's impact and interference and that the Subcommittee was under no obligation to look to other witnesses to find credible information.

The Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors argues that the Subcommittee could not and should not unilaterally consider conditions that were not supported or contained in the record and were not addressed by the parties through testimony and cross-examination.

McKenna's Purchase points out that the property value guarantee that was proposed by the Applicant before deliberations did not apply to McKenna's Purchase. Tr., Day 1, 04/13/2017, Afternoon Session, at 174. McKenna's Purchase concludes that the Subcommittee was not required to expand – and was prohibited by the New Hampshire Constitution, laws, and rules from expanding – the property value guarantee because there was no evidentiary basis for such an expansion in the record.

The Bethlehem to Plymouth Abutting Property Owners Group of Intervenors asserts that expansion of the property value guarantee and redirection of funds towards tourism, as offered by the Applicant, would not address the Subcommittee's concerns. According to the Intervenors, the expanded property value guarantee offered by the Applicant continues to be deficient by not providing notice to all homeowners and not addressing all issues that may cause diminution of value. Similarly, the Intervenors argue that the Forward New Hampshire Fund may fail to address all losses and damages that could be suffered by the business owners in the region.

2. Analysis and Findings

The Subcommittee agrees with the arguments set forth by Counsel for the Public and the Intervenors in their objections to the motions for rehearing.

RSA 162-H:16, IV does not require the Subcommittee to consider all potential conditions prior to the denial of a certificate. RSA 162-H:16, IV requires the Subcommittee to determine if issuance of a certificate will serve the objectives of RSA 162-H after "due consideration of all relevant information." The Subcommittee gave due consideration to all relevant information. The Subcommittee found that it did not have sufficient information that would allow it to determine whether the Project would unduly interfere with the orderly development of the region. The Subcommittee determined that it could not articulate conditions addressing the potential interference of the Project with the orderly development of the region without knowing the extent and nature of such interference, and concluded that it could not issue the Certificate. The Subcommittee did not act unlawfully, unjustly or unreasonably when it did not extend deliberations to consider information irrelevant to its findings that the Applicant failed to carry its burden of proof and failed to demonstrate that the Project would not unduly interfere with the orderly development of the region.

Site 202.28(a) requires the Subcommittee to "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." It does not require the Subcommittee to consider potential conditions prior to denying to issue a Certificate.

Site 301.17 (Conditions of Certificate) states the following:

> In determining *whether a certificate shall be issued* for a proposed energy facility, the committee shall consider whether the following conditions *should be included in the certificate* in order to meet the objectives of RSA 162-H:
>
> (a) A requirement that *the certificate holder* promptly notify the committee of any proposed or actual change in the ownership or ownership structure of the holder or its affiliated entities and request approval of the committee of such change;
>
> (b) A requirement that *the certificate holder* promptly notify the committee of any proposed or actual material change in the location, configuration, design, specifications, construction, operation, or equipment components of the energy facility subject to the certificate and request approval of the committee of such change;
>
> (c) A requirement that *the certificate holder* continue consultations with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency, and comply with any agreement or memorandum of understanding entered into with the New Hampshire division of historical resources of the department of cultural resources and, if applicable, the federal lead agency;
>
> (d) Delegation to the administrator or another state agency or official of the authority to monitor the construction or operation of the energy *facility subject to the certificate* and to ensure that related terms and conditions of the certificate are met;
>
> (e) Delegation to the administrator or another state agency or official of the authority to specify the use of any technique, methodology, practice, or procedure *approved by the committee within the certificate* and with respect to any permit, license, or approval issued by a state agency having permitting or other regulatory authority;

> (f) Delegation to the administrator or another state agency or official of the authority to specify minor changes in route alignment to the extent that such changes *are authorized by the certificate* for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate;
>
> (g) A requirement that the energy *facility be sited* subject to setbacks or operate with designated safety zones in order to avoid, mitigate, or minimize potential adverse effects on public health and safety;
>
> (h) Other conditions necessary to ensure construction and operation of the energy *facility subject to the certificate* in conformance with the specifications of the application; and
>
> (i) Any other conditions necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

The rule is titled "Conditions of Certificate." It requires the Subcommittee to consider whether enumerated conditions "*should be included in the certificate* in order to meet the objectives of RSA 162-H." It does not require the Subcommittee to consider conditions of a certificate "that could have been issued." The rule does not apply when the Subcommittee determines that it cannot issue a certificate. This conclusion is further supported by the fact that the conditions enumerated in Site 301.17 apply to:

- a "certificate holder" - Site 301.17(a)-(c);
- a "facility subject to the certificate" - Site 301.17(d), (h);
- technique, methodology, practice or procedure "approved by the Committee within the certificate" - Site 301.17(e); and
- changes "authorized by the certificate" - Site 301.17(f).

The Subcommittee did not act unlawfully, unjustly, and unreasonably when it did not consider conditions of a certificate that it could not issue.

Site 301.17(i) does not require the Subcommittee to consider conditions of a Certificate that is never issued. Site 301.17 requires the Subcommittee to consider "[a]ny other conditions

necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16." The Applicant interprets the rule as requiring the Subcommittee to draft and consider conditions that could cure the Applicant's failure to carry its burden of proof. The Applicant's interpretation is mistaken. This provision in Site 301.17 is merely one part of the rule addressing conditions in a to-be-issued certificate, as opposed to conditions of a certificate that will not be issued. We cannot read and interpret this part of the rule in isolation. In reading the rule as a whole, we conclude that we are not required to address conditions when a certificate is denied.

Reading the rule to require the Subcommittee to consider conditions not offered by the Applicant in order to cure the Applicant's failure to carry its burden of proof would lead to an absurd result. RSA 162-H:16, IV clearly and unambiguously states the findings the Subcommittee must make to issue a certificate and includes a finding that the Project will not unduly interfere with the orderly development of the region. *See* RSA 162-H:16, IV(b). The statute specifically and unambiguously requires the Subcommittee to deny an application if a determination cannot be made that the Project will not unduly interfere with the orderly development of the region. To read the rule and statute as proposed by the Applicant would mean that the Subcommittee cannot deny a certificate after it finds that an applicant did not satisfy the requirements of RSA 162-H:16, IV and, instead, should proceed to considering conditions that would render a project certifiable under RSA 162-H:16. Such a reading of the statute would render meaningless the criteria and the requirement to deny an application if such criteria are not satisfied. The Subcommittee did not act unreasonably, unjustly, or unlawfully, and did not commit any error of law when it refused to consider the conditions of the Certificate after it determined that one could not be issued.

The Applicant's argument that the Subcommittee should itself draft conditions addressing the Applicant's failure to carry its burden of proof is further not supported by the record. The Subcommittee determined that the Applicant failed to provide information that would establish beyond vague platitudes the negative impacts of the Project on local businesses and employment. Without having such information, the Subcommittee concluded that it could not ascertain the impact on the local economy. The Subcommittee found the Applicant's expert testimony and report addressing the impacts of the project on tourism was not reliable. The Subcommittee was left with little understanding as to the type and extent of impacts on tourism that would be caused by the Project.

Similarly, the Subcommittee found that the Applicant's expert testimony and report on property value impacts also simply was not reliable. The Subcommittee weighed the evidence and testimony that the Project would have some impact on property values. Based on the record presented, however, the Subcommittee could not determine the extent of the impacts.

The Applicant's expert testimony on the impact of the Project on land use was based on an assumption that there would be no impact as long as the Project was constructed within an existing transmission right-of-way. It did not even contemplate that there may be some impact, never-mind provide information that would identify the impact, its location, and its extent.

Without knowing the nature and extent of the impact of the Project on the economy, employment, tourism, property values, and land-uses, the Subcommittee could not articulate reasonable conditions that would begin to address such impacts. RSA 162-H:16, II specifically provides that "[a]ny certificate issued by the site evaluation committee shall be based on the record." Any condition that the Subcommittee could try to articulate to address a lack of information it had, by definition, would not be based on the record. The statute prohibits the

Subcommittee from engaging in such an exercise. The Subcommittee's failure to consider irrelevant conditions or to craft its own is not good cause warranting a rehearing.

C. *Ad Hoc* Decision-Making; Vagueness

1. Standard of Review

When addressing whether a statute is unconstitutionally vague as applied, the New Hampshire Supreme Court considers whether the statute provides a reasonable opportunity to know that particular conduct is proscribed by the statute.[16]

Although the statute and rules in dispute do not prohibit any acts, it is clear that, when deciding whether the statute is vague as applied to a party, the Court inquires as to whether the statute provides reasonable notice to the party to form an understanding as to what the law requires. A statute is not vague "simply because it does not precisely apprise an individual of the standards by which the decision will be made." *MacPherson*, 158 N.H. at 13; *Webster*, 146 N.H. at 437; *Freedom v. Gillespie*, 120 N.H. 576, at 580 (1980); *see also Derry Sand & Gravel v. Londonderry*, 121 N.H. 501, 505 (1981). "The specificity required by due process need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage." *Marino*, 155 N.H. at 716; *see also*

[16] *See Bleiler v. Chief, Dover Police Dep't*, 155 N.H. 693, 703 (2007); *see also N.H. Dep't of Envtl. Servs. v. Marino*, 155 N.H. 709, 716 (2007) (statute prohibiting building a home within fifty feet of the referenced line of Back Lake (RSA 483-B:9) and a statute permitting DES to impose conditions upon construction of a home on a nonconforming undeveloped lot (RSA 483-B:10, I) were not unconstitutionally vague, as applied, because they provided notice that constructing a home within fifty feet of the edge of Back Lake is not allowed without first obtaining DES approval to do so); *MacPherson v. Weiner*, 158 N.H. 6, 12 (2007) (statute allowing a restraining order to be extended for up to five years upon showing "good cause" (RSA 633:3-a,III-c) was not unconstitutional, as applied to the defendant, because it put the Defendant on notice "that if he participated in activity that constituted stalking or violated conditions of the original stalking order, the court could issue an extended protective order"); *Webster v. Town of Candia*, 146 N.H. 430, 437 (2001); *see also State v. Hynes*, 159 N.H. 187, 201 (2009) (statute defining extortion (RSA 637:5, II(i)) was not unconstitutionally vague as applied to the defendant because it put the defendant on notice that threats of a lawsuit by a party with no standing and no reason to sue constitutes extortion); *State v. Foster*, 120 N.H. 654, 654 (1980) (statute that prohibited a person in custody from possessing "anything which may facilitate escape" was not vague as applied to the Defendant because it put the Defendant on notice that possession of the mop handle that was fashioned in a double-ended spear was prohibited).

Hynes, 159 N.H. at 201 ("A law is not invalid . . . merely because it could have been drafted with greater precision") (citation omitted). "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." *MacPherson*, 158 N.H. at 11.

2. Arguments

a. RSA 162-H:16, IV, Site 301.15, and Site 301.09

(1) Positions of the Parties

(a) Applicant

The Applicant does not argue that either RSA 162-H or the Committee's rules are vague on their face. The Applicant asserts that the Subcommittee's decision is arbitrary and *ad hoc* because the Subcommittee failed to define the terms, "undue," "interference," and "region" as used in RSA 162-H:16, IV(b) and Site 301.15. The Applicant argues that the deliberations demonstrated that the Subcommittee did not have a clear understanding of the meaning of those terms. The Applicant opines that the Subcommittee's finding that the Applicant failed to carry its burden of proof without defining these terms during deliberations and in the Decision was based on each of the Subcommittee's member's individual interpretation of the terms and resulted in an unconstitutional arbitrary application of the statute and the rule.

The Applicant claims that the Subcommittee failed to explain how it considered information provided pursuant to Site 301.09 while analyzing whether the Applicant met its burden of proof. Similarly, the Applicant claims that the Subcommittee failed to explain how it relied on Site 301.09 in determining that the Applicant failed to prove that the Project would not unduly interfere with the orderly development of the region under RSA 162-H:16, IV(b) and Site 301.15.

The Applicant argues that the Decision is similar to the arbitrary decision made by the Planning Board in *Derry Senior Development, LLC v. Town of Derry*, 157 N.H. 441 (2008). According to the Applicant, the Subcommittee, like the Derry planning board, based its decision on vague concerns and "the mere personal opinion of its members" when it found that the Applicant failed to carry its burden of proof: (i) without defining "undue," "interference," and "region;" and (ii) without explaining how documentation provided pursuant to Site 301.09 was considered by the Subcommittee while addressing criteria of Site 301.15.

(b) Counsel for the Public

Counsel for the Public responds that RSA 162-H:16, IV(b), Site 202.19, Site 301.09 and Site 301.15 are not vague as applied by the Subcommittee. Counsel for the Public argues that, in order for a certificate to issue, the Applicant was required to carry its burden of proof and demonstrate by a preponderance of evidence that the Project would not unduly interfere with the orderly development of the region. *See* RSA 162-H:16, IV(b); *see also* Site 202.19(b) ("[a]n 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"); Site 202.19(a) ("[t]he party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence."). Site 301.15 sets forth the factors the Subcommittee is required to consider in determining whether the Project will unduly interfere with the orderly development of the region: (i) the extent to which the siting, construction, and operation of the Project will affect land use, employment, and the economy of the region; (ii) the provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility; and (iii) the views of municipal and regional planning commissions and municipal governing bodies regarding the Project. Site 301.09 identifies

documents and information the Applicant is required to provide in order to address the effect of the Project on land use, employment, and economy of the region.

Counsel for the Public argues that RSA 162-H and the rules far exceed the relevant standards for clarity set forth by the New Hampshire Supreme Court and unambiguously notified the Applicant of the requirements. Counsel for the Public asserts that the Applicant's argument mischaracterizes the findings and determinations made by the Subcommittee that clearly and unambiguously followed the statute and rules. It considered evidence and documents submitted by the Applicant and found that the Applicant failed to carry its burden of proof and failed to provide information that would enable the Subcommittee to ascertain the impact of the Project on tourism, property values, land use, and the local economy. The Subcommittee determined that it could not make a finding that the Project would not unduly interfere with the orderly development of the region without having reliable and credible information demonstrating the impacts of the Project or lack thereof.

(c) Intervenors

The Municipalities argue that neither the enabling statute (RSA 162-H) nor the rules require the Subcommittee to define the terms "undue," "interference," and "region." The Municipalities assert that, unless it is in clear conflict with express statutory language, the Subcommittee's interpretation of these terms should be given great deference. *See Appeal of Hampton Falls*, 126 N.H. 805, 809 (1985); *see also Com. of Mass., Dept. of Educ. v. United States Dept. of Educ.*, 837 F.2d 526, 541 (1st Cir. 1988). The Municipalities conclude that the Applicant failed to identify express statutory language that conflicts with the usage of these terms and, therefore, the Subcommittee's interpretation and usage should stand.

The Municipalities also argue that the Decision unambiguously identifies a correlation between Site 301.09 and Site 301.15. The Decision clearly states that, in order to issue the

Certificate, the Subcommittee must find that the Project will not unduly interfere with the orderly development of the region. Site 301.15 further identifies the factors that the Subcommittee is required to consider while analyzing the Project's interference with the region. Site 301.09, in turn, identifies the documentation and/or information the Subcommittee should consider.

The Forest Society asserts that both RSA 162-H:16, IV and the rule put the Applicant, like any other reasonable person, on notice as to the information that should be presented in order to satisfy the burden of proof.

The Forest Society argues that the Subcommittee's application of Site 301.15 and Site 301.09 was not arbitrary. The Decision specifically stated that: (i) in order to issue the Certificate, the Subcommittee would have to find that the Project would not unduly interfere with the orderly development of the region with due consideration being given to municipal and other regional authorities; (ii) Site 301.15 sets forth criteria that the Subcommittee should consider while making its decision; and (iii) Site 301.09 identifies the documentation and information that the Subcommittee should evaluate while making such a decision.

The Forest Society acknowledges that the rules and the Decision do not define the terms "interference," "unreasonable," and "region." It argues, however, that failing to define those terms did not render the Decision unreasonable or arbitrary where the vagueness standard is one of reasonableness, not perfection.

The Forest Society also asserts that the *Derry* case is not applicable to this matter. The Site Regulations on which the Derry Planning Board exercised its authority created a presumption that the sewer system proposal protected the public interest and there is no presumption of public interest protection in this case.

The NGOs argue that the Subcommittee did not decide that the Project would unduly interfere with the orderly development of the region, but determined that the Applicant failed to carry its burden of proof. The NGOs conclude that, because the Subcommittee did not find that the Project would unduly interfere with the orderly development of the region, it is immaterial whether or not it defined the terms used in Site 301.15.

(2) Analysis and Findings

The Subcommittee agrees with the arguments set out in the objections filed by Counsel for the Public and the Intervenors. RSA 162-H:16, IV(b), requires that in order to issue a certificate, the Subcommittee is required to find that the Project will not unduly interfere with the orderly development of the region. Site 301.15 sets forth criteria relative to a finding of undue interference and requires the Subcommittee "[i]n determining whether a proposed energy facility will unduly interfere with the orderly development of the region," to consider the following: (i) "[t]he extent to which the siting, construction, and operation of the proposed facility will affect land use, employment, and the economy of the region;" (ii) "[t]he provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility;" and (iii) "[t]he views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility." Site 202.19(b) provides that "[a]n 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." Site 301.09 specifies the information that the Applicant must submit for the Subcommittee's consideration:

> Each application shall include information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning

ordinances of the proposed facility host municipalities and unincorporated places, and the applicant's estimate of the effects of the construction and operation of the facility on:

(a) Land use in the region, including the following:

(1) A description of the prevailing land uses in the affected communities; and

(2) A description of how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses;

(b) The economy of the region, including an assessment of:

(1) The economic effect of the facility on the affected communities;

(2) The economic effect of the proposed facility on in-state economic activity during construction and operation periods;

(3) The effect of the proposed facility on State tax revenues and the tax revenues of the host and regional communities;

(4) The effect of the proposed facility on real estate values in the affected communities;

(5) The effect of the proposed facility on tourism and recreation; and

(6) The effect of the proposed facility on community services and infrastructure;

(c) Employment in the region, including an assessment of:

(1) The number and types of full-time equivalent local jobs expected to be created, preserved, or otherwise affected by the construction of the proposed facility, including direct construction employment and indirect employment induced by facility-related wages and expenditures; and

(2) The number and types of full-time equivalent jobs expected to be created, preserved, or otherwise affected by the operation of the proposed facility, including direct employment by the applicant and indirect employment induced by facility-related wages and expenditures.

The statute and the rules put the Applicant (like any other reasonable party) on notice that: (i) the Subcommittee could issue the Certificate only if the Applicant established that the Project would not unduly interfere with the orderly development of the region; (ii) when determining whether the Project would unduly interfere with the orderly development of the region, the Subcommittee would consider the effects of the Project on land use, employment, and the economy of the region; (iii) when determining the Project's impact on land use, the Subcommittee would consider the assessment that the Applicant filed pursuant to Site 301.09(a); (iv) when determining the Project's impact on employment, the Subcommittee would consider the assessment that the Applicant filed pursuant to Site 301.09(c); and (v) when determining the Project's impact on the economy, the Subcommittee would consider the reports addressing the Project's impact on the economy, taxes, property values, and tourism filed by the Applicant pursuant to Site 301.09(b). The statute and the rules provided the Applicant with a reasonable opportunity to know not only the standard to be considered, but also the information that would be considered when deciding whether the Applicant satisfied its burden of proof.

The Applicant relies on a single case to support its argument that the Subcommittee's decision was arbitrary and *ad hoc* decision-making - *Derry Senior Dev., LLC v. Town of Derry*, 157 N.H. 441 (2008). In *Derry*, the New Hampshire Supreme Court held that: (i) the board is entitled to rely upon its own judgment and experience in acting on an application for a site plan review, but cannot deny approval on an *ad hoc* basis because of vague concerns; and (ii) the board's decision must be based upon more than the mere personal opinion of its members. 157 N.H. at 452. The Court further found that the regulation in dispute created a presumption that the sewer system proposal protects the public interest if it is approved by the Department of Environmental Services (DES). *Id*. at 451. The Court held that "[w]here, as here, another

agency's approval creates a presumption that the proposal protects the public interest, the record must show specific facts justifying rejection of the agency's determination; that is, concrete evidence indicating that following the agency's determination in the particular circumstances would pose a real threat to the public interest." *Id*. at 452. The Court concluded that the board could not reasonably deny the site plan approval that was pre-approved by DES "based upon its vague concern that the down-gradient wells might be in danger" where "nothing in the record suggest[ed] that the proposed system created an identifiable danger to the four down-gradient wells." *Id*. at 452-453.

The Applicant is correct that the Subcommittee cannot deny the Application on an *ad hoc* basis based on some vague, unarticulated concerns. That is not, however, what happened here. Instead, the Subcommittee denied the Application based on the record. It was not necessary to specifically define "undue," "interference," and "region." Failure to define the statutory terms that are not defined by the Legislature does not render the Decision unreasonable if: (i) the statutory scheme provides a notice as to what will be considered by the Subcommittee; and (ii) such decision is based on the facts supported by the record. The words in the statute are all understood to have a common meaning.

RSA 162-H:16, IV, Site 301.09, and Site 301.15, provided the Applicant with a reasonable notice of the information that would be considered while deciding whether the Project would unduly interfere with the orderly development of the region. The record and the Decision clearly identify the facts the Subcommittee relied on when determining that the Applicant failed to carry its burden of proof and failed to demonstrate facts sufficient for the Subcommittee to find that the Project would not unduly interfere with the orderly development of the region. The Subcommittee members specifically addressed the testimony and reports filed by the Applicant's

experts, identified gaps and inaccuracies in the reports, identified the reasons why the testimony and reports were inadequate and not credible, and specifically stated why they could not be relied upon. The Subcommittee's decision that the Applicant failed to carry its burden of proof was based on the record and specific facts, and did not constitute arbitrary, capricious, and *ad hoc* decision-making.

The Applicant's argument that the Subcommittee engaged in arbitrary decision-making because it did not specifically explain the correlation between RSA 162-H:16, IV(b), Site 301.15, and Site 301.09, is not supported by the record. Prior to starting a discussion addressing the potential interference of the Project on the orderly development of the region, Mr. Way specifically outlined the correlation between RSA 162-H:16, IV(b) and Site 301.15, by stating the following:

> "Orderly development of the region is a many-headed animal. There's a lot of different parts to it. So, as we go through it, I think we're going to have a lot of us, several of us, taking different pieces. With regards to the statute, RSA 162-H:16, IV(b) requires the Subcommittee to consider whether the proposed project "will *[not]* unduly interfere with the ordinarily[sic] development of the region with due consideration given to the views of municipal and regional planning commissions and municipal governing bodies."
>
> "Under the Code of Administrative Rules, Site 301.15, when determining whether a project will unduly interfere with the orderly development of the region, the Subcommittee is required to consider the following: "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, 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. Deliberations, Day 1, 01/30/2018, Morning Session, at 105-106.

The Presiding Officer also explained the correlation between RSA 162-H:16, IV and the applicable rules by stating the following:

> The statute is RSA 162-H:16, the required findings regarding the issuance of a certificate. Roman IV says, "After due consideration of all relevant information regarding the potential siting of routes of a proposed energy facility, including potential significant impacts and benefits, the Site Evaluation Committee shall determine if issuance of the certificate will serve the objectives of this chapter. In order to issue a certificate, the Committee shall find that," and Paragraph (b) says, "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." We have two rules that are directly relevant to this criterion. One is Site 301.15, which are 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." The other rule that's directly relevant is Site 301.09, which I will not read in full. It 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.
> …
>
> Again, it is the Applicant's burden to establish, more likely than not, that there will not be an undue interference with the orderly development of the region. Lawyers love formulations like that, but no one else does. But the lawyers in the room understood what I just said, and I think the members of the Subcommittee do as well.

Tr. Deliberations, Day 3, 02/01/2018, Morning Session, at 3-6.

The record further demonstrates that the Subcommittee's decision-making was not arbitrary and demonstrated a clear understanding of the correlation between Site 301.15 and

Site 301.09, and the Applicant's requirement to carry its burden of proof. While discussing the potential effect on land use, the Subcommittee reviewed the report that was filed by the Applicant pursuant to Site 301.09(a). *See* Tr. Deliberations, Day 1, 01/30/2018, Afternoon Session, at 105-106; Deliberations, Day 2, 01/31/2018, Morning Session, at 5-73. The Subcommittee determined that the report and the Applicant's expert testimony were not credible and could not be relied upon in ascertaining the impact of the Project on land use. Without having a credible report before it, the Subcommittee determined that the Applicant failed to carry its burden of proof and failed to demonstrate the effect of the Project on land use.

While addressing the potential impact on the economy, the Subcommittee reviewed reports and testimony that the Applicant provided pursuant to Site 301.09(b): (i) information addressing the effect of the Project on real estate values in the affected communities; and (ii) information addressing the effect of the Project on tourism and recreation. The Subcommittee found the Applicant's reports and testimony on real estate values and tourism were not credible and concluded that it could not rely on them to ascertain the impact of the Project on real estate values and tourism.

The Subcommittee also reviewed reports and testimony addressing the impact of the Project on the economy and employment submitted pursuant to Site 301.09(b)(c). The Subcommittee determined that the Applicant's assessment of the impacts on the economy and employment failed to account for the negative impacts on local businesses and employment. Without having the information about the extent of the negative impacts of the Project, the Subcommittee determined that it could not truly ascertain the extent of the impacts.

In summary, the Subcommittee found that the information provided by the Applicant pursuant to Site 301.09, failed to adequately demonstrate the effects of the Project and the extent

of such effects on land use, the economy, employment, property values, and tourism. The Subcommittee proceeded to find that, without being able to ascertain the effects and the extent of the effects as required by Site 301.15(a), it could not decide whether the Project would unduly interfere with the orderly development of the region. The Subcommittee concluded that the Applicant failed to carry its burden of proof and failed to provide the Subcommittee sufficient credible information that would allow it to determine that the Project would not unduly interfere with the orderly development of the region.

The Applicant's argument that the Subcommittee's deliberations and Decision failed to explain how the Subcommittee reached its conclusion of the Applicant's failure to carry its burden and correlations between RSA 162-H:16, IV, Site 301.09, and Site 301.15 is contradicted by the record. The Subcommittee did not act arbitrarily and capriciously when: (i) the statute and rules provided a reasonable notice to the Applicant of the decision that will be made and the documents that will be considered; and (ii) the Subcommittee specifically explained the information it considered, the determinations it made, and the reasons upon which the Decision was based.

b. Standards Under RSA 162-H and Site 301.15

(1) Positions of the Parties

(a) Applicant

The Applicant argues that the Subcommittee used criteria that are contrary to Site 301.15 and that are not enumerated in RSA 162-H or the rules. Specifically, the Applicant asserts that it "appears" that, while deciding whether the Project would cause undue interference with the orderly development of the region, the Subcommittee decided that "unless the Applicant demonstrated 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, the Applicant had

necessarily failed to meet [its] overall burden on [the orderly development of the region]." In support of its claim, the Applicant asserts that, during deliberations, various Subcommittee members discussed whether the Applicant demonstrated that there would be no impact on land use, tourism, and property values. The Applicant argues that such inquiries are contrary to the requirements of RSA 162-H:16, IV.

The Applicant also makes a litany of claims that the Decision is arbitrary because the Subcommittee applied "new" standards that are not included in RSA 162-H. In support of those claims, the Applicant cites to various statements made by members of the Subcommittee during deliberations.

The Applicant also notes that, while deciding that the Applicant did not meet its burden of proof, the Subcommittee found that the Applicant's expert on tourism failed to conduct appropriate surveys, failed to obtain and address the views of a substantial number of varied stakeholders, and failed to address and analyze the impact on construction of the Project on tourism. The Applicant argues that neither RSA 162-H nor the Committee's rules require the Applicant's expert to conduct such research and that consideration of the failure to conduct such studies and research constitutes a violation of the Applicant's due process rights.

(b) Counsel for the Public

Counsel for the Public asserts that the Applicant's reliance on isolated statements made by members of the Subcommittee during deliberations to establish an arbitrary application of the Subcommittee's rules is unpersuasive. Counsel for the Public noted that during deliberations, as required by the law, the Subcommittee members expressed their opinions about the potential impact of the Project and the lack of evidence regarding such impacts. Counsel for the Public concludes that that the Subcommittee employed the correct standard in denying the Application.

(c) Intervenors

The Municipalities acknowledge that the statute and the rules do not specify the weight that should be given to the various criteria in Site 301.15. They argue, however, that the Subcommittee, as the agency tasked with implementation of the statute and rules, has discretion to evaluate and weigh the evidence before it as it deems appropriate to render the decision. *See In re Hampton Falls*, 126 N.H. 805, 809 (1985). The Municipalities assert that the deliberations and the Decision demonstrate that members of the Subcommittee were fully aware of the factors and information they were required to evaluate in order to determine whether the Project would unduly interfere with the orderly development of the region.

The Forest Society repeats its assertion that the Subcommittee's determination that the Applicant did not carry its burden of proof is amply supported by the record. The Forest Society argues that the Subcommittee, as required by Site 301.15, considered the impact of the Project on the economy, land use, real estate values, and tourism. The Subcommittee reviewed the record and determined that the Applicant failed to provide sufficient information to establish the extent of such impact or lack thereof. The Subcommittee decided that, without having such information, it could not determine whether or not the Project would unduly interfere with the orderly development of the region.

The Forest Society asserts that the Applicant's reliance on isolated statements of the Subcommittee members is unpersuasive and that the Subcommittee applied the correct standard in determining that the Applicant failed to demonstrate by a preponderance of evidence that the Project would not unduly interfere with the orderly development of the region.

The Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors asserts that the Subcommittee did not apply an erroneous standard while addressing the Applicant's expert reports and testimony. The Intervenors argue that the Subcommittee identified flaws in

the experts' methodology and identified reasons why it found their testimony unpersuasive. The Intervenors assert that the Applicant chose to limit its evidence and reports to a bare minimum and should bear the consequences of them being unsatisfactory.

(2) Analysis and Findings

(a) No Negative Impact or Positive Impact

The Subcommittee did not engage in arbitrary decision-making. The Subcommittee did not require the Applicant to prove that there would be no impact or a positive impact on land use, the economy, employment, tourism, and property values. The Applicant relied on isolated statements made during deliberations to argue that it "appears" that the Subcommittee used such a standard. The Applicant has misconstrued the record. The Subcommittee members, as required by Site 301.15(a), considered the impact the Project would have on land use, employment, and the economy. While undertaking its analysis on land use, the Subcommittee considered the assessment filed by the Applicant pursuant to Site 301.09(a). While analyzing the effect of the Project on employment, the Subcommittee considered the assessment that was filed by the Applicant pursuant to Site 301.09(c). While analyzing the effect on the economy, the Subcommittee considered reports that addressed the Project's effect on economy, taxes, tourism, and property values that were filed by the Applicant pursuant Site 301.09(b). The Subcommittee considered the substance, accuracy, and reliability of those reports.

As required by the law, the Subcommittee members shared their respective opinions about the credibility of these reports and their findings. While sharing their opinions, they indicated doubts about the conclusions in the reports of "no effect" or "no discernable effect." The Subcommittee, however, did not find that the Applicant failed to carry its burden of proof because it failed to demonstrate with credible evidence that there would be positive or no negative effect. Instead, the Subcommittee specifically and clearly concluded that the Applicant

failed to carry its burden of proof because it failed to provide sufficient credible evidence that would allow the Subcommittee to determine the impact and the extent of the impact of the Project on the components of the orderly development of the region - land use, property values, tourism, local economy, and employment. It was not that the reports demonstrated no impact or did not demonstrate a benefit. It was the fact that they did not provide credible information that would allow the Subcommittee to determine whether there would be impact, the extent of such impact (if any), and whether such impact would amount to undue interference with the orderly development of the region. As pointed out by Counsel for the Public and the Intervenors, the Applicant's argument that the Subcommittee used the wrong standard while deciding that the Applicant failed to carry its burden of proof is not supported by the record and is meritless.

(b) Standards Relating to Analysis of the Project's Impact on Land Use

The Applicant's expert on land use concluded that, as long as the Project was constructed within the existing transmission right-of-way, it would have no impact on land use. The Applicant argues that the Subcommittee should have agreed with that premise and believes that the Subcommittee improperly applied a standard and considered whether the Project would overburden the land use within and surrounding the right-of-way. The Applicant's argument is without merit.

The possibility that a transmission line may impact land use, even if it is constructed within an existing right-of-way, is not an arbitrary and unreasonable consideration. When determining whether the Project would unduly interfere with the orderly development of the region, the Subcommittee was required to consider the Project's impact on existing land use. RSA 162-H:16, IV required the Subcommittee to give "due consideration" to "all relevant evidence" when deciding whether to issue the Certificate. The Subcommittee received

substantial testimony and evidence indicating that the Project, due to its size and scope, would intensify and overburden the right-of-way to the extent that it would render it inconsistent with the existing land uses in the region. The Subcommittee members decided that, contrary to the Applicant's expert's claim, it is possible for a transmission project constructed within an existing right-of-way to impact existing land uses.

The Subcommittee did not find that the Project would have a negative impact on land use because it would overburden the use of the right-of-way. The Subcommittee determined that it was possible and found that the Applicant failed to provide sufficient credible evidence to determine the impact on land in this case. The Subcommittee did not apply "overburden" or "tipping point" standards. These terms were used as descriptors to contextualize the arguments made by the parties in this docket. The Subcommittee found that the Applicant failed to seriously analyze the impact of the Project on land use and relied instead on the sole premise that the Project would not impact land use so long as it is located within the existing right-of-way. The Subcommittee's decision was not arbitrary, capricious, or *ad hoc* decision-making.

Requiring the Applicant to take into account the views of municipalities and the provisions of the master plans and zoning ordinances with the Project was neither arbitrary nor *ad hoc*. Site 301.09 specifically requires the Applicant to provide, as part of the Application, "information regarding the effects of the proposed energy facility on the orderly development of the region, including the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility, if such views have been expressed in writing, and master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places." RSA 162-H:16, IV(b) requires the Subcommittee to consider "the views of municipal and regional planning commissions and municipal governing

bodies." The statute and rule both give fair notice to the Applicant that the Subcommittee will consider the views of municipalities and local and regional planning agencies. How the Project impacts land use and planning objectives of the affected region is within the appropriate consideration of the Subcommittee. The Applicant and its expert witness simply did a poor job of addressing the views of municipalities and local and regional planning agencies. The Applicant knew that the Subcommittee would require such an analysis. In fact the Applicant's expert report attempted, but failed, to provide a credible and reliable analysis.

The Subcommittee's finding that the Applicant's expert's report lacked specificity and failed to address specific provisions of municipal documents was not unreasonable, unlawful, and *ad hoc* decision-making. The Subcommittee received substantial evidence and testimony indicating a contradiction between the Project and land uses identified in the municipal documents and the Project. The report submitted by the Applicant's expert failed to adequately address these inconsistencies. The Subcommittee's criticism of the report and determination of its inadequacy are based on the record and are not arbitrary, unlawful, and unreasonable.

(c) Standards Relating to Analysis of the Project's Impact on Property Value and Tourism

The argument that the Subcommittee applied a new standard when it considered the Project's effects on property values is without merit. Contrary to the Applicant's argument, the Subcommittee did not use a "discernable effect" standard. Instead, what happened is that the Applicant's expert testified that the Project would not have a "discernable" effect on property values. App.30, at 40. The Subcommittee discussed the validity of the expert's conclusion.

The Subcommittee did not apply new standards and did not require the Applicant's expert on tourism to conduct listening sessions and surveys. The Subcommittee discussed and considered the value and validity of the surveys and listening sessions conducted by the expert.

The efforts of the expert did not assist the Subcommittee in determining if the Project would have an impact on tourism. The Subcommittee's discussion of the results and adequacy of surveys and listening sessions was reasonable and based on the record.

The Applicant was on notice that the Subcommittee would consider the impact of construction of the Project on tourism. *See* Site 301.15(a) (stating that the Subcommittee is required to consider the effect of construction of the Project on economy); Site 301.09 (b)(5) (stating that the economy of the region includes assessment of the Project's effect on tourism and recreation). The Subcommittee found that the Applicant's expert's work in this area provided an inadequate basis upon which to form an opinion.

Site 301.15(a) requires the Subcommittee to consider the effect of the Project on the economy. The information that should be considered includes assessing the impact on property values and tourism. The Subcommittee addressed the reports and testimony provided by the Applicant and found that they were not credible. The Subcommittee found that the Applicant failed to provide credible information that would demonstrate the effect or the absence of effect. Without this information, the Subcommittee could not ascertain the effect of the Project on the economy and, consequently, could not determine the extent of the Project's interference with the orderly development of the region, if any. This is a failure of the evidence provided by the Applicant. It is not good cause for a rehearing.

c. Findings of Fact

(1) Positions of the Parties

(a) Applicant

The Applicant argues that the Subcommittee failed to vote and make findings of fact that explains why the Applicant failed to meet its burden of proof and that the Decision suffers from the same defect. The Applicant argues that this case is similar to *Society for the Protection of*

New Hampshire Forests v. Site Evaluation Comm., 115 N.H. 163 (1975), because the Subcommittee did not issue findings of fact as required by RSA 541-A:35.

(b) Counsel for the Public

Counsel for the Public argues that the Subcommittee's determination that the Applicant failed to carry its burden of proof is supported by factual findings. Counsel for the Public asserts that the Decision specifically and unambiguously made factual findings that the evidence presented was not credible and that the Applicant's experts' methods were not reliable. Those factual findings are sufficient to support the conclusion that the Applicant failed to carry its burden of proof and failed to demonstrate that the Project would not unduly interfere with the orderly development of the region.

(c) Municipalities, Forest Society, and Non-Governmental Organizations Group of Intervenors

The Municipalities, the Forest Society, and NGOs argue that the Decision contains the necessary findings of fact required by RSA 541-A:35. The Municipalities assert that the Decision explains the positions of each party and, in the "Deliberations" section of the Decision: (i) explained how it considered the evidence and reports; and (ii) made findings with regard to each aspect of the orderly development of the region.

The Municipalities argue that this case is distinguishable from the *Society for the Protection of New Hampshire Forests v. Site Evaluation Comm*., 115 N.H. 163 (1975). In *Society for the Protection of New Hampshire Forests*, the agency's decision did not contain an explanation of the findings and simply enumerated conclusory statutory findings. Here, the Decision explained how and why each particular decision was reached.

The NGOs assert that the Applicant's disagreement with the Subcommittee's findings of fact does not warrant rehearing and does not render the Decision erroneous and unreasonable.

(2) Analysis and Findings

We agree with the objections filed by Counsel for the Public and the various Intervenors that under RSA 541-A:35, "[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." RSA 541-A:35. "A reviewing court needs findings of basic facts to understand administrative decisions and to ascertain whether the facts and issues considered sustain the ultimate result reached." *Society for Protection of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 173 (1975).

> The site evaluation committee must furnish basic findings of fact to support the conclusions that the statute requires it to make. It will be sufficient in this case if the committee focuses on and makes explicit those basic findings drawn from the evidence that led it to decide as it ultimately did and indicates the experts or expert evidence upon which it relied.

Id. at 174 (citations omitted).

Where experts are relied upon to establish facts, the Subcommittee is "free to accept or reject an expert's testimony, in whole or in part." *In re Mary Allen*, 2018 N.H. LEXIS 38, 2017-0313, *15-16 (May 11, 2018).

During the deliberations, the Subcommittee addressed reports and testimony concerning the impact of the Project on land use, the economy, employment, tourism, and property values. The Subcommittee also considered reports and arguments made by various parties disputing the accuracy of the Applicant's reports. During deliberations and in the Decision, the Subcommittee specifically stated why it found that the conclusions reached by the Applicant's experts on land use, tourism, and property values were not credible. The Subcommittee also explained that the Applicant failed to account for the negative impacts of the Project on local business and

employment during construction. Based on these findings, the Subcommittee determined that the Applicant failed to provide reliable information that would allow the Subcommittee to ascertain whether the Project would unduly interfere with the orderly development of the region. The deliberations, analyses, and reasoning are well-documented in the written Decision. The Decision was not conclusory and contained the essential underlying facts to support it.

Notably, the Applicant (unlike the City of Berlin) did not request that the Subcommittee make any specific findings of fact prior to deliberations or as part of its motions for rehearing. If the Applicant believed that specific findings were required, it could have requested a ruling on such findings.[17]

d. RSA 91-A

(1) Positions of the Parties

(a) Applicant

The Applicant argues that the Decision is invalid because the Subcommittee's findings were not made in public session and were made in violation of the Right-To-Know Law (RSA 91-A). The crux of this claim of error is an assertion that the Decision included discussion that was not reasonably derived from the public deliberations.

(b) Counsel for the Public, the Forest Society, and Non-Governmental Organizations Group of Intervenors

Counsel for the Public, the Forest Society, and NGOs assert that the Applicant's argument of violation of the Right-To-Know Law by the Subcommittee is unsubstantiated. Counsel for the Public points out that, apart from making unverified allegations of a violation of

[17] The Subcommittee acknowledged that it overlooked a request for findings of fact made by the City of Berlin when it issued the Decision. The Subcommittee found that rehearing and opening of the record was warranted for the purposes of addressing that request. The rulings on the City of Berlin's request for findings of fact are attached to this Order as Attachment A.

RSA 91-A, the Applicant failed to cite to a single section of the Decision that went beyond the scope of public deliberations.

(2) Analysis and Findings

The Applicant failed to state a single fact that would support its argument that the Subcommittee's findings were not made in public session. Each and every finding included in the Decision was discussed and deliberated by the Subcommittee members in open public sessions. The Subcommittee members did not meet and did not deliberate before or after the decision was made at the public hearing. All of the meetings were held in public. The Applicant fails to state good cause warranting a rehearing.

D. The Subcommittee's Application of the Criteria Set Forth in Site 301.15 and Its Analysis of the Information Supplied Under Site 301.09

1. Land Use and Municipal Views

a. Positions of the Parties

(1) Applicant

As noted above, the Applicant argues that the Project is consistent with the land uses in the region because it would be constructed within an existing right-of-way. The Applicant asserts that the Subcommittee's disagreement with that argument is contrary to past precedent and is arbitrary, capricious, and *ad hoc*.

The Applicant asserts that, during the deliberations, the Subcommittee members discussed whether it is possible for a project that would be constructed in an existing transmission right-of-way to change the nature and character of the right-of-way causing it to become inconsistent with surrounding land uses. The Subcommittee referred to such analysis as a possibility of reaching a "tipping point." The Applicant argues that consideration of such a possibility was arbitrary and capricious. The Applicant also argues that the Subcommittee failed

to explain how and when a "tipping point" may be reached and that the Subcommittee did not explain how the Applicant failed to carry its burden of proof on this issue.

The Applicant complains that the Subcommittee erroneously considered the concept of "non-conforming uses" when analyzing the consistency of the Project with land uses and that this concept has never been considered by the Committee before. They also argue that this concept is applicable only to zoning appeal cases and is not applicable to the review of the projects under RSA 162-H. The Applicant argues that the Subcommittee's application of this doctrine was arbitrary because the Subcommittee failed to note that: (i) a number of municipalities where the Project would be constructed do not have zoning ordinances identifying conforming uses; and (ii) this concept does not apply to the lands owned by the Applicant.

The Applicant states that, while discussing the orderly development criteria, the Subcommittee erroneously considered the impact of the Project on aesthetics and the natural environment.

The Applicant claims that, instead of analyzing consistency with the land use in the region, the Subcommittee erroneously based its decision on the potential effects of the Project on a limited number of sites: (i) Turtle Pond in Concord; (ii) McKenna's Purchase; and (iii) New Hampton. The Applicant argues that the determination that the Project could be inconsistent with land uses at these locations was not supported by the record because: (i) the right-of-way near Turtle Pond contains not only forty-foot wooden poles, but also steel structures that are over ninety-feet tall; (ii) the vegetation buffer adjacent to McKenna's Purchase would not be cleared and the eastern berm would be relocated closer to the development; and (iii) there are structures that are taller than 35 feet in New Hampton.

The Applicant argues that the Subcommittee erroneously found that the Project would be inconsistent with prevailing land uses because it was inconsistent with a number of restrictions contained in municipal ordinances.

The Applicant also asserts that the Subcommittee's criticism of the report provided by its expert, Mr. Varney, was unfounded and erroneous and that the Site rules and past precedent do not require Mr. Varney to identify the extent of the impact of the Project and analyze its consistency with specific terms, objectives, and purposes of municipal governing documents.

The Applicant further argues that, while considering the views of municipalities, the Subcommittee erroneously gave them "dispositive consideration."

(2) Counsel for the Public

Counsel for the Public argues that the Subcommittee did not create new rules, but identified and applied reasonable limitations of past precedent based on the testimony and evidence in the record. The Subcommittee specifically acknowledged that, in prior dockets, it considered construction of a transmission line within an existing right-of-way to be a sound planning principle that rendered projects consistent with land use. The Subcommittee, however, provided a reasonable explanation as to why this principle was not applicable to the Project.

Counsel for the Public argues that the Subcommittee did not improperly rely on new tests. Counsel for the Public asserts that the Subcommittee did not apply a non-conforming use test, but used it as an analytical and illustrative tool appropriate under the circumstances where the evidence demonstrated that the Project may cause changes in the nature and intensity of the right-of-way and surrounding area. Counsel for the Public explains that the clear language of the Decision describes the non-conforming use test "to be informative in the context of this case."

Counsel for the Public states that the Subcommittee did not determine that the Project would be inconsistent with the orderly development of the region because it found inconsistency

with land uses at specific locations, but: (i) used specific locations as examples of sites where the Project could be inconsistent with current land uses to identify gaps in the Applicant's experts' analyses; and (ii) determined that the Applicant failed to carry its burden of proof to demonstrate that the Project would be consistent with prevailing land uses in the region.

Counsel for the Public also asserts that the Applicant's criticism of consideration of the consistency of the Project with existing aesthetics and natural environment is misplaced. Counsel for the Public argues that numerous municipalities presented evidence that the Project would not be consistent with prevailing land uses because it would not be consistent with the goal of preserving aesthetics, the natural environment, and rural character of municipalities identified in governing land use documents. Counsel for the Public explained that the Subcommittee was required to consider these views while ascertaining the consistency of the Project with local land uses.

(3) Intervenors

The Municipalities and the Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors assert that Site 301.15(a) specifically requires the Subcommittee to consider "the extent to which the siting, construction and operation of the proposed facility will affect land use" and that determination should be made on a case-by-case basis. Requiring the Subcommittee to find that the Project would be consistent with land use because it would be constructed within an existing right-of-way would render Site 301.15(a) meaningless. The Subcommittee followed the rules and evaluated the consistency of the Project with the land use based on the facts and circumstance of this case. The Decision was not arbitrary.

The Forest Society and NGOs also argue that the Subcommittee is not bound by prior decisions and is required to give due consideration to all "relevant" factors as determined on a case-by-case basis. The Subcommittee reasoned, after evaluating the facts and circumstances of

this case, that Mr. Varney's testimony that the Project would be consistent with prevailing land use because it would be constructed within an existing right-of-way was not credible. The Forest Society asserts that the Applicant's comparison of the Project to the Merrimack Valley Reliability Project is unreasonable when considering the relative size and impacts of the two projects.

The Municipalities and the Forest Society argue that the Subcommittee did not apply the non-conforming use standard that applies in a zoning context to the Project, but simply used it as a comparative tool.

The Municipalities also assert that the impact of the Project on aesthetics of the communities was properly considered by the Subcommittee because one of the aspects of land use is enjoyment and preservation of aesthetic qualities in the community.

The Municipalities, the Forest Society and NGOs argue that consideration of the municipal views was proper because it is explicitly required by the statute. They state that the Applicant's argument that the Subcommittee found the views of the municipalities dispositive is unavailing because the Decision specifically acknowledges the Subcommittee's understanding that it is not "required to give deference" to municipal views.

b. Analysis and Findings

The findings of fact made by the Subcommittee are presumed prima facie lawful and reasonable. RSA 541:13. "The legislature has delegated broad authority to the Committee to consider the 'potential significant impacts and benefits' of a project, and to make findings on various objectives before ultimately determining whether to grant an application." *In re Mary Allen*, 2018 N.H. LEXIS 38, 2017-0313, *15-16 (May 11, 2018) (citing RSA 162-H:16, IV). When faced with competing expert witnesses, "a trier of fact is free to accept or reject an

expert's testimony, in whole or in part." *In re N.H. Elec. Coop.*, 170 N.H. 66, 74 (2017) (quotation omitted).

The Subcommittee's finding that a transmission project constructed within an existing right-of-way may be contrary to the land uses in the region is not based on errors of fact, reasoning, or law and is not arbitrary and capricious. RSA 162-H:16, IV(b) required the Subcommittee to consider whether the Project, if constructed, would unduly interfere with the orderly development of the region. Site 301.15(a) required the Subcommittee to ascertain the impact of the Project on land use. While addressing the impact on land use, the Subcommittee was required to give "due consideration" to "all relevant evidence." *See* RSA 162-H:16, IV.

Requiring the Subcommittee to find that the Project would be consistent with prevailing use solely because it would be constructed within the existing right-of-way without analyzing the characteristics of the Project and its actual consistency with prevailing land uses would render the requirement to assess the impact of each project on land uses meaningless. The Subcommittee did not act arbitrarily and unreasonably when it considered the arguments made by the parties that the Project, if constructed within the existing right-of-way, may be inconsistent with the land use. Recognizing that construction within an existing right-of-way is one principle of sound energy facility siting, the Subcommittee also recognized that it must consider all the facts and circumstances in making its determination. Construction of the project in the existing right-of-way was the Applicant's mantra throughout the proceeding. Simply repeating the same reason did not nullify the legitimate concerns of the Subcommittee and the municipal governing bodies.

The Applicant tries to claim that the Subcommittee created a new, vague standard by discussing a "tipping point" in the context of constructing a new transmission line within an

existing right-of-way corridor. The Subcommittee did not create a new standard. The term was used simply to illustrate and contextualize the common sense recognition that the addition of new transmission lines in an existing corridor can negatively impact land use within and around the corridor. During deliberations and in the Decision, the Subcommittee found that the Applicant and its witnesses failed to recognize and appropriately address whether the project would have such an effect in this case. The Subcommittee found that the Applicant failed to consider the land use impact, relied on a mistaken premise that as long as the Project is constructed within an existing right-of-way it will be consistent with prevailing land uses, regardless of its characteristics and nature of the land uses, and failed to analyze the actual consistency or inconsistency with land uses in the region.

The Subcommittee did not rely on the non-conforming use doctrine as the basis for finding that the Applicant failed to carry its burden of proof. The Subcommittee discussed the illustration as "guidance" and a tool to assist it with understanding of potential impacts of the Project on land uses. This is evidenced by the statements made by Ms. Weathersby during deliberations:

> And for what it's worth, I look to the guidance of land use law concerning - from a zoning perspective. And I talked about it yesterday. There's the concept of, okay, there's a non-conforming use. You know, there's a commercial facility right in the middle of a[n] agriculturally zoned area. And that is allowed to stay there because it either got permission or it was grandfathered, or whatever it is. However, it was allowed to be there lawfully. But then as it expands, at some point it becomes a different use because of its intensification. And there's a whole line of cases pretty consistently throughout three factors to consider when making that determination. And I'm not giving you legal advice. This is probably something Mr. Iacopino could speak to. But for me, I use this as guidance.

Tr., Deliberations, Day 2, 01/31/2018, Morning Session, at 43-44.

The Decision clearly states that the Subcommittee understood that it was not legally required to apply the doctrine, but found it "informative in the context of this case." Decision, at 279. The Subcommittee is required to consider all relevant information and to use their knowledge and experience in order to ascertain the issues raised by the parties. The Subcommittee cannot and should not disregard the arguments made by the parties and the knowledge and experience of the members of the Subcommittee simply because such arguments were not raised in other dockets.

Finally, the Subcommittee was not required to explain why the non-conforming use illustration did not apply to certain portions of the Project (municipalities without zoning ordinances or properties owned by the Applicant) because discussing the expansion of non-conforming uses was not offered as a legal rule, but as an example of the manner in which the Project could impact the land use.

Consideration by the Subcommittee of the impacts of the Project on aesthetics and the natural environment during its discussion of consistency with prevailing land uses was not erroneous. Neither the statute nor the Committee's rules precisely define "land use." The Subcommittee received significant testimony indicating that the right-of-way and the surrounding area is used for recreation and conservation purposes that could be affected. The impact on aesthetics, agricultural uses, and the natural environment of the land directly relates to the ability of the parties to continue to use the land for its current purposes. The Subcommittee acted lawfully and reasonably when it considered the Project's impact on different aspects of land use, including impacts on aesthetics, agriculture, and the natural environment.

The Applicant's assertion that the Subcommittee limited its consideration of the impact of the Project to a limited number of locations is simply wrong. The Subcommittee did not limit

its consideration of the impact on land use to Turtle Pond, McKenna's Purchase, and New Hampton. The Subcommittee noted that the Applicant failed to analyze the Project's consistency with the land use in locations where it would be constructed within the existing right-of-way. The Subcommittee further indicated, "by way of example," that it received testimony indicating that it could be inconsistent with current uses in Turtle Pond, McKenna's Purchase, and New Hampton. The Subcommittee concluded that, without having information of the Project's impact on land use in locations where it would be constructed within the existing right-of-way, it could not ascertain the impact on land use. *See* Decision, at 280 (finding that "[t]he Applicant failed to demonstrate by a preponderance of evidence that proposed expansion of the right-of-way use would not interfere with the orderly development of the region" after considering characteristics of the Project at certain locations).

The Subcommittee did not determine that the Project would be inconsistent with land uses at a few specific locations. It found that the Project's consistency with land uses in the region, including at specific locations, could not be determined. The Applicant failed to provide information addressing the Project's impact:

> There are areas along the route where the introduction of the Project with its increased tower heights and reconfiguration of existing facilities would create a use that is different in character, nature and kind from the existing use. There are places along the route where the Project would have a substantially different effect on the neighborhood than does the existing transmission facilities. By way of example . . . Turtle Pond in Concord . . . McKenna's Purchase . . . New Hampton . . .
> . . . .
>
> The Applicant failed to demonstrate by a preponderance of evidence that proposed expansion of the right-of-way use would not interfere with the orderly development of the region.

Decision, at 280-281.

The Applicant's argument that the Subcommittee overlooked certain facts in the record indicating that the Project would be consistent with land uses at these locations misses the point. The Subcommittee, with the benefit of seven site visits, determined that there are various places along the route where there could be a significant impact. The Subcommittee might find that the Project was or was not consistent with existing land uses at these locations, if the Applicant had actually addressed the impacts. The Subcommittee did not overlook the facts on the record. There was insufficient credible evidence in the record that would allow it to make a determination of conformity with the existing land use. The Applicant's only rationale was that the Project would be built within the existing corridor.

Further, the Subcommittee did not find that the Project would be inconsistent with prevailing land use simply because it would be inconsistent with a number of restrictions contained in municipal ordinances. A number of municipalities presented evidence indicating that the Project would be inconsistent with goals and objectives set forth in their Master Plans and Ordinances. The Subcommittee considered that evidence and also considered that Mr. Varney "did little in the way of applying the details of the Project to the plans and ordinances." Decision, at 280. The Subcommittee concluded that "[g]iven the nature of the master plans and local ordinances along the Project route, that it would have a large and negative impact on land uses in many communities that make up the region affected by the Project." Decision, at 281. The Subcommittee, however, did not deny the Application because it found that the Project would have a negative impact on land use. Instead, the Subcommittee could not issue a Certificate because the Applicant failed to provide credible information addressing the impact of the Project on land use (among other factors), including information reconciling the alleged

inconsistency of the Project with the goals and purposes identified in the Master Plans and Zoning Ordinances.

The Applicant's argument that the criticism of Mr. Varney's report was unreasonable because Mr. Varney was not required to analyze consistency of the Project with the goals and objectives expressed in municipal governing documents is unfounded. Site 301.09 requires the Applicant to file "master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places." The Applicant cannot expect that the Subcommittee would not analyze the subject matter of these documents and would not analyze the consistency of the Project with these documents. In fact, the Applicant accurately determined that the Subcommittee would engage in such analysis and filed a report that attempted to explain how the Project would be consistent with these documents. It was reasonable for the Subcommittee to identify flaws and inadequacies of the report.

The Applicant's argument that Mr. Varney was not required to consider the scope and characteristics of the Project while ascertaining its impact on land uses is without merit. Site 301.09(a) requires the Applicant to file an estimate of the effect of the Project on land use, including: (i) a description of the prevailing land uses in the affected communities; and (ii) a description of how the Project will be consistent with such land uses and identification of how the Project will be inconsistent with such land uses. The clear language of the rule requires the Applicant to state how the Project will be consistent or inconsistent with the prevailing land uses. The Subcommittee reviewed the report filed by the Applicant and found it not persuasive and not credible. The finding is reasonable and well supported by the record. The Applicant's alleged lack of knowledge that the report should contain information that would enable the

Subcommittee to reach a conclusion about the subject matter of the report is not a reason that warrants a rehearing.

The Subcommittee did not give dispositive consideration to the views expressed by municipalities. During the deliberations, Ms. Weathersby stated that it "would be good to keep in mind" the Applicant's argument that municipal views do not preempt the jurisdiction of the Subcommittee and that only "due consideration" should be given to municipal views. Tr. Deliberations, Day 2, 01/31/2018, Morning Session, at 8. The Decision specifically and unambiguously states the finding that it "is not bound by the views of municipal and regional planning bodies." Decision, at 276. The Subcommittee did precisely what it was required to do by its enabling statute – duly considered the views expressed by the municipalities. The Applicant fails to state a single fact demonstrating that the Subcommittee gave dispositive consideration to such views. The Applicant fails to state good cause warranting a rehearing.

2. Property Values

a. Positions of the Parties

(1) Applicant

The Applicant argues that the Subcommittee erred when it decided that Dr. Chalmers' report and analysis were not credible. The Applicant asserts that, contrary to the findings, Dr. Chalmers did not opine that the Project would have no impact on property values. He determined that there is a likelihood that a limited number of properties that meet specific requirements could be affected. The Applicant asserts that the Subcommittee erroneously found that Dr. Chalmers based his findings on a "windshield analysis" where he testified that he inspected 89 properties from public roads and viewing points. The Applicant also argues that the finding that Dr. Chalmers' report had some "gaps" constitutes an error of fact and reasoning. The Applicant argues that neither the rules nor past precedent require Dr. Chalmers to determine

the impact of the Project on commercial properties, condominiums, multi-family housing, vacant land, second homes, or property along the underground portion of the route. The Applicant argues that the Subcommittee erroneously found that Dr. Chalmers did not address the impact on non-residential properties where Dr. Chalmers: (i) specifically opined that the Project may impact commercial properties if the properties are physically constrained by the right-of-way in a way that reduces the income potential; (ii) testified that it is reasonable to assume that a number of studied properties were seasonal and opined that there is no evidence indicating a difference in impact between seasonal and permanent residences; (iii) analyzed the potential impact of the Project on McKenna's Purchase; and (iv) concluded that the underground portion of the Project would have no impact on property values.

The Applicant argues that the conclusion that the Project could impact the value of properties that are not encumbered by the right-of-way is not supported by the record. The Applicant asserts that the Subcommittee failed to cite any empirical data that refutes the findings of Dr. Chalmers and relied purely on their own opinions and beliefs.

(2) Counsel for the Public

Counsel for the Public argues that the Subcommittee did not misconstrue Dr. Chalmers' findings and asserts that the Decision carefully reviewed and analyzed the statements and opinions of Dr. Chalmers, and the Decision goes to great length to identify specific areas where the Subcommittee concluded that the evidence presented by Dr. Chalmers did not match his conclusions.

Counsel for the Public further argues that, contrary to the Applicant's statement, the Subcommittee did not affirmatively find that the Project would have negative effects on property values. The Subcommittee found that the Applicant did not meet its burden when it failed to provide sufficient credible and reliable evidence to support a finding that the Project would not

unduly interfere with the orderly development of the region, with consideration given to the "effect of the proposed facility on real estate values in the affected communities."

(3) Intervenors

The Forest Society states that the Applicant's request for rehearing should be denied because the Applicant failed to state good cause warranting the rehearing, but simply rehashed and bolstered the arguments made by its experts.

The Deerfield Abutting Property Owners Group of Intervenors argues that the Subcommittee did not commit an error of law or fact when it found Dr. Chalmers' report and testimony not credible. The Intervenors assert that their pre-filed testimony and cross-examination of Dr. Chalmers clearly demonstrated that the Project may have a negative effect on the value of properties that are not directly encumbered by the right-of-way. The Intervenors also assert that the Subcommittee's determination that Dr. Chalmers' report and testimony were not credible is well-supported by the record where a number of Intervenors and Counsel for the Public's witnesses identified flaws in Dr. Chalmers' testimony.

b. Analysis and Findings

The objections filed by Counsel for the Public and the Intervenors are correct. The record clearly supports the fact that the Subcommittee understood and considered that Dr. Chalmers determined that only certain properties meeting certain criteria would be impacted by the Project. *See* Decision, at 197 ("Dr. Chalmers' ultimate opinion was that there would be an infrequent property value impact that would occur primarily with respect to single family homes, within 100 feet of the right-of-way, with a change in an artificial category of view of the structures in the right-of-way"); Tr. Deliberations, Day 2, 01/31/2018, Morning Session, at 107 ("His ultimate conclusion was that the only significant effects on real estate occur within 100 feet of the edge of the right-of-way. It requires seeing new structures."). The Subcommittee

specifically noted that Dr. Chalmers determined that the Project would have a limited impact on property values.

The Subcommittee did not find that Dr. Chalmers based his findings on a "windshield analysis." The Subcommittee, during its deliberations and in its Decision, discussed at length the extent of research and analysis performed by Dr. Chalmers. While analyzing Dr. Chalmers' determination of increased visibility, the Subcommittee used the term "windshield analysis" to characterize the fact that Dr. Chalmers testified about expected views from private properties without entering such properties. Tr. Deliberations, Day 2, 01/31/2018, Morning Session, at 120-121 (determination made from the public roads and viewing points located in public places). The characterization of Dr. Chalmers' assessment was not the basis for the Subcommittee's decision.

The Applicant's argument that neither the rules nor past precedent requires Dr. Chalmers to ascertain the Project's impact on commercial properties, condominiums, multi-family housing, vacant land, second homes, or property along the underground portion of the route is erroneous. Site 301.09(b)(4) requires the Applicant to provide an assessment of the effect of the Project "on real estate values in the affected communities." Commercial properties, condominiums, multi-family housing, vacant land, and second homes are real estate. The Applicant was required to provide an assessment of the impact on these types of real estate. Properties along the underground portion of the Project are properties "in the affected communities." The Applicant should have addressed the impact of the Project on these properties. The Applicant's argument that the Subcommittee overlooked the testimony is unfounded. The testimony presented was conclusory and did not amount to a reliable and credible "assessment" of the Project's effect on real property within the affected communities.

The Subcommittee's conclusions on the effect of the Project on property values is amply supported by the record. The Subcommittee received extensive testimony and many public comments indicating that the visibility of the Project may have an adverse effect on the value of properties that are not encumbered by the right-of-way. The Subcommittee's reliance on such testimony and its own knowledge and experience was neither unreasonable nor unlawful. The Applicant's disagreement with the Subcommittee's conclusion that the Project may affect value of the properties that are not encumbered by the right-of-way is not a good cause for a rehearing.

The Subcommittee did not misconstrue or overlook Dr. Chalmers' findings. The Subcommittee considered Dr. Chalmers' methodology and findings. The Subcommittee also considered Dr. Chalmers' acknowledgments that:

- some of the appraisals he relied upon while reaching his conclusions incorrectly identified square footage of the property, failed to account for improvements, and incorrectly identified the extent of the buyers' interest when only a single offer to sell was received for that property - Tr., Day 24, Afternoon Session, 07/31/2017, at 154-162;

- one case study he relied upon did not accurately reflect the broker's statement about the visibility of the line - Tr., Day 24, Afternoon Session, 07/31/2017, at 162-165;

- some of the data relied on in the subdivision studies were inaccurate, *i.e.* dates of sales of some lots were incorrectly determined; sales of six out of eleven lots in Allenstown were between family members, and the sale of a number of lots in a subdivision in Deerfield was to a single contractor and might have been sold at a discounted price - Tr., Day 24, Afternoon Session, 07/31/2017, at 109-130; DFLD 110-117; and

- while analyzing time on the market, he did not consider and did not study the intent of the sellers and reasons why some properties were listed earlier than others - Tr., Day 24, Afternoon Session, 07/31/2017, at 109-130; DFLD 130-137.

The Subcommittee's finding that Dr. Chalmers' report was not reliable and could not be used to ascertain the Project's impact on property value was supported by the record.

3. Tourism

a. Positions of the Parties

(1) Applicant

The Applicant asserts that the Subcommittee erroneously found that its tourism expert, Mr. Nichols, determined that there would be absolutely no adverse impact on tourism.

The Applicant complains that the Subcommittee found that Mr. Nichols' comparison of the Project to the Hydro-Québec Phase II and the Maine Reliability Project was flawed. The Applicant argues that the Subcommittee based its finding on the proposition that the Northern Pass structures would be considerably taller than the Phase II and Maine Reliability structures and would be seen above tree canopy in most of the region. The Applicant asserts that there is no evidence in the record that the Phase II line is below the tree line and there is no evidence comparing the heights of the Northern Pass structures to the Phase II project. The Applicant admits that Counsel for the Public's experts testified about these facts, but argues that Counsel for the Public's experts' testimony was not supported by the record and the evidence. The Applicant also argues that the Subcommittee based its tourism finding on the position that the Phase II and Maine projects are located in areas that are substantially different from the location of the Northern Pass project and is not supported by the record.

The Applicant argues that the Subcommittee incorrectly determined that Mr. Nichols admitted that the transmission lines in North Cascades National Park are located along the road through the Park and are visible for a few seconds or for a few minutes. The Applicant also asserts that the Subcommittee erroneously failed to consider Applicant's Exhibit 312, depicting Diablo Lake Vista Point along the North Cascades Scenic Byway with transmission lines and structures.

(2) Counsel for the Public

Counsel for the Public argues that the Applicant's statement that the Subcommittee misconstrued certain facts does not warrant rehearing and that the Applicant relies on a few distinct examples where the Subcommittee allegedly misconstrued the record. Counsel for the Public asserts that the Applicant ignores the other factors used by the Subcommittee to determine that Mr. Nichols' testimony was not credible and reliable and that the Applicant failed to identify evidence that the Subcommittee overlooked or misapprehended.

b. Analysis and Findings

When faced with competing expert witnesses, "a trier of fact is free to accept or reject an expert's testimony, in whole or in part." *In re N.H. Elec. Coop.*, 170 N.H. 66, 74 (2017) (quotation omitted). The Applicant argues that the Subcommittee's determination was erroneous because it stated that Mr. Nichols determined that there would be no effect on tourism. The Subcommittee did not reject Mr. Nichols' report because of a mistaken belief that he concluded that there will be no effect on tourism. The Subcommittee rejected Mr. Nichols' report and testimony because he failed to demonstrate knowledge of North Country tourism attractions, failed to assess the impact of construction on tourism, and based his conclusions on "poorly designed listening sessions and a dubious online survey." Decision, at 225-227. The Subcommittee's finding that Mr. Nichols' report was not credible was based on the record and was within the discretion of the Subcommittee.

The Applicant's argument that the Decision was erroneous because it found that the Project's structures would be considerably taller than the Phase II structures and would be seen above the tree canopy in most of the region is also without merit. The Subcommittee's determination, as acknowledged by the Applicant in its Motion to Reconsider, was based on the record where Counsel for the Public's experts testified about these facts. The Applicant's

disagreement with Counsel for the Public's experts' testimony and the Subcommittee's decision to give credit to such testimony does not warrant a rehearing.

The Applicant's argument that the Subcommittee's decision that the Phase II and Maine projects are located in areas that are substantially different from the Project's location is not supported by the record and is without merit. The Applicant presented no credible evidence that either the Phase II line or the Maine line were constructed in similar tourism locations.

The Applicant's argument that the Subcommittee incorrectly determined that Mr. Nichols admitted that the transmission lines in North Cascades National Park are located along the road through the Park and are visible for a few seconds or for a few minutes and failed to consider the Applicant's Exhibit 312 does not warrant a rehearing.

The Subcommittee determined how much weight to give to the testimony and "to accept or reject an expert's testimony, in whole or in part." *In re N.H. Elec. Coop*., 170 N.H. 66, 74 (2017) (quotation omitted). The Subcommittee considered Mr. Nichols' testimony and found it unpersuasive, unsupported by the facts, based on false assumptions and, ultimately, unreliable. None of the facts that the Applicant states the Subcommittee allegedly overlooked or misconstrued have any bearing on the Subcommittee's decision that Mr. Nichols' research was inadequate and his report was not credible. The Applicant failed to assert good cause warranting a rehearing.

4. Construction

a. Positions of the Parties

(1) Applicant

The Applicant argues that the Subcommittee erroneously considered the effect of construction and traffic management on the orderly development of the region. The Applicant asserts that issues related to traffic were considered in other dockets as issues associated with the

impact of a project on public health and safety and not orderly development. The Applicant concludes that the Subcommittee's consideration of construction under municipal roads and the traffic impacts as part of the orderly development of the region consideration was erroneous.

The Applicant also argues that the Subcommittee overlooked the detailed assessment of local road crossings provided in Appendix 10 to the Application and their characterization of the list of State and local roads and its relationship to the Applicants' planning with respect to the impact of the Project on local roads is unfounded.

(2) Counsel for the Public and the Forest Society

Counsel for the Public asserts that the Subcommittee properly considered the effects of construction and associated traffic on the orderly development of the region. The evidence presented indicated that delays associated with construction would have a large impact on local business, the economy, community services, and infrastructure and that these issues directly relate to the orderly development of the region.

As to the Applicant's exhibit identifying local road crossings, Counsel for the Public asserts that reference to this exhibit does not require rehearing because the Decision discusses in detail the evidence regarding local road crossings and fully explains the Subcommittee's rationale for its finding.

The Forest Society argues that Site 301.15 requires the Subcommittee to consider the extent to which the construction of the Project would affect land use, employment, and the economy of the region. The Forest Society concludes that the Subcommittee properly considered impacts from construction and associated traffic while discussing orderly development of the region.

b. Analysis and Findings

Site 301.15(a) (Criteria Relative to a Finding of Undue Interference), provides that in determining whether the Project will unduly interfere with the orderly development of the region, the Subcommittee is required to consider "[t]he extent to which the siting, *construction*, and operation of the proposed facility will affect land use, employment, and the economy of the region." (emphasis added). Consistent with the rules, the Subcommittee acted appropriately when it considered the impact of construction of the Project on land use, employment, and economy of the region.

E. RSA 541-A:35

1. Positions of the Parties

a. Applicant

The Applicant argues that the Subcommittee conducted its deliberations "in such a conclusory fashion" that it failed to satisfy requirements of RSA 541-A:35, and failed to provide on the record an adequate basis upon which the Supreme Court could review the Subcommittee's decision.

2. Analysis and Findings

The Applicant's argument is not supported by the record. The Subcommittee considered each and every aspect of the orderly development of the region and identified multiple facts during deliberations and in its Decision on which it concluded that the Applicant failed to carry its burden of proof. The Applicant's request for rehearing is denied.

V. MOTION TO STRIKE

A. Positions of the Parties

The NGOs and the Plymouth to Bethlehem Non-Abutting Property Owners Group of Intervenors request that the Subcommittee strike attachments to the Applicant's Motions for Rehearing. The Applicant did not file an objection.

The NGOs assert that RSA 162-H:10, III, limits the Subcommittee's consideration to the "evidence presented at public hearings and . . . written information and reports submitted to it by members of the public before, during, and subsequent to public hearings but prior to the closing of the record of the proceeding." 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." There is only one exception to this rule: "[p]rior to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing." Site 202.26(a). The NGOs argue that the record was closed on December 22, 2017, and that the Applicant did not request that the record be kept open. The Applicant did not request that the Subcommittee re-open the record for the purpose of submitting attachments when it filed its Motions for Rehearing. Potential conditions listed by the Applicant in attachments to its Motion for Rehearing were available to the Applicant prior to the closing of the record. The Applicant failed to submit them for the Subcommittee's consideration prior to the close of the record. The NGOs argue that the Applicant's submission of additional documentation and information after the close of the record is improper and the Subcommittee should strike the attachments.

B. Analysis and Findings

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." It is

clear that the Applicant filed the attachments containing conditions to the Motions for Rehearing that, according to the Applicant, the Subcommittee could and/or should have considered during deliberations after the record was closed. Such filing is contrary to Site 202.26(a). The attachments are struck from the record by a vote of 6-1.

VI. CONCLUSION

The Applicant failed to state good cause for a rehearing. The Applicant's Motions for Rehearing are denied.

The Applicant's request to resume deliberations is denied by a vote of 5-2.

The request to strike attachments to the Applicant's Motions for Rehearing is granted by a vote of 6-1.

SO ORDERED this twelfth day of July, 2018.

Martin P. Honigberg, Presiding Officer
Site Evaluation Committee
Commissioner and Chair
Public Utilities Commission

Kathryn M. Bailey, Commissioner
Public Utilities Commission

Christopher S. Way, Designee
Deputy Director
Division of Economic Development
Department of Business and Economic Affairs

William J. Oldenburg, Designee
Assistant Director of Project Development
Department of Transportation

Craig A. Wright, Designee
Director
Air Resources Division
Department of Environmental Services

Patricia M. Weathersby, Public Member

Rachel E. Dandeneau, Alt. Public Member

ATTACHMENT A

In its Final Brief and Request for Findings of Fact and Rulings of Law, the City of Berlin requested specific findings. The requests and the Subcommittee's rulings are set forth below.

1. The Coos Loop is a 115 kV transmission line that starts at the Lost Nation substation in Northumberland, travels east through Northumberland, Stark and Dummer to the Paris substation, then travels south through Milan, the City (through the Berlin substation), and Gorham, then travels west through Randolph, Jefferson, and Whitefield, and completes the Loop by traveling north through Whitefield and Lancaster back to Lost Nation substation.
   Granted.

2. The Coos Loop is a critically important portion of the transmission grid that allows small-scale hydro generation and other renewable generation to get to the local and regional energy markets and also serves customers in the North County.
   Granted except for the words "critically important."

3. Thermal, voltage, and stability restrictions exist along the western and northern portions of the Coos Loop running from Whitefield to the Paris substation.
   Granted.

4. Thermal, voltage, and stability restrictions limit the Coos Loop's ability to transmit electricity to market and constrains the ability of generators situated along the Coos Loop to produce power.
   Granted.

5. The Applicants have agreed to upgrade and repair such portions of the Coos Loop that are co-located with the Project Route, specifically 12.1 miles along PSNH Line 0154 and 18 miles along PSNH Line Dl42.
   Granted.

6. PSNH has further agreed to upgrade a half mile portion of the Coos Loop that is not co-located with the Project up to the Paris substation and upgrade the Coos Loop leading from Whitefield to the Moore Hydro-Electric Facility in Monroe.
   Granted.

7. PSNH has committed to request permission from ISO-New England to perform a study on a static VAR compensator ("SVC") at the Berlin Substation and install an SVC at the Berlin Substation should the study suggest the installation of an SVC.
   Granted.

8. The Applicants' proposed upgrades and repairs to the Coos Loop will improve thermal, voltage, and stability constraints along the Coos Loop, thereby allowing generators located along the Coos Loop to transmit a greater amount of renewable energy and experience fewer constraints in the generation of that renewable energy.
   Granted.

9. The proposed upgrades and repairs to the Coos Loop associated with the Project are in the public interest, will benefit renewable energy generators, increase the value of those generation facilities, and will benefit local economies.
   Denied.

10. The North Country of the State of New Hampshire has struggled economically with the closure of paper mills and other industries in the North Country.
    Granted.

11. The City of Berlin, being a municipality in the New Hampshire's North Country, has struggled economically and has attempted to revitalize the City and the region's economy through various initiatives.
    Granted as to the statement that: "The City of Berlin, being a municipality in the New Hampshire's North Country, has struggled economically." The rest of the statement is denied.

12. Despite these efforts, the City of Berlin continues to struggle economically.
    Granted except for the words "despite these efforts."

13. The City has the second highest tax rate in the State of New Hampshire.
    Granted to the extent that "as of 2016," the City "had" the second highest tax rate.

14. The City has the third highest recorded unemployment rate in the State of New Hampshire.
    Granted to the extent that "as of 2016, the City "had" one of the highest recorded unemployment rates in the State of New Hampshire."

15. The City has one of the highest recorded median ages in the State of New Hampshire.
    Denied.

16. The City is an economic hub of the North Country
    Denied.

17. The Applicants have agreed, as a condition of approval, to establish the $200 million Forward NH Fund, the purpose of which is to promote tourism, clean energy, and economic development, with a focus on the North Country of New Hampshire.
    Granted with the exception of the following phrase: "with a focus on the North Country of New Hampshire."

18. The Applicants have also agreed to establish the $7.5 million North Country Job Creation Fund as a condition of approval for the Project.
Granted.

19. The establishment of guidelines and by-laws for the Forward NH Fund and the NCJCF that emphasize disbursement of funds to the North Country and, particularly, the City of Berlin will ensure that the monies from these funds will provide the greatest possible economic opportunities possible.
Denied.

20. With these guidelines and by-laws in place, the Forward NH Fund and the NCJCF will be in the public interest, benefit regional and local economies, and provide needed employment opportunities.
Denied.

21. The Project will result in the construction of taxable electric utility property in host municipalities.
Granted.

22. The Project will result in tax base increases for host municipalities.
Denied.

23. The Project will result in tax base increases for host counties.
Denied.

24. For non-host municipalities located in host counties, the Project will result in a decrease in the county tax rate owed by those non-host municipalities.
Denied.

25. The City of Berlin is a non-host municipality located in a host county.
Granted.

26. The Project will result in a decrease to the City of Berlin's county tax rate
Denied.

27. The Applicant has pledged not to bring suit against host-municipalities that assess the Project at the Project's "net book value."
Granted, to the extent that the pledge is limited to a twenty-year period and with the exception that the Subcommittee has no opinion as to whether "net book value" is the appropriate method of evaluation.

28. Net book value is not a reliable indicator of the value of electric utility assets and results in a tax assessment that is unreasonably low.
Denied.

29. The Committee's issuance of a Certificate of Site and Facility for the Project is not a finding that the Applicant's proposed taxation methodology is an accurate methodology for the determination of fair market value of the Project for any state and/or local property taxes, including, but not limited to RSA 72:6, RSA 72:8, and RSA 83-F. **Denied.**