THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2018-0468

Appeal of Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy

APPEAL PURSUANT TO RULE 10 FROM AN ORDER OF THE NEW HAMPSHIRE SITE EVALUATION COMMITTEE

BRIEF OF COUNSEL FOR THE PUBLIC

March 21, 2019

Christopher G. Aslin
Senior Assistant Attorney General
33 Capitol Street
Concord, New Hampshire 03301
603-271-3679
christopher.aslin@doj.nh.gov
N.H. Dept. of Justice
Environmental Protection Bureau
NH Bar ID No. 18285

Oral Argument Requested. Christopher Aslin will argue.

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STATEMENT OF THE CASE AND FACTS

Pursuant to RSA 162-H:10, Applicants, Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy, held pre-application public information sessions between September 2 and September 10, 2015, in each of the five counties through which the 192-mile 1,090 megawatt (MW) transmission line and associated facilities (the "Project") was proposed. DK-Tab-3. Applicants filed an application with the Site Evaluation Committee on October 19, 2015. DO at 8.[1] Pursuant to RSA 162-H:9, on October 28, 2015, the Attorney General designated Senior Assistant Attorney General Peter Roth as Counsel for the Public ("CFP").[2] DO at 9. A subcommittee was appointed by the Chair of the Committee on November 2, 2015. *Id.*

Following a public hearing held on December 7 and 18, 2015, the Subcommittee issued an order accepting the Application as complete for purposes of review. *Id.* Post-application public information sessions were held between January 11 and January 21, 2016, in each of the five counties proposed to be impacted by the Project. *Id.* The Subcommittee conducted seven public hearings across the Project route between March 1 and June 23, 2016. DO at 10.

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[1] In this brief, citations are designated as follows: the Subcommittee's March 30, 2018 Decision and Order Denying Application for Certificate of Site and Facility as "DO" (DK-Tab-1432); the Subcommittee's July 12, 2018 Order on Applicant's Motion for Rehearing as "RHO" (DK-Tab-1478); Applicants' Brief as "AB"; Applicants' Appendix to its Brief as "App"; and Applicants' Appendix to its Notice of Appeal as "NOA App".

[2] Attorney Roth was replaced by Assistant Attorney General Christopher Aslin as CFP on August 25, 2017. DK-Tab-1138.

The Subcommittee received 160 motions to intervene and, following a hearing, issued a May 20, 2016 Order ruling on intervention requests and combining the intervenors into 25 intervenor groups by geography and areas of interest. DO at 10-14; DK-Tab-487. During the course of proceedings, Applicants supplemented and corrected their application on February 26, May 10, June 11 and 22, and September 29, 2016, and August 25 and November 20, 2017. DO at 8. The Subcommittee conducted seven days of site visits on March 7, 8, 14 and 16, 2016, and July 27, 28 and October 3, 2017. DO at 10. The Subcommittee held public comment hearings on May 19 and June 23, 2016, June 15 and 22, July 20, and August 30, 2017 to take oral and written public comments. DK-Tabs-485-521-1035-1044-1090-1148.

Adjudicative hearings were held between April 13, 2017, and December 21, 2017, consisting of seventy days of testimony from 154 witnesses and the submission of 2,176 exhibits. DO at 14. The evidentiary record closed on December 22, 2017, and the parties filed post-hearing briefs between January 11-19, 2018. In their final brief, Applicants refuted the expert testimony of CFP's experts Thomas Kavet and Nicholas Rockler of Kavet, Rockler & Associates, LLC ("KRA"), arguing that KRA's findings were neither relevant nor determinative, and "should be disregarded." DK-Tab-1386 at 116-17, 125-33. Applicants also objected to the majority of conditions proposed by CFP and other intervenors, asserting that the proposed conditions were variously unnecessary, overly burdensome, inappropriate, and even impossible. *Id.* at 404-24.

The Subcommittee deliberated in public session from January 30 through February 1, 2018. The Subcommittee first deliberated on the

required finding under RSA 162-H:16, IV(a) of whether Applicants had "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" if issued. DK-Tab-1398 at 18-20. The Subcommittee did not take a vote on the issue, but reached a preliminary consensus that the Subcommittee could make the required finding under RSA 162-H:16, IV(a). *Id.* at 103-105.

The Subcommittee then deliberated on the required finding under RSA 162-H:16, IV(b) that "The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies." *Id.* at 105-108. During deliberations on orderly development of the region ("ODR"), various members of the Subcommittee indicated their opinions that Applicants' experts on tourism (Mitch Nichols) and property values (Dr. James Chalmers) were not credible.

By way of example, Commissioner Bailey stated she "didn't find Dr. Chalmers very convincing at all." DK-Tab-1400 at 115. Similarly, Chairman Honigberg "did not find [Dr. Chalmers] an especially credible witness on [property values] because of the mistakes that he did not seem to recognize were mistakes until they were put in front of him." *Id.* With regard to Dr. Chalmers' opinion that there would be no impact to property values, Mr. Way stated "I just don't think it passes the 'straight-face test.'" DK-Tab-1402 at 10. Mr. Wright similarly opined "with respect to the real estate values, I did not find the witness [Dr. Chalmers] credible," *id.* at 23, and Ms. Dandeneau agreed, stating "I did not find the analysis credible or

convincing, and I do have concern about this project's impact on property values." DK-Tab-1402 at 13.

With regard to Mr. Nichols, Mr. Way "did not find the witness to be particularly knowledgeable about the state [or] its tourist destinations," *id.* at 9, and Ms. Weathersby stated that the "analysis by Mr. Nichols was deficient in many respects, and I was left unpersuaded that New Hampshire tourism will not be unduly influenced in a negative manner." *Id.* at 18. Mr. Wright "didn't find the witness credible for a number of reasons," *id.* at 23, and Commissioner Bailey stated that "of all the witnesses, Mr. Nichols was the least credible in my mind. And not credible almost at all." DK-Tab-1401 at 87. Ultimately, Mr. Way felt that "on orderly development, it's not even close," DK-Tab-1403 at 6, and Commissioner Bailey summarized that "overall, I think that the evidence that we have lacks the information that I would need to make a finding ... that the site and facility will not unduly interfere with the orderly development of the region." DK-Tab-1402 at 29.

On February 1, 2018, the Subcommittee found by unanimous vote that Applicants failed to demonstrate that the Project would not unduly interfere with the orderly development of the region. DK-Tab-1403 at 24-25. Having found that the Subcommittee could not make one of the four findings required under RSA 162-H:16, IV in order to grant a certificate, the Subcommittee voted 5-2 to end deliberations and voted unanimously to deny the application. DK-Tab-1403 at 23-26.

Following the Subcommittee's vote to deny the application, Applicants negotiated with CFP to reach agreement on all of CFP's previously proposed conditions with some minor modifications. DK-Tab-1406 at 2, Attach. A. On February 28, 2018, prior to issuance of the

Subcommittee's written order, Applicants filed a Motion for Rehearing and Request to Vacate Decision. DK-Tab-1406. In the motion, Applicants requested that the Subcommittee resume deliberations, and appended both their newly agreed-upon versions of CFP's proposed conditions, DK-Tab-1406 at 2, Attach. A, and a list of additional potential conditions Applicants suggested might alleviate the concerns expressed by the Subcommittee in its deliberations. DK-Tab-1406 at 2-4, Attach. B.

On March 12, 2018, the Subcommittee held a hearing on pending motions at which it declined to resume deliberations prior to issuing a written decision and voted to suspend the Subcommittee's February 1, 2018 oral decision pending issuance of a written decision and consideration of any motions for rehearing. DK-Tab-1429 at 23-26.

The Subcommittee issued a 287-page written Decision and Order on March 30, 2018, memorializing the findings made during deliberations and the Subcommittee's decision to deny the application. DK-Tab-1432 (the "Order"). With regard to Applicants' experts on property values, the Subcommittee expressly found "much of Dr. Chalmers' testimony and his report to be shallow and not supported by the data," DO at 194, and that "many of Dr. Chalmers' conclusions from the case studies [were] unreliable." *Id.* at 196. Ultimately, the Subcommittee found Dr. Chalmers' "report and testimony to be insufficient to demonstrate that the Project will not have an unreasonably adverse impact on real estate values throughout the region." *Id.* at 194. Accordingly, the Subcommittee ruled that "Applicant[s] did not meet [their] burden in demonstrating that the Project's impact on property values will not unduly interfere with the orderly development of the region." *Id.* at 199.

On the effects of the Project on tourism, the Subcommittee "did not find the report and testimony submitted by Mr. Nichols credible" for a variety of specified reasons. DO at 225-27. In the face of Mr. Nichols unreliable analysis, the Subcommittee determined "we are no better off than we were before the evidentiary hearing," and, therefore, "cannot conclude the Applicant[s] ha[ve] met [their] burden [of proof]" regarding the impacts of the Project on tourism. *Id.* at 226-27. Based on these inadequacies in Applicants evidence, as well as the Subcommittee's disagreement with Applicants' expert on land use impacts, *id.* at 277-78, the Subcommittee ultimately found that Applicants "failed to establish that the Project would not unduly interfere with the orderly development of the region." *Id.* at 283.

Applicants timely filed a Motion for Rehearing. DK-Tab-1435. In the motion, Applicants again highlighted their post-close-of-the-record agreement with CFP's proposed conditions and argued that the Subcommittee should have imposed additional conditions that Applicants had previously argued against. DK-Tab-1435 at 1-2. Applicants also argued that the Subcommittee should have relied on KRA's findings at the same finding Applicants previously disparaged at to fashion conditions to mitigate Project impacts. *Id.* at 16-18.

The Subcommittee held deliberations on the motion on May 24, 2018. RHO-6. The Subcommittee voted 5-2 to deny Applicants' request to resume deliberations, DK-Tab-1475 at 5-6, and voted unanimously to deny rehearing. DK-Tab-1475 at 78-79. The instant appeal followed.

SUMMARY OF THE ARGUMENT

Applicants face a high hurdle on appeal, where the Subcommittee's factual findings are presumed *prima facie* lawful and reasonable and the Subcommittee's credibility determinations are entitled to significant deference. Applicants' attempt to transform a sufficiency of the evidence challenge into a procedural due process violation falls short where Applicants fail to identify any particular record evidence the Subcommittee did not properly consider. The Subcommittee's credibility determinations and ultimate decision are supported by substantial record evidence and are explained in detail in the Subcommittee's orders. Applicants have not established any legal error in the Subcommittee's weighing of the evidence.

Applicants' reliance on select comments by individual members of the Subcommittee during oral deliberations is misplaced. The Subcommittee makes findings only by majority action, with its collective findings and decisions set forth in its written order. Individual comments are entitled to only marginal weight when assessing the Subcommittee's written decision, and must be considered in the broader context of the deliberations as a whole.

Applicants appear to have waived their previous argument that the Subcommittee was legally required to continue deliberations after making a dispositive finding on orderly development. To the extent the argument is not waived, Applicants fail to point to any legal mandate to continue deliberations once it is clear that a certificate cannot be granted. While CFP agrees that completing deliberations would have been an appropriate policy decision, Applicants have not demonstrated that the Subcommittee

committed any reversible error in ending deliberations after unanimously finding that the Applicant failed to meet its burden to prove that the Project would not unduly interfere with the orderly development of the region.

Similarly, Applicants are unable to show that the Subcommittee either failed to consider mitigating conditions or was legally required to consider potential conditions that were not part of the record. As set out in the Order, the Subcommittee did consider the numerous conditions proposed by state agencies, Applicants, CFP, and the intervenors that related to orderly development. Moreover, the statute and administrative rules clearly leave the imposition of conditions to the discretion of the Subcommittee. The Subcommittee properly and defensibly exercised its discretion not to impose conditions that either had been opposed by Applicants or were not supported by the record. The Subcommittee had no legal obligation to create new conditions to backfill Applicants failure of proof.

The Subcommittee's finding that Applicants failed to sustain their burden of proof did not constitute *ad hoc* decision-making. As set forth in administrative rule, Applicants had the burden to prove sufficient facts to allow the Subcommittee to make the statutory findings that are a pre-requisite to issuance of a certificate of site and facility. Upon finding that Applicants' evidence on the effects of the Project on tourism, property values, and land use was either not credible, not reliable, or unpersuasive, the Subcommittee properly ruled that Applicants failed to prove sufficient evidence to support a finding that the Project would not unduly interfere with the orderly development of the region.

Based on the record evidence and the Subcommittee's credibility determinations, the Subcommittee had insufficient credible evidence upon which to weigh the various impacts and benefits of the Project on orderly development. The Subcommittee was not obligated to rely on disputed evidence from other parties to sustain Applicants' burden of proof. In making its credibility findings, the Subcommittee did not apply new standards or burdens of proof. Rather, the Subcommittee discussed and refuted the stated opinions of Applicants' experts. Applicants mischaracterize criticism of their experts as the creation of new standards.

Finally, to the extent Applicants argue that the statute or administrative rules were unconstitutionally vague "as applied," Applicants fall well short of the required showing. RSA chapter 162-H and the Site rules provide extensive notice of both the types of evidence to be considered by the Subcommittee and the standards by which the Subcommittee would evaluate such evidence. Instead of arbitrary decision-making or impermissibly vague application of statutory provisions, the determinative factor for the Project was the lack of sufficiently credible and reliable evidence submitted by Applicants.

Ultimately, the Subcommittee found that Applicants failed to prove sufficient credible evidence to support the statutorily required finding that the Project would not unduly interfere with the orderly development of the region. The Subcommittee's finding is amply supported by the record and, Applicants have not demonstrated that the Subcommittee's decision was unreasonable or unlawful. Accordingly, the Subcommittee's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW.

Pursuant to RSA 162-H:11, judicial review of decisions by the SEC are governed by RSA chapter 541. This Court has recently summarized its standard of review of SEC subcommittee decisions as follows:

> Under RSA 541:13, we will not set aside the subcommittee's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. The subcommittee's findings of fact are presumed prima facie lawful and reasonable. In reviewing those findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record. We review the subcommittee's rulings on issues of law de novo.

Appeal of Mary Allen, 170 N.H. 754, 757–58 (2018) (citations omitted) (underlining in original). The Court went on to reaffirm the longstanding administrative law principle that "it is not [the Court's] task to determine whether [the Court] would have credited one expert over another, or to reweigh the evidence, but rather to determine whether [the Subcommittee's] findings are supported by competent evidence in the record." *Id.* at 762. *Cf. Appeal of Jackson*, 142 N.H. 204, 207 (1997) ("It is the board's province, not ours, to weigh the evidence in the first instance."). On appeal, Applicants bear the burden of proving that the Subcommittee's order was unreasonable or unlawful. *See* RSA 541:13 ("Upon the hearing the burden of proof shall be upon the party seeking to

set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful.").

II. STATEMENTS BY INDIVIDUAL SUBCOMMITTEE MEMBERS DURING PUBLIC DELIBERATIONS DESERVE LITTLE WEIGHT WHERE A WRITTEN ORDER WAS ISSUED BY THE SUBCOMMITTEE.

Throughout their brief, Applicants rely heavily on cherry-picked statements by individual Subcommittee members during deliberations to paint a picture of alleged arbitrary decision-making. However, while the Subcommittee's deliberations are part of the record and can provide the Court with some context, statements by individual Subcommittee members – much like statements of individual legislators – deserve little weight when the Court considers the formal written findings and rulings of the Subcommittee acting as a whole. *Cf. N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 942 (2017) ("What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators."); *Appeal of Routhier*, 143 N.H. 404, 408 (1999) ("We are reluctant to give too much weight to comments offered by proponents of bills."). At a minimum, such statements must be viewed in their full context, including both the totality of the deliberations and the Subcommittee's written decision and order. *See Martin v. City of Lewiston*, 939 A.2d 110, 114 (Me. 2008) ("We do not, however, review individual board member comments without regard for the record as a whole, but instead analyze a board's deliberations in context, taking into consideration both the comments of other board members and the board's written findings.").

As with most boards, commissions and committees, a majority vote of the Subcommittee is required to make findings or rulings. RSA 162-H:16, II ("The decision to issue a certificate in its final form or to deny an application once it has been accepted shall be made by a majority of the full membership" of the Subcommittee). Accordingly, the statements or opinions of individual Subcommittee members have no legal effect and cannot be imputed to the Subcommittee as a whole. Instead, the Subcommittee's written decision and order sets forth the Subcommittee's collective findings and the reasoning underlying those findings. Attempts to characterize individual deliberative statements as representing the position of the Subcommittee as a whole should be rejected, and individual deliberative statements should be weighed for what they are at the thoughts and opinions of individuals provided during frank discussions of Applicants' evidence.

III. THE SUBCOMMITTEE CONSIDERED ALL RELEVANT INFORMATION AND ISSUED A DETAILED ORDER EXPLAINING ITS FINDINGS.

A central theme of Applicants' appeal is the allegation that the Subcommittee failed in various ways to consider all relevant information in violation of the mandate set out in RSA 162-H:10, III and :16, IV. Applicants' position is belied, however, by the extensive decisional record below, including detailed recitations of the evidence in the Subcommittee's 287-page Order and 68-page Rehearing Order, the 785 pages of deliberation transcripts, and the specific finding of the Subcommittee itself that it "considered all relevant information regarding the proposed Project, including potential significant impacts and benefits." DO at 286.

Notwithstanding Applicants' exhortations, Applicants do not point to a single piece of specific evidence that the Subcommittee allegedly failed to consider.[3] Rather, Applicants attempt to disguise a challenge to the Subcommittee's weighing of the evidence as a procedural due process violation. Their attempt falls well short.

A. The Subcommittee Was Not Required to Continue Deliberations After a Dispositive Finding on Orderly Development of the Region.

Under the heading "the SC failed to consider all relevant information," Applicants state that the Subcommittee failed "to deliberate on at and to make at all statutory findings in RSA 162-H:16, IV…." AB at 31. However, Applicants provide no explanation of how the Subcommittee's decision to end deliberations after making a dispositive finding on the orderly development of the region criterion ("ODR") represented a failure to consider all relevant information. Moreover, Applicants present no argument that the Subcommittee's decision to end deliberations was unlawful. Having failed to brief the issue, the Court should properly consider the argument waived. *Town of Londonderry v. Mesiti Dev., Inc.*, 168 N.H. 377, 380 (2015) (finding "issue waived" when issue "was not addressed in the body of their brief").

Notwithstanding Applicants' waiver of the issue, the Subcommittee's decision to end deliberations after making a dispositive

[3] Applicants make passing reference to testimony provided by CFP's economic experts, Kavet, Rockler & Associates ("KRA"), and pose a series of rhetorical questions about how the Subcommittee might have utilized KRA's testimony. AB at 33-34. However, in addition to falling short of claiming the Subcommittee overlooked such evidence, the record demonstrates that the Subcommittee did fully consider KRA's testimony. DO at 177-79, 219-20.

finding on ODR was lawful. While there are strong policy reasons for subcommittees to deliberate on all areas of an application, *see* DK-Tab-1426 at 12, nothing in RSA chapter 162-H or in the SEC's regulations requires the Subcommittee to deliberate on and to vote on each of the findings the Subcommittee must make "[i]n order to issue a certificate" when the Subcommittee denies a Certificate. RSA 162-H:16, IV. The statute directs that "[a]fter 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." *Id.* RSA 162-H:16, IV further specifically directs that "*[i]n 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).

By its plain language, the statute mandates that a Certificate can issue *only if* the Subcommittee can make the four required findings set out in RSA 162-H:16, IV(a)-(e). No such statutory requirement applies, however, in order to *deny* a certificate. Rather, the Subcommittee is *required* to deny a certificate if the Subcommittee is unable to make any one or more of the four required findings. Accordingly, once it is clear that a certificate cannot legally issue, deliberation on the remaining criteria is legally unnecessary. Had the General Court intended to require deliberation and findings on all four statutory criteria in order for a subcommittee to deny a certificate, it would have indicated such in the statutory language. *See Bovaird v. N.H. Dep't. of Admin. Servs.*, 166 N.H. 755, 759 (2014) ("We can neither ignore the plain language of the legislation nor add words which the lawmakers did not see fit to include.").

Nor do the SEC's rules impose a requirement to deliberate or make express findings on each of the four required statutory criteria after finding that a certificate cannot issue. New Hampshire Administrative Rules, Site 202.28(a) states that the subcommittee "[s]hall 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." *N.H. Admin. R.*, Site 202.28(a). While the rule references numerous criteria, use of the preposition "a" and the singular form of "finding," demonstrate an express intent to require only a single finding by a subcommittee at namely a finding on whether or not the project satisfies the statutory and regulatory requirements for issuance of a certificate. Indeed, the rule goes on to reference issuance of "an order pursuant to RSA 541-A:35 issuing or denying a certificate." By its plain language, Site

202.28(a) requires only the ultimate finding on issuance or denial of a certificate based on the criteria set forth in statute and administrative rule. Here the Subcommittee made such a finding in compliance with Site 202.28(a) and RSA 162-H:16, IV.

B. The Subcommittee Appropriately Considered Evidence of Mitigation and Proposed Conditions.

Applicants next assert that the Subcommittee failed to consider all relevant evidence by not considering "mitigating measures and conditions that could have reduced or eliminated Project impacts." AB at 34. Rather than point to specific proposed "mitigating measures or conditions" that the Subcommittee allegedly failed to consider, however, Applicants' actual argument is that the Subcommittee failed to go beyond the conditions proposed by Applicants and impose alternative conditions created by the Subcommittee itself. While the Subcommittee has the discretion to impose conditions, it has no legal obligation to do so and the Subcommittee's decision here was lawful and reasonable.

1. Applicants Improperly Conflate Mitigation and Conditions.

Throughout their brief Applicants improperly conflate the concepts of mitigation measures and certificate conditions, leading to the possible misconception that no mitigation was considered by the Subcommittee. While Applicants use the terms "conditions" and "mitigation" interchangeably in their brief "to mean measures intended to avoid, minimize and mitigate impacts," AB at 35, n.22, these terms actually represent separate and distinct concepts. Mitigation is a generic concept

typically used in the SEC context to mean measures taken by applicants, and incorporated into the proposed project, in order to reduce the project's impacts. *See, e.g.*, *N.H. Admin. R.*, Site 301.05–301.08 (requiring application to include "plans for avoiding, minimizing, or mitigating potential adverse effects of, the proposed facility" on aesthetics, historic sites, air quality, water quality, and the natural environment, and public health and safety). Conditions, on the other hand, are specific requirements imposed by the SEC and incorporated into a certificate. *See, e.g.*, *N.H. Admin. R.*, Site 301.17 (requiring the Subcommittee to consider whether certain conditions "should be included in the certificate"). Conditions can act to mitigate project impacts or to achieve other appropriate goals, such as informing the public of project information or facilitating SEC oversight of an approved project. *Id.*

To the extent Applicants suggest that the Subcommittee failed to consider mitigation measures, such an assertion is inherently incorrect. Applicants' proposed mitigation measures are part of the application and representations made by Applicants' witnesses during the adjudicatory hearing. By way of example, the application states "that many measures have been incorporated into the planning and design of the Project in order to avoid, minimize or mitigate visual effects," DK-Tab-1 at 58, and during the adjudicatory hearing Kenneth Bowes testified that "the Applicant would limit the construction activity hours" in order to "mitigate the impact of construction noise." DO at 93; DK-Tab-986 at 45-47. Thus, mitigation measures were an integral part of the application and evidence presented by Applicants and considered by the Subcommittee.

Conditions, on the other hand, are external to the application and are proposed by state agencies and various parties as additional requirements or restrictions on Applicants if a certificate is issued. As set out below, the Subcommittee considered the relevant conditions proposed by the parties prior to Subcommittee deliberations.

2. The Subcommittee Considered All Relevant Proposed Conditions in the Record.

As stated by Applicants, the statutory scheme "contemplates two types of conditions: Conditions offered by agencies with specific expertise and permitting responsibility 'necessary to make a final decision on the parts of the application that relate to its permitting or other regulatory authority,' 162-H:7, VI-b and 7-a, I(b), and conditions proposed by applicants, parties or the SEC itself and unrelated to the specific requirements of the state permitting agencies." AB at 36. With regard to the former category, conditions proposed by state permitting agencies, it is beyond dispute that the Subcommittee considered such conditions. *See* DO at 43-52 (summarizing the state permitting agencies' proposed conditions).

The Subcommittee similarly considered the second category of conditions for those statutory criteria on which the Subcommittee deliberated. Throughout the Order, the Subcommittee itemizes and discusses the various conditions proposed by the parties. *See, e.g.*, DO at 73, 98-100, 106-108, 115-16, 135, 137, 149-50, 175-77, 197-98, 229-30. Indeed, Applicants admit that the Subcommittee considered some of their proposed conditions, but complain that the Subcommittee did not go further

by imposing more stringent conditions than those proposed or agreed to by Applicants. AB at 37.

Applicants' admission exposes the true nature of their complaint at that the Subcommittee refused to take matters into its own hands and impose conditions to which Applicants objected or create new conditions not proposed by any party. However, as discussed below, the Subcommittee has no legal obligation to impose or manufacture conditions, particularly where such conditions would substantially alter the proposed Project or its economics, or would be based on facts not established in the record.

3. The Subcommittee Exercised Its Discretion Not to Impose Arbitrary or Project-Altering Conditions.

Applicants offer no statutory authority for their claim that the Subcommittee was required to consider mitigating conditions prior to denying a certificate. The sole authority cited by Applicants is New Hampshire Administrative Rules, Site 301.17(i), which states:

> 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.
>
> * * *
>
> (i) Any other condition necessary to serve the objectives of RSA 162-H or to support findings made pursuant to RSA 162-H:16.

N.H. Admin. R., Site 301.17 (emphasis added). By its plain language, this catch-all gives the Subcommittee broad discretion to consider potential

conditions "to support findings made pursuant to RSA 162-H:16." The rule clearly contemplates conditions only when the Subcommittee's findings pursuant to RSA 162-H:16 result in the issuance of a certificate. Here, the Subcommittee's "findings made pursuant to RSA 162-H:16" include a finding that the Applicants failed to sustain their burden of proof to demonstrate that the Project would not unduly interfere with the orderly development of the region. There are no conditions that would "support" a finding that precludes issuance of a certificate.

Moreover, the rule leaves imposition of conditions squarely within the Subcommittee's sound discretion.[4] Even given its broadest possible reading, the rule requires only that the Subcommittee "consider" potential conditions; under no reasonable reading of the rule does it require the Subcommittee to impose any particular condition—whether the condition were proposed by a party or created by the Subcommittee itself. Where, as here, the Subcommittee *did* consider potential conditions, Applicants' argument is reduced to a complaint that the Subcommittee either did not consider the correct conditions or failed to *impose* particular conditions. Yet, both the statute and the rules leave imposition of conditions squarely to the discretion of the Subcommittee. RSA 162-H:16, VI; *N.H. Admin. R.*, Site 301.17. Where the General Court has delegated discretion to the

[4] The Subcommittee's discretion is further codified in RSA 162-H:16, VI, which states that a "certificate of site and facility *may* contain such reasonable terms and conditions … as the committee deems necessary ...." RSA 162-H:16, VI (emphasis added). Use of the permissive "may" indicates the decision is left to the sound discretion of the Subcommittee. *See In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) ("It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.") (quoting *Appeal of Rowan*, 142 N.H. 67, 71 (1997)).

Subcommittee to impose conditions, it is neither Applicants', nor this Court's, role to substitute their judgment for that of the Committee. *Appeal of Mary Allen*, 170 N.H. at 762.

The record demonstrates that the Subcommittee exercised its discretion over conditions reasonably and lawfully. First, as set out above, the Subcommittee did consider both the conditions proposed by state agencies with permitting authority, DO at 43-58, and the conditions proposed by the parties, including Applicants. DO at 98-100, 115-16, 135, 137, 175-77, 197-98, 229-30. This fact, standing alone, defeats Applicants' failure to consider claim.

Second, the Subcommittee was well within its discretion to decline to impose conditions that Applicants opposed on the record. For example, CFP proposed a series of conditions in his post-hearing brief, DK-Tab-1373-163 at 70, but Applicants expressly objected to almost all of them.[5] DK-Tab-1386 at 404-15. Indeed, it was only after the Subcommittee voted to deny issuance of the certificate that Applicants reversed course and worked with CFP to reach agreement on most of CFP's proposed

[5] This lies in stark contrast to the applicant's approach in the Seacoast Reliability Project ("SRP") proceedings, where Eversource agreed to CFP's proposed conditions, including a wide-reaching dispute resolution condition, during the adjudicatory hearings and well before the close of the record. Site Evaluation Committee Decision and Order (January 31, 2019) in Docket No. 2015-04 ("SRP Order") at 324 (submitted to the Court with Appellants' February 25, 2019 Notice of Supplemental Authority). Applicants point favorably to the SRP subcommittee's handling of conditions, but omit the key fact that prior to the close of the record Eversource "agreed to comply with a comprehensive and unprecedented set of conditions to ensure that impacts of the Project will be appropriately avoided, minimized, and mitigated." SRP Order at 323.

conditions.[6] DK-Tab-1406 at 2, Attach-A. Applicants' *post decision* attempt to revise the record was improper, and the Subcommittee was statutorily barred from considering evidence that was not part of the record. *See* RSA 162-H:10, III (limiting subcommittee consideration to only "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") (emphasis added). Applicants cannot reasonably criticize the Subcommittee for declining to impose conditions that were not part of the record and that Applicants themselves represented were unnecessary, overly burdensome, or even impossible.[7]

Third, the Subcommittee exercised sound discretion in declining to impose conditions where there was inadequate evidentiary support in the record. At the heart of Applicants' complaint is the suggestion that the Subcommittee should have concocted a set of conditions, beyond those agreed to by Applicants or even those proposed by other parties, in order to

[6] Similarly, it was only after the Subcommittee voted to deny a certificate that Applicants suggested the Subcommittee could have considered other never-before-proposed conditions to rectify Applicants' failure of proof. DK-Tab-1406 at 2, Attach-B.

[7] For example, CFP proposed a condition requiring the Forward New Hampshire Fund ("FNHFund") to have an independent board and an economic development professional. Applicants objected stating that the FNHFund was an independent entity and "Certificate conditions cannot bind such a Third Party. It is solely within the purview of the FNHFund to make decisions about the disbursement of funds." DK-Tab-1386 at 414. Thus, prior to a decision by the Subcommittee Applicants represented that conditions directing disbursements from the FNHFund were not possible, yet complained after the Subcommittee denied a certificate that the Subcommittee should have directed disbursements from the FNHFund to mitigate tourism and property value impacts.

rectify any areas where the Subcommittee felt that the Project's impacts would be too great. However, in the absence of testimony or other record evidence demonstrating how a subcommittee-created condition would address or alleviate Project impacts, such an exercise of the Subcommittee's discretion would entail a high risk of resulting in arbitrary and ineffective conditions.

For example, where the Subcommittee found that there was likely to be an unquantified negative impact on tourism, Applicants argued on rehearing that the Subcommittee could have redirected money from the FNHFund to address tourism impacts.[8] DK-Tab-1406 at 40. Yet, because Applicants denied there would be any tourism impacts, there was no evidence in the record of what types of mitigation measures could be deployed or what the effect of any expenditure of money from the FNHFund might be on tourism. Had the Subcommittee attempted to fill this void without adequate evidentiary support, the resulting condition would be *a fortiori* arbitrary. Indeed, the Subcommittee recognized this very problem:

> Regarding tourism, we did not find the Applicant's witness regarding the effects of the Project to be credible. His report and his testimony provided us with no way to evaluate the Project's tourism effects and no way to fashion conditions that might mitigate those effects.

DO at 284-85.

Finally, the essentially unbridled authority to impose conditions now espoused by Applicants is bad policy and could lead to unreasonable

[8] Applicants had previously argued that conditions directing disbursements from the FNHFund were not possible. *See* Note 7, *supra*.

results. The Subcommittee should not be put in the position of redesigning projects or imposing burdensome conditions that substantially alter the nature or the economics of a proposed energy facility. Applicants control what project they put forward to the SEC and have the opportunity to make adjustments or reach agreements with other parties during the proceedings to address concerns. When the record closes, the subcommittee must assess the Project as presented. While the Subcommittee has discretion to impose conditions, the extreme latitude suggested by Applicants would constitute an unsustainable exercise of that discretion.

Here, Applicants refused to acknowledge any impacts of the proposed 192-mile transmission line on tourism, land use, or property values beyond a mere handful of properties. By choosing not to present potential mitigation measures, or accede to proposed conditions, Applicants left the Subcommittee with an insufficient record upon which mitigating conditions could be crafted. Accordingly, the Subcommittee acted reasonably and lawfully by appropriately declining to exercise its discretion to reach beyond what Applicants proposed.

IV. THE SUBCOMMITTEE'S APPLICATION OF THE BURDEN OF PROOF WAS NOT AD HOC DECISION-MAKING.

Applicants raise a host of complaints alleging that the Subcommittee's finding that Applicants failed to sustain their burden constituted *ad hoc* decision-making. *See* AB at Part II. Applicants disparage the Subcommittee's burden of proof finding as "its deus ex machina—for avoiding the hard work of defining terms, considering all evidence and ruling on undue interference with ODR." (underlining in

original). AB at 46. Yet, Applicants' indignation cannot overcome the Subcommittee's well-supported credibility determinations or weighing of the evidence, and Applicants misperceive the Subcommittee's application of the burden of proof. Applicants' *ad hoc* arguments fail to raise any legal error by the Subcommittee.

A. The Subcommittee's Finding That Applicants Failed to Produce Sufficient Evidence to Support a Finding of No Undue Interference with Orderly Development of the Region Is Amply Supported by the Record.

To understand the true nature of Applicants' burden-of-proof argument, a clear understanding of the applicable burdens of proof and of the Subcommittee's findings is essential. The rules impose two separate burdens of proof: a "preponderance of the evidence" burden applied generally to any proponent of a proposition,[9] and a burden of production applied specifically to applicants. New Hampshire Administrative Rules, Site 202.19 states: "An *applicant* for a certificate of site and facility shall bear the burden of *proving facts sufficient* for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16." *N.H. Admin. R.*, Site 202.19(b) (emphasis added). This special burden on applicants is necessary in light of the mandate in RSA 162-H:16, IV that the Subcommittee make four specific findings, "[i]n order to issue a

[9] *See N.H. Admin. R.*, Site 202.19(a) ("The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.").

certificate."[10] In other words, the Subcommittee cannot issue a certificate without first receiving sufficient facts to support the four findings required by RSA 162-H:16, IV, and it is Applicants' burden to produce the requisite evidence.

At issue on appeal is the Subcommittee's ruling on the required finding under RSA 162-H:16, IV(b) that:

> The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

RSA 162-H:16, IV(b). Critically, the Subcommittee's ODR finding was *not* that the Project would unduly interfere with ODR, but that Applicants failed to prove sufficient facts to allow the Subcommittee to make the required finding. DO at 284-85. Specifically, the Subcommittee found that Applicants' expert witnesses on land use, tourism and property values were either not credible or their opinions were not reliable or persuasive. DO at 194-99, 225-27, 284-85; RHO at 33-35, 40-41, 60, 64. Without credible evidence from Applicants on these necessary parts of the ODR analysis, the Subcommittee had insufficient information to make the required finding under RSA 162-H:16, IV(b).

Applicants do not dispute that tourism, property values and land use are all required elements of the ODR analysis. New Hampshire Administrative Rules, Site 301.15(a) establishes key elements of ODR that

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

the Subcommittee must consider—the Project's effects on "land use, employment, and the economy of the region." New Hampshire Administrative Rules, Site 301.09, in turn, itemizes specific categories of information Applicants were required to submit for the Subcommittee's consideration of each of these three elements of ODR.[11] Under the element of the "economy of the region," Site 301.09 requires Applicants to submit an assessment of, among other things, the "effect of the proposed facility on real estate values in the affected communities," and on "tourism and recreation." Reading Site 301.09 and 301.15 together, the rules clearly demonstrate that tourism and property values are part of the Subcommittee's required consideration of the Project's effects on the "economy of the region." *See* RHO at 30-31.

Ultimately, Applicants have the burden to "prov[e] facts sufficient for the … subcommittee … to make the findings required by RSA 162-H:16." *N.H. Admin. R.*, Site 202.19(b). Once the Subcommittee found Applicants' evidence on the Project's effects on the land use element and two components of the economy element (tourism and property values) neither credible nor reliable, the conclusion that Applicants had not met

[11] Applicants submitted substantial information on each of the enumerated categories in Site 301.09, *see, e.g.*, DK-Tab-1 at 84-92, Appx 41, Appx 45, Appx 46; APP 20, APP 30, APP 31, APP 96, APP 104, APP 105, APP 120, APP 121, APP 122, and APP 123, demonstrating that Applicants were clearly on notice of the information required to sustain their burden, and obviating any claim of inadequate notice. Site 301.09 is organized by the areas the Subcommittee is required to consider under Site 301.15—land use, economy and employment—with subcategories of evidence to be submitted by Applicants listed for each. The structure of the rules clearly demonstrates that the subcategories of evidence required by Site 301.09 are elements of the required areas of consideration by the Subcommittee under Site 301.15. *See* RHO at 30.

their burden of proof was inescapable. Without key pieces of the ODR puzzle, the Subcommittee could not weigh the various impacts and benefits of the Project on ODR and could not, therefore, make the required finding of no undue interference. DO at 283-85.

Thus, in order to overturn the Order on appeal Applicants must demonstrate that the Subcommittee's findings on the credibility of Applicants' expert witnesses and the sufficiency of the Applicants' evidence were erroneous. Those findings, however, are explained in detail in the Order and are amply supported by the record. *See* DO at 194-99, 225-27, 284-85; RHO at 33-35, 40-41, 60, 64. As such, the Subcommittee's findings should not be disturbed on appeal. *See Appeal of Mary Allen*, 170 N.H. 754, 762 (2018) ("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.' When reviewing the subcommittee's decision, it is not our task to determine whether we would have credited one expert over another, or to reweigh the evidence, but rather to determine whether its findings are supported by competent evidence in the record.") (citations omitted); *In re Bloomfield*, 166 N.H. 475, 479 (2014) ("We will not disturb the board's credibility determinations on appeal. Weighing testimony and assessing its credibility are solely the province of the board.") (quoting *Appeal of Huston*, 150 N.H. 410, 414 (2003)); *ACAS Acquisitions (Precitech), Inc. v. Hobert*, 155 N.H. 381, 391 (2007) ("We defer to the trial court's determinations of credibility unless no reasonable person could have come to the same conclusion after weighing the testimony.") (citations omitted).

1. The Subcommittee Is Not Obligated to Look to CFP's Expert Testimony to Sustain Applicants' Burden to Produce Sufficient Facts.

On appeal, Applicants imply that the Subcommittee should have turned to evidence from CFP's witnesses to sustain Applicants' burden of proof. AB at 33-34. Specifically, Applicants point to testimony by KRA that addressed the potential magnitude of tourism impact and effects on property values as a potential source of evidence that the Subcommittee should have considered, and pose rhetorical questions about why the Subcommittee would ignore such testimony. *Id.* However, the record shows that the Subcommittee did *not* ignore KRA's testimony. *See* DO at 177-79, 219-20 (detailing KRA's testimony and opinions on property values and tourism).

Moreover, Applicants omit the key fact that during the hearings and in their post-hearing brief, Applicants argued that KRA's opinions were neither relevant nor determinative and "should be disregarded." DK-Tab-1386 at 116-17, 125-33. It was only after the Subcommittee voted to deny a certificate that Applicants made an about-face and gave any credence to KRA's testimony.[12] DK-Tab-1435 at 16-18.

[12] Similar to the doctrine of judicial estoppel, which serves "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment," Applicants should not be permitted to assume "a certain position in a legal proceeding, and … thereafter, simply because [its] interests have changed, assume a contrary position." *Kelleher v. Marvin Lumber & Cedar Co.*, 152 N.H. 813, 848 (2005) (quoting *New Hampshire v. Maine,* 532 U.S. 742, 749–50 (2001) (citations omitted)).

Having strenuously challenged KRA's analysis at hearing, Applicants cannot now claim KRA's testimony as satisfying Applicants' own burden of proof.[13] The rules specifically require *applicants*—not CFP, intervenors or the Subcommittee—to submit evidence of the impacts of a proposed project and to prove sufficient facts to allow the Subcommittee to make the required statutory findings. *See N.H. Admin. R.*, Site 301.09 and Site 202.19(b). Applicants never proffered KRA's testimony as evidence to support their burden; rather, Applicants waited until after the Subcommittee ruled against them to argue that the Subcommittee should have used KRA's testimony to fashion conditions.[14] DK-Tab-1435 at 16-18.

Indeed, Applicants' suggested approach would effectively shift the burden of proof to the Subcommittee, requiring the Subcommittee to hunt

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[13] The only legal support Applicants offer for the proposition that a party can rely on an opposing party's experts to meet their burden is *IBEW Local 98 Pension Fund v. Best Buy Co., Inc.*, 818 F.3d 775, 781-83 (8th Cir. 2006). AB at 33, n.19. However, in *Local 98*, the defendants' expert "agreed with" plaintiff's expert opinion and defendants "submitted direct evidence (the opinions of both parties' experts)" in support of their burden of proof. *Local 98*, 818 F.3d at 782-83. Here, Applicants neither agreed with nor submitted KRA's testimony in support of their burden and Applicants' reliance on *Local 98* is misplaced.

[14] In their Final Brief, Applicants did reference comments by KRA that the "potential impact to tourism within the affected areas in New Hampshire is a 'teeny tiny percentage.'" DK-Tab-1386 at 125-26 (quoting DK-Tab-1233 at 17). However, Applicants took this comment out of context and attempted to use it to discredit KRA's estimate of impacts. *Id.* In context, Mr. Kavet's comment actually clarified that because the tourism industry in New Hampshire is "a very big industry, and it's growing fairly well," even the estimated "fifteen one-hundredths of one percent difference … adds up to real money." DK-Tab-1232 at 169. Moreover, because the impact of the Project on tourism "continues as long as that visual encumbrance exists" and results in "a constant amount off a base that's growing," the reduction in tourism spending increases over time. DK-Tab-1233 at 15-18.

through the record for any evidence that might conceivably allow a finding in favor of Applicants. The Subcommittee has no obligation to do so, and requiring such an effort would contravene the statutory and regulatory intent that unequivocally puts the burden of proof on the applicant, not the Subcommittee. Nor is RSA 162-H a remedial statute entitled to broad interpretation to protect an applicant's vested rights. *See*, *e.g., Appeal of Langenfeld*, 160 N.H. 85, 92 (2010) (construing "the workers' compensation statute liberally, resolving all reasonable doubts in statutory construction in favor of the injured employee in order to give the broadest reasonable effect to its remedial purpose"). Rather, RSA 162-H:1 recognizes that energy facilities can have both benefits and impacts and, pursuant to Site 202.19(b), Applicants bear the burden to prove that the balance tips in favor of the public interest.

Here, rather than acknowledging the potential for impacts and offering potential mitigation measures, Applicants steadfastly denied that the Project could have *any* negative impact on tourism, land use, or property values beyond a tiny handful of properties. Applicants must live by the strong position they took at hearing and should not be allowed to make a *post hoc* revision to the record. Moreover, the Subcommittee was not obligated to look to KRA's disputed testimony to satisfy *Applicants'* burden of proof.

2. The Subcommittee Did Not Err by Failing to Weigh Applicants' Claimed Capacity Market Benefits Against Unknown Impacts of the Project.

In addition to suggesting that Applicants could meet their burden of proof by relying on KRA's disputed testimony, Applicants fault the

Subcommittee for failing to use claimed capacity market benefits to satisfy Applicants' burden of proof. AB at 38-40. However, the record shows that the Subcommittee did not overlook Applicants' claimed capacity market benefits; the Subcommittee rejected them as at best uncertain. DO at 161 ("Based on the record before us . . . we cannot conclude there will be saving from the Capacity Market."); DO at 284 (noting the "uncertainty regarding Capacity Market savings" and finding that Applicants had "not demonstrated that savings from the Capacity Market will occur; or if they do occur, that they will be as large as the Applicant's expert said they would be").

Even if the Subcommittee had found the projected savings sufficiently certain, however, the Subcommittee still could not have reasonably weighed such savings against unknown impacts. First, in light of the lack of credible or reliable evidence from Applicants' witnesses on land use, tourism and property values, it is impossible to weigh positive market benefits against negative tourism or property value impacts.[15] Second, it is not a simple question of dollars in and dollars out, for there is no direct correlation between capacity market savings (in essence additional money in the pockets of electricity consumers) and negative impacts to

[15] While Applicants suggest that CFP's experts provided potential "bookends" on tourism and property value impacts that the Subcommittee could have relied upon, AB at 33, KRA testified that its estimates were offered only as "'order of magnitude' guidance" based on one set of possible assumptions. CFP 148 at Ex. B, p. 74. For example, with regard to potential tourism impacts, KRA provided an estimate of approximately $10 million annually, but qualified this as a "conservative" assessment of impacts that could, in reality, be "many times greater." *Id.* at 73. KRA further testified that tourism impacts persist as long as the Project is in place, resulting in impacts that would continue to accrue for decades. *Id.* at 75.

other economic factors such as tourism or property values. Capacity market savings flow to all electric customers in the state (and the region), while tourism and property value impacts are felt by individual business or property owners affected by the Project. More money in the pockets of all electric customers will not be spent on programs to mitigate reduced tourism in the North Country or depressed property values along the Project route.

As much as Applicants may wish that the ODR analysis could be reduced to a simple mathematical calculation of net economic effect, it is clear from both the statute and the rules that no such quantitative test was intended. RSA 162-H:16, IV requires broad findings that leave significant discretion to the Subcommittee to weigh impacts and benefits of proposed energy facilities across areas of importance to the state. *See Appeal of Mary Allen*, 170 N.H. at 762 ("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."). Similarly, the rules contemplate consideration of a wide range of elements when analyzing ODR, but make no reference to a calculation of net economic benefit as the dispositive factor. In fact, the inclusion of factors such as impacts on land use and the views of municipal entities, which are not reducible to monetary figures, demonstrates that ODR is much more than a mathematical solution.

As is the case throughout their brief, Applicants fault the Subcommittee for not finding a way to "yes," but refuse to acknowledge Applicants' own significant shortcoming in failing to present credible and

reliable evidence to sustain their burden "of proving facts sufficient for the … subcommittee … to make the findings required by RSA 162-H:16." *N.H. Admin. R.*, Site 202.19(b). None of Applicants' protestations change this fundamental failure of proof that led to the Subcommittee's decision to deny a certificate.

B. The Subcommittee Did Not Apply New Standards or Burdens of Proof.

Applicants persist in their argument that the Subcommittee imposed new standards and/or burdens of proof despite the Subcommittee 's clear explanation to the contrary in its Rehearing Order. *See* RHO at 38-42. In reality, the cherry-picked comments from deliberations and selected phrases from the Order do not demonstrate the application of new standards; rather, they represent the Subcommittee's attempt to explain the flaws in Applicants' expert testimony. The Subcommittee was forced to contend with experts who stubbornly held to non-credible opinions and refused, even in the face of contrary evidence, to acknowledge that the 192-mile Project could have any significant impacts. The Subcommittee rejected these unhelpful expert opinions and spent considerable time and pages explaining why. *See* DO at 194-99, 225-27, 284-85; RHO at 33-35, 40-41, 60, 64.

Applicants also seem to suggest that because Site 301.09 requires the submission of only "estimates" of the effect of the Project on tourism and property values, Applicants should not be faulted for failing to make a more specific showing of the "type and extent of impacts" and "the extent and nature of such interference." AB at 44. The logical extension of

Applicants' argument, however, is that they have no burden of proof at all; so long as they provide some "estimate" of the effects of the Project, no matter how superficial and unreliable, they have met their burden. To the contrary, as set out above,[16] the plain language of the rules places the burden on Applicants to "prov[e] facts sufficient for the … subcommittee … to make the findings required by RSA 162-H:16." *N.H. Admin. R.*, Site 202.19(b). While Site 301.09 only requires submission of "estimates" of the effects of the Project, if Applicants' estimates are unreliable or otherwise not credible, they are not sufficient to persuade the Subcommittee to make the required finding. Thus, it was the Subcommittee's credibility findings, not the application of alleged "new" standards, that led to the determination that Applicants failed to meet their burden of proof on ODR.

1. Applicants' Tourism and Property Value Experts Were Not Credible.

The Subcommittee found the opinions of Applicants' tourism expert, Mitch Nichols, and property value expert, Dr. James Chalmers, unreliable and not credible. DO at 194-99, 225-27, 284-85; RHO at 33-35, 60, 64. Mr. Nichols took the position that the 192-mile Project proposed to cut through town centers, scenic and recreational areas, and the North Country "would have absolutely no adverse impact on tourism in the region." DO at 199. Dr. Chalmers opined that the value of only those properties physically encumbered by the above-ground portion of the Project, with a residence within 100-feet of the right-of-way, and that experience a significant

[16] *See* Part IV.A, *supra*.

increase in visibility would be effected by the Project. DO at 198. Based on his analysis, Dr. Chalmers "estimated 6-9 properties of the thousands along the 192 mile route" would be negatively impacted by the Project.[17] *Id.* Based on the record and an analysis of the experts' methodologies and findings, the Subcommittee found these expert opinions to be "conclusory," "unpersuasive, unsupported by the facts, based on false assumptions and, ultimately, unreliable." RHO at 60, 64.

Rather than challenge the Subcommittee's credibility findings and weighing of Mr. Nichols' and Dr. Chalmers' opinion and testimony directly, Applicants instead contend that the Subcommittee applied "new" terms, criteria, or standards that are not part of the statutory or regulatory scheme. AB at 46-48. Yet, Applicants merely point to isolated phrases from the Order taken out of context to support their claim. These statements, however, were not discussions of the applicable legal standard, but rather an attempt by the Subcommittee to address Applicants' experts' opinions that the Project would have virtually no impact on the orderly development of the region.

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[17] In the much smaller Merrimack Valley Reliability Project ("MVRP") (18 miles) and the Seacoast Reliability Project ("SRP ") (12.9 miles), Dr. Chalmers estimated a similar number of affected properties as in the more than ten-times longer Northern Pass Transmission project (192 miles). For MVRP, Dr. Chalmers estimated a "small" number of homes (10-12) would be affected. *See* NOA App at 2112 (MVRP Order); MVRP Transcript, Day 2AM at 94, available at https://www.nhsec.nh.gov/projects/2015-05/documents/2015-05_2016-06-14_transcript_adj_hearing_day2_morning.pdf. And for SRP, Dr. Chalmers estimated approximately 4 homes could see a negative effect. SRP Order at 282. The fact that Dr. Chalmers estimated more affected properties for MVRP than NPT, when the length of the MVRP project was less than ten percent that of NPT, highlights the unreasonable nature of Dr. Chalmers' opinion in this case.

For example, Applicants complain that "their burden was measured against the standard of "hurting tourism" and assert that the Subcommittee "found 'valid reasons' to believe that the Project 'would hurt tourism.'" AB at 48 (quoting DO at 227). What the Subcommittee actually said is:

> The Project may have a negative impact on tourism or it may not, although there are valid reasons to believe that the Project would hurt tourism if it were built. Even Mr. Nichols agreed that the presence of transmission lines would not be a positive element of the landscape.

DO at 227. The Subcommittee's discussion was in the context of Mr. Nichols' opinion that the Project would have "no impact" on tourism at all. DO at 225. Far from announcing a "hurt tourism" standard as suggested by Applicants, the Subcommittee merely found that there was evidence that the impact of the Project on tourism would be negative,[18] and that Mr. Nichols' opinion to the contrary was not credible or reliable.

Similarly, with regard to property values, Applicants argue that the Subcommittee imposed a "some impact" standard. AB at 47. Again, however, the Subcommittee's statement that "the Project would have some impact on property values," RHO at 22, was a refutation of Dr. Chalmers' opinion that there would be no discernible impact. DO at 194. Applicants' attempt to manufacture alleged improper new standards falls flat when the Subcommittee's statements are read in their context as addressing the

[18] This finding was amply supported by the record evidence. *See, e.g.*, CFP-146 at 7-9 (Kavet Testimony opining that the Project would have a "measurable negative" impact on tourism).

unreliable and incredible claims of Applicants' experts that the 192-mile Project would have no impact on tourism or property values.

2. The Subcommittee Did Not Impose New Tests for Assessing the Project's Effects on Land Use.

With regard to land use, Applicants again argue that the Subcommittee imposed new tests, pointing to discussions by the Subcommittee of a "tipping point" where the Project could "overburden" the right-of-way ("ROW"), and of the legal framework of a non-conforming use. AB at 51. However, as with the other alleged "new tests," Applicants mistake conceptual explanations for new standards.

In its Order, the Subcommittee premised its discussion of nonconforming uses by stating: "While not legally required to apply the three prong [nonconforming use] analysis, *we find it to be informative in the context of this case*." DO at 279 (emphasis added). The Order makes clear that the Subcommittee did not use the nonconforming use analysis as a new test, but rather as an analytical tool appropriate in this context, where the evidence demonstrated that the Project would change the existing transmission corridor in "nature and intensity." DO at 278. Indeed, the Subcommittee explained this again in its Rehearing Order stating that it "did not rely on the non-conforming use doctrine as the basis for finding that the Applicant failed to carry its burden of proof." RHO at 52. Rather, the Subcommittee explained it had "discussed the illustration as 'guidance' and a tool to assist it with understanding of potential impacts of the Project on land uses." *Id.* Applicants' obstinate refusal to accept the Subcommittee's explanation is without merit.

With regard to the Subcommittee's discussion of a "tipping point" or "overburdening" concept, the Subcommittee was responding to the narrow basis of the opinion of Applicants' proffered expert, Mr. Robert Varney, that "the Project would be consistent with prevailing [land] use solely because it would be constructed within the existing right-of-way." RHO at 51. The Subcommittee rejected this position, noting the lack of substantive analysis included in Mr. Varney's testimony and reports. For example, the Subcommittee found that Mr. Varney "was not aware of the fact that structures associated with the Project and existing structures that would be relocated would be higher than currently existing structures." DO at 237. Indeed, the Subcommittee noted Mr. Varney's incredible position that "regardless of how intense the use of the right-of-way would be or how tall the new structures would be (even if structures would be up to 300 feet tall), it would not have an adverse effect on local land use." *Id.*

Thus, the Subcommittee's discussion of the potential for a Project to "overburden" a ROW was a response to Mr. Varney's opinion that the size, scope and burden of a Project was irrelevant to local land use, as long as the Project was sited within an existing ROW. Again, far from imposing a new test, the Subcommittee was merely pointing out the lack of credibility and inherent flaws in the reasoning and opinions of Applicants' experts.

Applicants also attempt to cast the Subcommittee's findings as contrary to past precedent pointing to statements in prior decisions that constructing a transmission line within an existing utility corridor is a

sound planning principle.[19] AB at 49-50. Yet, Applicants significantly overreach in claiming that this past precedent, even if subject to administrative gloss, means that there is no limit to how much development can be forced into an existing utility corridor regardless of what type or size of infrastructure is currently in a corridor. At most, the precedent stands for the principle that siting transmission projects within existing utility corridors will have a substantially lesser impact than the alternative—creating new utility corridors. This principle, however, cannot reasonably be extended, as Mr. Varney attempted, to a *per se* rule that if a project is proposed in an existing utility ROW no further analysis of the effect of the Project on land use need be conducted.

Here, the Subcommittee appropriately applied an obvious and reasonable limitation to an existing precedent, based upon the extensive record in this case, including the Subcommittee's many site visits. Indeed, the Subcommittee directly acknowledged the precedent, stating that it was not "the only principle of sound planning nor is it a principle to be applied in every case," explaining why it did not apply here:

> Over-development of an existing transmission corridor can impact land uses in the area of the corridor and unduly interfere with the orderly development of the region. Increases in the use of a transmission corridor require

[19] Applicants' assertion that "Northern Pass and MVRP offer very similar facts," AB at 49-50, stretches credulity. Northern Pass was a 192-mile merchant transmission line project including underground and over-head segments, sited in both new ROW corridors and in existing ROWs often with only a single existing line. DO at 14-17. MVRP, by contrast, was an 18-mile over-head reliability project sited entirely within large existing ROWs (in some places wider than 500 feet) that already contained two or more existing transmission lines. NOA App at 2064-71 (MVRP Order).

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

DO at 278. The Subcommittee explained further:

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

DO at 279.

Given the Subcommittee's analysis and the discussion in the Order, it is clear that the Subcommittee acknowledged the past precedent but found that it did not equate to an unlimited rule.[20] Because Applicants failed to even assess the potential impacts of the Project's increased

[20] While the statute requires the Subcommittee to "consider, as appropriate, prior committee findings and rulings on the same or similar subject matters," the statute also specifies that the Subcommittee "shall not be bound thereby." RSA 162-H:10, III.

structure heights, vegetative clearing and other associated impacts, the Subcommittee appropriately concluded that the Applicants "failed to demonstrate by a preponderance of the evidence that proposed expansion of the right-of-way use would not interfere with the orderly development of the region." DO at 280.

3. The Subcommittee Did Not Impose a New Burden to Resolve Concerns with Municipalities.

Applicants assert that the Subcommittee "imposed an affirmative burden on the Applicants to address and resolve [municipal] views or concerns." AB at 52. This assertion, however, is without merit or support in the record. Once again Applicants mischaracterize commentary as a supposed new burden of proof. Applicants point to a single declaratory statement in the introduction of the Order as somehow imposing a new burden of proof: "the Applicants failed to adequately anticipate and account for the almost uniform view of those groups that the Project, as planned and presented, would unduly interfere with the orderly development of the region." DO at 7. Yet, this was merely a factual statement by the Subcommittee.

On the merits, the Subcommittee evaluated and weighed the overwhelming amount of evidence submitted by the municipalities with regard to ODR, DO at 247-73, and found it to be "generally persuasive." DO at 276. More specifically, the Subcommittee found that "the Project would have a large and negative impact on land uses in many communities that make up the region affected by the Project" based on analysis of "the master plans and local ordinances" of the affected communities. DO at

281. Taking these municipal views into consideration, as required by RSA 162-H:16, IV(b),[21] and in conjunction with prior findings that Applicants had failed to meet their burden to prove facts sufficient to support findings on tourism, property values and land use, the Subcommittee ultimately found that Applicants "failed to carry [their] burden of proof and failed to demonstrate by a preponderance of the evidence that the Project would not unduly interfere with the orderly development of the region." DO at 285. The Subcommittee did not apply a new test or different burden of proof.

In the end, Applicants failed to provide reliable or persuasive evidence that would allow the Subcommittee to make the required finding on ODR. The Subcommittee was statutorily required to consider the views of "municipal and regional planning commissions and municipal governing bodies," and it did so. RSA 162-H:16, IV(b). The fact that the Subcommittee gave more weight to the evidence submitted by municipalities than it gave to Applicants' experts does not give rise to a legal error.

Finally, Applicants appear to suggest that the Subcommittee erred by considering municipal master plans because "absent the adoption of ordinances implementing them, master plans are merely aspirational guides without the force of law." AB at 53. However, Site 301.09 requires applications to include "master plans of the affected communities," providing notice that the Subcommittee would consider master plans in

[21] "In order to issue a certificate, the committee shall find that: … (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*." RSA 162-H:16 (emphasis added).

analyzing the effect of the Project on ODR. Moreover, Applicants' assertion that "[a]ny violation of zoning ordinances would be irrelevant, given the SEC's preemptive jurisdiction," AB at 53, further demonstrates the Applicants' disdain for municipal concerns. While a violation of zoning ordinances would not require denial of a certificate, it is precisely the type of information the Subcommittee is required to consider when making a determination of whether the Project would unduly interfere with the orderly development of the region. Had the General Court intended for the SEC to ignore municipal master plans and zoning ordinances, it would not have required the Subcommittee to give "due consideration" to the views of municipalities and regional planning commissions. RSA 162-H:16, IV(b).

V. THE STATUTE AND RULES ARE NOT UNCONSTITUTIONALLY VAGUE AS APPLIED.

Though it is difficult to discern in Applicants' brief, Applicants make various claims that the Subcommittee's decision and application of its regulations was "unduly or impermissibly vague" because the Subcommittee "did not define the vague standards in RSA 162-H:16, IV or the Rules, failed to make findings of fact supporting its rulings, and applied the Statute and Rules in an arbitrary and therefore erroneous manner." AB-8. Because Applicants do not develop this argument in their brief, it is unclear whether they are claiming the statute and rules are unconstitutionally vague as applied or something less. However, anything less than unconstitutional vagueness is meaningless as it would not constitute reversible error. The statute and rules are either void for

vagueness or they are permissibly vague. Applicants fail to explain what legal standard they wish the Court to apply or how the Subcommittee's application of the statute and rules in this case constitutes a violation of Applicants' constitutional due process rights.

As established by this Court, vagueness can only invalidate a statute where: (1) it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits"; or (2) it "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *Bleiler v. Chief, Dover Police Dep't.*, 155 N.H. 693, 701 (2007) (quoting *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). Importantly, however, "[a] party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *Id.* (quoting *State v. MacElman*, 154 N.H. 304, 307 (2006)).

The prohibition on vagueness does not invalidate a statute simply because "a reviewing court believes [it] could have been drafted with greater precision. Many statutes will have some inherent vagueness, for in most English words and phrases there lurk uncertainties." *Id.* (quoting *Rose v. Locke*, 423 U.S. 48, 49-50 (1975)). Additionally, "mathematical certainty" is not required. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972)). "The necessary specificity … need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage." *Webster v. Town of Candia*, 146 N.H. 430, 434 (2001) (quoting *In re Justin D.*, 144 N.H. 450, 453-54 (1999)).

RSA 162-H and its associated regulations (including Site 301.09 and 301.15) far exceed the relevant standards of clarity. As the Court explained in *Webster*, a statute is sufficiently clear if it warns the average person of prohibited conduct absent planning board consent. *See Webster*, 146 N.H. at 435. Here, Applicants knew, as any average person would, that they cannot proceed with their proposed facility without first obtaining a Certificate from the Site Evaluation Committee. That alone is sufficient to render RSA 162-H "not unconstitutionally vague." *Id.*

Here, Applicants claim that the statute and rules were improperly vague "as applied" because the rules "provide no guidance as to the 'information that will be considered when determining whether the Applicant[s] satisfied [their] burden of proof.'" AB at 44 (quoting DO at 30). Yet, the Court has consistently held that "a law is not necessarily vague because it does not precisely apprise an individual of the standards by which a permitting authority will make its decision." *Bleiler*, 155 N.H. at 702 (quoting *Webster*, 146 N.H. at 435) (alterations omitted). Several decisions have been issued upholding ordinances, statutes and regulations that provide far less guidance than what RSA 162-H, Site 301.09 and Site 301.15 provide here. *See, e.g., Bleiler*, 155 N.H. at 702-03; *Webster*, 146 N.H. at 435-37; *Durant v. Town of Dunbarton*, 121 N.H. 352, 355-56 (1981); *Derry Sand & Gravel, Inc. v. Town of Londonderry*, 121 N.H. 501, 502-05 (1981).

For example, in *Derry Sand & Gravel*, the plaintiffs "argue[d] that the ordinance [wa]s unconstitutionally vague because it fail[ed] to provide standards governing the selectmen's decision to issue a license to operate a

private dump."[22] *Derry Sand & Gravel*, 121 N.H. at 504. The Court held it would not "strike down an ordinance as unconstitutionally vague simply because it does not precisely apprise an applicant of the standards by which the selectmen will make their decision." *Id.* at 505. Ultimately, the Court held that the standards set out in the dump ordinance permitting the selectmen to issue a license "for good cause and sufficient reason" provided "adequate criteria to guide a governmental body, such as a board of selectmen, in the exercise of its discretion." *Id.*

The Court also noted that "[i]n this case, the ordinance contains a statement of purpose which further defines the terms of the ordinance." *Id.* Given the statement of purpose, "good cause and sufficient reason" were held to be "any circumstances that further the ordinance's stated goals of establishing provisions for the 'orderly' and 'sanitary' disposal of garbage

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[22] The dump ordinance in question provided in relevant part:

> A. PURPOSE.
>
> To provide for orderly, sanitary and reasonable provisions for the disposal of garbage and waste in the Town of Londonderry, New Hampshire.
>
> C. PRIVATE DUMPS.
>
> No private dump or junk yard as defined by statute or the provisions of this ordinance, whichever is more restrictive shall be maintained within the Town of Londonderry except by license issued by the Board of Selectmen, after a public hearing at which time good cause and sufficient reason must be shown, justifying, in the opinion of the Selectmen, the issuance of such a license.

Id. at 504-05.

and waste in the town."[23] *Id.* The Court acknowledged that the ordinance in question was "not a model to be emulated," but it nevertheless did "find the ordinance adequate to inform an applicant of what facts he must establish in order to obtain a license." *Id.* RSA 162-H and its accompanying regulations significantly exceed the bare guidance provided by the dump ordinance in *Derry Sand & Gravel*.

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

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

Likewise, in *Durant* the Court considered the constitutionality of a broad regulation of septic tanks and sewage systems. *Durant v. Town of Dunbarton*, 121 N.H. at 355. The plaintiff argued that the regulations were "impermissibly vague because they d[id] not contain standards for the evaluation of on-site septic systems." *Id.* The Court again emphasized that "broad regulations are not necessarily vague even if they do not 'precisely apprise one of the standards by which an administrative board will make its decision.'" *Id.* at 356 (quoting *Town of Freedom v. Gillespie*, 120 N.H. 576, 580 (1980)). The Court held that the regulations were not void for vagueness because when read as a whole they "inform a subdivider that his plan must provide adequate information to enable the board to conclude that future development of the land will not pose an exceptional danger to health." *Id.* The Court held that "this language provides sufficient notice to developers of what is expected of them." *Id.*

Applicants' complaints regarding Site 301.09 and 301.15 notwithstanding, Applicants do not dispute (nor can they) that RSA 162-H:16, IV(b) requires the Subcommittee to make a specific finding, and Site 202.19(b) requires Applicants to "bear the burden of proving facts sufficient for the committee or subcommittee, as applicable, to make the findings required by RSA 162-H:16." Applicants complain that the statute and regulations do not spell out for them precisely how to meet their burden. However, the statute and regulations inform Applicants that they "must provide adequate information to enable the [Subcommittee] to conclude" that "[t]he site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and

municipal governing bodies," and the regulations list the specific issues to be addressed. *See Durant*, 121 N.H. at 356; RSA 162-H:16, IV(b); *N.H. Admin. R.*, Site 301.09 and 301.15.

Under New Hampshire law, the language of the statute and regulations here "provides sufficient notice to developers of what is expected of them." *Durant*, 121 N.H. at 356. The Subcommittee found that several of Applicants' experts were either not credible or offered unreliable opinions leading to a finding that Applicants failed to provide adequate information for the Subcommittee to make its required finding under RSA 162-H:16, IV(b). *See, e.g.,* DO at 194-99, 225-27, 284-85; RHO at 33-34, 60, 64. The Subcommittee cannot be faulted for Applicants' failure to provide what was expected of them. It was not a lack of clarity in the statute or the rules that doomed the Application here, it was a lack of sufficiently credible and reliable evidence submitted by Applicants.

CONCLUSION

For the foregoing reasons, Counsel for the Public respectfully requests that this Honorable Court affirm the judgment below.

Counsel for the Public requests a fifteen-minute oral argument.

Respectfully submitted,

COUNSEL FOR THE PUBLIC

By his attorneys,

/s/Christopher G. Aslin
Christopher G. Aslin
Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301
(603) 271-3679
christopher.aslin@doj.nh.gov
N.H. Dept. of Justice
NH Bar ID No. 18285

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitation set out in Supreme Court Rule 16(11) as amended by the Court Order dated January 23, 2019, and contains 13,295 words.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Counsel for the Public's brief was sent by service through the New Hampshire Supreme Court's electronic filing system to registered of record, by electronic mail to non-attorney parties, and by first class mail to parties without email addresses.

/s/Christopher G. Aslin
Christopher G. Aslin

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