

**THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

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 for the Construction of a New High Voltage Transmission Line in New Hampshire

Docket No. 2015-06

**POST-HEARING MEMORANDUM  
FILED BY  
MUNICIPAL GROUPS 1 SOUTH, 2, 3 SOUTH AND 3 NORTH**

## **TABLE OF CONTENTS<sup>1</sup>**

I.	INTRODUCTION .....	1
II.	BURDEN OF PROOF .....	3
III.	PUBLIC COMMENTS.....	3
A.	The Comments From The Public Have Been Overwhelmingly Opposed To The Proposed Northern Pass High Voltage Electric Transmission Line Project.....	3
IV.	ANALYSIS OF SEC REQUIRED FINDINGS .....	6
A.	The Applicants Have Failed To Demonstrate They Have The Technical And Managerial Capability To Construct The Proposed Facility .....	7
1.	Technical and Managerial Capability: Public Outreach .....	7
2.	Technical and Managerial Capability: Project Engineering .....	17
a.	Survey Deficiencies .....	18
b.	Failure to Conduct Necessary Investigations, Resulting in Multiple Avoidable Inaccuracies .....	21
B.	Orderly Development of the Region.....	24
1.	Orderly Development – Impacts to Land Use .....	24
a.	The Application Fails to Describe Land Use In All Affected Communities .....	25
b.	The Applicants Failed To Properly Analyze Interference to Land Use.....	27
c.	The Applicants Improperly Assume That Use of Existing Right of Way Equates To No Undue Interference .....	28
2.	Orderly Development – Master Plans and Zoning Ordinances .....	33
a.	The Application Fails To Provide Information About Master Plans and Zoning Ordinances .....	33
b.	The Project Is Inconsistent With The Host Communities’ Master Plans and Zoning Ordinances.....	35
1.	Bethlehem .....	37
2.	Bristol.....	38
3.	Concord.....	40
4.	Deerfield .....	46
5.	Easton.....	49
6.	New Hampton .....	50

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<sup>1</sup> This brief is being submitted by all municipalities represented by Municipal Groups 1 South, 2, 3 North and 3 South, except for the Town of Canterbury which is a member of Municipal Group 3 South.

7. Pembroke .....	52
8. Sugar Hill .....	55
9. Whitefield .....	56
c. The Applicants Improperly Dismiss The Significance Of The Master Plans and Zoning Ordinances.....	57
3. Orderly Development - Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies .....	58
a. The Application Fails To Provide Information About Views of Governing Bodies.....	58
b. Views of Regional Planning Commissions.....	60
c. Views of the Municipal Governing Bodies .....	64
d. This Application Is Unprecedented Based On Overwhelming Opposition of Municipal Governing Bodies, Planning Commissions and County Governments.....	67
e. The Applicants Communications With Municipalities Do Not Change The Outcome.....	70
4. Orderly Development – Impacts During Construction.....	73
5. Orderly Development – Property Tax Payments.....	80
6. Orderly Development – Property Values.....	82
7. Orderly Development – Employment.....	88
8. Orderly Development – Conclusion .....	91
C. Unreasonable Adverse Effects.....	91
1. Unreasonable Adverse Effects - Aesthetics.....	91
a. The Applications Failed To Analyze Recreational Current Use Property .....	92
b. The Applicants Failed To Analyze Impacts to Public Roads.....	96
c. There Are A Large Number of Scenic Resources That Will Have Unreasonably Adverse Impacts.....	98
2. Unreasonable Adverse Effects – Historic Sites .....	102
3. Unreasonable Adverse Effects – Water Quality and the Natural Environment .....	113
a. Wetlands and Vernal Pools.....	114
i. Delineation.....	114
ii. Temporary versus Permanent Impact .....	121
iii. Whether Impacts Will Be Unreasonable .....	122
b. Rare Plants and Natural Communities .....	124

4. Unreasonable Adverse Effect - Public Health and Safety .....	128
D. Public Interest .....	131
E. Other SEC Requirements Not Briefed.....	136
V. Local Permits and Licenses .....	137
VI. Conclusion .....	139

## **I. INTRODUCTION**

This application for a Certificate of Site and Facility is unprecedented to the extent that it is a private merchant transmission line that is one of the most controversial and opposed energy projects in New Hampshire history. There has never been an approval of a high voltage transmission line energy project in which the vast majority of the host municipalities and unincorporated places have intervened and actively opposed a proposed project.

In the event this application is approved, 31 municipalities and unincorporated places would be required to host the high voltage transmission line in their respective communities. Twenty-two of the those municipalities (or their boards and commissions) and unincorporated places intervened to oppose the Project: Ashland, Bethlehem, Bridgewater, Bristol, Canterbury, Clarksville, Concord, Dalton, Dixville, Deerfield, Easton, Franconia, Millsfield, New Hampton, Northumberland, Pembroke, Pittsburg, Plymouth, Stewartstown, Sugar Hill, Whitefield, and Woodstock.<sup>2</sup> In addition, there are three municipalities, the Towns of Campton, Lancaster and Thornton, that did not intervene but passed warrant articles at their town meetings to oppose the proposed Northern Pass high voltage transmission line. There are also two counties, Grafton County and Coos County, that have intervened to oppose the project.

There is only one host municipality that intervened to support the proposed Project, which is the City of Franklin. The Town of Dummer initially sent a public comment to the Site Evaluation Committee expressing conditional support of the Project. *See* Public Comment,

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<sup>2</sup> The Coos County Commissioners intervened on behalf of the two unincorporated places of Dixville and Millsfield to oppose the project. The towns of Woodstock and Bridgewater withdrew their interventions. Withdrawal as Party-Intervenor of Town of Woodstock dated March 16, 2017; Withdrawal of the Town of Bridgewater dated March 21, 2017. The Woodstock Board of Selectmen sent a public comment stating that the Board remains opposed to the proposed Project despite no longer participating in the SEC review process, and that the Board withdrew for financial reasons and not due to any acquiescence to the Project. Public Comment, Town of Woodstock Board of Selectmen dated August 17, 2017. The Town of Bridgewater sent a public comment letter that the town withdraw only for financial reasons, and reiterated its position that it opposes the Projects. Public Comment, Town of Bridgewater Board of Selectmen dated December 20, 2017.

Town of Dummer Board of Selectmen dated February 1, 2016. In its letter, the Dummer Board of Selectmen explained that “some adjacent landowners continue to have concerns about view impacts of this project. We encourage the Northern Pass project and the NH Site Evaluation Committee to consider those concerns and consider mitigation efforts to alleviate them.” The record demonstrates that the “concerns about view impacts” raised by property owners in Dummer have not been mitigated since that letter was sent almost two years ago. The Town of Dummer Board of Selectmen subsequently sent a public comment letter indicating that it wants to ensure that it maintains control of its municipally maintained highways. *See* Public Comment, Town of Dummer Board of Selectmen, February 9, 2017.

The remaining four municipalities, the Towns of Allenstown, Hill, Northfield and Stark, have not participated in the Site Evaluation Committee proceedings. The fact that those municipalities have not intervened and/or submitted a public comment does not indicate that they support this proposed Project.<sup>3</sup>

When translated into a percentage, there is a supermajority (over 80%) of the proposed host municipalities and unincorporated places that oppose this Project. These municipalities and unincorporated places have made it clear that Northern Pass Transmission line Project is not needed or wanted in New Hampshire. This controversial Project would have swiftly died on the floor of any legislative proceeding.

Despite the fact that 80% of the proposed host municipalities and unincorporated places oppose this Project, the Applicants have attempted to assert there is an “economic benefit” by referencing the potential tax benefits in the impacted communities associated with the proposed infrastructure. The reliance on the tax payments is no more than a thinly veiled attempt to dress

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<sup>3</sup> There are various reasons why those municipalities may not have intervened, including the cost, time, and/or expertise required to navigate through the SEC process.

up the economic benefits of this proposed merchant-funded enterprise to argue that it is being carried out in the public interest. The record demonstrates that the overwhelming majority of impacted communities that would allegedly gain a tax benefit still oppose the Project.

The municipalities in New Hampshire are not known to approve development proposals merely because of the potential tax benefits associated with a proposed project. If that were the case, the municipalities in New Hampshire would have no need for land use regulations, as the determining factors would instead be based on an assessment of the potential tax revenue that a proposed development project would be required to pay. If approved, the Project would introduce unwanted and undesirable infrastructure that significantly transforms the natural landscape of the impacted communities. The lure of higher property taxes cannot justify the degradation. With the vast majority of the host communities in opposition to this private merchant-funded Project, it is clear that these communities are not “for sale” to Eversource.

## **II. BURDEN OF PROOF**

The Applicants bear the burden of proving facts sufficient for the Subcommittee to make the findings required by RSA 162-H:16 by a preponderance of the evidence. *See* N.H. Admin. Rule Site 202.19. Despite their attempt to portray this Project as being in the public interest, the record demonstrates that the Applicants have failed to meet their burden with respect to all of the findings required by RSA 162-H:16, IV.

## **III. PUBLIC COMMENTS**

### **A. The Comments From The Public Have Been Overwhelmingly Opposed To The Proposed Northern Pass Project**

The Subcommittee is required to consider and weigh all evidence presented at public hearings and to consider and weigh 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. RSA 162-H:10, III. There has been considerable opposition expressed for the proposed high voltage transmission line by the general public and by local, county and state officials during the public hearings and in written correspondence. There have been thousands of public comment letters, petitions and public hearing statements which make it abundantly clear that the proposed Northern Pass transmission project is not wanted or needed in New Hampshire. The members of the public and governmental officials who have spoken at the public hearings and submitted written comments have been overwhelmingly opposed to the proposed Project.

As discussed at the Public Comment hearing on August 30, 2017, “the Subcommittee has received upwards of 1500 written comments. We’ve not tracked the positive and negative comments precisely, but we have generally looked at them, and they run around 11 to 1 against the proposal as it was filed.” Transcript, August 30, 2017 at 7. Between August 30, 2017 and December 22, 2017, approximately 1500 additional comments were received, and almost all of them have been opposed to the Project. There is not just a groundswell of opposition, but rather, a tsunami.

There have also been petitions and letters with multiple signatures submitted as part of the record of people who stand in opposition to the Project. For examples, the public comment dated April 12, 2017 from Andrew Smith, the President of Peabody and Smith Realty, enclosed a petition joined by over 80 New Hampshire businesses calling for the entire proposed Northern Pass project to be buried. Public Comment, Andrew Smith, April 12, 2017. A number of those signatures are from businesses located within the host communities. *Id.* A public comment dated July 20, 2017 was co-signed by 107 legislators who also oppose the project unless it is fully buried for its entire length. Public Comment, State Legislators, July 20, 2017. A public



comment submitted by Protect the Granite State included a citizen petition from hundreds of people that sent letters opposing the Project. Public Comment, Citizens Petition Protect the Granite State, August 25, 2017. During the public comment hearing on July 20, 2017, Melissa Elander presented two petitions that she noted were signed by 20,000 people. Tr. 7/20/17, Public Comment Hearing, at 87-88; *see also* Public Comment, Petition from Melissa Elander, March 3, 2017; Public Comment, Petition dated July 20, 2017. As discussed in the pre-filed testimony of Concord Councilors Gail Matson and Candace Bouchard dated December 30, 2016, the Concord also received a petition requesting burial of the proposed Project through Concord that had over 1,100 signatures. Jt. Muni. 129 at 2.

The public's opposition to the Project is a necessary consideration for the Subcommittee when determining whether the project should be approved, and towards that end, meaningful weight has been assigned to public opinion in past decisions issued by the Site Evaluation Committee. By way of example, in the Application of Antrim Wind Energy, LLC for Certificate of Site and Facility, Docket No. 2015-02 ("Antrim Wind II"), both the Site Evaluation Committee and the applicant relied on public opinion to support the approval of that wind project. The applicant argued that approval of the wind project was appropriate because it had earned "widespread support." The applicant explained that support was received from groups such as the Nature Conservancy, New Hampshire Sierra Club, the Town of Antrim, all of the state legislators representing Antrim and other conservation organizations. The applicant also explained it entered into a settlement agreement with the Appalachian Mountain Club to resolve all of its concerns related to the project. Post-Hearing Memorandum filed by Antrim Wind Energy, LLC at 1. The Site Evaluation Committee similarly noted in its decision that an opinion survey indicated that 84.4% of the Town of Antrim's residents were in favor of commercial wind

energy, 63.2% favored construction of wind turbines in the rural conservation district, and an unofficial ballot demonstrated that 63.2% of voters were in favor of that wind project. Decision and Order dated March 17, 2017, Page 95. It is apparent from the Antrim Wind II proceeding that the court of public opinion played an important factor in the approval of the wind project. Unlike Antrim Wind II, there is no “widespread support” of the proposal and/or lack of opposition to the Northern Pass high voltage transmission line.

It should be further noted that this is not a situation in which it can be argued that, regardless of the project, there will be public opposition because the general public simply dislikes transmission lines. The Site Evaluation Committee recently reviewed an upgrade to a transmission line in the Merrimack Valley Reliability docket. Unlike this proceeding, there was no widespread opposition to that application, presumably because it involved significantly less visual and construction impacts.

In addition to the general opposition to the proposed Northern Pass high voltage transmission line, there have also been a significant amount of comments that raise specific and important concerns about the impacts to specific property owners and communities. The Subcommittee is required to consider both these general and specific comments in making its decision.

#### **IV. ANALYSIS OF SEC REQUIRED FINDINGS**

A number of issues are briefed herein. In addition to the facts and arguments raised in this post-hearing memorandum, the Referenced Municipalities are relying on the full record which includes the pre-filed testimony submitted in this matter, exhibits and the testimony presented during the adjudicative hearings by witnesses. It is also anticipated that a number of topics will be briefed by other parties. In order to avoid unnecessary duplication, the Referenced

Municipalities reserve the right to review the post-hearing memoranda and will be filing a notice to join and adopt some or all of those arguments by incorporating them by reference to this post-hearing memorandum.<sup>4</sup>

**A. The Applicants Have Failed To Demonstrate They Have The Technical And Managerial Capability To Construct The Proposed Facility**

**1. Technical and Managerial Capability: Public Outreach**

Under RSA 162-H:16, IV(a), when making a decision whether to issue a Certificate, the Subcommittee is required to determine whether the Applicants have adequate technical and managerial capability to assure construction and operation of the Project in continuing compliance with the terms and conditions of the Certificate. *See* RSA 162-H:16, IV(a).

With respect to the technical capability to construct and operate the Project, under N.H. Admin. Rules, Site 301.13, the Subcommittee is required to consider the Applicants' (1) experience in designing, constructing, and operating energy facilities similar to the proposed facility; and (2) experience and expertise of any contractors or consultants engaged or to be engaged by the Applicant to provide technical support for the construction and operation of the proposed facility, if known at the time.

One of the issues addressed by the Applicants throughout these proceedings to support their contention that they have the capability to construct the Project is their ability to perform project outreach both before and during the proposed construction. This issue was raised in the pre-filed testimony of Samuel Johnson, John Kayser and Lynn Frazier (formerly Farrington), as well as on numerous occasions during the testimony of the Applicants' experts who testified

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<sup>4</sup> Those topics may include, by way of example, the purported energy market benefits to the extent it relates to the economy of the region under N.H. Admin. Rules, Site 301.15(a) and the provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility under N.H. Admin. Rules, Site 301.08(a)(8) and 301.15.

about construction, orderly development and tourism. The communication outreach efforts were also raised on a number of occasions during cross-examination of municipal officials in an effort to undermine their concerns about the proposed Project.

Despite their repeated efforts to argue that their public outreach has been extensive, well-organized and well implemented, to date, the Applicants have failed to come even close to that level. As described below, much of their outreach has centered around statutorily-mandated public information sessions and hearings as well as form letters and notifications, and no information or attempt to communicate has been made on several issues of great importance to municipalities. Also as described below, outreach to businesses along the proposed route has been similarly lacking, consisting mostly of form letters. Meetings and other exchanges have frequently been superficial and did not provide the information that the municipalities were seeking.

To understand the superficial nature of the outreach the Applicants have actually made to municipalities along the proposed route, one need look no further than the Applicants' own summary exhibits of these contacts. App. 145, 148, 150(a), 153, 357, 360, 361, 402, 405, 413, 440, 446, 470, 488 and 497. Many of the contacts listed on these summaries were required by an applicable law or regulation, involved activities that were not directed at the municipality at all, or were simple form letters:

1. All of the municipal outreach summaries include as part of the Applicants' outreach the "Public Information Sessions & Public Hearings" that were held in 2015 and 2016.

These information sessions/public hearings were legally required to be held as part of the application process before the SEC and the US Department of Energy. *See* RSA 162-H:10 (public information sessions must be held); *see also* 40 C.F.R. §1506.6 (public

involvement in EIS process). The Applicants did not hold these information sessions out of the goodness of their hearts and there is nothing in the record to indicate that they would have done so if it had not been required.

2. Most of the municipal outreach summaries actually list as part of the Applicants' outreach the various site visits conducted by the Subcommittee. App. 357, 360, 361, 402, 405, 446, 470, 488, and 497. This is laughable. Not only were these site visits conducted by the Subcommittee pursuant to state regulations, the municipalities had no opportunity during those visits to ask questions of the Applicants. *See* Site 202.13; *see also* Notice and Order of Site Visits 3/30/2017; Notice and Order of Site Visits 7/12/2017. The site visits were not for the benefit of municipalities at all, but rather to provide the Subcommittee with necessary information.
3. All of the municipal outreach summaries include various form correspondence that was sent to each municipality: one regarding purported tax benefits of the project, one about a construction Memorandum of Understanding (MOU), one informing the municipality that the Site Evaluation Committee application had been filed, and one informing the municipality that certain (form) letters had been sent to businesses in the area. App. 145, 148, 150(a), 153, 357, 360, 361, 402, 405, 413, 440, 446, 470, 488 and 497. Each of these letters provided minimal information or, in the case of the tax letter, was preliminary and specifically said that actual amounts might vary significantly. App. 486 at 2. Again, the notice that the application had been filed is a statutory requirement the Applicant had to follow. *See* RSA 162-H:7, V(f).
4. Each municipal outreach summary lists the contact that the Applicants' representatives had with the regional planning commission for the region in which that municipality is

located. App. 145, 148, 150(a), 153, 357, 360, 361, 402, 405, 413, 440, 446, 470, 488 and 497. The regional planning commission is a separate organization from the municipality and including that contact on this list serves no purpose other than to make the list look longer. *See* RSA 36:46.

One omission of note in the municipal outreach summaries is the lack of any visits, emails, letters or telephone calls from Mr. Varney, the Applicants' witness regarding orderly development of the region, to any municipality that did not have a professional planner on staff. Mr. Varney admitted that he made no attempt to meet with any municipal planning boards, town administrators or governing bodies regarding issues related to orderly development. Tr. 9/16/17 (Day 37 PM) at 127. As discussed herein, one of the three aspects of orderly development that the Subcommittee is required to consider in determining whether a project will unduly interfere with the orderly development of the region is "the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility." N.H. Admin. Rule, Site 301.15(a). Of the 31 municipalities that would be forced to "host" this Project, only seven employ professional planners with whom Mr. Varney met. CFP 471. Apparently, the Applicants did not believe the views of the remaining 24 municipalities' planning boards or governing bodies were important enough to bother asking them. And even with the professional planners Mr. Varney did consult, the meetings were primarily held just to verify that he had collected the most recent version of the relevant planning documents. Tr. 9/18/17 (Day 35 PM) at 33-34. To the extent the notes of those meetings reflect that he heard concerns about the Project, he did not repeat those meetings after the application had been filed to see whether the planners' concerns had been addressed, were resolved, or had increased. Tr. 9/21/17 (Day 37 PM) at 105, 113.

Furthermore, there is very little information provided about the majority of the contacts with municipalities that were listed on the Applicants' municipal outreach summaries (most of which were never verified by the municipalities on the record). App. 145, 148, 150a, 153, 357, 360, 361, 402, 405, 413, 440, 446, 470, 488 and 497. For example, although various telephone calls are listed on the summaries, the Applicant provided no further information on the record about whether they consisted of voicemails or actual conversations. Without that information, there is no way for the Committee to draw any significant conclusions about the true effort expended and whether it was at all effective.

To the extent that the Applicants met directly with municipal officials, the summaries fail to reflect that some of those meetings occurred after the municipality made repeated requests. For example, the Easton Conservation Commission needed additional detailed information about the project and, although they requested a meeting and were promised by an Eversource representative that it would occur "before the SEC process," it was not until February 11, 2016 (a year and a half after the Conservation Commission made the request) that the meeting was held. Tr. 12/11/17 (Day 65AM) at 70-71.

In many instances, rather than engaging in meaningful communication with municipalities and property owners on important issues, the Applicants simply sent a letter without any follow up. For example, a letter was sent to the Sugar Hill Board of Selectmen regarding temporary road lane closures, an important issue for municipalities that requires direct communication. App. 360. There is no indication in the record that the Applicants verified that the Town actually received this letter or that it was forwarded to the Board of Selectmen. In any other construction project, it would be unacceptable for a contractor to assume without verification that such a letter had been received and, more importantly, proceed with the project

regardless of whether the municipality responded. *See* RSA 41:11. Direct conversations with the governing body, public works director or highway agent are standard procedure for even the most minimal lane closures.

There are also a number of instances in which the Applicants failed to initiate direct contact with property owners and businesses to address specific concerns. The Applicants have instead relied on generic form letters that were sent, and in some instances to the incorrect address. In Stewartstown, there were concerns raised by Rod McAllaster about his dairy farm business. Tr. 10/20/17 (Day 49AM) (Video Testimony). Mr. McAllaster stated that he had not heard from anybody at the Project regarding arranging a meeting, and had also not received any letters. Tr. 10/20/17 (Day 49AM) at 76-77. When Mr. McAllaster was shown two generic letters that had been sent to him dated December 10, 2014 and October 2, 2017, it was determined that they were sent to the incorrect mailing address. Tr. 10/20/17 (Day 49AM) at 82-83, 90-91. With respect to the City of Concord, the Concord Assistant City Planner and the owner of Alton Woods, a large residential apartment complex, raised concerns throughout the proceedings about issues such as the location of construction pads on an access road and playground, the removal of vegetative buffer near Interstate 393 and the height of certain poles. Jt. Muni. 138 at 2-3 and Ex. F, attached thereto. The Applicants' construction panel stated that it could review design changes to address those issues with the property owner, but there is no evidence in the record that the Applicants initiated any recent communication with Alton Woods after the filing of the application other than sending the same generic form letters sent to all



property owners.<sup>5</sup> Tr. 5/2/17 (Day 7PM) at 94-95; Tr. 11/16/17 (Day 60AM) at 135-36; Tr. 11/16/17 (Day 60PM) at 71-73, 250-51; App. 422, 423.

Similarly, a number of concerns about the current design and construction plans about 41 Hoit Road were raised during the proceeding, including the proposed relocation of a transmission line seven feet from the residence, removal of a shed, and clearing of vegetative buffer along Mountain Road and Hoit Road for access roads. The Applicants have been aware of the concerns about the current design proposal since December 30, 2016, when pre-filed testimony was submitted. Jt. Muni. 129 at 3; Jt. Muni. 137 at 5-6. The Applicants have not undertaken any measures to initiate outreach to the property owners since the application was filed, and it was *only* after the property owners contacted Eversource in late 2017 that any recent discussions have occurred.<sup>6</sup> Tr. 11/16/17 (Day 60PM) at 94-95. There is also no information in the record that the concerns about 41 Hoit Road have been resolved.

In other cases, the Applicants have failed to take any measures to communicate with municipalities and property owners about concerns that have been raised. For example, the Town of Franconia has raised concerns about Exception Request 104 submitted to DOT, which proposes work in the Gale River crossing to occur beneath the pavement. CFP Exhibit 554. Franconia's water and electrical infrastructure are situated beneath the pavement at that location. Tr. 12/18/17 (Day 86 AM) at 12-13. Franconia is concerned about the location of where the proposed HVDC will be buried, as well as the manner in which it would impact the ability to

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<sup>5</sup> Even more troubling is that Robert Varney, the expert hired by the Applicants to address orderly development, interpreted Alton Wood's letter identifying concerns about the Project as being "in favor" of the design proposal. Tr. 9/22/17 (Day 38PM) at 144-49.

<sup>6</sup> During the hearing, Attorney Needleman made an unsubstantiated representation that EMF testing was conducted at 41 Hoit Road as a result of a request by the owners. Tr. 11/16/17 (Day 60PM) at 94-95. There is nothing in the record to support that representation. Moreover, it is unclear when the EMF testing occurred, if at all, but it would have very likely related to testing of the utility line in its current location and has no bearing on the proposal to relocate the line seven feet from the home.

access the water and electric lines for future routine and emergency maintenance. Tr. 12/18/17 (Day 86 AM) at 12-13. Based on responses the Applicants provided during discovery, Franconia expected the Applicants to contact them about this issue; however, as of December 18, 2017, that had not yet happened. Tr. 12/18/17 (Day 86 AM) at 14-15.

Perhaps the most egregious failure of outreach in this case, however, is that the Applicants made no attempt to contact municipalities about project plan changes that fundamentally alter the project and its potential impacts to those municipalities. The best example of this occurred when the Applicants acknowledged that they were unlikely to be able to bury the underground portion beneath the paved surface of the state roads from Bethlehem to Bridgewater. The design plans changed drastically once it became apparent that DOT's Utility Accommodation Manual would not allow burial in this area, and that proposed construction would need to occur mostly outside of the pavement. *See, e.g.*, DOT Conference Report dated 9/16/2015 (conference of 9/1/2015) and DOT Conference Report dated 3/7/2016 (conference of 3/1/2016), on DOT website.

Before that time, the Applicants had led the municipalities and property owners in that area to believe that construction would occur beneath the pavement or, at worst, partially in the shoulder, as set forth in great detail on pages 2-7 of Grafton County's Motion for New Public Hearings and Motion to Require a New Application (filed with the SEC on November 6, 2017). Tr. 9/8/15, Public Information Session, at 35, 60 and 70; Tr. 1/21/17, Public Information Session, at 70-72, 79-80, 88. These representations included discussions during public information sessions, during which the Applicants' representatives made statements such as "Yeah, I would say for over 99.9 percent of the Project we have no plans to trim any trees, that we will try to stay in the shoulder and travel lane of the road itself." Tr. 9/8/15, Public Information Session, at

60. The Applicants repeated these representations during meetings with municipal officials. Tr. 12/11/17 (Day 65AM) at 71-72. The Applicants failed to initiate communications with municipalities and property owners along the proposed underground route between Bethlehem and Bridgewater about the design changes, and they were only first identified in the proceeding when they were posted on DOT's website. The Applicants have still not taken any steps to correct the misunderstanding with municipalities and property owners that had been created, and as shown during their testimony, they do not intend to commence such communications unless and until the project is approved.<sup>7</sup> Tr. 5/5/17 (Day 9PM) at 104-112.

Another significant failure to communicate about potential design changes involves the change of location of Transition Station #5 in Bethlehem. At one point, the Applicants suggested that they might reach an agreement with the developer of a hotel that is proposed to be adjacent to the current proposed location of Transition Station #5. Tr. 5/31/17 (Day 10 AM) at 55-56. Bethlehem has raised concerns because it considers a new hotel to be highly advantageous, and the municipal officials are concerned that the developer will withdraw his proposal in the event that Transition Station #5 is not relocated. Tr. 11/8/17 (Day 58 AM) at 102-106. The Applicants have not taken any steps to amend their plans to reflect the potential relocation of Transition Station #5, and they further testified that there are no plans to have it relocated. Tr. 5/31/17 (Day 10 AM) at 55-56. The Town, on the other hand, has heard from the property owner's representative that they believe it may still be relocated.<sup>8</sup> Jt. Muni. 350. There is also information in the record that the Applicants intended to relocate Transition Station #5,

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<sup>7</sup> Although municipal and private property owner intervenors are likely now to be aware of the potential design changes, there are a number of municipalities and private property owners that will be impacted and are likely to be unaware of any design changes, thereby foreclosing the opportunity to provide comments to the Subcommittee about impacts from a different proposal.

<sup>8</sup> Additional information about the proposal in Bethlehem was raised in a motion to reopen the record filed on January 4, 2018. As of the date of the filing of this memorandum, that motion is still being adjudicated.

but, rather than provide this important information to be reviewed by the Subcommittee, decided to keep the information confidential. Public Comment, Patrick Miller-Bartley, December 20, 2017.

Finally, the record shows that some of the businesses that directly communicated with the Applicants were unable to receive a satisfactory response. For example, Kevin Johnson, owner of the Gale River Motel in Franconia, requested a meeting with the Applicants. Following the meeting, the Applicants exchanged follow-up letters regarding the concerns raised by the Gale River Motel. Grafton 51; App. 407; Jt. Muni. 346. It is evident from these letters that the Applicants' representative was unable to provide specific information to address the concerns raised. Grafton 51. Mr. Johnson's expressed disappointment in his second letter, stating:

Of all the questions that I originally posed, nearly all of the responses reflected a failure to demonstrate any detail or sincere consideration for the concerns of myself as a business owner and the threat that the Northern Pass project poses for the health, safety, and livelihood of our community.

Jt. Muni. 346 at 1. Another business owner, Alec Morris, owner of the Franconia Inn, requested a conference call with the Applicants that was held in November 2017. Jt. Muni. 347 at 2. Mr. Morris asked five specific questions regarding the impacts the project might have on his business. Jt. Muni. 347 at 2. The responses provided by the representatives for the Applicants' may be summarized as "we don't know" and "we'll work that out later." *Id.* Needless to say, Mr. Morris' concerns were not resolved by that conference call. If these interactions are representative of even a fraction of the outreach that the Applicants have conducted, it is absolutely unacceptable for a project of this magnitude.

Taken as a whole, the Applicants' efforts to conduct meaningful outreach to the municipalities and businesses along the route are simply inadequate. The Applicants should have made a concerted effort over time to ensure that municipalities and property owners

understood the substantive changes that were being proposed to the plans. They should have made an affirmative attempt, beyond a generic form letter, to meet with municipal officials to provide updates on the changes and respond to the concerns that were raised. Unfortunately, the Applicants did none of these things. Despite their claims of nearly heroic efforts, the reality is that they used outreach that was heavy on generic form letters over substance. The only explanation is that the Applicants either do not know how to conduct an effective outreach campaign, or they simply did not make the effort. Either way, it is unacceptable and creates grave doubt about their willingness or ability to adequately communicate with affected communities and property owners during the construction and operation phase of the proposed Project.

## **2. Technical and Managerial Capability - Project Engineering**

With respect to the locations in which the Applicants propose to bury the HVDC transmission line along state and local public highways, a project this complex requires an applicant to have the managerial and technical expertise to obtain all necessary information for the planning portion of the project. As discussed in more detail below, the Applicants failed to develop an adequate survey demonstrating the actual location of the right of way through the 52 miles of proposed burial from Bethlehem to Bridgewater, or that the right of way is wide enough to accommodate the proposed project. The Applicants also failed to conduct the proper research and investigation during the planning phase, resulting in inaccuracies that could have been avoided by a more organized process. The evidence indicates further that the Applicants have failed to address adequately the likelihood that future maintenance of both the transmission project and any other infrastructure in the vicinity will be challenging and expensive for municipalities and property owners, and potentially the Applicants. The failures in the planning

process raise significant doubt about the Applicants' ability to manage the construction process properly.

a. Survey Deficiencies

The Applicants were required to certify that the right of way lines shown on the plans are accurate locations defined by ground survey and all pertinent research. App. 107 at 4. BL Companies and Meridian Land Services submitted their respective surveys of the underground portion to the New Hampshire Department of Transportation ("DOT") on April 12 and 19, 2017, both of which were rejected by DOT on August 11, 2017. CFP 493, 495. As explained in a memorandum prepared by DOT on August 1, 2017:

both of these reports indicate that the majority of the right-of-way shown on the plans is approximate location only. *The condition of approval requires an accurate location defined by ground survey; neither of these reports has met that requirement.* The survey reports need to be in compliance with New Hampshire Code of Administrative Rules Board of Licensure for Land Surveyors, specifically, Lan 503.03 and 503.04.

CFP 493 at 2 (emphasis added). DOT subsequently assured one of the municipal intervenors in this proceeding that it would be requiring a completed survey report that documented and defined the right of way in the underground portion of the proposed route. Jt. Muni. 326 at 1. It further explained that the requirements of the survey report would "include that all evidence collected and methods used to accurately identify the existing ROW are identified," as well as that the document be certified by a New Hampshire licensed land surveyor. Jt. Muni. 326 at 1.

On October 3, 2017, DOT approved the Applicants' proposed survey procedure.<sup>9</sup> This survey has not been completed and, as a result, incomplete information is available in the record

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<sup>9</sup> There are also major concerns that the survey process approved by DOT does not meet the requirements of the land survey standards. App. 228. Stephan Nix testified that the survey procedure is insufficient to create a factually accurate survey upon which the Subcommittee can rely for this project. Tr. 10/20/17 (Day 49PM) at 18-19, 21-22. The survey procedure omits a variety of critical sources that contain information relevant to the actual location of

to assess impacts by the Subcommittee, state agencies, intervenors and the general public. The delay in providing accurate survey report should be deemed unacceptable. The Applicants were aware in 2014 that “confirming all the accurate right of way lines shown [on project plans in the Franconia area] would take extensive research and time.” Jt. Muni. 198 at 1-2; Tr. 5/4/17 (Day 9AM) at 86-87. Despite the foregoing, the evidence shows that the survey reports submitted by BL Companies and Meridian Land Services in April 2017 were *not intended* by the Applicants to include all of the available evidence. The survey reports prepared by Meridian Land Services and BL Companies failed to reference all relevant and available documentation, despite the fact that a large portion of those records were able to be located by non-expert intervenors in this matter. Tr. 5/4/17 (Day 9AM) at 71-82; Tr. 10/29/17 (Day 49PM) at 49-68.

The Applicants should have obtained these important records to determine the correct location and width of the right of way in the underground portions of the proposed route. Both survey companies stated in their respective April 12 and 19, 2017 reports that the scope of their assignment was not broad enough to produce an accurate determination of the right of way, and therefore boundaries needed to be marked as “approximate” instead of “determined.” App. 130, Part 1 at 62272; CFP 495. Meridian Land Services further stated in its report that, although it had anticipated being hired to perform additional work for certain sections of the underground

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the right of way, including historic plans and records such as 1860 wall maps, the 1895 Atlas, and the 1909 USGS maps. Tr. 10/20/17 (Day 49PM) at 20. It also omits historic maps, parole evidence, and additional research currently available at municipal offices to determine whether any portions of a road have been moved or discontinued. Tr. 10/20/17 (Day 49PM) at 24-25. Even if DOT has the authority to determine what constitutes a valid survey, which is disputed, the Subcommittee has heard clear expert evidence that the survey procedure is inadequate. RSA chapter 162-H creates the Site Evaluation Committee to, among other things, “maintain a balance” among the potential significant impacts and benefits of energy projects, including private property rights. This Subcommittee cannot possibly strike a balance that is in the public interest if it does not have all the necessary information to do so. Without a certifiably accurate survey, it is impossible for this Subcommittee to assess what impacts the Applicants’ Project will have on private property. See Tr. 10/20/17 (Day 49 PM) at 70-72. Even if DOT is willing to accept something less than an accurate survey, that does not relieve this Subcommittee of its responsibility in this area.

route to assist in determining the right of way, the company had “not received any requests for this level of effort.” App. 130, Part 1 at 62272. There should be no dispute that the Applicants were aware that the surveys lacked accuracy. This situation casts doubt upon the Applicants’ managerial judgment, particularly given the significant impacts that this project would have on surrounding property owners and the community.

The Applicants’ delay in providing a survey report that contains more accurate information about the right of way cannot be justified by the assertion that the design process is “iterative.” The Applicants chose to limit the fieldwork required for the survey reports, resulting in a low level of accuracy that was criticized by the DOT. One of the major failures is that the Applicants treated the surveys as part of the design process, even though this survey work should have been performed before the proposed project was designed. Tr. 10/20/17 (Day 49 PM) at 14-15. As explained by Stephan Nix, “the survey and the establishment of the boundaries are not part of the design process. They are preliminary to the design process. They need to be done prior to the design process starting. They need to be done, or at least 95 to 98 percent done [before the project is designed].” In this case, there was “zero percent done.” Tr. 10/20/17 (Day 49PM) at 14-15.

To the extent that the relevant right of way can be established by prescription, it is also undisputed that neither the DOT nor a licensed land surveyor has the authority to determine the existence, location or width of a prescriptive easement. A highway right of way established by prescription can only be determined by a court. *See Gordon v. Town of Rye*, 162 N.H. 144, 152. There is no evidence in the record to indicate that the Applicants or anyone else has obtained a court decision regarding the right of way location or width through the underground portion from Bethlehem to Bridgewater. Private property may not be taken by eminent domain for this



project, which means that unless every such private property owner grants the Applicants permission, the project may not be located there. *See* RSA 371:1. Therefore, if any portion of the right of way was established by prescription, the Applicants have failed to procedure adequate evidence for that determination. Unless and until a proper survey is submitted, and the Subcommittee is presented with specific design locations for the underground route, there simply is not enough information upon which to approve this project.

b. Failure to Conduct Necessary Investigations, Resulting in Multiple Avoidable Inaccuracies

The underground portion of the project also presents particular challenges that the overhead portion does not, including among other things, taking into account already-existing underground infrastructure and determining whether other substances and natural structures exist within the planned route. It might be understandable that the Applicants were unable to perform such research or investigations before the application was filed in October 2015 because the underground route was allegedly only added to the design shortly before the application was filed.<sup>10</sup> However, in the more than two years that have transpired since that timeframe, the Applicants have not only failed to provide any final plans depicting the location of the underground portions of the proposed route, but they have also failed to conduct extensive research and investigation regarding the nature and extent of underground infrastructure that exists. At this point in the process, the Applicants have fallen far short by failing to introduce this necessary information into the record.

For example, although geotechnical borings along the underground portion were conducted in 2015 and 2016 (see Quanta HDD Memo, on DOT website), the Applicants have

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<sup>10</sup> This of course raises the question of whether the Applicants should have delayed the submission of the application until they could obtain adequate information.

not yet produced any “final” plans depicting the exact location of the underground portions of the project. The Applicants filed 185 exception requests between May and July of 2017 seeking to construct the Project in sections of the public highway that do not comply with DOT’s Utility Accommodation Manual. As of the close of the record in this case, many of those requests remain outstanding and had not yet been resolved. CFP 496-582, 619 -621, 632, 643-645, 656. The resolution of several of these exception requests would require the Project’s alignment to be moved to a different side of the road. Until all of the exception requests are resolved, there is no way for the Applicants to produce accurate project maps that depict the project alignment. This is significant for the abutting property owners who would be affected, and also has various impacts on underground infrastructure and natural resources. CFP 494 at 13516.

Moreover, with respect to those specific locations of the proposed underground route that may involve exception requests, the plans submitted by the Applicants to DOT contain inaccuracies and omissions. CFP 494 at 13511; Tr. 12/5/17 (Day 64PM) at 57-65. While the DOT survey requirement does not include subsurface features (as discussed in the next paragraph), the exception requests do include such a requirement. The Applicant was informed by DOT that “all underground utilities such as water, sewer, gas and etc. are to be shown....” Conference Report dated May 4, 2016 (conference of April 26, 2016) at 2 (on DOT website). The exception requests filed in 2017 contained so many inaccuracies and omissions that DOT personnel needed to spend a significant amount of time performing quality control, and as explained by DOT staff overseeing the project, “these errors make Department personnel wonder about the accuracy of existing facilities and the right of way throughout the entire route. . . .” *Id.*

In addition, the current survey process for the right of way that the Applicants are providing to DOT only requires “observable monuments” to be identified. Grafton 53.

Accordingly, the information contained in the survey reports will be inadequate for purposes of designing the underground portion of the project. As the Subcommittee heard during the adjudicative hearings, unless the underground utilities are shown on a plan on record at the Registry of Deeds, a surveyor will be unaware of their existence unless they speak to the abutting property owners and/or reviewed the town building files for the abutting lots. Tr. 10/20/17 (Day 49 PM) at 79-81. These additional steps have not been taken, and therefore, the full impacts of the proposed route cannot be determined.

The Applicants also failed to make any meaningful effort to consult the municipalities in which the underground route is proposed in order to obtain information about existing municipal or private infrastructure in or near the road.<sup>11</sup> The municipal outreach summaries of their contacts with the intervenor towns of Bethlehem, Franconia, Sugar Hill, Easton, and Plymouth do not indicate that any meaningful effort was made by the Applicants to seek information from municipal public works, highway, planning, or other relevant departments regarding which municipal water, sewer, gas, electric or telecommunications infrastructure, or underground storage tanks or other structures are located in or adjacent to the route, nor do they indicate any meaningful research regarding privately-owned infrastructure or structures of which the towns might be aware. App. 148, 150(a), 360, 405, and 446. Indeed, when the owner of the Gale River Motel in Franconia had a meeting with the Applicants, the representatives of the Applicants were unable to provide information regarding underground infrastructure. Grafton 51; App 407; Jt. Muni. 346. As set forth in his letter dated October 19, 2017, he states: “I provided more detailed information about the project to your representatives pointing out a sewer line that runs under the

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<sup>11</sup> The one municipal entity Applicants met and coordinated with is the Plymouth Village Water & Sewer District, a separate legal municipal entity from the Town of Plymouth. However, none of the plans submitted in the record in this matter reflect any information that the Applicants may have obtained from the District.

roadway to a septic tank located eight feet from the roadway which services my residence and the water line crossing under the roadway servicing my neighbor.” Grafton 51.

It is concerning that there have been numerous occasions on which DOT personnel have needed to correct mistakes and/or require the Applicants to be more diligent in their work product. It is also concerning that the Applicants have failed to identify and address concerns raised by municipalities and property owners regarding the subsurface infrastructure, even though this particular concern has been raised by several municipalities along the buried portion of the route since the beginning of the Site Evaluation Committee process. Jt. Muni. 102 at 2; Jt. Muni. 320 at 4 and Appx. E; Jt. Muni. 103 at 2. These are more examples of the Applicants’ failure to demonstrate their ability to oversee and manage the project.

## **B. Orderly Development of the Region**

RSA 162-H:16, IV(b) requires the Subcommittee to determine that a proposed facility will not unduly interfere with the orderly development of the region, with due consideration given to the views of municipal and regional planning commissions and municipal governing bodies. *See* RSA 162-H:16, IV(b). Under the Site Evaluation Committee’s administrative rules, when determining whether the Project will unduly interfere with the orderly development of the region, the Subcommittee is required to consider: (1) impacts to land use, employment, and the economy of the region; (2) decommissioning plans; and (3) the views of planning commissions and municipal governing bodies. A number of those requirements are discussed below.

### **1. Orderly Development – Impacts to Land Use**

With respect to evaluating impacts to land use, the Site Evaluation Committee’s rules require an application to describe “land use in the region,” by including: (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. N.H. Admin. Rules, Site 301.09. The Site Evaluation Committee's rules also require the application to include "master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places." *Id.* The Applicants have failed to meet their burden to prove that there will not be an undue interference with land use in the region. Not only did the Applicants fail to provide adequate information to address this important issue, but the testimony from the intervening opposing municipalities and counties is unequivocal that the proposed Northern Pass high voltage transmission line would unduly interfere with orderly development.

a. The Application Fails to Describe Land Use In All Affected Communities

The Subcommittee is required to evaluate impacts to "land use" in making a determination that a proposed project will not unduly interfere with the orderly development of the region. To assist in this evaluation, the Site Evaluation Committee's rules require an application to include: (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. N.H. Admin. Rules, Site 301.09.

The application fails to meet these basic requirements. The term "affected communities" is defined as "the proposed energy facility host municipalities and unincorporated places, municipalities and unincorporated places *abutting* the host municipalities and unincorporated places, *and other municipalities and unincorporated places that are expected to be affected by*

*the proposed facility*, as indicated in studies included with the application submitted with respect to the proposed facility.” N.H. Admin. Rules, Site 102.07.

The application provided a description of the prevailing land uses in the host municipalities and unincorporated places along the project corridor, but it failed to provide information regarding any of the other communities that are abutting and/or expected to be affected by the proposed Northern Pass high voltage transmission line. App. 1, Appx. 41.

Under cross examination regarding this issue, Robert Varney, the expert retained by the Applicants to render an opinion that there would be no impact on land uses, acknowledged that he did not include information in his report regarding the land use of affected municipalities other than the host municipalities and unincorporated places. Tr. 9/22/17 (Day 38AM) at 34-42. One of the justifications proposed by Mr. Varney for failing to provide information regarding land use in those communities was that such an analysis was unnecessary because there would be no “land use” impact on any of those communities other than a potential visual impact. *Id.* at 34-42. On redirect examination, it was also implied that the requirements of the Site Evaluation Committee’s rules were followed because Mr. Varney offered the one sentence opinion in his supplemental testimony that “the abutting communities are often a considerable distance from the Project and, regardless of distance, likely will not be affected.” Tr. 9/26/17017 (Day 40AM) at 158-59; App. 96 at 9.

This cursory opinion, which contains no analysis, is insufficient to meet the requirements of the Site Evaluation Committee’s rules which require a “description of the prevailing land uses in the affected communities” and 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.” N.H. Admin. Rules, Site 301.09. The Northern Pass is a proposed 192-mile high voltage

transmission line that includes 32 miles of new overhead transportation corridor. A one sentence statement regarding the land use in the affected communities in a supplemental report that was submitted on April 17, 2017, approximately 18 months after the application was filed, cannot be held to meet the requirement to provide a description of the prevailing land uses in all affected communities.

b. The Applicants Failed to Properly Analyze Interference To Land Use

Mr. Varney's expert opinion regarding orderly development was also legally insufficient because: (1) it failed to conduct any analysis of how the visual impacts of the Project could potentially undermine the visual oriented goals and objectives of the respective host municipality master plans and zoning ordinances, *i.e.* how the Project could potentially alter a host municipality's "rural character;" (2) it only considered input from host community professional planners (7 out of 31 host communities), failing to speak to any town official or staff from the remaining 24 host communities regarding their respective input on the Project's consistency with their master plans and zoning ordinances; (3) when Mr. Varney did speak to the host community professional planners, he failed to ask them whether they thought the Project would unduly interfere with the orderly development of the region; and (4) it ignored the overwhelming opposition to the Project expressed by the numerous warrant articles passed at respective host community town meetings. These failures render Mr. Varney's opinion incomplete and therefore legally insufficient as a basis for the Subcommittee's ultimate determination regarding the Project's impact on orderly development.

Mr. Varney's expert opinion failed to examine how the Project could potentially undermine a host community's "rural character" and other visually oriented goals, objectives, and limitations expressed in master plans and zoning ordinances. The overhead portion of the

Project includes a proposal to relocate existing structures and add new structures that will generally be double, and in some instances, triple the height of the existing transmission structures. While the Site Evaluation Committee's rules require the Applicants to conduct a visual impact assessment of the Project's impact on "scenic resources" within each host community, that term is specifically defined and is not necessarily synonymous with the visually oriented goals and objectives in a municipality. N.H. Admin. Rule, Site 102.45. Moreover, Mr. Dewan and Mr. Varney both admitted during their respective questioning that they did not consider how the visual impacts might undermine the visual oriented goals, objectives, and limitations expressed in master plans and zoning ordinances. Tr. 9/12/17 (Day 32PM) at 110-111; Tr. 9/18/17 (Day 35PM) at 54-55, 126-127; and Tr. 9/21/17 (Day 37AM) at 105. The goal and/or objective to protect a host community's "rural character" is ubiquitous among the host communities. The Applicants' failure to offer an opinion on how the Project might not impact these values undermines their entire opinion on this subject.

c. The Applicants Improperly Assume That Use of Existing Right Equates to No Undue Interference

The Applicants assert that approximately 100 miles of the proposed overhead Northern Pass high voltage transmission line will not have an adverse impact on land use because (1) it is located in an existing electric transmission line; and (2) in the overhead section, the prevailing land uses along the corridor have coexisted with existing electric utility transportation corridors as part of the "fabric of local and regional development." App. 20 at 4; App. 1, Appx. 41 at 1.

The use of an existing right-of-way for sections of the Project does not automatically mean that there will be no interference or other impacts to the region. If that were the case, there would be no logical need for the Site Evaluation Committee's review of a new transmission line when it will be travelling through an existing corridor. Rather, under RSA chapter 162-H, before



a public utility is allowed to construct an energy facility in New Hampshire, even in an existing corridor, it must obtain a certificate from the Site Evaluation Committee. This statute applies to all electric transmission lines in excess of 200 kilovolts, regardless of whether they will be sited in a route already occupied by a transmission line. RSA 162-H:2, VII(e). The legislature could have exempted electric transmission lines placed in an existing corridor in the event that it believed that the siting of such facilities did not require review by the Site Evaluation Commission.

Despite the foregoing, Mr. Varney asserts that the use of existing transmission lines is consistent with orderly development and is “a sound planning and environmental principle because it reinforces local patterns of development and minimizes environmental impacts.” App. 20 at 7; App. 1, Appx. 41 at 1.<sup>12</sup> In support of that statement, Mr. Varney references the decision in Portland Natural Gas Transmission System Maritimes & Northeast Pipeline Company, SEC Docket 96-01 and 96-03 (July 16, 1997), as well as the Findings of the Bulk Power Facility Site Evaluation Committee, SEC DSF 850-155 (September 16, 1986). *Id.* His reliance on those decisions is misguided. The decision in Portland Natural Gas involved a buried pipeline along an existing utility corridor, which is a considerably different project. The decision in the application filed by New England Hydro-Transmission Electric Company, Inc. in 1985 to construct the Phase II transmission line to import energy from Hydro-Quebec portion is also easily distinguished. That proceeding involved the use of an existing right-of-way that was 350 feet wide and involved “very little tree clearing.” Findings of the Bulk Power Facility Site Evaluation Committee, SEC DSF 850-155 (September 16, 1986) at 12 and 19. There were also

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<sup>12</sup> Mr. Varney has provided that opinion not only in this case, but also provided an identical opinion in the Seacoast Reliability Project and the Merrimack Valley Reliability Project. Tr. 9/18/17 (Day 35PM) at 107-108, 110-111.

reports that indicated that the visual impact at most points along the line would be minimal or none. *Id.* at 20. Most importantly, unlike this proceeding, there were also no witnesses called by intervenors or Counsel for the Public to present evidence to rebut the information provided by the applicants. *Id.* at 7. In fact, the only municipality to express its view was the Town of Bedford, and it did not oppose the approval of the project. *Id.* at 16.

It is also anticipated that the Applicants will also rely on the recent decision in the decision granting the application for a certificate in the Merrimack Valley Reliability Project, Docket 2015-05. Again, that application can be easily distinguished from this proceeding. The proposal in that case involved 18 miles of a new transmission line, and none of the municipalities intervened or provided comments to the Subcommittee regarding the project. *Id.* at 56-57.

Here, using the existing right-of-way will exacerbate, not lessen, the impact of the Project due to the significant changes that have occurred along the route, as well as the narrow confines of the right of way. The clearance requirements for the new proposed high voltage transmission line cannot be accommodated without relocating and increasing the heights of the existing 115kv transmission line structures, as well as the rebuilding of a number of distribution lines. Due to the tree buffer clearings, relocation of existing transmission and distribution structures and the use of taller and more industrial-type structures, a new transmission line will radically change the character of the region.

The supplemental analysis presented by Mr. Varney regarding the development surrounding the PSNH corridor near Loudon Road and the Hydro-Quebec Phase II transmission line in Concord, Bedford and Londonderry does not support the conclusion that “there is no evidence that the presence of a new high voltage transmission line in an existing corridor . . . has had a negative impact on a community’s economic development or growth potential.” App. 96

at 6. With respect to the Hydro-Quebec Phase II transmission line in the Referenced Municipalities, the Concord Assistant City Planner reviewed the recent development that has occurred over the last twenty-five years between Concord and Londonderry. Tr. 11/16/17 (Day 60AM) at 98-108. It was her opinion as a professional planner that development has been impacted as a result of the Phase II. Tr. 11/16/17 (Day 60AM) at 39-102. Among other things, this opinion was based on the fact that (1) there is only one house on Warner Road that is located adjacent to the Phase II corridor in Concord, and that house is buffered with vegetation<sup>13</sup>; (2) only three residential developments have occurred between Hopkinton and Litchfield over the last twenty-five years, and all of those developments maintained vegetative buffers; and (3) the commercial development at Constitution Drive adjacent to the Phase II line, which was a parcel relied upon by Mr. Varney to support his opinion, was used for a parking lot which in the planning profession is not “considered the highest and best use of land.” Tr. 11/16/17 (Day 60AM) at 101-07 App. 96, Att. A at 19.

The negative impact on development of the Hydro-Quebec Phase II transmission line again became apparent during a review of the recent development of Market Basket in Bedford, which was also relied upon by Mr. Varney to support his opinion. App. 96, Att. A at 17. The developer noted the unique challenges of the Hydro-Quebec Phase II easement, which has significantly impacted development:

I don’t believe there is another commercial parcel in Town that has this easement running through it, and if you can visualize following this easement down through the Town of Bedford, you won’t see any other development under it. There is a

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<sup>13</sup> The remaining parcels adjacent to the corridor in Concord are undeveloped land that includes conservation easements that were gifted to Concord and/or placed in conservation land as part of a subdivision process. When property owners are required to place property in conservation as a result of a subdivision approval, Ms. Fenstermacher explained that they do not provide the most valuable part of their land, and will usually choose where they do not want their house to be located. Tr. 11/16/17 (Day 60AM) at 99-101.

little bit of parking off one of the lots on Constitution Drive, but other than that, it goes right through Town and no one has tried to do any kind of any development under it because you can't. So this development allows us to make some good use of land that nobody else has found a use for except hitting golf balls.

Jt. Muni. 292 at 23. A member of the Zoning Board of Adjustment further noted that "it looks like a moonscape where the power lines are . . . with those huge power lines, it would be hard to say you're making the neighborhood look worse by building a 78,000 square foot building. . . ."

Jt. Muni 292 at 40. There should be no dispute that a thorough review of the Hydro-Quebec Phase II transmission corridor actually demonstrates that there are impacts on residential and commercial development in the region adjacent to the line.

There is also evidence to sufficiently contradict Mr. Varney's opinion that the development along the PSNH corridor near Loudon Road has not been impacted. As discussed by City Planner Heather Shank in great detail during the hearing, it is her opinion as a professional planner that while there has been some recent development, the nature of that recent development has been impacted by the existing transmission line because it was not an ideal site. Tr. 11/16/17 (Day 60PM) at 77-81, 172, 180, 225. Ms. Shank and the Concord City Councilors also discussed the importance of the Gateway Performance District in Concord, and the current work that Concord is actively performing to redevelop the area in a manner focused on new urbanism and town center development. Ms. Shank and the Concord City Councilors were unequivocal in expressing their view that the proposed changes by the Project in the existing right-of-way would have detrimental consequences to those redevelopment plans. Tr. 11/16/17 (Day 60PM) at 73-81, 170-87, 196-99, 219-222, 224-29, 236-39. The fact that these redevelopment plans are being actively pursued, although not yet been finalized, demonstrates their significance to Concord. *Amended Application of Portland Natural Gas Transmission System*, SEC Docket 1996-01 and 1996-03 Decision dated July 16, 1997 at 17 (holding that

installation of an underground pipeline would create undue interference with orderly development because the proposed location was being considered by municipality as the site for a new public library).

Lastly, the three communities selected by Mr. Varney for his supplemental report bear little resemblance to the majority of the Project host communities, which are smaller and more rural communities. For instance, Deerfield Conservation Commission and Planning Board member Kate Harnett noted that Londonderry, Concord, and Bedford are distinct from Deerfield, which has taken steps to preserve its rural setting over development that would transform Deerfield into a more urbanized community. *See* Tr. 12/12/17 (Day 66 PM), at 134-135. Mr. Varney's supplemental report has no relevance on how the Project is likely to impact those smaller more rural communities like Deerfield.

In short, the proposed Northern Pass high voltage transmission line will have significant and deleterious consequences to the overall and orderly development of the regions in which it is proposed to be sited. The Applicants cannot be dismissive of those impacts to land use based on the generalized statement that the project is utilizing an existing utility corridor. As extensively discussed throughout the proceedings by the Referenced Municipalities, as well as others, the proposed route is not consistent with the land use of their communities.

## **2. Orderly Development – Master Plans and Zoning Ordinances**

### **a. The Application Fails To Provide Information About Master Plans and Zoning Ordinances**

The Site Evaluation Rules require the application to include information about the “master plans of the affected communities and zoning ordinances of the proposed facility host municipalities and unincorporated places.” N.H. Admin. Rules, Site 301.09. The application's failure to comply with this requirement is discussed in more detail under orderly development.

However, in summary, the report prepared by Mr. Varney is devoid of any substantive analysis regarding master plans and zoning ordinances of either the host or adjacent communities. App. 1, Appx. 41 at 29-30. It is mystifying that the applicants allowed their expert to spend “hundreds” of hours to review master plans and zoning ordinances, and then failed to provide any valuable information in the application in accordance with the requirement that those master plans and zoning ordinances be discussed. Tr. 9/22/17 (Day 38AM) at 42-43.

It should also be noted that, during the adjudicative hearing, Mr. Varney attempted to justify his failure to include information about master plans because he prepared two documents marked “draft” which he explained was a working document on his review of master plans. Tr. 9/22/17 (Day 38AM) at 39-40; App. Exs. 121 and 123. Mr. Varney’s report noted that he “compiled detailed summaries” of master plans, but they were not included in the application. Tr. 9/26/17 (Day 40AM) at 158; App. 1, Appx. 41 at 2. The summaries of master plans were only later provided in discovery, and then even later marked as exhibits by the Applicants in April 2017. Tr. 9/22/17 (Day 38AM) at 39; Tr. 9/26/17 (Day 40PM) at 158. The requirement to include information in the application about master plans cannot be satisfied by providing a “draft” working document to the Site Evaluation Committee during the adjudicative hearing phase approximately 18 months after the application was filed. App. 123.<sup>14</sup>

Moreover, the Applicants failed to provide any substantive description regarding the zoning ordinances of host municipalities. N.H. Admin. Rules, Site 301.09. The only reference to zoning ordinances is a summary of RSA chapter 674, as well as identification of the seven host municipalities that do not have zoning ordinances. With respect to the remaining 24 host communities, the reference to their zoning ordinances is the following statement:

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<sup>14</sup> The Applicants’ Track 2 Exhibit List and App. 123 were submitted to the Site Evaluation Committee late April 2017.

The Project is not subject to local zoning regulations. By utilizing existing transportation and utility corridors, and locating the new ROW in an area that is used primarily for commercial forestry, the existing land use development patterns along the corridor are maintained.

App. 1, Appx. 41 at 30. The complete failure to provide any substantive analysis of zoning ordinances of the host municipalities, as well as the dismissive attitude regarding the applicable zoning ordinances, shows a lack of diligence and a level of overconfidence that cannot be a substitute for compliance with Site 301.09. The Applicants have the burden to provide information about zoning ordinances as part of the analysis on orderly development, which they completely failed to meet.

b. The Project Is Inconsistent With The Host Communities' Master Plans and Zoning Ordinances

With respect to municipal master plans, Mr. Varney incorrectly concludes that the Project is consistent with those plans because it “helps to implement economic development efforts by helping to reduce energy costs, improve air quality and address potential local and potential regional consequences associated with climate change.” App. 1, Appx. 41 at 30. He also states that the Project will preserve “open space by locating within or along already developed utility and roadway corridors, and going underground in key locations.” App1, Appx. 41 at 30. These conclusions demonstrate Mr. Varney’s lack of a full understanding of the scope of the master plans of the affected communities, and is an obvious attempt to cherry-pick sections that address energy initiatives and to completely disregard the sections that address community aesthetics and important regions in a municipality.<sup>15</sup> Mr. Varney also fails to address whether utilizing already developed corridors remains consistent with master plans when it involves adding and replacing

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<sup>15</sup> For many municipal master plans, the sections on energy initiatives are focused on reducing consumption and developing small-scale local energy sources, and they are not intended to suggest support of the importation of large-scale hydro from Canada. Tr. 11/16/17 (Day 60PM) at 236; *See e.g.* Energy Chapter of Deerfield Master Plan, Jt. Muni. 153, at 6696-6699.

structures that are frequently double (and sometimes triple) the existing heights, replacing wooden poles with industrial structures such as lattice towers and weathered-steel monopoles, and removing vegetation.

During trial, Mr. Varney repeatedly attempted to discredit the usefulness of master plans by stating that they simply contained “broad” visions and goals with respect to community aesthetics and efforts to preserve the rural landscape. *See e.g.* Tr. 9/21/17 (Day 37 AM), at 51-52. Ironically, in the *Application of Portland Natural Gas*, a proceeding in which Mr. Varney was the Presiding Chair, the Committee determined a proposed underground natural gas pipeline could not be sited in a particular location of Shelburne because it would unduly interfere with orderly development. Among other things, the Committee found that the proposal would unduly interfere with orderly development because “the location of the pipeline on the north side of the river conflicts with the master plan and the zoning ordinance of the Town of Shelburne which have attempted to preserve the rural nature and charm of the area.” *Amended Application of Portland Natural Gas Transmission System*, SEC Docket 1996-01 and 1996-03, Decision dated July 16, 1997 at 17. Despite Mr. Varney’s attempts to diminish the importance of master plan and zoning ordinance goals to ensure that the rural character and charm of a community is preserved, it is clear that during his tenure on the Site Evaluation Committee he placed great emphasis on that type of language.

The written and oral testimonies of the various witnesses for the Referenced Municipalities demonstrate that the Project would unduly interfere with the host communities’ orderly development because it is not consistent with the respective community’s master plan and/or zoning ordinances. This is discussed as follows:



1. Bethlehem

Town witness Cassandra Laleme's testimony described the Project's inconsistency with Bethlehem's master plan and zoning ordinance. In Bethlehem, the Project consists of 80-100 foot overhead structures leading to Transition Station #5, located off of Route 302, where the line will then transition from overhead to underground for the remainder of the Project route in town, where it will follow Routes 302, and 18 for approximately 3 miles.

Ms. Laleme states that the master plan focuses on maintaining a quiet, rural environment that emphasizes development that is in character with the history and character of the town. Jt. Muni. 89 at 4077. Among guiding vision principles of the town's 2004 master plan, the very first one is to "[m]aintain the rural landscape." Jt. Muni. 89 at 4092. Several of the goals of the master plan, which are intended to further the vision principles, reinforce the importance to Bethlehem of its rural character and unique setting:

- Goal 9: Maintain the rural character of the town, and the natural ecosystems of the region, by promoting land use practices that maintain open space in large, contiguous parcels;
- Goal 13: Recognize new technologies (such as personal wireless service facilities) which may affect the town's view sheds, existing utility infrastructure, and development in specific areas. The town should adopt ordinances or regulations which will minimize adverse impact of these facilities...;
- Goal 14: Preserve the town's historic, cultural, scenic, and architectural heritage.

Jt. Muni. 89 at 4094.

Master plan Goal 13 even anticipates "new technologies" that may impact the town's valuable view sheds in an effort to eliminate or alleviate those impacts as much as possible. The intent of Bethlehem's master plan could not be more clear: it seeks to ensure that projects or developments that were unanticipated at the time of the master plan's 2004 enactment do not undermine the vision principles and goals. The residents of Bethlehem have chosen to prioritize

their view sheds and rural character over unhindered development like the Project that would undermine those goals.

Ms. Laleme also opines that the Project is inconsistent with Bethlehem's zoning ordinance. Jt. Muni. 89 at 1-2. Article II, C requires that no "building or structure" shall be greater than 40 feet in height, unless a special exception is granted by the zoning board; in no circumstances, however, may a building or structure exceed 60 feet in height. Jt. Muni. 89 at 4305. According to the Project's Forward NH informational webpage for Bethlehem, the overhead structures in town will be a minimum of 60 feet, a maximum of 105 feet, and most commonly will be 80 feet in height. The record is devoid of any analysis of whether the Project could obtain a special exception from the zoning board to allow for the minimum height 60 foot towers, let alone a variance to exceed that maximum allowable height of 60 feet for the most common 80 foot high tower structures. *See* RSA 674:33, I(b) for variance standard. The Project is inconsistent with Bethlehem's master plan and zoning ordinance, and would unduly interfere with its orderly development.

## 2. Bristol

Town witness Nicholas Coates testimony described the Project's inconsistency with Bristol's master plan and zoning ordinance. In Bristol, the Project entails 2.5 miles of overhead line, crossing the Pemigewasset River. Jt. Muni. 115 at 1. Mr. Coates opined that the Project conflicts with the town's master plan because it would adversely impact the town's rural character, scenic viewsheds, and its protected wetlands. Jt. Muni. 115 at 1-2. The town's master plan seeks to protect and preserve among other things: the rural quality of the Town of Bristol; building to create enduring value and beauty; and conserving and showcasing the town's natural assets. Jt. Muni. 115 at 2; Jt. Muni. 115 at 5454-56. The Project is not consistent with the

town's vision for the future of Bristol as the additional, taller tower structures would visually endanger the town's rural character, threaten the town's intrinsic natural value and beauty, and would be contrary to conserving and showcasing the town's natural assets.

In addition, the Project is also inconsistent with the town's zoning ordinance. In particular, the Project would violate Bristol's Pemigewasset Overlay Zoning District, which regulates construction within 500 feet of the river's normal high water mark. Jt. Muni. 115, at 5544-45. More specifically, the Pemigewasset Overlay zoning district, Section 3.2, H(2)(a&b), prohibits structures on slopes which exceed 15 percent, and separately also prohibits construction of primary structures within 100 feet of the normal high water mark. Jt. Muni. 115, at 5544-45. Several overhead towers are in violation of these restrictions as they are within the overlay district or located on slopes which exceed 15%: towers DC-1174 & E115-122 are within 100 feet of the normal high water mark and/or located on slopes that exceed 15%. Jt. Muni. 115 at 38, Jt. Muni. 116, at 2-3; App. 201, Sheet 133. In addition, the town's Wetlands Conservation Overlay zoning district, Section 9.5, prohibits construction in a wetland by right. Jt. Muni. 115 at 5593-94. More particularly, Section 9.6, A(1) of the zoning ordinance require a special use permit from the planning board for the erection of the overhead tower structures in the utility corridor as well as for any newly constructed access roads. *See id.*, at 5594. In rendering a decision on whether to grant the special use permit, Section 9.7, A & B requires the planning board to seek input from the town's conservation commission and health officer, hold a public hearing, and to consider the environmental impact of the Project and the character and degree of injury to abutting and downstream properties. Jt. Muni. 115 at 5595. The record is devoid of any evidence whereby the Applicants have demonstrated that it would be able to comply with the Bristol planning board's special use permit criteria.

### 3. Concord

City witnesses Heather Shank, Beth Fenstermacher, Kristine Tardiff, Jan McClure, Gail Matson, Candace Bouchard and Ed Roberge described the Project's inconsistency with Concord's master plan and zoning ordinance, as well as other municipal permitting requirements.

The right-of-way corridor for the proposed Project is approximately 250 wide in Concord. Jt. Muni. 133 at 5. In order to accommodate the new proposed 345kv transmission line, the Project will increase the average height of the existing 115kv line from 43 feet to the most common height of 88 feet, and a maximum structure height of 120 feet. Jt. Muni. 133 at 5. The Project would also entail adding approximately 78<sup>16</sup> new structures in Concord with an estimated height of 100 feet, with a maximum height of structures as tall as 125 feet, although that height may need to be increased to 165 feet in accordance with the Department of Transportation's requirements for crossing the bridge at Interstate 393. Jt. Muni. 133 at 5; Jt. Muni. 193 at 8126-131; Jt. Muni. 315; Tr. 5/12/17 (Day 7PM) at 82-89; Tr. 11/16/17 (Day 60AM) at 92-95; Tr. 11/16/17 (Day 60PM) at 246-47. This represents on average over a doubling in structure height from the most common existing structures within the Project's corridor. As discussed in more detail below, the increased visibility of the Project structures due to their increased height and number will undermine the goals and objectives of the city's master plan, zoning ordinances and current objectives for redevelopment.

The City, through its master plan, seeks to protect and preserve the unique rural landscape that defines Concord. Jt. Muni. 182. There are repeated references throughout the Vision Section in Concord's master plan about the importance of retaining Concord's extensive

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<sup>16</sup> Although the city's Northern Pass Committee reported that there would be 77 structures, a count of the structures actually indicates that there will be 78 new structures for the proposed 345kV line in Concord. Jt. Muni. 128, Ex. B at 5926.

“rural landscape.” Jt. Muni. 182 at 7050-53; Tr. 9/22/17 (Day 38AM) at 49-50. This is specifically identified as an “essential characteristic” of Concord and demonstrates the importance of the rural landscape to the citizens of Concord.<sup>17</sup> Jt. Muni. 182 at 7050-53; Tr. 9/22/17 (Day 38AM) at 49-50.

In order to achieve the vision of the citizens of Concord, the Land Use Section in Concord’s master plan includes, among others, the following land use goals:

- Protect and conserve important open space, environmentally sensitive areas, and natural resources outside the UGB (Urban Growth Boundary).
- Promote orderly transition among land uses and separate or buffer incompatible uses to the greatest extent possible in order to limit or minimize undesirable impacts to adjacent land uses.
- Provide for the reservation of land area of adequate size and in appropriate location for public facilities and utilities that will serve the future land uses.
- Improve and enhance the overall appearance and aesthetics of the community inclusive of architectural features, streetscapes, landscapes and signage.
- Discourage sprawl by focusing future development and concentrating demand for services within the limits of the UGB.

Jt. Muni. 182 at 7055-7056. The Land Use and Vision sections of the master plan further demonstrate the importance of maintaining and improving *community aesthetics*, which not only addresses scenic resources as may be defined by the Site Evaluation Committee’s rules, but the entire community. Jt. Muni. 182 at 7050-7053, 7055-7056; Tr. 9/22/17 (Day 38AM) at 50-52. Moreover, with respect to the goal to “promote orderly transition among land uses and separate or buffer incompatible uses to the greatest extent possible in order to limit or minimize undesirable impacts to adjacent land uses,” it was undisputed by Mr. Varney that, although the

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<sup>17</sup> Under state law, a master plan is required to include a vision statement that “articulate[s] the desires of the citizens affected by the master plan.” RSA 674:2.

master plan does not specifically reference transmission lines, a transmission line project that might impact and/or be otherwise undesirable to an adjacent land use would be inconsistent with that requirement of the master plan. Jt. Muni. 182 at 7056; Tr. 9/22/17 (Day 38AM) at 50-51.

Concord's master plan also has a Housing Section, which includes the following goal and recommendation:

- Promote the maintenance and enhancement of existing and developing residential neighborhoods, and protect existing and developing residential areas from blighting influences and negative impacts that detract from their livability, quality, and aesthetics.
- Prevent the intrusion of inappropriate non-residential uses into residential neighborhoods and protect neighborhoods from negative influences of adjacent non-residential uses, such as noise, light, traffic, and visual blight through regulation as well as the retention or installation of buffers between non-residential and residential uses.

Jt. Muni. 182 at 7088, 7110; Jt. Muni. 133 at 6-7.

In her pre-filed testimony, the City Planner, Heather Shank, discusses the inconsistency of the proposed Project with Concord's master plan. Jt. Muni. 133 at 3-9. Those inconsistencies include the failure to adequately separate and buffer incompatible uses, the location of a high voltage transmission line in close proximity to residential homes, the removal of tree vegetation, and the impacts to the character and feel of the neighborhoods where the lines are proposed to be located, as well as the overall appearance, character and aesthetics of Concord. Jt. Muni. 133 at 3-6. The inconsistencies also include the concern that the "protection of residential neighborhoods from potential blight and the intrusion of inappropriate non-residential land uses, as recommended by the Housing Section of the Master Plan 2030, cannot be accomplished due to the greater height and location of the proposed lines." Jt. Muni. 133 at 6-7. In addition to Ms. Shank's prefiled testimony, a significant amount of discussion occurred with the witnesses for the City of Concord about the manner in which the proposed Project is inconsistent with these

sections of Concord's master plan. *See, generally*, Tr. 11/16/17 (Day 60PM). A number of the concerns raised included impacts to the Gateway Performance District. Tr. 11/16/17 (Day 60PM).

Concord's master plan also includes an Open Space Section. Jt. Muni. 182 at 7172. One of the goals of the Open Space Section is to maintain and enhance scenic views and natural vistas from the City's roads and public properties where possible. Jt. Muni. 182 at 7173. This goal was discussed at length in the pre-filed testimony submitted by the Concord Conservation Commission, Assistant City Planner Beth Fenstermacher, as well as during the adjudicative hearing by several of the witnesses appearing on behalf of Concord. Jt. Muni. 135 at 9; Jt. Muni. 136 at 2-3; Jt. Muni. 138 at 10-13; Tr. 11/16/17 (Day 60PM) at 17-22, 89-90, 188-94, 234-39. Among other things, the proposed Project will unduly interfere with this goal due to the visibility of structures on the ridgeline where the Northern Pass corridor is proposed, as that ridgeline "is an iconic landmark in Concord and is a treasured view from the downtown core and many of the residential structures rising west of the downtown." Jt. Muni. 136 at 3. As explained by Ms. McClure and the other witnesses from the City of Concord, the proposed structures along the ridgeline "would be a sharp deviation from the kind of rural character and scenic views that we've been trying to protect for years." Tr. 11/16/17 (Day 60PM) at 17-22.

It is also significant that the vision, goals and recommendations in Concord's master plan are not merely "aspirational." Concord has actively worked to ensure that the master plan is followed. For example, with respect to the Open Space Section's goal to maintain and enhance scenic views, Concord has taken measures to conserve land with that criterion in mind. Jt. Muni. 138 at 10; Tr. 11/16/17 (Day 60PM) at 17-22. A total of 2,296 acres in land in Concord has been conserved based on the goals in the Open Space Section of the master plan, and the Concord

Conservation Commission has spent approximately \$3,700,000 of its funds over the last 10 years to purchase property.<sup>18</sup> Jt. Muni. 138 at 10. Concord Conservation Commission has been involved in multi-year efforts to acquire property for the purpose of preserving views and scenic vistas, including areas such as Dimond Hill, Carter Hill and Oak Hill. Tr. 11/16/17 (Day 60PM) at 17-22. In fact, with respect to Oak Hill, since Concord's master plan was published in 2008, the Conservation Commission has conserved approximately 90 acres to preserve the views. Tr. 11/16/17 (Day 60PM) at 235. As further explained by Ms. Fenstermacher, when the Concord Conservation Commission approaches the City Council to purchase land for purposes such as preserving scenic vistas, the master plan is referenced. Tr. 11/16/17 (Day 60PM) at 235. The master plan is not just a document that was formulated and then set aside, but rather, it has been used to create a set of action items that Concord is actively pursuing. Tr. 11/16/17 (Day 60PM) at 235.<sup>19</sup>

Concord has also adopted a number of zoning ordinances, site plan regulations, subdivision regulations and architectural design review guidelines to ensure the implementation of adequate buffering, rural landscape and overall community aesthetics. Although this is not an exhaustive list, the ordinances and other regulations include: (1) Code of Ordinance Article 28-4-2, which sets forth buffer requirements in residential district boundaries; (2) Code of Ordinance Article Section 28-2-4 which requires a conditional use permit for the construction of transmission lines; (3) Section 26 of the Site Plan Regulations which requires buffer and screening requirements for site plan applications; (3) Section 27 of the Site Plan Regulations that

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<sup>18</sup> This amount does not include matching and other grants received by other organizations to assist in the purchase of property. Jt. Muni. 138 at 10.

<sup>19</sup> Concord also actively works to achieve the goals and recommendations in the Vision and Land Use Sections of Concord's master plans to maintain the rural landscape. Although Concord is over 65 square miles, the City has intentionally concentrated development in the City core while protecting the scenic qualities and rural character of the less developed Open Space Residential District ("RO") zone of the City, which is the location where much of the proposed Project is located. Jt. Muni. 136 at 2-3; Tr. 11/16/17 (Day 60PM) at 17-22.



set forth landscape and preservation requirements; (5) the Architectural Design Review Guidelines that are adopted to review a site's aesthetics, and include guidelines such as façade and landscaping requirements. Jt. Muni. 272; Jt. Muni. 316; Jt. Muni. 319; Tr. 9/22/17 (Day 38AM) at 80.<sup>20</sup>

Some of these ordinances are utilized to eliminate negative impacts of transmission lines. For example, as explained during the adjudicatory hearing, Concord recently used its buffer ordinance and conditional use permits to screen transmission lines from Cobblestone Pointe Senior Living Center. For that property, Concord required a forty-foot vegetative buffer to be maintained against the utility lines. Tr. 11/16/17 (Day 60AM) at 140, 223. Although that buffer is currently sufficient for the existing transmission lines, it will no longer be adequate in the event that the proposed Project is allowed to install higher transmission lines in the area. Similarly, Concord regulated the proposed construction of a 317 line by issuing a conditional use permit that required that only 65 feet of the 100 foot utility corridor be cleared. Tr. 11/16/17 (Day 60PM) at 249-50; Jt. Muni. 316. In that case, the vegetative buffer was required even though the structures being proposed were approximately 45-50 feet, much shorter than the proposed Northern Pass structures.

Finally, this Project is inconsistent with a number of other zoning ordinances that have been adopted in Concord. Those ordinances include Concord's wetland buffers and setback ordinance, which is discussed further herein with respect to natural resources. Jt. Muni. 319 at 63-65 (Article 28-4-3). The Project is also inconsistent with Concord's buffer-to-bluff ordinance, which requires a conditional use permit to construct structures within fifty feet of a

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<sup>20</sup> As also discussed during the hearing and in pre-filed testimony, there are height restrictions on buildings and other structures. Tr. 11/16/17 (Day 60PM) at 24; Jt. Muni. 135 at 15.

bluff.<sup>21</sup> Jt. Muni. 319 at 65-67 (Article 28-4-4); Jt. Muni. 135 at 14. This issue was addressed by the City of Concord with the Applicants' construction and environmental panels relative to the structures near the Soucook River in Concord. *See, e.g.*, Tr. 5/2/17 (Day 7PM) at 121-24; Tr. 6/20/17 (Day 18AM) at 104-11. As discussed by Adam Zysk, the construction expert retained by Counsel for the Public, there are no plans in this particular area showing the proposed best management practices to address the steep slope. Tr. 10/23/17(Day 50AM) at 124-26. Finally, in the event that this project is approved, which the Referenced Municipalities dispute should occur, Concord's City Engineer identified a number of ordinances and regulations that are required to be followed relating to construction. Jt. Muni. 131 and 132.

#### 4. Deerfield

Town witness Kate Harnett's November 2016 testimony described the Project's inconsistency with Deerfield's master plan and zoning ordinance. Ms. Hartnett explained that Deerfield identifies itself as a rural town using either a quantitative or qualitative definition of "rural character." Jt. Muni. 153 at 6622. *The town's master plan vision emphasizes the town's desire to preserve and protect that rural character: "[Deerfield] desires to maintain its character as a small, rural, but vibrant place with open space, natural beauty, and a strong sense of community. People live and move to Deerfield because of its rural and small town character, its quietness and privacy, its scenic qualities...These community qualities and values make our town a desirable and special place."* Jt. Muni. 153 at 6622 and 6631. Deerfield's master plan then goes on to specify how to maintain those qualities by espousing certain relevant guiding principles: "A well managed town that controls its growth and development, keeping it in line with the existing character, appearance and beauty of the town...while protecting and enhancing

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<sup>21</sup> This issue was raised by the City of Concord with the Applicants' construction and environmental panels. *See, e.g.*, Tr. 5/2/17 (Day 7PM) at 121-24; Tr. 6/20/17 (Day 18AM) at 104-11.

its existing community, cultural, educational and natural resource;” and “[a]n attractive town that values its history, environment, scenic beauty, open space, clean water, clean air, and wildlife and seeks to protect these and other community resources through managed growth and careful planning.” Jt. Muni. 153 at 6632. Deerfield’s master plan goes further to specify how the town should accomplish the vision and guiding principles:

- Goal LU-1: Promote development that will preserve the natural and cultural features that contribute to Deerfield’s rural character;
- Goal ED-1: Encourage limited economic development that will be consistent with the Town’s rural character, as well as support the needs of the community, to create a sustainable local economic base;
- Goal NR-1: Recognize that the town’s natural resources and open space form the basis of the overall character and well-being of Deerfield;
- Goal CHR-1: Promote the preservation and protection of its historic and cultural resources.

Jt. Muni. 153 at 6633, 6636, 6639, and 6641. Ms. Harnett points out the “evident contradiction” between the intensity of use from the scale and size of the Project in town, i.e. additional and larger tower structures and an expanded substation, and the vision, guiding principles, and goals that Deerfield is committed to in maintaining and preserving its rural character. Jt. Muni. 153, at 6622.

Further, Deerfield’s Open Space Plan, part of its master plan, carries on this consistent theme, stating as its vision: “[a] Deerfield with sustaining rural character...,” and describing a 50 + year strategy to protect the ecological integrity and maintain the rural character of the town. Jt. Muni. 153 at 6702. To that end, Deerfield has seen significant success in retaining more than 12,500 acres, or 38% of the town, within the town’s Green Infrastructure network. Jt. Muni. 153 at 6691, and Map 4, Appx A, CFP 651.

Ms. Hartnett's testimony also raised concerns over the Project undermining the goals and objectives of the master plan, including the open space plan. Jt. Muni. 153 at 6702. Her concerns are more than merely academic. Over the years, the town has worked with more than 25 individual property owners to conserve properties within the Green Infrastructure network. The Deerfield Conservation Commission, which prepared and implements the open space plan, believes the Project will undermine the progress that has been made to date and the goals and objectives identified in the master plan and open space plan because the presence of "industrial scale towers" will decrease interest from landowners from conserving their land in contravention of the Open Space plan and the Green Infrastructure network. Jt. Muni. 153 at 6702. The Deerfield Conservation Commission's fear is that the presence of additional and higher tower structures, and the expanded substation, will "...speed the town's transition to a suburban, rather than rural town, threatening completion of the ecologically valuable, currently functional, and essential Green Infrastructure system." The Deerfield Conservation Commission's fears have already become reality as numerous residents submitted public comments to the Subcommittee bearing out these fears as well founded and already influencing future conservation and residency decisions. Ms. Hartnett included public comments from several town residents as an exhibit to her April 2017 testimony. These residents stated that the effect of the Project would transition the town away from its distinct and valuable rural character, decrease or eliminate their respective desire to remain in Deerfield, reduce their respective desire to further conserve land in the future, and made them second guess having conserved land in the first place. *See* Exhibit 2 to Hartnett April 2017 Testimony, Jt. Muni. 156 at 6806-6810. These letters demonstrate how people in Deerfield and elsewhere will react once the Project is built: they will move someplace else that has not had its rural character compromised by a large scale industrial complex.

The Project could also be inconsistent with Deerfield's zoning ordinance. Deerfield has only one Agricultural-Residential Zoning District with several additional overly zoning districts. "Public Utility Facilities," which would include the Applicants, are only allowed by special exception granted by the zoning board. Section 206.1 and 206.2 of the Deerfield zoning ordinance lists the criteria that must be complied with to obtain a special exception from the zoning board and the possible conditions the zoning board could impose to grant the special exception, and includes consideration of noise, vibration, obstruction to view, character and keeping of surrounding area, and protecting the best interests of the surrounding area. Jt. Muni. 156 at 6623. The record is devoid of the Applicants establishing that it could satisfy any of the applicable criteria.

5. Easton

Town witness Jim Collier testimony described the Project's inconsistency with Easton's master plan and zoning ordinance. The Project is underground in Easton for about 9.4 miles in Route 116 and 112 and is not consistent with the master plan and zoning ordinances emphasis on protecting surface water quality and wetlands. One of Easton's master plan goals is to "[p]rotect surface water quality and the town's aquifers." Jt. Muni. 101 at 4966. Easton is located in the Connecticut River Water Shed; the northern 2/3 of the town drain via the Ham Branch into the Gale River which later joins the Ammonoosuc River; the southern 1/3 of the town drains directly into the Ammonoosuc River. Jt. Muni. 101 at 1. Several water bodies in town, the Ham Branch, Slide Brook, and Reel Brook, are of high enough quality to provide treated drinking water for residents. Jt. Muni. 101 at 2. Mr. Collier believes the burial of the underground line in town will endanger the town's surface waters undermining the goals of the master plan. Jt. Muni. 101 at 2.

The Project will also be inconsistent with the town's zoning ordinance. Easton's zoning ordinance includes a Wetlands Conservation Overlay zoning district, Section 604(C), whose purpose is in part "...protection of wetland ecosystems and water quality in accordance with the goals and objectives of the master plan." Jt. Muni. 101 at 5063. The Project is proposed to be buried parallel and in close proximity to the Ham Branch and its tributaries. Jt. Muni. 101 at 2. The Project related activities necessary to bury the line, including but not limited to boring, blasting, and digging, are likely to cause harm to wetland ecosystems and water quality from pollution of wetlands, surface water, and/or ground water. Jt. Muni. 101 at 2.

6. New Hampton

Town witness Ken Kettenring's April 15, 2017 testimony describes the Project's inconsistency with New Hampton's master plan, zoning ordinance, and site plan regulations. The town's master plan states that it "...is a tool to be used by the Planning Board and the Board of Selectmen to guide growth at a rate that is consistent with the town's ability to absorb it, while preserving the existing rural and small town character." (emphasis is in the master plan). Jt. Muni. 121 at 1; Jt. Muni. 120 at 10. Mr. Kettenring further explains how three of the master plan's primary goals would be undermined by the Project's presence in town. Goal 3.1 of the master plan states the goal to "Preserve the rural working landscape to protect prime agricultural lands." Jt. Muni. 119 at 5698. The town's zoning ordinance was recently amended to allow agricultural tourism by special exception to allow existing and future farms an additional revenue stream to maintain their economic sustainability and continued presence and operation in town, as a way to further this particular master plan goal. Jt. Muni. 120 at 11. The degradation of pastoral views caused by the Project, i.e. the additional tower structures and increased height of

those structures, will diminish the value of the agricultural tourism option and thereby undermine the master plan goal to preserve the rural working landscape. Jt. Muni. 120 at 11.

Goal 3.2 of the master plan states the goal to “Ensure that the town retains the unique and historic rural character.” Jt. Muni. 119 at 5699. The Project will add 62 new overhead structures in town, which Mr. Kettenring characterizes as the “tallest and ugliest in the town,” excluding two isolated cell towers. Jt. Muni. 120 at 12. In addition, the cumulative effect of these additional structures creates a massive industrial complex that is distinctly at odds with the historic nature of the Project’s surroundings in town, and that the master plan seeks to preserve and protect. Jt. Muni. 120 at 12.

Goal 3.3 of the master plan states the goal to “Preserve important wildlife habitat, scenic view areas, ridgelines, wetlands, and water resources.” Jt. Muni. 119 at 5700. New Hampton took concrete and explicit steps to transform this aspirational statement into a regulatory limitation by enacting Section X, P of the town’s Site Plan Regulations which states: “[w]here appropriate, installation of any new utilities and/or transmission lines shall be buried underground.” Jt. Muni. 120 at 12. The record is devoid of the Applicants demonstrating that burial is not appropriate in the Town of New Hampton, and therefore Site Plan Section X, P has not been satisfied, and by extension nor has master plan Goal 3.3. Jt. Muni. 120 at 14-15.

In addition, the entire length of the Project in New Hampton lies in the General Residential, Agricultural and Rural Zoning District, and would not satisfy any of the uses allowed in that district; if subject to local jurisdiction, it would therefore require a variance from the zoning board. Jt. Muni 120, at 13, 7285-7286. The Applicants have not provided any opinion on the Project’s ability to satisfy RSA 674:33, I(b), the statutory standard to obtain a variance. New structures within this zoning district are limited to 35 feet; each of the Project’s

62 structures in town would violate this height limitation and would therefore require a variance. *See id.* As mentioned previously, the Applicants have not provided any opinion on the Project's ability to obtain a variance.

New Hampton's zoning ordinance, at Article IV, H, also contains a Pemigewasset Overlay District which extends 500 feet horizontal distance from the normal high water mark of the Pemigewasset River. Jt. Muni. 120 at 14. This district is overlaid on top of any other existing zoning district in town, and adds additional limitations or requirements to those imposed by the underlying zoning district. Significantly, Article IV, H, 3(v) of the Pemi Overlay District imposes a structure setback requirement that prohibits structures within 200 feet of the normal high water mark of the Pemigewasset River. Jt. Muni. 121, Ex. 8 at 7293. Eight of the Project structures are within the Pemi Overlay District and five violate the overlay district's setback requirements. Jt. Muni. 120 at 14. More specifically, Mr. Kettenring provides a chart detailing the eight tower structures within the overlay district including the five offending ones, corresponding Project Map Plan sheets for each, and approximate distance to the river for each structure. Jt. Muni. 120 at 16. The purpose of the Pemi Overlay District is "to provide protection for the environmentally sensitive corridor along the Pemigewasset River." Jt. Muni. 121, Ex. 8 at 7292. The Project is not consistent with New Hampton's master plan, zoning ordinance, and site plan regulations, as outlined above, and would therefore unduly interfere with the town's orderly development.

## 7. Pembroke

Town witnesses Ammy Heiser and Stephanie Verdile's testimonies described the Project's inconsistency with Pembroke's master plan and zoning ordinance. Ammy Heiser, for the town's Conservation Commission, noted that the Project will entail an estimated 54 new



overhead tower structures in town at an average height of 130 feet with some at 145 feet. Jt. Muni. 149 at 6528. This represents on average a doubling in tower height from the most common existing structures within the Project right of way. Jt. Muni. 146 at 6389. The increased visibility of the Project towers, due to their increased height and number, will undermine the goals and objectives of the town's master plan.

Town planner Stephanie Verdile notes that the majority of the Project's towers will run through the most rural portion of the town, which has local significance due to the existing stonewalls visible from public roads and the Range Roads located in the area, which are both of local importance for historic, recreation, and aesthetic reasons. Jt. Muni. 146 at 6389-90. The Range Roads are historic roads in Pembroke that were once used to provide access to farm lots. According to Ms. Verdile, Pembroke has one of the earliest, most regular, and best preserved systems of range in New Hampshire. Jt. Muni. 146 at 6389-90. Pembroke also contains exemplary examples of stone walls which are among the best in the Merrimack Valley. Jt. Muni. 146 at 6389-90. Ms. Verdile describes them as highly visible, in good condition, and used to layout Pembroke's township, which adds to their historic significance. Jt. Muni. 146 at 6389-90.

The town, through its master plan, seeks to protect and preserve the unique rural landscape described above that defines Pembroke. The master plan goals state: "[t]o develop measures for retaining the visual quality and character of the landscape of Pembroke." Jt. Muni. 146 at 6410. That goal is further defined by the master plan:

- Preserve existing range roads as Class VI roads or as Class B trials, or upgrade only if necessary while preserving the historical integrity of the roadway;
- Protect and preserve stone walls along range roads and encourage landowners to consider retaining or rebuilding stone wall during alteration or development.

Jt. Muni. 146 at 6410.

Ms. Verdile states that the Project will have “an unreasonable, permanent, and adverse visual effect on the naturally occurring aesthetic and scenic qualities in [Pembroke], especially in the Rural/Agricultural-Residential (R3) Zone.” Jt. Muni. 147 at 1. She goes on to state that the “permanent visual and environmental impacts are in contrast with the intentions of the residents, taxpayers...and existing land use regulations.” Jt. Muni. 147 at 6. As the basis of her opinion, Ms. Verdile points to among other things the town roads the Project will intersect: Fourth Range Road, partial Class VI; Brush Road, Class VI; Cross Country Road; Sixth Range Road, partial Class VI; Flagg Road, Class VI; Fuller Road, Class VI; and North Pembroke Road. Jt. Muni. 147 at 7. The classification of these roads as well as certain of them being Range Roads, speaks to the intent and visual character of the R3 zone. Jt. Muni. 147 at 6. Ms. Verdile also points to various characteristics of the R3 zone that are elements of producing “the most rural properties in town for their important visual and aesthetic properties for the general public”: the size of the lots, the uses that are allowed by right or by special exception in the R3 zone vs. those that are not allowed; the location of conservation lands, and the intent and purpose of the R3 zone itself. Jt. Muni. 147 at 7. The Project would unduly interfere with the orderly development of Pembroke by introducing a large scale industrial complex that is at odds with the characteristics in the R3 zone that the master plan seeks to preserve and protect. To put a finer point on Pembroke master plan’s emphasis on protecting and preserving areas such as the R3 zone, in the 2003 Community Survey results referred to in the town’s master plan, 73% of respondents indicated that maintaining the rural character is an important contributing factor for living in Pembroke. Jt. Muni. 149 at 6528, 6536.

Ms. Verdile also points out that the Project is likely inconsistent with the town’s zoning ordinance. Public and private utilities are permitted in the R3 zone but only by special exception

from the zoning board as required by Section 143-113. Jt. Muni. 147 at 11. Ms. Verdile does not believe the Project would obtain a special exception as it does not meet the spirit and intent of the town zoning ordinance in general, nor the R3 zone where the majority of the line is located. Jt. Muni. 147 at 11; RSA 674:33, IV.

8. Sugar Hill

Town witness Margaret Connors' testimony dated November 15, 2016 described the Project's inconsistency with Sugar Hill's master plan and zoning ordinance. In Sugar Hill, the Project will run underground for roughly 1.7 miles on Route 18 in very close proximity to Coffin Pond and the Gale River, which is in stark contrast to the master plan's emphasis on the protection of water resources within the town. Jt. Muni. 99 at 2. In the 2012 community survey, which was instrumental in guiding the town's 2014 master plan, 90% of residents thought there should be a restriction to protect water sources, and were particularly concerned about hazardous materials over an aquifer. Jt. Muni. 99 at 2. The master plan recognizes that a stratified drift aquifer in the area of Coffin Pond and the Gale River which has potential for a future public water supply or for a commercial development dependent on large volumes of water. Jt. Muni. 99 at 2. Over 50% of the respondents in that 2012 community survey agreed that no construction should take place in the Gale River floodplain, which includes the portion of Route 18 where the Project will be buried. Jt. Muni. 99 at 2. The Project is inconsistent with the master plan's desire to protect these resources as the Project would entail heavy equipment, blasting and boring on top of the aquifer and would also deplete the vegetated buffer which acts to protect the Gale River. Jt. Muni. 99 at 3.

9. Whitefield

Town witnesses Wendy Hersom and Frank Lombardi's testimony dated November 15, 2016 describes the Project's inconsistency with Whitefield's master plan and zoning ordinance. The Project will be overhead in Whitefield, will run for approximately 10.4 miles in state highways, will be in a 150 foot wide ROW, and will entail towers of up to 120 feet in height. Jt. Muni. 95 at 3. Whitefield utilizes a Comprehensive Development Guide that serves as the town's zoning ordinance. All development proposals must be in compliance with all of the Absolute Criteria set forth in that guide; if a proposal does not satisfy even one of the criteria on that list, the proposal is not approved by the planning board which is the permitting authority in town. Jt. Muni. 95 at 3. Ms. Hersom and Mr. Lombardi have grave concerns about the Project's ability to comply with these criteria and believe the Project would not satisfy numerous of those criteria. Among the criteria that they believe are unlikely to be satisfied are the following:

- A, Master Plan: the Project does not fit within the town's master plan and vision for the future of the town, see below for further explanation;
- C, Scenic Roads: Views from scenic roads would likely be negatively impacted and the Project has not analyzed which scenic roads would be most affected by the Project and how those impacts would be adequately mitigated;
- H, Topography: With towers up to 120 feet in height, no vegetation would be able to mitigate the height of the Project;
- J, Historic Preservation: the Project is proposed to be built just north of the town's historic village and town common and the views of and from these areas would be severely impacted, including but not limited to Mountain View Grand Resort
- Q, Natural Compatibility: the design, arrangement, and sheer size of the Project would not be compatible with the existing natural topography, natural water bodies, existing desirable trees, exposure to sunlight, wind, or scenic views;
- R, Setbacks: many towers structures are located in violation of the town's 25 foot setback from adjacent properties;

- V, Building Height: the Project “is in extreme violation of this standard,” as building heights are limited to 35 feet and the towers would greatly exceed that limitation.

Jt. Muni. 95 at 3-7 and Appx. C at 4544-49.

The Project is also inconsistent with the several of the goals of the town’s master plan.

Among the goals that the Project are unlikely to satisfy are the following:

- E, Scenic Resources: the locations of the tower structures in town will be a great detriment to valued scenic roadways and views. Whitefield has a variety of scenic resources both natural and historic as well as important views along Routes 3, 116, and 142. The Project crosses directly overhead above all three of these roadways and each is in close proximity to the historic town village. The Project towers would also scar the town’s most scenic vistas. These scenic views and gateways are cherished by residents and visitors alike.
- F, Cultural and Historic Resources: the village atmosphere of Whitefield is an integral part of the town’s community character and the town works to maintain the Town Common to reflect that feeling. The Project’s overhead towers will circle the village and cut through views in every direction, and residents and visitors would not be able to enter or exit the village without having their view of or from the village corroded by those towers, greatly damaging the community character and beauty of Whitefield.

Jt. Muni. 95 at 8-9 and Appx. D at 4607-60.

Ms. Hersom and Mr. Lombardi note that many residents and visitors live and vacation by Whitefield’s lakes and rivers, use the nearby lands and waters for recreation, and conduct business in the town village. Jt. Muni. 95 at 10. The Project would invariably and severely change the character of the town for people traveling, visiting, and residing in Whitefield due to the inescapable presence of the towers cutting through every significant view point entering or exiting the town village.

c. The Applicants Improperly Dismiss The Significance Of the Master Plans and Zoning Ordinances

During his testimony at the adjudicative hearings, Mr. Varney explained his belief that the Project was not inconsistent with host community master plans because those planning documents are general in nature and do not specifically mention large scale transmission lines as

a long term planning consideration or detriment to a town's other goals and objectives. Tr. 9/21/17 (Day 37AM) at 51-52. Testimony from the Referenced Municipalities belies this assertion as witnesses from these communities stated that the broad language of the master plan cannot and should not be interpreted as the goals and objectives stated therein not being applicable to Northern Pass. Tr. 11/8/17 (Day 58 PM), at 103-106; Tr. 12/5/17 (Day 64 PM), at 84-86; Tr. 12/12/17 (Day 66 PM), at 130-131. This conclusory opinion contradicts the time, thoughtfulness, and input from numerous parties that goes into the enactment of a community's master plan. It also misses the point that the language in these documents is intended to be general in nature so that it can be applied to wide manner of circumstances. It would be short-sighted for a community to write their master plan so specifically to try and capture every conceivable development because they would be inviting a situation where a certain development was not foreseeable and they would be without any guidance on how to proceed. That is not how master plans are intended to operate.

Moreover, many host communities did not specifically consider how a project such as Northern Pass might be inconsistent with the community's long range planning goals because proposals under the jurisdiction of the Site Evaluation Committee are not subject to a host community's land use or planning ordinances.

**3. Orderly Development - Views of Municipal and Regional Planning Commissions and Municipal Governing Bodies**

**a. The Application Fails To Provide Information About Views of Governing Bodies**

The Site Evaluation Rules require each application to “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.*” N.H. Admin.

Rules, Site 301.09 (emphasis added). Despite the fact that this requirement is unambiguous and straightforward, the applicants failed to provide information regarding the views of all municipal governing bodies that were expressed in writing. A review of the materials submitted to comply with this rule reveals that the applicants only provided five municipal comments. App. 2 at Attach. 11. Two of those comments were letters sent from the Town of Whitefield, and the other comments were sent from the Towns of Bristol, New Hampton and Deerfield. *Id.*

The Applicants' cover letter explained that they were including only those comments that were submitted after the announcement of the new route and that were not submitted to the Site Evaluation Committee. App. 2, Sec. 2 at 18. There is no language in the Site Evaluation Committee's rules that allow the Applicants to narrowly interpret the scope and timeframe in which the municipal comments were provided, and moreover, the selection of five comments referenced by the Applicants is arbitrary and haphazard because it does not even follow their alleged interpretation of the rules.<sup>22</sup> The Applicants have the burden to provide information regarding *all* of the written comments from municipalities.

There is no dispute that more than four municipalities and planning commissions provided their opinions about the project in writing prior to the submission of the municipal comments on February 26, 2016.<sup>23</sup> Although the views of the governing bodies and planning commissions are discussed in more detail herein, it is the Applicants' burden to provide a comprehensive record of this information to the Subcommittee. The Applicants cannot meet

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<sup>22</sup> For example, one of the comments from the Town of Whitefield was sent to the Department of Energy in 2013, approximately two years before the announcement of the new route.

<sup>23</sup> The rule is unclear regarding whether written comments only need to be provided that were submitted before the original application, however the applicants included comments received both before and after the application was submitted, and further include comments that were submitted to both the Department of Energy and to the Applicants.

their burden of proof without all of the essential information, because the failure to provide a complete record results in a piecemeal overview of the opinions of governing bodies.

b. Views of Regional Planning Commissions

The Applicants have implied that the relevant regional planning commissions are in favor of the project and have asserted that Mr. Varney considered the views of regional planning commissions (RPCs) in his report. App. 1, Appx 41. at 12-16. However, the only evidence submitted in the record shows clearly that, not only have none of the RPCs taken a position one way or the other on the project, but they in fact have raised concerns about the project that were *not* addressed by the current version of the project plans. The record also shows that Mr. Varney's real purpose in meeting with them was not to elicit concerns and have a meaningful discussion about how the Applicants might work with those concerns, but rather to gather the relevant regional plans in a "check the box" manner so he could say that he had reviewed them. Tr. 9/18/17 (Day 35PM) at 33-34.

The proposed project route runs through the territory covered by four Regional Planning Commissions: North Country Council, Lakes Region Planning Commission, Central NH Regional Planning Commission, and the Southern NH Regional Planning Commission. RSA 36:45-46. None of the four RPCs intervened in the Site Evaluation Committee proceeding or submitted statements in support of the project. Mr. Varney and a staff member from Normandeau Associates, on behalf of the Applicants, met twice with staff from North Country Council (March and September 2015) and once with staff from the remaining three RPCs (August 2015). App. 122.

There is no evidence that Mr. Varney discussed the specific details of the project with the planners. Similar to the meetings with several municipalities, the only records of those meetings



reflect that the purposes of the meeting were to explain the application process and to confirm that Mr. Varney had obtained the most recent versions of relevant RPC planning documents. CFP 471 at 1-4. The Lakes Region Planning Commission stated during the meeting that they had not taken a position because their component municipalities were of differing opinions about the project. CFP 471 at 2. North Country Council indicated in September of 2015 that they were not likely to take a position on the project for the same reason. CFP 471 at 4. There is nothing in the record regarding the position, if any, taken by the remaining two RPCs. It is clear, however, that none of them indicated that they supported the project.

Furthermore, those meeting notes (prepared by Normandeau staff) prove that the RPCs raised concerns about the project that the Applicants either ignored or chose not to address in their plans. The Lakes Region Planning Commission told Mr. Varney that “following I-93 seems like the most direct route” and “expressed concern about large river crossings, like the Pemi River.” CFP 471 at 2. Neither of these concerns appear in Mr. Varney’s report and they have not been addressed anywhere in the application. App. 1, Appx. 41.

A variety of concerns were also discussed during the March 2015 meeting with the North Country Council. CFP 471 at 3. These included: the visual impact of the project on scenic resources and the effect that will have on property values and tourism; the cumulative impact of large projects such as transmission lines and wind farms on tourism and scenic resources; opinion of the Connecticut River Headwaters subcommittee that the project should be buried under the Connecticut River; that the areas of “most concern” were Pittsburg and Franconia Ridge (Easton, Sugar Hill) and the White Mountain National Forest; Appalachian Trail crossing; and visual impacts to the Balsams and Mountain View Grand. CFP 471. Interestingly, Mr. Varney’s report (submitted to the SEC after that meeting) did not mention these concerns or

explain how the project addressed them. Instead, the report conveniently notes only the North Country Council's earlier comments to DOE in 2011 regarding the project and says that the project addresses *those* concerns by using existing corridors and burying 60 miles of the line. App. 1, Appx. 41 at 13-14. There is no indication that Mr. Varney ever asked North Country Council whether the proposed project did, in fact, address the 2011 concerns to North Country Council's satisfaction.

More interestingly, Mr. Varney talked with the North Country Council a second time before his report was submitted and was reminded that total burial was the preferred alternative in that area and that, although the Applicants were now proposing to bury some of the line, NCC's Coos County communities were still overhead. CFP 471 at 4. However, neither his report nor the evolving project design has ever addressed these concerns or sought to make the Committee aware of them.

It is also of note that the North Country Council also submitted comments to the Subcommittee regarding the project. North Country Council's Tara Bamford submitted a comment to the Committee on June 23, 2016, stating that the viewshed analysis submitted by the Applicants was "misleading" and suggesting that the Applicants "should be required to provide the SEC with a more meaningful viewshed analysis...to enable the Committee to fully understand the scope of the impact." Public Comment, Tara Bamford, June 23, 2016. Prior to that, however, North Country Council submitted a written comment and spoke to the Committee during the public hearing on March 14, 2016. *See* Tr. 3/14/16 at 156-159; CS 103. North Country Council clearly told the Committee that their regional plan contains the following strategy statement: "Protect the region's iconic and popular viewsheds from undue adverse impacts associated with incompatible land uses such as large transmission lines like Northern

Pass through such means as legislative restriction and participation in EIS and permit reviews.” CS103 at 2. They also noted that “Alternatives 4 and 6, which provide for burial in roadway corridors throughout our region, would be consistent with the region plan’s emphasis on the scenic natural environment as a foundation for orderly development in the region.” *Id.* The Applicants, however, have made no attempt to accommodate or address this view and the plans still propose overhead construction through much of the North Country Council’s communities, in direct conflict with both the regional plan and the view of this Regional Planning Commission.

Of more concern yet is the casual way in which the Applicants approached the entire exercise of determining whether and how the project might be in conflict with regional planning documents and policies. Mr. Varney testified, in fact, that “the major objective” in meeting with the RPC planners was to make sure he had obtained the most recent version of regional plans and land use mapping. Tr. 9/18/17 (Day 35 PM) at 33-34. The purpose of the meetings clearly was *not* to gather information before making a decision about whether the project would unduly interfere with the orderly development of the region, because he told the planners at those meetings that he was likely to conclude that it would not. Tr. 9/18/17 (Day 35 PM) at 34-35. And as Mr. Varney himself admitted, none of the planners had any actual application to review at the time of those meetings because it had not yet been submitted. Tr. 9/18/17 (Day 35 PM) 35. There is no evidence that the concerns raised in these meetings were considered or incorporated into the application or that the plans were altered in any meaningful way to address them. Practically speaking, of course, there was little chance that they would be, because 3 of the 4 meetings occurred 1-2 months before the application was filed. CFP 471 at 1-4. Had the Applicants truly been interested in a meaningful discussion with the RPCs, they could have met with the planners well in advance of the submission of the application to incorporate their views

into the plans, and met with them again after the application was filed. At that point, the planners would have had something they could review and they might have been able to work with the Applicants to see if anything could be done as part of the “iterative design process” to address their concerns. The fact that they did not speaks volumes.

As the evidence demonstrates, the Applicant expended precious little effort to determine whether the RPCs understood with any level of detail what the impacts of the project would be, whether and what concerns they had about the consistency of the project with their planning documents and policies, and whether the project as proposed adequately addresses the concerns that they did express. For all its fanfare, Mr. Varney’s report is nothing more than an exercise in obtaining plans, summarizing them, and noting the few places in which the project happens to coincide with those plans. Nothing in the report meaningfully discusses areas of conflict or balancing that might have been done among the various costs and benefits. To the extent the Subcommittee can conclude anything from this, it must be that the Applicant has failed to carry its burden of demonstrating that the project is consistent with the views or plans of the RPCs.

c. Views of the Municipal Governing Bodies

Similar to the flaws identified with Mr. Varney’s meetings with RPCs, Mr. Varney’s description and analysis of his meetings with municipal professional planners is insufficient. In addition to failing to solicit informed opinions of municipal professional planners during the referenced meetings, Mr. Varney’s opinions resulting from those meetings are unreliable because he had already arrived at his conclusions about the Project’s impact on orderly development prior to meeting with the professional planners. When Mr. Varney met with the professional planners, he had already arrived at the “preliminary” conclusion that so long as the Project was in an existing transmission corridor, it would not unduly interfere with the orderly development of the

region. Tr. 9/18/17 (Day 35PM) at 34-35. Further, when he did solicit input from professional planners, he did not ask their opinion of whether the Project would unduly interfere with the orderly development of the region. Tr. 9/18/17 (Day 35PM) at 34-35. In other words, he did not meet with them to consider how each viewed the potential impact of the Project on the region's orderly development, but rather to obtain documentation on relevant master plans and zoning ordinances.

Mr. Varney also failed to solicit input from any host community that did not employ a professional planner. Of the 31 host communities, only seven employ a professional planner.<sup>24</sup> Of those seven communities with a professional planner, one community is the lone host community/intervenor publicly supporting the Project (Franklin), two others have not intervened before the SEC and have executed MOUs with the Applicants (Lancaster and Thornton), and three of the remaining four communities opposed the Project as currently proposed are located in close proximity to one another (Concord, Pembroke, Deerfield). What input Mr. Varney did receive from the professional planners was thus focused on central New Hampshire host communities and not representative of the numerous smaller, more rural host communities to the north.

Mr. Varney's opinion also ignores the numerous warrant articles passed by the host communities that were consistently in opposition to the Project as currently proposed. Mr. Varney dismissed those warrant articles because he deemed them not "definitive actions inconsistent with the town's master plan. . .". App. 20 at 6. His conclusory statement ignores the clear will expressed by voters up and down the Project route in opposition to the Project. In addition, his dismissal of the warrant articles also assumes, without any evidentiary support in

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<sup>24</sup> Mr. Varney met with the following host community professional planners: Plymouth, Thornton, Franklin, Lancaster, Concord, Pembroke, and Deerfield.

the record, that town voters were not making an informed decision. Tr. 9/27/17 (Day 37AM) at 67-74. This dismissive attitude towards town warrant votes demonstrates Mr. Varney's self-serving use of municipal opinions that have been expressed.

As discussed in detail in the introduction, the views of the municipal planning commissions and governing bodies have been expressed through intervention in this proceeding, public comments and warrant articles. There are thirty-one municipalities and unincorporated places that would be requested to host the high voltage transmission line and its associated facilities. Twenty-two of the municipalities (or their boards and commissions) and unincorporated places intervened to oppose the project: Ashland, Bethlehem, Bridgewater, Bristol, Canterbury, Clarksville, Concord, Dalton, Dixville, Deerfield, Easton, Franconia, Millsfield, New Hampton, Northumberland, Pembroke, Pittsburg, Plymouth, Stewartstown, Sugar Hill, Whitefield, and Woodstock. There are three municipalities, the Towns of Campton, Lancaster and Thornton, that did not intervene but passed warrant articles at town meetings to oppose the proposed Northern Pass high voltage transmission line. There are also two counties, Grafton County and Coos County, that have intervened to oppose the project.

With respect to the views of these municipalities, there have been a large number of specific concerns that have been raised about the proposed project, many of which are discussed throughout the various sections of this memorandum. These concerns are too numerous to identify individually, but include concerns about the visual impacts resulting from the proposed overhead transmission line due to its size and scope, impacts resulting from construction of both the overhead and underground sections of the proposed route, and impacts to tourism, natural resources and impacts to private property (both in the use and enjoyment and property values). Moreover, in the pre-filed and hearing testimony of several of the Referenced Municipalities,

there have been concerns identified with respect to specific locations in the communities, including residential and commercial private properties. To the extent that specific concerns have not been further identified in this memorandum, the Referenced Municipalities rely on the testimonies and exhibits were previously submitted during the adjudicatory hearings.

d. This Application Is Unprecedented Due To The Overwhelming Opposition of Municipal Governing Bodies, Planning Commissions and County Governments

There has never been an application for a certificate approved that was so vehemently opposed by the majority of governing bodies being asked to host the proposed energy facility. Indeed, a review of the certificates that have been issued by the Site Evaluation Committee over the last twenty years demonstrates that this application is unprecedented due to the widespread opposition of the host municipalities. By way of example, the following provides a brief overview of the opinions of host community governing bodies in which the Site Evaluation Committee granted a certificate for those energy facilities:

1. Application of New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility (Merrimack Valley Reliability Project), SEC Docket 2015-05: There were no municipalities, country boards or planning commissions that requested to intervene in the docket or provided comments opposing the project. Decision dated October 4, 2016 at 56-57.
2. Application of Antrim Wind Energy, LLC, SEC Docket 2015-02: The Town of Antrim supported the project as the host community. Decision dated March 17, 2017 at 22-23.
3. Application of Groton Wind, LLC, SEC Docket No. 2010-01: The Groton Board of Selectmen and Groton Planning Board, as well as the vast majority of the townspeople,

supported the project as the host community. The Grafton County Commissioner for District #3 (which includes the Town of Groton) also supported the project. Decision dated May 6, 2011 at 14-15, 35.

4. Application of Laidlaw Berlin BioPower, LLC, SEC Docket 2009-02: The City of Berlin and the Coos County Board of Commissioners, as the host community and county, supported the project. Decision dated November 8, 2017 at 54.

5. Application of Granite Reliable Power, LLC, SEC Docket 2008-04: The SEC explained in its decision that the Town of Dummer as one of the host communities, as well as the Coos County Planning Board and Coos County Commissioners that oversees all of the unincorporated places that are host communities, supported the project.<sup>25</sup> Decision dated July 15, 2009 at 36.

6. Tennessee Gas Pipeline Company – Concord Lateral Expansion Project, SEC Docket 2008-02: The Town of Pelham did not intervene as the host community, but the Chairman of the Town of Pelham and the Pelham Planning Director spoke at an informational hearing and “each expressed a high degree of comfort” in the SEC’s review of the application. Decision dated March 12, 2009 at 16.

7. Application of Tennessee Gas Pipeline, SEC Docket 00-01: Two out of the three host communities did not oppose the project. The Towns of Windham and Pelham did not object or seek to intervene for any purpose in the proceeding. The Town of Londonderry did not present any witnesses or prefiled testimony, although after the conclusion of the adjudicatory hearing it sent a letter from an engineering consultant

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<sup>25</sup> In addition to the Town of Dummer, the project was sited in unincorporated places of Dixville, Erving’s Location, Millsfield and Odell. Under RSA 28:7-a, the County Commissioners have the same responsibility to provide services as a town and governing body to all unincorporated places.



raising concerns about public health and safety, but did not request any additional hearing.<sup>26</sup> Decision dated December 28, 2000 at 7-8, 15.

8. Application of Granite Ridge Energy, LLC f/k/a AES Londonderry, LLC, SEC Docket No. 1998-02: The Town of Londonderry, as the host community, supported siting of the facility contingent upon certain conditions that were stipulated by the applicant. Decision dated May 25, 1999 at 8.

9. Application of Newington Energy, LLC, SEC Docket No. 1998-01: The Town of Newington through its Board of Selectmen, Planning Board and attorneys supported the granting of a certificate as the host community, subject to certain conditions that were stipulated to by the applicant and approved by the Site Evaluation Committee. Decision dated May 25, 1999 at 7, 13-14.

It is clear from a review of all of the foregoing dockets that the applications were approved only in cases where the majority of host communities supported the project. In the few rare situations where one of the host communities raised concerns, the Site Evaluation Committee took measures to address the concerns that were raised. Unlike those proceedings, however, this docket does not present concerns that can be simply addressed by conditions. There are too many issues. For example, there are significant visual and aesthetic concerns raised by the host municipalities, and the Applicants have consistently stated that those concerns cannot be avoided as a result of their proposed route and project plans. The host communities have also raised concerns about the additional infrastructure that the Applicants seek to construct in public highways for the underground section, as well as construction-related disruptions, that cannot be resolved through conditions. Rather, the application needs to be denied.

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<sup>26</sup> The concerns raised by the Town of Londonderry were addressed by the SEC in its decision on pages 24-30.

e. The Applicants' Communications With Municipalities Do Not Change The Outcome

Throughout the proceedings, the Applicants have attempted to assert that they have been working diligently with the municipalities, and that the concerns raised by the municipalities are unwarranted and/or could have been addressed under a Memorandum of Understanding. As discussed in detail in the section relating to technical and managerial capability, the Applicants' outreach efforts have consisted in large part generic form letters. App. 6 at 7. Moreover, in many instances where there were meetings with various officials of the host municipalities, the purpose of the meeting was to provide information about the Project's design and purported benefits, rather than to obtain feedback about concerns raised by the municipalities so that it could be meaningfully addressed. App. 145, 148, 150(a), 153, 357, 357, 360, 361, 402, 405, 413, 440, 446, 470, 488 and 497.

The Applicants have had ample opportunities to make new design changes based on concerns raised during this proceeding, whether voluntarily or as a result of a stipulation with an intervening municipality. The fact that there have been no agreements submitted by the Applicants in which they have made design changes based on the concerns raised by the municipalities should indicate an inability and/or unwillingness on behalf of the Applicants. It is also telling that, despite the large number of concerns that have been raised throughout these proceedings since the application was submitted over two years ago, the Applicants only referenced nine design changes in their correspondence dated August 25, 2017. Jt. Muni. 308.

The Applicants' failure to enter into agreements similarly applies to private property owners. The Applicants repeatedly indicated during the hearings that they were in the process and/or willing to enter into agreements with private property owners who testified about their concerns. Despite these representations, there has only been one agreement filed with an

intervenor. App. 502. Certainly, if the Applicants were intent on resolving the concerns of municipalities and private property owners, they would have found a way to come to an agreement.

The Applicants also criticized a number of municipalities for failing to enter into a memorandum of understanding relative to the construction impacts. This stipulation was presented as a way to address a range of issues such as construction impacts, hours of construction, use of local roads, laydown areas and other issues of local roads. App. 6, Att. H. Although it was represented that the stipulations were a process for municipalities to address concerns over project impacts and resolve issues relative to siting and construction, the draft memorandum of understanding sent to municipalities fails to meaningfully address the construction concerns raised by municipalities. App. 6 at 7. In fact, in some situations, the proposed stipulation might increase rather than minimize construction disruptions.

By way of example, the proposed stipulation seeks to expand work hours from Monday through Saturday, 7:00 a.m. to 7:00 p.m. by including a provision that those “normal work hours may be extended, however due to exigent circumstances . . . .” and that “when practical, NPT will advise the City/Town of circumstances that will likely require extended work hours and the duration of such periods, including any necessary work on Sundays.” App. 6, Att. H at ¶2.4. The proposed stipulation also would allow construction vehicles to start-up and idle between 6:00 a.m. and 7:00 p.m., and between 6:30 a.m. and 7:00 p.m. on Saturday and Sunday. App. 6, Att. H. at ¶2.9(a). It is clear from this language that the Applicants are seeking to use the stipulation to provide flexibility to work on Sundays, a timeframe that was never requested in its application. As further discussed by former City Engineer Edward Roberge, the start-up and idling of construction vehicles must normally be conducted within normal working hours

because those activities are “usually a typical source of a neighborhood complaint.” Tr. 11/17/17 at 77-78.

The stipulation also seeks to use municipal roads during the posted weight time limits under RSA 231:191, even though the Applicants’ construction panel testified that they would comply with the seasonal weight restrictions for municipal roads and ensure that all construction activities are scheduled to avoid the limitation period imposed by RSA 231:191. Tr. 5/3/17 (Day 8AM) at 26-27; Tr. 5/4/17 (Day 9AM) at 118. The stipulation also would allow the use of municipal roads during posted timeframes without prior approval of the road agent, which again, appears to be intended to provide the Applicants with more flexibility than would otherwise be allowed. App. 6, Att. H at ¶3.1.

As discussed by several municipal officials, they were uncomfortable entering into a draft stipulation because of the discretionary language that it contained. Tr. 11/8/17 (Day 58PM) at 59-60, 92; Tr. 12/18/17 (Day 68AM) at 140; Tr. 12/19/17 (Day 69PM) at 103-104. The stipulation contains numerous examples of terms such as “when practical,” “normally,” and “reasonably” that would provide the Applicants with significant discretion and may be challenging to enforce. App. 6, Att. H Although the Applicants suggested during the hearing that the municipalities could have submitted revised stipulations to modify that language, there is no information in the record to demonstrate that they were willing to agree to such modifications of the stipulation.<sup>27</sup> *See, e.g.*, Tr. 11/Tr. 12/18/17 (Day 68PM) at 139-40; Tr. 12/19/17 (Day 69PM) at 101-104. Indeed, there have only been five agreements executed by municipal entities, and in all of those agreements, there were only minor changes, none of which modified this

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<sup>27</sup> The discussions and exchange of stipulations are confidential settlement negotiations, and therefore, the draft versions of the stipulations exchanged between the municipalities and counsel for the Applicants have not been filed or discussed substantively. *See, e.g.*, Tr. 12/19/17 (Day 69) at 99-100.

vague language and/or made substantive design changes.<sup>28</sup> App. 146, App. 206, 207, 208 and 209.

#### **4. Orderly Development – Impacts During Construction**

In reaching a determination on the application, the Subcommittee is required to consider, among other factors, the extent to which the construction and operation of the project will affect the economy of the region. Site 301.15(c). Economic effects of the construction phase are highly relevant to each of those factors. Accordingly, the Applicant was required to provide as part of its application an estimate of the effects of the construction and operation of the project on “the economic effect of the facility on the affected communities.” Site 301.09(b)(1).

Here, not only have the Applicants failed to provide meaningful information regarding the economic effect of the construction of the project on the host municipalities, throughout this process they have displayed a cavalier attitude toward the potentially serious and long-lasting effects that the construction phase would have on businesses along the route, particularly those along the underground portion. As discussed below, their dismissal of these issues is based upon their claims that one lane of travel will always remain open, that any loss in local business will be made up for by the patronage of construction workers on the project and offset by increased business in other areas away from the construction, and, of course, that these effects would be only temporary. However, when these claims are examined with any measure of objectivity, it is obvious that they are, at best, wildly optimistic.

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<sup>28</sup> In fact, in the stipulation entered into with Thornton to address work being performed during a Blue Grass Festival, the Applicants included “to the extent practicable, NPT will work collaboratively with the Town to minimize any impact . . . .” App. 208 at ¶2.3. It is surprising that this stipulation was even necessary, as it makes no promises and the Applicants’ construction panel claimed that they try to work around events occurring in the municipality, regardless of the municipality having executed the memorandum of understanding.

The construction phase of the project will not only disrupt travel along the entire proposed route, but it will have a more profound effect along the underground portions. The Applicants have claimed repeatedly that, other than some areas in the northernmost three towns and one location in Plymouth, one lane of travel will remain open at all times during construction of the underground portion of the project. Tr. 9/29/17 (Day 42PM) at 11; Tr. 9/29/17 (Day 42AM) at 66. However, the evidence shows that, in some areas in which the right of way may be narrower than the Applicants have assumed, there will not be enough room to accommodate the required 30-foot wide construction envelope to also allow for one open travel lane, meaning the road would be completely closed. Tr. 10/23/15 (Day 50PM) at 153-157.

It is interesting to note that none of the handful of memoranda of understanding the Applicants have entered with municipalities along the route contain a guarantee that one travel lane will remain open at all times. App. 146, 206, 207, 208, 209. If the Applicants were confident of their ability to maintain one open lane at all times, they could have included that as part of the agreements. Furthermore, even in areas where a single lane will remain open for travel, there is evidence that the disruption and delays along the underground portion may last from 6 to 24 days or more in many locations. Tr. 9/29/17 (Day 42AM,) at 64. In the 11 mile stretch between the Route 18/116 intersection and the Route 116/112 intersection in Franconia and Easton, the Applicants estimated that construction work would require approximately seven months of lane closures over two construction seasons. Tr. 5/4/17 (Day 9PM) at 114-117. More specifically, the work at the Gale River crossing in Franconia, alone, would require 14-20 weeks of lane closures over two construction seasons. Tr. 9/29/17 (Day 42AM) at 67-68. Work through downtown Plymouth has been estimated to take at least three months, but the actual times may vary and the work may not all occur at the same time. Tr. 5/2/17 (Day 7AM) at 62.

The Applicants rely heavily on the Traffic Management Plan that will be developed in the future (described in App. 91 at 1-2), and have asserted that it will handle any issue that may arise. However, that plan does not yet exist and a draft is not expected to be submitted to DOT until February or March of 2018, at least two months after the close of the record in this matter. Tr. 9/29/19 (Day 42AM) at 123-125. The final plan will not be available until 1-2 months after the final construction drawings have been completed. Tr. 9/29/19 (Day 42AM) at 126. In addition, there is nothing in the record *requiring* the Applicants to keep at least one travel lane open at all times, or delineating the circumstances under which a road may be completely closed such as who would make that determination, and how detours would be handled in each area. Vague statements that the Applicant “will work to minimize impacts not only on the traveling public but in turn on vacationers and tourists” are nothing more than empty promises at this point. Tr. 6/2/17 (Day 12PM) at 110. Given the amount that is not yet known, how can the Subcommittee determine whether the project plans will address this sufficiently?

Even if a single lane remains open, the Applicants have not addressed the reality of the impacts that will be felt. The REMI model used by the Applicants to predict the economic effects of the construction phase of the project analyzes those effects only on a statewide basis, and not town by town. Tr. 6/9/17 (Day 14AM) at 154-146. The Applicants produced no analysis of the effects to any single town along the route as a result of business disruption, job loss and business failure caused by the construction phase of the project<sup>29</sup>. *Id.* As a result, the Applicants have provided no research-backed testimony in this matter about the economic effect

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<sup>29</sup> Furthermore, the statewide analysis was provided to the Applicants by a witness who has never once provided analysis of local economic effects for any project that has subsequently been approved, constructed and operated, and thus those predictions have never been tested to see whether they bear any resemblance to the actual results. Tr. June 9, 2017 (Day 14 AM, Frayer) at 138-139.

that the construction phase of the project will have on each of the affected communities as required by Site 301.09(b)(1).

These effects will include impacts to businesses and more broadly to the tourism industry in the area. There can be no doubt that businesses, particularly those in the North Country, are concerned. Many were represented during the public comment period held by the Committee in July 20, 2016. During that hearing, there were 75 businesses letters which were presented to the Committee in connection with the public statement of Katherine Cote, owner of Polly's Pancake Parlor in Sugar Hill, each expressing concerns regarding the potential adverse impact that the Project would have on them. Public Comment, Katherine Aldrich Cote with Franconia Area Businesses Letters, July 20, 2017. Another 21 businesses in downtown Plymouth submitted letters outlining their concerns about the negative impacts the project would have. Jt. Muni. 200 at 63-86. Multiple municipalities also presented testimony relating to concerns they had heard from local businesses, as well as the concerns municipal officials have about the potential damage that will occur to local businesses and the tourist economy in the area. Tr. 12/11/17 (Day 65AM) at 95-96; Tr. 12/18/17 (Day 68AM) at 126-33; Tr.12/19/17 (Day 69 PM) at 6-11; Jt. Muni. 104 at 2-3; Jt. Muni. 95 at 10-12, Jt. Muni. 106 at 6-7; Jt. Muni. 116 at 2-3.

The Applicants assert that all of these concerns are unwarranted and that the construction of the construction of the project will not affect businesses or tourism in a material way. In support of these assertions, they have presented no evidence other than the testimony and reports of Mr. Nichols. The Referenced Municipalities anticipate that the shortcomings of Mr. Nichols methodology and conclusions will be addressed in detail by other intervening parties and Counsel for the Public, and therefore, they will not be repeated here. However it is important to note that Mr. Nichols dismissed the potential impacts of construction-related traffic, detours and



delays without any analysis, and made no attempt to study particular events or tourist attractions in the host municipalities. Tr. 7/18/17 (Day 21AM) at 8-22; Tr. 7/19/17 (Day 22AM) at 10-21. He did not consider impacts from the Project to any particular aesthetic or historic resource and how that might affect tourism. Tr. 7/18/17 (Day 21AM) at 50-51. Although he agrees that tourism dollars spent in an economically challenged area such as the North Country can have a disproportionate local economic impact, he fails to account for that fact in his conclusions. Tr. 7/18/17 (Day 21AM) at 59-60; App. 31; App. 1, Appx. 45 at 30-31. He also based his conclusions in part on a survey designed in a way that failed to elicit meaningful information about the deterrent that large-scale transmission structures can be for tourists in New Hampshire. Tr. 7/18/17 (Day 21PM) at 151-54.

Moreover, the assurances the Applicants provide that any potential local business losses will be minimal rest mainly on two assertions: that spending by construction workers will make up the difference, and that business lost in one place will be made up in another area of the state. Neither of these assertions holds up to even casual scrutiny.

The Applicants have assured the Subcommittee that the construction workers on the project will patronize local businesses and make up the difference lost to regular or tourist customers. Tr. 6/12/17 (Day 12AM) at 107. However, while these workers may mitigate a small portion of the losses for some kinds of businesses, they are not going to completely offset the losses. Tr. 10/11/17 (Day 45PM) at 29-31. Insurance companies, dentists, and similar service businesses are very unlikely to see any business from construction workers, and even for lodging and restaurants, the construction workers would be subjected to the same difficulties of traffic delays and (in the Plymouth downtown area) an almost total lack of parking. Tr. 10/11/17 (Day 45PM) at 29-31. The Applicants have also touted as a fix for this issue their “business

directory,” a list of businesses located along the construction route who want to work with the Applicants, which will be distributed to construction workers to make it easier for them to patronize local businesses while they are in the area. Tr. 6/2/17 (Day 12 AM) at 114-115. This list contains 209 businesses. Jt. Muni 349. Of those, 60 can be identified by name alone as businesses which construction workers are very unlikely to patronize while working on the Project (dentist, funeral director, photographers, veterinarians, nail/day spas, furniture store, tailor, self-storage, flower shop, and HVAC businesses, to name a few). Jt. Muni 349.

Furthermore, the owners of some businesses on the list did not ask to be included, and some of them have since asked to have their businesses to be removed. Public Comment, Kate Foley, Cold Mountain Cafe, 12/8/17, December 8, 2017; Tr. 12/18/17 (Day 68AM, Coates) at 124-125. Although this list could be of some use if compiled in a thoughtful manner, the Applicants appear to have put only minimal effort into it thus far. The impression is that the list was begun so that the Applicants could mention it as part of their efforts rather than because they were truly interested in offsetting business losses during construction.

The second argument is even less compelling: if business is lost in one town during construction, it will be offset by temporary increased business in another town. App. 102 at 47. In other words, if traffic issues cause negative impacts to businesses along Main Street in Plymouth, for example, it does not matter because those customers will spend their money in another town. The Applicants have provided no expert analysis to back up this claim, only a simple assertion. App. 102 at 47; Tr. 6/9/17 (Day 9 AM) at 144-146. The Applicants claim that these temporary effects are of so little consequence, in fact, that they were almost entirely ignored in Mr. Varney’s consideration of the economic effects of the project on the orderly development of the region. Tr. 9/21/17 (Day 37 PM) at 117,145-146.

The evidence shows, however, that these “temporary” construction effects have the potential to be significant for the businesses that experience them and could in some cases become permanent. The record is replete with letters, comments, and testimony regarding specific businesses along the project route and their concerns about the losses they will suffer as a result of the construction of the project. Jt. Muni. 200 at 63-86 (21 businesses); Public Comment, Katherine Aldrich Cote with Franconia Area Businesses Letters, July 20, 2017 (75 businesses); Jt. Muni. 347; Tr. 12/19/17 (Day 69 PM) at 6-11; Grafton 51. These concerns relate not only to traffic delays that may deter customers and send them elsewhere, but also (in the case of a place such as downtown Plymouth) the drastic shortage in parking and resulting loss of foot traffic in the area during construction. *Id.*; Tr. 10/11/17 (Day 45 PM) at 33-34; Jt. Muni. 106 at 6-8. Businesses in downtown Plymouth will lose regular customers during construction, and in some cases it will lead to businesses going under because they cannot survive two bad construction seasons. Tr. 10/11/17 (Day 45 PM) at 27-28; CFP 148 at 2-3; Tr. 12/21/17 (Day 70 PM) at 28-31; Jt. Muni. 200 at 63-86. While Plymouth currently has a good downtown economy, transportation and parking are essential to maintaining this success and it is dependent upon the forward momentum generated by businesses that are successful and new businesses moving into town as vacancies arise. Jt. Muni. 106 at 8; Tr. 12/21/17 (Day 70 PM) at 28-29. This balance is challenging for the Town under ordinary circumstances; the impact of the construction of the project may tip the balance and set that area back decades in its economic health. The Applicants’ response to these concerns has been to tell businesses that they can file a claim for damages, but they have not yet provided any information to those businesses or in this record about the criteria for recovery, records or burden of proof required for recovery, timeline for decisions, avenues of appeal, or any other details. Tr. 6/2/17 (Day 12AM) at 130-134; Tr.

12/18/17 (Day 68 AM) at 23-24. For businesses living season to season, an undefined process that may or may not provide them any relief is cold comfort, and is insufficient.

##### **5. Orderly Development – Property Tax Payments**

Public utilities in New Hampshire are required to pay local property taxes just like any private property owner. *See* RSA 72:8 (stating that “[a]ll structures, machinery, dynamos, apparatus, poles, wires, fixtures of all kinds and descriptions, and pipe lines employed in the generation, production, supply, distribution, transmission, or transportation of electric power ... shall be taxed as real estate in the town in which said property or any part of it is situated”). That requirement extends to the Applicants for any assets they may construct within any of the host communities, regardless of whether the Subcommittee grants Applicants a certificate for the Project.

The potential tax payments by the Applicants as a purported “benefit” to the Project are insufficient to warrant approval of the application. Those local property tax payments are required under New Hampshire law, and moreover, the host communities have provided testimony that they will see reductions in other forms of revenue as a result of the Project, such as a decrease in surrounding property values, increase in abatement requests, and decreases in tourism. Even more importantly, regardless of whether there is a net benefit or loss as a result of the tax payments, the Referenced Municipalities have made it clear that they do not support the Project as proposed. The municipalities in New Hampshire do not approve development proposals simply because of the potential tax benefits associated with a project, and if that was the case, there would be little use for planning boards, zoning boards of adjustments and land use regulations. Indeed, as discussed by the Town of Bethlehem during the hearing, the lure of tax payments is insufficient to buy support of projects, and for that reason, the town recently “voted

out” the town’s largest taxpayer because it is an unwanted landfill. Tr. 11/8/17 (Day 58PM) at 25-28.

The Referenced Municipalities also dispute the appropriate tax assessment methodology to employ for any Project assets within the host communities, and have raised the legitimate concern that the Applicants proposal to use this methodology could likely result, at best, in expensive litigation, or, at worst, tax payments that are significantly depreciated over the proposed Project’s life. This is a real concern for municipalities, particularly small towns, who often do not have the financial resources to get involved in protracted litigation.

Most importantly, the Referenced Municipalities uniformly do not believe the stated tax benefits outweigh the other non-monetary negative aspects of the Project, including visual and other impacts to the region’s character. Tr. 11/8/17 (Day 58PM, Bethlehem) at 25-28; Tr. 11/8/17 (Day 58PM, Pembroke), at 141-146; Tr. 11/16/17 (Day 60PM, Concord) at 83-84; Tr. 12/5/17 (Day 64PM, New Hampton) at 86-92; Tr. 12/11/17 (Day 65AM, Easton) at 146, 149-152; Tr. 12/12/17 (Day 66PM, Deerfield), at 136-139; Tr. 12/18/17 (Day 68AM, Franconia) at 118-119; Tr. 12/18/17 (Day 68AM, Bristol) at 149; Tr. 12/19/17 (Day 69PM, Sugar Hill) at 47-48; Tr. 12/19/17 (Day 69PM, Whitefield) at 110-116; Tr. 12/21/17 (Day 70PM, Plymouth) at 64. Indeed, as the Town of Bethlehem aptly explained, it “ is willing to absorb higher taxes because of the environment. We have a very special place. . . . We want our town to be consistent with what our master plan and the town wants, which is a rural, quiet, orderly development community that doesn’t have 105-foot towers and thousand –volt lines going across it. So we don’t sell out. . . . This will affect our scenery, our tourism, our travel. It really is not just about money. . . Our home is our community.” Tr. 11/8/17 (Day 58PM) at 25-26.

In light of the testimony of the Referenced Municipalities, any purported benefit from tax revenues should be accorded little weight as the Subcommittee weighs whether the Applicant has proven that the Project will not unduly interfere with the region's orderly development.

**6. Orderly Development – Property Values**

Dr. James Chalmers' opinion that the Project will not have a significant impact on surrounding property values is unreliable for a number of reasons, including (1) he is not an expert in the New Hampshire market; (2) the case studies on which he based his opinions include inaccurate information; and (3) the methodology he used for his own analysis of the properties is flawed.

During testimony before the Subcommittee, Dr. Chalmers acknowledged that he did not familiarize himself with any of the local real estate markets in the 31 host communities and does not consider himself and is not holding himself out as an expert on the New Hampshire real estate market. *See* Tr. 7/31/17 (Day 24AM), at 11-12. This is a striking admission from the expert who was retained to provide an opinion about whether the Project will result in property value impacts. For this reason alone, the Subcommittee should give his opinion only minimal weight because he is not qualified to render an opinion on whether the Project will negatively impact the values of properties surrounding the Project route.

With respect to the case studies that Dr. Chalmer's presented as part of his report, Dr. Chalmers clarified that his ultimate opinions about the proposed Project's impacts to surrounding property values were largely dependent on the 58 case studies that were contracted out to local New Hampshire appraisers. Tr. 7/31/17 (Day 24AM) at 34-35; Tr. 7/31/17 (Day 24PM) at 42; App. 1, Appx. 46 at 24 (Corridor 1), 27 (Corridor 2), 29 (Corridor). Dr. Chalmers acknowledged that those 58 case studies were confined to single-family detached residential property, and did

not include any hotels, motels, campgrounds, or commercial property. Tr. 7/31/17 (Day 24AM) at 35-37. The 58 case studies were performed primarily by Brian Underwood, who conducted 50 of them, and Frank Amidon, who performed the remainder. Tr. 7/31/17 (Day 24AM) at 77. Those case studies focused on properties that directly abut or were encumbered by an existing utility right of way corridor, and therefore excluded any properties that had visibility of the existing right of way corridor and/or utility structures within it that were not also abutting or encumbered by the ROW. Tr. 7/31/17 (Day 24AM) at 50-51. Dr. Chalmer's ultimate opinions regarding possible impacts from the Project were then based on this case study work. Tr. 7/31/17 (Day 24AM) at 77-78.

Based on the significant amount of studies conducted by Mr. Underwood, the credibility and objectivity of Mr. Underwood's case study work is important. Tr. 7/31/17 (Day 24AM) at 116-117. Dr. Chalmers confirmed that he was reliant on Mr. Underwood's conclusions and rationale, and that he did not review or check Mr. Underwood's source data. Tr. 7/31/17 (Day 24AM) at 101. Mr. Underwood's work for this proceeding is concerning because, prior to even being retained to perform these case studies, he had already rendered an opinion that a high voltage transmission line was unlikely to diminish the value of surrounding properties. Tr. 7/31/17 (Day 24AM) at 78-80; CFP 391. In a 2011 report entitled *Preliminary Study Report, Impact on Value of High Voltage Transmission Lines, Towns of Deerfield and Littleton*, Mr. Underwood concluded that based on his preliminary analysis, "there is no market evidence in either Deerfield or Littleton that would indicate diminution of property value due to [HVTL]." Tr. 7/31/17 (Day 24AM) at 79. Dr. Chalmers was aware of that report, as well as the fact that Mr. Underwood's conclusions for this proceeding were unlikely to be different. Tr. 7/31/17 (Day 24AM) at 80. Moreover, as raised by Counsel for the Public during the hearing, at the time

of Mr. Underwood's work on the 50 case studies, he owed creditors over \$360,000 and later filed for bankruptcy protection, and there were allegations that he provided false testimony in the bankruptcy proceedings. Tr. 7/31/17 (Day 24AM) at 117-123. Based on the foregoing, it is entirely reasonable for the Subcommittee and parties to discredit Mr. Underwood's opinions in the underlying case studies. These case studies are the most critical data that informed Dr. Chalmers' opinion, there was no opportunity to examine Mr. Underwood about his work, and by extension, Dr. Chalmer's opinions that rely on the case studies should be afforded little weight.

As another matter, Mr. Underwood's case studies are flawed. The methodology used for the case study was to conduct a retrospective appraisal of properties that sold along an existing right of way after 2011, and then make a determination about whether there was impact to price or time on market as a result of the HVTL corridor. App. 1, Appx. 46 at 24, 27, 29; Tr. 7/31/17 (Day 24AM) at 84-116. Dr. Chalmers then used the findings from those case studies to arrive at criteria for his ultimate opinion of the possible impacts from the proposed Project. Tr. 7/31/17 (Day 24AM) at 84-116.

Dr. Chalmers was unable during the hearing to explain the specific basis for many of the conclusions reached by Mr. Underwood or Mr. Amidon for the properties they identified as having no price effect or only a possible effect. Tr. 7/31/17 (Day 24AM) at 84-116. This is a significant concern because Dr. Chalmers relied on the case studies to formulate his opinion that only within one hundred feet of the Project route that abut or were encumbered by the right of way, and would have increased visibility of the HVTL structures might be impacted. Tr. 7/31/17 (Day 24AM) at 84-116. Dr. Chalmers acknowledged during the hearing that, if the conclusions drawn by Mr. Underwood or Mr. Amidon were altered, he would have similarly needed to change his ultimate opinion and criteria for determining potential impact. Tr. 7/31/17 (Day



24AM) at 96-97, 105-116. As shown during cross-examination of Dr. Chalmers, there are a number of properties that indicate that there was a price effect from the high voltage transmission line, however no such effect was found by Mr. Underwood or Mr. Amidon. Tr. 7/31/17 (Day 24AM) at 96-97, 105-116. If those properties were properly identified in the case studies as having a price or market time impact from the existing right of way, it would have expanded the scope of potentially impacted properties that were the foundation of Dr. Chalmers opinion. Tr. 7/31/17 (Day 24AM) at 96-97, 105-116.

George Sansoucy, the expert retained by several municipalities, further stated that Dr. Chalmers' opinion is not supportable. He explained that, among other things, in the event the case studies had included all of the properties that expired and were then relisted, the total diminution in value for those properties would be 13.2%. SAN 34 at 25-26; SAN 38, Ex. 36. Mr. Sansoucy also testified that the Project will likely result in an adverse impact to properties in its vicinity. He agreed with Dr. Chalmers that properties that abut and/or are encumbered by a high voltage line will likely have a reduced value, however he disagreed with Dr. Chalmers' opinion that non-abutting properties with a visual impact of the Project would not experience a property value impact. SAN 1 at 19-20.

Mr. Sansoucy also provided the opinion that, in some circumstances, the impacts to value from a high voltage transmission line can be so extensive that the tax rate in the entire host community is impacted. SAN 1 at 20. Mr. Sansoucy reviewed tax cards for several communities in which a high voltage transmission line presently exists in order to summarize the potential range of the town-wide impacts. SAN 39. Mr. Sansoucy fundamentally disagreed with the reliance on retrospective appraisals employed by Dr. Chalmers, explaining that "[e]qual

paired sales say nothing of the effect on value of the electric transmission line because the effect is built in.” SAN 1 at 23-24.

In addition to the flaws referenced above, the methodology used by Dr. Chalmers to review impacts associated with the properties along the Project route is also flawed. Dr. Chalmers requested from the applicants a list of the 89 abutting residential properties within 100 feet of the Project right of way. Tr. 7/31/17 (Day 24PM) at 53-54. He then examined the 89 properties on the list to render an opinion regarding whether the Project would have a negative impact on their value, which required the property to abut or be encumbered by the right of way, the house to not only be within 100 feet of the edge of the right of way, and also to have increased visibility of the Project from the existing structures. From that list, he then concluded that only 11 properties indicated a potential for negative value impact, while the remaining 78 showed no such potential. App. 197.

The execution of Dr. Chalmers’ methodology is insufficient to produce a credible result. For instance, an important portion of his analysis involved determining the change in visibility as a result of the Project. To make that judgment, Dr. Chalmers did not attempt to gain permission to enter any property in order to fully assess the impacts from different portions of the property, but instead made his determination from the public road. Tr. 7/31/17 (Day 24PM) at 57-62. Dr. Chalmers acknowledged during the hearing that he also did not attempt to confirm the accuracy of the list of properties that was provided him, and upon review, acknowledged that there are several properties that were missed. Tr. 7/31/17 (Day 24PM) 75, 78. Dr. Chalmers also acknowledged that he only reviewed single family detached residential properties within 100 feet of the property, and excluded all other types of properties such as condominiums and hotels. Tr. 7/31/17 (Day 24PM) 82-86.

Dr. Chalmers' opinion on property value impacts should be rejected because it defies common sense and is contradicted by New Hampshire law. There are a number of decisions from the Board of Tax and Land Appeals ("BTLA") that do not take the narrow view of property impacts that is being advocated by Dr. Chalmers. Many of these decisions show that the BTLA has found that the existence of a utility line could have a chilling effect on the value of property, and that "common sense" indicates that if there are two identical properties but one has a utility easement on it, the property with the easement would sell for less.<sup>30</sup> SAN 40 at 3929, 3945, 3949, 3953, 3969. It is clear from these cases, and well as the other reasons set forth above, that Dr. Chalmers' methodology is unreliable and the opinions he reached should be afforded little to no weight.

Finally, neither Dr. Chalmers or other witnesses for the Applicants submitted any information regarding the effects the Project may have on property values along the 60 miles of the route where the Project is proposed to be buried, presumably because Dr. Chalmers concluded that there could be no effects without visibility. App. 30 at 12. This analysis failed to recognize that the presence of a buried high voltage transmission line could have a negative impact on the value of abutting property and its potential for development due to the need to work around the line in order to develop it and add subsurface infrastructure such as drains, water/sewer, and other utilities. Tr. 11/20/17 (Day 62PM) at 40-44. The Applicants have the burden to provide this Subcommittee with sufficient information about the impacts the Project may have on property values, and they have failed to do so.

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<sup>30</sup> Indeed, as discussing during the hearing with Dr. Chalmers, the BTLA applied a 50% reduction to the total value of one property in the Town of Wentworth due to its proximity near the Hydro-Quebec Phase II line. SAN 40 at 3945; Jt. Muni. 258.

## **7. Orderly Development - Employment**

In order to address impacts to the impacts to employment in the region, the administrative rules require the following information to be included in an application for the Subcommittee's review, which includes:

- (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.

N.H. Admin. Rules, Site 309.09(c).

The Site Evaluation Rules make it clear that the only type and number of jobs to be considered when assessing the impacts to employment in the region from construction activities are “full-time equivalent local jobs,” and that information must be presented regarding the “number and types” of those jobs. Despite this requirement, most of the focus during trial related to the estimated number of jobs without regard to whether they were full-time equivalent and/or the types of those jobs. For example, William Quinlin, the President and Chief Operating Officer of Eversource stated in his pre-filed testimony that “Northern Pass will create over 2,600 jobs in New Hampshire at the peak of construction.” App. 5 at 5. In making this statement, Mr. Quinlin failed to reference that those jobs are not full-time equivalent jobs, but instead include full-time, part-time and seasonal employment. App. 1, Appx. 43 at 76, n.83. He also failed to reference the fact that these statistics include direct jobs, indirect jobs and induced jobs. *Id.* at 76, Figure 46; Tr. 6/9/17 (Day 14PM) at 30-31.

In terms of the estimated number of jobs to be created in New Hampshire during construction, there is no information in the record regarding how many full-time equivalent jobs will be created. The Applicants submitted a report prepared by London Economics International LLC (“LEI”) to identify local economic impacts of the proposed high voltage transmission line. In the report prepared by LEI, *Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project*, it was projected that over a four year construction period, there would be 38 (year 1), 1249 (year 2), 976 (year 3) and 132 (year 4) full-time, part-time and seasonal created direct jobs. *Id.* at 71, Figure 40. There is no breakdown on the number of full-time equivalent jobs that will be created in New Hampshire. It is also noteworthy that the estimated total number of jobs are presented as annual totals, and therefore, a person hired to work during all four years of the proposed construction schedule would be included in the totals for each year. *Id.*; see also Tr. 6/13/17 (Day 15PM) at 118-119.

The application also failed to include information regarding the *type* of local direct jobs that are anticipated to be created in New Hampshire. Tr. June 9, 2017 (Day 14PM) at 24-26. The report instead generally stated that “the construction and installation of NPT will require construction workers, logging workers [,] engineering project managers, environmental specialists, legal professionals and other labor services.” App. 1, Appx. 43 at 69. The only breakdown of employment sectors was in Table 44, which related to indirect jobs rather than direct jobs.<sup>31</sup> *Id.* at 75. In response to cross-examination, over twenty-one months after the application was filed, the Applicants finally prepared a chart that included the types of direct jobs in New Hampshire that might be created during the construction phase. App. 172; Tr. 10/6/17 (Day 44PM) at 35-36. This chart shows for the first time that almost half of the direct jobs

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<sup>31</sup> Of that number, 29% (almost 1/3 of the jobs) were categorized as “others” in the application without any explanation for the types of jobs that might be included in the sector.

(44%) estimated in New Hampshire are “forestry, fishing and related activities.” App. 172; Tr. 10/6/17 (Day 44PM) at 35-36.

The high percentage of direct jobs in New Hampshire anticipated to be in the “forestry, fishing and related activities” segment is concerning because there is also no guarantee that these jobs will be provided to New Hampshire workers, because the Project Labor Agreement also does not cover logging, site work and road construction work. Tr. 9/25/17 at 6-10 (Day 39PM); CFP 488 at 7. Indeed, William Quinlin acknowledges in his pre-filed testimony that “there will be *opportunities* for local contractors and businesses to bid on work related to construction of the Project.” App. 5 at 5. The fact that there are “opportunities” for local contractors to bid on work does not constitute a binding commitment to hire those companies, and certainly, there is the very strong potential that these logging jobs will be provided to companies in surrounding areas such as Maine or Canada to the extent that they are ultimately the lowest bidders on the project. Indeed, Allen Bouthillier, the owner of AB Logging in Lancaster which is a significant contractor in the North Country, acknowledged that despite his optimism that New Hampshire workers would be hired because “it is a matter of common sense” to hire local contractors for construction work, his company has never been hired to perform any work for Eversource or PSNH in the past. Tr. 4/13/17 (Day 1PM) at 11; Tr. 9/25/17 (Day 39PM) at 119, 121.<sup>32</sup>

Finally, with respect to the operations period, the total amount of direct jobs to be created in New Hampshire during the first 11 years is miniscule. The anticipated direct jobs to be created

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<sup>32</sup> The record also shows that the number of direct logging jobs was not based on the estimated amount of workers needed to perform the job, but rather, the cost that the Applicants would be paying to contractors to perform site work. *Id.* at 44-45. As explained by Nicholas Rockler, an economic expert hired by Counsel for the Public, LEI did not use the estimated industry employment numbers that they had calculated for the proposed project, and instead used the cost of all of the contracts that Eversource would be paying. *Id.* at 40-42; Jt. Muni. 208. There is no information provided in the record regarding the actual estimated amount of workers a contractor would need to hire to perform the necessary site-clearing and other right-of-way work. *Id.*

during the operations period was estimated by Mr. Frayer to be *two jobs* per year, although in some years there is only one direct job anticipated to be created. App. 1, Appx. 43 at 79; Tr. 6/9/17 at 33-34. These direct jobs during the operations period, similar to the direct jobs anticipated during the construction phase, include part-time, seasonal and full time jobs. *Id.* at 34. Although it is generally anticipated that the spending will be in the “utilities” industry, there is no breakdown regarding whether any of those 1-2 jobs involve continued employment for lineworker(s) or administrative support staff. App. 1, Appx 43 at 115; Tr. 6/9/17 at 35.

## **8. Orderly Development – Conclusion**

The orderly development prong covers a very broad array of topics. For each of these, the Applicants have failed to demonstrate that the Project will not unduly interfere with any region’s orderly development.

### **C. Unreasonable Adverse Effects**

Under New Hampshire law, the Subcommittee may only issue a Certificate of Site and Facility if it finds that the proposed Facility will not have an unreasonable adverse effect on: (1) aesthetics; (2) historic sites; (3) air and water quality; (4) the natural environment; and (5) public health and safety. RSA 162-H:16, IV(c); see also N.H. Admin. Rules, Site 202.19. The Subcommittee must consider each of the issues set forth in RSA 162-H:16, IV(c). If the Subcommittee finds that the proposed Project will have an unreasonable adverse effect *on any one of the statutory criteria*, the Subcommittee must deny a Certificate of Site and Facility.

#### **1. Unreasonable Adverse Effects - Aesthetics**

The Subcommittee may only issue a certificate for the project if it determines, among other things, that the facility will not have an unreasonable adverse effect on aesthetics. *See* RSA 162-H:16, IV(c). In making that determination, the Subcommittee is required to consider

(1) the existing character of the area of potential visual impact, (2) the significance of affected scenic resources and their distance from the proposed facility, (3) the extent, nature and duration of public uses of affected scenic resources, (4) the scope and scale of the change in the landscape visible from affected scenic resources, (5) the evaluation of the overall daytime and nighttime visual impacts of the facility as described in the visual impact assessment submitted by the applicant and other relevant evidence submitted pursuant to Site 202.24, (6) the extent to which the proposed facility would be a dominant and prominent feature within a natural or cultural landscape of high scenic quality or as viewed from scenic resources of high value or sensitivity, and (7) the effectiveness of the measures proposed by the applicant to avoid, minimize or mitigate unreasonable adverse effects on aesthetics, and the extent to which such measures represent best practical measures. N.H. Admin. Rules, Site 301.14(a).

a. The Applicants Failed To Analyze Recreational Current Use Property

The Subcommittee's findings on this issue, therefore, will be heavily dependent upon which scenic resources are identified, evaluated, and addressed by the Applicants. However, the Applicants have failed to identify, evaluate or address an entire category of scenic resources: privately owned land that property owners make open to public recreational use in exchange for reduced property tax assessments ("recreational current use property"). As the Applicants' visual expert, Mr. DeWan, noted, a very large percentage of private property in New Hampshire is recreational current use property. Tr. 8/31/17(Day 30 PM) at 66. It is reasonable to assume, therefore, that some of this property lies within the area of potential effect of this project. As a result, the Applicants have not provided the Committee with any of the required information regarding those scenic resources (i.e., location and description of the scenic resources, visibility analysis from them, characterization of the potential visual impacts on them, and a description of



the measures planned to avoid, minimize or mitigate potential adverse effects on them). N.H. Admin. Rule, Site 301.05(b). Consequently, the record contains insufficient evidence for the Committee to find that the Applicant has satisfied this element.

“Scenic resources” are defined as resources to which the public has a legal right of access, and include “recreational trails, parks, or areas established, protected or maintained in whole or in part with public funds.” N.H. Admin. Rule, Site 102.45(d). The administrative rule does not qualify or limit the manner or amount of public funding that must be applied toward the establishment, protection or maintenance of these recreational trails, parks or areas in order for it to qualify as a scenic resource. However, the Applicants have chosen to exclude an entire category of property which falls within this definition solely because of the form in which the public funds are received by the property owner.

The “current use” system essentially rewards private property owners with a reduction in property taxes in exchange for retaining all or at least 10 acres or more of that property in its “current use” as open space land, which includes farm land, forest land, and unproductive land. *See* RSA 79-A:2, V and IX; RSA 79-A:5, I. Qualifying land which is formally designated by the property owner and municipality is valued at a lower rate than it otherwise would be, based on criteria and rates set by the State Current Use Advisory Board. *See* RSA 79-A:4, I; RSA 79-A:5, I. Qualifying property is assessed at its lower current use value for as long as it is kept in current use. Once the use changes, the taxation benefit is lost, the owner is required to pay a one-time land use change tax, and future taxes are assessed on the property’s full and true value. *See* RSA 79-A:5, IV; RSA 79-A:7.

As an added incentive, the property valuation is reduced by an additional 20 percent beyond the ordinary current use valuation if the land is kept open 12 months a year to public

recreational use without entrance fee, and if there is no prohibition of skiing, snowshoeing, fishing, hunting, hiking or nature observation unless those activities would be detrimental to a specific agricultural or forest crop or activity. *See* RSA 79-A:4, II. In other words, the property owner receives a specific economic benefit *from the government* in exchange for creating publicly-accessible recreational areas on his or her property.

The Applicants' visual impact witnesses, Mr. DeWan and Ms. Kimball, decided that recreational current use property does not qualify as a scenic resource under Site 102.45(d). Tr. 8/31/17 (Day 30 PM) at 66, 126. They provided various rationales for this position, but it appears that they mostly argue that the property owner has to receive some kind of public money in the deal, but that a tax reduction would not qualify. Tr. 8/31/17 (Day 30 PM) at 128.<sup>33</sup> However convenient this interpretation may be for the Applicants, it ignores the reality of municipal funding, property taxation and the purposes of the current use system.

It is clear that municipal tax revenues are public funds. Real estate is taxed by the municipality in which it is located. *See* RSA 73:10. Taxes received by a municipality on that property are paid to the municipal tax collector and turned over to the municipal treasurer, who has custody of all "moneys belonging to the town." *See* RSA 76:10, I; RSA 41:35; RSA 41:29, I. Tax revenues raised by a municipality pursuant to its budgeting and taxing authority must, then, be considered "public funds."

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<sup>33</sup> Another dubious reason for artificially excluding recreation current use property that was proffered by Mr. DeWan was that "there is no mapping or special identification of these places maintained by the state." Tr. 8/31/17 (Day 30PM) at 128. Mr. DeWan was perhaps conveniently unaware that every municipality in the state is required to maintain a list of properties that are in current use and which of those receive the special recreational use assessment. Tr. 11/16/17 (Day 60AM) at 86-87. Municipal information of this sort is public under RSA chapter 91-A and would be available to the Applicants and anyone else who wished to obtain it. Moreover, contrary to Mr. DeWan's claim that it would take too long to determine which recreational current use property is located within the area of potential effect, the evidence shows that it took a matter of 15 minutes to determine which of the 4,700 acres (on 125 parcels) in the City of Concord lie within the area of potential effect for this project. Tr. 11/16/17 (Day 60AM) at 17. Surely for a matter as important as this the Applicants could have performed such a basic review.

It is also clear that the default position in New Hampshire law is that all real estate is taxable. “All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.” RSA 72:6. Unless there is a separate statute granting an exemption or a reduction in appraised value, all taxable property must be appraised at its market value, meaning its “full and true value as the same would be appraised in payment of a just debt due from a solvent debtor.” RSA 75:1. Current use treatment under RSA Chapter 79-A is an exception specifically targeted at property owners to make them keep their property undeveloped, and the recreation overlay is an additional financial incentive to keep the property open to the public for recreational use.

In other words, the state legislature has ordered that a portion of the money that municipalities are statutorily entitled to collect as property taxes, money that the municipality would be entitled to use for public purposes, be retained by the property owner to further the public purpose of retaining open space land and creating public recreational areas on private property. Using Mr. DeWan’s analysis, if the municipality assessed and collected the taxes, and then returned a portion of it to the property owner, that payment would qualify as “public funding” to establish or maintain a publicly-accessible recreational area. However, the same result is reached by the current use system without the unnecessary steps of assessing a tax and then returning a portion of it to the property owner. Creating an artificial distinction between money that is paid by the government on one hand, and money that the government decides to let the property owner keep on the other hand, frustrates the purpose of both New Hampshire Administrative Rule, Site 102.45(d) and the Site Evaluation Committee process. The current use system was created to further the public interest in encouraging the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state’s citizens, maintaining the character of the state’s landscape, and conserving the land,

water, forest, agricultural and wildlife resources. RSA 79-A:1. It is also intended to prevent the loss of open space due to property taxation at values incompatible with open space usage. *Id.* Similarly, the purpose of the site evaluation process is, in part, to address the “significant impacts” that energy facilities may have on the environment of the state, aesthetics, and public health and safety. *See* RSA 162-H:1. The only way to harmonize the current use system with the site evaluation process is to recognize that recreational areas that are recreational current use property are created by the diversion of public funds to the property owners through the current use system. As a result, the Applicants should have identified, evaluated, and addressed all recreational current use property within the area of potential effect. They did not do so, and therefore the Committee does not have enough information to make a determination about the effect of the project on aesthetics.

b. The Applicants Failed To Analyze Impacts to Public Roads

The Applicants also failed to adequately analyze impacts to public highways because they failed to adequately determine the full extent of the public roads that have been designated pursuant to RSA 231:157, and also because they failed to address “scenic rides and drives.”

First, RSA 231:157 requires that, in the event that a road is designated by a municipality as a “scenic road,” it is then required to update a list annually that contains “sufficient information to permit ready identification of the location and extent of each scenic road or portion thereof, by reference to a town map or otherwise.” RSA 231:157. It is apparent from this statutory requirement that the legislature intended to ensure that, upon request, an up-to-date list of all roads designated under RSA 231:157 could be easily available to the general public upon request. Despite the foregoing, there is no evidence in the record that any of the consultants for the Applicants contacted the affected communities to obtain the list. Mr. Dewan

and Ms. Kimball's visual impact assessment states that the only source of information that they used to identify locally designed roads was through a review of a website or master plan. App. 1, Appx. 17 at C-3 to C-6 (14765-14767). Mr. Varney's report on land use similarly states that the methodology he used was instead to rely on the town's website or master plan. App. 1, Appx. 41 at 23. It is clear from these reports that the consultants never made the effort to obtain a complete list of all scenic roads in affected communities by making requests under RSA chapter 91-A, the Right to Know Law, or some other mechanism. This failure once again demonstrates a lack of effort by the Applicants to have meaningful communication with the affected municipalities.

The Applicants' aesthetic experts also failed to assess any "scenic drives and rides" as a scenic resource. The definition of a "scenic resource" includes those resources that are "designated by applicable statutory authority by national, state, or municipal authorities for their scenic quality," as well as the more broad category of "scenic drives and rides . . . that possess a scenic quality" N.H. Admin. Rule, Site 102.45. Applicants failure to asses "scenic drives and rides" resulted in the elimination of a significant amount of public highways that should have been evaluated as scenic resources.

A municipality may only designate locally maintained highways, and therefore, a state maintained highway is not eligible for scenic road designation. As such, a municipality does not have control over which public highways within its jurisdiction receive official designation. Moreover, there are a number of municipalities that choose not to designate their public highways as a scenic road under RSA 231:157. Many of the municipalities have nonetheless taken measures, whether in their master plans or through zoning, to ensure that the scenic quality of the landscape surrounding particular roads spoiled and otherwise compromised. By way of

example, although Concord does not have any local roads designated as scenic roads under RSA 231:157, the importance of preserving the scenic quality of roads such Hoit Road, Shaker Road and Oak Hill Road was also discussed by the Assistant City Planner, Concord City Councilors and the members of the Concord Conservation Commission in their pre-filed testimony and during the hearing. *See, generally*, Tr. 11/16/17 (Day 60PM). Similarly, the Town of Canterbury has raised concerns in its petition relative to the concern that the proposed transmission line will cross two major entry points (at Exit 17 and 18) which serve as the gateway to its town center. Town of Canterbury Petition to Intervene at ¶2. The lack of designation does not mean that the public highway is not a “scenic drive and ride” that must be analyzed under the Site Evaluation Committee’s rules.

c. There Are A Large Number of Scenic Resources That Will Have Unreasonably Adverse Impacts

The Project’s impacts on aesthetics in New Hampshire are unreasonable, and the Applicants’ justification for being unable to lower the proposed heights in several locations is not a valid basis for approving the Project. There are a number of scenic resources that were identified and discuss in detail during the proceeding. The following provides just two examples:

Bethlehem

In the Town of Bethlehem, Mr. Dewan identified three separate scenic resources that would be impacted by the Project. Those scenic resources are: (1) the Presidential Range Trail Scenic Byway; (2) River Heritage Trail Scenic Byway; and (3) Baker Pond. The Byways are located along Route 302, which is a state designated scenic and cultural byway. Baker Pond is a publicly accessible water body that is located near the existing corridor and the proposed site of Transition Station #5. App. 1, Appx. 18, 2-59 (Resources 1, 2, 22); App. 201, Sheet 76.

There are two towers that are planned to bring the DC line into Transition Station #5. App. 201, Sheet 76. The two towers in question are DC-694 and DC-695, and they have proposed heights of 105 and 95 feet, respectively. *Id.* As explained by the Town of Bethlehem, the towers are proposed to be “located at the entrance to our Town on Route 302 and will dominate the landscape in a way we are very concerned will adversely affect the perception of our Town.” Jt. Muni. 89 at 2.

The visual impacts that are proposed by the Project are unreasonable. Bethlehem is located in the Ammonoosuc River Valley of the White Mountains and enjoys spectacular, unspoiled views of the Presidential Range. *See* Bethlehem Petition to Intervene, January 29, 2016, at 1. Route 302 is one of the major east-west “highways” in northern New England and is one of the primary access point to Bethlehem as well as the route tourists travel when exiting 1-93 at Exit 40 on their way to The Rocks, the Mt. Washington Hotel, the Bretton Woods ski area, and Cannon Mountain. *Id.* Route 302 also serves as the “Main Street” of Bethlehem. *Id.* The Project towers in this location will result in an unreasonably adverse impact to the aesthetics of the town as the towers and transition station will unreasonably impact the views of the Presidential Range, surrounding White Mountains, and Ammonoosuc River Valley.

Transition Station # 5 is also problematic for the town, and the Town strongly disagrees with Mr. Dewan’s analysis of the three scenic resources in this area. Mr. Dewan ranks the visual impact as “medium” for all three of these resources, but his analysis is based upon flawed information. App. 1, Appx. 18 at 2-59 (Resources 1, 2, 22). Mr. Dewan states that visibility of the towers and transition station will be about 14 seconds for vehicles traveling at 50 mph on Route 302. App. 1, Appx. 18 at 2-59. Ms. Laleme corrected this assertion, stating that it is in fact a 40 mph zone, and also that several citizens have indicated an intent to petition the State of

New Hampshire to decrease that speed limit to 30 mph. Jt. Muni. 90 at 3. At lower speeds, the towers and transition station will be visible for a longer period of time. Jt. Muni. 90 at 3. Mr. Dewan also admits to not knowing the uses of Baker Pond. App. 1, Appx. 18, 2-69. Ms. Laleme states that Mr. Dewan could have easily learned that information if he had merely asked the town. Jt. Muni. 90 at 3. Past and current uses of the Baker Pond are fishing and small boating, and there are currently efforts underway to renovate and redevelop the Baker Brook development which utilizes in part the Baker Pond. Jt. Muni. 90 at 3. Lastly, the Baker Pond is directly across from the overhead towers and the proposed location of Transition Station #5, and Ms. Laleme is doubtful, to say the least, that vegetative screening will be effective to mitigate the visual impact of 95 and 105 foot towers, and a transition station that contains elements that are 95 feet high as well. Jt. Muni. 90 at 3. Such plantings, to the extent they are effective at all in mitigating these visual impacts, will take years to reach full growth.

### Deerfield

Mr. Dewan and Ms. Kimball found that the Project would not have unreasonably adverse effect on the historic Deerfield Town Center. *See* Dewan Visual Impact Assessment, App. 1, Appx. 18 at 6-21, 6-26 (Resource 18). Mr. Dewan's opinion regarding the Project's impact for the Deerfield Historic Center resource is erroneous because he failed to follow his own methodology and relied upon a photo simulation and key observation points that did not show the maximum extent of Project visibility. Mr. Dewan's visual impact assessment ("VIA") methodology states that "[t]he evaluation of each scenic resource is based upon an assessment of views from key observation points (KOPs)," and KOPs are then defined as a "publically accessible location in or adjacent to a scenic resource" where "the largest number of transmission structures...would be potentially visible. . . ." App. 1, Appx. 18 at M-10, Sec. 6.1. When



determining where within a “scenic area” to locate a KOP, Mr. Dewan’s methodology required him to find a place where “...the greatest number of structures are likely to be visible.” App. 1, Appx. 18 at M-10, Sec. 6.2. In testimony before the Subcommittee, Mr. Dewan claimed that the KOP’s are first identified by viewshed mapping, but then field verified by site visit and by reviewing other sources such as town plans. Tr. 9/12/17 (Day 32AM) at 125. Mr. Dewan stated that when on field visits to investigate a scenic resource and how the Project may impact it, he and Ms. Kimball “look at changes in visibility. We try and assess where the Project might be most visible from,” and for scenic areas, “...we then select a point within that area to represent the entire scenic resource.” Tr. 9/12/17 (Day 32AM) 126, 128. The selection of KOP’s are critical to the VIA, as the photo simulations for each scenic resource are created from these KOP’s, App. 1, Appx. 18, at M-11, Sec. 7.1, and the visual assessment of impact on each scenic resource is then based, in part, on the “[p]hotosimulation(s) of the view from/of the scenic resource that illustrate the effect of the NPT project.” App. 1, Appx. 18, at M-12, Sec. 8.

In testimony before the Subcommittee, Mr. Dewan admitted that the KOP and corresponding photosimulation for the Deerfield Town Center was not a location where the Project was most visible, as required by his own methodology. Tr. 9/12/17(Day 32AM) at 141. This omission and lack of consideration of locations within the district where the Project was most visible extended to Mr. Dewan’s determination of the “Overall Visual Impact: Low-Medium” for this resource. In that section of the visual impact assessment for this resource, Mr. Dewan provides bullet points to support his conclusion of low-medium overall visual impact, and the second bullet describes the areas of greatest visibility of the Project as being “outside the historic district,” which is contrary to his testimony mentioned above. App. 1, Appx. 18 at 6-27.

The impact of Mr. Dewan's omission in his KOP's and photosimulations of where the Project is most visible is not speculative. The Subcommittee need only review the visual impact assessment of either or both of TJ Boyle on behalf of Counsel for the Public, or Harry Dodson on behalf of the Forest Society. Both of those respective experts identified the problematic nature of the Project's visual intrusion into this district and found the resulting impact to be unreasonably adverse. More specifically, TJ Boyle described the Project's impact on this resource as "...unreasonably high due to the height and industrial character of the proposed 345kV structure when compared with the existing historic character and sense of place." CFP 139, Supp. Appx. F-90-91; CFP 138, Appx. F at E-55 through E-60. In addition, Mr. Dodson stated in both his original and supplemental visual impact reports that "[t]he project is in full view of the historic church, the scenic byway and the town green, and is prominent in the foreground of the view," and then later concluded that "[t]he high visibility and scale of the project immediately adjacent to a unique scenic and historic resource will result in a high overall visual impact." SPNF 69, Appx. A at 75-77; SPNF 69 at 62-67.

## **2. Unreasonable Adverse Effects - Historic Sites**

In order to issue a certificate to the Applicants, the Subcommittee must determine that the proposed energy facility will not have an unreasonable adverse effect on historic sites in the region. RSA 162-H:16, IV(a). The Site Evaluation Committee rules set forth five factors that the Subcommittee is required to consider, which are:

- (1) all of the historic sites and archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources;
- (2) the number and significance of any adversely affected historic sites and archeological resources, taking into consideration the size, scale, and nature of the proposed facility;

- (3) the extent, nature, and duration of the potential adverse effects on historic sites and archeological resources;
- (4) findings and determinations by the New Hampshire Division of Historical Resources of the Department of Cultural Resources and, if applicable, the lead federal agency, of the proposed facility's effects on historic sites as determined under Section 106 of the National Historic Preservation Act, 54 U.S.C. §306108, or RSA 227-C:9; and
- (5) the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resources, and the extent to which such measures represent best practical measures.

See N.H. Admin. Rules, Site 301.14 (b)(1)-(5). These administrative rules, which were first adopted effective December 16, 2015, make it abundantly clear that the findings and determinations of the New Hampshire Division of Historical Resources (“DHR”) and the Department of Energy (“DOE”) under the Section 106 process *are only one of the five factors that must be considered by the Subcommittee*. Accordingly, the Applicant’s reliance on delegation to the DHR and the Section 106 process that may have been utilized by the Site Evaluation Committee in previous decisions is no longer permissible or adequate under the law. The determinations of DHR and the DOE in the Section 106 process only address whether there will be an adverse effect to a historic site, and it is not their role to determine whether the effect is “unreasonable.” That determination must be made solely by the Site Evaluation Committee.

It is also inappropriate for the Subcommittee to defer or delegate a determination on whether the impacts to historic sites will be unreasonable based on the potential for avoidance, minimization and mitigation that will ultimately be required by DHR and the Department of Energy in the Section 106 process. The Applicants have asserted during the adjudicatory hearings, both during examinations of their own witnesses and cross-examination of other witnesses, that because the identification and evaluation of historic resources with the DHR and

Section 106 is an “iterative” process, and decisions on avoidance, minimization and mitigation have not yet been determined, it would be appropriate to have continued consultation with DHR to assure that the construction and operation of a facility will not be unreasonably adverse. Tr. 9/28/17 (Day 41PM) at 22-23, 58-63; Tr. 11/2/17 (Day 54PM) at 33-34; Tr. 12/18/17 (Day 68PM) at 197-201.

In support of their request for delegation, the Applicants have relied on the decision in *Application of Groton Wind, LLC*, SEC Docket 2010-01, which was issued May 6, 2011. In that matter, Counsel for the Public argued that the Applicant failed to meet its burden of proof because the proposed wind farm would not have an unreasonable adverse effect on historic sites because the process of identification and evaluation was still ongoing and there was insufficient information to determine whether any impact would be adverse. *See* Order dated May 6, 2011 at 54-55. DHR had notified the Subcommittee that the project areas forms were initially deficient and failed to provide a “well-researched document to act as a solid basis of information.” *Id.* at 54. DHR subsequently received an acceptable project area form, but was unable to provide input on impacts to historical resources because their review had not been completed. *Id.* For that reason, DHR was unable to provide input on impacts to historic resources before the Site Evaluation Committee’s decision was issued.<sup>34</sup> *Id.* Over Counsel for the Public’s opposition, and without any analysis of the specific above-ground historic resources that would be affected, the Site Evaluation Committee in that docket nonetheless determined that the proposed facility would not have an unreasonable adverse effect on historic sites on the basis that DHR would be monitoring the project. *Id.* at 54-57. This decision was never appealed.

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<sup>34</sup> The letter from DHR is a matter of public record, and is available on the Site Evaluation Committee’s website at [https://www.nhsec.nh.gov/projects/2010-01/documents/110201nhdhr\\_evaluation.pdf](https://www.nhsec.nh.gov/projects/2010-01/documents/110201nhdhr_evaluation.pdf). This letter makes it clear that a number of properties still needed to be surveyed.

The Groton Wind project is easily distinguishable because this project is much larger and does not involve the construction of a wind farm in an isolated location, but instead involves a 192-mile proposed transmission line that will have numerous impacts in both the overhead and underground sections of the route. The Referenced Municipalities also respectfully contend that the delegation that occurred in Groton Wind is not good precedent and/or advisable due to the legal issue of whether the Site Evaluation Committee improperly delegated its obligation to evaluate whether there would be unreasonable impacts to overhead historic resources.<sup>35</sup> The decision in Groton Wind also only has a limited bearing on the Subcommittee's decision in this matter because it was issued before the administrative rules were amended. N.H. Admin. Rules, Site 301.14(b) now makes it clear that the Subcommittee must make its own finding of unreasonable adverse impacts, and that the findings and decisions of DHR and the DOE in the Section 106 process is only one of five factors that must be considered.

While it is anticipated that this procedural issue will be more fully developed in the briefs of other parties, a general overview of the information that remains lacking includes identification of *all* of the historic sites and archeological resources potentially affected, as well as whether there will be an adverse effect to those resources. By way of example, there is no dispute that the archeological review of the human remains likely to be encountered on Old County Road in Stewartstown has still not been completed, and therefore, there is insufficient information to make a finding of "all of the . . . archaeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources." N.H. Admin Rule, Site 301.14(b)(1). There have also been questions raised by a number of witnesses about whether the methodology used by the Applicants' consultants to analyze historic

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<sup>35</sup> The Site Evaluation Committee was able to determine from completed archeological surveys that the project would not pose any significant impacts to archeological resources. Order dated May 6, 2011 at 53.

sites is unlawfully narrow under N.H. Admin. Rule, Site 102.23, which provides the definition of “historic sites.” For example, the cultural landscape form provided no study area for the area between Franklin and Concord. Tr. 10/27/17 (Day 53PM) at 103-04; CFP 143 at 12. While this may have been adequate for the Section 106 process, it is not adequate for the review by the Site Evaluation Committee. Patricia O’Donnell, the cultural resource expert for the Counsel for the Public, explained that there are likely cultural resources in that area that have not been studied and which are relevant for the Site Evaluation Committee’s review. Tr. 10/27/2017 (Day 53PM) at 105-06.

There is also insufficient information to make a finding of whether the project will have an unreasonable adverse effect on historic sites due to “the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic sites and archaeological resource.” N.H. Admin. Rule, Site 301.14 (b)(5). DHR recently completed its preliminary review of the overhead historic sites that will be adversely affected. *See* Correspondence from DHR dated December 21, 2017 (Findings of Effects). There has been no information provided to date, however, regarding the measures that are proposed by the Applicants to “avoid, minimize, or mitigate” the unreasonable adverse effects on all of those specifically identified sites.

The fact that there is a Programmatic Agreement is insufficient for the Site Evaluation Committee to assess the proposed avoidance, minimization and mitigation efforts, because that agreement is simply “an agreement to make more agreements.” App. 204; Tr. 9/28/17 (Day 41PM) at 49. For example, the Historic Property Treatment Plan which governs operations and maintenance and construction of the proposed Project has not yet been developed. Tr. 9/28/17 (Day 41AM) at 12-13, 24-25, 42; Tr. 9/28/17 (Day 41PM) at 26-27. Similarly, the Resolution of

Adverse Effects which governs the manner in which avoidance, minimization and mitigation of adverse effects will be undertaken, has not been identified in the Programmatic Agreement. Tr. 9/28/17 (Day 41AM) at 34-36, 43; Tr. 9/28/17 (Day 41PM) at 25-26. The Programmatic Agreement also does not contain a process or protocol for dealing with human remains, which as discussed during the adjudicatory hearing, there is a high likelihood of encountering in Stewartstown along Old County Road. Tr. 8/31/17 (Day 30PM) at 13-14; Tr. 9/28/17 (Day 41AM) at 38; Tr. 11/2/17 (Day 54PM) at 153-55; Tr. 12/14/17 (Day 67PM) at 43-45. It is also significant that, although Ms. Widell claimed confidence in the Section 106 process, she has “no role specifically in the Programmatic Agreement.” Tr. 9/28/17 (Day 41AM) at 55.

During the adjudicatory hearing, Ms. Widell attempted to make an end-run around the requirements set forth in N.H. Admin. Rule, Site 301.14(b)(5) by asserting that the Applicants are not obligated to present evidence to the Site Evaluation Committee on specific plans to avoid, minimize or mitigate any adverse effects to historic sites, because none of the adverse effects have been deemed by her to be “unreasonable.” Tr. 9/28/17 (Day 41AM) at 59-61. This argument is unavailing because the methodology she utilized to determine whether an adverse effect to a historic site would be “unreasonable” was improper.

Instead of analyzing each historic site on a location-by-location basis, Ms. Widell diluted her opinion of whether the project would result in an unreasonable adverse impact to historic sites by reviewing the adverse impacts *and then comparing them to the size of the entire 192-mile route*. In other words, the bigger the project, the less likely that adverse effects identified to historic sites along the route could ever be deemed “unreasonable.” This methodology has not been utilized by the Site Evaluation Committee in the past when considering whether adverse effects are unreasonable, and certainly, this is not the proceeding to be creating new precedent.

*See, e.g., Application of Antrim Wind, LLC*, SEC Docket 2012-01, Decision dated April 23, 2013 at 53 (determining that proposed facility would not only have unreasonable adverse impact on regional setting, but also would create unreasonable effects to a particular scenic resource); *Amended Application of Portland Natural Gas Transmission System*, SEC Docket 1996-01 and 1996-02, Decision dated July 16, 1997, at 18-19 (determining that a 100 mile pipeline would create unreasonable adverse effects to aesthetics due to a section in the Town of Shelburne, and therefore, required rerouting).

Here, there are a number of adverse effects to historic sites and archeological resources that the Applicants have claimed cannot be further avoided or minimized. The DHR identified two archeological resources and thirty-seven architectural/above-ground resources that will be adversely impacted by the proposed energy facility. *See Correspondence from DHR dated December 21, 2017 (Findings of Effects)*. Some of these resources are located in areas near or along the overhead section of the proposed route, and include the Rocks Estate in Bethlehem, Windswept Farm in Canterbury, Maple View Farm and Oak Hill Agricultural District in Concord, 47 Candia Road and the Deerfield Center Historic District in Deerfield and the Weeks Estate in Lancaster. Several of these locations were specifically identified by the Referenced Municipalities in the section on orderly development. The fact that the DHR has now rendered an opinion that these locations include historic sites that will suffer adverse effects only underscores the unreasonableness of the proposed project.

It should be noted that there is a disagreement between Ms. Widell and others regarding whether some of the historic sites identified by DHR will be adversely impacted. In the following two examples, Deerfield Center Historic District and Nottingham Road, Ms. Widell incorrectly concluded each would not have any adverse effects, let alone unreasonably adverse



effects. *See* CFP 438 at 2, Deerfield Center Historic District Effects Table; CFP 437, Nottingham Road Effects Table. As explained below, Ms. Widell's analysis and ultimate opinion were flawed and, therefore, should not be given much weight by the Subcommittee. More specifically, she ignored or severely underestimated the impact of the Project's intrusion on the character defining features of these historic resources. Each are discussed further:

Deerfield Historic District: During the adjudicatory hearing, Ms. Widell stated that she did an assessment of the visual impact of the visibility of structures outside of the Deerfield Historic District, but opined that the views of the Project from within the district were "not character defining features which contribute to the significance of the Deerfield Center Historic District." Tr. 8/29/17 (Day 28PM) at 97. She based her opinion, in part, on a photo simulation of the Project created by Mr. Dewan as part of his visual impact assessment. Ms. Widell acknowledged on cross-examination that the photosimulations created by Mr. Dewan for Deerfield Center were not an accurate depiction of the Project because the nearby vegetation would only screen the view of the Project from a finite location and amount of time within the district. Tr. 8/29/17 (Day 28PM) at 103-08.

Ms. Widell also admitted that the Project towers visible from the Deerfield Center Historic District would be silhouetted against the sky, would rise above the roofline of the Deerfield Community Church and the existing vegetation by some 30-40 feet.<sup>36</sup> Tr. 8/29/17 (Day 28PM) at 105-06. When questioned about how such an intrusion would not create an unreasonably adverse impact on the Deerfield Historic District, Ms. Widell explained that the District already contained a modern intrusion when it was nominated to the national registry, *i.e.*

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<sup>36</sup> She also acknowledged that because the amount of pole rising above the roof would be 30-40 feet, it would be essentially like adding a typical wooden distribution pole to the roofline of the building. Tr. 8/29/17 (Day 28PM) at 105-06.

the typical wooden utility distribution poles that are present in the district, and that she equated the Project's intrusion to that of the 43 foot high distribution poles that presently exist within the district. Tr. 8/29/17 (Day 28PM) at 131-34. Her explanation for equating the impact of 43 foot tall wooden distribution poles with a 130 foot high steel structure that rises above rooflines and vegetation by a comparable 43 feet, is that the Project would not impact the significance of the *architecture* of the district. Tr. 8/29/17 (Day 28PM) at 134.

Ms. Widell's response not only lacks credibility, but it also ignored the need to address the significance associated with the district's listing in the National Register of Historic Places under Criterion C in the area of Community Planning and Development. CFP 438 at 3, Deerfield Center Historic District. That analysis would have required a further review of the visual impact of the Project from within the entire district because the Community Planning and Development criteria is more susceptible to impact as a result of visual intrusions. This impact was not addressed by Ms. Widell in her analysis.

D. Scott Newman, a historic resources expert retained by the Deerfield Abutters, also disagrees with Ms. Widell. Mr. Newman concluded that "the new towers would extend well above the tree canopy, be backdropped by the sky and horizon in many instances, and loom over the historic district in a way that substantially degrades its scale, aesthetics, and integrity." DFLD-ABTR 46 at 2, Newman December 2016 Testimony. In applying the SEC criteria under N.H. Admin. Rule, Site 301.14(b) for determining unreasonably adverse impacts on historic sites, he stated: "[t]he size of the project is massive: with increased heights, footprints, and widths of proposed infrastructure completely at odds with the character of the affected Deerfield village center, and rural historic district." DFLD-ABTR 46 at 8.

Nottingham Road District: Similar to DHR, Mr. Newman also disagreed with Ms. Widell's opinion that there would be no adverse effect on the Nottingham Road Historic District. CFP 437. Mr. Newman concluded in his pre-filed testimony submitted on December 30, 2016 that this area would have an unreasonable adverse impact. The DHR subsequently expanded the size of the historic district, which resulted in the Project physically bisecting the historic district. DFLD-ABTR 47, at 2. As a result of the expansion of the boundaries, Mr. Newman presented supplemental pre-filed testimony explaining that: "The significance of the District lies in its historic patterns of local agricultural use with farmhouses, barns, and open fields conveying the intact integrity of this rural area. The proposed installation of metal towers up to 140 feet with suspended high tension wires 'cutting through' the Historic District clearly and severely degrades these characteristics that qualify the Nottingham Road District for the National Register of Historic Places." DFLD-ABTR 47 at 2.

Mr. Newman also updated his previous analysis of the requirements of N.H. Admin. Rule, Site 301.14, explaining:

The size, scale, and nature of the proposed industrial scaled transmission line are an even greater unreasonable adverse impact considering its proposed physical location within the boundaries of the Historic District. The effect of the massive, linear cut through the District will directly and adversely impact the District by visually splitting the district into two separate components.

...

The extent and nature of the effect are exponentially greater than initially determined given the direct, physical, and adverse effects of dividing the Nottingham Road Historic District. Screening mitigation has no impact on this effect given the location of the towers within the district boundaries.

DFLD-ABTR at 2-3. Mr. Newman's opinion demonstrates the obvious impact that will result from the Project bisecting the Nottingham Road Historic District, namely, that the defining

characteristics of this resource will be compromised by the Project, which will result in an unreasonably adverse impact.

In addition to the architectural/above-ground resources, there will also be unreasonable adverse impacts to archeological/below-ground resources. For example, one of the archeological resources that will be adversely impacted is located in Concord [REDACTED]

[REDACTED], and Northern Pass now claims that it cannot be avoided. App. 108(a)

(Confidential).<sup>37</sup> [REDACTED]

[REDACTED]

Tr. 8/29/2017 (Day 28PM) at 189. This particular site is significant and eligible for listing on the National Register of Historic Places. App. 108(a) [REDACTED]

[REDACTED]

There has been no information presented to the Site Evaluation Committee regarding proposed mitigation for this site, and it should also be noted that the Applicants did not introduce any evidence into the record that they attempted to avoid the site by acquiring additional right-of-way on adjacent parcels, or avoiding the area altogether. [REDACTED]

[REDACTED]. As discussed during the adjudicatory hearings, [REDACTED] has taken significant measure to protect the integrity and landscape of the area, and both of those areas are discussed in the master plan as being important areas to protect. [REDACTED]

[REDACTED] When considering all of the archeological, aesthetic, historic and other impacts that will occur to that area as a result of

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<sup>37</sup> The Referenced Municipalities have not reviewed App. 108(a) - Confidential because they are required to review the documents in the format as provided to DHR, and therefore, they are unable to provide a more specific reference. The Site is referenced in the confidential Phase II archeological reports as [REDACTED].

this proposed project, there should be no question that the impacts are unreasonable and the project should be denied unless they can be avoided.

Finally, the Applicants will likely assert that mitigation measures required in the Section 106 process will sufficiently address the adverse impacts. Any such assertion is disputed. The Section 106 process, which includes DHR's involvement, is not responsible for determining whether an adverse impact is unreasonable, and it also does not have the power to deny a proposed project based on the adverse impacts. Rather, its sole responsibility is to require avoidance and minimization, and where not possible, to agree on some "mitigation" measure as a last resort. The mitigation of adverse effects under the Section 106 can involve academic projects and public education programming, to name a few. See Correspondence from DHR dated December 21, 2017 (Findings of Effects). While a report or school programming is a nice gesture, there should be no dispute that it does not remedy the permanent scar that will be left on the adversely affected historic properties in the identified communities. For that reason, the Site Evaluation Committee needs to specifically review the proposed mitigation to the historic site to determine whether it would reasonably resolve the unreasonable adverse effects. The Referenced Municipalities dispute that mitigation is a satisfactory measure to address the impacts to the historic sites. Nonetheless, until a review of the proposed measures can be thoroughly conducted by the Site Evaluation Committee, the Project should not be approved.

### **3. Unreasonable Adverse Effects - Water Quality and the Natural Environment**

The Applicants have failed to meet their burden of proof to demonstrate that the proposed project will not have an unreasonable adverse effect on water quality and the natural environment, as required by RSA 162:H:16, IV(c) and N.H. Admin. Rules, Site 301.14(d-e). The Applicants have repeatedly suggested throughout the proceedings that they have satisfied

their burden of proof based on the information they have provided and the determinations received from state and federal agencies. Those determinations are insufficient to meet the Applicant's burden of proof. As the record currently stands, there is insufficient information to determine the full impact on wetland resources proposed by the Applicants.

New Hampshire Administrative Rules, Site 301.14(d) is clear that the finding of whether a proposed energy facility will have an unreasonable adverse impact on water quality shall be based on determinations of the New Hampshire Department of Environmental Services, the United States Army Corps of Engineers and other state and federal agencies, *as well as* other relevant evidence submitted pursuant to Site 202.24. New Hampshire Administrative Rules, Site 301.14(e) further states that the findings of whether a proposed energy facility will have an unreasonable adverse effect on the natural environment requires consideration of seven factors, *only one of which* is the analysis and recommendations of applicable state and federal agencies. As such, the receipt of a favorable decision or recommendation from a state or federal agency is not the ultimate determinant of the inquiry.

a. Wetlands and Vernal Pools

There are several concerns regarding impacts of wetlands and vernal pools raised by Counsel for the Public and the intervenors, including whether: (1) wetlands and vernal pools are adequately delineated; (2) permanent wetlands impacts are being properly identified; and (3) the impacts to wetlands and vernal pools are unreasonable. Those concerns are discussed as follows.

i. Delineation:

There was significant evidence presented by the City of Concord and that the consultants hired by the Applicants failed to properly delineate all of the wetlands and vernal pools. The expert hired by the City of Concord, Dr. Van de Poll, made an initial determination based on a

careful review of color infrared aerial photography that there are a number of errors on the October 2015 Wetland Permit Application filed with the NH Department of Environmental Services by Normandeau Associates, Inc. (“Normandeau”). Jt. Muni. 142 at 4. These errors include the failure to adequately identify all wetlands and vernal pools within the City of Concord. *Id.*

The Applicants unsuccessfully attempted to discredit Dr. Van de Poll’s findings based on his initial use of color infrared aerial photography, however those efforts were unpersuasive. Dr. Van de Poll explained that the use of infrared aerial photography provides a best initial approximation of potentially-impacted wetlands that should then be field checked. Tr. 12/21/17 (Day 70AM) at 46-47. Dr. Van de Poll utilized infrared aerial photography to identify errors at 38 different areas shown on the wetland maps in Concord. Jt. Muni. 142 at Ex. B, attached thereto. Dr. Van de Poll subsequently field checked six of the areas (first in the winter months, and then during the growing season), and as he explained during the adjudicatory hearing, the results of the field survey showed that “five out of the six initial sites that I thought were wrong were in fact wrong.” Tr. 12/21/17 (Day 70AM) at 17. Significantly, even in the area of Sanborn Road, which was the only site where Dr. Van de Poll’s field work confirmed there would not be any further impacts resulting from construction, he still noted that the delineations of the wetlands on the map were incorrect. Tr. 12/21/17 (Day 70AM) at 59-60.

There is no dispute that Dr. Van de Poll is a well-respected wetland scientist, and that he understands how to delineate wetlands. Tr. 6/20/17 (Day 18PM) at 115; Tr. 12/21/17 (Day 70AM) at 29. He applied the same wetland delineation methodology as the Applicants’ consultants, and conducted two separate field tests to document wetlands and wetland impacts that were unaccounted for by the Applicants. The findings and opinions of Dr. Van de Poll are

sufficient to conclude that the Applicants' wetland delineations are inaccurate both in Concord and likely elsewhere along the proposed route. It is significant that although other municipalities may have had concerns about the delineation, but it is often cost prohibitive for some of the small towns to hire consultant to address.

Furthermore, in addition to errors with the wetland delineations, it is undisputed that the wetland maps submitted by the Applicants failed to identify a vernal pool at a location near Maplewood Farm on Shaker Road. Tr. 6/20/17 (Day 18PM) at 117-23; Tr. 11/16/17 (Day 60AM) at 116-17; Jt. Muni. Exs. 214, 215 and 309. Dr. Van de Poll initially identified the vernal pool using the aerial photographs, and subsequently confirmed the location of the vernal pool during the growing season using the State's definitional guidelines (Env-Wt Chap 100.75 & 100.86). He further confirmed that one of the poles that needs to be relocated was located *within* (not adjacent) to inundated portion of the vernal pool. Tr. 11/16/17 (Day 60AM) at 116-17, 119-22; Jt. Muni. 309. During cross-examination, Lee Carbonneau, the consultant hired by the Applicants to provide an assessment of the potential effects of Northern Pass on wetland resources, agreed that she "would have no doubt that he [Dr. Van de Poll] knows how to identify a vernal pool." Tr. 6/20/17 (Day 18PM) at 117-23.

It is concerning that, despite significant and persuasive evidence submitted by a well-respected wetland scientist hired by the City of Concord, the Applicants failed to take measures to verify the accuracy of their wetland delineations and/or the location of the vernal pool in Concord (or for that matter, elsewhere along the proposed route). The lack of thoroughness and diligence raises questions about the reliability of all of the Applicants' wetlands delineations. In an apparent attempt to justify their failure to recheck the wetland delineations as a result of Dr. Van de Poll's findings, the Applicants suggested during the cross-examination of Dr. Van de Poll



that they were unaware that he had conducted additional field work during the growing season to confirm his concerns. Tr. 12/21/17 (Day 70AM) at 29-31. That argument should be rejected. During the cross-examination that occurred on June 20, 2017, the consultants for the Applicants were notified that Dr. Van de Poll had conducted this additional field work during the growing season and had confirmed his concerns. Tr. 6/20/17 (Day 18PM) at 122-26; Tr. 12/21/17 (Day 70AM) at 61.

The Applicants also suggested during the cross-examination of Dr. Van de Poll that they could not verify the errors because they could not identify the specific locations and/or did not have photographs of the areas that he identified. Tr. 12/21/17 (Day 70AM) at 16, 27-30. Those arguments are also unavailing. Dr. Van de Poll provided a spreadsheet that was attached to his supplemental pre-filed testimony filed on April 17, 2017 that detailed the specific structures and locations where his review indicated that impacts to wetlands had been missed. Jt. Muni. 142 at 3-4 and Ex. B, attached thereto. Although Dr. Van de Poll was criticized during cross-examination for not providing hard copies of all of the photographs that he reviewed, he explained that during discovery he provided information about where to locate the photographs, and it would be “very easy” for somebody familiar with wetlands to locate the photographs that he referenced. Tr. 12/21/17 at 58. Finally, any requests for further information could have been informally or formally made to the City of Concord.

The Applicants also suggested that Dr. Van de Poll’s concern might be overstated because the Army Corps of Engineers had checked some of the wetlands in Concord, as well as because other consultants hired by municipalities had also verified the delineations. Tr. 6/20/17 (Day 18AM) at 121. That argument is also insufficient to discredit Dr. Van de Poll’s concerns. With respect to the Army Corps of Engineers, Dr. Van de Poll explained that the Army Corps

does not generally conduct a delineation of wetlands when checking a site, and he had not seen anything in the record regarding the methodology that the Army Corps of Engineers used to check the wetlands. Tr. 12/21/17 (Day 70AM) at 13, 47-78. Dr. Van de Poll explained that he has worked on a number of projects with the Army Corps of Engineers in the past, and it generally entails just a “walk-through” without the use of soil augers or plant calculations. Tr. 12/21/17 (Day 70AM) at 56-57.<sup>38</sup> Moreover, there are approximately seventy wetlands along the proposed corridor in Concord, and out of those, less than ten wetlands were “checked” by the Army Corps. App. 199 at 67064-120 (Sheets 595-614).

With respect to consultants retained by other municipalities, those reports are also insufficient to discredit Dr. Van de Poll’s opinion. During cross-examination of Dr. Van de Poll, it was represented by Attorney Walker that Elise Lawson and John Severance issued reports for the towns of Bethlehem and Northumberland in which they concluded that the wetland delineations for those municipalities were accurately delineated and documented by Normandeau. Tr. 12/21/17 (Day 70AM) at 32. To the contrary, the report for Northumberland made the conditional statement that “based on previous field work and review of submitted maps, it appears that wetlands were accurately delineated and documented.” Jt. Muni. 91, Appx. A at 6. Later in their report, the consultants note that one of their concerns about vernal pools in Northumberland was that “[s]ome may have been missed, or more likely the reported size and impact area could be incorrect.” *Id.* at 12. Moreover, as discussed in their 2006 Functional Assessment of Wetlands, it is clear that their “previous field work” involved only a review of six wetland complexes in Northumberland. Jt. Muni. 91, Appx. B at 6.

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<sup>38</sup> Moreover, to the extent that a wetland was completely missed, such as the location on Appleton Street, the Army Corps of Engineers would not have checked that area. Tr. 12/21/17 (Day 70AM) at 57.

Similarly the report for Bethlehem states that “[b]ased on our field assessment and review of submitted maps, wetlands were accurately delineated and documented.” Jt. Muni. 96, Appx. A at 5. However, in the report, they note that their field assessment consisted of walking the right-of-way, and they did not perform any delineation of wetlands and/or give the wetlands a functional assessment. *Id.* at 2-3. They also noted that vernal pools were not documented during their field work, and similar to Northumberland, stated that “[s]ome may have been missed, or more likely the reported size and impact area could be incorrect.” *Id.* at 2-3, 9. As such, in Northumberland and Bethlehem, it is clear that the work by the consultants only involved a “walk through” and a review of field work that had been performed on a fraction of the wetlands along the route. As such, the opinion of those consultants does not demonstrate that the wetland delineations performed by Normandeau are accurate. Tr. 12/21/17 (Day 70AM) at 18.

When asked whether the Applicants had any plans to reinspect the sites identified by Dr. Van de Poll, the response was that there were no immediate plans because the Department of Environmental Services would require the wetland boundaries to be delineated again before construction. Tr. 6/20/17 (Day 18PM) at 122. This statement is concerning. As explained by Dr. Van de Poll, he was “not very comfortable at all” with having the Site Evaluation Committee rely on that condition. Tr. 12/21/17 (Day 70AM) at 61. Dr. Van de Poll explained that wetlands are difficult to delineate during the winter months unless the conditions are suitable, and therefore, to the extent that construction occurs during that timeframe, a valid delineation would not be able to occur. *Id.* Moreover, the Applicants should not be permitted to adopt a wait-and-see approach in the face of strong evidence that wetlands and vernal pools were missed. The Site Evaluation Committee has a statutory obligation to assess the full impacts on wetlands, and it is the Applicants’ burden to demonstrate that the impacts to water quality and the natural

environmental will not be unreasonably adverse. To the extent that the Applicants have represented throughout the proceedings that the application involves an “iterative” process of planning, and that they are open to communications to address the concerns of municipalities, it is unacceptable that they are turning a blind eye to the legitimate concerns raised by Dr. Van de Poll.

Finally, as discussed by the members of Concord’s Conservation Commission, as well as Dr. Van de Poll, Concord has wetland buffer ordinance that requires a conditional use permit to disturb the buffer. Tr. 11/17/2017 (Day 60PM) at 31-32; Jt. Muni. 319 at 63-65 (Section 28-4-3). Depending on the amount of permanent impact to the buffers, Concord has required the conservation of a large portion of wetlands off-site within its limits as mitigation to the buffer impact. Tr. 11/17/2017 (Day 60PM) at 32. This requirement is separate and distinct from the conditions that are imposed by the Department of Environmental Services, and the zoning ordinance is one of the many items that the Site Evaluation Committee needs to take into consideration as part of its orderly development analysis. Tr. 11/17/2017 (Day 60PM) at 32-36, 154-55, 203-06, 241. This ordinance is important because the City of Concord’s Conservation Commission will “look at the buffers as much as the temporary and permanent impacts.” Tr. 11/17/2017 (Day 60PM) at 206. The failure to adequately delineate wetland resources, which includes wetland buffers, contradicts the Applicants position that they have accurately completed this basic and necessary task for the Subcommittee to evaluate the Application. As the record currently stands, there is insufficient information to determine the full impact on wetland resources proposed by the Applicants, as well as whether conditions that should be imposed in the unfortunate event the application is granted.

ii. Temporary versus Permanent Impacts

A large number of intervenors, including several municipalities such as Deerfield, Bethlehem and Pembroke have raised concerns that the very large number of wetland impacts that have been identified by the Applicants as “temporary” are actually permanent impacts.

With respect to the total number of wetland impacts that should be considered “permanent” rather than “temporary,” there was approximately 720 square feet identified by Dr. Van de Poll in Concord that should have been identified a “permanent” rather than “temporary” impacts. These locations involved areas in which utility poles, construction pads and access roads were being placed. Jt. Muni. 141 at 2-3; Jt. Muni. 142 at 5-7 and Ex. B, attached thereto. Dr. Van de Poll explained that these areas could not be defined as “temporary” because there would be long-term impacts to “wetland functions that have been identified by the Army Corps of Engineers as being pertinent to the adequate functioning of a wetland system.” Tr. 11/16/17 (Day 60PM) at 39-40. These issues include areas where even several years after the construction the flood storage still has not returned or groundwater discharge by a brook has not returned after the placement of a tower. Tr. 11/16/17 (Day 60PM) at 40. Other long-term impacts to wetland functions involve effects to wetland-dependent wildlife habitat, fish & aquatic life habitat, scenic quality and loss of rare & endangered species. Jt. Muni. 141.

Indeed, there is strong evidence that shows that the Applicants have incorrectly stated that access roads and construction pads in wetlands will typically only create “temporary” impacts. Jt. Muni. 141 at 3. As explained by Dr. Van de Poll, it is his opinion the use of 50-100 ton equipment over soft hydric soils will have a permanent, compacting effect regardless of

protective mats that are used.<sup>39</sup> Jt. Muni. 141 at 3-4. As also discussed by Dr. Van de Poll in his pre-filed testimony and during the adjudicatory hearing, he has seen first-hand the unreliability of classifying impacts as “temporary” when using heavy equipment due to soil compaction, despite the use of matting, especially in areas such as Turtle Pond. Jt. Muni. 142 at 5-7; Tr. 12/21/17 (Day 70AM) at 52-55.

This issue was also addressed by a number of other intervenors, including municipalities. By way of example, the Town of Deerfield and Society for the Protection of New Hampshire raised issues relative to the permanent impacts that will result from the construction activities. Jt. Muni. 154 at 2-3, Attach. 4 at 6766-768; Jt. Muni. 155 at 12-13; Jt. Muni. 157 at Exs. 6-9; Jt. Muni. 158 at Ex. 10; Jt. Muni. 149, at 6528-6531; Jt. Muni. 150, at 4-6; Jt. Muni. 96, at 2-10, 13-21.

This issue is also important because it impacts the amount of money that will be going to the Aquatic Resource Mitigation (“ARM”) fund, as the fund “is not going to get what they’re due.” Tr. 11/16/17 (Day 60PM) at 211-212; Tr. 12/21/17 (Day 70AM) at 37-38. It should be noted, however, that payment into the ARM fund does not necessarily mean that the municipalities that experience impacts to their wetland resources will benefit. Tr. 11/16/17 (Day 60PM) at 33. Accordingly, those municipalities will experience permanent and/or long-term wetland resource impacts without any guarantee that funds will be used for mitigation in their communities.

iii. Whether Impacts Will Be Unreasonable

A voluminous amount of information has been introduced before the Subcommittee during the course of this matter regarding the proposed and potential impacts to wetlands. These

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<sup>39</sup> The estimated weight of typical equipment used in transmission line work is provided by Dr. Van de Poll, and the equipment varies in weight from 39,300 for a skidder to 202,300 for a crane. Jt. Muni. 142 at 5-7.

concerns are too numerous to identify individually but they include, among others, concerns about the extent of the impacts, the adequacy of proposed avoidance, minimization and mitigation, the potential for various forms of contamination, and the ways in which the application fails to satisfy all statutory, regulatory and agency requirements. To the extent that these concerns have not been further identified in this Memorandum, we refer to the testimony and exhibits submitted in the record.

A significant issue which has become apparent over the course of the adjudicative process is the fact that the information provided by the Applicants, relied upon by DES, and analyzed by other parties regarding the impacts that the Project would have on wetlands was predicated upon the assumption that the underground portion of the project would be located under the pavement. During the past year, however, the Applicant has been working with DOT to revise the plans to meet the requirements of the DOT Utility Accommodation Manual so that the line is placed adjacent to the pavement in some areas, and has filed 185 Exception Requests seeking for DOT's approval to locate portions of the project under the pavement. CFP 496-582, 619 -21, 632, 643-45, 656. Most of those Exception Requests remained unresolved by the close of the record in this case. The Applicants have admitted that they may need to go back to DES to revise their plans and DES approval depending upon the outcome of the Exception Requests, because they may need to impact more wetlands than they had requested. Tr. 5/31/17 (Day 10PM) at 171-176. These potential additional wetlands impacts are as yet unknown, undefined, and unaccounted for in the application that is before the Subcommittee. Without that information, the Subcommittee cannot make a determination of whether the Project will have an unreasonable adverse effect on water quality and the natural environment as required by RSA 162-H:16, IV(c) and N.H. Admin. Rule, Site 301.14(d-e). Any delegation of this duty to DES to

approve additional wetlands impacts that were not part of the project impacts considered by the Subcommittee, therefore, would be improper. If a certificate were issued for this Project and the Applicants intended to impact additional wetlands, they would be required to bring that request back to the Site Evaluation Committee for review.

b. Rare Plants and Natural Communities

The Applicants also failed to meet their burden to prove that the proposed energy facility will not have an unreasonable adverse effect on the natural environment, which includes wildlife species, rare plants, rare natural communities, and exemplary communities. N.H. Admin. Rules, Site 301.14(e). There are a number of significant rare natural communities that were not studied by the Applicants, including fifteen state-listed rare insects (*Lepidoptera*) that occupy the riverbluff and pine barren habitats in south Concord. *Jt. Muni.* 141 at 6. This concern was not only raised by the expert hired by Concord, but also by the experts hired by Counsel for the Public. CFP 136 at 10. Although the Karner Blue butterfly was studied, other species did not receive the same attention, as Arrowwood described that there are a number of rare, threatened and endangered species that were identified “however, surveys have not been conducted to determine population numbers within the Project area.” CFP 136 at 10 and Exhibit E at 71-74. These species include, among others, the Persius duskywing skipper, the pine pinion moth and the frosted elfin, which are listed as either state-threatened or state-endangered. *Id.* Dr. Van de Poll noted that some of those species are known to be located in the area, and that he was “baffled” that these other state-listed insect species were not studied, especially when such a review was recommended by John Kanter, the former Director of New Hampshire Fish & Game’s Nongame and Endangered Wildlife Program. *Tr.* 11/16/17 (Day 60PM) at 57-59; *App.* 124 at 61305. Without this information, the Subcommittee cannot find that the proposed high-



voltage transmission line will not have an unreasonable adverse impact on the state-listed species. Tr. 11/16/17 (Day 60PM) at 59; CFP 136, Ex. E at 71-74; CFP 137 at 10; Jt. Muni. 141 at 6. Indeed, Ms. Barnum, the expert for the Applicants, agreed that there is no way to estimate the impact the proposed high voltage transmission line will have on some of those species unless they are studied. Tr. 6/14/17 (Day 16AM) at 123, 127, 135.

It is anticipated that the Applicants will assert that the inventory of those populations was unnecessary because the New Hampshire Fish & Game did not request an inventory of those species. Tr. 6/14/17 (Day 16AM) at 123, 135. That argument should be rejected. The Applicants have the burden under N.H. Site Admin. Rules, Site 301.14(e) to provide information regarding the nature, extent, and duration of potential effects on rare communities, as well as the effectiveness of measures to avoid, minimize or mitigate those potential adverse effects.

Although there was no requirement from Fish & Game to conduct an inventory, this does not reduce the Applicant's obligation to meet their burden of proof in a proceeding separately being evaluated by the Site Evaluation Committee. Moreover, it is undisputed that an inventory of those species could have been provided. Ms. Barnum acknowledged that the "inventory and that particular study could have been done." Tr. 6/14/17 (Day 16AM) at 136. Similarly, Michael Amaral, the expert for Counsel for the Public, stated that "anyone with biological training could be trained to make a species identification for them." Tr. 11/7/2017 (Day 57AM) at 126. This inventory is particularly important for the frosted elfin, which unlike the Karner Blue butterfly, does not have a history of a successful breeding program. Tr. 11/17/16 (Day 57AM) at 124.

There is also insufficient information to find that the proposed energy facility will not have an unreasonable adverse impact on the Karner blue butterfly, a federally endangered species. This is an extremely vulnerable population, and prior to the propagation project in

Concord, the Karner blue butterfly population was extirpated, or in layperson's terms, "completely gone." Tr. 6/14/17 (Day 16AM) at 110-11. The proposed energy facility could have a long-term adverse impact on the Karner blue butterfly, and the adverse impact from the proposed project includes "direct mortality during construction." Tr. 6/14/17 (Day 16AM) at 111. Even more troubling is that Sarah Barnum, an expert for the Applicants, was unable to state whether the Karner blue butterflies would be self-sustaining if the proposed energy facility is approved. Tr. 6/14/17 at 119-121. Moreover, when she was asked whether the proposed construction would have an unreasonable impact on the population, Ms. Barnum's response was simply that the Applicants were providing a "mitigation plan" to compensate for the loss of the Karner blue butterfly. Tr. 6/14/17 at 121.

The problem with the proposed "mitigation plan" is that there is no guarantee that the Karner blue butterflies will colonize the mitigation parcel that was purchased by the Applicants. Tr. 11/17/16 (Day 60PM) at 36-39,. There will also be a significant delay before the Karner Blue butterflies can even attempt to be repopulated at the mitigation parcel, as it will take two to five years for wild lupine to be reintroduced and successfully propagated at the parcel, which is required for the presence of the butterflies. Tr. 6/14/17 (Day 16AM) at 128-29. When asked how long after the lupine is established it would take to have a population similar to the site that is proposed to be impacted by the construction, Ms. Barnum simply responded that "I can't offer an opinion on that." Tr. 6/14/17 (Day 16AM) at 129. These concerns remain even with the revised plans that have reduced the impacts to the Karner blue butterfly population. Tr. 11/17/16 (Day 60PM) at 37; App. 142(b) at 88757 and 88759. There is a limited amount of habitat for the Karner Blue, and any impacts to the habitat that remains should be protected. Tr. 11/17/16 (Day 60PM) at 160-61. Although the biological opinion issued on October 19, 2017 by the United

States Department of the Interior Fish and Wildlife Service states that the proposed construction is not likely to “jeopardize the continued existence” of the species, this only means that the project will not drive the population into extinction. App. 124(a) at 85593; Tr. 11/7/17 (Day 57AM) at 8-9; Tr. 11/17/16 (Day 60PM) at 163. It does not mean that there would not be adverse effects on the species that are unreasonable under the circumstances. It is also significant that, since the biological opinion was issued, the Applicants have provided updated information stating that the impacts to the Karner Blue site will be *three times greater* than it was originally anticipated when the biological opinion was issued. App. 124(b) at 88758. As such, it is now necessary to revisit testimony about that letter, which includes testimony from Counsel for the Public’s experts and other witnesses about whether the increased impact to the Karner Blue will not result in an unreasonable adverse impact to the population.

Finally, as discussed by the City Planner Heather Shank, Concord is opposed to the use of the mitigation parcel at 60 Regional Drive for conservation purposes. Tr. 11/16/17 (Day 60AM) at 109-11; Tr. 11/16/17 (Day 60PM) at 214-15. This is one of the last remaining available parcels located in the industrial zone, and it is located in an established business park with municipal water and sewer that is an ideal for development. Tr. 11/16/17 at 214-15; Jt. Muni. 245 at 1, 4-5. The permanent encumbrance of this parcel with a conservation easement means that it will never be developed for its original intent, and therefore, any potential future tax revenue and other benefits such as permanent jobs associated with this type of desirable development will never be realized.<sup>40</sup> Moreover, the Applicants initially contacted Carlos Baia, the Deputy City Manager of Community Development, to discuss potential mitigation parcels but he was never contacted about the proposed use of 60 Regional Drive. Tr. 11/16/17 (Day

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<sup>40</sup> The fact that the parcel had been on the market and not yet sold does not indicate that it would never be developed, and therefore is irrelevant to this discussion.

60AM) at 109-11; Tr. 11/16/17 (Day 60PM) at 215. As such, the use of that parcel was a surprise to Concord. Tr. 11/16/17 (Day 60PM) at 215. The lack of communication with municipal officials about an important decision such as the permanence encumbrance of a 6.9 acre buildable lot in a highly valuable industrial zone demonstrates, yet again, the Applicants' failure to have a meaningful and continued dialogue with affected communities. As discussed by Ms. Shank, Concord "could have offered some better solutions, for them and for us, if they had reached out to us and had more conversations about it." Tr. 11/16/17 (Day 60PM) at 215. It is Concord's opinion that the use of 60 Regional Drive is not inadequate to guarantee that the Karner blue butterflies will be successfully repopulated, but it also constitutes an undue interference with the orderly development of that area.

#### **4. Unreasonable Adverse Effect - Public Health and Safety**

In determining whether the Project will have an unreasonable adverse effect on public health and safety, the Subcommittee must consider impacts to public health and safety, which includes an analysis of "the potential impacts on public health and safety of electric and magnetic fields generated by the proposed facility." N.H. Admin. Rules, Site 301.08 (f)(1). During the course of the proceedings, the Applicants presented the testimony of William Bailey and Gary Johnson to support their contention that the electric and magnetic fields generated by the proposed Project do not have the potential to create health hazards. App. 1, App. 37. During the cross-examination of Dr. William Bailey, Counsel for the Public and other intervenors presented a significant amount of research reports which indicated that there are potential links between cancer and electromagnetic fields that continue to be studied. These reports have been issued by credible research organizations such as the World Health Organization, the Scientific Committee on Emerging and Newly Identified Health Risks of the European Commission

(SCENIHR) and the IARC. Jt.Muni. 27, CFP 63A, CFP 108. Indeed, as recently as 2015, SCENIHR issued a report stating that new epidemiological data “do not alter the assessment that EMF magnetic exposure field is a possible carcinogen based on the reported association with childhood leukemia risk,” and that a “positive association” has been observed in multiple studies between EMF magnetic fields and childhood leukemia. Tr. 4/8/17 (Day 4AM) at 67-68; CFP 108 at 158. According to information from the National Institute and Health Sciences, the public concern relating to EMFs was first raised in 1979 because studies showed that a group of children who died from leukemia and other cancers were 2 to 3 times more likely to have lived within 131 feet of a high current electrical or distribution line. Tr. 4/8/17 (Day 4PM) at 5.

During the adjudicatory hearings, there was discussion regarding impacts that the proposed Project will have on 41 Hoit Road as a result of the proposed relocation of the 115kv line to the home. With respect to that property, the plans and testimony show that the 115kv line is proposed to be relocated approximately 7 feet from the garage/barn, and alternatively 17 feet from the portion of the home that is used for living space. Tr. 11/16/17 (Day 60AM) at 96-97. The close proximity of the line to the house was not only recently viewed by Concord’s Assistant City Planner and City Survey, but it can also be observed when comparing the site plans to the survey that was attached to a Joint Use Agreement entered into between the property owners and Public Service of New Hampshire. Tr. 11/16/17 (Day 60AM) at 94-95; Jt. Muni. 86 at 3421-424; Jt. Muni. 286 at Attch.4(Attached Survey).<sup>41</sup> The survey attached to the Joint Use Agreement shows that the edge of the garage is currently located 62.1 feet from the garage. Jt. Muni. 286 at Attch.4(Attached Survey). The project plans intend to move the 115kv line 55 feet closer towards the edge of the right of way, which will result in the line being located 7.1 feet

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<sup>41</sup> The survey for 41 Hoit Road is on page 53 of the PDF.

away from the garage. Tr. 4/18/17 (Day 4AM) at 40-41; 56-57; 62, 67, 91; Jt. Muni. 27; CFP 61; App. 201 at 156. The close proximity of the line to the house is particularly troubling because there is a child living at the house. Tr. 11/16/17 (Day 60AM) at 97. Not only does the close proximity of the home to the transmission line raise issues relative to compliance with basic restriction for exposure of the general public to EMFs, but there are unreasonable public health and safety concerns that will be caused by the Applicants' proposed relocation of the 115kv line only seven feet from a property's garage/barn.

The Applicants are well aware of the close proximity of the relocated transmission line to the home, yet they have never notified Mr. Bailey or Gary Johnson, both of the experts hired by the Applicants to address EMFs, about this particular site and/or have taken measures to address concerns relative to EMF at 41 Hoit Road. Tr. 4/8/17 (Day 4PM) at 17. The garage/barn has been located at the property since 1997, over twenty years. Tr. 5/2/17 (Day 7PM) at 35-36; Jt. Muni. 193 at 8074. Although a Joint Use Agreement was entered into on February 6, 2009 with the prior owners, there is nothing in that agreement that would allow the Applicants to relocate the transmission lines to a location that has the potential to create public health and safety risks for the property owners, or to authorize the Applicants to seek removal of the house structures within the right of way. Moreover, the Subcommittee should not be resolving these types of legal issues, and instead should look at the potential risk of health and safety resulting from the proposed Project based on the manner that adjacent properties are currently being used. Finally, although Attorney Needleman made a representation that the property owners have contacted Eversource to address their concerns, there is no information in the record that the health and safety concerns have been resolved. Tr. 11/16/17 (Day 60PM) at 94-95. The anticipated argument that the Applicants will attempt to work with the property owners is insufficient to

address those concerns. As the record currently stands, it must be determined that the project plans will present an unreasonable impacts due to the potential health and safety hazards to the current and future property owners.

In short, the Applicants' proposal to reconstruct the proposed 115kv line within approximately 7 feet of the garage/barn and within 17 feet of living space, is irresponsible. Setting aside issues regarding impacts to property value and land use, the Applicants proposal demonstrates a disregard for the health and safety of the property owners.

#### **D. Public Interest**

The Subcommittee may issue a Certificate only if it finds that issuance of a certificate will serve the public interest. RSA 162-H:16, IV(e). While determining whether the issuance of a certificate will serve the public interest, the Subcommittee is required to consider the following: (a) the welfare of the population; (b) private property; (c) the location and growth of industry; (d) the overall economic growth of the state; (e) the environment of the state; (f) historic sites; (g) aesthetics; (h) air and water quality; (i) the use of natural resources; and (j) public health and safety. N.H. Admin. Rules, Site 301.16 (a)-(j). When considered the criteria contained N.H. Admin. Rules, Site 301.16, it is apparent that the siting, construction and operation of the Project, even with potential conditions, will not be in the public interest. This memorandum has already addressed a significant number of issues pertaining to historic sites, private property, aesthetics, water quality, natural resources and health and safety, and considering those issues, the Subcommittee should find that the Project is not in the public interest.

In addition to the issues already briefed, it is necessary to independently analyze and consider the welfare of the population, private property, the location and growth of industry, the

overall economic growth of the state and the environment of the state. These broad topics make it clear that the evaluation of public interest is significantly more than simply “ticking off” the list or otherwise completing the task to the barest minimum standard. Rather, the purpose of the “public interest” standard is to allow an opportunity to consider whether a proposed energy facility should be approved even if there is a finding that the facility will not “unduly interfere with the orderly development of the region” or have an “undue adverse effect” as required by RSA 162-H:16, IV(b) and (c).

Moreover, the determination of whether the Project is in the public interest in light of the “welfare of the population” and “private property” requires a set of different factual findings than those to be considered under orderly development and adverse effects. The “welfare of the population” and “private property” includes a determination of whether a Project is, overall, in the public interest, regardless of whether there is a verifiable financial loss of property value and/or there will be an adverse visual impact to communities beyond the potentially narrow category of “scenic resources.” As discussed throughout this memorandum, there are a significant number of concerns that have been raised by municipalities, as well as other intervenors, Counsel for the Public and the general public throughout the proceedings. It is clear that, regardless of the purported economic benefits of the Project, these benefits do not outweigh or obviate the extensive negative impacts raised during this proceeding, and that should make it apparent that the Project is not in New Hampshire’s public interest.

In evaluating the public interest standard, it is also appropriate to consider the fact that there are a number of alternative projects in New England that are currently proposing to bring the same economic and energy benefits (if not more) than the Project. These alternatives are entirely appropriate to consider because, in deciding whether the objectives of RSA chapter 162-



H would be best served by the issuance of a Certificate, the Subcommittee is required to give “due consideration to *all relevant information regarding the potential siting or routes of a proposed energy facility*, including potential significant impacts and benefits.”<sup>42</sup> RSA 162-H:16, IV (2016).

The consideration of whether the Project is needed, whether there are other less impactful but comparably beneficial alternatives, are both subjects the Subcommittee should consider as it makes its finding on whether the Project is in the public interest. In this case, the Project is not in the public interest because there is very likely to be sufficient generation and capacity to fulfill ISO New England’s estimated needs. The Project has failed to demonstrate that the need sufficiently exists to warrant the level of disruption and adverse impact that the Applicants are proposing to inflict on the affected communities.

Mr. Sansoucy’s examination of the 2016 CELT Report showed that ISO New England estimated that in 2025 there will be sufficient available capacity and reference load without the Project. SAN 1 at 4; SAN 15. In addition, a substantial amount of new generation is currently being proposed in the interconnection queue for ISO New England that may obviate the alleged need for the Project. SAN 1 at 4-5. More particularly, the queue indicates that some 2,800 MW are being proposed for the ISO New England region, and while all of the proposals may not come to fruition, it demonstrates that there are multiple avenues by which additional power and capacity could enter ISO New England. SAN 1 at 4-5.

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<sup>42</sup> This issue was also briefed by the Referenced Municipalities in their Objection to Strike Certain Track 1 Testimony filed on April 5, 2017. The Presiding Officer issued a ruling on the admissibility of alternative route testimony in his order dated April 24, 2017 at 6-9. In denying motion to strike testimony related to alternative routes, the Presiding Officer acknowledged that such information may be relevant to the Subcommittee’s evaluation of this Application stating: “[e]vidence of alternatives might be relevant to the statutory factors that must be considered by the Subcommittee in granting or denying a Certificate or conditions that may be imposed if a Certificate is granted.” *Id.*

In conjunction with the estimates in the 2016 CELT Report, there is little need for the 1,090 MW proposed by the Project and there are other generators proposing to provide some or all of that amount. In February 2017, FCA 11 was conducted and the system value for capacity closed at \$5.29 per kW/m. SAN 3; SAN 26. This represents an almost \$2 kW/m decrease from FCA 10. SAN 3; SAN 26. In comparing the FCA 11 results with the results from FAC 10, Mr. Sansoucy described the market economics for the Project as far less hospitable than when it was first proposed – ISO New England procured adequate new energy resources, efficiency, and demand reduction capacity resources of 640 MW; obtained an additional 720 MW of behind the meter photo-voltaics; and cleared with a surplus of over 1,700 MW. SAN 3; SAN 26.

As Mr. Sansoucy described, the timing for the Project could not be worse, because in his estimation there is a “glut” of electricity and capacity greater than there was in FCA-10, with various other generators seeking to enter the ISONE region, that glut is likely to continue increasing, and without any sort of bilateral contract the capacity market could collapse. SAN 3 at 8-9. Mr. Sansoucy predicted and evidence during the hearing showed, “collapsing capacity prices reduce the value and likelihood that Northern Pass can be financially constructed and operated because the line will be paid less for its operations. Therefore, Northern Pass may end up with no option but to either be successful in one of the state sponsored initiatives, or cease development.” SAN 3 at 8-9; CFP 600.<sup>43</sup>

Not only is there is a demonstrated lack of need for this particular merchant-funded Project, but there is also the potential that the ratepayers of New Hampshire will ultimately be

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<sup>43</sup> The transcript from the Eversource July 28, 2017 second quarter investor call on July 28, 2017 shows that Mr. Sansoucy’s predictions were accurate. Leon Olivier, the Executive Vice President of Enerprise Energy and Business Development for Eversource explained that if Eversource does not win the Massachusetts RFP, “we’ll take a pause . . . and we’ll look at where the other states are in those RFPs and in that process. And we’ll make a decision at that time.” CFP 600 at 14325. Later in the call, Mr. Olivier further stated that “if for some reason, we did not win this RFP, we would sit down with our partners, HQ, assess where we are vis-à-vis the other states, and then make that decision to proceed. . . .” CFP 600 at 14327.

responsible for the expenses associated with the Project. By order issued on October 14, 2016, the New Hampshire Public Utilities Commission (“PUC”) granted the Applicant status as a public utility in Docket DE15-459. SAN 31. That decision presents two possible scenarios by which New Hampshire ratepayers would be responsible for costs related to the Project: (1) if the Federal Energy Regulatory Commission (“FERC”) designates the AC portion of the Project as a reliability upgrade, at which point the costs would be recovered through regional transmission rates from New Hampshire ratepayers; and (2) if the DC portion of the Project is deemed a reliability project to the extent it becomes eligible for regional cost allocations through the FERC 1000 process or any other regional cost mechanism. SAN 31 at 7-8. In his appearance before the Subcommittee, Mr. Quinlan acknowledged that the PUC’s order reserved these two scenarios, thereby exposing New Hampshire ratepayers to these costs. *See* Tr. 4/13/17 (Day 1 PM), at 40-45.<sup>44</sup> The exposure of costs associated with this Project to New Hampshire ratepayers under any scenario, and to any extent, is contrary to the public interest.

This Project is also not in the public interest is because it is not economically feasible. The Applicants’ experts failed to prepare a detailed revenue requirement to construct a proper tariff for the Project, which is a requirement that must be satisfied before additional revenue is available in the marketplace to pay for electricity. SAN 34. By failing to conduct this process, the Applicants have failed to demonstrate that the Project is economically feasible. In contrast, Mr. Sansoucy performed this exercise and constructed a minimum transmission tariff necessary

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<sup>44</sup> The PUC order does give NH ratepayers some limited protections from being subject to rates to cover the costs of the Project. SAN 31 at 7-8. However, those assurances are not sufficient to conclusively rule out NH exposure to these costs. For the AC portion of the line, the Applicants have committed to work with PUC staff “to limit as much as possible any potential rate effect on New Hampshire ratepayers. SAN 31 at 7-8. Committing to work with PUC staff is a far cry from ensuring that no such exposure exists in the first place. SAN 3 at 14. For the DC portion of the line, the Applicants have gone a step further and agreed to “hold harmless New Hampshire retail electric customers” from any regionally allocated cost sharing. SAN 31 at 7-8. However, that assurance is limited to “so long as Northern Pass Project costs are being recovered through any such regional cost sharing process or mechanism.” SAN 3 at 14.

for the Project's "break even amount" to recoup their costs. SAN 34 at 13; SAN 36. Mr. Sansoucy's calculations showed that price per kW/month of the Project would be \$25/kW month, or *five (5) times higher than the \$5/kW month in FCA 11*.<sup>45</sup> SAN 34 at 18. An energy project that is not economically feasible to construct and/or will not provide the purported market benefits cannot be deemed to be in New Hampshire's public interest.

Lastly, there are also myriad competing comparable projects which could provide Hydro-Quebec or another generator the ability to transfer energy or capacity to the ratepayers of southern New England, without the negative aspects that are inherent to the Project.<sup>46</sup> SAN 12, 34. These alternative options includes the Champlain Hudson Power Express, Northeast Energy Link, Granite State Power Link, to name a few. SAN 2,3, 34, 39, 41. In the end, based on the lack of need for this project, questions about whether it is economically feasible and the other alternative options, this Project should not be approved.

#### **E. Other SEC Requirements Not Briefed**

In addition to the issues addressed in this brief, there are other topics that will be reviewed by the Site Evaluation Committee. Those issues include: (1) a review of the financial capability of the applicant, as required to be reviewed under N.H. Admin. Rules, Site 301.13(a); (2) the purported energy market benefits to the extent it relates to the economy of the region under N.H. Admin. Rules, Site 301.15(a); (3) the provisions of, and financial assurances for, the proposed decommissioning plan for the proposed facility under N.H. Admin. Rules, Site

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<sup>45</sup> As part of his analysis, Mr. Sansoucy assumed a capacity factor of 30%, which differs greatly from the 83% capacity factor utilized by Ms. Frayer in some of her analyses of the Project's economics. SAN 34 at 13-15. Mr. Sansoucy explained his rationale for using that capacity factor during the adjudicatory hearing. Mr. Sansoucy also prepared a forecast of the capacity prices going forward using Ms. Frayer's 83% capacity factor, and even under that scenario the economic outlook is dim. SAN 34 at 18-20.

<sup>46</sup> In his prefiled testimony, Mr. Sansoucy also provided a map of several alternative lines by which a generator could supply electricity and capacity to ISO New England. SAN 12, SAN 34.

301.08(a)(8) and 301.15; and (4) whether the project will have an unreasonable adverse effect on air and water quality under RSA 162-H:16, IV(c) and N.H. Admin. Rules, Site 301.14(c).

The undersigned municipalities understand that other parties will be briefing these issues. In order to avoid unnecessary duplication, the undersigned municipalities will review those briefs and will be filing a notice to join and adopt some or all of those arguments by incorporating by reference to this brief.

## **V. Local Permits and Licenses**

In the event that the Subcommittee approves the application over opposition of the host municipalities and unincorporated places, the municipalities seek as part of an order a confirmation that the Applicants are required to receive local permits and licenses. This issue was previously raised in Petition for Declaratory Ruling that was filed with the Site Evaluation Committee on December 19, 2016, in SEC Docket 2015-06. After that Petition was dismissed without prejudice, it was raised in a Motion for Expedited Order Relative to Local Permits, Licenses and Ordinances filed on March 17, 2017 in this proceeding. On April 13, 2017, the Presiding Officer denied that motion without prejudice on the basis of that “those issues should be resolved as part of the Subcommittee’s deliberative process after reviewing all of the evidence and arguments presented in this docket.” Order dated April 13, 2017 at 4. This issue is now being renewed by the Referenced Municipalities.

As already extensively discussed in the Motion for Expedited Order Relative to Local Permits, Licenses and Ordinances, there are a number of local permit and licenses that are required to be obtained in the event that this project is approved. In order to avoid repetition, the Referenced Municipalities adopt the same facts and arguments that are already contained in that motion. However, to briefly summarize the position of the Referenced Municipalities, the

Applicants should be required to receive a permit or license agreement to use and occupy the public right of way in accordance with RSA 231:161, I(a) and (b). The Applicants should also be required to comply with other local ordinances and regulations, some of which require obtaining permits. These local ordinances and regulations include blasting permits, encumbrance permits, temporary and permanent access permits (including driveway permits where applicable), noise ordinances, and seasonal weight limits on certain local roads for trucks.

The doctrine of preemption does not apply to RSA 231:161 or the other ordinances and permitting requirements of a municipality that are allowed to be enacted under New Hampshire law, including RSA 31:39 and 47:17. The doctrine of preemption requires that “[w]here reasonably possible, statutes should be construed as consistent with each other.” *EnergyNorth Natural Gas, Inc. v. City of Concord*, 164 N.H. 14 (2012). Towards that end, “when interpreting two statutes which deal with similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute.” *Id.* (quotation omitted). Moreover, to the extent two statutes conflict, the more specific statute controls over the general statute. *Id.*

In this case, there should be no dispute that the RSA 231:161 and the municipal ordinances and permitting requirements being sought to be enforced are not in conflict with each other. RSA 162-H:1 provides authority over the Site Evaluation Committee to oversee the “planning, siting, construction, and operation of energy facilities.” The fact that the Site Evaluation Committee has the authority to oversee these activities does preempt municipal authority under RSA 231:161 to require a permit in order to cross a public highway, or local ordinances and regulations that govern issues such as noise, blasting and encumbrance permits.

Lastly, as discussed by a number of municipal officials, regardless of whether the local permit and ordinance requirements are preempted, the Subcommittee should require the Applicants to comply with local municipal regulations in the event that this Project is approved. The municipalities have the most knowledge of the local highways under their jurisdiction, which includes use and safety considerations; they have the most knowledge about blasting requirements, including the location of aquifers and other sensitive resources in the areas; and when it comes to noise, they have the most knowledge of which residential or other areas might be particularly sensitive not noise and vibrations. The oversight of construction activities cannot be delegated.

## **VI. CONCLUSION**

To obtain a certificate of site and facility, the Applicants bear the burden of proving facts sufficient for this Subcommittee to make the findings required by RSA 162-H:16. N.H. Admin. Rules Site 202.19(b). As discussed herein, the Applicants have not met their burden in this case. They have failed to prove that they have adequate financial, technical, and managerial capability to assure construction and operation of the Project in continuing compliance with the terms and conditions of a certificate. They have failed to prove that the Project will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public safety. They have failed to prove that issuance of a certificate for this Project will serve the public interest. RSA 162-H:16, IV. Consequently, their application should be denied.

Respectfully submitted,

By and through its attorneys,

CITY OF CONCORD

Dated: January 12, 2018

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TOWNS OF NEW HAMPTON, LITTLETON,  
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**CERTIFICATE OF SERVICE**

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

Dated: January 12, 2018

By: /s/ Danielle Pacik  
Danielle L. Pacik, Esq., Bar #14924