STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for Certificate of Site and Facility

ORDER ON MOTIONS FOR REHEARING

April 11, 2019

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I. INTRODUCTION

This Order denies the following: (i) the Durham Residents Group's Partially Assented-To Joint Motion for Rehearing; (ii) the Conservation Law Foundation's Partially Assented-To Motion for Rehearing and Reconsideration[1]; and (iii) the Town of Durham's Partially Assented-To Motion for Rehearing.

II. PROCEDURAL HISTORY

On January 31, 2019, the Subcommittee issued a written Decision and Order Granting the Application for a Certificate of Site and Facility (Decision) and contemporaneously issued an Order and Certificate of Site and Facility with Conditions (Certificate). The procedural history in this docket is discussed at length in the Decision.

On March 4, 2019, the following parties filed Motions for Rehearing:

- Town of Durham;
- Conservation Law Foundation; and
- Durham Residents Group.

On March 8, the Applicant objected, and on March 11, the Subcommittee held a public hearing and conducted deliberations on the pending motions. This Order memorializes that decision.

III. STANDARD OF REVIEW

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

[1] As corrected on March 6, 2019.

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

"The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invite reconsideration upon the record to which that decision rested." *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted if the Committee finds "good reason." *See* RSA 541:3. A motion for rehearing must be denied where no "good reason" or "good cause" has been demonstrated. *See O'Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

A motion for rehearing shall:

> (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;
>
> (2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable;
>
> (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and
>
> (4) Include any argument or memorandum of law the moving party wishes to file.

N.H. CODE ADMIN. RULES, Site 202.29.

IV. MOTIONS FOR REHEARING

A. Governor and Executive Council Approval

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee committed an error of law when it determined that the Applicant was not required to obtain Governor and Executive Council approval to install the transmission line and concrete mattresses in Little Bay. The Town of Durham asserts that the Subcommittee lacks authority to determine "property rights" and that only the Governor and Executive Council, or a court of appropriate jurisdiction has authority to consider this issue.

The Town of Durham also argues that the Subcommittee committed an error of law by failing to require the Applicant to obtain Governor and Executive Council approval for construction of the Project in Little Bay. The Town argues that the Applicant will use Little Bay for the Project for a number of years. The Town claims the proposed use is a "disposal" or "disposition" of property held by the State in the public trust. The Town argues that the Applicant does not intend to remove the concrete mattresses and their perpetual existence in Little Bay will result in "disposal" of property held by the State in public trust. Finally, the Town argues that the license issued by the Public Utilities Commission (PUC) for construction and operation of the Project constitutes a *de facto* lease or can be converted into an easement by the Applicant, because the Applicant will invest significant funds in constructing the Project in reliance on the license.

The Town of Durham, in part relies on a letter issued by an Assistant Attorney General who opined that the crossing of Little Bay for the purposes of an entirely different project required the approval by the Governor and Executive Council. CLF Ex. 23.

The Town of Durham also argues that construction of the Project in Little Bay will violate the public trust doctrine because it will cause "disposing or allowing uses of public-trust resources that substantially impair the recognized public use of those resources." *See Chernaik v. Brown*, 295 Ore. App. 584, 600 (2019). The Town claims that this is against public policy.

The Town of Durham also claims that the wetlands permit recommended by DES is defective because it was not approved by the Governor and Council under RSA 482-A:3, II.

b. Conservation Law Foundation

Conservation Law Foundation (CLF) asserts that the public trust doctrine requires the Applicant to receive approval from the Governor and Executive Council to use the tidally submerged lands of Little Bay. CLF argues that, by determining that the Applicant is not required to obtain Governor and Executive Council approval for construction of the Project in Little Bay, the Subcommittee granted to the Applicant a property right to use the lands that are subject to the public trust doctrine. CLF asserts that the Subcommittee does not have the legal authority to grant such property rights. CLF opines that the Subcommittee should have required the Applicant to obtain the property rights required to construct the Project in Little Bay from a court of competent jurisdiction or should have ordered the Applicant to obtain approval from the Governor and Executive Council.

CLF also argues that the authority of the PUC to issue a license to construct the Project in subtidal lands does not supersede the public trust doctrine that requires the Governor and Executive Council to approve construction of the Project in Little Bay.

CLF claims the Subcommittee's finding that concrete mattresses will eventually be removed is not supported by the record where the Applicant stated that it did not anticipate the need for decommissioning of the Project and characterized the impacts caused by concrete mattresses as permanent.

CLF also argues the wetlands permit recommendation issued by DES is defective because it was not approved by the Governor and Council under RSA 482-A:3, II.

c. Applicant

The Applicant asserts that the Intervenors waived their argument by not raising this issue before the PUC at the time of adjudication of the Applicant's request for a license to cross Little Bay.

The Applicant explains that the plain language of RSA 371:17, requires the Applicant to obtain a license for crossing Little Bay and the statute does not require the Applicant to obtain Governor and Executive Council approval for the license.

The Applicant asserts that a grant of a license to a public utility does not dispose of State land and that contrary to the Town's position, the land will not be used permanently because the Applicant is obligated to remove the concrete mattresses when the Project is decommissioned.

The Applicant also argues that the Intervenors' reliance on the letter issued by an assistant attorney general is erroneous where the letter does not constitute an official opinion of the Attorney General and is based on a statute that has been repealed.

2. Analysis and Findings

The Town of Durham and CLF failed to state good cause warranting rehearing. The same arguments were raised in their Post-Hearing Briefs and were fully addressed by the Subcommittee during deliberations.

The argument that the Subcommittee determined property rights is unsupported by the record. The Subcommittee did not adjudicate rights in real property. Rather, the Subcommittee acknowledged that the Applicant acquired a license to cross Little Bay and determined that the statute does not require the Applicant to also obtain Governor and Executive Council approval.

The Subcommittee addressed the argument of the parties that installation of concrete mattresses will cause "disposal" of state property. Decision at pp. 71-74. The Subcommittee specifically ordered the Applicant to develop a decommissioning plan that will require removal of the concrete mattresses. Certificate at 9. Although the record demonstrates that the mattresses will be installed and will stay in place for a significant period, nothing in the record indicates that they will never be removed and will cause a "disposal" of State property.

Similarly, the Subcommittee reviewed and addressed the impacts of the concrete mattresses, including permanent impacts, on the natural environment of Little Bay. Governor and Executive Council approvals are required only for the state property that will be "disposed" or "leased." *See* RSA 4:40. The record demonstrates that construction of the Project will have some impact on the natural environment of Little Bay. That impact, however, does not constitute a "disposal" of state property that requires Governor and Council approval under RSA 4:40.

The argument that the license that was granted to the Applicant by the PUC may be transformed into an easement after the Applicant invests significant funds in the Project is not

supported by New Hampshire law. The Intervenors rely on the Georgia Court of Appeal's decision *Decker Car Wash, Inc. v. BP Products North America, Inc.,* 649 S.E.2d 317 (Georgia App., 2007). *Decker Car Wash* is distinguishable from this case. It is based on an interpretation of a Georgia statute. In *Decker Car Wash*, the Georgia Court of Appeal determined that a license for use of private property was converted into an easement after the licensee invested significant funds in renovating its property in reliance on the license. *Id*. at 319-320. The Court's decision was based on Georgia Statute of Frauds stating "[a] parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expenses in such case, it becomes an easement running with the land." OCGA § 44-9-4. There is nothing in New Hampshire's statutory scheme or common law that supports a proposition that a license granted by the PUC may be converted and become an easement if the licensee incurs significant expenses in reliance on such license. The PUC license is governed by RSA 371, which expressly grants the authority to issue a license to the PUC. Nothing in the statute can be interpreted to support an argument that the license issued is somehow transformed into an easement by construction of the transmission line that requires the license.

The argument that the Applicant is required to obtain Governor and Executive Council approval under a doctrine of public trust is also not supported by NH's existing statutory scheme and common law. The Legislature is charged with recognizing and protecting the public trust in public property. The Legislature, while being aware of the difference between a license and a disposal of property, saw fit to allow public utilities and others to cross state waters by license. *See* RSA 371:17. The Legislature required approval by the Governor and Executive Council for the disposal or lease of state property. Nothing in RSA 4:40 negates the authority granted by the

Legislature to the PUC. The common law public trust doctrine does not require enforcement by the Governor and the Executive Council.

The use of portions of Little Bay for construction and operation of the Project are not prohibited by the public trust doctrine. The public trust includes "all useful and lawful purposes." *State v. Sunapee Dam Co.*, 70 NH 458, 460 (1900). Use of Little Bay for purposes of construction and operation of a transmission line and associated fixtures pursuant to the licenses granted by PUC constitutes one of the legal uses authorized by the Legislature. The Project does not violate the public use doctrine by "substantially impair[ing] the recognized public use of those resources." *See Chernaik v. Brown*, 295 Ore. App. 584, 600 (2019).

The letter from an assistant attorney general was considered by the Subcommittee, and is unpersuasive and does not warrant a rehearing. CLF Ex. 23. The opinion expressed in the letter was based on a statute that has since been repealed.

Governor and the Executive Council approval is not necessary for the wetland permit because it was not issued by DES. RSA 482-A:3, II states:

> (a) *The department shall submit* to the governor and council all requests for permits approved by the department which meet the definition of major projects located in great ponds or public-owned water bodies under the rules of the department which have been approved by the department.
>
> (b) The governor and council shall consider the request for permit *transmitted by the department*. The governor and council may approve *as transmitted* or deny the submitted request. Following action by the governor and council the requests *shall be returned to the department for permitting, if approved, or filing, if denied*. (emphasis added.)

For transmission lines or other energy facilities subject to the Committee's jurisdiction, the Department of Environmental Services (DES) does not issue permits, but "submit[s]

recommended draft permit terms and conditions to the committee." RSA 162-H:7-a, I (b). The Committee issues a certificate – a document that authorizes an applicant to proceed with construction and operation of a proposed site and facility. RSA 162-H:4, I(a); RSA 162-H:16, II. The Subcommittee is required to incorporate in a certificate "such terms and conditions as may be specified to the committee by any of the state agencies having permitting or other regulatory authority." RSA 162-H:16, I. RSA 482-A:3, II, requires Governor and the Executive Council approval of permits issued by DES for major projects located in great ponds or publicly-owned water bodies. However, DES did not issue a final permit requiring approval of the Governor and the Executive Council in this docket. Pursuant to RSA 162-H:7-a, I(b), DES submitted its recommended permit and conditions to the Subcommittee. In turn, the Subcommittee incorporated these recommendations as conditions in the Certificate pursuant to RSA 162-H:16, I. Nothing in RSA 482-A:3, II, requires the Subcommittee to seek approval from the Governor and the Executive Council.

B. Approval by the Public Utilities Commission

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee committed an error of law when it determined that the Applicant should not be required to disclose to the PUC that the Project will require approximately 8,600 square feet of concrete mattresses. The Town of Durham argues that the Applicant's statement to the PUC that it may be using "supplemental mechanical protection" was not sufficient to put the PUC on notice that the Applicant will use 8,600 square feet of concrete mattresses. Without knowing the specifics of "mechanical protection," the

Town argues that the PUC could not determine that the licensed use "may be exercised without substantially affecting the public rights." Without making such determination, the PUC could not issue a valid license for the crossing of Little Bay. The Town of Durham concludes that the Subcommittee committed an error of law when it determined that the PUC had sufficient information to license the proposed crossing of Little Bay and issued a valid license for the crossing.

b. Applicant

The Applicant argues that the Town failed to state good cause warranting a rehearing where its argument has already been considered and fully addressed by the Subcommittee.

2. Analysis and Findings

The Town failed to state good cause warranting rehearing. The Subcommittee fully addressed this argument in the Decision. The Subcommittee specifically found that the Applicant notified the PUC of its intent to use concrete mattresses by stating that "mechanical protection" may be used for the Project. The PUC reviewed the Applicant's disclosure and determined that no further evaluation was required. Based on the record, the Subcommittee determined that the Applicant effectively disclosed its intent to use mechanical protection, including concrete mattresses, for construction of the Project. The Subcommittee's determination was based on the record and was not unreasonable or erroneous.

C. Communication with the Department of Environmental Services

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee committed an error of law when it allowed the Applicant to communicate with DES after DES provided its permit recommendations on February 28, 2018.

The Town also avers that it was inappropriate for the Presiding Officer to request that DES comment on conditions that were in dispute prior to the hearing and without the approval of the Subcommittee. The Town asserts that the Presiding Officer's request was contrary to RSA 162-H:7-a, I(e), and alleges that such request may be made by the committee only after it decides to impose different conditions.

The Town claims that the action of the Presiding Officer and the Subcommittee was unreasonable and unfair, constituted an error of law, and resulted in a violation of due process rights by depriving the parties of the opportunity to comment on the revised conditions.

b. Applicant

The Applicant answers that the Subcommittee fully considered and addressed the arguments made by the Town and that the motion for rehearing "offers no new facts or arguments that the Subcommittee failed to address."

2. Analysis and Findings

The Town's argument was considered by the Subcommittee during its deliberations. RSA 162-H does not authorize the Subcommittee to direct DES' internal processes in conducting its hearings and/or meetings in carrying out its statutory authority. *See* Order on Motion to

Suspend, August 28, 2018, at pp. 6-7. Nothing in RSA 162-H prohibits the Applicant from continuing communications with DES following the issuance of its final recommendations. *Id*.

The Subcommittee also determined that the Presiding Officer's request to DES for more information was not unreasonable or unjust where RSA 162-H:4, V, specifically authorizes the Presiding Officer to identify significant disputed issues for hearing and decision by the committee. The Presiding Officer did nothing more than identify issues that would come before the Subcommittee in an effort to determine whether they were disputed or not – an action that was well within her purview. Tr., 03/11/19, at 13-15. The Town fails to raise any fact demonstrating that the Subcommittee's determination constituted an error of law, or that it was unreasonable or unlawful. The Subcommittee did not overlook or misapprehend any matter of fact or law warranting rehearing.

D. Final Recommendations from the Department of Environmental Services

1. Positions of the Parties

(a) Town of Durham

The Town of Durham asserts that the Subcommittee committed an error of law when it: (i) denied the Town's motion filed on August 21, 2018, requesting suspension of the proceedings and that the parties be included in communications with DES; and (ii) denied the joint motion to strike filed on October 24, 2018, regarding the response from DES provided to the Subcommittee after February 28, 2018, and related testimony. The Town of Durham argues that denial of these motions was procedurally improper and resulted in deprivation of its due process rights.

(b) Applicant

The Applicant answers that the Subcommittee fully considered and addressed the arguments made by the Town of Durham and the motion for rehearing "offers no new facts or arguments that the Subcommittee failed to address."

2. Analysis and Findings

The Town fails to raise any arguments and/or provide any facts that were not previously addressed. The Town's request that the Subcommittee order DES to include the parties in its communications was addressed in the Order on Motion to Suspend, issued on August 28, 2018. The Subcommittee addressed the Town's request to strike communication from the record that it received from DES in multiple ways, including the following: the Order on Motion to Strike, issued on November 20, 2018; during deliberations; and in the Decision. All the parties had an ample opportunity to consider, understand and dispute the recommendations provided by DES and the testimony about those recommendations. The Town's experts met with and communicated with DES about the recommendations. The Town's motion fails to raise any fact demonstrating that the determination made by the Subcommittee constituted an error of law, was unreasonable or unjust. The Subcommittee did not overlook or misapprehend any matter of fact or law warranting rehearing.

E. Delegation of Authority

1. Appropriateness of Delegation

a. Positions of the Parties

(1) Town of Durham

The Town of Durham argues that RSA 162-H:4, III-a and III-b, limit the ability of the Subcommittee to delegate its authority. The Town opines that the Subcommittee committed an error of law when it delegated authority that is not authorized under the statute. The Town claims that the Subcommittee erred when it authorized DES to review the results of the jet plow trial run and determine modifications that may be necessary. The Town claims that the decision to delegate was based on incomplete or unverified reports and argues that this delegation goes beyond "the authority to specify the use of any technique, methodology, practice, or procedure" approved by the Subcommittee and, in effect, delegates the authority to determine the effect of the Project on the natural environment. The Town also alleges through the delegation of authority, that the Subcommittee abandoned its obligation to provide full and timely consideration of environmental consequences of construction and operation of the Project as required by RSA 162-H:1. The Town also submits that the delegation of authority resulted in: (i) failure to assure full and complete disclosure to the public of such plans and reports; and (ii) failure to resolve all environmental, economic, and technical issues in an integrated fashion.

The Town of Durham identifies the additional instances where it claims the Subcommittee committed an error of law by delegating the following authority:

- When the Subcommittee stated that it was confident in the expertise and ability of DES to determine which conditions offered by the Town's experts should be implemented and which conditions should not. Decision at 169;

- When the Subcommittee stated that DES has experience and expertise to determine the adequacy of the Soil and Groundwater Management Plan prepared by the Applicant. Decision at 172;

- When it relied on the experience and expertise of DES to determine the type of testing that should be required of oysters and other organisms. Decision, at 208;

- When it delegated authority to DES to determine whether updated surveys for rare, threatened, and endangered species should be completed prior to construction of the Project. Decision at 209;

- When it delegated authority to DES to review and address any reports that will be filed with DES and refused to conduct a separate and independent review of such reports. Decision at 209;

- When it delegated authority to the Division of Ports and Harbors and/or the Department of Safety, Marine Patrol to determine whether installation of concrete mattresses will create a navigational hazard. Decision at 229;

- When it authorized agencies with permitting authority to review required permit applications and issue permits that will be required for establishing marshalling yards and laydown areas. Decision at 253; and

- When it authorized the Department of Transportation to make its determinations and to issue the required permits, licenses, and approvals in accordance with existing DOT policies, rules, and recommendations. Decision at 68.

(2) Conservative Law Foundation

CLF argues that the Subcommittee committed an error of law when it delegated the following authority to DES:

- Authority to review the results of the jet plow trial run and to determine which modifications of the jet plow trial should be implemented;

- Authority to monitor water quality issues, including release of nitrogen; and

- Authority to determine whether updated surveys for rare, threatened, and endangered species shall be completed prior to construction of the Project.

CLF also asserts that the Subcommittee erroneously relied on DES' determination as to which oyster and pathogen testing should and should not be conducted.

CLF opines that delegation of this authority to DES "preclude(s) critical information from being made available to the Committee and the parties as part of the decision-making process." According to CLF, the Subcommittee is obligated to review the final jet plow trial reports and to determine whether the Project will have an unreasonable adverse effect on water quality and the natural environment. CLF claims that the Subcommittee erroneously delegated this authority to DES.

(3) Durham Residents Group

The Durham Residents argue that the Subcommittee improperly delegated its authority by adopting a dispute resolution procedure. They claim it was improper to authorize a dispute resolution administrator to review records and determine the nature and extent of impact on individual private properties. The Durham Residents argue that such delegation is not appropriate where it is the obligation of the Subcommittee to analyze the impact of the Project on private properties and to determine whether the Project will be in the public interest. They also argue that such delegation will result in violation of due process rights and may result in an unconstitutional regulatory taking of private property.

(4) Applicant

The Applicant argues that the Subcommittee appropriately delegated its authority pursuant to RSA 162-H:4, III-a.

The Applicant asserts that the Subcommittee properly considered state agency recommendations, and incorporated those conditions into the Certificate pursuant to RSA 162-H:7-a, I(e).

The Applicant also argues that the Subcommittee did not delegate any of its statutory findings to DES, but delegated the requirement for ongoing monitoring that is consistent with DES practice.

With regard to the jet plow trial run, the Applicant argues that the Intervenors mischaracterized the trial run as an initial evaluation of the jet plow procedure. The purpose of the trial run is to simply verify the accuracy of the sediment dispersion modeling and make adjustments, if needed, to the jet plow procedure. Delegation of authority to confirm the accuracy of the model and to determine whether adjustments should be made, if any, is not erroneous and does not constitute a delegation of "important decision-making."

b. Analysis and Findings

Except as provided by RSA 162-H, the Subcommittee "may not delegate its authority or duties." RSA 162-H:4, III-b. Relative to delegation of authority, RSA 162-H:4, III-a, provides that:

> The committee may delegate to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate for those portions of a proposed electric transmission line or energy transmission pipeline for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate.

The Subcommittee did not delegate its authority to determine whether the Project will have an unreasonable effect on water quality, the natural environment, and public health and safety. After reviewing the extensive evidence and testimony, the Subcommittee determined that the Project will not have an unreasonable adverse effect on water quality, the natural

environment, and public health and safety. In making this determination, the Subcommittee provided full and timely consideration of the environmental consequences of construction and operation of the Project as required by RSA 162-H:1. In each instance where the Subcommittee delegated authority to a state agency or to the administrator, the delegation fit firmly within the statutory criteria that authorizes the Subcommittee to delegate the authority to specify the use of any technique, methodology, practice, or procedure approved by the Subcommittee. The delegation of authority was legal, reasonable, and just.

As to the dispute resolution procedure, the argument offered by the Durham Residents mischaracterizes the record. The Subcommittee did not delegate the authority to a third-party to ascertain the impact of the Project on private property and did not shift the burden of proof to property owners. The Subcommittee set forth a mitigation mechanism that will be available to the property owners on a voluntary basis. Based on the record and evidence presented, and considering the availability of the dispute resolution procedure, the Subcommittee determined that the impact of the Project on real estate values will not interfere with the orderly development of the region and will serve the public interest. The dispute resolution procedure is a purely voluntary process that is available to landowners who believe that their property has been damaged or devalued by the Project. Any landowner or other person aggrieved, remains free to forgo the dispute resolution process and bring a claim in a court with jurisdiction.

The Intervenors fail to state good cause warranting a rehearing and fail to identify facts indicating that the Subcommittee committed an error of law or that its decision was unreasonable or unlawful.

2. Delegation and Due Process

a. Positions of the Parties

(1) Town of Durham and Conservation Law Foundation

The Town of Durham argues that the Subcommittee deprived it of its due process rights when it refused to implement a separate process for review, comment, and hearings on plans for, and results of, the jet plow trial.

CLF argues that the Subcommittee deprived the parties of their due process rights by delegating the authority to DES review and approve final reports generated as a result of the jet plow trial and also by authorizing DES to require adjustments, if any, to the actual jet plow process.

(2) Applicant

The Applicant responds that the delegation of authority to DES to monitor the jet plow trial and require changes or adjustments to the jet plow process is fully compliant with the delegation of authority contained in RSA 162-H: 4, III-a, and is consistent with prior decisions of the Committee.

b. Analysis and Findings

The Subcommittee fully considered the due process arguments during deliberations and in the Decision. The jet plow trial results will be reported to DES and to the SEC and posted on the Committee's website. The purpose of the jet plow trial is to verify the results of the modeling and to fine-tune the jet plow process, if necessary. The Subcommittee specifically found that DES has the appropriate level of expertise and experience to address reports from the jet plow trial and to develop appropriate minimization and mitigation measures.

The issue of how the jet plow trial should be conducted was a central issue during the adjudicative process and while CLF and the Town may disagree with the ultimate ruling, each had ample opportunity to be heard and to express concerns. There was no error of law.

F. Orderly Development of the Region and the Great Bay Estuary

1. Positions of the Parties

a. Conservation Law Foundation

CLF argues that the Decision is erroneous and is not based on the record because it fails to address the impacts of the Project on the Great Bay Estuary and the significant efforts and investments to improve the health of the estuary as part of the "orderly development of the region" criterion required by RSA 162-H:16, IV(b).

b. Applicant

The Applicant did not address this specific argument in its objection.

2. Analysis and Findings

The Subcommittee considered the impact of the Project on water quality and the natural environment of Little Bay and the Great Bay Estuary by listening to days of testimony and then deliberating on the evidence for hours, after which it determined that the impact of the Project will not be unreasonably adverse. The Subcommittee also addressed the impact of the Project on the Great Bay Estuary when it considered whether the Project will unduly interfere with the orderly development of the region. After considering all evidence and testimony presented, the Subcommittee determined that the Project will not interfere with the orderly development of the "region." Among other things, the Subcommittee heard evidence of the revitalization efforts

undertaken by municipalities and others but was unpersuaded that the Project would undermine those efforts. CLF's disagreement with that conclusion is not good cause warranting rehearing.

G. The Need for Reliability

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee's finding that there is a need for a reliability project in the Seacoast region is unreasonable, arbitrary, and is not supported by the record. The Town of Durham asserts that the Subcommittee's finding was based on an outdated determination by the Independent System Operator for New England (ISO-NE). The Town argues that there is no evidence of outages indicating reliability problems and that the Applicant has already constructed improvements addressing Seacoast region reliability needs, including the demand growth in the Seacoast region.

The Town of Durham also argues that the Subcommittee committed an error of law when it refused to request that ISO-NE participate in the adjudicatory hearing and provide an updated analysis of the reliability needs in the Seacoast region.

The Town of Durham also complains that the Subcommittee acted arbitrarily and unreasonably when it refused to order that the Applicant consider other allegedly less impactful alternatives to satisfy reliability needs.

b. Applicant

The Applicant argues that the decision of the Subcommittee was neither unreasonable nor unlawful. The record demonstrates that there is an immediate need for additional transmission capacity in the Seacoast region. ISO-NE identified the Project as the preferred solution to ensure

the safe and reliable delivery of electricity to the Seacoast region, and expects the Project to be constructed.

As to the request to consult with ISO-NE, the Applicant asserts that this issue was fully addressed by the Subcommittee and the Town failed to raise good cause warranting a rehearing.

2. Analysis and Findings

The Subcommittee's findings of fact are presumed prima facie lawful and reasonable. RSA 541:13. "The legislature has delegated broad authority to the Committee to consider the 'potential significant impacts and benefits' of a project, and to make findings on various objectives before ultimately determining whether to grant an application." *In re Mary Allen*, 170 N.H. 754, at 762 (2018) (citing RSA 162-H:16, IV). When faced with competing expert witnesses, "a trier of fact is free to accept or reject an expert's testimony, in whole or in part." *In re N.H. Elec. Coop.*, 170 N.H. 66, 74 (2017) (quotation omitted).

The finding of the Subcommittee that the Project is a needed reliability project is based on the record. The Subcommittee received extensive testimony that ISO-NE identified reliability needs in the Seacoast region and decided that the Project is the preferable solution to meet those needs. The Subcommittee also received testimony that, prior to the hearing, ISO-NE had the ability to change its determination, but chose not to do so. The Subcommittee gave this testimony and evidence significant weight. The Town's disagreement that the Subcommittee accepted such evidence and testimony as credible does not warrant a rehearing.

As to the Subcommittee's alleged failure to consider other alternatives, this argument is not supported by the record. The Subcommittee specifically considered the arguments that other alternative routes or projects present better alternatives. After addressing the arguments and the

record, the Subcommittee determined that it did not have sufficient information that would allow it to determine the potential impacts of such alternatives. The Subcommittee's decision is reasonable and is based on the record.

The Town did not present any new facts or argument demonstrating that the Subcommittee's decision not to consult with ISO-NE was unreasonable, unlawful or unjust. The Town restates the arguments that were already addressed by the Subcommittee. The Town fails to establish good cause warranting rehearing.

H. Orderly Development of the Region and the Views of Municipalities

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee failed to provide appropriate consideration of the views expressed by the municipalities. It states that the Subcommittee arbitrarily and unreasonably failed to provide due consideration to the testimony presented by the Town and instead, relied on an erroneous report prepared by Mr. Varney.

b. Applicant

The Applicant answers that the Town of Durham did not allege any facts that would demonstrate that the Subcommittee failed to consider the Town's position. The Applicant also states that the Subcommittee's decision that the Project will not unduly interfere with the orderly development of the region is lawful and reasonable where the Subcommittee defined a region as the entire Seacoast area that will be served by the Project, and an inconsistency between the

Master Plan and Zoning Ordinance of one town in the region does not rise to the level of interference with the orderly development of the entire region.

2. Analysis and Findings

RSA 162-H:16, IV (b), requires the Subcommittee to give "due consideration" to the views expressed by municipalities. The statute does not require adoption of the Town's position. In its deliberations and in the Decision, the Subcommittee explicitly recognized the position of each of the four affected communities, as well as the impacts on the entire Seacoast Region. The Town's argument that the Subcommittee failed to consider its views is not supported by the record. The Town fails to state good cause warranting rehearing.

I. Orderly Development of the Region and Prior Precedent

1. Positions of the Parties

a. Town of Durham

The Town of Durham argues that the Subcommittee committed an error of law and acted unreasonably when it relied on Mr. Varney's reports and determined that the Project will not unduly interfere with the orderly development of the region.

The Town argues that in the Northern Pass docket (Docket No. 2015-06), similar reports presented by Mr. Varney were considered and reviewed and it was concluded that the transmission line located within an existing right-of-way was inconsistent with existing land uses. In the Northern Pass docket, that subcommittee found that Mr. Varney failed to apply the details of the Northern Pass project to the master plans and ordinances of affected municipalities. The Northern Pass subcommittee ultimately concluded that the Applicant failed to carry its

burden of proof and failed to demonstrate that the Project will not unduly interfere with the orderly development of the region.

The Town argues that, similar to the Northern Pass project, in this docket Mr. Varney relied on an assumption that the Project will be consistent with current land uses because it will be located within an existing right-of-way. The Town claims that the Subcommittee should have followed the precedent in Northern Pass and should have found that the Project will not be consistent with existing land use simply because it will be located within an existing right-of-way. According to the Town, similar to the Northern Pass, in this docket Mr. Varney failed to accurately describe master plans and ordinances of affected communities and failed to analyze the consistency of the Project with existing land uses. The Town concludes that the Subcommittee in this docket should have followed the precedent set forth in the Northern Pass docket and should have found that Mr. Varney's reports were insufficient to demonstrate that the Project will not unduly interfere with the orderly development of the region. They claim the Subcommittee's failure to do so resulted in an error of law and an unreasonable and unlawful decision.

b. Applicant

The Applicant argues that the Subcommittee already addressed the arguments made by the Town of Durham and the Town "offers no new facts or arguments that the Subcommittee failed to address."

The Applicant asserts that the Northern Pass project and the Project in dispute are significantly different. It also states that the Town failed to identify in its Motion for Rehearing a single section of the Project that, in fact, will be inconsistent with prevailing land uses.

2. Analysis and Findings

RSA 162-H:10, III, provides that "[t]he committee shall consider, *as appropriate*, prior committee findings and rulings on the same or similar subject matters, *but shall not be bound thereby*." (emphasis added). The statute clearly and unambiguously states that the Subcommittee is not bound by the decisions in other dockets.

The Town's argument is based on the premise that the report filed by Mr. Varney in the Northern Pass docket was similar in scope and subject matter to the report that was filed in this docket. That premise is false. The report that was filed by Mr. Varney in this docket did not simply state that the Project will not interfere with the orderly development of the region because the Project will be constructed within an existing right-of-way. Mr. Varney identified and analyzed all prevailing land uses in the region. The subject matter of Mr. Varney's report was also different from the report that was filed in the Northern Pass project. The Subcommittee found Mr. Varney's report and testimony in this docket to be reliable and credible. The Project in this docket is significantly different from the Northern Pass project. The Subcommittee's decision was reasonable and lawful.

J. Impact on Water Quality and the Natural Environment of Little Bay

1. Nitrogen

a. Positions of the Parties

(1) Town of Durham and Conservation Law Foundation

The Town of Durham and CLF argue that the Subcommittee misapprehended facts and evidence when it concluded that the Project will not add nitrogen in Little Bay and will not have an unreasonable adverse impact on water quality in Little Bay. They claim that the Project will

release nitrogen currently located in sediments in the water column causing an adverse effect on water quality. The Town and CLF opine that the Subcommittee failed to address the amount of nitrogen that will be released in the water column and erroneously concluded that no new nitrogen will be added to the water. They also argue that neither the jet plow trial run or the water quality standards will address and mitigate the amount of nitrogen that will be released where: (i) the jet plow trial run will not address nitrogen that is present in the water; and (ii) the water quality standards contain only narrative standards pertaining to nitrogen. The Town of Durham and CLF conclude that the Subcommittee's decision that the Project will not have an unreasonable adverse effect on water quality is erroneous because it does not address nitrogen that will be released in Little Bay and does not provide for effective avoidance, minimization, and mitigation measures that could address impacts associated with such release.

(2) Applicant

The Applicant asserts that the Town of Durham and CLF failed to state good cause warranting a rehearing and simply rehash arguments that have already been considered by the Subcommittee. The Applicant asserts that the Subcommittee's decision was not arbitrary and unjust where the Applicant's experts testified and provided substantial proof that construction of the Project will not adversely affect water quality and the Town and CLF failed to provide any

evidence demonstrating that construction of the Project will result in an unreasonable adverse effect on water quality.

2. Jet Plow Trial Run

a. Positions of the Parties

(1) Town of Durham

The Town of Durham argues that the reliance of the Subcommittee on the jet plow trial run to ensure that the Project will not have an unreasonable adverse effect on water quality of Little Bay is unsupported where the record demonstrates that: (i) it is "highly questionable" that DES can review and address the results of the jet plow trial run in the time allotted in the Certificate; (ii) it is "questionable" that the Applicant will be able to adjust the trial run within the time frame set forth in the Certificate; (iii) the parties will not be able to address and provide comments to DES about the results of the jet plow trial run within the time frame set forth for such comments; and (iv) the jet plow trial run may be inadequate where it is based on a sediment suspension model that erroneously assumed a seven-hour continuous crossing during an ebb tide.

(2) Conservation Law Foundation

CLF argues that the Subcommittee erroneously determined that the jet plow trial run will reasonably assure results that are representative of the full jet plow operation. CLF argues that the trial run will not demonstrate all potential impacts that should be addressed where it will be limited in time and scope.

CLF also asserts that the Subcommittee's decision that the impact of the Project on water quality will not be unreasonably adverse is not supported by the record. It claims that the Decision fails to authorize DES to stop construction of the Project. CLF acknowledges that the

Decision and the Certificate specifically state that "[i]nstallation of the submarine cable in Little Bay shall not proceed until authorized by DES." CLF argues that the Decision should state that "[i]nstallation of the submarine cable in Little Bay shall not proceed ***unless and*** until authorized by DES."

3. Sediment Dispersion Analysis

a. Positions of the Parties

(1) Conservation Law Foundation

CLF argues that the Subcommittee unreasonably relied on sediment dispersion modeling that erroneously assumed a 7-hour crossing time for the jet plow operation and that the actual crossing time may be significantly longer – up to 15-hours. CLF further argues that the fact that the modeling was erroneous was also evidenced by the testimony of an expert that conducted the modeling and confirmed that the plume will dispense further south than was predicted by the model.

(2) Applicant

The Applicant argues that the sediment dispersion modeling demonstrated that construction of the Project will produce a sediment plume that will last less than a few hours in any given location, that there is limited potential for prolonged resuspension of sediment, and there will be no cumulative increases in suspended sediment. The reliance on the modeling was not arbitrary where Counsel for the Public's experts verified its accuracy and testified that the model provided conservative estimates. The Applicant also asserts that the jet plow trial run will confirm the adequacy of the model and will ensure that construction of the Project will not result in water quality violations.

4. Impact on Eelgrass

a. Positions of the Parties

(1) Conservation Law Foundation

CLF argues that the Subcommittee's determination that the Project will not impact established eelgrass beds was erroneous because it was based on unreliable sediment dispersion modeling and did not consider that the Applicant's expert testified that the sediment plume will disperse further south than was predicted by the model.

(2) Applicant

The Applicant argues that the Subcommittee's decision that the Project will not impact eelgrass is supported by the record that demonstrates that no eelgrass has been present within nearly a mile of the Project corridor since 2012, that CLF failed to provide any evidence demonstrating that eelgrass will actually be impacted, and that the area will be re-surveyed for eelgrass during the growing season prior to in-water cable installation.

5. Analysis and Findings

Each and every argument raised by the parties was considered and addressed by the Subcommittee during deliberations and in the Decision.

The Subcommittee received testimony demonstrating that the Project will cause a release of nitrogen in the water column. The Subcommittee also received testimony that the amount of nitrogen will be negligible and that DES considered the concerns presented by the Town and CLF in coming to its final recommendations. The Subcommittee credited substantial weight to such testimony and evidence. Disagreement with the Subcommittee's decision does not warrant a rehearing.

The Subcommittee also considered arguments that the sediment suspension modeling and the jet plow trial run were inadequate to avoid impacts to Little Bay and the estuary. The Subcommittee gave significant weight to the Applicant's expert testimony and report and to the DES determination that a jet plow trial run, as proposed by DES, would address and resolve any uncertainties. The Subcommittee's conclusion that the Project would not cause an unreasonable adverse impact on water quality or the natural environment was based on the record and was not unreasonable or unlawful.

Similarly, the Subcommittee gave significant weight to the testimony indicating that there are no established eelgrass beds in the area of potential impact and that a pre-construction survey will be conducted to determine that eelgrass is, or is not, present. Disagreement with testimony that the Subcommittee credited does not warrant a rehearing.

6. Salt Marsh Restoration

a. Positions of the Parties

(1) Town of Durham

The Town of Durham argues that the Subcommittee's determination that the Project will not have an unreasonable adverse effect on water quality and the natural environment was erroneous because it assumed that the Town will receive $213,763, from the Aquatic Resource Mitigation Fund for salt marsh restoration at Wagon Hill Farm. The Town was advised, however, by the United States Army Corps of Engineers and DES that it is not guaranteed that it will receive these funds and that it has to apply for distribution of these funds to the Town, along with other applicants for the funds.

(2) Applicant

The Applicant argues that the Subcommittee's finding of no unreasonable adverse effect on water quality was not based on a determination that the Town of Durham will receive an identified mitigation package. The conditions provided by DES specifically stated that the mitigation package may include the designation of mitigation funds to the Town and that, if the proposed mitigation goals cannot be achieved, the funds will revert to the Aquatic Resource Mitigation Fund for issuance during a future competitive grant round. Comm. Ex.12c, Conditions 68 and 73. The Applicant's expert also testified that, ultimately, it will be the decision of DES as to how to distribute the funds. The Applicant explains that the finding of no adverse effect on water quality was not based on the assumption that the Town will receive the funds and, therefore, reconsideration is not warranted.

b. Analysis and Findings

The Town of Durham mischaracterizes the record. The Subcommittee did not base its decision that the Project will not have an unreasonable adverse effect on water quality because $213,763.28, in Aquatic Resource Mitigation Funds will be provided to the Town. The Subcommittee clearly indicated that the funds will be paid into the Aquatic Resource Mitigation Fund. The Decision stated that "[i]t is *estimated* that $213,763.28 of this payment will be paid to Durham for salt marsh restoration at Wagon Hill Farm…" *See* Decision, at 33 (emphasis added). The Subcommittee did not determine that $213,763.28, will indeed be paid to the Town and, consequently, did not decide that the Project will not have an unreasonable adverse effect on water quality because the Town will receive these funds. The Town failed to state good cause warranting a rehearing.

7. Impact on Public Health and Safety – Oysters

a. Positions of the Parties

(1) Conservation Law Foundation

CLF argues that the Subcommittee committed an error of law by failing to analyze the testimony that bacteria, viruses, and pathogens that will be released in Little Bay as a result of construction of the Project will impact oysters which, in turn, will have an adverse effect on the health and safety of people who consume oysters.

CLF also asserts that the Subcommittee committed an error of law when it failed to analyze the effect of pathogens on oysters and relied on DES' determination that testing for pathogens is not required.

(2) Applicant

The Applicant responds that the Subcommittee's decision was not unreasonable or unlawful where the Applicant's witnesses and DES did not express concerns about the introduction of contaminants or pathogens into the water column, the Subcommittee heard extensive testimony on this issue, and considered the arguments during its deliberations.

b. Analysis and Findings

The Subcommittee specifically discussed concerns that bacteria, viruses, and pathogens may be released as a result of construction of the Project and may impact oysters. The Subcommittee considered the arguments and took into account the fact that DES considered and addressed, or chose not to address, certain concerns that were raised. CLF's disagreement with the Subcommittee's determination that was based on the record does not constitute a good cause warranting rehearing.

K. Private Property

1. Public Interest

a. Positions of the Parties

(1) Durham Residents Group

The Durham Residents argue that, in order to issue the Certificate, the Subcommittee was required to determine that the Project will serve the public interest. *See* RSA 16-H:16, IV(e). In order to determine that the Project will serve the public interest, the Subcommittee had to consider the impact of the Project on private property. *See* Site 301.16. The Durham Residents argue that the Subcommittee failed to consider facts relevant to a determination of the impact of the Project on private property, *i.e.* it failed to determine the specific properties that will be impacted and the extent to which specific properties will be impacted. Instead, the Decision stated that: "[i]t is reasonable to conclude, depending on the extent of increase in visibility of the Project, that the Project will have some effect on values of some of these properties" and "it is reasonable to conclude that the Project will have some effect on values of additional properties." Decision at 288. The Durham Residents argue that, without establishing the effect and the degree of effect on private properties, the Subcommittee could not balance the impacts and benefits of the Project and could not determine that the Project will be in the public interest. They claim that the Subcommittee's decision that the Project will be in the public interest is unreasonable and unlawful.

(2) Applicant

The Applicant argues that the position of the Durham Residents that the Subcommittee should have ascertained the impact of the Project on each individual private property is not

supported by the statute or the rules. Site 301.09(b)(4) requires the Applicant to provide an "assessment of . . . the effect of the proposed facility on real estate values in the affected communities." Neither the enabling statute nor the rules require the Applicant to provide documentation evidencing the impact of the Project on each individual property and do not require the Subcommittee to address and evaluate impacts on each individual property. The Applicant asserts that the Durham Residents' argument is not supported by the law and, therefore, should be denied.

b. Analysis and Findings

Site 301.15(a) states that: "in determining whether a proposed energy facility will unduly interfere with the orderly development of the region, the committee shall consider [t]he extent to which the siting, construction, and operation of the proposed facility will affect . . . the economy of the region." While addressing the extent of the impact on the economy, the Subcommittee evaluated the impact of the Project on real estate values. The rule does not require the Subcommittee to consider the impact on the value of each individual parcel of private property that may be affected. It requires the Subcommittee to analyze and determine the extent of the impact on the economy of the entire region. The Subcommittee reviewed testimony, reports, and evidence submitted by the parties and determined that, considering the availability of the dispute resolution procedure, the impact of the Project on real estate values will not rise to a level that will impact the economy of the entire region and cause undue interference with the orderly development of the region. The Subcommittee's Decision was not erroneous, unjust, or unreasonable.

2. Dispute Resolution Procedure

a. Positions of the Parties

(1) Durham Residents Group

The Durham Residents argue that the Subcommittee impermissibly avoided its statutory obligation to determine that the Project will serve the public interest by setting forth a dispute resolution procedure and authorizing an independent administrator to determine the impact of the Project and the extent of such impact on private properties.

The Durham Residents also argue that, by establishing a dispute resolution procedure, the Subcommittee shifted the burden of demonstrating the impact of the Project on private properties to the private property owners.

The Durham Residents also argue that the dispute resolution procedure is contrary to the Right-to-Know Law (RSA 91-A) where it specifically states that the final decisions by the dispute administrator will be confidential.

Finally, the Durham Residents argue that the Subcommittee committed an error of law and acted unreasonably and unlawfully when it: (i) adopted a two-year limitation on filing claims under the Dispute Resolution Process; and (ii) adopted a waiver of the right to file suit with a Court if a person pursues the Dispute Resolution Process. They argue that such limitations are unreasonable and unlawful because they constitute an encroachment of the powers of the judicial branch of government, and unconstitutionally interferes with the right to file suit.

(2) Applicant

The Applicant asserts that the Durham Residents' argument is misplaced. The Applicant submits that, by creating the Dispute Resolution Process, the Subcommittee did not erroneously

delegate its authority to the third party, but imposed a mitigation condition. There is nothing in the statute that prohibits the Subcommittee from imposing such a condition.

As to the limitation of constitutional rights, the Applicant argues that the Dispute Resolution Process does not and will not deprive the participants of their constitutional rights where it is not mandatory and simply presents an alternative avenue for the voluntary resolution of limited issues in dispute.

b. Analysis and Findings

The Subcommittee did not shift the burden of demonstrating the impact of the Project on private property to private property owners and did not delegate its duty to ascertain the impact of the Project to the dispute resolution administrator. The Subcommittee considered the impact on private property and, after balancing the impacts of the Project against the benefits, determined that the Project will serve the public interest. The Subcommittee authorized a voluntary Dispute Resolution Process that will mitigate and minimize the impact on private properties. Implementation of a mitigation measure in the form of a dispute resolution procedure following the Subcommittee's determination that the Project will serve the public interest, does not shift the burden of proof, or delegate non-delegable authority.

Implementation of the dispute resolution procedure will not violate the Right-to Know Law. It will be administered by an independent third party who will be compensated by funds that will be provided by the Applicant.

The Dispute Resolution Process will not violate the parties' due process or constitutional rights. It is established as a purely voluntary option that the parties may choose. The parties are free to decide not to use the procedure and seek a resolution of disputes in another forum.

The Subcommittee did not commit an error of law and did not act unreasonably or unjustly when it established and conditioned the Certificate upon the Applicant's compliance with a mitigation and minimization measure in the form of the dispute resolution procedure.

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V. CONCLUSION

The Durham Residents Group's Partially Assented-To Joint Motion for Rehearing is denied.

The Conservation Law Foundation's Partially Assented-To Motion for Rehearing and Reconsideration is denied.

The Town of Durham's Partially Assented-To Motion for Rehearing is denied.

SO ORDERED this eleventh day of April, 2019.

David J. Shulock, Presiding Officer
Site Evaluation Committee
General Counsel
Public Utilities Commission

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

Elizabeth H. Muzzey, Director
Division of Historical Resources
Department of Natural and Cultural Resources

Michael Fitzgerald, Designee
Assistant Director
Air Resources Division
Department of Environmental Services

Susan V. Duprey
Public Member