THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0468

NORTHERN PASS TRANSMISSION LLC
AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

Appeal from Orders of the Site Evaluation Committee
Dated March 30, 2018 and July 12, 2018

REPLY BRIEF OF NORTHERN PASS TRANSMISSION LLC AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

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In their multiple briefs, the Opponents argue that there was nothing unusual or irregular about the SC's Orders in which, for the first time, the SEC denied an application based on an applicant's purported failure to satisfy the burden of proof. In fact, as the Applicants have shown, the Orders are the product of a truncated process in which the SC, with an eye to this appeal, failed in its statutory obligations and left the Applicants and this Court to guess at the reasoning underlying its action—as well as what is required to meet the burden of proof.

The SC's Orders confuse the inherent differences between a civil action and the hybrid permitting proceeding mandated by RSA chapter 162-H (the "Statute") and administered by the SEC. That confusion permeates the Orders. The SC misapplied the burden of proof under the Statute and departed from the (1) statutory requirement to consider all evidence of estimated impacts in the record; (2) obligation to consider mitigation that would have addressed estimated impacts; (3) need to deliberate on all statutory factors when applying concepts from another statutory factor to determine whether the Applicants had met their burden on undue interference with orderly development of the region ("ODR"); (4) requirement to weigh the benefits and impacts of the Project; and (5) responsibility for explaining what would have satisfied the Applicants' burden of proof while also imposing standards adopted solely for this proceeding. The Opponents respond by ignoring the statutory requirements, misconstruing the Applicants' arguments (and the Statute and SEC Rules), creating strawman arguments the Applicants did not raise, and

failing to recognize the obligations of the SC to apply discernible standards when ruling on the burden of proof.

Permitting proceedings and the burden of proof.

The Opponents do not challenge Appellants' core argument: the SC failed in its statutory obligation to weigh the significant benefits and impacts of this Project.[1] Appellants' Brief ("AB") 38-41. CFP concedes that the Applicants' burden was to "prov[e] facts sufficient for the…subcommittee…to make the findings required by RSA 162-H:16," including ODR. CFP 33. Yet CFP contends that once the SC concluded that the evidence on land use, tourism and property values was not reliable, "the conclusion that the Applicants had not met their burden of proof was inescapable." CFP 34-35. CFP thus wrongly argues for a "check the box" application of the burden of proof where a failure to provide what the SC considers to be adequate estimates of Project impacts on any of the Site 301.09 criteria dooms the Application.

By contrast, the NGOs concede that "the Applicants did not have to prove that the Project's impact on *each* [301.09] factor would fall below the level of undue interference, so long as the Project in its entirety would not unduly interfere with [ODR]" but that the Applicants were required to provide sufficiently reliable evidence of what the impacts on each Site

[1] Opposition briefs were filed by, and will be cited herein, as follows: Counsel for the Public ("CFP"); Municipal Groups 1 South, 2, 3 South and 3 North ("Mun"); McKenna's Purchase Unit Owners Association ("MK"); Society for the Protection of New Hampshire Forests ("SPNHF"); NGO Intervenors ("NGO") In addition, memos were filed by Municipal Group North 1 and Daryl and Bradley Thompson, et al. Parties filing briefs or memos are referred to as the "Opponents."

301.09 factor would be. NGO 43-44 (emphasis in original).[2] What both arguments miss is that in assessing the reliability of estimates of impact under Site 301.09, or making the ultimate determination of whether the totality of the evidence is sufficient to determine undue interference with ODR, the Statute requires consideration of all evidence and relevant information rather than a narrow focus on only that evidence offered by the Applicants.

Unlike a civil proceeding in which a burden of proof is set by common law precedent or statutes, SEC proceedings are a hybrid of an adjudicative hearing and a permitting process – one that compels a different approach to applying the burden of proof – something the SEC failed to recognize here for the first time in its history.[3] Here, when evaluating whether a subcommittee has reliable evidence about the 301.09 criteria, the Statute requires a subcommittee to "consider and weigh all evidence presented" and "all relevant information" whether offered by an applicant or appearing elsewhere in the record. RSA 162-H:10, III (supp. 2018) and 162-H:16, IV (supp. 2018); AB 31-34.[4] It must then weigh and balance all of the criteria together to determine if the interference with ODR is undue. And it must also consider whether the degree of interference with

[2] With respect to property values, the SC found that the "Applicant[s] did not meet [their] burden in demonstrating that the Project's impact on property values will not unduly interfere with [ODR]. DK-tab-1432-at-199.

[3] Unlike a court, an SEC subcommittee is required to notify applicants of additional information required in an application and to specify what information must be provided. RSA 162-H:7, III. In addition, a subcommittee "shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake." RSA 162-H:10, IV. And together with the CFP it "shall conduct such reasonable studies and investigations as they deem necessary or appropriate." RSA 162-H:10, V.

[4] All references in this reply brief to RSA chapter 162-H are to the 2018 supplement.

development in the "region" as a whole, including impacts under any 301.09 criteria, is "so excessive that it warrants mitigation" through the imposition of conditions in the certificate, including mitigating conditions offered by the Applicants, opponents and State agencies, or those of its own creation. See SEC Groton Decision cited at AB 34. And unlike a civil proceeding in which there are only opposing parties, the Statute calls for a counsel to represent the public interest and establishes that counsel's right to retain and present expert testimony at the applicant's expense. RSA 162-H:10, V.

The Opponents ignore these differences as well as the requirement to consider all evidence and relevant information or mitigating conditions, and spend multiple pages of their briefs asserting that the SC had no obligation to consider other evidence or mitigation at all.[5] In the Opponents' view—and that of the SC—if a subcommittee is not satisfied with an applicant's estimate of the effects of any of the elements of Site 301.09, it need go no further. This view is contrary to the statutory mandate to consider all evidence and relevant information, SEC precedent and practice, and the basic functioning of any permit proceeding, as shown by the order on the recent Seacoast Reliability Project ("SRP").

Failure to consider all evidence.

If the SC had considered other evidence in the record it could have estimated the Project's impacts on tourism and property values in order to make the ultimate finding on ODR. AB 31-34. Contrary to the Opponents'

[5] CFP19-30; Mun 45-48; SPNHF 52-54; NGO 27-34; MK 22-25.

claim, consideration of this evidence—specifically from CFP's expert KRA—is not barred by judicial estoppel. CFP 35; Mun 33-34.[6] Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase," to the prejudice of a party who has acquiesced in the prior position. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001).

The Applicants' critiques of KRA's testimony did not "prevail." On the contrary, the SC spent pages criticizing the Applicants' experts on these issues but cited KRA's testimony and quantified KRA's estimated impacts without criticism. DK-tab-1432-at-177-79, 219-220. Nor can CFP assert "prejudice" by the Opponents' reference to testimony it offered and endorsed.[7] The SC was free to consider KRA's testimony and reject it, but having cited it without criticism (and quantified the impacts estimated by KRA), the Statute required it to consider this testimony. RSA 162-H:10 and 16; AB 31-34.

The Opponents argue that requiring the SC to consider evidence from other parties would shift the burden of proof to the SC. See e.g.,

[6] CFPB 35-37; MB 50; MK 32.

[7] CFP concedes that the Applicants raised KRA's testimony on tourism in their post-hearing memo. CFP 36. McKenna's claims that the Applicants waived the argument that the SC should have considered KRA's testimony and contends that it was not until this Appeal that the Applicants "for the first time claimed that the SEC should have considered the opinion of KRA." MK at 28-29. McKenna's is wrong. The Applicants asserted multiple times in their two motions for rehearing that the SC failed to consider KRA's evidence and opinions. See, e.g., DK-tab-1405-at-10-11 (noting that KRA testified that the Forward Fund would have been more than adequate to compensate for property value effects, and pointing out SEC's failure to consider KRA's comments that effects on tourism would be minimal); and DK-tab-1435-at-12-21 (asserting that SEC failed to consider all relevant evidence including, "the totality of evidence from the Applicants and other parties [that] established clear boundaries that could be applied to address the perceived impacts" and specifically referencing testimony from KRA on property values and tourism. Id. 14.

CFP 36-37. This claim is meritless. The question is not whether the SC must hunt through the record to support the Applicants. It is whether, under the Statute, the SC is free to ignore evidence of impacts it ratified by claiming, in effect, that only the Applicants' evidence matters. CFP's expert evidence serves to highlight this problem because its special statutory role— to "conduct reasonable studies…to carry out the purposes of [the Statute]"—is different from that of other intervenors. RSA 162-H:10, V. CFP suggests that despite its extensive participation in the hearing, and its presentation of expert testimony—paid for by the Applicants—that testimony can be ignored.

The Opponents argue against the value of their own evidence by asserting that reliance on KRA's testimony to "bookend" tourism and property value impacts is flawed. They assert that KRA offered only "order of magnitude guidance" that was not reliable to provide estimates of impacts. CFP 38; MK 45-46. But the Order did not question the value of KRA's estimates of the impacts on property values and tourism. DK-tab-1432-at-177-179; 219-220. And KRA's report on property values specifically stated that its evidence "can frame potential impact ranges." CFP-Ex-148-at-56; see also AB 33-34.

CFP claims that the Applicants take "out of context" or misstate KRA's testimony on tourism, suggesting that KRA's estimated impacts were more substantial. CFP 36, footnote 14 and Mun 58-59. This ignores the SC's description of KRA's estimated impacts. DK-tab-1432-at-220; AB 16, 33-34. KRA explained that its estimated tourism impact is "a small change." DK-tab-1233-at-18. CFP excerpts portions of KRA's subsequent testimony on this issue, stating that the estimated "fifteen one-hundredths

of one percent…adds up to real money." CFP 36 (quoting DK-tab-1232-at-169). The citation is correct but incomplete. The entirety of that referenced testimony also stated that the impact is "not going to be like an earthquake in New Hampshire tourism," that the tourism industry was "growing fairly well…"[t]here's real growth in that sector, and there's likely to be for some years." DK-tab-1232-at-169. KRA also attached dollar figures to measure these impacts. DK-tab-1432-at-220. To conclude that a fifteen one-hundredths of one percent (0.0015) impact to tourism is anything but de minimis ignores KRA's testimony.

The SC had evidence from CFP's experts concerning the extent of the impacts. The Statute required the SC to consider that evidence—together with the estimates from the Applicants—in assessing estimated impacts.

Failure to consider mitigating measures or conditions.

The Applicants demonstrated that the SC's failure to consider all evidence was compounded by its failure to consider key mitigating measures offered by the Applicants. AB 34-38. In response, the Opponents create a series of strawman arguments, including that the Applicants assert that the SC did not consider any conditions or that the SC should be required to craft entirely new mitigating measures that were not included in the record.[8] The Applicants make no such claim, instead pointing out that while the SC specifically noted that mitigating measures had been offered, and that the Applicants were willing to modify or revise

[8] CFP 22-30; Mun 45-48; NGO 27-36; SPNHF 52-54; MK 40-42.

them, it then failed to address them. Id. 37-38. Specifically, the SC could—and should—have considered the proposed property value guaranty as a means of mitigating impacts on property values, the proposed Forward New Hampshire Fund ("FNHF") and North Country Job Creation Fund (together, the "Funds") and the business claims process as conditions for addressing tourism and other economic impacts.

CFP devotes a section of its brief to a false distinction between mitigation and conditions, claiming that mitigation means "measures taken by applicants and incorporated into the proposed project in order to reduce the project's impacts," whereas conditions are requirements imposed by the SEC that "can act to mitigate project impacts." CFP 23.[9] The Opponents then argue—as did the SC—that the decision to apply conditions is made only after a decision has been made to grant a Certificate, citing language in the Rules providing that "in determining whether a certificate shall be issued, the committee shall consider whether the following conditions should be included in the certificate in order to meet the objectives of RSA 162-H…or to support findings made pursuant to RSA 162-H:16." Site 301.17; CFP 25. These arguments fail.

CFP concedes—as the Applicants argued—that mitigating measures are part of an applicant's burden of proof. CFP 23; AB 35. Because that is true, such measures are part of "determining whether a certificate shall be issued," and are not limited to consideration only after that decision is made. They are integral to a decision about whether adopting those measures—as proposed by an applicant or as modified by the SC—"meets

[9] The Applicants used mitigation and conditions interchangeably to refer to measures intended to avoid or mitigate impacts. AB 35, footnote 22.

the objectives of RSA 162-H," or "supports the findings made pursuant to RSA 162-H:16" by, among other things, mitigating interference with ODR. The contention that the consideration of conditions when determining "whether a certificate shall be issued," or to "meet…the objectives" or "support…the findings" limits that determination to situations where the decision to issue a certificate has already been made, reads the word "whether" out of the Rule and is a tortured and erroneous reading of the Statute and Rule.

The Opponents are correct that the ultimate decision of whether to impose specific mitigating measures as conditions rests with the SC. But that does not mean that the SC was free to ignore measures the Applicants offered to reduce impacts, either as part of their burden of persuasion to estimate the Project's effects, or their ultimate burden on the ODR finding. Indeed, as the Applicants pointed out in their Notice of Supplemental Authority ("Notice") regarding the recent SRP Order, in making the RSA 162-H:16 findings, the SRP subcommittee considered and modified mitigation offered by the applicant in part to mitigate possible property value impacts. Notice at 2-6; SRP Order at 288.

The Opponents further assert that the SC correctly declined to consider the Applicants' proposed conditions because the Applicants refused to accept revisions proposed by CFP relating to the independent boards operating the Funds, or to appeal mechanisms in the independent business claims process. CFP 27-28; Mun 47; see also, DK-tab-1432-at-149-150. Just as the SRP subcommittee could modify applicant-proposed conditions, no rejection by the Applicants of CFP's proposals could serve to limit the SC's authority to impose oversight and spending requirements

on the Funds as a condition to the grant of a certificate. Notice at 2-4. The SC never pointed to these alleged "refusals" as a basis for its failure to consider these mitigation measures. And during deliberations, when a question was raised concerning whether the SC had the authority to include conditions in a certificate to revise the FNHF to provide "more rigor and process," counsel for the SC stated: "Yes, you can include those types of conditions in your certificate." DK-Tab-1401-at-33-34.[10]

The Opponents also argue that there was insufficient evidence in the record to allow the SC to consider—or modify—the Applicants' mitigation measures. CFP 27-29; Mun 30-32.[11] For example, the SC found that it had "insufficient information upon which to structure a broader property value guarantee program" based on its criticism that Chalmers limited the area of impact to 100 feet. DK-tab-1432-at-198. But if the SC disagreed with that assessment, there was ample evidence in the record from the literature, from the Department of Energy Environmental Impact Statement, and from KRA, that impacts decline with distance from the line, taper off dramatically at 325 feet and are near zero at 500 feet from the line. App-Ex-1-Appendix-46-at-Ch.2-at-8; APP-Ex-205.13-at-25; CFP-Ex-148-at-59-60. If the SC had completed its deliberations, consideration of that evidence

[10] The Opponents criticize the Applicants for citing the SC's deliberations, yet their briefs contain multiple citations to them in support of their arguments. See, e.g. CFP 9, 17-18; Mun 26-35.

[11] McKenna's contends that "there was no developed mechanism to compensate property owners" whose property value might be impacted and asserts that the "so called PVG did not and does not exist." Mun 10. This ignores the record. The PVG was submitted as part of the supplemental testimony of Mr. Quinlan and set out a specific mechanism for property owners along the route whose properties have certain characteristics to seek compensation if their property was impacted by the Project. APP-Ex-6-at-Attach.M. The SC discussed the PVG during deliberations, noting the Applicants' willingness to revise it, including revisions that might alleviate impacts on McKenna's. DK-tab-1400-at-110-113. See also AB 37.

plainly would have allowed the SC to expand the guarantee accordingly. AB 36, footnote 26.

The SC's failure to weigh $1.5 billion in Project benefits.

The Applicants showed that the SC failed to weigh significant Project benefits ($1.5 billion). AB 12-14, 38-41. The Opponents challenge the description of these benefits in the Applicants' brief as uncontested, asserting that this "grossly overstates the value of the benefits." Mun 25. Yet while complaining about the structure of the FNHF and Applicants' reliance on the estimates of CFP's experts in calculating additions to the Gross State Product, the Municipal Brief does not point to any benefit that has been misstated. For example, that Brief agrees with the dollar value of energy market savings, but simply says it is less than what was originally projected. Id. 26. Likewise, it does not dispute the potential property tax benefits, arguing instead that municipal officials had concerns, even if they were "unable to quantify" them. Id. 27. The Applicants' estimate of these benefits was conservative, did not include benefits from the forward capacity market, and was drawn directly from the SC's Orders.

The Opponents also take issue with the Applicants' contention that the SC failed to reconcile the potentially "outcome determinative" forward capacity market benefits. AB 38-39; CFP 37-40; Mun 26. The Applicants showed that the SC improperly based its conclusion that no such benefits would accrue on the record (without explaining how the record supported that conclusion or how it reconciled expert testimony) and on an alleged admission from the Applicants that reconciling such testimony was an unnecessary "intellectual exercise." AB 39. The SC's finding on the

forward capacity market benefits had two parts: a reference to the record and to the alleged "admission" by the Applicants. The Opponents have no answer to the fact that the SC did not explain how the record supported its finding or that it did not finally reconcile the expert testimony. And the CFP's citation to the SC's finding conveniently omits any reference to the alleged "admission," which was an essential part of that finding. CFP 38.

The Opponents' final point on these benefits is that whatever their magnitude, they cannot overcome the potential detriments to tourism, property values or to the "non-monetary negative aspects of the project such as the degradation of the character and aesthetics" of communities. Id. 39; Mun 27-28. Putting aside the evidence from CFP's experts that placed dollar estimates on the impact to tourism and property values, the Statute and Rules do not contemplate the weighing of "character and aesthetics" against economic factors in the ODR analysis.

The SC's failure to complete deliberations.

The Opponents spend time arguing that as a matter of law, RSA 162-H:16, IV and the Rules require deliberation on all of the statutory factors only if a Certificate can be granted, and that once the SC found the evidence on ODR to be inadequate to satisfy the Applicants' burden of proof, no further deliberation was necessary.[12] The Applicants did not brief the issue of whether the Statute or Rules require consideration of all of the RSA 162-H:16, IV criteria as a matter of law. They argue that if the SC was going to improperly apply the aesthetic considerations of a separate statutory factor to the ODR determination, it should have deliberated on

[12] CFP 19-22; MB 43-45; NGO 18-27; SPNHF 41-44; MK 47-50.

aesthetics, and thus provided a framework for its consideration of aesthetics relative to ODR. AB 31-33. By failing to deliberate on that issue, the SC failed to consider all evidence and improperly considered aesthetics as part of ODR using purely subjective standards.

The SC's Order involved extensive consideration of the aesthetics of this line, while giving little consideration to the fact that the line was to be constructed primarily in existing transmission line rights-of-way. For example, the SC found that the burden of proof on land use (an admittedly undefined term) had not been met because Mr. Varney did not consider the impact of "unsightly transmission corridors." DK-tab-1432-at-278.[13] Likewise, testimony from municipal officials almost entirely addressed aesthetic considerations such as "scenic beauty." AB 23. The SC does not say how the determination of "unsightliness" was to be made (particularly when the Project towers were to be constructed next to existing towers), or whether any standard was applied to concerns about "scenic beauty." Id.

[13] The Opponents would have the Court believe that Mr. Varney did no analysis of actual land uses at all. See e.g. CFP 46. This ignores Mr. Varney's substantial reports, which evaluated land uses in every town along the route and the consistency of this line with those uses. See Varney reports cited at AB 21-22. The Opponents offer no response to the SC's departure from the precedent that construction in the right-of-way does not unduly interfere with ODR other than to say that the SC was not required to follow precedent, or that other projects were different from this one. See e.g. NGO 39-42; SPNHF 56. Likewise, this ignores the SC's failure to explain that departure or to base it on specific differences in projects. Projects may be different, but the principles applicable to evaluating them should be the same, unless an explanation for departure is provided. Moreover, in an effort to undermine Mr. Varney's knowledge of land uses along the Project corridor, the CFP misstates his testimony. CFP states that the SC "not[ed] the lack of substantive analysis" in Mr. Varney's testimony and reports and refers to the SC's finding that "Varney was not aware of the fact that structures associated with the Project and existing structures that would be relocated would be higher than existing structures." CFP 45, citing DK-tab-1432-at-237. In fact, the Order—and Varney's testimony—state the exact opposite, i.e., that "Varney confirmed that he was aware" of those facts. Id. citing DK-tab-1184-at-58-59.

The Legislature placed the consideration of aesthetics in the "unreasonable adverse effect" section of RSA 162-H:16, IV (c), not under ODR, and the Rules provide elaborate and very specific criteria for how aesthetic issues are to be considered, as the Municipal Brief concedes. Site 301.05 and 301.14; MB 44-45. If the Legislature had intended aesthetics to be incorporated into ODR—without any standards—it would have said so, and the SEC has no rules describing how aesthetics relate to, or should be considered, in ODR.

The Opponents nonetheless assert that undue interference with ODR may be measured by "community aesthetics" and "community attractiveness" (apparently using personal opinions), or by "visually oriented goals" in master plans. Mun 45. None of these terms is defined by, or appears in the Rules. They also criticize Chalmers for not "perform[ing] a visibility assessment or consider[ing] visual impact assessments and photo-simulations from the [Applicants'] or other parties' witnesses." SPNHF 26. Yet the SC failed to consider visibility assessments that were part of the record and from which it could have addressed aesthetics in a framework other than "we know it when we see it."

By contrast to the SC's failure to deliberate on aesthetics, the SRP Order addressed aesthetics first and then evaluated ODR having assessed that issue. SRP Order 87-117 (aesthetics); 237-290 (ODR). As a result, when evaluating tourism impacts, for example, the SRP subcommittee could conclude: "The Project will have some impact on aesthetics of tourism destinations, but it will not have an unreasonable adverse effect on aesthetics or tourism. It is unlikely that views of the Project will preclude

the public from going to and enjoying various tourism destinations. Nothing in the record indicates that the modest tourism impacts will unduly interfere with the orderly development of the region." Id. at 291.

The CFP concedes that "there are strong policy reasons for subcommittees to deliberate on all areas of an application." CFP 20. Here, the SC's failure to deliberate on the aesthetics factor in RSA 162-H:16, IV(c) in order to inform its decision-making on ODR demonstrates one such reason.

The failure to explain key standards or what was necessary to satisfy them.

In addition to its misapplication of the burden of proof by failing to consider all evidence and mitigating conditions, the SC measured that burden by wholly arbitrary standards that the Applicants could not predict or meet. The Opponents argue that statutory terms need not be defined with precision, are allowed to be flexible, and that RSA 162-H:16, IV, when read with Site 301.09, provided ample notice to the Applicants of the requirements of ODR.[14] They thus contend that the SC had no need to define any term in RSA 162-H or the Rules in applying the burden of proof. The NGOs argue that the Applicants have waived any claim that the definition of ODR in the Statute or Rules is unconstitutionally vague, and CFP claims that "anything less than unconstitutional vagueness is meaningless." NGO 48; CFP 50-51.

The Applicants recognize the broad principle that statutes and rules are not necessarily vague because they do not precisely spell out the

[14] CFP 50-56; Mun 51-57; SPNHF 44-48; NGO 45-48; MK 50-52.

standards to be used by an agency in making a decision. See, e.g., CFP 50-56. But here, the SC's application of the ODR standard and of the Rules was both unlawful and unreasonable under RSA 541:6, and unconstitutional, because the SC provided no definition to them in its decision, and no explanation of the standards it was applying.[15] AB 41-45; Pearson v.Shalala, 163 F.3rd 650, 660-61 (D.C. Cir. 1999) (agency action is arbitrary and capricious when its application of terms does not allow the "regulated class to perceive the principles which are guiding agency action.")

In addition to a host of other shortcomings, the SC never explained what "region" it used to find the Applicants' evidence insufficient relative to anything regional in nature, nor how the various purported impacts of the Project affected "development." AB 41-50. Nor did it explain what would have been required for the testimony of Nichols, Chalmers, and Varney to measure up to the undefined "burden of proof," as opposed to ad hoc statements about what those witnesses should have provided to meet the standards adopted solely for this case. Id. 48-54. And with respect to municipal views, the SC imposed a new burden on the Applicants, finding that they "failed to adequately anticipate and account for" those views, without explaining how this new burden could be met. DK-tab-1432-at-7.[16]

[15] The Applicants preserved both the constitutional due process issue and the argument that the SC applied the Statute and Rules in an arbitrary and therefore unlawful and unreasonable manner in their Motion for Reconsideration (DK-tab-1435-at-22-37) and briefed the issue. AB 41-43.

[16] CFP claims that the SC's reference to this "failure" was simply a statement of fact. CFP 48. But it appears in the SC's findings in the introduction to the Order. DK-tab-1432-at-7. On the issue of the whether the Applicants failed to adequately account for municipal views, the Opponents challenge the Applicants' reference to statements from SC members that the towns had "stiff-armed" or refused to cooperate with the Project, or to enter into MOUs that might have resolved many of their concerns, asserting that these statements were "taken out of context," and

The SC goes on at length about what the Applicants did not provide in failing to meet their burden but never explains what would have been enough. Id. 44-45. Society for the Protection of New Hampshire Forests v. SEC, 115 N.H. 163 (1975) (SEC required to "weigh with care the evidence before it and to delineate the basic facts supporting its conclusions.") The Applicants are thus left in the dark with regard to a subsequent application. And this Court is without an assurance that a discernible standard "is in fact guiding the agency's behavior, rather than merely serving as a cover for arbitrary and capricious decision-making." United Food and Commercial Workers International Union v. NLRB, 880 F.2d 1422, 1439 (D.C. Cir. 1989). The Opponents do not address this issue.

The Opponents argue that the criteria in Site 301.09 are sufficient to inform the Applicants of the specific areas that would be used to measure the burden of proof because they call for an assessment of the effects on—in the case of land use and property values—the "affected communities" (a term defined by the Rules), or on "in-state economic activity" (Site 301.09 (b)(2)), "host and regional communities" (Site 301.09 (b)(3)), or "community services and infrastructure" (Site 301.09 (b)(6)) (none of which are defined). See, e.g., Mun 51-54.[17] The problem with this

related only to construction issues. In fact, the SC's statements, although made as part of the discussion over construction, indicated the SC's understanding that the Applicants were willing to work with the towns to address a range of concerns, but that the towns had refused to do so. DK-tab-1399-at-42-43, 102-103. The Municipal Brief admits that "several municipalities believed it was inappropriate to enter into a stipulation" where they had concerns about the "design and proposed route of the project." Mun 68. By contrast, the SRP Order demonstrates that where towns worked with a project, a different result could be achieved. SRP Order 231-232 and Notice at 6, citing examples.

[17] With regard to tourism, the Rules provide no guidance whatsoever concerning the "region" in which those effects are measured.

argument is that the SC offered no explanation of the particular area or region it was considering when it found the Applicants' proof to be wanting on any criteria under Site 301.09, nor did it even once explain how the estimated effects would supposedly interfere with "development." For example, the SC said that "there were places along the route" where "increased tower heights" "would create a use that is different in character nature and kind from the existing use" and "would have a substantially different effect on the neighborhood." Order 278-279; AB 25.[18] But it never explained how any such impact might affect development in any particular "region" or how that "neighborhood" affects some "region." Mere reference to the criteria in Site 301.09 says nothing about how this SC actually applied the Applicants' proof relative to these criteria, or whether the SC even considered a particular area when finding that the burden of proof had not been met. Just as important, the Opponents ignore the fact that eventually, all of the 301.09 criteria must be evaluated to determine whether the estimated impacts unduly interfere with ODR. At that point, describing the "region" against which the impacts are applied is critical. The failure to do so implicitly renders the term "region" meaningless.

The Opponents' collective inability to even articulate a consensus definition of "region" in their filings proves the point. While they assert that the common meaning of "region" is clear, their briefs describe "region"

[18] In searching for evidence that the Project would be inconsistent with prevailing land uses, the Opponents cite this finding in the SC's Order. This ignores the SC's Rehearing Order, which backtracked on many of the findings in the Order, including this one. DK-tab-1432-at-279-280. There, the SC denied that it had made any such finding, only that it "might find that the Project was or was not consistent with lands uses at these locations." DK-tab-1478-at-54-55. And like the SC, the Opponents do not identify any location where the line is inconsistent with prevailing land uses.

as "includ[ing] impacts that affect a municipality as well as larger geographic areas;" "involv[ing]an analysis of widespread and localized impact;" "appl[ying] at multiple geographic scales [and] provid[ing] flexibility to assess the impacts of projects that vary widely in scope;" by "common sense…the relevant region is coextensive with the effects of a project;" and "depend[ing] on the geographic and aesthetic scope of a project." Mun 52-53; NGO 16; 47 SPNHF 44-45. What the Opponents miss is that if the "region" can be applied so inconsistently to widely different areas, then what matters is how a subcommittee defines it in a specific proceeding, both when assessing impact estimates or the higher level question of undue interference with ODR. For example, it is plain that if the estimated effects of a project are distributed among three towns, those effects are inherently greater proportionately then if distributed among twenty.

When this SC was considering whether the estimated effects were sufficiently proven by the Applicants, it matters whether it was considering the State, a particular area, or just a few towns. For example, CFP's expert KRA determined different effects on tourism depending on whether one examined a specific area of visual impact or the State as a whole. CFP-Ex.-146-Table-18-at-67. When the SC determined that there were "valid reasons" to believe that the Project would "hurt tourism," where were those effects, and how did they relate to development? AB 48. Likewise, when it looked at the impacts on property values and concluded that "properties not encumbered by the right-of-way will be affected," what area is being described? Id. The SC offered no explanation. Id. 42. Nor did it explain what evidence it required to demonstrate effects under any criterion in Site

301.09 in any particular area or region. The result is an Order that allowed for a purely arbitrary application of those criteria and of the burden of proof.

The recent SRP Order demonstrates why defining terms such as "region" and explaining how the effects are measured against those terms matters. As the Applicants pointed out in the Notice, the SRP subcommittee defined the applicable region and then found that the estimated effects of construction in certain towns did not prevent a determination concerning undue interference with ODR because the region was broader than those towns and, in fact, broader than the entire Project. Notice at 5-6; SRP Order at 313.

Conclusion.

For these reasons, and those set forth in the Applicants' Opening Brief, the Court should vacate the Orders and remand this matter to the SEC.

Respectfully submitted,

NORTHERN PASS TRANSMISSION LLC

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Dated: April 10, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2019, I served the foregoing Reply Brief by email to the parties on the electronic service list, and by first class mail to parties without email addresses.

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CERTIFICATION OF WORD COUNT

I hereby certify that this Reply Brief contains 5,908 words, exclusive of the cover page, table of contents, tables of authorities, certificate of service and certification of word count.

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