Pittsburg
NEW HAMPSHIRE

New Hampshire's Northernmost Town

December 20, 2016

TO: New Hampshire Boards of Selectmen
New Hampshire City Mayors and Governing Boards
New Hampshire Town Councils

FROM: Steve Ellis, Chair, Town of Pittsburg, Board of Selectmen

SUBJECT: Local Control of Municipal Roads

I write on behalf of the Boards of Selectmen in Pittsburg, Clarksville and Stewartstown, to share with you a concern we have about the legal control of municipal roads and how the established principle of home rule applies to the continued ability of municipalities to retain control over municipal roads. I also write to ask you to consider writing a letter to defend the principle of home rule as it relates to municipal roads.

Our concern arises over a claim by the region's largest electric utility (Eversource) that they have the right to appropriate municipal transportation rights of way without any consultation or approval from the municipal governing authority to build a high voltage electric transmission line within the right of way. In fact, RSA 231:161 (copy enclosed) clearly provides that municipal governing bodies have the exclusive authority to permit and license such uses of municipally owned rights of way. Eversource, the developer of the Northern Pass project, claims that the New Hampshire Site Evaluation Committee has the power to preempt this statute. Nothing in the statute authorizing the Site Evaluation Committee (RSA 162-H) sets aside the statutory provisions in RSA 231:161. Eversource lamely argues that a prior Supreme Court case with an entirely different set of facts supports their claim. An excerpt from the Northern Pass application to the SEC making this claim is enclosed. Follow this link to the Supreme Court decision cited by Northern Pass: https://www.courtlistener.com/opinion/2111618/public-serv-co-v-town-of-hampton/.

Our three towns have joined with a number of other intervenors in the Northern Pass docket at the SEC to ask the SEC to initiate a new docket to specifically address this dispute. Under SEC rules, any party can file a request for a declaratory ruling for the purpose of addressing matters within the SEC's jurisdiction. A copy of our filing made December 19 is enclosed for your review.

Whether one is for, against or agnostic on the issue of Northern Pass, it is the height of arrogance (not to mention against the law) for a large domestic utility partnering with a large foreign utility to commandeer for their exclusive financial benefit a municipal transportation corridor without the acquiescence of the municipality. In the six years since Northern Pass was first announced,

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project developers have never formally or informally asked our towns' permission to use town roads for their project. Their application to the SEC has a single blank license form for the locations within our three towns where they propose to bury their facility along more than 8 miles of municipally maintained roads. The Legislature has precluded Northern Pass from having access to eminent domain for the purpose of condemning private property for their project. However, RSA 231:167 provides that if a landowner has suffered damage as a result of the installation, the landowner may *apply to the Selectmen* to assess damages in the same manner as laying out a new road. In other words, the Town would be liable for the taking and responsible for paying the damages assessed, not Northern Pass. Northern Pass is thus shifting the burden of eminent domain – a power it does not possess - to the Towns, while arguing that the towns have no say in the matter.

This back-door condemnation of municipal roads must not be allowed to stand. I ask you to consider writing a letter to the SEC in support of our petition, opposing the Eversource attempt to secure through the back door what they cannot achieve through the front door. Please direct your comments to: Ms. Pamela Monroe, Administrator, NH Site Evaluation Committee, 21 Fruit Street, Concord, NH 03301. Or e-mail your comments to Pamela.Monroe@sec.nh.gov.

Thank you for your consideration of this request.

FROM PAGE 82-83 of NORTHERN PASS SEC APPLICATION, Submitted October 19, 2015

(D) Crossing Local Highways

NPT seeks permission to install the Project, including conduit, cable, wires, poles, structures and devices across, over, under and along certain locally-maintained highways, including 71 aerial crossings and four underground roadway installation sections. The underground sections are identified by town and roadway. The SEC has exclusive authority to grant permission to an energy facility to utilize locally-maintained highways. In *Public Service Company of New Hampshire v. Town of Hampton,* 120 N.H. 68 (Jan. 31, 1980), the Court pointed out that the "declared purposed of RSA ch. 162-F [forerunner to RSA ch. 162-H] is to provide a resolution, in an 'integrated fashion,' of all issues involving the routing of transmission lines." The Court found that the Town of Hampton could not regulate transmission lines associated with the Seabrook Nuclear Station, noting that the SEC protects the public health and safety of towns with respect to transmission lines covered by the siting statute. NPT has filed a request with the NHDOT to cross state-maintained highways and has included that request with the Application as required by RSA 162-H:7 and Site 301.03 (d). See Appendix 9.

RSA 162-H:16, IV provides that the SEC must find, among other things, that issuance of a certificate of site and facility will not have an unreasonable adverse effect on public health and safety. Utilities of all varieties, including power lines, have long been recognized as appropriate users of public highways, so long as the facilities do not conflict with the general public's superior use. E.g., *McCaffrey v. Concord Electric Co.,* 80 N.H. 45, 46-47 (1921). In *King v. Town of Lyme*, 126 N.H. 279, 284 (1985), the Court affirmed that a utility's use of a highway easement is appropriate since New Hampshire has never considered highway purposes to be limited to the transportation of movable vehicles, persons or property. The authority to erect electric transmission lines and underground cables in state and local highways is codified at RSA 231:160. The standard for locating poles, lines, and underground cables is set forth at RSA 231:168, which states that the lines "will not interfere with the safe, free and convenient use for public travel of the highway." To further that process, the NHDOT has adopted certain standards, which are set forth in its *Utility Accommodation Manual* ("UAM"), dated February 24, 2010. This filing constitutes notice of these proposed crossings, associated pole placements and locations in accordance with the procedures set forth in the UAM Appendix G-3.1-2.

The New Hampshire Supreme Court has made it clear that the authority to license placement of power lines, poles and underground conduit within highways is regulatory in character and must be exercised in a non-exclusionary and reasonable manner. In *Rye v. Public Service Company of New Hampshire*, 130 N.H. 365 (1988), the Court found that a crossing application may be denied only for a public safety-based reason.

NPT seeks approval from the SEC to install its Project within, along, over, under and across locally-maintained highways. This request mirrors the approach followed, and the standards applied, in the request made to NHDOT for state-maintained highways. With respect to the underground highway installation sections in the towns of Clarksville and Stewartstown, NPT proposes that the SEC apply the NHDOT *Standard Specifications for Road and Bridge Construction* and the provisions, instructions, and regulations set forth in the NHDOT's standard Excavation Permit. Furthermore, NPT proposes that the SEC condition approval of a certificate, to the extent necessary, on compliance with such standards. Accordingly, Project plans for aerial crossings and underground sections within highways are provided at the 30% design level, which is the commonly accepted level of detail for initial permit applications and consistent with NHDOT practice. See Appendix 9 and 10.

TITLE XX
TRANSPORTATION

CHAPTER 231
CITIES, TOWNS AND VILLAGE DISTRICT HIGHWAYS

Lines of Telegraph and Other Companies in Highways

Section 231:161

231:161 Procedure. – Any such person, copartnership or corporation desiring to erect or install any such poles, structures, conduits, cables or wires in, under or across any such highway, shall secure a permit or license therefor in accordance with the following procedure:

I. Jurisdiction.

(a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(b) City Maintained Highways. Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this subdivision for selectmen; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herein. The commissioner shall also have the same authority as conferred upon the selectmen by RSA 231:163 to revoke or change the terms and conditions of any such license. The commissioner is hereby authorized to delegate all or any part of the powers conferred upon him by the provisions of this section to such agent or agents as he may duly appoint in writing; he shall cause such appointments to be recorded in the office of the secretary of state, who shall keep a record thereof.

(d) The word "selectmen" as used in the following paragraphs of this section shall be construed to include all those having jurisdiction over the issuance of permits or licenses under paragraph I hereof.

II. Permits. The petitioner may petition such selectmen to grant a permit for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduits, cables or wires. Such permit shall designate and define in a general way the location of the poles, structures, conduits, cables or wires described in the petition therefor. Such permit shall be effective for such term as they may determine, but not exceeding one year from the date thereof, and may, upon petition, be extended for a further term not exceeding one year. A permit shall not be granted to replace an existing utility pole on any public highway unless such replacement pole is erected at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20-foot requirement.

III. Effect of Permit. Except as otherwise provided herein, the holder of such permit shall during the term thereof be entitled to have and exercise all the rights, privileges and immunities and shall be subject to all the duties and liabilities granted or imposed hereby upon the holder of a license hereunder.

IV. Licenses. The petitioner may petition such selectmen to grant a license for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduits, cables or wires described in the petition.

V. Provision of Licenses. The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the placement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

VI. Effect of License. All licenses granted under the provisions hereof shall be retroactive to the date the petition therefor is filed. The word "license" as hereinafter used herein, except in RSA 231:164 shall be construed to include the word "permit". The holder of such a license, hereinafter referred to as licensee, shall thereupon and thereafter be entitled to exercise the same and to erect or install and maintain any such poles, structures, conduits, cables, and wires in approximately the location designated by such license and to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers and other attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service; and to place in such underground conduits such number of ducts, wires and cables as they are designed to accommodate, and to supply and install in connection with such underground conduits and cables the necessary and proper manholes, drains, transformers and other accessories which may reasonably be required.

Source. 1881, 54:3, 4. PS 81:2. 1903, 81:1. PL 97:2. 1935, 100:1. 1937, 102:1. RL 113:2. 1943, 126:1. 1945, 188:1, part 24:2. RSA 254:3. 1959, 223:1, 2. 1981, 87:1. 1985, 402:6, I(b)(3).

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. _____

PETITION FOR DECLARATORY RULING

The Town of Bethlehem, Town of Bridgewater, Town of Bristol, Town of Clarksville, City of Concord, Town of Deerfield, Town of Easton, Town of Franconia, Town of Littleton, Town of New Hampton, Town of Northumberland, Town of Pembroke, Town of Pittsburg, Town of Plymouth, Town of Stewartstown, Town of Sugar Hill and Town of Whitefield, Town of Woodstock, the Ashland Water and Sewer Department, the Society for the Protection of New Hampshire Forests, and the Appalachian Mountain Club (the "Petitioners"), pursuant to New Hampshire Administrative Rule Site 203.01, respectfully petition the New Hampshire Site Evaluation Committee (the "SEC" or "Committee") to issue a declaratory ruling stating that, pursuant to RSA 231:160 *et seq*, only municipalities have the authority to authorize or not authorize the erection, installation, or maintenance of electric power poles or structures or underground conduits or cable, or their respective attachments or appurtenances, on, across, or under locally maintained highways, regardless of whether the New Hampshire Department of Transportation (the "NHDOT"), the SEC, or other agencies have authority to permit or license other portions of any proposed facility. In support of this Petition, the Petitioners offer the following:

JURISDICTION AND STANDARDS

1. Pursuant to RSA 541-A:16, I(d), New Hampshire Administrative Rule Site 203.01 authorizes "[a]ny person [to] submit a petition for declaratory ruling from the committee

on matters within its jurisdiction." A declaratory ruling is a ruling as to the "specific applicability of any statutory provision or any rule or order of the agency." RSA 541-A:1, V. The SEC has 90 days from the time of submission to rule on the petition. N.H. Admin. Rule Site 203.02(b).

2. The Petitioners, especially the Petitioning Towns, have an interest in the management and regulation of activities along, and under, municipally maintained highways and rights of way, and in seeing that municipal authority is recognized. Further, the Forest Society holds conservation easements on land abutting and under municipally maintained highways, and has an interest in assuring that existing encumbrances are managed lawfully and not exceeded.

3. The following standards govern declaratory petitions. The SEC may not dismiss a petition that: (1) sets forth factual allegations that are definite and concrete; (2) does not involve a hypothetical situation or otherwise seek advice as to how the committee would decide a future case; (3) implicates the legal rights or responsibilities of the petitioner; and (4) is within the committee's jurisdiction. *Id.* 203.03(c). The jurisdiction of the SEC is to evaluate and issue or deny a certificate of site and facility approval for certain energy generation and transmission projects. RSA 162-H.

BACKGROUND

4. The Petitioners request this ruling because resolution of this issue would impact their interests generally, and more particularly in Docket No. 2015-06 involving the Northern Pass project. While the Northern Pass project provides the impetus for this petition, the interpretation of the statute, issues raised, and relief sought are broader than a single project.

5. On October 19, 2015, Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively "Applicants") submitted an Application to the SEC for a Certificate of Site and Facility ("Application") to construct a 192-

mile transmission line ("Project"). As proposed, the Project would run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

6. As part of the Project, Applicants propose to install conduit, cable, wires, poles, structures, and devices across, over, alongside, and under highways maintained by the following municipalities:[1] *Town of Pittsburg*; *Town of Clarksville*; *Town of Stewartstown*; Town of Dummer; Town of Stark; *Town of Northumberland*; Town of Lancaster; Town of Dalton; *Town of Bristol*; City of Franklin; Town of Northfield; Town of Canterbury; *City of Concord*; *Town of Pembroke*; Town of Allenstown; and the *Town of Deerfield*, including at least 71 aerial crossing and four underground roadway installation sections. Joint Appl. of N. Pass Transmission, LLC and Pub. Serv. Co. of N. H. d/b/a Eversource Energy for a Certificate of Site for the Construction of a 1,090 MW Electric Transmission Line 82 [hereinafter "Appl."]; Appl. App. 10, at 3-5.

APPLICANTS' POSITION

7. Applicants maintain that the "SEC has exclusive authority to grant permission to an energy facility to utilize locally-maintained highways." Appl. 82.

8. Accordingly, Applicants seek "approval from the SEC to install its Project within, along, over, under and across locally-maintained highways." *Id.* 83. Applicants claim this "request mirrors the approach followed, and the standards applied, in the request made to NHDOT for state-maintained highways." Applicants propose that the SEC has authority to permit this portion of the installation and should do so by applying "the NHDOT *Standard Specifications for Road and Bridge Construction* and the provisions, instructions, and regulations set forth in the NHDOT's standard Excavation Permit." *Id.*

[1] Towns in italicized font are Petitioners here.

9. Applicants have not sought, obtained, or applied for a permit or license, in accordance with RSA 231:161, I(a), and (b), from any of the municipalities that maintain highways whose highways the Applicants would be use.

10. In subsection (d) of the Application, "OTHER REQUIRED APPLICATIONS AND PERMITS," Applicants do not reference any permits or licenses obtained from municipalities for the installation across, over, under and alongside locally maintained highways. *Id.* 17-21. Applicants have, however, submitted a blank NHDOT excavation permits within of the section of the Appendix 10 of the Application concerning underground plans of locally maintained highways. Appl. App. #10, Part B.

11. Applicants' apparent position is that municipalities do not have any permitting or licensing role regarding the utilization of municipally maintained highways, and that submitting 13 blank applications for NHDOT excavation permits to the SEC in an appendix satisfies a statutory requirement to seek licenses or permits from municipalities.

12. Applicants also state a "separate request for permits for the municipally maintained highways has been filed with the Site Evaluation Committee." Appl. App. #9, at 5. Upon careful review of the Application, it is unclear what this "separate request" is. The Application does not appear to include any document that constitutes a "separate request."

13. In their Application, Applicants cite *Public Service Company of New Hampshire v. Hampton*, 120 N.H. 68 (1980) as the primary authority for this position. Appl. 82. As discussed in the subsequent analysis section, this case does not apply because that *per curiam* decision was narrow when it was made and its holding has been eroded over time, and the facts of the case were completely different, namely that Hampton and other municipalities changed

their laws five years *after* a certificate of site and facility had been granted, and the applicant agreed with municipal requests to redesign the project.

14. Of note, in its November 13, 2015, letter notifying the SEC that its review of the Application was complete, the NHDOT stated that it "anticipates executing a Use and Occupancy Agreement for the entire project *within state-maintained* rights-of-way (ROW)." Letter from Victoria F. Sheehan, Commissioner, NHDOT, to Pamela G. Monroe, Administrator, NH SEC (Nov. 13, 2015) (emphasis added). Commissioner Sheehan did not opine on or issue any permits in regards to municipally maintained highways, and her letter indicated NHDOT's anticipated permit would not include the portions of the project impacting municipally maintained rights of way. *Id.* Thus, NHDOT has impliedly acknowledged that it does not have the authority to issue any permits or licenses in regards to municipally maintained highways.

15. Similarly, the Applicants' own conduct begs the question whether the Applicants are required to obtain municipal permits or licenses to use municipally maintained highways. In connection with performing borings to further the design of underground portions of the proposed Project, the Applicants obtained boring permits from the state to bore in state-maintained highways. However, Applicants did not obtain such permits from municipalities to bore in municipally maintained highways. Instead, Applicants paid thousands of dollars to abutting property owners for permission to bore into land near municipally maintained highways. *See* Affidavits of James Nuttall and Robert Brooks, attached as Exhibits 1 and 2.

ANALYSIS

16. Petitioners seek a declaratory ruling stating that the SEC does not have authority to grant the permits and licenses specified in RSA 231:161 for the installation of portions of utility infrastructure projects located across, over, under, and alongside locally maintained

highways. Therefore, the ruling should further state that applicants must obtain from municipal officers the permits and licenses required by RSA 231:160 *et seq.*

A. RSA 231:160 *et seq* Provides a Clear Statutory Scheme that Empowers Only Towns and Cities to Permit or License the Utilization of Town- or City-Maintained Highways

17. Applicants' position that the SEC has exclusive authority is based on a reading of RSA 231:160 *et seq* that is at best inaccurate and that would result in the violation of clear statutory procedures. In its application, Applicants omit the portions of the statute that are directly on point, and then propose an ostensibly novel approach for the SEC to follow for approving the Applicants' utilization of locally maintained highways—as if the Legislature had not already specified a clear procedure in that same statutory section cited.

18. RSA 231:160 states:

> Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation *as provided in this subdivision and not otherwise.*

(emphasis added).

19. This statute demonstrates that the Legislature intended that the specific procedures for installing and maintaining electric transmission lines and their supporting structures on any public highway contained in RSA 231:160 *et seq* shall govern because the term "not otherwise" means that this authority shall not be subordinate to any other state statute or rule governing the same subject matter. *Id.*

20. RSA 231:160 *et seq* provides *different*—not *mirrored* as the Applicants claim—procedures that any person, co-partnership, or corporation desiring to erect or install any poles, structures, conduits, cables or wires across, over, under, and alongside any such highways that

are state-maintained, as opposed to highways that are town- or city-maintained, must follow. RSA 231:161, I.

21. For state-maintained highways:

> Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herein.

RSA 231:161, I(c).

22. For town-maintained highways:

> Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

RSA 231:161, I(a).

23. For city-maintained highways:

> Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this subdivision for selectmen; and they are hereby authorized to delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

RSA 231:161, I(b).

24. The remaining subsections of RSA 231:161 govern the specifics of the permits and licenses, including their effect, effective life, required specifications, and the conditions for granting them. RSA 231:161, II-VII.

25. Most pertinently, all those entities having jurisdiction over the issuance of permits or licenses in this statutory section shall grant a permit or license if the "public good requires." *Id.*[2]

26. Therefore, the SEC's authority to issue or not issue a Certificate of Site and Facility for this Project does not extend so far as to supplant the authority of a municipality to issue or not issue a permit or license for the utilization of municipally maintained highways in accordance with RSA 231:160 *et seq.*[3]

27. This is unlike the roles that state agencies play regarding this Project, because RSA 162-H:7-a explicitly limits and defines those roles. RSA 162-H places no such limit on the authority RSA 231:160 *et seq* give to municipalities. Indeed, RSA 162-H is silent on this issue.

28. In practice, when an entity proposes to install utility infrastructure in accordance with RSA 231:160 *et seq*, a municipality generally issues two types of permits pursuant to RSA 231:161, most commonly in the form of letters of approval presented on official town or city letterhead. First, a municipality may issue such a permit for any installation that involves excavation of the locally maintained right-of-way. Second, municipalities may issue such a permit for installation that involves placing poles or supporting structures on, across, or alongside the right-of-way, i.e. no excavation. Furthermore, per the general authority granted in

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[2] The evaluation of the "public good" has been adjudicated to be limited to determining whether the proposed utility use would impair other public uses. *Parker-Young Co. v. State of New Hampshire*, 83 N.H. 551, 555-57 (1929).

[3] Municipal authority and the scope of highway easements are limited. With respect to municipal authority, RSA 231:168 provides, in part:

> The location of poles and structures and of underground conduits and cables by the selectmen shall be made *so far as reasonably possible* so that the same and attachments and appurtenances *thereto will not interfere with the safe, free and convenient use for public travel* of the highway or of any private way leading therefrom to adjoining premises or with the use of such premises or any other similar property of another licensee.

(emphasis added). With respect to the scope of highways easements, RSA 231:167, which provides for the payment of damages when installation of a facility would harm a landowner, clearly implies that highway easements have limits.

the statute, some municipalities have more detailed and stringent permitting and licensing requirements for such projects. No matter the exact municipal protocol, all of these are designed to assure that the use of municipally maintained highways preserves public safety.

29. As a matter of law, however, the distinction between permits or licenses for installation involving excavation and installation not involving excavation is not relevant. The narrow issue presented in this petition concerns the authority of municipalities to issue or not issue permits or licenses per RSA 231:161 *et seq.*, which clearly encompasses both excavation and non-excavation installations. *See* RSA 231:160.

30. This reading of the law is consistent with the NHDOT's statement that it anticipates issuing a Use and Occupancy Agreement for the entire project *only* within state-maintained rights-of-way. Letter from Victoria F. Sheehan, Commissioner, NHDOT, to Pamela G. Monroe, Administrator, NH SEC (Nov. 13, 2015) (emphasis added).

B. New Hampshire Public Policy Favors Municipal Authority for Municipal Concerns

31. Although Applicants may view this statutory scheme as burdensome because it empowers many individual municipalities to exercise control over a state-wide project, this is precisely what the Legislature intended.

32. The law empowering municipalities to evaluate the public safety concerns in these circumstances is appropriate considering the severe and significant impacts that the Project would cause in connection to municipally maintained highways.

33. The installation of utility infrastructure across, over, under, or alongside municipally maintained highways could cause highway closures, traffic delays, engineering conflicts with respect to municipal infrastructure, damage to roadbeds, and many other issues.

34. Additionally, Applicants have admitted that construction of this project would require extended highway closures on at least Bear Rock Road, North Hill Road, and Old County Road in Clarksville and Stewartstown.

35. Moreover, this scheme is consistent with New Hampshire's strong public policy that municipalities have the authority to protect the health, safety, and financial sustainability of their own citizens. *See* RSA 31:39; RSA 41:9, 11; RSA 47:17, VII-VIII & XVIII. To deprive municipalities of their express statutory authority to evaluate the impacts of this Project would fly in the face of New Hampshire's well-regarded tradition of local governance.

36. After all, municipalities are in the best position to evaluate the impacts of the Project on the "safe, free and convenient use for public travel of the highway or of any private way leading therefrom . . . ." RSA 231:168; *Rye v. Pub. Serv. Co.*, 130 N.H. 365, 369 (1988) (quoting RSA 231:168).

C. *Public Service Company of New Hampshire v. Town of Hampton* Does Not Support Applicant's Position that SEC has Exclusive Authority to Permit Applicants to Utilize Locally Maintained Highways

37. Aside from omitting the unfavorable portions of a legislatively mandated procedure in an attempt to create their own procedure that is more amenable to their goals, Applicants also cite to the New Hampshire Supreme Court's decision *in Public Service Company of N.H. v. Hampton*, 120 N.H. 68 (1980) to support their position. In doing so, Applicants argue that *Hampton* supports their position that the SEC has exclusive authority to grant permission to an energy facility to utilize locally maintained highways for an electric transmission project.

38. It does not. The outdated, narrow, and *per curiam* holding of *Hampton* does not apply here because *Hampton* concerned the authority of municipalities pursuant to local regulations enacted years after the state actions at issue, and where the applicant had previously

agreed to modify its design as a result of consulting the municipalities. This issue, by contrast, involves municipalities empowered by a state statute that predates the proposed Project by decades, where the petitioning towns have reached no such agreement with the Applicants, where the certificate of site and facility has not yet been issued or denied, and in a legal context where *Hampton* cannot be read so broadly as to apply under these circumstances.

39. In *Hampton*, the plaintiff energy company sought an order declaring void, as applied to it, the votes of towns taken *five years after* the SEC approved the energy project at issue to adopt certain ordinances requiring all electric transmission lines over 69,000 volts to be buried underground. *Id.* at 69-70.

40. The trial court submitted two questions on interlocutory appeal:

> 1. Do the votes purportedly adopted by the defendant towns endowing them with any legal authority to interfere with the construction of overhead transmission lines associated with the Seabrook Project, in light of RSA 162-F F [the forerunner to RSA 162-H], the Certificate and the other permits held by the plaintiff?
>
> 2. Do the votes purportedly adopted by the defendant towns endowing them with any legal authority to interfere with the construction of overhead transmission lines by the plaintiff in connection with the Seabrook Project, in light of the requirements of the Zoning Enabling Act (RSA 31:60 et seq.) or other provisions of law relating to actions taken by Town Meetings?

Id.

41. The Court concluded the purpose of RSA 162-F *et seq.* was to "provide a resolution, in an 'integrated fashion,' of all issues involving the selection of sites and routing of associated transmission lines." *Id.* at 70. It held that "[b]y enacting RSA ch. 162-F, the legislature has preempted any power that the defendant towns might have had with respect to transmission lines embraced by the statute, and the actions by the defendant towns with regard to transmission lines are of no effect." *Id.* at 71.

42. This narrow holding is inapposite to the issue before the SEC on this petition. The issue in *Hampton* was whether municipal ordinances enacted *five* years after a state had approved a project were preempted by the state statute that provided for the project's prior approval. Here, the relevant law empowering municipalities is well-established state law, not a retroactive municipal ordinance. Neither the narrow holding nor the dicta of *Hampton* alters or amends the provisions of RSA 231:160 *et seq.*

43. Moreover, the if the *Hampton* case was as dispositive as the Applicants suggest, the SEC would not have had to entertain as much adjudication as it did in Docket No. 2012-01 (Antrim Wind Energy, LLC) focused on the question of whether the SEC preempted municipal subdivision authority. While the SEC did not reach that issue in its decision-making, the volume of pleadings and the SEC's deliberations suggest that the extent of SEC preemption of municipal authority is anything but well-settled.

D. RSA 162-H Does Not Override RSA 231:160 *et seq.*

44. RSA 162-H does not override RSA 231:160 *et seq.* or preempt the authority of a Board of Selectmen pursuant to it.

45. "Where reasonably possible, statutes should be construed as consistent with each other. When interpreting two statutes which deal with a similar subject matter, we will construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute. To the extent two statutes conflict, the more specific statute controls over the general statute." *State v. Cheney*, 165 N.H. 677, 682-83 (2013) (quotation marks and internal citations omitted).

46. The statutory schemes do not conflict. RSA Chapter 162-H does not contain an explicit statement to override the authority given to municipalities in RSA 231:160 *et seq.* Unlike

the roles of states agencies, which are explicitly limited by RSA 162-H:7-a, RSA Chapter 162-H does not restrict the permitting and licensing role of municipalities as it pertains to the utilization of locally maintained highways for electric transmission projects.

47. Applicants appear to take this same position because they follow the procedures of RSA 231:160 *et seq* when it comes to seeking licenses and permits from the DOT. Appl. at 82-84.

E. SEC Rules Anticipate the Interplay Between RSA 162-H and RSA 231:160 *et seq.*

48. The SEC rules anticipate the interplay between RSA 162-H and RSA 231:160 *et seq.*

49. New Hampshire Administrative. Rule Site 301.03(c)(6) requires an application for site certification to contain:

> Evidence that the applicant has a *current* right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of:
>
> a. Ownership, ground lease, easement, or other contractual right or interest;
>
> b. A license, permit, easement, or other permission from a federal, state, or *local government* agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application; or …

(emphasis added). This rule explicitly mentions licenses or permits issues by local government agencies.

50. Applicants have not submitted to the SEC any permits or licenses issued by any of the municipalities that operate locally maintained highways that the Project would utilize, as is required by RSA 231:161.

CONCLUSION

This Petition sets forth factual allegations that are definite and concrete, does not involve a hypothetical situation or otherwise seek advice as to how the Committee would decide a future case, implicates the legal rights and responsibilities of the Petitioners, and is within the Committee's jurisdiction.

Reading RSA 162-H, RSA 231:160 *et seq.*, and SEC Rule 301.03 together, there is a clear legislative intent that entities wishing to construct an electric transmission line (and its supporting structures) across, over, under, or alongside locally maintained highways must obtain the required licenses and permits from the Selectboard of the municipalities. The SEC does not have authority to grant said licenses and permits.

WHEREFORE, the Town of Bethlehem, Town of Bridgewater, Town of Bristol, Town of Clarksville, City of Concord, Town of Deerfield, Town of Easton, Town of Franconia, Town of Littleton, Town of New Hampton, Town of Northumberland, Town of Pembroke, Town of Pittsburg, Town of Plymouth, Town of Stewartstown, Town of Sugar Hill and Town of Whitefield, Town of Woodstock, the Ashland Water and Sewer Department, the Society for the Protection of New Hampshire Forests, and the Appalachian Mountain Club, respectfully request that the Committee issue a ruling declaring that pursuant to RSA 231:160 *et seq*, only municipalities have the authority to authorize or not authorize the erection, installation, or maintenance of electric power poles or structures or underground conduits or cable, or their respective attachments or appurtenances, on, across, or under locally maintained highways, regardless of whether the New Hampshire Department of Transportation (the "NHDOT"), the SEC, or other agencies have authority to permit or license other portions of any proposed facility.

Respectfully Submitted,

TOWN OF BETHLEHEM, TOWN OF BRISTOL, TOWN OF EASTON, TOWN OF FRANCONIA, TOWN OF NORTHUMBERLAND, TOWN OF PLYMOUTH, TOWN OF SUGAR HILL AND TOWN OF WHITEFIELD

By their Attorneys,

Gardner, Fulton & Waugh, PLLC

Date: December 19, 2016

By: _____ for

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TOWN OF BRIDGEWATER, TOWN OF NEW HAMPTON, TOWN OF WOODSTOCK, TOWN OF LITTLETON, TOWN OF PEMBROKE, TOWN OF DEERFIELD, AND ASHLAND WATER AND SEWER DEPARTMENT

By their Attorneys
Mitchell Municipal Group, P.A.

Date: December 19, 2016

By: _____ for

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CITY OF CONCORD
By its Attorney

Date: December 19, 2016

By: _____

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TOWN OF PITTSBURG

By its Selectboard

Stephen Ellis, Selectboard

Brendon McKeage, Selectboard

Richard Lapoint, Selectboard

TOWN OF STEWARTSTOWN

By its Selectboard

Allen Coats, Selectboard

Hasen Burns, Selectboard

James Gilbert, Selectboard

TOWN OF CLARKSVILLE

By its Selectboard

Judith E. Roche, Selectboard

Ramon F. DeMaio, Selectboard

Melvin C. Purrington, Selectboard

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By its Attorneys,

BCM Environmental & Land Law, PLLC

Date: December 19, 2016

By: _____

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By its Attorneys,

Drummond Woodsum & MacMahon

Date: December 19, 2016

By: Amy Mangelli for

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EXHIBIT 1

AFFIDAVIT OF JAMES NUTTALL

I, James Nuttall, being over the age of eighteen years and competent to testify to the matters contained herein, do state under oath that I do believe the following to be true and accurate to the best of my personal knowledge:

1. I reside at North Hill Road in Stewartstown, New Hampshire. My mailing address is Post Office Box 235, Colebrook, NH, 03576.
2. I have personal knowledge that in 2013 a representative of Northern Pass asked me if I would consent to allowing Northern Pass to conduct a geotechnical excavation on my land fronting North Hill Road. As I understand, my land goes to the centerline of North Hill Road. It is not clear to me whether the boring that was actually done on my land was within or outside of the Town's right of way over my land.
3. Mr. James Wagner, the representative of Northern Pass, offered me $3,000 for permission to conduct one boring on my land. I was paid $500 before the work, and paid a second installment of $2,500 once the work was completed.

Dated: December 13, 2016

Print Name: James W. Nuttall

***

STATE OF NEW HAMPSHIRE

December 13, 2016

COOS, ss.

Personally appeared the above named James W Nuttall and gave oath that the foregoing affidavit is true and accurate to the best of his/her knowledge, information, and belief.

Before me,

Notary Public, State of New Hampshire

My Commission Expires:

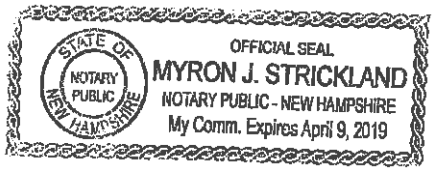

EXHIBIT 2

AFFIDAVIT OF ROBERT BROOKS

I, Robert Brooks, being over the age of eighteen years and competent to testify to the matters contained herein, do state under oath that I do believe the following to be true and accurate to the best of my personal knowledge:

1. I reside at 66 North Hill Road, Stewartstown, New Hampshire, 03576.

2. I have personal knowledge that in 2013 a representative of Northern Pass approached me about using my land on North Hill Road for the purpose of doing a geotechnical boring near North Hill Road on my land outside of the municipal road right of way.

3. Mr. Scott Mason, representing Northern Pass, offered me $3,000 in exchange for doing one test boring excavation on my land. I told Mr. Mason that I would agree to allow Northern Pass to do the boring if Northern Pass would donate the $3,000 to the North Hill Church, which is adjacent to my land. Mr. Mason initially said that Northern Pass could not make such an accommodation. I then indicated to Mr. Mason that I would not consent to Northern Pass doing the work on my land.

4. Mr. Mason later called back, and indicated that Northern Pass would consent to making a $3,000 donation to the Church. NP made the contribution, and then did the excavation project on my land.

Dated: December 13, 2016

Robert J Brooks

Print Name: Robert Brooks

STATE OF NEW HAMPSHIRE

COOS, ss.

December 13, 2016

Personally appeared the above named Robert Brooks and gave oath that the foregoing affidavit is true and accurate to the best of his/her knowledge, information, and belief.

Before me,

Notary Public, State of New Hampshire

My Commission Expires: