STATE OF NEW HAMPSHIRE

BEFORE THE

SITE EVALUATION COMITTEE

Petition Requesting Jurisdiction and Oversight of Eversource's Proposed X-178 Transmission Line Replacement Project

Docket No. 2024-02

Motion of the Office of the Consumer Advocate for Rehearing of "Order on Pending Motions to Intervene"

NOW COMES the Office of the Consumer Advocate ("OCA"), the state agency tasked with representing the interests of New Hampshire's residential utility customers, and moves pursuant to RSA 541:3 and N.H. Code Admin. Rules Site 202.29 for rehearing of the Order entered by the Site Evaluation Committee ("SEC" or "Committee") on October 1, 2024 denying the intervention requests of the OCA and its counterpart agency in Maine, the Maine Office of the Public Advocate ("OPA"). In support of this rehearing motion the OCA states as follows:

I. Introduction and Background

The SEC opened this docket to consider a request from the Towns of Easton and Bethlehem (the "Towns") that the Committee exercise its discretionary jurisdiction with respect to a plan by Public Service Company of New Hampshire d/b/a Eversource ("PSNH") to rebuild and enhance its X-178 transmission line running connecting substations in Campton and Whitefield, including the portions

of the X-178 line that traverse the Towns. PSNH has urged the SEC not to take up the case.

On September 23, 2024, the SEC met, among other things, to consider timely petitions for intervention submitted by the OCA and OPA. On motion of Transportation Commissioner William Cass, seconded by Public Member Susan Duprey, the Committee voted 8-0 to reject both requests. The SEC issued an order memorializing this decision on October 1, 2024, determining that (1) neither party qualified for mandatory intervention pursuant to RSA 541-A:32, I, and (2) the ratepayer advocates should not be granted intervention on a permissive basis pursuant to RSA 541-A:32, II because the "interest as expressed by the OCA and []OPA were not within the scope of the proceeding and would not lead to an orderly and prompt resolution of the docket." Order of 10/1/24 (Tab 14) at 2. The Order stated that "t]he fact that the OCA and the []OPA had an interest in the outcome of the proceeding, because the outcome may lead to higher energy rates for NH or ME residence [*sic*], was not sufficient grounds to grant the petitions to intervene" in light of the Committee's focus, which it described as "assessing projects based on environmental impact and how the project will affect the people in the community." *Id.*

II. Applicable Standard

Rule Site 202.29 governs motions for rehearing submitted to the SEC. Under the rule, a party seeking rehearing of a decision of the SEC must (1) be filed within

30 days of a Committee "decision or order," (2) "[i]dentify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered," (3) "[d]escribe how each error causes the committee's order or decision to be unlawful," and (4) "[s]tate concisely the factual findings, reasoning or legal conclusion proposed by the moving party."[1] The SEC must "grant or deny a motion for rehearing, or suspend the order or decision pending further consideration, within 10 days of the filing of the motion for rehearing."

The statute governing rehearing motions in administrative proceedings, RSA 541:3, merely provides that an agency may grant such a motion when "good reason for the rehearing is stated the motion." Essentially, the statute creates a mechanism whereby the agency has a full opportunity to correct erroneous rulings prior to appellate proceedings. *See* RSA 541:4 ("No appeal from any order or decision . . . shall be taken unless the appellant shall have made application for rehearing" and "no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds").

In this instance, no facts are in dispute. In relevant part, section 32 of the Administrative Procedure Act requires the presiding officer to grant an intervention petition if two conditions are met. First, the intervention petition must "state[]

[1] While Site 202.11(f) provides that ant party "aggrieved by a decision on a petition to intervene" may request review of such decision by the Committee or a subcommittee within 10 days, that rule pertains only to intervention decisions made by the presiding officer or a designated hearing officer. In that the entire Committee acted upon the intervention requests in issue here, the OCA relies upon the rehearing provisions of Site 202.29 in this motion.

facts that the petitioner's rights, duties, privileges, immunities or other substantial interests may be affected by the proceeding or that the petitioner qualifies as an intervenor under any provision of law." RSA 541-A:32, I(b). Second, the presiding officer must also determine that "the interests of justice and the orderly and prompt conduct of the proceedings would not be impaired by allowing the intervention." RSA 541-A:32, I(c). The SEC's rulings as to both subparagraph (b) and subparagraph (c) are erroneous as a matter of law.

III. The OCA is entitled to automatic intervenor status.

First, as to subparagraph (b), the SEC incorrectly concluded that the OCA did not qualify for automatic intervenor status under an applicable provision of law. As a state agency that is not endowed with "permitting or other regulatory authority," the OCA is entitled to participate in this proceeding as a party "provided that the presiding officer determines that a material interest in the proceeding is demonstrated and such participation conforms with the normal procedural rules of the committee." RSA 162-H:7-a, III. The statutory charge of the OCA – framed as both a "power" and a "duty," is to "petition for, initiate, appear or intervene in any proceeding concerning rates, charges, tariffs, and consumer services before any board, commission, agency court or regulatory body in which the interests of residential utility consumers are involved." RSA 363:28, II. The "interests of residential utility customers" are involved in a proceeding that concerns whether the X-178 rebuild project may go forward because, should the project gain site authority (either via the issuance of a certificate of site authority or via the SEC's

discretionary determination that no such issuance is necessary), the cost of the project (estimated at nearly $400 million) will be placed automatically into the rates that apply to transmission charges paid by residential electric customers throughout New Hampshire and, indeed, all of New England. The OCA has a material interest in assuring that a decision regarding this facility is made with full consideration of the interests of those who will be required to pay for it.

In its order, the SEC merely stated, without elaboration, that neither the OCA nor the OPA qualified for "mandatory intervention." Order at 2. In opposing the intervention requests, PSNH argued that intervention was inappropriate because an SEC proceeding is not one that is "concerning rates, charges, tariffs, and consumer services." This argument, to the extent the SEC may have relied upon it, is unpersuasive. The SEC lacks authority to determine whether a particular effort by the OCA is *ultra vires* in light of the quoted language. The correct standard is simply whether the "interests of residential customers are involved" – something the Committee, in its order, actually *conceded*. *See* Order at 2 ("The fact that the OCA and the OPA had an interest in the outcome of the proceeding, because the outcome may lead to higher energy rates for NH or ME residence [*sic*], was not sufficient grounds to grant the petitions to intervene").

III. Denial of Permissive Intervention was Error

Second, even assuming *arguendo* that the OCA does not qualify for automatic intervention, our intervention petition clearly meets the standard for permissive intervention – i.e., that the petition "states facts demonstrating that the petitioner's

rights, duties, privileges, immunities or other substantial interests *may* be affected by the proceeding." RSA 541-A:32, I(b) (emphasis added). Again, the Committee conceded the possibility (which, in fact, is actually a certainty) that allowing PSNH to rebuild and enhance the X-178 line will increase rates paid by residential utility customers, which is unquestionably a "substantial interest" within the meaning of section 32. Given that reality, the SEC erroneously concluded that the OCA cannot seek to vindicate this substantial interest on the ground that this is not a rate proceeding and will not lead directly to a rate increase.[2]

In the course of rejecting the OCA's intervention petition, the SEC made a determination as to the scope of the instant proceeding that was both premature and incorrect. Specifically, the Committee determined that "the scope of docket 2024-02 [is] limited to reviewing whether the proposed Eversource transmission line replacement project constituted a sizeable addition or change to the existing facility that would require certification."

In urging this view upon the SEC via its pleading in opposition to the OCA intervention request, Eversource relied on the Committee's decision in Docket No. 2021-05, which concerned certain capacitors, circuit breakers, and associated equipment to be constructed at the transmission substation adjacent to the Seabrook nuclear power plant. In that proceeding, the developer of the project (New

[2] In the absence of caselaw from the New Hampshire Supreme Court applying RSA 541-A:32, it is unclear whether the Committee erred as a matter of law – i.e., misinterpreted the phrase "substantial interest" – or whether it abused its discretion in finding no interest. *See, e.g., Brzica v. Trustees of Dartmouth College*, 147 N.H. 443, 446 (2002) (applying abuse—of-discretion standard on appeal of intervention denial in civil case). We assert both grounds, in the alternative.

Hampshire Transmission LLC) sought a declaratory ruling to the effect that the proposed construction was not of sufficient size as to require the SEC's imprimatur.[3] After considering an extensive record, the SEC answered the question in the negative and, accordingly, issued a declaratory judgment to the effect that New Hampshire Transmission LLC need not obtain a certificate of Site and Facility. Order on Petition for an Exemption, for a Declaratory Ruling that this Project is Not a Sizeable Addition, or for Expedited Review (September 12, 2022) in Docket 2021-05 at 14-15.

The instant case is not a request for a declaratory order, and to the extent the proposed X-178 transmission line rebuild and enhancement is or is not of a sufficient size and scope to warrant full SEC review this is a mixed question of fact and law which the SEC must resolve based on an adequate record. In effect, the Committee has prejudged this issue by determining that the scope of the proceeding is too narrow to justify the full participation of the OCA.

Furthermore, it appears that the SEC has improperly narrowed the scope of its required review which has the effect of excluding relevant parties such as the OCA. In its order, the SEC stated that "The SEC is authorized to review proposed energy site applications. It is tasked with assessing projects based on environmental impact and how the project will affect the people in the community."

[3] Notably, in that case, the petitioning utility argued that its proposed project was exempt from the certification process, but also filed a complete application "to assist in expediting the process to meet ISO-NE timelines, and to meet the requirements in the exemption statute, RSA 162-H:4, IV" to provide adequate information for the SEC to render a decision. April 1, 2022 Cover Letter in Docket No. SEC 2021-05 at 1. No such information has been provided in this case.

Order at 2. Contrary to this limited view, RSA 162-H:16, IV provides that after reviewing "all relevant information regarding the potential siting, or routes of a proposed energy facility, including potential significant impacts and benefits" when determining that the facility "will serve the public interest." That public interest is articulated in RSA 162-H:1, which requires, in relevant part, that "the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which *all environmental, economic, and technical issues* are resolved in an integrated fashion" (emphasis added). Economic impacts are explicitly within the purview of the SEC and the SEC's determination to limit itself to environmental factors alone demonstrates a fundamental misunderstanding of its role, and the role of the OCA, in proceedings such as this.

Finally, the OCA is concerned about certain comments made at the SEC's public hearing – comments that appear to have informed the Committee's decision to deny the OCA's intervention request even though those comments were not reflected in the SEC's written order. Specifically, one member of the Committee opined that "it's really important for our body to be sure that we are taking a thorough look at who's intervening and making . . . judgments on that, not just being willing to let anyone intervene for any reason." Transcript of September xx, 2024 Hearing at 43, lines 15-19. A few moments later, this same Committee member observed that "[p]arties go at these cases hammer and tong. They bring everything they can, and if you're opposing a project, to try to make sure that it doesn't go forward. And that's a time-consuming process. And we already have

parties who are going to do that." *Id.* at 50, lines 8-17. This Committee member also characterized the SEC's task as "primarily a real estate-bound situation" that has "nothing to do with rate-setting," stressing that "it's not our charge to nix a project because of rate structure." *Id.* at 45, lines 3-10.

Although the instant proceeding is, to our knowledge, the first time the OCA has ever sought to participate in an SEC docket, we share this Committee member's interest in administrative proceedings that are fair, efficient, and focused exclusively on matters that are within the jurisdiction of the adjudicator. From the sidelines, we have seen SEC proceedings become unwieldly because there are so many parties seeking to raise so many issues and introduce so much evidence that the public's confidence in the state's ability to site the energy facilities New Hampshire needs (and reject those it does not need) is undermined.

We have given the SEC no reason to think that we will contribute to delay, inefficiency, or unhelpful complexity. More to the point, distaste among Board members for repeat examples of prior cases that became difficult or impossible to manage is not a valid ground under New Hampshire law for denying intervention requests in this proceeding. We explicitly offered to subject ourselves to conditions (e.g., the obligation to coordinate our efforts with those of the OPA, the Counsel for the Public, and the municipalities seeking SEC review even though our interests are not necessarily coextensive with those of all these parties) designed to reduce or eliminate any incremental impact we might have on the length or complexity of hearings. This Committee must reconsider its decision to rebuff this offer, which we

hereby renew. Meanwhile, to the extent individual SEC members fear the annoyance and inconvenience of adjudicating a case that will be time-consuming and unhelpfully complicated, it is an abuse of discretion to rely on such a concern in denying party status to a state agency that has given the Committee no reason to think the agency would exacerbate such complications.

IV. Conclusion

For the reasons stated above, the SEC should grant rehearing of its October 1, 2023 order denying intervenor status to the Office of the Consumer Advocate in this proceeding and determine that the OCA is entitled both to automatic intervenor status pursuant to RSA RSA 162-H:7-a, III as well as permissive intervenor status pursuant to RSA 541-A:32, I(b). The fact that this is not a rate proceeding does not preclude the Office of the Consumer Advocate from vindicating its concern about rate impacts – which are grounded in concerns about the need for the project at issue – by participating in an SEC docket as a party and addressing those issues that are germane to the Committee's authority.

WHEREFORE, the OCA respectfully request that this honorable tribunal:

A. Grant rehearing of the Site Evaluation Committee's Order of October 1, 2024,

B. Enter an order granting the motions to intervene submitted by the Office of the Consumer Advocate and the Maine Office of Public Advocate; and

C. Grant such further relief as shall be necessary and proper in the circumstances.

Sincerely,

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October 18, 2024

Certificate of Service

I hereby certify that a copy of this pleading was provided via electronic mail to the individuals included on the Site Evaluation Committee's service list for this docket.

Donald M. Kreis