

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



ANN M. RICE
DEPUTY ATTORNEY GENERAL

March 26, 2018

Hand-Delivered

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, New Hampshire 03301

Re: SEC Docket No. 2015-04
Application of Public Service Company of New Hampshire d/b/a Eversource
Energy ("Eversource") for a Certificate of Site and Facility for the Construction
of a New 115 kV Transmission Line from Madbury Substation to Portsmouth
Substation

Dear Ms. Monroe:

Enclosed you will find an original and one copy of Counsel for the Public's
Response to Pending Motions Requesting The Site Evaluation Committee to Hire an
Expert and to Address NHDES Recommendations, and to the Proposed Procedural
Schedules for filing in above-referenced matter.

Thank you for your attention to this matter. Please feel free to call with any
questions.

Sincerely,

Christopher G. Aslin
Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

/llm
Enclosures
cc: Distribution List

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

Docket No. 2015-04

Application of Public Service Company of New Hampshire d/b/a Eversource Energy
("Eversource") for a Certificate of Site and Facility for the Construction of a New 115 kV
Transmission Line from Madbury Substation to Portsmouth Substation

**COUNSEL FOR THE PUBLIC'S RESPONSE TO PENDING MOTIONS
REQUESTING THE SITE EVALUATION COMMITTEE TO
HIRE AN EXPERT AND TO ADDRESS NHDES RECOMMENDATIONS,
AND TO THE PROPOSED PROCEDURAL SCHEDULES**

Counsel for the Public, by his attorneys, the office of the Attorney General, and pursuant to New Hampshire Code of Administrative Rules Site 202.14, hereby responds to motions filed by the Town of Durham and the University of New Hampshire ("Durham/UNH") and by the Conservation Law Foundation ("CLF") related to the February 28, 2018 recommendations of the New Hampshire Department of Environmental Services ("NHDES"), and to the proposed procedural schedules submitted by the Applicant and Durham/UNH. Counsel for the Public respectfully responds as follows:

1. On April 12, 2016 Public Service Company of New Hampshire d/b/a Eversource Energy (the "Applicant") submitted an Application for a Certificate of Site and Facility in the above captioned docket. As part of its Application, the Applicant described its proposed method for crossing Little Bay by cable burial through a combination of jet plowing and hand jetting techniques.

2. Following its technical review of the Application for compliance with wetlands and water quality regulatory requirements, NHDES issued a letter dated February 28, 2018 recommending approval of the Application as it relates to wetlands and water quality, with

specified conditions. *See* NHDES letter (Feb. 28, 2018) and accompanying proposed conditions of approval.

3. In addition to the proposed conditions, NHDES also expressed its recommendation that the Subcommittee “consider having the Applicant conduct:

- 1) a more thorough evaluation of the Horizontal Directional Drilling (HDD) method for installing cable under Little Bay and
- 2) A trial jet plow run (without cable) in Little Bay”

NHDES Letter at 1. NHDES went on to provide details regarding its recommendations, including its concern that “the proposed jet plow method[,] which will result in hundreds of cubic yards of sediment being temporarily suspended in the water column and deposited elsewhere in Little Bay,” may not be the least impactful means of crossing Little Bay.

4. On March 16, 2018, the Applicant submitted a proposed schedule for the remainder of the procedural schedule in this docket. The proposed schedule did not expressly contemplate further analysis of the HDD alternative for the Little Bay crossing or of a potential jet plow trial run, nor did the proposed schedule include discovery on any such additional analysis.

5. On March 16, 2018, Durham/UNH filed a partially assented-to Motion Requesting that the SEC Hire Horizontal Directional Drilling Expert (the “Durham/UNH Motion”). In their motion, Durham/UNH argued that the Subcommittee “should hire its own expert to insure that a thorough and unbiased evaluation [of HDD alternatives] is completed.” Durham/UNH Motion at 4. In the alternative, the Durham/UNH Motion requested that the Subcommittee “direct the Applicant to hire its own expert to address the HDD issue and to submit this testimony by the date set in the procedural schedule for Supplemental testimony, and that this testimony be subject to discovery and a technical session.” *Id.* at 5-6.

6. On March 21, 2018, CLF filed a partially assented-to Motion Requesting Site Evaluation Committee to Address NHDES Recommendations as Part of Adjudicatory Process (the “CLF Motion”). In the motion CLF argued that the issues of the HDD alternative and a jet plow trial run should be addressed “during the adjudicatory process, to enable development of needed information for the benefit of the Committee, and with the ability of parties to engage in discovery and cross-examination, prior to the Committee’s final decision relative to issuance of a certificate.” CLF Motion at 3.

7. CLF further argued that a jet plow trial run should be conducted “only after completion of the HDD evaluation, and only if such evaluation demonstrates that HDD is technologically infeasible or would have greater environmental impact than the jet plow method is anticipated to have.” *Id.*

8. On March 23, 2018, Durham/UNH submitted a competing proposed procedural schedule that expressly includes deadlines for an HDD analysis and discovery thereon by the intervenors and Counsel for the Public.

Response to Pending Motions

9. At the outset, Counsel for the Public notes the distinction between NHDES’ recommended permit conditions for approval of a certificate of site and facility (a “Certificate”) and NHDES’ recommendations that the Subcommittee consider requiring further analysis of an HDD alternative and a jet plow trial run. The latter recommendations were not presented as conditions required for approval of a certificate pursuant to RSA 162-H:16, I, and the Subcommittee is not required to accept NHDES’ recommendations in order to issue a Certificate.

10. Rather, NHDES' recommendations demonstrate NHDES' apparent concern that the proposed jet plow method of crossing Little Bay may have significant environmental impacts, and that an alternative HDD method may or may not have lesser environmental impacts. While not binding, the Subcommittee should give NHDES' concerns, as the state agency entrusted with regulating impacts to wetlands and water quality, significant weight.

11. Counsel for the Public shares NHDES' concern that the record currently has an insufficient analysis of potential alternative methods for the crossing of Little Bay. As pointed out by NHDES, "the Applicant provided a relatively brief explanation as to why HDD was not selected and, in our opinion, did not provide sufficient information to support their conclusion." NHDES Letter at 2.

12. Counsel for the Public further agrees with Durham/UNH and CLF that the feasibility, cost, benefits, and impacts of an HDD alternative should be introduced into the record and made subject to discovery and cross-examination in order for the Subcommittee to make a fully informed decision about the proposed Project.¹

13. Moreover, Counsel for the Public points out that without such information in the record prior to a decision, to the extent the Subcommittee was concerned with the potential impacts of the jet plowing method, the Subcommittee would have insufficient information to consider potential alternatives such as HDD that could be imposed as a condition of approval of a Certificate.

¹ Counsel for the Public disagrees, however, with CLF's apparent suggestion that the jet plow method should be allowed only if further evaluation "demonstrates that HDD is technologically infeasible or would have greater environmental impact than the jet plow method is anticipated to have." CLF Motion at 3. Counsel for the Public notes that technical feasibility and environmental impact are only two of the many considerations the Subcommittee must weigh in deciding whether to issue a Certificate. Impacts to abutters, aesthetics, wildlife, historic resources, as well as the cost to ratepayers and the broader economy must also be considered under the criteria set forth in RSA 162-H:16, IV.

14. However, Counsel for the Public notes the Applicant's stated intent to provide "the Committee with additional information about HDD" in its rebuttal testimony.

Durham/UNH Motion at 5; Applicant's Proposed Procedural Schedule at 3. Similarly, Counsel for the Public anticipates that his expert witnesses from the ESS Group will also provide generalized information on HDD alternatives in their supplemental testimony.

15. As pointed out by Durham/UNH, the Subcommittee has the clear authority to hire experts "as they deem necessary or appropriate to carry out the purposes of [RSA Ch. 162-H]." RSA 162-H:10, V. Similarly, the Subcommittee has the clear authority to "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, and in the determination of the terms and conditions of any certificate under consideration." RSA 162-H:10, IV.

16. Whether the Subcommittee exercises its authority to hire experts or require the Applicant to submit additional information rests in the sound discretion of the Subcommittee, and Counsel for the Public takes no position on whether or not the Subcommittee should exercise such authority in this docket.

17. Nonetheless, Counsel for the Public does strongly support the development of a full and complete record on the feasibility, cost, benefits, and impacts of HDD alternatives to the crossing of Little Bay, as recommended by NHDES, Durham/UNH and CLF. Moreover, Counsel for the Public strongly supports the opportunity for discovery and a technical session on any new testimony or analysis of HDD alternatives submitted by the Applicant.

18. Finally, with regard to CLF's request that for a "sequenced approach" to further HDD analysis and a potential required jet plow trial run, CLF Motion at 3-4, Counsel for the Public agrees that a decision on the jet plow trial run issue should be deferred until after further

testimony by witnesses for the Applicants and other parties.² Currently, there is insufficient information in the record on the costs, benefits, and optimal timing of a jet plow trial run upon which the Subcommittee could make a reasoned decision.

Response to Proposed Procedural Schedules

19. Counsel for the Public concurs with the proposed procedural schedule submitted by Durham/UNH, subject to the clarification that Counsel for the Public takes no position on whether the Subcommittee should exercise its discretionary authority to hire an HDD expert. Counsel for the Public suggests that July 20, 2108 be the deadline for supplemental pre-filed testimony for the Applicant as well as the Intervenor and Counsel for the Public, and that the discovery deadlines set forth in Paragraphs 5-10 apply to any new testimony or analysis of HDD alternatives submitted by any witness for the Applicant, Intervenor, Counsel for the Public, or the Subcommittee.

20. Counsel for the Public partially objects to the Applicant's proposed procedural schedule largely for the reasons stated in Applicant's submittal. First, as discussed above, Counsel for the Public takes the position that discovery and a technical session should be scheduled for new testimony or analysis of HDD alternatives submitted by any witness. While HDD was the subject of some discovery previously in this docket, NHDES's detailed recommendations and suggestion of partial HDD as an alternative warrant further exploration.

21. Moreover, where the Applicant has indicated it will respond to NHDES' detailed recommendations on evaluation of HDD alternatives, such a response will be new analysis that could not have been anticipated at the original technical sessions that were held more than 8 months prior to NHDES' February 28, 2018 recommendations.

² *But see supra*, Note 1.

22. Second, Counsel for the Public objects to the Applicant filing Supplemental testimony after Counsel for the Public and the intervenors. The purpose of Supplemental testimony is to rebut the pre-filed testimony of other parties; not to sur-rebut the rebuttal. By allowing the Applicant an additional 7 days to file its Supplemental testimony, the Applicant would have the opportunity to file both rebuttal testimony and sur-rebuttal testimony. Such disparate treatment of the parties is not warranted and would not serve the public interest in a full and fair proceeding.

23. Third, Counsel for the Public objects to the Applicant's proposed briefing schedule. While recognizing that the Applicant has the burden of proof, Counsel for the Public submits that allowing the parties to submit a reply brief adequately protects the Applicant's interest in having the final word. Moreover, providing the same schedule for all parties' closing and reply briefs provides the Subcommittee with a complete set of arguments to support its deliberations. Unlike a traditional criminal or civil trial, there are not two sets of diametrically opposed parties in an SEC proceeding. Rather, Counsel for the Public and various Intervenors may agree with the Applicant and each other on some issues and disagree on others. Accordingly, it is both unnecessary and potentially counterproductive to treat the parties as "adverse" in the traditional courtroom context.

24. Fourth, Counsel for the Public agrees with the position of Durham/UNH and the Town of Newington that responses to technical session requests for other witnesses should be due on May 31, 2018 to accommodate the Memorial Day holiday, and that such a schedule would not unduly prejudice the Applicant.

25. Finally, Counsel for the Public notes that his Historic Resources witness, Patricia O'Donnell of Heritage Landscapes, LLC, is not available during the proposed technical sessions

on May 15, 16, and 17. The Applicant has indicated a willingness to schedule Ms. O'Donnell's technical session the following week, and Counsel for the Public requests that the deadline for Ms. O'Donnell's responses to technical session requests be set at least 10 days from her technical session.

WHEREFORE, Counsel for the Public respectfully requests that the Committee:

- A. Issue a procedural schedule for the resumption of this docket consistent with the positions set forth in this Response;
- B. Include in the procedural schedule the opportunity for discovery and a technical session on any new testimony or analysis of HDD alternatives to the proposed jet plow method to cross Little Bay;
- C. Defer judgement on CLF's request to require a jet plow trial run until after Supplemental testimony has been filed; and
- D. Grant such other and further relief as may be just.

Respectfully submitted,

COUNCIL FOR THE PUBLIC

By his attorneys



Dated: March 26, 2018

Christopher G. Aslin (N.H. Bar# 18285)
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
Tel. (603) 271-3679
Christopher.Aslin@doj.nh.gov

Certificate of Service

I, Christopher G. Aslin, hereby certify that a true copy of the foregoing Response has on this date been sent by email to the service list in Docket No. 2015-04.

Dated: March 26, 2018



Christopher G. Aslin, Esq.