

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-05

**Re: Joint Application of New England Power Company
d/b/a National Grid and Public Service Company of New Hampshire
d/b/a Eversource Energy for a Certificate of Site and Facility**

May 20, 2016

**ORDER GRANTING APPLICANT'S MOTION FOR
PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

I. BACKGROUND AND DESCRIPTION OF THE PROJECT

On August 5, 2015, New England Power Company d/b/a National Grid (NEP) and Public Service Company of New Hampshire (PSNH) d/b/a Eversource Energy (collectively Applicant) filed a joint application for a certificate of site and facility (Application) with the Site Evaluation Committee (Committee). The Application seeks the issuance of a Certificate of Site and Facility (Certificate) approving the siting, construction and operation for a new 345 kV electric transmission line (Project). The proposed transmission line will be constructed in an existing developed transmission line corridor between NEP's Tewksbury 22A Substation in Tewksbury, Massachusetts and PSNH's Scobie Pond 345 kV Substation in Londonderry, New Hampshire. The pre-existing transmission line corridor traverses the towns of Pelham and Hudson in Hillsborough County, and Windham and Londonderry, in Rockingham County.

II. POSITIONS OF THE PARTIES

On December 31, 2015, the Applicant filed a Second Partially-Contested Motion for Protective Order and Confidential Treatment (Motion). The Motion seeks a protective order and

confidential treatment for information relating to the status, location, and distribution of rare, threatened and endangered native plants and animal species and natural communities on or adjacent to the Project site. The Applicant seeks confidential treatment for the following documentation that was provided as part of Appendix F-1 (Revised NHDES Wetland Permit Application) of Supplement 2 to the Application:

- MVRP Rare Plant Surveys-2015 Results-Mitigation Recommendations;
- MVRP Rare Plant Surveys -2016 Survey Protocols;
- MVRP - Black Racer Collector Permit, Turtle Survey Results and other Observed Rare Species Observations; and
- MVRP Northern Long-eared Bat Acoustic Survey Report.

The Applicant asserts that said documentation includes maps, survey results, and other materials relating to the location and type of rare, threatened, and endangered native plant and animal species and natural communities.

The Applicant makes the following request: “. . . to the extent the Applicants offer any confidential evidence at any hearing before the Committee, the Applicant respectfully request the SEC to afford similar protection to such documents that are deemed confidential.”

Counsel for the Public took no position to the requests contained in the Applicant’s Motion. Ms. Huard objected to the Applicant’s Motion.

III. ANALYSIS AND FINDINGS

In support of the Motion the Applicant asserts that protective treatment of information relating to the status, location, and distribution of rare, threatened and endangered native plants is consistent with the legislative purpose of the New Hampshire Native Plant Protection Act of 1987 that states the following:

Because there are no laws protecting any of our native plants, every year hundreds of our native plants are dug up and removed without permission from public and private property. Many of these are taken out-of-state and sold for profit. Therefore, the legislature finds and declares that:

I. For human needs and enjoyment, the interests of science, and the economy of the state, native plants and natural communities throughout this state should be protected and conserved; and that native plant numbers should be maintained and enhanced to insure their perpetuation as viable components of their ecosystems for the benefit of the people of New Hampshire.

II. Native species of plants within this state and the nation that are endangered, threatened, or otherwise reduced in number or may become so because of loss, modification, or severe curtailment of their habitats, or because of exploitation for commercial, scientific, educational, or private use, should be accorded protection as is necessary to maintain and enhance their numbers.

RSA 217-A:2.

The Applicant also asserts that production of information related to animal species and natural communities is contrary to the legislative intent codified in the Endangered Species Conservation Act which, in relevant parts, states:

I. Species of wildlife normally occurring within this state which may be found to be in jeopardy should be accorded such protection as is necessary to maintain and enhance their numbers.

II. The state should assist in the protection of species of wildlife which are determined to be threatened or endangered elsewhere pursuant to the endangered species act by prohibiting the taking, possession, transportation or sale of endangered species and by carefully regulating such activities with regard to threatened species.

RSA 212-A:3.

The Applicant also relies on the Nongame Species Management Act that states that it should be a policy of the State to manage and maintain "invaluable natural resources with

ecological, scientific, educational, historic, recreational, economic, and aesthetics values.” *See* RSA 212-B:2.

The Applicant concludes that, based on the policy and legislative intent that were codified in New Hampshire Native Plant Protection Act of 1987 (RSA 217-A:2), the Endangered Specious Conservation Act (RSA 212-A:3), and Nongame Species Management Act (RSA 212-B:2), the information relating to the status, location, and distribution of rare, threatened and endangered native plants and animal species and natural communities on or adjacent to the Project site should be protected and treated as confidential under the “Right-to-Know” statute that exempts information from public disclosure that is “confidential, commercial or financial.” *See* RSA 91-A:5.

Data regarding status, location, and distribution of rare, threatened and endangered native plants and animal species and natural communities appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Rare, threatened and endangered native plants as well as animal species and natural communities are protected by number of statutes. *See* RSA 217-A:2; RSA 212-A:3; RSA 212-B:2. The State recognizes that these resources are in “jeopardy” and require protection of the State. *See id.* Considering the importance ascribed to rare, threatened and endangered native plants and animal species and natural communities by the legislature and the need to protect such resources, it follows that documentation identifying said resources and their location qualifies as confidential information under RSA 91-A:5. However a determination that information is “confidential” does not end the analysis.

A state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure pursuant to the Right-to-Know law, RSA 91-A:5, IV. See *Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); and *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first prong of the analysis is to determine if the Applicant has identified a privacy interest. *Lambert*, 157 N.H. at 382. If a privacy interest is invoked then the agency must assess whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government. *Id.* at 383. If disclosure does not serve that purpose then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

In this case the public benefit of disclosing information relating to the status, location, and distribution of the rare, threatened and endangered native plants and animal species and natural communities, is slight and in fact disclosure would be detrimental to the public interest in protecting said resources. Therefore, under this balancing test the following documentation is exempted from disclosure under the exemption provisions of the Right to Know law: (i) MVRP Rare Plant Surveys-2015 Results-Mitigation Recommendations; (ii) MVRP Rare Plant Surveys - 2016 Survey Protocols; (iii) MVRP - Black Racer Collector Permit, Turtle Survey Results and other Observed Rare Species Observations; and (iv) MVRP Northern Long-eared Bat Acoustic Survey Report. The Motion is granted and the documentation will not be disclosed or made available to the public. The documentation will be available for review by Subcommittee members. If any party to this docket seeks disclosure of said documentation they may file a motion setting forth the reason for the requested disclosure and follow the procedures set forth below.

To the extent that the Applicant seeks an order regarding confidentiality of documents to be filed in the future, that request is denied. It is impossible to apply the three part *Lambert/Lamy* test to documents that have not yet been filed with the Subcommittee. *See* Order on Unassented-To Motion for Protective Order and Confidential Treatment, Application of Antrim Wind Energy, LLC, Docket No. 2012-01 (June 4, 2012).

IV. TREATMENT OF CONFIDENTIAL INFORMATION

MVRP Rare Plant Surveys-2015 Results-Mitigation Recommendations, MVRP Rare Plant Surveys -2016 Survey Protocols, MVRP - Black Racer Collector Permit, Turtle Survey Results and other Observed Rare Species Observations, and MVRP Northern Long-eared Bat Acoustic Survey Report contained in Appendix F-1 of Supplement 2 shall be treated as confidential documents and shall not be disclosed to the public. They shall remain redacted in the public domain. Nonetheless, the confidential information contained in said documents will be available for review by the members of the Subcommittee without the need to sign a confidentiality agreement. Subcommittee members may review the confidential material at the offices of the Site Evaluation Committee on an *in-camera* basis without participation by parties to the proceeding. Subcommittee members are not required to sign a protective agreement.

If a party to these proceedings seeks access said documentation, they must file a motion identifying the reason for such access and execute a protective agreement in the form set forth and attached hereto. A true copy of the motion and protective agreement shall also be forwarded to the Applicant. Only Parties authorized by the presiding officer, after receipt of the executed protective agreement, shall be afforded access to the confidential information. The parties shall

not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket.

Unless otherwise ordered, the parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the parties shall destroy any notes referencing the confidential information and return all confidential information to the Applicant. Within sixty days thereafter each party shall certify to the Applicant, with a copy to the Administrator of the Committee that said notes have been destroyed and all confidential information returned. The rights of the parties under this order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order, which are subsequently granted by the Committee, will be handled with the same procedures detailed above.

If a party, other than Counsel for the Public, is granted authority to review the confidential material then such review shall occur at the offices of the Site Evaluation Committee during normal business hours. Copies of the confidential materials shall not be made available to any party to the proceeding, except Counsel for the Public, without an explicit order from the presiding officer.

So ordered this twentieth day of May, 2016:



F. Anne Ross
Site Evaluation Committee
Presiding Officer

EXHIBIT A

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC Docket No. 2015-05

CONFIDENTIALITY AGREEMENT

I, _____, hereby certify that I am a Party to the above-captioned proceeding and in connection with my interests therein, I request to be given access to the following Confidential Information maintained by the Site Evaluation Committee: _____.

I further certify that I have read the Site Evaluation Committee's protective order issued in the above-captioned matter, understand it and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above Confidential Information until I have signed and delivered it to counsel for New England Power Company and Public Service Company of New Hampshire, and until it has been provided to the Site Evaluation Committee by said counsel.

Date: _____

Signature of Party to Docket No. 2015-05

¹ A "Party" or "Parties" to the SEC Proceeding include Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervenor status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.

