



September 6, 2016

Via Hand-Delivery

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

**Re: 2015-06— Joint Application of Northern Pass Transmission, LLC and
Public Service Company of New Hampshire d/b/a Eversource Energy for a
Certificate of Site and Facility—Motion to Compel**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find attached the a Motion to Compel and to Postpone the September 21, 2016 Technical Session, filed on behalf of the New England Power Generators Association, Inc.

Please contact me if you have any questions in this regard. Thank you for your assistance.

Very truly yours,

Carol J. Holahan

cc: Service List 2015-06 (electronic mail only)

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-06

Joint Application of Northern Pass Transmission, LLC
and Public Service Company of New Hampshire
d/b/a Eversource Energy for a Certificate of Site and Facility

**PARTIALLY ASSENTED-TO MOTION OF THE NEW ENGLAND POWER
GENERATORS ASSOCIATION, INC.,
TO COMPEL RESPONSES TO DATA REQUESTS AND TO POSTPONE THE
SEPTEMBER 21, 2016 TECHNICAL SESSION**

The New England Power Generators Association, Inc. (NEPGA)¹ respectfully moves for an order to produce data requested by NEPGA through data requests and objected to by the Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (“Applicants”) in the above-referenced action before the New Hampshire Site Evaluation Committee (SEC or Committee). In support hereof, NEPGA states as follows:

I. BACKGROUND

1. On October 19, 2015 Applicants filed its Application for a certificate of site and facility pursuant to RSA 162-H. NEPGA timely propounded twenty-seven (27) data requests on May 31, 2016. The Applicants and NEPGA were able to reach consensus with respect to those responses.

2. In its Order on Pending Motions and Procedural Order, issued on June 23, 2016, the SEC allowed NEPGA the opportunity to propound a second set of data requests on issues raised in the economic reports and prefiled testimony on or before July 8, 2016. By agreement of the parties, that deadline for propounding those requests

¹ The comments expressed herein represent those of NEPGA as an organization, but not necessarily

and the Applicants' deadline to provide responses to NEPGA's second set of data requests was similarly extended.

3. The Applicants timely objected to certain of NEPGA's responses, but the parties continued to work together to resolve their differences, and the Applicants' extended the time in which NEPGA could compel responses.

4. On August 27, 2016, the Applicants issued their final responses. This motion addresses only those four data requests which the Applicants and NEPGA were unable to resolve to NEPGA's reasonable satisfaction, specifically NEPGA 2-5, NEPGA 2-7, NEPGA 2-8 and NEPGA 2-14.²

5. NEPGA's data requests and the Applicants' responses are attached as Exhibit A (NEPGA 2-5), Exhibit B (NEPGA 2-7), Exhibit C (NEPGA 2-8) confidential and redacted versions) and Exhibit D (NEPGA 2-14.)

II. SUMMARY OF THE APPLICANTS' OBJECTIONS

6. The Applicants' objections to NEPGA's data requests fall generally into two broad categories: (1) that the request seeks information not in the Applicants' possession; and (2) that the request seeks confidential information that is protected from disclosure by RSA 91-A. Neither basis is sustainable.³

7. As discussed more fully within, with respect to information not currently in the Applicants' possession, the SEC has generally recognized that requiring Applicants to conduct additional analysis when information is readily available to all the parties is

² NEPGA reserves the right to request leave to pursue additional discovery with respect to NEPGA 2-2 and issues related to the Clean Energy RFP. As noted in the SEC's June 23, 2016 Order, because the results of the Clean Energy RFP have not yet been announced, the SEC has determined that the information is not yet discoverable. When the results of the Clean Energy RFP become available, NEPGA will seek leave to conduct additional discovery.

³ On or about July 8, 2016, NEPGA and the Applicants reached agreement on the terms of a confidentiality agreement and NEPGA has received the confidential data produced by the Applicants in this proceeding.

not permissible. Here, however, the information sought is exclusively within the Applicants' control, and compelling its production is consistent with New Hampshire's liberal discovery rules for a full and fair consideration of the issues presented in this docket. As also discussed in more detail herein, Applicants' second basis for objection, that certain material NEPGA seeks is protected by RSA 91-A, cannot be sustained.

III. APPLICANTS' RESPONSE TO NEPGA 2-5 IS INCOMPLETE

8. In NEPGA 2-5, NEPGA requested that the Applicants "show in detail the calculations used to develop Figure 7 (page 30) of Frayer's testimony." In its response, Applicants simply refer to an Appendix in the LEI Report. The referenced Appendix is not, however, fully responsive to NEPGA's data request. Specifically, the Applicants have failed to provide the calculation showing how it combined projected wholesale market benefits, along with annual project costs which are not in Appendix B, and any other costs that consumers will need to pay for the energy that will be delivered on the Project to arrive at the retail cost impacts it shows in Figure 7 of Julia Frayer's testimony.

9. The New Hampshire Supreme Court has held that a party in a legal proceeding in New Hampshire is entitled to be "fully informed and have access to all evidence favorable to his side of the issue. This is true whether the issue is one raised by him or his opponents..." *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386 (1969): *see also Yancey v. Yancey*, 119 N.H. 197, 198 (1979) (New Hampshire takes a "liberal view" of discovery). *See also* N.H. Const. Part 1, Art 8 (public's right of access to governmental proceedings and records shall not be unreasonably restricted); *accord City of Nashua*, NH PUC Order No. 24,681 (October 23, 2006) (confirming that

its discovery policies are "consistent with Superior Court Rule 35(b) regarding the scope of discovery," and requires parties to show that the information sought is "reasonably calculated to lead to admissible evidence"); *Re Public Service Co. of N.H.*, 86 PUC 730, 731-32 (2001) (PUC will deny discovery only when it can "perceive of no circumstance in which the requested data will be relevant"); see *also* RSA 541-A:33.

10. Since NEPGA's requests are "reasonably calculated to lead to admissible evidence" in these proceedings, consistent with New Hampshire's liberal discovery rules, Applicants should be compelled to provide the information requested in NEPGA 2-5 immediately.

IV. APPLICANTS SHOULD BE COMPELLED TO PROVIDE ADDITIONAL INFORMATION BASED ON LEI MODELING

11. In response to NEPGA 2-7 and NEPGA 2-8, the Applicants objected because the requests would require the Applicants "to develop additional data that are not presently in the care, custody, of control of the Applicants and is not reasonably calculated to lead to admissible evidence." Neither basis for those objections can be sustained.

12. LEI's analysis regarding the purported savings of the project is calculated on a stale natural gas price forecast from 2015. NEPGA 2- 7 requests that LEI recalculate those projected savings based on the Energy Information Administration's 2016 Annual Energy Outlook's natural gas price forecast to obtain a more up-to-date savings calculation. Applicants object, maintaining that it does not have the information and cannot be compelled to obtain it. NEPGA is not requesting that LEI change any other parameters or input variables; in fact NEPGA expressly requests that Applicant not change any other variables. Nor is NEPGA requesting additional analyses. NEPGA

is simply requesting that LEI insert a single, updated price forecast for natural gas into its existing economic model so that NEPGA has more current information regarding the project's market impact.

13. Where NEPGA has been granted intervention to assess the economic impacts related to this project on the competitive wholesale market, the Applicants must be required to use pricing information that accurately reflects the commodity price, and must not be permitted not hide behind outdated pricing that yields misleading and unrealistic savings projections so that NEPGA can fairly assess the market impacts.⁴

14. Similarly, the Applicants, in response to NEPGA 2-8, state that they have not performed any additional analysis regarding the new ISO-NE zonal and system demand curves the Federal Energy Regulatory Commission (FERC) approved for effect in June 2016. The new demand curves will dramatically change Forward Capacity Market Clearing Prices and the volume of resources that clear the auction beginning with Forward Capacity Auction 11 commencing in February 2017. This new market design completely changes the economics of the Northern Pass project and will, undoubtedly, affect the market impacts as well as the projected savings resulting from the project. Since this analysis can, once again, only be calculated using LEI's "proprietary modeling," NEPGA asserts that the Applicants are the sole party capable of producing that critical analysis and should be required to do so.

⁴ If the Committee is not inclined to make the Applicants produce this information at this time, NEPGA asserts that under N.H. Admin. Rules Site 202.12(m), the Applicants have an ongoing obligation to provide parties with supplemental information responsive to this and any other data request as additional information becomes available.

15. The SEC has previously recognized that, in some instances, compelling a party to produce information not in its possession is impermissible. In *Antrim Wind Energy, Order on Outstanding Motions, Docket 2012-01 (August 22, 2012)*, for example, the intervenors sought to compel information that was readily available in the public domain. In deciding against compelling the applicant in that proceeding to produce the requested information, the SEC stated, “the information sought...is not specific to the Applicant. Any party can undertake its own study” to obtain it. *Id.* at 11-12.

16. Unlike the propounding party in *Antrim Wind*, however, NEPGA seeks information that is the subject of LEI’s economic modeling software. Since the Applicants have also taken the position that LEI’s modeling is proprietary and not subject to discovery,⁵ Applicants have essentially created an insurmountable barrier for NEPGA, and any other intervenor, to conduct meaningful discovery related to economic and market impact modeling.⁶ Since this information is critical to NEPGA’s intervention in determining the effects of the project on the competitive wholesale electricity market, the Applicant’s should be compelled to conduct the additional modeling using their existing models.

17. The Applicants further claim that the responses to NEPGA 2-7 and NEPGA 2-8 are not reasonably calculated to lead to admissible evidence; Applicants’ claims are wholly without merit and completely inconsistent with New Hampshire’s liberal approach to discovery.

⁵ See Forest Society’s Data Requests and Motion to Compel, *Northern Pass Transmission 2015-06* (July 15, 2016).

⁶ Even if NEPGA were to undertake its own analysis of these issues, using different models would be of limited value since the results would not allow for an “apples to apples” comparison.

18. As discussed *supra* at Paragraph 8, the New Hampshire Supreme Court has adopted a liberal interpretation relating to discovery in adjudicative proceedings. *See Scontsas v. Citizens Insurance Co.*, 109 N.H. 386 (1969).

19. The information sought by NEPGA in these two data requests is highly relevant to the project's impact on the wholesale electricity market. The Information provided by the Applicants and upon which the Applicants rely in assessing market impacts in both Julia Frayer's testimony and in the LEI Report, is premised upon outdated and overinflated gas prices and on a capacity market model that the ISO-NE has determined is not sustainable and has been replaced. The information requested by NEPGA 2-7 and NEPGA 2-8 is not only "reasonably calculated to lead to admissible evidence," but critical to NEPGA's analysis of the project's impact on the competitive wholesale market.

20. Permitting the Applicants to rely on outdated commodity prices and on original and soon-to-be outdated market models without performing additional analyses using the market models recently adopted by ISO-NE and approved by FERC (and the models that will be in effect if the project is approved), effectively bars NEPGA from developing comparable evidence on market impacts. Moreover, allowing the Applicants to rely on this outdated information without compelling updates will ultimately limit the Committee to information that is both erroneous and misleading.

V. NEITHER RSA 91-A NOR THE PUC DOCKET SHIELD APPLICANTS FROM PRODUCING THE POWER PURCHASE AGREEMENT

21. In NEPGA 2-14, NEPGA requested that the Applicants produce the unredacted versions of the purchase power agreement (PPA) between Public Service Co. of New Hampshire d/b/a Eversource Energy and Hydro Renewable Energy, Inc.,

as well as the unredacted testimony of Eric Chung and James Daly filed in support of the PPA in a docket at the N.H. Public Utilities Commission filed by Eversource Energy, *Petition for Approval of a Power Purchase Agreement with Hydro Renewable Energy, Inc.*, (DE 16-693).

22. The Applicants' objection is two-fold. First, the Applicants claim that the information is protected from discovery based on RSA 91-A, New Hampshire's Right to Know law. Second, the Applicants claim that, since the PPA is now the subject of another pending regulatory proceeding, Applicants do not need to produce the PPA in this docket. Neither basis can support the Applicants' refusal to disclose the requested information.

a. Balancing of Interests under RSA 91-A Favors Disclosure

23. The Applicants' objection asserted that responsive information is confidential and is exempt from disclosure under RSA 91-A:5, IV, the Public Right to Know Law. Applicants' objection cannot be sustained.

24. As discussed *supra* at Paragraphs 8 and 18, the New Hampshire Supreme Court has indicated that it takes a very liberal view of discovery in adjudicative proceedings within New Hampshire. *Scontsas v. Citizens Insurance Co.*, 109 N.H. 386 (1969).

25. Moreover, "[t]he purpose of the Right to Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people...we resolve questions regarding the Right to Know Law with a view to providing the utmost information." *Lambert v. Belknap County Convention*, 175 N.H. 375, 378 (2008). See N.H. Const. Part 1, Art. 8

(public's right of access to governmental proceedings and records shall not be unreasonably restricted).

26. In considering when information should be protected from public disclosure under RSA 91-A, the SEC applies the three-step analysis developed by the New Hampshire Supreme Court in *Lamy v. New Hampshire Public Utilities Commission*, 152 NH 106 (2005). See, e.g., Order on Motions for Protective Order and Confidential Treatment, *Antrim Wind* 2015-02 (July 6, 2016). The SEC first must determine whether there is a privacy interest that would be invaded by the disclosure. Second, when there is a privacy interest at stake, the public's interest in disclosure is assessed. Disclosure should inform the public of the conduct and activities of its government. If the information does not serve that purpose, disclosure is not warranted. Finally, where there is a public interest in disclosure, that interest is balanced against any privacy interest in non-disclosure. *Id.*

27. Applying the *Lamy* analysis here, the public certainly has an interest in knowing the contents of the PPA as it relates to the siting process and the potential effects the terms of the PPA have on the competitive wholesale market. The Applicants have touted this PPA as bringing direct benefits to the ratepayers of New Hampshire, which benefits bear directly on existing generators and the competitive wholesale market. The terms of the PPA should be disclosed so that NEPGA has the opportunity to analyze the effect the PPA has on these issues. The SEC has previously considered, and denied, Applicants' request for confidential treatment of certain PPAs. See *Antrim Wind*, 2015-02 at 9.

28. Moreover, the SEC has appropriately drawn a distinction between the discoverability of PPAs that are still in the negotiation stage and those that have been fully executed. See Order on Outstanding Motions, *Antrim Wind* 2012-01 (August 22, 2012) at 9. As distinguished from the PPA in *Antrim Wind* proceeding where the SEC denied discovery, the PPA at issue here is fully negotiated; Applicants' claim for protection from disclosure cannot prevail especially when balanced against NEPGA's compelling interests in disclosure.⁷

b. The Existence of the PUC Docket Does Not Negate the PPA's Discoverability in the SEC Docket

29. Nor can the Applicants' claims that because issues related to the PPA will be adjudicated at the PUC, the PPA and related testimony should not be discoverable in this proceeding be sustained. The jurisdiction of the PUC and SEC are different; their statutory mandates are different. Simply because the PPA is the subject of a separate regulatory proceeding does not mean that its terms are "not reasonably calculated to lead to admissible evidence" in this proceeding. This is especially so when the PPA is one of the very issues upon which NEPGA's intervention is premised. See Subcommittee Order on Review of Intervention, *Northern Pass Transmission* 2015-06 (May 20, 2016, 2016) at 25. Finally, the Applicants have conceded the relevance of the PPA by filing a copy of it in this proceeding and cannot now credibly claim that NEPGA should not be permitted to review it for the purposes of participating in this proceeding.

⁷ In this docket, the SEC has recognized a similar distinction. In its June 23, 2016 Order, the SEC denied NEPGA the opportunity to conduct discovery on issues related to the Applicants' response to the Clean Energy RFP because the results of the RFP had not yet been announced and the disclosure of information might put the Applicants at a competitive disadvantage. Such is not the case, however, with a fully-executed PPA.

30. Since the Applicants here, just like the Applicants in the *Antrim Wind* 2015-02 proceeding, have identified only broad privacy interests that may be implicated by disclosure of the terms of the fully executed PPA, and because it is clear that the disclosure of the PPA's terms are relevant to NEPGA's intervention in this proceeding, the interest in disclosure far outweighs any claims to privacy. Applicants' attempts to shield this information from disclosure cannot be supported. See Order on Motions for Protective Order and Confidential Treatment, *Antrim Wind* 2015-02 (July 6, 2016) at 9.⁸

31. Accordingly, NEPGA respectfully requests that the SEC order the Applicant to provide the requested information, subject to the terms of the confidentiality agreement previously agreed upon by the Applicants and NEPGA in this docket.

VI. THE SEC SHOULD POSTPONE THE TECHNICAL SESSION SCHEDULED FOR SEPTEMBER 21, 2016

32. The SEC has scheduled a technical session for September 21, 2016 (the September 21 Panel) to discuss the Forward New Hampshire Plan, the purported benefits of the project to New Hampshire residents and the Clean Energy RFP. Many of the purported benefits the Applicant's claim relate to the previously discussed PPA and the Clean Energy RFP. Since the Applicants have not produced an unredacted copy of the PPA and supporting testimony, and since the results of the Clean Energy RFP, originally scheduled to be released in July, have now been indefinitely postponed, NEPGA asserts that it cannot adequately prepare for the September 21 Panel. Without the benefit of information related to the PPA and related to the Clean Energy RFP,

⁸ Similarly, in this Northern Pass docket, this Subcommittee conducted the RSA 91-A analysis when the ss sought confidential treatment of certain information, and the Subcommittee granted the Applicants' motion for protective treatment but ordered that the information be provided to intervenors subject to confidentiality agreements. *Joint Application of Northern Pass Transmission*, Order on Motion for Protective Order and Confidential Treatment, Docket 2016-06 (May 25, 2016).

NEPGA cannot assess the impact of the project on the competitive market. NEPGA requests that the SEC postpone the panel until the Applicants produces the unredacted PPA and the results of the Clean Energy RFP are announced and NEPGA has had an opportunity to conduct discovery.

VII. CONCLUSION

33. NEPGA made a good faith effort to obtain the concurrence of other parties to the docket:

- Grafton County Commissioners, Society for the Protection of New Hampshire Forests, Deerfield Abutters Group, Ashland Water and Sewer and Municipal Group 2 concur in this Motion.
- The Applicants object to the Motion.
- The Remaining parties to the docket did not respond or take no position on the Motion.

34. NEPGA hereby certifies that it made a good faith effort pursuant to N.H. Admin. Rules Site 202.12(k)(4) to resolve these disputes informally.

35. Based on the foregoing, NEPGA seeks to compel the Applicants to produce the information NEPGA has appropriately and reasonably requested so that, consistent with the SEC's Order on Intervention, it may fully analyze the effects of Applicants' proposal and the PPA on the effects on the competitive wholesale electricity market.

WHEREFORE, NEPGA respectfully requests the Committee

- A. Compel the Applicants to deliver the information requested immediately with respect to NEPGA 2-5, NEPGA 2-7, NEPGA 2-8 and NEPGA 22-14, so that NEPGA can adequately prepare for the upcoming technical sessions;
- B. Postpone the Technical Session scheduled for September 21, 2016, until such time as NEPGA has reviewed the unredacted terms of the PPA and the results of the Clean Energy RFP have been announced and NEPGA had adequate opportunity to conduct discovery and prepare for the technical session of addressing the PPA and the Clean Energy RFP; and
- C. Grant such other and further relief that the Committee may deem just and reasonable.

Respectfully Submitted,

**NEW ENGLAND POWER GENERATORS
ASSOCIATION, INC.**

By its Attorneys,



By: _____

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Date: September 6, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 6, 2016, a copy of the foregoing Motion to Compel was hand-delivered to the N.H. Site Evaluation Committee and sent by electronic mail to persons named on the Service List of this docket.

A handwritten signature in blue ink, appearing to read "Carol J. Holahan", with a long horizontal flourish extending to the right.

Carol J Holahan, Esq.

NEPGA 2-5 Please show in detail the calculations used to develop Figure 7 (page 30) of Frayer's testimony. Specifically, please explain how the retail electricity cost savings from the wholesale market benefits, the averages of which are quoted in Figure 1 (page 6), and all costs, including the annual costs of the Project and the costs paid to the shipper to deliver the electricity that produced the wholesale market benefits were developed or derived.

Response: Please refer to the Appendix D: Calculation for retail cost impact of the LEI Report.

NEPGA 2-7 The 2016 EIA AEO forecast is now available and predicts that natural gas prices will remain below \$5 per million Btu (2015 dollars) through most of the projection period, which extends to 2040. Please calculate the impact that these lower natural gas prices would have on the wholesale market benefits previously provided in the LEI Report.

Response: The Applicants object to the request to the extent it requests the Applicants to develop additional data that are not presently in the care, custody, or control of the Applicants and is not reasonably calculated to lead to the discovery of admissible evidence. Without waiving such objection, NPT states that LEI has not modeled the energy market impact of Northern Pass under the 2016 AEO in its 2015 analysis that is summarized in the LEI Report.

NEPGA 2-8 As shown in [REDACTED] than the actual clearing price of \$7.03/kW-month. Please state whether you believe that the overestimate of the FCA 10 clearing price, along with the recently FERC approved new system and zonal demand curves for use in FCA 11 and beyond, will result in lower FCA clearing prices for FCA 11 and beyond than originally estimated in the LEI Report and thus lower estimates of wholesale capacity market benefits than those originally estimated in the LEI Report?

Response: The Applicants object to the request to the extent it requests the Applicants to develop additional data that are not presently in the care, custody, or control of the Applicants and is not reasonably calculated to lead to the discovery of admissible evidence. Without waving such objection, NPT states that LEI has not modeled the capacity market impact of Northern Pass with the resources that cleared in FCA 10.

NEPGA 2-14 Page ES-4 of the Executive Summary of Eversource's Application to the Site Evaluation Committee states: "Northern Pass will lower energy costs for the region as a whole and for New Hampshire in particular. PSNH will enter into a power purchase agreement (PPA) with HQ for approximately 100 MW of...power. The PPA will provide competitive pricing..." Please provide an unredacted copy of the power purchase agreement between PSNH and HQ and unredacted versions of the prefiled testimony of James G. Daly and Eric H. Chung filed at the N.H. Public Utilities Commission on June 28, 2016, Docket DE 16-693.

Response: The Applicants object to this data request as it seeks to obtain confidential business information that is not discoverable. *See* RSA 91-A:5, IV (exempting production of "confidential, commercial, or financial information" from the Public Right to Know Law).

The SEC has routinely recognized that confidential treatment should be granted to competitively sensitive or proprietary information under the 91-A:5 exemption for "confidential, commercial, or financial information." *See, e.g., Order on Pending Motions and Further Procedural Order, Application of Groton Wind, LLC*, NH SEC Docket 2010-01 (Dec. 14, 2010) (granting confidential treatment for financial statements and the applicant's capacity factor profile); *Order on Partially Assented-to Motion for Protective Order and Confidential Treatment for Certain Confidential, Commercial, and Financial Documents, Application of Laidlaw Berlin BioPower, LLC*, NH SEC Docket 2009-02 (June 9, 2010) (granting confidential treatment for business plans and financial models because disclosure of the information could negatively affect the applicant's competitive position in the renewable energy market).

The Applicants also incorporate by reference and rely on the facts, positions, legal authority and arguments regarding the confidentiality of the PPA as contained in PSNH's Motion for Confidential Treatment (June 28, 2016) in NH PUC Docket DE 16-693. *See also* N.H. Code Admin. Rules Puc § 203.08. The NH PUC has regularly granted confidentiality for pricing information similar to that contained in the PPA. *See* Motion at p. 4-5. The SEC should provide similar treatment to the PPA in this proceeding. *See also* RSA 374-F:1 (protecting "free and fair completion" in the development of competitive markets for wholesale and retail electricity services, which are key elements in a restructured industry).

Finally, the PPA is the subject of litigation and administrative approval at the NH PUC, therefore, litigation of the PPA before the SEC is improper. The SEC will take administrative notice of the PUC's determination, including, any findings that the NH PUC makes regarding the public interest and / or public benefits.

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