

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

**MOTION FOR REHEARING AND CLARIFICATION REGARDING
TRANSCRIPTION**

The Society for the Protection of New Hampshire Forests (“Forest Society”) together with the NGO Intervenors, comprised of Ammonoosuc Conservation Trust, Appalachian Mountain Club, and Conservation Law Foundation, Abutting Owners Underground Clarksville-Stewartstown and The Pemigewasset River Local Advisory Committee (collectively, the “Movants”) submit this Motion regarding the August 29, 2016 Order (“Order”) of the New Hampshire Site Evaluation Committee (“Committee”) denying Applicants’ Motion to record and transcribe the technical sessions in this proceeding. The Movants state the following in support:

AUTHORITY FOR REHEARING

1. The Movants, as parties to this proceeding, may move for a rehearing of the Order pursuant to RSA 541:3 and N.H. Code Admin. R. Ann. Site 202.29.

BACKGROUND

2. The Applicants, Eversource Energy and Northern Pass Transmission LLC, applied to the Committee for a Certificate of Site and Facility to construct a 192-mile high-voltage transmission line, extending from the Canadian border at Pittsburg, New Hampshire to a substation located in Deerfield, New Hampshire, commonly referred to as the Northern Pass Project.

3. Parties in this proceeding are participating in a series of technical sessions, during which the Applicants present each of their witnesses for questioning.

4. On August 10, 2016, Applicants filed a motion seeking permission to have these technical sessions recorded and transcribed, simply stating that “the Committee has granted such requests to record and transcribe the technical sessions in the past.”¹ Many parties assented to the motion, including the NGO Intervenors and the Forest Society.²

5. On August 18, 2016, Counsel for the Public objected to Applicants’ Motion to Transcribe for a number of reasons, as follows.³

- The SEC rules separately provide for both technical sessions and depositions.
- A concern that recording and transcribing the technical sessions would “deter the dialogue necessary to fully understand the pre-filed testimony.”
- A concern that “recording and transcribing will lead to more disputes or could otherwise lengthen the time necessary to complete the technical session.”
- A concern that recording and transcribing could “work to the disadvantage of the many unrepresented parties in this case.” More specifically, “[m]any of the parties do not have lawyers and will not enjoy the full benefits of the technical sessions under a legalistic deposition environment.”

¹ The NGO Intervenors assented conditioned on their ability to purchase copies of the transcript. *Applicants’ Partially Assented To Motion to Have Technical Sessions Transcribed*, Docket No. 2015-06, at ¶ 4 (Aug. 10, 2016) (“Applicants’ Motion to Transcribe”).

² *Id.* at ¶ 7. The Forest Society assented on the following conditions: “only if parties will be able to obtain a copy of the transcript produced by the court reporter that the Applicants will arrange, and only if such court reporter is a court reporter subject to N.H. Admin. Rule Rep 501.03. The Forest Society acknowledges that the court reporter may charge the Forest Society for the copy of the transcript.” *Id.* at ¶ 8.

³ Objection of Counsel for the Public at ¶¶ 1-6.

6. On August 29, 2016, the Committee denied Applicants' Motion. The Committee concluded that the Counsel for the Public "had the better argument" in that the "[t]echnical sessions present a form of informal discovery . . . [the purpose of which] is for the parties and their experts to involve in a mutual dialog in order to get a better understanding of their testimony." *Id.* at 2. The Committee stated that the dialog and information provided at the technical sessions is neither designed for nor should be used for impeachment, and that "recording technical sessions may undermine their purpose and effectiveness." *Id.* It further concluded that "[t]here may be circumstances in which transcribing a technical session is appropriate . . . [but] [s]uch circumstances have not been shown to be present here." *Id.*

REQUEST FOR REHEARING AND CLARIFICATION

7. Rehearing is warranted when there is "good reason" to conclude the Committee's decision is "unlawful or unreasonable." RSA 541:3, 4.

8. This Order is at odds with the Committee's prior actions in similar circumstances. For instance, in response to a similar request to record and transcribe technical sessions, the Committee granted the request, finding "[t]he request to record and transcribe technical sessions is a reasonable request." *See Order Granting Motion to Record Technical Session*, Docket No. 2015-05 (April 28, 2016).

9. The Order is unreasonable because the parties already have had extensive question-and-answer sessions regarding the project at public meetings. Each of these prior public meetings was transcribed pursuant to N.H. Admin. Code R. Ann. Site 201.03(g). It is unreasonable to permit recording of one public hearing in this proceeding but not another, particularly given the concerns underlying the Order presumably are equally applicable to both venues. In addition, it is clear from the record of those prior meetings that recording and

transcription itself does not hinder the active participation of members of the general public, i.e. concerned parties who are not members of the Bar.

10. The Order does not comport with the statutory and regulatory regime for adjudicative proceedings. The Committee shall conduct an adjudicative proceeding regarding an application in accordance with RSA 541-A, the New Hampshire Administrative Procedure Act. N.H. Admin. Code R. Ann. Site 202.01. RSA 541-A:31 provides, “[t]he entirety of all oral proceedings shall be recorded verbatim by the agency. Upon the request of any party or upon the agency’s own initiative, such record shall be transcribed by the agency if the requesting party or agency shall pay all reasonable costs for such transcription.” The technical sessions are a form of discovery permitted by the rules as part of the adjudicative hearings. *See* N.H. Admin. Code R. Ann. Site 202.12(l).

11. The Order is at odds with the purpose of the rules. The Committee reasoned that permitting transcription and recording of the technical sessions would interfere with the purpose of the technical sessions, namely to provide an informal process whereby the parties and their experts may engage in a mutual dialog so as to better understand their testimony. Order at 2. This purpose is not explicit in the rules. Section 202.12 does not mandate that these forms of discovery, including the technical sessions, be conducted in an informal manner; rather, the discovery procedures provided for in Section 202.12 are within the section of the rules regarding adjudicative hearings and are analogous to those employed in civil litigation.

12. The Movants furthermore wish to respectfully point out that this Order has unintended consequences that will undermine the Committee’s stated goal of encouraging a useful dialog that does not disadvantage *pro se* parties or lead to more disputes that will lengthen the time necessary to complete the technical sessions or otherwise hinder the proceeding.

13. The fact that depositions are separately provided for under rule is inapposite here. The feasibility of conducting depositions on the 26 witnesses proffered by the Applicants is highly questionable. In practical terms, the Applicants cannot make all 26 witnesses available for what would essentially be duplicative sessions, one formally transcribed and one not. To attempt to do so would delay the proceeding substantially. It would certainly be to the disadvantage of *pro se* participants, who are less likely to have the time and financial resources necessary for such depositions. Moreover, it is worth noting that most counsel present and asking questions of the witnesses at the technical sessions, including Counsel for the Public and his attorneys, are doing so consistent with typical deposition practices. The primary difference appears to be the lack of a shared record, which lack has the greatest impact on parties such as the *pro se* participants who are not able to participate in all technical sessions due to other regularly scheduled daytime obligations.⁴

14. In a proceeding with fewer witnesses, *pro se* participants would be less disadvantaged by the lack of a shared record of technical sessions. In this case, they are inevitably disadvantaged by their inability to defer other obligations for an entire month, and withholding a record of the proceeding does them no favors. The technical and detailed content of many of the technical sessions also militates toward a written record that *pro se* participants lacking the resources to obtain expert consultants can review and study at their convenience.

15. The technical sessions may now take longer because, without the availability of a court reporter, it is more difficult for parties to keep track of what was said by witnesses and what questions have already been asked. This will result in duplicative questions and answers.⁵

⁴ The fear of potential obstructionist objections by counsel should not constrain the rights of the parties.

⁵ Indeed, a phenomenon observed at the technical sessions convened to date is that participants are often too busy attempting to take extensive notes to absorb what has already been asked and answered.

16. Multiple parties have already employed various technology in an attempt to record and document the proceedings.⁶ Informal transcriptions may also result from these recordings. This fosters inequity among docket participants, and parties with greater access to technological and financial resources may be advantaged. Further, due to inevitable human and technological error in recording and transcription, conflicting accounts of what was said are likely to result. Such confusion may cause delay and dispute, and is contrary to the public interest.

17. The deadline for discovery is December 30, 2016. As noted, there simply is not enough time to schedule, let alone adequately prepare and conduct, 26 depositions on top of a month-long stretch of technical sessions. Recording and producing an official transcript of the technical sessions, which the parties should be entitled to use for any lawful purpose, would likely eliminate the need for such depositions. The same logic would of course apply to the witnesses proffered by intervenors in this proceeding. The schedule established by the Committee in this docket is challenging given the scope of the subject matter and the number of intervenors. It does not currently allow adequate time for duplicative questioning of either the Applicants' or the intervenors' many witnesses.

18. On rehearing, the Movants respectfully request that the Committee consider subjecting the remaining scheduled technical sessions to formal recording and transcription. This will help to level the playing field for all parties, reduce misunderstandings, and increase daily efficiency as well as efficiency in the overall docket schedule.

19. Movants also ask that the Committee clarify that any and all information developed in this proceeding can be used for any lawful purpose that does not delay or disrupt the proceeding. Circumscribing the use of any relevant information at this early stage of the

⁶ This accords with RSA 541-A:31,VII.

proceeding will have a chilling effect, particularly on *pro se* participants, but also represented parties.

20. The parties below take the following positions with respect to this request:

A. Concur

Town of Woodstock
Town of Easton
Town of Franconia
Town of Plymouth
Town of Sugar Hill
Town of New Hampton
Town of Littleton
Town of Ashland Water & Sewer
Town of Woodstock
Town of Deerfield
Town of Bridgewater
Town of Canterbury
Town of Pembroke
Town of Deerfield
City of Concord
The National Trust for Historic Preservation
Grafton County Commissioners
Abutting Property Owners: Pittsburg-Clarksville-Stewartstown

B. Object

Counsel for the Public

C. Take No Position

The Cities of Berlin and Franklin

The remainder of the parties did not respond to a request for their position.

WHEREFORE, the Movant respectfully requests the Committee:

A. Grant this Motion;

B. Expeditiously schedule a rehearing on the Applicants' Partially Assented-To Motion to Have Technical Sessions Transcribed; and

C. Grant such further relief as it deems appropriate.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,

BCM Environmental & Land Law, PLLC



Date: September 16, 2016

By: _____

Amy Manzelli, Esq. (17128)
Jason Reimers, Esq. (17309)
3 Maple Street
Concord, NH 03301
(603) 225-2585
manzelli@nhlandlaw.com
reimers@nhlandlaw.com

**The NGO Intervenors, comprised of
Ammonoosuc Conservation Trust, Appalachian
Mountain Club, and Conservation Law
Foundation**



Date: September 16, 2016

By: _____

Melissa E. Birchard
Designated Spokesperson for the
NGO Intervenors
Attorney for Conservation Law Foundation
27 N. Main Street
Concord, NH 03301
(603) 225-3060 x3016
Fax (603) 225-3059
mbirchard@clf.org

Date September 16, 2016

Abutters -Underground Clarksville-Stewartstown

By: _____ for

Bradley Thompson
Designated Spokesperson for the
Abutters -Underground Clarksville-Stewartstown

The Pemigewasset River Local Advisory Committee

September 16, 2016

By: _____ for

Max Stamp
Designated Spokesperson for The
Pemigewasset River Local Advisory Committee

CERTIFICATE OF SERVICE

I hereby certify that on this day, September 16, 2016, a copy of the foregoing Motion for Rehearing and Clarification on the August 29, 2016, Order on Applicants' Partially Assented To Motion to Have Technical Sessions Transcribed was sent by electronic mail to persons named on the Service List of this docket.

Amy Manzelli, Esq. (17128)