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[mdavis@carolsoncapital.com](#)
Subject: NH SEC Docket No. 2015-06: Northern Pass Transmission LLC [MCLANE--FID1340229]
Date: Thursday, March 30, 2017 10:17:29 AM
Attachments: [image008.png](#)
[SEC w Objection to Mot. to Compel Economic Model.pdf](#)
[NPT Objection to Motion to Compel Production of Economic Model.pdf](#)

Following up on the notice sent from Tom Getz on Tuesday, we have identified 2 additional emails

that were quarantined and not delivered to the service list last week. Accordingly, I am resending the email sent last Thursday, March 23rd with a cover letter and objection.

The original and one copy were hand delivered to the Committee on Thursday, March 23rd.

Thank you,
Stacey Burgess

From: Burgess, Stacey [mailto:Stacey.Burgess@MCLANE.com]
Sent: Thursday, March 23, 2017 10:37 AM
To: martin.honigberg@puc.nh.gov; craig.wright@des.nh.gov; kate.bailey@puc.nh.gov; christopher.way@dred.state.nh.us; woldenburg@dot.state.nh.us; weathersbylawpllc@gmail.com; rwhitaker@ccsnh.edu; pamela.monroe@sec.nh.gov; marissa.schuetz@sec.nh.gov; miacopino@brennanlenehan.com; idore@brennanlenehan.com; cmunroe@brennanlenehan.com; brian.buonamano@doj.nh.gov; Needleman, Barry; Walker, Jeremy; Dumville, Adam; Walkley, Rebecca; Getz, Thomas; dbisbee@devinemillimet.com; christopher.allwarden@eversource.com; marvin.bellis@eversource.com; elizabeth.maldonado@eversource.com; robert.clarke@eversource.com; peter.roth@doj.nh.gov; Maynard, Laura (Laura.Maynard@doj.nh.gov); Gagnon, Dawn; Frazier, Denise; russ.kelly@eversource.com; Fish, Viggo; tpappas@primmer.com; eemerson@primmer.com; smerrigan@primmer.com
Subject: NH SEC Docket No. 2015-06: Northern Pass Transmission LLC [MCLANE--FID1340229]

Attached for filing in the above-captioned docket, please find a cover letter and objection.

The original and one copy will be hand delivered to the Committee this afternoon.

Thank you,
Stacey Burgess



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would go into more formal advice or a formal legal opinion.

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March 23, 2017

Via Hand Delivery

NHPUC MAR23'17 PM 3:50

Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

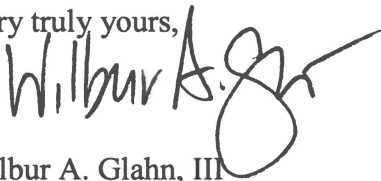
**Re: New Hampshire Site Evaluation Committee Docket No. 2015-06
Joint Application of Northern Pass Transmission LLC and Public Service Company
of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for
Construction of a New High Voltage Transmission Line in New Hampshire**

Dear Ms. Monroe:

Enclosed please find an original and one copy of the Objection of Applicants to Motion By the
Counsel for the Public to Compel Production of the Economic Model of London Economics
International, LLC.

Thank you for your assistance, and please feel free to call me if you have any questions.

Very truly yours,



Wilbur A. Glahn, III

WAG:ap
Enclosures

cc: SEC Electronic Distribution List

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**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

SEC DOCKET NO. 2015-06

**JOINT APPLICATION OF NORTHERN PASS TRANSMISSION LLC &
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR A CERTIFICATE OF SITE AND FACILITY**

**OBJECTION OF APPLICANTS TO MOTION BY THE COUNSEL FOR THE PUBLIC
TO COMPEL PRODUCTION OF THE ECONOMIC MODEL OF LONDON
ECONOMICS INTERNATIONAL, LLC**

Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) (collectively the “Applicants”), object to the March 15, 2017 Motion of Counsel for the Public (“CFP”) to Compel Production of the Economic Model of London Economics International, LLC (“LEI”) and to the alternative request to strike the testimony of Julia Frayer of LEI under Rule 702 of the New Hampshire Rules of Evidence.¹ The Motion should be denied.

Introduction

1. The CFP asks this Committee to reconsider an issue it has already decided. On September 22, 2016, the Committee rejected a request by the Society for the Protection of New Hampshire Forests (“SPNHF”) for the identical information (the “September 22nd Order”). SPNHF’s request was made with far greater specificity than the CFP has offered here. The CFP now seeks the same information based on its erroneous contention that RSA 162-H:10 somehow provides it with the unfettered right to whatever information it deems necessary, even if the request is unreasonable. The CFP further asserts that the Committee’s Rules and precedent from

¹ The Society for the Protection of New Hampshire Forests and the City of Concord together with the Towns of Bethlehem, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill, Whitefield, Bridgewater, New Hampton, Littleton, Deerfield, Pembroke and the Ashland Water and Service District, joined in the CFP’s Motion on March 17, 2017.

the Public Utilities Commission requires that its Motion be granted. It does so without explaining why the information it has received is insufficient to allow it to evaluate the LEI reports or to cross-examine Ms. Frayer. Nor does it mention, let alone attempt to distinguish, the September 22nd Order denying SPNHF access to the LEI model and finding that the model is not necessary to evaluate the LEI report or Ms. Frayer's testimony.

2. Apart from the total absence of cited legal authority supporting its right to examine LEI's "model," the CFP ignores the fact that the expert report submitted by LEI (together with the pre-filed testimony of Ms. Frayer) is replete with references to the inputs, outputs and assumptions made by LEI in its "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project" submitted on October 16, 2015, and the supplemental report entitled "Update of the Electricity Market Impacts Associated with the Proposed Northern Pass Transmission Projects," submitted on February 15, 2017.²

3. Even a cursory review of the LEI reports demonstrates that the data relied on by LEI and the assumptions made by LEI are spelled out in significant detail. For example, the words "assume," "assumed," and "assumption" appear 18 times in the nine-page Executive Summary of the LEI Report, and hundreds of times thereafter. Report at 12-21. The Report contains three appendices with "Detailed assumptions for wholesale power market simulations" (Appendix C), the "Calculation for retail cost impact" (Appendix D), and an "Introduction to REMI PI+," the "dynamic forecasting and policy analysis" utilized in the Report ("Appendix E"). The mechanics of the simulation model for capacity and the simulation model for energy have also been described in these reports, and in the technical sessions with Ms. Frayer. The CFP also fails to advise (or perhaps remind) the Committee that in responding to the SPNHF

² Following a technical session on February 27, 2017, LEI discovered a minor error in the updated report and reissued it on March 16th to correct the error.

motion to compel that led to this Committee's September 22nd Order the Applicants submitted 229 pages of data detailing the inputs and outputs LEI used in its analysis, with each separate input and output labelled and in a readable and useable format.³

4. While ignoring this substantial data of inputs, outputs and assumptions that the Committee found sufficient to allow SPNHF to challenge the LEI Report and Ms. Frayer's testimony, all the CFP can offer is a list of 11 alleged examples of "issues and judgments embedded in LEI's economic model" that it can "investigate" if it had the model. Motion at ¶ 7. Yet these examples demonstrate precisely why the CFP's Motion should be denied. Every example could have been addressed by data requests or can be addressed on cross-examination because each question raised seeks information on data inputs or assumptions made by LEI.⁴ And as shown below, every "issue or judgment" in paragraph 7 of the CFP's Motion is either addressed in the LEI Report, in the updated report or in the response to a recent data request.

5. What the CFP seeks (just as SPNHF did) is that highly proprietary information developed by LEI be given to its expert, the Brattle Group, a direct competitor of LEI. Yet as in any case in which experts are used, if an expert has all of the inputs, outputs and assumptions of

³ In response to SPNHF Request No. 7, and the Environmental NGOs Request Nos. 2 and 14, Applicants provided the inputs and outputs used in the LEI analysis in the following areas: (1) Input assumptions for peak load and demand by zone in New England; (2) Input assumptions for delivered natural gas prices for the LCO/HH and GPCM/MS Scenarios; (3) Input assumptions for external flows; (4) Input Assumptions for Generic New Entry for the LEI Base Case and Project cases from 2016-2029; (5) Input assumptions for NPT delivery commitment; (6) Input assumptions for oil prices from 2019-2029; (7) Input assumptions for retirements (for 24 power plants in the ISO-NE region); (8) Input assumptions for carbon prices 2019-2029; (9) Input assumptions for internal transfer limits for the LEI Base and Project Cases 2016-2029; (10) Input assumptions and price projections with respect to the benefits associated with capacity market prices; (11) Outputs for average production costs; (12) Outputs of LCOP and GPCM Gas Models for each month 2019-2029; (13) Outputs-average production costs for the Base and Project cases 2019-2029; (14) The breakdown of project spending of the construction period 2016-2019; and (15) Impacts on employment and GDP of construction and operations periods 2015-2029.

⁴ The CFP claims that it "inquired about LEI's model at technical session [sic] but Ms. Frayer declined to *adequately* describe the model or LEI's embedded judgments and assumptions in the model." Motion at ¶ 7, footnote 1 (emphasis added). But it does not identify the session or sessions in which this occurred or whether it asked and obtained information by data requests. (See discussion at paragraph 15 below.) Likewise, the CFP does not explain why the answers given by Ms. Frayer were "inadequate," and does not assert that Ms. Frayer did not answer the questions, only that the CFP deems the answers "inadequate." And if the answers were inadequate, the CFP could have asked additional questions.

the opposing expert, that expert can run the information in its own model or can attack the inputs and assumptions. It is unclear why the CFP expert has not done so, and the CFP has offered no explanation for that failure. The fact that one side does not like an expert's result is an insufficient reason to seek proprietary information or to disqualify the expert under rules of evidence that are inapplicable in this proceeding. RSA 541-A:33, II. There is no reason for the Committee to revisit its prior order.

The Committee's September 22, 2016 Order Resolves This Motion

6. The CFP asks the Committee to allow it to "investigate the underlying economic model used by LEI." Motion at ¶ 6. Apart from that very general description, the CFP does not say exactly what it is looking for. By contrast, the Committee's September 22nd Order addressed data requests served on the Applicants by SPNHF⁵ which sought very detailed information about the LEI model, including: "simulation methodology used (*e.g.*, Monte Carlo, varied distribution selection)" "analysis methodology used (*e.g.*, frequent, Bayesian);" "prior assumptions, forecast and projection methodologies used (*e.g.*, linear progression, averaging, neural networks);" "modeling methodology used;" distribution assumptions for independent variable (*e.g.*, normal, inverse gamma, etc.); and "simulation outputs." September 22nd Order at 30-31.⁶ SPNHF also requested that the Applicant be compelled to produce the "three proprietary models used by LEI to any party subject to a confidentiality agreement, which was requested through SPNHF's Data Request 12." Order at 33. It contended that without this information, it could not "test, replicate,

⁵ The LEI Report is dated October 16, 2015. On May 31, 2016, SPNHF filed data requests seeking detailed information relating to LEI's modeling (Requests 7-12 addressed in the Committee's September 22nd Order). The Applicants responded to those requests on August 5, 2016. The Applicants' Response to these specific requests, much like this Objection, pointed out that SPNHF had been given all of the assumptions and inputs necessary to test the data using its own modeling, including the 229 page document setting out the inputs and outputs from the report referred to in Paragraph 3 above.

⁶ For ease of reference of the Committee, the relevant portion of the September 22nd Order is attached to this Objection. That Order addressed a number of motions to compel, including some filed by the CFP.

or insure the accuracy of LEI's methodology and conclusions." *Id.* at 30. The CFP similarly contends that the more general "model" it describes is necessary to allow it to "test or understand the judgment embedded into the model with respect to a critical opinion of Ms. Frayer concerning the value of the capacity forward market benefits she claims." Motion at ¶6. In other words, to test the entire LEI report.

7. This Committee rejected SPNHF's Motion, stating:

The Applicant notified SPNHF that these items are "not applicable" as LEI did not use statistical analysis, but rather used three software modeling programs (POOLMod, FCA Simulator, and REMI PI+). SPNHF argues that all three modeling programs extensively utilize statistics and the outputs were derived using statistics. The Applicant referred SPNHF to specific sections of the LEI Report in its response. Those sections of the LEI report provide information explaining the modeling approach and assumptions used in the modeling and also contain information pertaining to the data used in the modeling. The Applicant submits that, fundamentally, SPNHF seeks access to LEI's modeling, which it developed at great expense, and which is not necessary for SPNHF's expert witness to analyze the LEI Report. Based on the arguments, it appears that *the Applicant has provided both the inputs and outputs established through LEI's modeling. In addition, the Applicant has provided a description of the modeling approach and assumptions used. With that information, SPNHF should be able to test the data using its own modeling approach and assumption. Revealing proprietary modeling software is unnecessary.* The motion to compel with respect to Data Requests 7-10 are denied.

Id. at 31 (emphasis added).⁷ As to the models, the Committee found that the "Applicant has provided relevant responsive data and documents and appears to have the better argument regarding the balancing of interests," *i.e.*, that LEI's privacy interest in the software outweighed the public interest in accessing the proprietary models, and denied SPNHF's request that the Applicant be compelled to produce the three proprietary models used by LEI. Order, at 34.

⁷ The POOLMod, FCA Simulator and REMI PI+ models and the assumptions used in each are described in detail in Appendices C, D, and E of the LEI Report dated October 15, 2016, and further supplemented in the Updated Analysis dated February 15, 2017.

8. SPNHF did not seek a rehearing on the Order.⁸ Moreover, the CFP had filed a motion to compel that was also considered in the September 22nd Order. It could have sought the same information as the SPNHF, had it chosen to do so, or could have joined in SPNHF's request. The CFP was plainly aware of the September 22nd Order at the time of its issuance. Nothing has changed since September except for the fact that all parties have obtained additional information regarding LEI's conclusions, including an updated report, additional opportunities to question Ms. Frayer at technical sessions and additional answers to data requests after those technical sessions. The CFP's failure to address these issues sooner has no justification.

9. This Committee's September 22nd Order is clear: the parties to this proceeding – including the CFP – have been given the data constituting the inputs and outputs of LEI's models, together with the description of the modeling approach and the assumptions used. The CFP thus has information that is sufficient to allow it to “test the data using its own modeling approach and assumption[s].” September 22nd Order, at 34. The CFP offers no absolutely no explanation of why a different result is now required, six months later and on the eve of the hearings in this proceeding.

Neither RSA Ch. 162, the Committee's Rules, Nor Civil Discovery Rules Compel the Production of LEI's Model

10. While ignoring the September 22nd Order, the CFP argues that RSA Ch. 162, general discovery rules and the New Hampshire Rules of Evidence require the production of LEI's model. The CFP is wrong on all counts.

11. The CFP first claims that production of the LEI model is compelled by the fact that RSA 162-H:10, V provides that the Committee and the CFP “*shall* conduct such reasonable studies and investigations as they deem necessary and appropriate.” Motion, ¶ 8 (emphasis in

⁸ SPNHF's joinder in this Motion is remarkable. Having sought and been denied the same relief, and having failed to preserve its rights with respect to this issue, it has no right to a second bite of the apple now.

original). While the CFP's argument is less than clear, it apparently contends (perhaps in an effort to distinguish its right to the information from SPNHF's) that whenever it deems a document to be "necessary" to its investigation, the document must be produced and the Applicants have no right to object or prevent production. On this theory, the CFP might compel the production of the individual tax returns of LEI's principals, their salary information, or every LEI report ever issued.⁹

12. The CFP overlooks the fact that the statute does not address the scope of discovery at all. Instead, it grants authority to the Committee and the CFP to undertake independent studies and investigations, and requires that such investigations and studies be "reasonable." Thus, not only must the CFP's investigation be reasonable in scope, but the investigation is also limited by the Committee's rules. Site 202.12 provides that "the public counsel....shall have the right to conduct discovery in an adjudicative proceeding pursuant to this rule and in accordance with an applicable procedural order" and Site 202.25 and RSA 541-A:33 provide that the presiding officer may determine that information is irrelevant or immaterial. Site 202.12 (l) provides that the standard to be applied by the presiding officer is whether "such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding." Requiring the Applicants to disclose their expert's proprietary and confidential models (software programs), when the Committee already determined in its September 22nd Order that disclosure of these programs was not necessary given the substantial information that LEI has provided, would clearly constitute an unreasonable investigation by the CFP.

⁹ If the CFP simply had the unlimited authority to obtain any document it wanted based on its sole determination that the document was "necessary," the Committee would never be entitled to deny a CFP motion to compel. But the September 22nd Order did exactly that, denying (in part) the CFP's request for detail about the underground portions of the NPT line. September 22nd Order at 14.

13. Perhaps recognizing that its argument under RSA 162-H:10 cannot be sustained, the CFP turns to the Committee's Rules and the discovery rules in civil proceedings to support its claim. Yet the authority cited by the CFP stands only for the proposition that discovery may be ordered when relevant and material to the proceeding at hand and that experts are required to disclose the *facts and data underlying their opinion*.¹⁰ Likewise, contrary to the CFP's citation of Order 25,646 (April 8, 2014) of the Public Utilities Commission, nothing in that order supports its alleged right to the LEI model. The PUC Order merely stands for the proposition that experts must produce the facts and data supporting their opinions. The CFP has complete access to the facts and data underlying LEI's opinions, and while RSA 516:29-b is not relevant to this proceeding, the 118-page LEI report, the updated report, Ms. Frayer's pre-filed testimony and the answers to data requests plainly satisfy the standard set out in the PUC Order and the statute.¹¹

14. What the CFP fails to do is to provide *any* basis for its claim that its expert cannot reasonably evaluate the conclusions of LEI when provided with the inputs, assumptions and outputs of LEI and detailed information about the models and those assumptions. Even if the Committee's September 22nd Order did not exist, this would be a sufficient basis to deny the Motion.

15. The best the CFP can do is to set out some "examples of issues and judgments embedded in LEI's economic model" that it could investigate "by examining the model." Motion

¹⁰ The CFP cites to language in *Yancey v. Yancey*, 119 N.H. 197, 198 (1979) as standing for the proposition that "full discovery [of the economic model] is favored." Motion, ¶ 17. To say the least, the CFP's inclusion of the bracketed language in this quote is a gross overstatement of the holding in *Yancey*. *Yancey* was a divorce case involving the right to letters in the Department of Probation. It has nothing to do with expert discovery or the scope of such discovery, or the issue raised in the CFP's Motion.

¹¹ The CFP creates a straw man argument that the LEI model cannot be withheld as privileged because proprietary interests are not privileged. But the Applicants have not asserted that the LEI model should be withheld on the basis of privilege. Rather, the FCA Simulator model is a highly confidential proprietary product belonging to LEI. Absent a showing of necessity, it should not be produced. Moreover, in this case, a confidentiality agreement would not resolve that concern. The CFP wants the LEI model so that its expert, a direct competitor of LEI, can duplicate LEI's conclusions. But the Brattle Group surely has its own model, and once provided with a competitor's model, any confidentiality is illusory. It cannot be expected to "unlearn" the information it has seen.

at ¶ 7. However, the information needed to answer each of the questions posed in the CFP's Motion is available in the LEI Report, the updated report, or the answers to data requests, as shown below:

- a. **Whether LEI properly applied the mechanics of ISO-NE's capacity market clearing, based on the supply curve and demand curve.**
 - LEI's demand curve is documented in Section 7 of LEI's Updated Analysis, which is titled, "Appendix C: LEI's approach for capturing the convex demand curves." LEI uses ISO-NE's demand curve, and shifts it to the right based on NICR, and scales the curve based on Net CONE.
 - LEI's supply curve is documented in LEI's March 13th response to item 1-14 of Data Request TS 11.
 - The market clearing mechanism is also documented in LEI's March 13 response to item 1-14 of Data Request TS 11.
- b. **How LEI determined that the Project would cause so few Base Case resources to exit the market (thus leading to a large price impact of the Project with little moderation by other suppliers' responses).**
 - The market response is discussed in Section 6.3 of LEI's Updated Analysis. Between 500-600 MW of delists are expected in the Project Case for the first four years.
 - See also the discussion in LEI's March 13th response to item 1-14 in Data Request TS 11.
- c. **What criteria LEI applied for retiring a resource such as mothballing a resource through a static or dynamic delist bid**
 - LEI's criteria for retiring versus delisting a unit is documented in LEI's March 13th response to item 1-14 in Data Request TS 11.
- d. **Whether LEI found that resources remaining in the market would remain profitable even under prices depressed by the Project**
 - The issue of resource economics is addressed in LEI's March 13th response to item 1-14 in Data Request TS 11. That response explains how retirements were considered only after multiple years of uneconomic operations. LEI also provided the annual generation of resources (item 1-16 in Data Request TS 11) and the price forecast in Figure 11 of LEI's Updated Analysis.
- e. **Whether LEI's analysis used realistic assumptions on the going forward fixed costs of aging resources**
 - In July, 2016, LEI provided the Brattle Group with the sources used in determining the net going forward fixed costs of existing resources. The components of the minimum going forward costs are also documented in LEI's March 13th response to item 1-14 in Data Request TS 11.

- f. Whether LEI's analysis used realistic estimates about the net revenues generators would earn from energy and ancillary services markets.**
- LEI has provided the annual generation (response to item 1-16 in Data Request TS 11) and the price forecast in Figure 11 of LEI's Updated Analysis. This should allow CFP's experts to ascertain the revenues for generators.
- g. Whether LEI's analysis properly accounted for the costs to the Project of taking on a capacity supply obligation and how those costs would change over time as ISO-NE increases its performance penalty rates**
- LEI has provided the energy and capacity market prices in LEI's Updated Analysis which can be used to estimate revenues for the Project and compare it to what the CFP's experts believe to be the PFP risks in the market.
 - LEI has also provided the number of scarcity hours it has projected in LEI's March 13 response to item 1-7 in Data Request TS 11. The other components such as the PFP payment rate are public information.
- h. Why the Merrimack and Schiller plants are projected to retire in LEI's Base Case as well as the Project Case, including what were LEI's assumptions on those plants costs revenues, and penalty exposures that led LEI to conclude they would retire even without the Project, and that the Project's impact on prices would not be the deciding factor**
- The criteria for retirements are explained in LEI's March 13th response to item 1-14 in Data Request TS 11 as well as in Section 10.5 of LEI's October 2015 Report.
 - LEI also provided the generation for the remaining coal units in LEI's March 13th response to item 1-16 in Data Request TS 11. This allows the CFP's experts to ascertain the profitability of these plants based on this information.
- i. Why the gas fired generator that LEI projected to retire in 2024–2026 in its original analysis are no longer retiring in either the Base Case or the Project Case in LEI's updated report, even though capacity and energy prices are lower in the updated analysis than in the original report**
- A description of the basis for these retirements are explained in Section 10.5 titled, "New Entry/Retirements" of LEI's October 2015 Report.
 - In the technical session on February 27, 2017, Ms. Frayer further explained the difference in projected economics under the Updated Analysis.
- j. What is the basis for LEI's projection that certain imports from New York chose to exit the ISO-NE capacity market for four, and only four, years following the Project's entry into the market, and what capacity prices LEI is assuming would be available in New York**
- The basis for this projected dynamic is documented in Section 6.2 of LEI's Updated Analysis titled, "New York Import Capacity."
- k. Whether LEI properly evaluates when a new generator would enter the market, both with and without the Project**

- The criteria for when a new generator would enter the market is documented in Section 10.5 titled, “New Entry/Retirements” in LEI’s October 2015 Report, as well as in in Section 6.1 titled, “Choosing a reference technology and projecting Net CONE” and Section 6.5 titled, “Thermal New Entry” in LEI’s Updated Analysis.

16. Finally, the CFP contends that under Rule 702 of the New Hampshire Rules of Evidence (which do not apply at the Committee), Ms. Frayer’s testimony should be excluded.¹² Case law construing Rule 702 of the Federal Rules of Evidence (which is nearly identical to the New Hampshire Rule) establishes that the CFP cannot compel the production of an expert’s proprietary and confidential software code or programs, and that where a model is not produced in discovery, the appropriate remedy is not to strike or exclude Ms. Frayer’s testimony or reports, but to simply test the weight of Ms. Frayer’s testimony and conclusions through rebuttal expert testimony and cross-examination. *See Flebotte v. Dow Jones & Co.*, No. Civ. A. 97-30117-FHF, 2000 WL 35539238, *3 (D. Mass. Dec. 6, 2000) (“Although the disputed statistical analyses may be subject to the various flaws indicated by the defendant, such imperfections affect their probative value rather than their admissibility. . . . Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”) (quoting *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 596 (1993)).¹³

17. In *Flebotte*, the plaintiffs moved to exclude an expert witness from testifying at trial because the expert allegedly violated Rule 26(a)(2)(B), the federal analog to RSA 516:29-b,

¹³ The CFP cites *In re Katrina Canal Breaches Consol. Litig.* in support of its contention that if the LEI model is not produced, the proper remedy is striking or excluding Ms. Frayer’s testimony. Motion, at 9. This decision and the isolated quote that the CFP pulls from it are of little probative value to the Committee’s analysis. The decision is silent as to what information or documents the parties disclosed as part of pre-trial expert discovery, and is likewise silent as to whether the referenced “model” is a proprietary business interest of the expert, as here, or whether it is a commercially-available software program or model, which are significant factors in the analysis of whether the mode must be disclosed in discovery. Moreover, the court in *Katrina* was admittedly “perplexed” by the parties’ positions as to disclosure of the model, and as a result, it ordered the model to be produced in discovery “out of an abundance of caution.”

by “conducting several tests but not including them in the report.” The court found the Plaintiffs’ interpretation of Rule 26 “at best, strained,” and ruled that “neither the plain language of the rule nor its purpose compels disclosure of every calculation or test conducted by the expert during formation of the report.” Accordingly, the court denied the motion to exclude the expert’s testimony and found that the “defendant’s expert disclosure provided the plaintiffs with a fair opportunity to adequately prepare a rebuttal to the defendant’s expert testimony.”

18. The Applicants have exceeded these obligations in this proceeding. They have not only provided the input and output data, and other relevant underlying data for LEI’s calculations, but have also provided detailed descriptions of the assumptions used in LEI’s analysis, the methodology of LEI’s calculations, the calculation logic of the LEI’s models and other software programs used (like REMI’s PI+ model).

19. The CFP has offered no reason why this Committee should revisit the September 22nd Order. The CFP’s Motion should be denied.

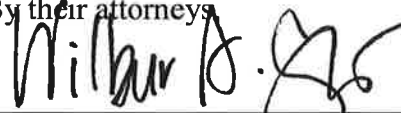
Respectfully submitted,

NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW
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By their attorneys

Dated: March 23, 2017

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Certificate of Service

I hereby certify that on the 23rd day of March, 2017 the foregoing Objection was electronically served upon the SEC Distribution List and an original and one copy will be hand delivered to the NH Site Evaluation Committee.



Wilbur A. Glahn, III

**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**

September 22, 2016

ORDER ON MOTIONS TO COMPEL

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I. Background

On October 19, 2015, Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively Applicant) submitted an Application to the New Hampshire Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Application) to construct a 192-mile transmission line. The transmission line is proposed to have a capacity rating of up to 1,090 MW, and to run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

In accordance with various procedural orders, discovery through data requests has been taking place. Unsatisfied with certain of the Applicant's responses, the following parties have filed Motions to Compel:

- Counsel for the Public¹
- Grafton County Commissioners
- Clarksville-Stewartstown Non-Abutters
- Society for the Protection of New Hampshire Forests
- Municipal Group 1 (South)
- Municipal Group 2
- Municipal Group 3 (North)
- Municipal Group 3 (South)
- Ammonoosuc Conservation Trust, Appalachian Mountain Club, and Conservation Law Foundation (NGO Intervenors)
- Deerfield Abutters
- Abutters of Pittsburg, Clarksville, Stewartstown
- Pemigewasset River Local Advisory Committee (PRLAC)
- Non-Abutting Property Owners: Stark, Northumberland, Lancaster, Whitefield, Dalton, Bethlehem

The Applicant filed a Response and Objection to Certain Motions to Compel and an Objection to Counsel for the Public and Grafton County Commissioners Motions to

¹ Counsel for the Public and the Grafton County Commissioners have also requested amendments to the Procedural Schedule. Those requests will be addressed in a separate Order.

Compel/Amend Procedural Schedule on August 25, and an Objection to the NGO Intervenor's Second Motion to Compel on August 29, 2016.

II. Standard

Motions to compel responses to data requests shall:

- (1) Be made pursuant to N.H. Code of Admin. Rules Site 202.14;
- (2) Be made within 10 days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner;
- (3) Specify the basis of the motion; and
- (4) Certify that the movant has made a good-faith effort to resolve the dispute informally.

N.H. CODE ADMIN. RULES, Site 202.12(k).

RSA 162-H:10, IV provides:

The site evaluation committee shall 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.

N.H. RSA 162-H:10, IV.

III. Analysis

This Order first addresses issues that are common to many of the motions to compel.

Specific issues raised by individual parties follow.

A. Common Issues

Five issues are commonly raised within the motions to compel. The five common issues are:

1. The Applicant did not identify the individuals responsible for answering each of the data requests.
2. The Applicant did not provide responsive "internal documents" in its answers to data requests.

5. London Economics International – Data Requests 7-12

SPNHF propounded several data requests seeking information about London Economics International's (LEI) economic analyses (data requests 7-12). The requests seek to understand the inputs that LEI used in its analyses, the outputs, and the analytical processes employed by LEI to arrive at its conclusions. SPNHF asserts that without the responsive information and documents it cannot test, replicate, or ensure the accuracy of LEI's methodology and conclusions. The Applicant stated that it has provided all responsive information in response to SPNHF's requests regarding LEI's data. The Applicant further argued that to the extent SPNHF seeks to test LEI's analysis, SPNHF has the data it needs to do this, and that to the extent SPNHF has questions regarding the data provided, those questions may be addressed at the Technical Session. In Data Request 7 through 10, SPNHF requested information pertaining to four specific areas of forecasting contained within the LEI report. The four areas are: (1) future wholesale energy prices influenced by the Project (1-7); (2) future household and commercial energy savings attributable by the Project (1-8); (3) retail economic benefits attributable to the Project (1-9); (4) economic benefits of the Project during construction (1-10). With respect to each specific data request, SPNHF sought production of the following information:

- i. "Simulation methodology used (e.g., Monte Carlo, varied distribution selection)";
- ii. "Analysis methodology used (e.g., frequent, Bayesian)";
- iii. "Prior assumptions, forecast and projection methodologies used (e.g., linear progression, averaging, neural networks)";
- iv. "Modeling methodology used";
- v. "Distribution assumptions for independent variable (e.g., normal, inverse gamma, etc.)";
- vi. "Random number seeds";

- vii. "Likelihood functions employed, if any";
- viii. "Number of simulations";
- ix. Simulation "outputs (including variance, standard errors; skewness; kurtosis; confidence intervals; goodness of model fit of all distributions of all simulated dependent variables; forecast results; r2 values; goodness of fit statistics; F statistics; t statistics; tests for heteroscedasticity; and, for scenarios, all scenario input and out used to make statements for the referenced time periods)"; and
- x. NAICS codes.

The Applicant notified SPNHF that these items are "not applicable" as LEI did not use statistical analysis, but rather used three software modeling programs (POOLMod, FCA Simulator, and REMI PI+). SPNHF argues that all three modeling programs extensively utilize statistics and the outputs were derived using statistics. The Applicant referred SPNHF to specific sections of the LEI Report in its response. Those sections of the LEI report provide information explaining the modeling approach and assumptions used in the modeling and also contain information pertaining to the data used in the modeling. The Applicant submits that, fundamentally, SPNHF seeks access to LEI's modeling, which it developed at great expense, and which is not necessary for SPNHF's expert witness to analyze the LEI Report.

Based on the arguments, it appears that the Applicant has provided both the inputs and outputs established through LEI's modeling. In addition, the Applicant has provided a description of the modeling approach and assumptions used. With that information, SPNHF should be able to test the data using its own modeling approach and assumption. Revealing proprietary modeling software is unnecessary. The motion to compel with respect to Data Requests 7-10 are denied.

SPNHF further requests that the Applicant be compelled to re-produce documents it provided in response to Data Request 7 in such a way as to include a full explanation of what they are as well as all of the inputs and outputs used therein; provide a data dictionary as well as more-detailed data outputs that include all the outputs, the distributional outputs, the outputs that were used by LEI, and the outputs discarded, as only select outputs are contained in the documents provided; and to make such production electronically. SPNHF's request that the Applicant be compelled to re-produce and supplement its response to Data Request 7 is granted. The information sought is a series of outputs generated by the LEI. The Applicant shall re-produce and supplement its response to Data Request 7.

SPNHF next argues that the Applicant has not produced reasonably sought data, leaving SPNHF unable to test the methods and inputs the Applicant consultants rely upon. SPNHF specifically requests that the Applicant be compelled to produce, pursuant to the confidentiality agreement between the parties, the Microsoft Excel Workbook responsive to Data Requests 7, 11, and 23 as follows: "(1) in the current version of Excel (.xlsx); (2) without corrupted cells; (3) not in 'protected' format; (4) with complete, active, and functioning links to data located in five separate databases concerning a detailed breakdown of NPT's revenue requirement (which may necessitate the production of those other databases); and (5) that includes (unstrips) all references in the 'To REMI' worksheet." The Applicant argues that it provided all relevant responsive information and documentation, and that SPNHF's requests that the Applicant be compelled to supplement seek information that was not originally requested, such as the Project's revenue requirement. SPNHF's request that the Applicant be compelled to re-produce the Microsoft Excel Workbook responsive to Data Requests 7, 11, and 23 is granted in part and denied in part. The request that the Applicant be compelled to produce Microsoft Excel Workbooks in the

current version of Excel is granted. The workbooks need not include data that was not originally requested (such as the Project's revenue report). SPNHF's remaining requests regarding Microsoft Excel Workbooks are denied. To the extent that removal of data not originally requested causes problems with the remaining portions of the workbook, the parties shall meet and confer about alternative methods of providing the data.

SPNHF further argues that the Applicant failed to provide any additional data with respect to Data Request 8 regarding future household and commercial energy savings. SPNHF requests that the Applicant be compelled to produce additional responsive information and/or documents to Data Request 8, and if such information/documentation is protected, to produce it subject to the parties' confidentiality agreement. SPNHF's request seeks input data. To the extent input data regarding future household and commercial energy savings has not been provided, the motion with respect to Data Request 8 is granted.

SPNHF next argues that the Applicant's responses to Data Requests 9 and 10 are insufficient as the Applicant only referred SPNHF back to sections of the LEI Report. The data sought by Requests 9 and 10 appear to be input data which is not proprietary and appears not to be the same as what is already in the referenced sections of the LEI Report. SPNHF's request that the Applicant be compelled to produce additional responsive information and/or documents to Data Requests 9 and 10 is granted.

SPNHF further requests that the Applicant be compelled to produce the three propriety models used by LEI to any party subject to a confidentiality agreement, which was requested through SPNHF's Data Request 12. The Applicant objected on grounds that the request seeks proprietary software developed by LEI, integral to its business model and competitive position in the market. The Applicant argues that release of this software could jeopardize LEI's

competitive position, and would not provide anything necessary to the Committee's determinations. The Applicant also argues that LEI's privacy interest in the software outweighs the public interest. The Applicant has provided relevant responsive data and documents and appears to have the better argument regarding the balancing of interests. SPNHF's request that the Applicant be compelled to produce the three propriety models used by LEI is denied.

6. Other Types of Information

a. Transcripts

SPNHF requests that the Applicant be compelled to provide transcripts of interviews pursuant to Data Request 13. The Applicant has indicated there are no transcripts. SPNHF's request that the Applicant be compelled to provide transcripts pursuant to Data Request 13 is denied.

b. Raw Data

SPNHF requests that the Applicant be compelled to provide the raw data requested in Data Requests 17 and 18 associated with two publications used in the Chalmers Report. The Applicant has stated that the raw data files are the property of NorthWestern Energy and can only be released with its permission. The Applicant further notes that it has provided a contact person at NorthWestern Energy. The Applicant appears to have sufficiently answered this data request. SPNHF's request that the Applicant be compelled to provide the raw data requested in Data Requests 17 and 18 is denied.

c. Recoupment of Costs

SPNHF's Data Request 26 seeks data related to the recoupment of costs of the Canadian portion of the Project. The Applicant referred SPNHF to two sections of its proposal in response to the Clean Energy RFP, which the Applicant stated is available at an identified website.