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April 6, 2017

**By E-Mail & U.S. Mail**

Pamela G. Monroe, Administrator  
New Hampshire Site Evaluation Committee  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429  
pamela.monroe@sec.nh.gov

**Re: 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**

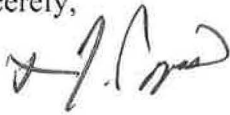
Dear Ms. Monroe:

Enclosed for filing in the above-referenced matter are the following:

1. Counsel for the Public's Reply to Applicants' Objection to Motion to Compel Production of London Economics International, LLC's Economic Model From the Applicants, or, Alternatively, Motion to Strike Testimony; and
2. Counsel for the Public's Objection to Motion for Clarification of Site 301.08(D)(2)(B).

Thank you.

Sincerely,



Thomas J. Pappas

TJP/scm - 2797291\_1

Enclosure

cc: Peter C.L. Roth, Esq.  
Elijah J. Emerson, Esq.

**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

**COUNSEL FOR THE PUBLIC'S OBJECTION TO  
MOTION FOR CLARIFICATION OF SITE 301.08(d)(2)(b)**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby objects to the Motion for Clarification of Site 301.08(d)(2)(b) (the "Motion") filed by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire ("PSNH") (collectively, the "Applicants") as follows:

**BACKGROUND**

1. RSA 162-H:7, V(g) requires an application for a Certificate of Site and Facility to "[d]escribe in reasonable detail the elements of and financial assurances for a facility decommissioning plan."

2. Site 301.08(d)(2) requires each application for an energy facility to provide "[a] facility decommissioning plan prepared by an independent, qualified person with demonstrated knowledge and experience in similar energy facility projects and cost estimates," and further requires that "the decommissioning plan shall include each of the following:

(a) A description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility components or materials;

(b) The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating;

(c) All transformers shall be transported off-site; and

(d) All underground infrastructure at depths less than four feet below grade shall be removed from the site and all underground infrastructure at depths greater than four feet below finished grade shall be abandoned in place”

3. On February 26, 2016, Applicants sought a waiver of Site 301.08(d)(2) “chiefly because the purpose of the rule, as expressed in the underlying statute, is satisfied by the decommissioning plan filed with the Federal Energy Regulatory Commission (“FERC”), which is described in the testimony of Michael J. Ausere.” Apps. Req. for Waiver dated February 26, 2016 at 9. Applicants claimed in their waiver request that “the TSA provides a satisfactory alternative mechanism for funding the decommissioning of the NPT transmission line, if it were to occur.” *Id.* at 10.

4. Counsel for the Public objected to Applicants’ waiver request and the Subcommittee held a motion hearing on the request on May 19, 2016.

5. At the hearing, Applicants again emphasized that the financial assurances Applicants proposed were essentially those found in the TSA. *See* Trans. on Mtn. Hearing dated May 19, 2016 at 47:14-:20. Oral argument and comments were heard by the Subcommittee and the Subcommittee ultimately denied Applicants’ waiver request. *Id.* at 56:15-57:5; Order on Applicants’ Request For Partial Waivers Under the Newly Adopted SEC Rules, dated June 23, 2016, pp. 24-29 (“Applicant’s request to waive decommissioning requirements of Site 301.08(c)(2) is denied.”) (“*Waiver Order*”). The Applicants did not seek rehearing on the denial of the requested waiver.

6. Subsequent to the Subcommittee’s denial of Applicants’ request to waive the applicability of Site 301.08(c)(2),<sup>1</sup> financial assurance from the TSA referenced previously by Applicants as the basis for the financial viability for their decommissioning plan was called into

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<sup>1</sup> Site 301.08(c)(2) has been renumbered as Site 301.08(d)(2).

question when the counterparty to the TSA, Hydro-Québec (“HQ”), publically demurred on its intention of paying the costs for the Project.

7. Applicants have thus far not addressed substantively the concerns as to HQ’s financial commitment to the project, despite Counsel for the Public’s inquiries regarding the same. Applicants have confirmed, however, that “The TSA remains in full force and effect,” Ausere Supplemental Testimony, dated March 24, 2017, at 4, subject to its being modified by the Applicants and HQ after the Massachusetts RFP bidding process. Quinlan Supplemental Testimony, dated March 24, 2017, at 11.

### **ARGUMENT**

#### **I. The Subcommittee’s Prior Determination of This Issue is Dispositive to Applicants’ Present Request.**

8. As noted above, Applicants previously sought a waiver from the Subcommittee of Site 301.08(d)(2) because they claimed that “the TSA provides a satisfactory alternative mechanism for funding the decommissioning of the NPT transmission line, if it were to occur.” Apps. Req. for Waiver dated February 26, 2016, at 10.

9. That waiver request was denied by the Subcommittee, Trans. on Mtn. Hearing dated May, 19, 2016, at 56:15-57:5, and Applicants have confirmed as recently as March 24, 2017, that “[t]he TSA has not changed substantively since it was approved by FERC in 2010.” Exhibit A at 1 (March 24, 2017 letter from Eversource to Counsel for the Public). The Applicants have also stated, however, that the TSA may be changed if HQ’s bid in the Massachusetts RFP is accepted. *See* Quinlan Supplemental Testimony, dated March 24, 2017, at 11. Such a change would likely not occur until after this proceeding has concluded.

10. In other words, Applicants have previously sought to waive the same rule they now seek to waive for the same reason they previously sought to waive it based on the same TSA they previously relied on as their basis for waiver.

11. This issue has been dispositively resolved by the Subcommittee and Applicants' "second bite at the apple" must be rejected now. The only change in circumstances since the Subcommittee denied Applicants' waiver request last June is new uncertainty about whether the TSA can be relied on "to ensure that local taxpayers will not be left with the financial burden of decommissioning in the event that the project becomes obsolete or unprofitable, and is abandoned at some future date." Waiver Order, at 28.

**II. The Four Forms of Financial Assurance Listed in Site 301.08(d)(2)(b) are the Only Four Forms of Financial Assurance Permitted.**

12. Site 301.08(d)(2)(b) specifically requires "[t]he provision of financial assurance *in the form of* an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating." Site 301.08(d)(2)(b) (emphasis added).

13. Applicants argue that "[i]t is not obvious whether the list was intended to serve as representative examples of financial assurance or to be an exclusive list of the only acceptable forms of assurance," but the use of the words "in the form of," and the absence of any catchall or general language demonstrates that the four forms of financial assurance listed are the only four forms of financial assurance permitted. *See* Apps. Mtn. at 2.

14. As the New Hampshire Supreme Court has explained, when legislators seek to craft a non-exhaustive list they generally employ phrases to that effect such as "the phrase 'may include, but not be limited to'" or "'for other purposes, such as.'" *Fisher v. Minichiello*, 155

N.H. 188, 192 (2007); *State v. Montgomery*, 144 N.H. 205, 208 (1999); *see also State v. Sideris*, 157 N.H. 258, 262 (2008).

15. The phrase “in the form of” contrasts sharply with the catchall or general language found in non-exhaustive lists, and directs that absent waiver one of the four delineated forms of financial assurance must be provided.

16. Moreover, as Eversource successfully argued in *Appeal of Campaign of Ratepayers’ Rights*, 162 N.H. 245, 251 (2011) about a section of RSA 162-H, the “familiar axiom” of *expressio unius est exclusio alterius* is dispositive in this case. Where the legislature provided a list of forms of financial assurance that can be used it intended to exclude others. The SEC cannot add to that list “in the absence of a clear showing of legislative intent.” *Id.* The Applicants’ suggestion that what they believe is a redundancy indicates that the list is intended to be representative falls far short of the clear showing that *Campaign of Ratepayers’* held is required.

17. What Applicants propose does not fall within any of the four permissible forms of financial assurance and Applicants should be required to provide one of the four forms before they can be granted a Certificate of Site and Facility.

**III. The Application Must Provide the Necessary Guarantees of Solvency and Completion of Future Decommissioning to Comply With RSA 162-H:7, V(g) and Site 301.08(d)(2).**

18. As noted above, Site 301.08(d)(2) requires various assurances of solvency and completion of future decommissioning that Applicants’ TSA/HQ plan as presently proposed simply does not have.

19. Site 301.08(d)(2)(a) requires “[a] description of sufficient and secure funding to implement the plan, which shall not account for the anticipated salvage value of facility

components or materials,” to be submitted with the Application. Applicants’ claim that the TSA obligates HQ to fund the decommissioning plan at some point in the distant future does not comply with the present requirements of sufficient and secure funding to implement the plan required at the time of application.

20. Among other things, it is unknown what the financial status or viability of any of the entities will be 40 or more years from now. Site 301.08(d)(2)(a) expressly requires a “secure” source of funding to implement the plan before the Project is constructed. Applicants’ plan to prepare a financial assurance plan decades from now does not account for the significant solvency risks inherent in such a plan. *See, e.g., In re Public Serv. Co. of N.H.*, 114 B.R. 820 (Bankr. D.N.H. 1990).

21. Additionally, the recent statements from HQ indicating that it may abandon the Project if the Project is not sufficiently profitable cast serious doubt on the financial commitment to fund the costs of the Project today, let alone 40 or more years from now. A *secure* and sufficient source of funding is needed now, at the outset of the Project, “to ensure that local taxpayers will not be left with the financial burden of decommissioning in the event that the project becomes obsolete or unprofitable, and is abandoned at some future date.” Waiver Order, at 28.

22. “The provision of financial assurance in the form of an irrevocable standby letter of credit, performance bond, surety bond, or unconditional payment guaranty executed by a parent company of the facility owner maintaining at all times an investment grade credit rating” must also be submitted with the Application. Site 301.08(d)(2)(b). This very specific requirement setting forth very specific forms of financial assurance ensures that a secure and independent source of funding is available irrespective of future developments. The TSA is

simply too closely linked to the Project's success or failure to provide the same level of protection and thus does not satisfy the purpose of the rule. *See* Site 202.15.

23. Site 301.08(d)(2) provides an important framework that must be followed to ensure that once a project is no longer valuable or functional that project is not simply abandoned either by choice or by financial insolvency of the companies involved or for any other reason.

24. In fact, one significant concern with Applicants' plan to rely on contractual obligations owed by HQ to Applicants is the inherent uncertainty imbedded in attempts to collect from international sovereign-owned entities. *See NML Capital, Ltd. V. Republic of Argentina*, 2016 U.S. Dist. LEXIS 26355 (S.D.N.Y. Mar. 2, 2016) (describing litigation to recover on Argentine government bonds defaulted in 1994 and as yet unpaid); MacDonald-Laurier Institute, *Provincial Solvency and Federal Obligations* (2012) at 5 (finding a probability of debt default by Québec over 30 years to be 1 in 3); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

25. If Applicants are permitted to wait until decommissioning actually occurs, or even shortly before it occurs, before ensuring funding for their plan for decommissioning it may be too late at that stage to create and fund a meaningful decommissioning plan and New Hampshire citizens will be left picking up the pieces.

26. The Subcommittee recognized this when it previously denied Applicants' waiver request. That decision should stand and Applicants' motion should be denied, again.



Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,

Dated: April 6, 2017 By:



Peter C.L. Roth, Senior Assistant Attorney General  
Environmental Protection Bureau  
33 Capitol Street  
Concord, NH 03301-6397  
(603) 271-3679  
Peter.roth@doj.nh.gov

PRIMMER PIPER EGGLESTON & CRAMER PC,

Dated: April 6, 2017 By:



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-and-

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing OBJECTION TO MOTION FOR CLARIFICATION OF SITE 301.08(d)(2)(b) has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: April 6, 2017

By:



Thomas J. Pappas, Esq. (N.H. Bar No. 4111)

# **EXHIBIT A**



Northern Pass Transmission LLC  
P.O. Box 330  
780 North Commercial Street  
Manchester, NH 03105-0330

March 28, 2017

Peter C.L. Roth  
Senior Assistant Attorney General  
Counsel for the Public  
Department of Justice  
33 Capitol Street  
Concord, New Hampshire 03301-6397

Re: Inquiry

Dear Peter:

In answer to your inquiry dated March 20, 2017, the Transmission Service Agreement ("TSA")<sup>1</sup> that is included with Northern Pass Transmission LLC's ("NPT") application before the Site Evaluation Committee ("SEC") remains in full force and effect. In fact the fundamental financial structure of the Northern Pass Transmission Project ("Project") has not changed since NPT filed its SEC application.<sup>2</sup>

The TSA has not changed substantively since it was approved by FERC in 2010. As is often the case with a contractual arrangement, the passage of time and evolution of circumstance sometimes call for a minor adjustment to one or more of its terms. That was the case recently as February 14, 2017, the TSA's "Approval Deadline", drew near, and, as specifically permitted by the terms of the TSA, the parties agreed to extend the Approval Deadline until December 31, 2020.<sup>3</sup> A copy of the written agreement extending the date was provided to you by email on March 22, 2017, and is included as an exhibit to Michael Auseré's Supplemental Testimony (filed March 24, 2017). The agreement to extend the Approval Deadline also confirms Hydro-Québec's continued commitment to the Project.

As further noted in William Quinlan's Supplemental Testimony (filed on March 24, 2017), NPT and Hydro-Québec have indicated an intent to participate in the upcoming Massachusetts clean energy solicitation. As was contemplated for last year's Tri State Clean Energy RFP, the parties will amend or augment the TSA, as appropriate, based on the outcome of the Massachusetts solicitation.

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<sup>1</sup> Included as Appendix 16 to the application for a Certificate of Site and Facility filed with the Site Evaluation Committee by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy, is the Transmission Service Agreement by and between NPT and Hydro Renewable Energy dated October 4, 2010, as amended and as accepted by the Federal Energy Regulatory Commission on January 13, 2014.

<sup>2</sup> See attached letter to Senator Jeanne Shaheen, dated March 17, 2017, from Leon J. Olivier, President of Northern Pass Transmission LLC, confirming the status of the TSA.

<sup>3</sup> Until the parties agreed to extend the date, Section 1.1 of the TSA provided that the "Approval Deadline means February 14, 2017, or such other date to which the Parties shall mutually agree in writing."

March 28, 2017

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The additional questions you raise have been addressed in the Supplemental Testimony submitted by NPT on March 24, 2017. To the extent you have further questions about these issues, you will be free to inquire about them during cross examination when the hearings commence in April.

However, as noted above, the fundamental financial structure of the Project has not changed, and you, as Counsel for the Public, are in no different a position today vis-à-vis the TSA than you were at the time the application was filed. No doubt you will find all of the relevant information needed to address any concerns you may have in the testimony and other evidence filed with the SEC during this final phase of the siting process.

Sincerely,

A handwritten signature in black ink, appearing to read "Marvin P. Bellis". The signature is fluid and cursive, with the first name "Marvin" being the most prominent part.

Marvin P. Bellis

Senior Counsel

Enclosure: Letter to the Honorable Jeanne Shaheen



56 Prospect Street  
Hartford, CT 06103

**Leon J. Olivier**  
Executive Vice President  
Enterprise Energy Strategy &  
Business Development

March 17, 2017

The Honorable Jeanne Shaheen  
United States Senate  
506 Hart Senate Office Building  
Washington, DC 20510

Dear Senator Shaheen:

It has come to my attention that you are in receipt of a letter dated March 14, 2017 from Mr. Will Abbott of the Society for Protection of New Hampshire's Forests ("SPNHF") falsely alleging that the Transmission Services Agreement ("TSA") between Northern Pass Transmission, LLC ("NPT") and H.Q. Hydro Renewable Energy, Inc. ("HQ") has expired. In his letter, Mr. Abbott asks that you coordinate "an inquiry by the New Hampshire Congressional delegation to the Federal Energy Regulatory Commission (FERC) asking FERC to explain the status of the TSA between HQ and NPT." As described below, such an inquiry is completely unnecessary, as the FERC approved TSA remains in full force and effect.

The term of the TSA, which specifies the respective rights and obligations of the parties, including terms for recovery of costs, began on the original execution date of October 4, 2010 and continues 40 years from the time the Northern Pass transmission line begins commercial operation, unless it is earlier terminated. SPNHF wrongly claims that the TSA expired on February 14, 2017 ("Approval Deadline"). However, as expressly provided in the TSA, that date could be extended by mutual agreement of the parties. The Approval Deadline was, in fact, extended earlier this year by written agreement between NPT and HQ. Accordingly, the extension of the Approval Deadline was fully consistent with the terms and conditions of the already approved TSA.

NPT's ability to finance, construct and operate the proposed Northern Pass project is currently under review by the New Hampshire Site Evaluation Committee. The TSA was part of the Application submitted in October of 2015 and the testimony of NPT officers has not only addressed the TSA's cost recovery provisions but has unequivocally stated that New Hampshire customers will not bear any costs associated with construction of the Northern Pass transmission line. The evidence to be presented during the final adjudicative hearings, set to begin in early April, will bear this out.

Page 2  
The Honorable Jeanne Shaheen  
March 17, 2017

As you are aware, recognizing the large and growing demand for clean energy in the region, several New England states have recently been seeking long-term contracts for clean energy resources. The next significant opportunity will occur this spring when Massachusetts will seek proposals for large quantities of clean energy that can be delivered to customers in the Commonwealth. Through this solicitation process, successful projects will receive contracts with Massachusetts utilities. If the Northern Pass project is selected in the MA RFP, the TSA will be modified and/or complemented by one or more other agreements at that time. In any event, under no circumstances would any such agreements impose cost obligations on New Hampshire customers.

I hope that this explanation fully addresses any questions that you may have concerning SPNHF's erroneous claims. If you wish to discuss this matter further, please feel free to contact me or Bill Quinlan at any time.

Sincerely,



Leon J. Olivier  
President - Northern Pass Transmission, LLC

cc. Mr. William J. Quinlan  
Ms. Donna Gamache  
Mr. Todd Lavin