

**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 MOTION *IN LIMINE* TO EXCLUDE TESTIMONY
AND REPORT OF MITCH NICHOLS AND NICHOLS TOURISM GROUP**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer
Piper Eggleston & Cramer PC, hereby moves in *limine* to exclude the testimony and report of
Mitch Nichols and the Nichols Tourism Group. In support of this motion, Counsel for the Public
states as follows:

BACKGROUND

1. On October 19, 2015, Northern Pass Transmission, LLC and Public Service
Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”),
submitted a Joint Application for a Certificate of Site and Facility (the “Application”) to the New
Hampshire Site Evaluation Committee (the “Committee” or “SEC”) to construct a 192-mile
transmission line to run through New Hampshire from the Canadian border in Pittsburg to
Deerfield (the “Project”).

2. The Applicants have submitted the pre-filed testimony and report of Mitch
Nichols and the Nichols Tourism Group, which assert that the “Project will not affect regional
tourism demand and it will not have a measurable effect on New Hampshire’s tourism industry.”
See Application, Appendix 45.

3. To investigate the effects of the Project on New Hampshire’s tourism industry and
to verify the Applicants’ claims the Committee authorized Counsel for the Public to retain Kavet,
Rockler & Associates, LLC (“KRA”).

4. The investigation and analysis conducted by KRA is set forth in detail in the expert report prepared by KRA and previously provided to the Committee, as well as the pre-filed testimony submitted for Dr. Nicholas O. Rockler and Thomas E. Kavet. *See* Pre-Filed Testimony of Nicholas O. Rockler; Pre-Filed Testimony of Thomas E. Kavet; Supplemental Pre-Filed Testimony of Thomas Kavet and Nicholas Rockler, *all available at* https://www.nhsec.nh.gov/projects/2015-06/2015-06_prefiled_testimony_2016-12-30.htm (the “KRA Reports & Testimony”).

5. The investigation and analysis conducted by KRA revealed serious issues and deficiencies in the Nichols report and pre-filed testimony, explained in more detail in the KRA report and set forth in brief below. *See* KRA Reports & Testimony.

ARGUMENT

I. The Testimony and Report of Mitch Nichols and the Nichols Tourism Group Should be Excluded Because Their Methodological Flaws and Lack of Reliability Render Them Unscientific and Lacking Evidentiary Value.

A. Legal Standard.

6. New Hampshire Rule of Evidence 702 provides that “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

7. Critically, “[s]ubsumed in the requirements of Rule 702 is the premise that expert testimony must be reliable to be admissible [because] only if the expert’s testimony is reliable can it assist the jury in understanding the evidence or determining a fact in issue.” *State v. Cressey*, 137 N.H. 402, 404–05 (1993).

8. “The opinions expressed by any expert are only of value insofar as they are based upon factual assumptions which are fairly supported in the record.” *Bartlett Tree Experts Co. v. Johnson*, 129 N.H. 703, 707 (1987) (emphasis added) (quoting *Johnson v. Califano*, 434 F. Supp. 302, 309 (D. Md. 1977)). Indeed, “the bases of expert testimony must be carefully considered,” for expert testimony to be admitted. *Id.*

9. To be admissible, an expert’s proposed testimony must be “derived by the scientific method,” and “ground[ed] in the methods and procedures of science.” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 590 (1993).

10. Although *Daubert* is only binding in federal court, the New Hampshire Supreme Court has acknowledged that the text of New Hampshire Rule of Evidence 702 is identical to the federal rule that existed at the time of the *Daubert* decision. *Baker Valley Lumber v. Ingersoll-Rand Co.*, 148 N.H. 609, 614 (2002). Accordingly, the New Hampshire Supreme Court elected to follow the lead of the “vast majority” of states, and adopted the *Daubert* standard to interpret New Hampshire Rule of Evidence 702. *Id.*

11. The New Hampshire legislature has further codified the *Daubert* standard in RSA 516:29-a, providing that “[a] witness shall not be allowed to offer expert testimony unless the court finds:

- (a) Such testimony is based upon sufficient facts or data;
- (b) Such testimony is the product of reliable principles and methods; and
- (c) The witness has applied the principles and methods reliably to the facts of the case.”

RSA 516:29-a. Additionally, when “evaluating the basis for proffered expert testimony, the court shall consider, if appropriate to the circumstances, whether the expert’s opinions were supported by theories or techniques that:

- (1) Have been or can be tested;

- (2) Have been subjected to peer review and publication;
- (3) Have a known or potential rate of error; and
- (4) Are generally accepted in the appropriate scientific literature.”

Id.

12. While the *Daubert* standard does not require that scientific knowledge be infallible to be admissible, it must be supported by appropriate validation – *i.e.*, good grounds, based on what is known. *Daubert*, 509 U.S. at 590; *Dahood*, 148 N.H. at 728. Additionally, the trial court must find that “the expert has applied the principles and methods reliably to the facts of the case.” *Gray v. Commonwealth Land Title Ins. Co.*, 162 N.H. 71, 77 (2011) (citing RSA 516:29-a). Reviewing the basis of the expert’s opinion in light of these factors is meant to ensure that proposed expert testimony imparts scientific knowledge rather than guesswork. *State of New Hampshire v. Regan*, No. 10-E-64, 2011 N.H. Super. LEXIS 110, *6 (N.H. Super. Ct. April 12, 2011).

13. To be “scientific,” the testimony must have the requisite “grounding in the methods and procedures of science.” *Daubert*, 509 U.S. at 590. As a result, “each step in the scientific analysis” underlying the expert’s conclusions must have good grounds supporting it and “any step that renders the analysis unreliable under the *Daubert* factors renders the expert testimony inadmissible.” *McClain v. Metabolife Int’l, Inc.*, 401 F.3d 1233, 1245 (11th Cir. 2005) (emphasis in original, quotations omitted).

14. While the rules of evidence do not apply in this proceeding, RSA 541-A:33, Rule 702 necessarily informs this Committee’s consideration of whether expert testimony should be permitted or is so deficient that it cannot be allowed lest its prejudicial effect outweigh any probative value it might have otherwise had.

15. Additionally, the legislative codification of the *Daubert* standard in RSA 516:29-a arguably alters the application of RSA 541-A:33 to the SEC’s consideration as to whether to exclude potential expert testimony. Counsel for the Public submits that RSA 516:29-a does and

should apply to this proceeding and that the testimony and report of Mitch Nichols and the Nichols Tourism Group should thereby be excluded in whole or in part.

B. The Testimony and Report of Mitch Nichols and the Nichols Tourism Group Should be Excluded in Whole or in Part Due to its Methodological Flaws and Inherent Unreliability.

16. As explained in greater detail in Section 5 of the report prepared by KRA,¹ the Nichols tourism impacts analysis is not a reasonable or credible assessment of the potential impact of the proposed Project on New Hampshire tourism. The methodological flaws and inherent unreliability of the Nichols report and proposed testimony are such that they could not survive a *Daubert* challenge because they are not based upon sufficient facts or data, they are not the product of reliable principles and methods, and Mr. Nichols applied the principles and methods he applied unreliably to the facts of this case.

17. The conclusion of Mitch Nichols and the Nichols Tourism Group that the “Project will not affect regional tourism demand and it will not have a measurable effect on New Hampshire’s tourism industry” was based on five “study elements.” Each of those five “study elements” suffers from significant flaws discussed at length in the report prepared by KRA, and discussed briefly below, that render the proposed report and testimony inadmissible. This Committee should accordingly exclude it from this proceeding in whole or in part.

1. Study Element 4 Should be Excluded Because the Design and Execution of that Study Element Rendered it Virtually Meaningless.

18. For Study Element 4, Prior Local Transmission Line Development Review, Mr. Nichols attempted to examine “actual experience” with two “similar” transmission projects: the “so-called Phase II line” in New Hampshire, a 450kV line constructed through portions of Grafton, Merrimack and Hillsborough counties “in the late 1980s” and the “Maine Power

¹ See KRA report at 28-37, available at https://www.nhsec.nh.gov/projects/2015-06/testimony/2015-06_2016-12-30_pretest_kavet_cfp.pdf.

Reliability Program,” affecting five of the most populous counties in Maine. *See* KRA Report at 31-35. Mr. Nichols attempted to assess tourism impacts from those projects “by comparing before and after employment and establishment counts in selected tourism-related industries in the counties through which the projects pass, with counties in New Hampshire and Maine through which the projects did not pass.” *Id.* at 31.

19. As explained in more detail in the KRA report “both the study design and its execution rendered that component of Mr. Nichols’s analysis virtually meaningless” for several reasons. *Id.* at 32. First, analysis at the county level did not properly capture potential impacts within the viewshed or close proximity to the transmission line where they are most likely to occur. *Id.* Instead, Mr. Nichols’ use of county-level employment metrics included “a great deal of economic activity that is completely unrelated to the transmission line.” *Id.* “For example, Hanover and Lebanon represent more than 25% of the population of Grafton County, and Lebanon alone accounts for more than 20% of all Accommodation and Food Services employment.” *Id.* While neither would expect to be impacted by the transmission line, Grafton County is considered an affected county in the Nichols analysis. *Id.* This and other similar variations in the Nichols analysis are explained in detail in the KRA report. These variations make it impossible to rely on that metric of Mr. Nichols’ report and proposed testimony as a consistent comparable measure of tourism activity between counties. *Id.*

20. Second, the time period over which the Phase II line was examined in the Nichols report introduced potential error into the analysis because the economic recession in the early 1990s in New England was particularly severe and affected various counties differentially. *Id.* The KRA report details how other much larger factors such as the economic recession could

affect employment and establishment counts in the various counties over the study period chosen. *Id.*

21. Third, the Phase II line used in Mr. Nichols' comparison is different in important respects from the proposed NPT Project. *Id.* Essentially the entire Phase II line was built on existing rights of way, placed between two other power lines, built with towers that are considerably lower than the proposed Project, and screened in many places by the existing canopy. *Id.* The proposed Project would add 32 miles of new rights of way, with taller and more visible towers, and a wider cleared ROW area along much of the existing corridor. *Id.*

22. Fourth, in addition to those methodological study design flaws, the calculations upon which the conclusions were drawn were erroneous in several ways. *Id.* at 33.

a. "First, they aggregated industry categories in counties in which there were suppressed data points due to nondisclosure limitations." *Id.* "These values were treated as '0' in the analysis, despite being positive integers of unknown size." *Id.* As the KRA report explained, "[t]o treat these as zeros is methodologically indefensible." *Id.*

b. Second, in the Phase II analysis, Mr. Nichols "also added all data from unknown geographic locations (labelled FIPS code 33099) to the non-impact area." *Id.* This data should have been excluded from the analysis entirely." *Id.*

c. Third, "when presenting and analyzing this data, 'average annual change' in both employment and establishment counts appear to have been calculated by averaging the percent change reported in each year (simple average), instead of the more common professional practice of calculating change over time using compound annual growth rates (CAGR)." *Id.* "While these two rates will not differ much for smoothly growing or shrinking series over longer time periods, they can be significantly different for volatile series over shorter time periods, such as some of the data in this study element." *Id.*

d. Fourth, there was also "some confusion regarding the starting and ending years for these calculations." *Id.* "In Table 5-1 in the Applicants' report, the starting year is labelled as 1985 for the number of establishments and 1986 for the number of employees." *Id.* "From a review of the source data, it appears that the starting date used was 1986 and not 1985, based on matching the simple averages displayed in the Applicants' report." *Id.*

e. Fifth, the “source data spreadsheet reveals another serious calculation error: The formulas in the source spreadsheet that were used to derive the data used for ‘All Other Counties’ excluded Rockingham County entirely.” *Id.* “Thus, what is reported and used in the analysis as the comparative control region is both misspecified and mislabeled.” *Id.*

23. Based only on the source data KRA was provided, and ignoring the many methodological problems with the approach noted in KRA’s report, “there is almost nothing conclusive that can be drawn from the Phase II analysis source data.” *Id.* at 34.

24. Because no source data were provided for the Maine Power Reliability Project (MPRP), it was not reviewed in detail by KRA, but KRA noted that it also suffered from the same methodological design flaws as the Phase II analysis and therefore “cannot be the basis of any meaningful conclusions regarding potential tourism impacts.” *Id.* at 35.

2. Study Element 2 Should be Excluded Because Basic Math and Labelling Errors Render it Useless From a Scientific and Evidentiary Perspective.

25. For Study Element 2, Descriptive Review of the New Hampshire Tourism Industry, the data used by Mr. Nichols is largely sourced from Plymouth State University’s Institute for New Hampshire Studies but there are “basic math and labelling errors in tables presented in this and other sections” of Mr. Nichols’ report. *See* KRA Report at 29. “For example, in Figure 3-1 of the report, the number labelled as ‘Direct/Indirect/Induced’ Visitor Spending is actually only ‘Induced’ spending.” *Id.* Also, in the same table, although Mr. Nichols counts direct, indirect and induced totals for visitor spending, Mr. Nichols omits induced employment (26,120 jobs) in the calculated total. *Id.* “This would change total employment from 90,825 to 116,945 and the calculation of the share of state employment that is tourist-related from 10.2% to 13.1%, as estimated using Plymouth State University (PSU) assumptions and data.” *Id.* These basic math and labelling errors render that aspect of the Nichols report useless from a scientific and evidentiary perspective.

3. Study Element 5 Should be Excluded Because Inconsistent Responses and Faulty Survey Selection Rendered it Unscientific.

26. For Study Element 5, Custom Survey of Potential Visitors, Mr. Nichols reviewed “factors influencing visitor demand” in New Hampshire, based on a web-based survey of 456 paid respondents. *Id.* The report prepared by KRA noted that there were “notable counterintuitive responses to several questions, including a 6.2% response that found ‘possible traffic delays’ to be an ‘essential or very important benefit’ of a tourist destination, along with 9.3% who considered ‘visible power lines in areas’ and 6.5% who responded that seeing ‘commercial or industrial from highway’ to be similarly positive visitation attributes.” *Id.* “When queried about this in telephone conversations and at the SEC-sponsored technical hearing sessions, Mr. Nichols indicated that he honestly believed that these responses were valid and that these destination characteristics are considered to be important or essential benefits of a place to vacation.” *Id.*

27. KRA noted that it is more likely that the respondents “either did not understand the question or interpreted it to mean the absence of the attribute was important” because it “defies belief that anyone would consciously seek out vacation locations with traffic delays, or travel to New Hampshire in order to see visible power lines or commercial and industrial buildings from its scenic highways, when such vistas are plentiful in the metropolitan locations from which most New Hampshire tourists originate.” *Id.*

28. As discussed in the KRA report, the “most glaring omission” in that study element was that there was not a single question in the survey that mentioned, provided a visual simulation, or described a high-voltage transmission line despite the primary purpose of the analysis being to evaluate potential tourism impacts from a high-voltage transmission line. *Id.* at

35-36. The one reference to “visible power lines in certain areas,” was so ambiguous as to render it effectively useless. *See id.* at 36.

29. The report prepared by KRA further noted that paying for the survey responses in the on-line survey used in that study element likely affected the outcome of those results, given the income distribution and time value weighting of respondents that likely resulted. *Id.* at 39. This issue was particularly significant as Mr. Nichols himself had previously explained the importance having a higher income mix for tourism-related surveys in a previous 2003 report. *See id.* (“... an emphasis was placed on soliciting survey responses from decision makers in households that have the financial ability to travel frequently and to spend impressively while traveling.”). As the KRA report explained: “Despite having considerably lower incomes, 77% of the respondents in the 2015 study element survey said they travel frequently in New England and 44% said they travel frequently throughout the U.S., versus only 75% and 36%, respectively, among the more affluent 2002-2003 survey sample [and] [t]hese kinds of discrepancies call into question the reliability and the appropriateness of the survey respondents relied upon for this study element.”

4. Study Element 3 Should be Excluded Because Limited Sampling Size and Selective Consideration of Views Presented Rendered it Unscientific.

30. For Study Element 3, Listening Tour Feedback, Mr. Nichols conducted a four stop “listening tour” arranged by the Applicants through the New Hampshire Travel Council, of which the Applicants are a member/sponsor. *See* KRA Report at 29-31. A review of that “study element” reveals numerous issues that eviscerate any scientific or evidentiary value for this “study element.”

31. For one, sampling size was limited with some of the sessions having as few as four attendees. *Id.* at 29. Additionally, despite mention in a “summary of key points” that

“opinions regarding the potential future impacts of the Northern Pass Project on tourism varied,” with “some concerns ... expressed in regards to New Hampshire losing its image as a beautiful state and tourism attraction power,” those opinions were simply dismissed because “no one offered an empirical basis supporting those concerns.” *See id.* at 29-30. That approach directly contradicted the “listening tour” nature of the sessions, and “[w]ithout taped transcripts or other recordings of the meetings – and none were made – it is impossible to know what was selectively reported in this section and what was omitted.” *Id.* at 30. The report prepared by KRA noted that “[b]ased on a few hand-written notes from the various sessions there were many negative comments about the proposed transmission line that were not reported or given voice in the conclusions reached by Nichols.” *Id.* at 30.

**5. Study Element 1 Should be Excluded Because it Relies on Faulty Logic
Contradicted by the Evidence.**

32. Finally, for Study Element 1, the Incidence of Relevant Prior Research Requests, Mr. Nichols references his 20 years of industry experience assisting tourism destinations with marketing and promotional activities and equates the absence of concerns raised about the presence of transmission lines and their possible effect on visitor demand with the absence of any possible negative effect.

33. As noted by the KRA report, Mr. Nichols’ assumption is based on faulty logic that fails to consider that no such concerns would be raised in areas of high scenic value “because such areas would never consider allowing this type of development and thus, neither ‘concern’ nor conversation would ensue.” KRA Report at 28. Mr. Nichols points to his work in the “red rock region of Sedona, Arizona,” but Jennifer Wesselhoff, the current President and CEO of the Sedona Chamber of Commerce & Tourism Bureau explained that there was never serious consideration of large power line development in that area precisely because “[t]he

presence of a large high voltage transmission line in Sedona could obviously have negative tourism impacts and any development causing degradation of the unique, natural scenic beauty that is [their] primary tourism draw would encounter considerable resistance.” *Id.* at 29.

CONCLUSION

34. The issues found with each of the “study elements” of Nichols’s proposed testimony and report are each sufficiently troubling to warrant exclusion of the relevant “study element” and taken together the pre-filed testimony and report of Mitch Nichols and the Nichols Tourism Group should be excluded entirely. The report and proposed testimony of Mitch Nichols and the Nichols Tourism Group are simply not scientific and not worthy of evidentiary weight in this proceeding. As such proposed testimony and report would never withstand a *Daubert* challenge it should not be permitted here.

The Spokespersons for the Following Parties Concur in this Motion:

Abutting Property Owners (overhead portion), Whitefield, Dalton, and Bethlehem

Grafton County Commissioners

Pemigewasset River Local Advisory Committee

Abutting Property Owners (underground portion), Bethlehem to Plymouth

Abutting Property Owners (underground portion) Deerfield

Non-Abutting Property Owners (overhead portion), Stark, Lancaster, Whitefield, Dalton, and Bethlehem

The remaining parties have not responded.

WHEREFORE, Counsel for the Public respectfully requests that the SEC:

- A. Strike the Pre-filed Testimony and report of Mitch Nichols and the Nichols Tourism Group and exclude them from any further testimony in this proceeding; and
- B. Grant such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,




Dated: April 24, 2017 By:

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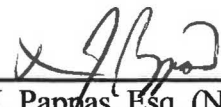
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION IN LIMINE TO EXCLUDE TESTIMONY AND REPORT OF MITCH NICHOLS AND NICHOLS TOURISM GROUP has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: April 24, 2017

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