

**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**

June 13, 2017

**ORDER DENYING COUNSEL FOR THE PUBLIC'S MOTION IN *LIMINE*
(Testimony and Report of Mitch Nichols and Nichols Tourism Group)**

This Order denies Counsel for the Public's Motion in *Limine* to Exclude Testimony and Report of Mitch Nichols and Nichols Tourism Group.

I. Background

On April 25, 2017, Counsel for the Public's filed a Motion in *Limine* to Exclude Testimony and Report of Mitch Nichols and Nichols Tourism Group. The Society for Protection of New Hampshire Forests joined in Counsel for the Public's request on April 25, 2017. The Applicant objected to Counsel for the Public's Motion on May 4, 2017.

II. Standard of Review

RSA 541-A:33, II provides the foundation for the admissibility of evidence in administrative proceedings:

The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

RSA 541-A:33, II. The touchstone for admissibility in administrative proceedings is relevance and the avoidance of immaterial or unduly repetitious evidence. *See id.*

III. Positions of the Parties

Counsel for the Public seeks to exclude the testimony and report of Mitch Nichols and Nichols Tourism Group. Mr. Nichols assessed and addressed the impact of the Project on tourism. Counsel for the Public argues that Mr. Nichols' testimony and report should be excluded because they are unscientific and lack evidentiary value.

First, Counsel for the Public argues that, under Rule 702 of New Hampshire Rules of Evidence, an expert witness should be allowed to testify only if his or her testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." Counsel for the Public asserts that an expert may be allowed to testify only if his or her testimony is reliable and based on assumptions that are supported by the record and that Mr. Nichols' testimony fails to meet that standard.

Second, Counsel for the Public argues that the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals.*, 509 U.S. 579 (1993), bars Mr. Nichols' testimony. In *Daubert*, the Court held that expert testimony is admissible only if it is "derived by the scientific methods" and is "ground[ed] in the methods and procedure of science."

Finally, Counsel for the Public relies on RSA 516:29-a, which states that expert testimony can be allowed only if: (i) the testimony is based on sufficient facts or data; (ii) the testimony is the product of reliable principles and methods; and (iii) the witness has applied the principles and methods reliably to the facts of the case. RSA 516:29-a also states that 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)

[h]ave been or can be tested; (2) [h]ave been subjected to peer review and publication; (3) [h]ave a known or potential rate of error; and (4) [a]re generally accepted in the appropriate scientific literature.” Counsel for the Public claims that Mr. Nichols’ testimony and report should be excluded because, in Counsel for the Public’s view, they are not based upon sufficient facts or data; they are not the product of reliable principals and methods; and Mr. Nichols applied the principles and methods unreliably to the facts of the case.

Counsel for the Public also asserts that Mr. Nichols conclusion that the Project will not have an unreasonable adverse effect on tourism was, in part, based on his assessment of impact on tourism by the 450 kV line constructed through portions of Grafton, Merrimack, and Hillsborough counties (Phase II line) and the Maine Power Reliability Program. Counsel for the Public asserts that the conclusions drawn from that assessment are unreliable because it did not address impacts in close proximity to the lines and it included towns and tourist attractions that were not actually impacted by the projects. Counsel for the Public further asserts that the assessment of impact associated with the Phase II line is unreliable because it assessed a time period when the economy was in recession, and various other factors may have affected the tourism industry. Counsel for the Public argues further that reliance on the impact caused by the Phase II line is erroneous because the Project and its effects will be substantially different from the Phase II line. Counsel for the Public also claims that the calculations of the impact on tourism by the Maine Power Reliability Program are erroneous.

Counsel for the Public makes additional methodological arguments about Mr. Nichols’ work. Counsel for the Public argues that Mr. Nichols’ review of the New Hampshire tourism industry is flawed because it is based, in part, on data provided by the Plymouth State University Institute for New Hampshire Studies. According to Counsel for the Public, the Plymouth State

data is not reliable because it contains math and labelling errors in tables. Counsel for the Public further claims that Mr. Nichols' reliance on a Custom Survey of Potential Visitors was also misplaced because the responding parties were paid for taking the survey and their answers indicated that they misunderstood the questions presented. Counsel for the Public also asserts that Mr. Nichols' report of results of listening tours cannot be used to support his opinion of Project's impact on tourism because such tours were sponsored by the Applicant, the audience was limited in size, the comments were not accurately described, and negative comments were largely ignored. Finally, Counsel for the Public disputes Mr. Nichols' reliance on the fact that concerns about the presence of transmission lines were not previously raised. Counsel for the Public points out that previous transmission lines were not considered for construction in the evaluated locations.

Counsel for the Public concludes that Mr. Nichols' report is unreliable and not scientific and should be excluded under Rule 702 of the Rules of Evidence, the *Daubert* standard, and/or RSA 516:29-a.

The Applicant argues that Mr. Nichols' testimony and report should be admitted because Rule 702 of the Rules of Evidence, the *Daubert* standard and RSA 516:29-a do not apply to these proceedings. The Applicant also responds that Counsel for the Public's own experts do not have expertise in evaluating impacts of transmission lines on tourism.

IV. Analysis

As quoted above, RSA 541-A:33, II states that "[t]he rules of evidence shall not apply in adjudicative proceedings." RSA 541-A:33, II. It further provides that the Presiding Officer may exclude only "irrelevant, immaterial or unduly repetitious evidence."

The rules of evidence, including Rule 702, do not apply to these proceedings. RSA 516:29-a applies only to court proceedings and does not apply to these proceedings. The *Daubert* standard is the standard used by courts to assess the admissibility of expert testimony under Rule 702. See *Baker Valley Lumber v. Ingersoll-Rand Co.*, 148 N.H. 609, 616 (2002). In this case Mr. Nichols' testimony, although challenged by Counsel for the Public, is relevant.

Even if those authorities did control the issues raised by Counsel for the Public, his complaint about the testimony of Mr. Nichols is not a true *Daubert* challenge. Counsel for the Public highlights several portions of the Nichols testimony that he believes contain errors or have weaknesses in logic. Those matters can be adequately addressed through cross-examination. In addressing a *Daubert* challenge, "[t]he trial court functions only as a gatekeeper, ensuring a methodology's reliability before permitting the fact-finder to determine the weight and credibility to be afforded an expert's testimony." *Baker Valley Lumber*, 148 N.H. at 616 (citation omitted). Counsel for the Public does not challenge the methodology or techniques used by Mr. Nichols. Counsel for the Public instead claims that Nichols used the wrong data or that there were errors in the data. Counsel for the Public's challenge is not about the reliability of methods but rather the reliability of the conclusions and opinions drawn by Mr. Nichols. The Subcommittee is capable of following and understanding cross-examination and making its own assessment of the reliability of Mr. Nichols' opinions and conclusions.

Mr. Nichols' testimony and report are relevant to the disposition of issues in this docket, *i.e.*, impacts of the Project on tourism and the orderly development of the region. Counsel for the Public's arguments relate to the credibility and weight of the report and testimony. Exclusion of the report and testimony is not required.

Counsel for the Public's Motion in *Limine* to Exclude Testimony and Report of Mitch Nichols and Nichols Tourism Group is denied.

SO ORDERED this 13th day of June, 2017 by the Site Evaluation Subcommittee:



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee