

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

**Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for Certificate of Site and Facility**

December 22, 2016

**ORDER ON MOTION FOR PROTECTIVE ORDER
AND CONFIDENTIAL TREATMENT**

I. BACKGROUND

On April 12, 2016, the Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed an Application for a Certificate of Site and Facility (Application) with the Site Evaluation Committee (Committee). The Application seeks the issuance of a Certificate of Site and Facility approving the siting, construction, and operation of a new 115kV electric transmission line between existing substations in Madbury and Portsmouth (Project.) The new transmission line is proposed to be approximately 12.9 miles in length. The Project is comprised of a combination of above ground, underground, and underwater segments. The Project will be located in the Towns of Madbury and Durham in Strafford County, and the Town of Newington and the City of Portsmouth in Rockingham County.

Contemporaneously with the Application, the Applicant filed a Motion for Protective Order and Confidential Treatment requesting confidential treatment of the following information and documentation: (i) archeological resources data (information contained in Appendices 8, 9 and 33 to the Application); (ii) Critical Energy Infrastructure Information (CEII) (Appendices 21 and 22 to the Application); and (iii) the status, location and distribution of rare, threatened and endangered native plants and natural communities (Appendix 37 to the Application).

The parties did not object to the Applicant's request.

This Order grants in part and denies in part the Applicant's request.

II. STANDARD OF REVIEW

A state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure pursuant to the Access to Public Records and Meetings Act, RSA 91-A:5, IV. *See Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first prong of the analysis is to determine if the Applicant has identified a privacy interest. *Lambert*, 157 N.H. at 382. If a privacy interest is invoked, then the agency must assess whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government. *Id.* at 383. If disclosure does not serve that purpose then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

III. ANALYSIS AND FINDINGS

a. Archeological Resources

The Applicant asserts that the following documents contain information regarding archeological resources data and archeological sites within or adjacent to the Project area:

- Appendix 8 - Desk Review - Archeological Sites on Abutting Properties (Madbury, Durham, Newington and Portsmouth, NH);
- Appendix 9 – Phase I-A Preliminary Archeological Survey (Madbury, Durham, Newington and Portsmouth, NH); and
- Appendix 33 – Communications with NHDHR and USACE (redacted information only).

The Applicant argues that the information is confidential and should not be disclosed to the members of the general public pursuant to the following provision of the New Hampshire Historic Preservation Act, RSA 227-C:11:

[i]nformation which may identify the location of any archeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.

The Applicant also argues that the archeological resource data is exempted from disclosure under RSA 91-A. The Applicant agrees to disclose documentation and information identifying archeological resources to the parties, subject to execution of a confidentiality agreement.

RSA 227-C:11, exempts archeological resource information “from all laws providing rights to public access.” The statute also provides that state agencies, institutions, political subdivisions, permittees, and private landowners should consult with the Commissioner of the Department of Cultural Affairs before any disclosure of such information. *Id.* The purpose of this consultation is to “insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk.” *Id.* Information regarding the nature and location of archeological resources is similarly protected under federal law. *See* 16 U.S.C. § 470hh (a).

RSA 91-A:5 also exempts information from public disclosure that is “confidential, commercial or financial.” Data regarding archeological sites appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Archeological sites are protected by statute. *See* RSA 227-C. Archeological sites are considered to be among the “most important environmental assets of the state.” RSA 227-C:1-a. The statute recognizes that social and economic development threatens such assets and recognizes the need for protection. *Id.* Understanding the importance ascribed to archeological resources by the legislature and the need to protect such resources, it follows that such archeological data qualify as confidential information under RSA 91-A:5.

Furthermore, the public benefit of disclosing the archeological information in Appendices 8, 9 and 33 to the Application is slight and, in fact, disclosure would be detrimental to the public interest in protecting archeological resources. Therefore, Appendices 8-9 and confidential information in Appendix 33 are exempt from disclosure under the exemption provisions of RSA 91-A:5, IV.

The Motion is granted as to archeological resources in Appendices 8-9 and the confidential information contained in Appendix 33 will not be disclosed or made available to the public. If any party to this docket seeks disclosure of these documents and information, they shall follow the procedures set forth below.

b. CEII and Other Confidential Infrastructure Information

The Applicant seeks to protect the following information from public disclosure:

- CEII information as defined by the Department of Homeland Security, including Protected Critical Infrastructure Information that is identified as such pursuant to the Critical Information Act of 2002;

- Confidential information regarding critical assets and critical cyber assets subject to the North American Electric Reliability Council Critical Infrastructure Protection standards pertaining to the reliability and availability of the Bulk Electric System in North America;
- Any other infrastructure information that will be designed by the Applicant as proprietary and confidential, whether provided before or after the date of the Motion, whether oral, written or recorded/electronic and regardless of the manner in which it is provided; and
- All reports, summaries, compilations, analyses, notes or other information which contain such information.

The Applicant identifies the following specific documents that it seeks to protect: (i) Appendix 21 – Proposed Plan Application submitted to ISO New England; and (ii) Appendix 22 – New Hampshire 10 Year Reliability Project Proposed Plan Application Report. The Applicant argues that these documents should be protected from disclosure because they contain details about Eversource’s energy infrastructure, including the precise locations of facilities within its transmission and distribution systems. The Applicant further argues that disclosure of these documents to the public may have an adverse effect on the operation of the region’s electrical grid and may be used by a person seeking to damage critical infrastructure. The Applicant agrees to provide these documents to Counsel for the Public and the Intervenors in this docket, subject to conditions proposed by the Applicant. The Applicant concludes that public interest in protecting this information and these documents outweighs any private interest in its disclosure.

Appendices 21 and 22 to the Application contain critical infrastructure information. The private interest in protecting such information and securing the safety and stability of infrastructure is extremely high. At the same time, considering the Applicant’s agreement to make these documents available to the parties in this docket, the public interest in receiving access to these documents is low. The private interest in protecting Appendices 21 and 22

outweighs public interest in their disclosure. These documents should be protected from disclosure to the general public. The Applicant's requests to protect and designate as confidential Appendices 21 and 22 is granted.

c. Native Plants and Natural Communities Within and Adjacent to the Site

The Applicant asserts that Appendix 37 to the Application (Rare, Threatened, and Endangered Species and Exemplary Natural Community Report), contains information relating to rare, threatened, and endangered native plants and natural communities within and adjacent to the proposed Project. The Applicant argues that this report should be confidential in order to preserve and protect native plants and natural communities. The Applicant further asserts that non-disclosure is consistent with the legislative purpose of the New Hampshire Plant Protection Act of 1987, RSA 217-A:2:

Because there are no laws protecting any of our native plants, every year hundreds of our native plants are dug up and removed without permission from public and private property. Many of these are taken out-of-state and sold for profit. Therefore, the legislature finds and declares that:

I. For human needs and enjoyment, the interests of science, and the economy of the state, native plants and natural communities throughout this state should be protected and conserved; and that native plant numbers should be maintained and enhanced to insure their perpetuation as viable components of their ecosystems for the benefit of the people of New Hampshire.

II. Native species of plants within this state and the nation that are endangered, threatened, or otherwise reduced in number or may become so because of loss, modification, or severe curtailment of their habitats, or because of exploitation for commercial, scientific, educational, or private use, should be accorded protection as is necessary to maintain and enhance their numbers.

The Applicant agrees to disclose information relating to rare, threatened, and endangered native plants and natural communities to the parties subject to execution of a confidentiality

agreement.

Data regarding the status, location, and distribution of rare, threatened and endangered native plants, animal species and natural communities appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Rare, threatened and endangered native plants, as well as natural communities, are protected by a number of statutes. *See* RSA 217-A:2; RSA 212-A:3; and RSA 212-B:2. The State recognizes that said resources are “in jeopardy” and require protection by the State. *See id.* Considering the importance ascribed to rare, threatened and endangered native plants and natural communities by the Legislature, and the need to protect such resources, it follows that documentation identifying said resources and their location qualifies as confidential information under RSA 91-A:5.

The disclosure of rare, threatened and endangered native plants and natural communities is exempt under RSA 91-A. The public benefit of disclosing information relating to the status, location, and distribution of the rare, threatened and endangered native plants and natural communities is slight. Disclosure of this information would be detrimental to the public interest in protecting said resources. Appendix 37 to the Application is exempt from disclosure and will not be disclosed or made available to the public. If any party to this docket seeks disclosure of said documentation, they shall follow the procedures set forth below.

d. Future Documentation Containing Information About Archeological Resources, CEII, and Information About Native Plants and Natural Communities Within and Adjacent to the Project

The Applicant requests that it be allowed to treat as confidential any future documentation that will contain information about archeological resources, CEII, and information about native plants and natural communities within and adjacent to the site. The Applicant’s request is denied. A decision as to whether each particular document is exempt from

disclosure under RSA 91-A, can be made only after a thorough evaluation of the public interest in disclosure and the private interest in non-disclosure associated with such documents. Without knowing which documents and which particular information may need protection, the private and public interests associated with the documents and information they contain cannot be determined. The Applicant shall seek an order for protective treatment if it determines that some documents, in the future, will require protection from disclosure to the general public.

IV. TREATMENT OF CONFIDENTIAL INFORMATION

The following documentation and information contained in the Application shall be treated as confidential and shall not be disclosed to the public: (i) Appendix 8 - Desk Review - Archeological Sites on Abutting Properties (Madbury, Durham, Newington and Portsmouth, NH); (ii) Appendix 9 – Phase I-A Preliminary Archeological Survey (Madbury, Durham, Newington and Portsmouth, NH); (iii) Appendix 33 – Communications with NHDHR and USACE (redacted information only); (iv) Appendix 21 – Proposed Plan Application submitted to ISO New England; (v) Appendix 22 – New Hampshire 10 Year Reliability Project Proposed Plan Application Report; and (vi) Appendix 37 (Rare, Threatened, and Endangered Species and Exemplary Natural Community Report).

The confidential information contained in these documents will be available for review by the members of the Subcommittee without the need to sign a confidentiality agreement. Subcommittee members may review the confidential material at the offices of the Site Evaluation Committee without participation by the parties.

If a party to the proceeding seeks access to said documentation, they must execute a protective agreement in the form set forth and attached hereto. A true copy of the protective agreement shall be forwarded to the Administrator and to the Applicant. Only parties authorized

by the presiding officer, after receipt of the executed protective agreement, shall be afforded access to the confidential information by the Applicant. The parties shall not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket.

Unless otherwise ordered, the parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the parties shall destroy any notes referencing the confidential information and return all confidential information to the Applicant. Within sixty days thereafter, each party shall certify to the Applicant that said notes have been destroyed and all confidential information has been returned. The rights of the parties under this Order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order, which are subsequently granted by the presiding officer, will be handled with the same procedures detailed above.

SO ORDERED this twenty-second day of December, 2016.



Robert R. Scott, Presiding Officer
NH Site Evaluation Committee

EXHIBIT A

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for Certificate of Site and Facility

I, _____, hereby certify that I am a Party¹ to the above-captioned proceeding and in connection with my interests therein, I request access to the following Confidential Information from the Applicant _____.

I further certify that I have read the Protective Order issued by the Presiding Officer in the above-captioned matter, understand it, and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above cited Confidential Information until I have signed and delivered it to counsel for Public Service Company of New Hampshire d/b/a Eversource Energy.

Date: _____

Signature of Party

¹ A "Party" to the proceeding includes Counsel for the Public, and any individual or organization, or their attorney that has been granted intervenor status in the proceeding by the presiding officer pursuant to Site 202.11.