

**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**

July 31, 2018

**ORDER ON PENDING MOTIONS**

This order denies motions filed by the Town of Durham, the University of New Hampshire and Conservation Law Foundation.

**I. BACKGROUND**

On April 12, 2016, Public Service Company of New Hampshire d/b/a Eversource Energy (Applicant) applied to the Site Evaluation Committee (Committee) to construct a new 115kV electric transmission line approximately 12.9 miles in length between existing substations in Madbury and Portsmouth (Project.)

On February 28, 2018, New Hampshire Department of Environmental Services (DES) issued a final decision, recommending approval with specific conditions, on the parts of the Application related to a Wetlands permit, an Alteration of Terrain permit, 401 Water Quality Certificate, and a Shoreland permit. DES also recommended that the Subcommittee “consider having the Applicant” conduct: (i) a more thorough evaluation of the Horizontal Directional Drilling (HDD) method for installing cable under Little Bay; and (ii) a trial jet plow run (without cable) in Little Bay. Upon completion, the HDD evaluation would be submitted to the DES Watershed Management Bureau and to the Committee at least ninety (90) days prior to construction of the Project in Little Bay. DES would then review the results of the evaluation and provide the Applicant and the Committee with its comments.

As to the trial jet plow, DES recommended that the Subcommittee require the Applicant to submit: (i) a Jet Plow Trial Plan for DES approval at least ninety (90) days prior to conducting the trial; and (ii) a report summarizing the jet plow trial to DES and the Committee at least 90 days prior to proposed cable installation. DES would then review the report and provide its recommendations to the Applicant and the Committee.

On March 16, 2018, the Town of Durham (Durham) and the University of New Hampshire (UNH) filed a motion requesting that the Subcommittee hire its own HDD expert. The Applicant filed a partial objection.

On March 21, 2018, Conservation Law Foundation (CLF) filed a partially assented-to motion requesting that the Subcommittee address recommendations made by DES as part of the adjudicatory process. The Applicant objected.

On March 26, 2018, Counsel for the Public responded to the motions filed by Durham, UNH, and CLF.

At a hearing on May 29, 2018, the Subcommittee voted unanimously to deny the Motion to hire its own HDD expert and to deny the relief requested in CLF's Motion. This Order memorializes the Subcommittee's deliberations and decisions.

## **II. POSITIONS OF THE PARTIES**

Durham and UNH argue that, under RSA 162-H:10, V, the Subcommittee has the authority to "conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes" of RSA 162-H, and also authorizes the Subcommittee: (i) to employ consultants; and (ii) order the Applicant to bear the costs associated with such consultants. *See* RSA 162-H:10, V. Durham and UNH assert that the Subcommittee should hire an independent HDD consultant to ensure that: (i) full and timely consideration of environmental

consequences of the Project is provided; and (ii) the public receives full and complete disclosure of the plans for the Project. They also argue that hiring a consultant would be consistent with the legislative directive requiring the Subcommittee to give deference to terms and conditions proposed by the agency. Finally, Durham and UNH assert that evaluation of HDD, as alternative method of construction under the Little Bay, is in public interest. They suggest that an expert hired by the Subcommittee should be required to submit his/her testimony within deadlines that would allow the parties to conduct discovery and technical sessions.

In its motion, CLF separately asserts that an independent HDD evaluation, as recommended by DES, will provide essential information that could lead to the avoidance of ecological and water quality impacts in Little Bay and other portions of the Great Bay estuary. CLF argues that the Subcommittee should receive an HDD evaluation before closing the record so that it can provide full and timely consideration of the environmental impacts of the Project. CLF also argues that such an evaluation is required for full and complete disclosure of the Project's plans to the public. CLF supports Durham and UNH's request to hire an independent HDD expert to conduct an evaluation as recommended by DES. CLF further asserts that the Applicant should be required to conduct a jet plow trial run only if the HDD evaluation demonstrates that: (i) HDD is technically infeasible; or (ii) HDD would have greater environmental impacts than the jet plow method. If the HDD evaluation does not obviate the need to consider the jet plow method, then CLF requests that the Committee should then require a jet plow trial. CLF asserts that the parties should then be provided with the opportunity to conduct discovery and cross-examination addressing the results of the HDD evaluation and jet plow trial.

Counsel for the Public asserts that recommendations made by DES were not identified as permit conditions and, therefore, the Subcommittee is not required to accept the recommendations. Counsel for the Public argues, however, that the Subcommittee should give significant weight to DES' apparent concerns about the potential environmental impacts of the Project on the Little Bay and finding that an alternative method of construction may be less impactful. Counsel for the Public agrees that the feasibility, cost, benefits, and impact of a HDD alternative should be introduced into the record. Counsel for the Public also agrees that the parties should be allowed to conduct discovery and cross-examination to address this alternative. Counsel for the Public takes no position as to whether the Subcommittee should hire an independent HDD expert or should require the Applicant to provide additional information addressing a HDD alternative. Counsel for the Public also asserts that, currently, there is insufficient information about the costs, benefits and timing of a jet plow trial. Counsel for the Public concludes that, considering this lack of information, the Subcommittee is not in a position to make a reasonable decision about the jet plow trial and should defer such decision until the record is developed.

At the hearing, Counsel for the Public advised the Subcommittee that its expert consultants from ESS would be conducting further study about a HDD alternative and would present additional testimony by July 1, 2018. Counsel for the Public also cautioned that his consultants were not independently designing a HDD plan, but were simply undertaking a study of the feasibility and relative impacts. While ESS is not a horizontal drilling contractor, it has been involved in projects that included HDD.

The Applicant argues that DES actually approved construction of the Project using jet plow and hand jetting technologies in Little Bay. DES did not require the Applicant to conduct

HDD evaluation or a trial jet plow. It recommended only that the Subcommittee consider such measures as conditions to the Certificate. The Applicant asserts that the Subcommittee is not required to adopt any suggestions made by DES and should accept DES' final decision to approve construction of the Project, with the proposed conditions, and that approval is not conditioned upon the Applicant conducting an additional evaluation of HDD methods. The Applicant also argues that it is unnecessary to hire a HDD expert because the parties have addressed HDD alternatives in prefiled testimony.

At the hearing, the Applicant also explained that its experts would be providing additional testimony and reports regarding the efficacy of a HDD alternative.

The Applicant also argues that the requests made by Durham, UNH and CLF are untimely and approving the requests will disrupt the orderly conduct of the proceedings.

### **III. STANDARD OF REVIEW**

RSA 162-H:10, V, provides that the Committee and Counsel for the Public “shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter and may employ a consultant or consultants . . .” The costs of such studies and investigations are to be assessed to the Applicant in an amount approved by the Committee. RSA 162-H:10, V. The standard of review is whether the study or investigation is reasonable and “necessary or appropriate.” *Id.*

### **IV. ANALYSIS**

The pending motion filed by Durham and UNH essentially requests that the Subcommittee employ an expert to study and address an alternative method for construction of the portion of the Project that must traverse Little Bay. The Applicant has proposed using a jet plow technique and the movants want the Subcommittee to consider HDD. Presumably an

expert hired by the Subcommittee would provide it with additional information about the relative benefits and impacts of each method of submarine construction.

The parties have identified several experts with regard to the effects of the submarine cable construction aspect of the Project. The Applicant has proffered prefiled testimony from William Wall of LS Cable America, Marc Dodeman of Caldwell Marine International, LLC, and Ann Pembroke and Sarah Allen of Normandeau Associates. Counsel for the Public has retained and proffered testimony from Payson Whitney and Matthew Ladewig of the ESS Group (ESS). Durham and UNH have proffered joint testimony from Joseph Famely and Matthew Shultz of the Woods Hole Group, Stephen Jones from the University of New Hampshire, and Michael Dacey of Geosight Inc., as well as the testimony of the Durham Town Administrator, Todd Selig. Jason Baker, on behalf of his company, Fat Dog Shellfish Co., LLC, has also filed testimony.

What is reasonable, necessary or appropriate must be considered within the scope of the purpose of the siting statute. The statute recognizes that “it is in the public interest to maintain a balance among those potential significant impacts and benefits” that energy facilities may have. RSA 162-H:1. In achieving this goal, the statute requires the Committee to “ensure that the construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion.” *Id.* In pursuit of the statutory purpose, both the Subcommittee and Counsel for the Public have the statutory authority to engage consultants. *See* RSA 162-H: 10, V. Counsel for the Public has been appointed in this docket. His role is to “represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.” RSA 162-H:9, I. Counsel for the Public is authorized by the statute to retain consultants and

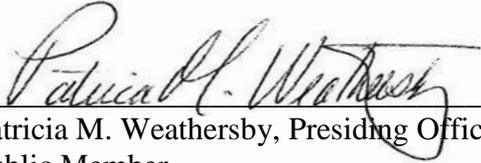
experts to undertake studies and investigations deemed necessary and appropriate to carry out the purposes of RSA 162-H. *See* RSA162-H:10, V.

Counsel for the Public has retained submarine construction consultants to address the issues raised by the recommendations made by DES and has obtained approval for additional funds. *See* Order on Assented-To Motion To Increase Budgets For Consultants (May 3, 2018.)

The task of the Subcommittee is to determine whether its own retention of an independent consultant to address HDD is necessary or appropriate. Hiring another submarine construction consultant is unnecessary and would be duplicative of the efforts of Counsel for the Public. There is no reason to question either the qualifications or the independence of Counsel for the Public's consultants. Moreover, after hearing all evidence on this subject, if the Subcommittee believes it requires more information on HDD and jet plow techniques, it is free to require the parties to produce such information or hire its own expert at such time. Therefore, the motion requesting that the Subcommittee now retain its own expert is denied.

The CLF motion to consider the recommendations made by DES as part of the adjudicatory process is also denied. The Applicant and Counsel for the Public are required to file further testimony and reports pertaining to the HDD recommendation made by DES by July 1, 2018. Thereafter the parties will have the opportunity for additional technical sessions. It is not necessary for the Subcommittee to adopt an extensive schedule pertaining to further HDD evaluation or a trial jet plow at this point in time. If the evidence at the adjudicative hearing warrants further HDD evaluation or a trial jet plow, the Subcommittee has the option to either deny the Application or otherwise condition the issuance of a Certificate to accommodate further study.

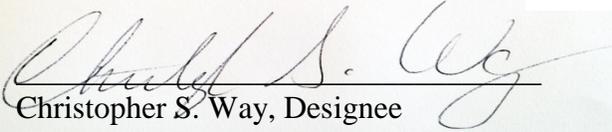
SO ORDERED this thirty-first day of July, 2018.



Patricia M. Weathersby, Presiding Officer  
Public Member



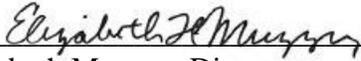
David Shulock, Designee  
Director of Legal Division  
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Christopher S. Way, Designee  
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Charles Schmidt, Designee  
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Susan V. Duprey  
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