

**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**

August 28, 2018

**ORDER ON MOTION TO SUSPEND**

The Town of Durham and the University of New Hampshire as joint intervenors (Durham/UNH) filed a motion entitled: Partially Assented-To Motion Requesting a Suspension of the Proceedings and that the Parties be Included in DES/Applicant Discussions (Motion). This order grants the Motion in part and denies the Motion in part. This order also strikes from the record the Memorandum in Support of Motion to Suspend filed by the Crowley Joyce Trust (CJT).

**I. BACKGROUND**

On April 12, 2016, the Public Service Company of New Hampshire d/b/a Eversource Energy applied 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).

On April 15, 2016, the Administrator of the Committee notified the Department of Environmental Service (DES) of the Application. On February 28, 2018, DES provided its final decision and recommendations pertaining to a Wetland Permit, Alteration of Terrain Permit, 401 Water Quality Certificate, and Shoreland Permit required for the Construction of the Project.

On April 20, 2018, a Notice of Adjudicative Hearing Dates was issued advising the

parties that the adjudicative hearing will begin on August 29, 2018.

On July 27, 2018, the Applicant filed the supplemental testimony of Ann Pembroke, Sarah Allen and Kurt Nelson (Supplemental Testimony). The Supplemental Testimony indicated that the Applicant disagreed with a number of conditions and recommendations issued by DES. The Supplemental Testimony indicated that the Applicant is negotiating with DES in an attempt to resolve disagreements. The Supplemental Testimony included a letter dated April 27, 2018 from Kurt Nelson to Collis Adams identifying the disputed recommendations and the Applicant's requested amendments (Adams Letter). The Applicant requested that the Subcommittee address the concerns that are not resolved as a result of negotiations with DES based on the record before the Subcommittee.

On August 10, 2018, the Presiding Officer requested that DES, within ten days of the request, to: (i) identify the concerns expressed by the Applicant that have been satisfied from DES' standpoint; (ii) advise the SEC whether the Applicant's proposal for the items that remain unresolved conform with the laws and rules applicable to the Project; and (iii) inform the Subcommittee whether the Applicant's proposals for resolution of its concerns are appropriate in light of DES's statutory responsibilities. The Presiding Officer invited DES to participate in the adjudicative hearing to inform the Subcommittee of any matter that will remain in dispute by the time of the hearing.

On August 17, 2018, DES requested that the Subcommittee allow it to respond to its request by September 7, 2018. On August 21, 2018, Durham/UNH filed the Motion. The Applicant objected. On August 28, 2018, CJT filed a document purporting to be a memorandum in support of the Motion.

## **II. POSITION OF THE PARTIES**

According to Durham/UNH, it requested at the technical session on July 10, 2018 that the Applicant provide all communication between the Applicant and DES following the issuance of the final DES decision. In response, on July 17, 2018, the Applicant produced the Adams Letter. The Adams Letter is dated April 27, 2018. Durham/UNH claims that its counsel telephoned Rene Pelletier at DES on July 18, 2018, and inquired about the Adams letter. Mr. Pelletier told counsel that he was unaware of the correspondence. Durham/UNH forwarded a copy of the Adams Letter to Mr. Pelletier but received no further communication from DES.

Durham/UNH argues that the Supplemental Testimony demonstrates that the Applicant has been involved in negotiations with DES in an attempt to resolve disagreements with the agency's recommendations. Following the disclosure on July 17, 2018, Durham/UNH complains that the Applicant failed to provide updated documentation relevant to the Applicant's communications with DES. Durham/UNH asserts that the Applicant's failure to update its response to the technical session's request is in violation of N.H. CODE ADMIN. RULES Site 202.12(m) requiring the parties to amend and supplement responses to data requests.

Durham/UNH also argues that the Applicant's communication with DES following the issuance of the final recommendations is inappropriate and is contrary to the procedural schedule and statutory framework that requires agencies with regulatory authorities to issue their final decisions within specific statutory deadlines.

Durham/UNH claims that the Applicant's failure to disclose its communication with DES in a timely manner and to allow the Durham/UNH to participate in such communication deprived Durham/UNH of their due process rights. They argue that any amendments to the final

recommendations will violate their due process rights because they will be precluded from addressing such amendments through discovery and cross-examination.

In addition to the alleged discovery violation, Durham/UNH complains that it will be disadvantaged by the DES request to extend its time to respond to the Presiding Officer's letter dated August 10, 2018. DES asked for an extension to reply by September 7, 2018. The adjudicative hearing begins on August 29, 2018. Durham/UNH argues that starting the hearing without a final response from DES puts it at a disadvantage and violates due process.

Durham/UNH moves that the Subcommittee: (i) require the Applicant to make discussions with DES open to the public or prohibit such discussions; (ii) require the Applicant to produce all documentation between the Applicant and DES including minutes of the meetings with DES; and (iii) suspend the adjudicative hearing scheduled to begin on August 29, 2018 pending resolution of issues with DES.

The Applicant objected. In its objection, the Applicant assures the Subcommittee that it is "committed to ensure that all parties have a full and fair opportunity to cross-examine its witnesses on any issue that may be affected by the modifications to the wetlands permit." The Applicant avers that the construction panel and the environmental panel of witnesses will be available after September 17, 2018 for cross-examination by all parties. The Applicant suggests that Counsel for the Public and the intervenors should reserve all questions relating to submarine construction in Little Bay until September 17, 2018, so that they have the benefit of DES's response during cross-examination.

The Applicant also objects by asserting that suspension of the proceeding would impair the orderly and prompt conduct of the proceeding. The Applicant claims that rescheduling the adjudicative hearing at this late date would be unfair and unreasonable as it increases the risk of

prolonged delay. The Applicant reports that it has voluntarily extended certain time frames in this docket in order to respond to the concerns raised by host communities and other stakeholders.

The Applicant also objects to that portion of the Motion seeking an order requiring that Durham/UNH and other Intervenors be permitted to attend any meetings between the Applicant and DES. The Applicant argues that the other parties have no inherent right to participate in meetings with DES and that the terms of intervention are limited to the proceeding before the Subcommittee. The Applicant underscores the fact that Durham/UNH has the same opportunity to communicate with DES. The Applicant claims that Durham/UNH has engaged in conversations and at least one meeting with DES without the Applicant's presence.

On August 28, 2018, CJT filed a memorandum purporting to support the Motion. The memorandum does not address the issues raised by the Motion but is, admittedly "in addition to the points made by" Durham/UNH.

The memorandum is improperly titled and improperly filed. While requesting the same relief as the motion, the memorandum is actually a new motion seeking to delay the proceedings for reasons that are entirely different from those asserted by Durham/UNH. The memorandum filed by CJT is struck from the record without prejudice to refile as a motion. This will allow the parties an opportunity to review the relief requested and the reasons therefore and cogently object or respond.

### **III. ANALYSIS**

#### **1. Request to Compel Production**

N.H. CODE ADMIN RULES, Site 202.12(m) requires the parties to "reasonably and promptly" supplement their responses to data requests if the parties obtain information which

they would have been required to provide in response to the requests if such information was available to them at the time of the responses. It is clear from the record that the Applicant responded and provided the Adams Letter in response to the following discovery request:

Provide all correspondence between Eversource and DES that apply to the development of monitoring criteria as referenced on page 10, lines 26-28, since the time that DES submitted its conditions for the Project to the SEC.

Motion, Att. A.

The Applicant is required to supplement its production if it is in possession of documents requested that were not available at the time of production and became subsequently available to the Applicant. The Applicant shall immediately supplement its production of documents and provide all documentation in its possession or under its control that is responsive to any data request and that has not been previously produced. All written communications with DES, memoranda of telephone conversations and minutes of meetings with DES shall also be immediately produced to the parties.

## **2. Negotiations with DES**

Durham/UNH requests the Subcommittee to order the Applicant to make discussions with DES open to the public or prohibit such discussions. “[A] tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation.” *Appeal of Campaign for Ratepayers’ Rights*, 162 N.H. 245, 250 (2011) (quotation and citation omitted).

The Committee is a tribunal with limited statutory jurisdiction. Nothing in RSA 162-H authorizes the Subcommittee to direct DES to conduct its hearings and/or meetings in any particular fashion. Durham/UNH is free to attend meetings that are conducted in public by DES. The Subcommittee has no authority to order DES to allow anyone to attend nonpublic meetings,

whether in person or by telephone.

Nothing in RSA 162-H prohibits the Applicant from continuing communications with DES following the issuance of DES's final recommendations. There is no reason or authority for the Subcommittee to prohibit the Applicant from discussions with DES conducted in compliance with DES rules. Durham/UNH's request is denied.

### **3. Request To Suspend**

The request to suspend the proceedings is not ripe. Durham/UNH's argument is based on the assumption that DES will amend its final recommendations and Durham/UNH will be deprived of the opportunity to meaningfully address such amendments. The Subcommittee has not received any indication that DES will, in fact, amend its recommendations. Without seeing the amendments, if any, the Subcommittee is not in a position to decide whether Durham/UNH will, in fact, be deprived of the opportunity to address them if the adjudicative hearings proceed as scheduled. Even if DES changes its conditions and/or recommendations, the Subcommittee will have the ability to reorder witnesses, add additional hearing dates, and make other orders that protect the interests of all parties to this proceeding. If found to be in the public interest, the Subcommittee will have the option to suspend the proceedings. However, suspending the proceedings at this time is not required by the record and would interfere with the orderly and prompt disposition of this matter.

### **IV. ORDER**

For the reasons set forth herein, the Motion is granted in part and denied in part.

It is hereby ordered that:

1. The Motion is granted in part and the Applicant shall immediately supplement its production of documents and provide all documentation in its possession or under its control that

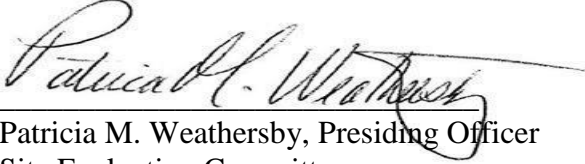
is responsive to any data request and that has not been previously produced. All written communications with DES, memoranda of telephone conversations and minutes of meetings with DES shall also be immediately produced to the parties.

2. The Motion is denied in part. The request that that the SEC require the Applicant and/or DES to allow all parties to attend meetings between DES and the Applicant is denied.

3. The Motion is further denied in part. The request to suspend the commencement of the proceedings is denied.

4. The Memorandum filed by the Crowley Joyce Trust is struck from the record without prejudice.

SO ORDERED this twenty-eighth day of August, 2018.

  
Patricia M. Weathersby, Presiding Officer  
Site Evaluation Committee