

STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-06

JOINT APPLICATION OF NORTHERN PASS TRANSMISSION LLC &  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
D/B/A EVERSOURCE ENERGY  
FOR A CERTIFICATE OF SITE AND FACILITY

**MCKENNA’S FINAL BRIEF IN OPPOSITION**

NOW COMES McKenna’s Purchase Unit Owners Association, (McKenna) by and through its attorneys, Wadleigh, Starr & Peters, P.L.L.C. and files the following Final Brief in Opposition to the Project stating as follows:

I. INTRODUCTION

McKenna is an upscale condominium association located at 84 Branch Turnpike in Concord, NH. It is in a private, quiet setting for 148 townhouses built in the late 80’s or early 90s. Mr. DeWan testified that McKenna “...certainly appeared to be a very attractive, well-kept neighborhood when I visited it.” Day 33, afternoon, page 68, line 11. Mr. Bowes testified that it is a “quiet, private setting....” Day 11, page 20, line 20-23. The median age of the owners is 65; their homes represent one of their biggest investments. ASHLAND-CONCORD ABTR 5 and 7.

PSNH has a 245 foot right of way (ROW) on the Eastern edge of the property. Currently, there is an existing vegetation/tree/berm barrier 40 feet tall between the homes and the ROW.

ASHLAND-CONCORD ABTR 5 and 7. Day 70, morning, page 148, lines 12-18.

There are 12 existing structures within the ROW supporting three lines. Three of the structures support an existing 115-kv line, are located 195 feet away from the edge of the ROW and are 75 feet tall. Four structures support an existing 115-kv line, are located 95 feet from the edge of the ROW and are 60 feet tall. Five of the structures support an existing distribution line, are located 45 feet from the edge of the ROW and are 45 feet tall.

The devastation to the ROW during the construction phase is the first exhibit shown below with construction pads in yellow and access roads in red. The preliminary plans for the dangerous new structures is the second exhibit:



Ex 200, Part 8, APP 67675 8/18/2017



Sheet 162 att 2 project maps 301-350

The new structure heights range from 70 feet to 125 feet. Sheet 162 att 2 project maps 301-350

The four closest new structures identified by PSNH as P145 (92-95) will be taller than any existing structure, ranging from 87.5 feet to 105 feet.

S 1-8 P145-92 88'; -93 88'; S 1-7 P145-94 95'; -95 105'.

At 88 feet tall, P145-92 and 93 will be only 75 feet from the edge of the ROW. S 1-8. There are homes in these locations that are right on the edge of the ROW:



The 3132 structures (140-143) will be even taller, ranging from 70 feet to 125 feet.

S 1-7T 3132-140 125'; S 1-8 3132-141 85'; -142 75'; -143 70'

The C189 structures (50-51) will be approximately 90 feet tall.

S 1-8 C189-50 87.5'; -51 90'.

The Project will fundamentally change the aesthetics and the real estate value of McKenna. And, PSNH has failed to demonstrate sufficient managerial responsibility to satisfy the requirements of RSA 162-H.

The Application must be DENIED.

## I. ARGUMENT

This section will analyze PSNH's legal obligation regarding the content of the application and its burden to prove that it has met all applicable criteria. The main focus is the failure to meet requirements regarding aesthetics, managerial ability and the economic effect on McKenna's real estate.

PSNH has the burden of proof by a preponderance of the evidence for facts that are sufficient to satisfy RSA 162-H:16. Site 202.19.

Site 202.28 Issuance or Denial of Certificate provides:

- (a) The committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, and

issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.

These requirements include:

IV. After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this chapter.

In order to issue a certificate, the committee shall find that:

(a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.

(b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.

(c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.

(d) [Repealed.]

(e) Issuance of a certificate will serve the public interest. (emphasis added)

An initial threshold is that PSNH's application must meet SEC criteria involving management, aesthetics and the value of real estate. Site 301.03; 301.05; 301.09.

**1. PSNH VIOLATED RSA 162-H by failing to consider the potential adverse effects of the project on private property, including McKenna.**

As a matter of statutory interpretation, the review of aesthetics includes whether there is an unreasonable adverse effect on private property. RSA 162-H, IV (c).

Site 301.16 requires that the SEC consider "aesthetics" in order to determine whether a proposed energy facility will serve the public interest.

Aesthetics is not confined to scenic resources.

Site 301.05 Effects on Aesthetics.

(a) Each application shall include a visual impact assessment of the proposed energy facility, prepared in a manner consistent with generally accepted professional standards by a professional trained or having experience in visual impact assessment procedures, regarding the effects of, and plans for avoiding,

minimizing, or mitigating potential adverse effects of, the proposed facility on aesthetics.

(b) The visual impact assessment shall contain the following components:

...

(2) A description of how the applicant identified and evaluated the scenic quality of the landscape and potential visual impacts; (emphasis added)

.... (emphasis added)

Site 102.10 “Area of potential visual impact” means a geographic area from which a proposed facility would be visible, and would result in potential visual impacts, subject to the areal limitations specified in Site 301.05(b)(4).

Site 102.44 “Scenic quality” means a reasonable person’s perception of the intrinsic beauty of landforms, water features, or vegetation in the landscape, as well as any visible human additions or alterations to the landscape.

Site 102.26 “Landscape” means the characteristic, visible features of an area including landforms, water forms, vegetation, historic and cultural features and all other objects and aspects of natural and human origin.

McKenna meets all the conditions for a visual impact assessment. PSNH failed to include this information in its application. Moreover, this failure is contrary to

Site 301.14 Criteria Relative to Findings of Unreasonable Adverse Effects.

(a) In determining whether a proposed energy facility will have an unreasonable adverse effect on aesthetics, the committee shall consider:

(1) The existing character of the area of potential visual impact;  
.... (emphasis added)

In addition to this basic requirement, the rules require more information if the area is a scenic resource. Site 301.05 (b) (1)(5)(6)(7). PSNH’s application and its aesthetics expert concentrated exclusively on scenic resources and failed to consider the adverse effects of the project on the aesthetics of McKenna.

On Day 33, in the afternoon at page 61-64, Mr. DeWan, PSNH’s aesthetics expert, testified that he did not consider potential adverse effects on private property and specifically did not consider potential adverse effects on McKenna in reaching his opinion that the Project will not have an unreasonable effect on aesthetics.

On page 76, Mr. DeWan was asked: ... would you agree with me that a transmission corridor that runs along the side of a condominium association has a potential adverse effect on the aesthetics of that property?

- A. I will grant you there's going to be an effect. But, A, we have not done a evaluation. We've done one site visit. It would not be professional for us to render an opinion without doing a complete Visual Impact Assessment using the methodology that we've outlined in our report.

Based on the failure of Mr. DeWan and PSNH to meet the requirements regarding the effect of aesthetics on private property, the application must be DENIED.

## **2. PSNH HAS NO CREDIBLE EVIDENCE REGARDING THE EFFECT OF THE PROJECT ON REAL ESTATE VALUES.**

Site 301.16 (b) provides that in determining whether a proposed energy facility will serve the public interest, the committee shall consider...private property.

Pursuant to Site 301.09,  
each application shall include ...the applicant's estimate of the effects of the construction and operation of the facility on:

- (b) The economy of the region, including an assessment of:
  - ...
  - (4) The effect of the proposed facility on real estate values in the affected communities;

In its application, PSNH provided a tax card for McKenna that placed its value at zero. Tax maps and assessor's cards, Concord 8172 (July 11, 2016). This error was identified in cross examination but has never been corrected.

Ms. Kleindienst testified that McKenna is worth \$27 million. She also testified that the Project will reduce property values in McKenna by 30-50%, from \$55,000 to \$93,000. ASHLAND-CONCORD ABTR 5 and 7. Day 70, morning, page 134.

In fact, PSNH's real estate expert, Mr. Chalmers, failed to consider McKenna at all in his 1700-page report and his initial pre-filed testimony. It is telling that he also did not acknowledge that

he was ignoring condominiums. CONCORD ABTR 6. He testified that "...he may have heard [McKenna] discussed but I didn't know much about it [when he filed his initial testimony]." The only reasonable interpretation is that he made a mistake in ignoring condominiums. His after-the-fact suggestion that he consciously decided to ignore condominiums is not credible.

He did acknowledge that some single family homes located within 100 feet of the ROW with additional visibility of the HVTL could experience a negative economic consequence. He refused to apply this theory to the 50 units in McKenna located within 100 feet and, in some cases, within two feet of the ROW. The view of the HVTL will be greatly increased if the Project is allowed. Day 70, morning, page 148 seriatim. Ms. Kleindienst testified that there is no reasonable distinction between a single family home and a townhome. Day 70, morning, page 142-143.

In his failed effort to correct his mistake, Chalmers created a totally different methodology. Day 25, morning, page 114 lines 6-20. He admitted the basic principle that real estate values must be determined by a comparison with properties not effected by a HVTL. Day 25, morning, page 81 line 4 to page 82 line 7. Instead of fixing his error, he compounded it by using the sale of properties in McKenna as comparables in support of his conclusion. Under cross examination, he recognized that the owners of a condominium association own an undifferentiated interest in the entire property. Day 25 morning, page 114, line 21 to page 116, line 1. Thus, the HVTL has an effect on the entire property. He conceded that the effect of a HVTL is generally negative. Day 25, morning, page 77 line 15 to page 78 line 5. He acknowledged that there were similar condominium properties in Concord not encumbered by the HVTL but he did not consider those properties as comparables. Day 25, morning, page 118, line 18 to page 119, line 21. Therefore, sales in McKenna are not a reliable basis to determine the economic consequences of the Project on real estate. As a result, the SEC must give no weight to Chalmers testimony regarding McKenna.

Another reason his testimony is not credible is the method he used to measure the distance from the units to the edge of the ROW. He had already conceded that an HVTL within 100 feet of a residence could have a negative effect. He provided measurements of the distance from the units



in McKenna to the ROW. It was not until his cross examination that he revealed that the measurements were taken from the front of the units, the furthest distance from the ROW. Day 25, morning, page 105, line 9 to page 111, line 14. Chalmers created a document in which structures that were actually within 2 feet of the ROW were over 40 feet from it. His testimony is fatally flawed.

Absent that testimony and with the erroneous tax card, PSNH has failed to meet the requirements for an application and failed to meet its burden of proof regarding the effect of the project on real estate values. The application must be DENIED.

### **3. PSNH has failed to demonstrate managerial capacity.**

PSNH must prove that it has the managerial capacity to ensure a successful Project.

Site 301.04 Financial, Technical and Managerial Capability. Each application shall include a detailed description of the applicant's financial, technical, and managerial capability to construct and operate the proposed energy facility, as follows:

(c) Managerial information shall include:

- (1) A description of the applicant's management structure for the construction and operation of the proposed facility, including an organizational chart for the applicant;
- (2) A description of the qualifications of the applicant and its executive personnel to manage the construction and operation of the proposed facility; and
- (3) To the extent the applicant plans to rely on contractors or consultants for the construction and operation of the proposed facility, a description of the experience and qualifications of the contractors and consultants, if known at the time of application.

Site 301.13 Criteria Relative to Findings of Financial, Technical, and Managerial Capability.

(c) In determining whether an applicant has the managerial capability to construct and operate the proposed facility, the committee shall consider:

- (1) The applicant's experience in managing the construction and operation of energy facilities similar to the proposed facility;  
.... (emphasis added)

It is submitted that PSNH has failed to manage the process for this facility, a failure that is more telling than any analysis of management of a similar facility. Three examples will suffice.



PSNH has taken the position that it has solicited input from McKenna throughout the process and “made significant design enhancements in and around McKenna ... to mitigate impacts.” Quinlan, Day 1, page 173, line 20. The evidence reveals that this is not true. Ms. Kleindienst testified that PSNH never provided “specific plans,” “final plans” or, in some cases “anything in writing.” Day 70, page 169, line 21 to page 173, line 14; page 181-182. To drive the point home, PSNH Ex. 154 memorializes a meeting at McKenna on November 18, 2016. In the margin, Ms. Kleindienst summarized the meeting, “Nothing Promised.” This statement is consistent with PSNH’s failure to manage the process.

McKenna requested that a structure, C189-51 be moved approximately five feet so that it is not on its property. PSNH agreed to “evaluate” the request. In a letter dated August 25, 2017 and included in the docket, PSNH shifted responsibility for this request to McKenna, tasking it with negotiating with the abutting landowner. Day 70, morning, page 138-140.

PSNH has not provided McKenna with any final plans for the ROW. The construction panel agreed that the new structures will need foundations. But, geotech sampling has not been done, therefore, the final foundation design has not been completed. Bradstreet, Day 11, page 48, line 13 to page 49. Mr. Bowes was asked whether there would be blasting in the ROW. He answered “It’s impossible to tell.” Day 11, page 67, lines 2-13. Similarly, Mr. Bowes testified that he had a general sense of the clearing that will happen in the ROW. He was asked to produce a plan that shows what and when there will be clearing. Day 11, page 63-64. No such plan has been produced. Day 70, Page 169.

The plans produced in this proceeding by PSNH are marked “preliminary design” and “Exact structure heights and placement are subject to change based on detailed designs.” Day 11, page 73. Ms. Kleindienst testified that no final plans have been provided. Day 70, Page 169. Succinctly, PSNH has asked for approval to blast and construct higher, additional structures in McKenna but there is “Nothing promised.”

PSNH’s plan is disconnected from reality.

WHEREFORE, McKenna respectfully request that the Site Evaluation Committee:

- a. Deny Applicants' Petition and
- b. Grant such further relief as it deems appropriate.

Respectfully Submitted,

McKenna's Purchase Unit Owners Association  
By its Attorneys

Wadleigh, Starr & Peters, P.L.L.C.

Dated: January 12, 2018

By: -s-  
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Certificate of Service

I hereby certify that on this day, a copy of the foregoing was sent by electronic mail or U.S. Mail, postage prepaid, to persons named on the Service List of this docket.

-s-  
Stephen J. Judge, Esquire