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November 10, 2015

Via Hand-Delivery and Electronic Mail

Martin P. Honigberg, Chairman
New Hampshire Site Evaluation Committee
21 Fruit Street, Suite 10
Concord, NH 03301

RE: Application of Northern Pass Transmission LLC for a Certificate for Site and Facility for the Northern Pass Transmission Project before the Site Evaluation Committee; Docket 2015-06

Dear Chairman Honigberg and Members of the Site Evaluation Committee:

The New England Power Generators Association (NEPGA) appreciates the opportunity to present its comments on the application by Northern Pass Transmission LLC's (NTP) application before the Site Evaluation Committee (SEC).¹ NEPGA is the trade association representing competitive electric generating companies in New England. NEPGA's member companies represent approximately 25,000 megawatts (MW), or 80% of all generating capacity in the region. In New Hampshire, NEPGA represents nearly 66% or roughly 2,700 MW of generation capacity located in 10 towns and cities from a diverse portfolio of fuels and technologies. NEPGA's members employ approximately 800 workers in the state and contribute nearly \$46 million in state and local taxes. NEPGA's mission is to support competitive wholesale electricity markets in

¹ The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

New England. We believe that open markets guided by stable public policies are the best means to provide reliable and competitively-priced electricity for consumers. A sensible, market-based approach furthers economic development, jobs and balanced environmental policy for the region.

As you are aware, on October 19, 2015, NPT filed an application with the SEC for a Certificate of Site and Facility to develop a 192-mile transmission project with associated access and interconnection infrastructure. NEPGA takes no position for or against energy infrastructure projects. NEPGA strongly supports competitively-developed electricity supplies. As an association, NEPGA works to develop competitive wholesale electricity markets that facilitate competitive entry to provide reliable, environmentally-responsible and competitively-priced power. NEPGA similarly has no position for or against NPT.

NEPGA, however, has consistently expressed significant public policy concerns regarding this project stemming from the relationship between Eversource and its competitive energy affiliate, NPT. These issues raise concerns about potential undue preference and a slanted playing-field harming competitive outcomes for the electricity marketplace and consumers. This is particularly true when a competitive energy affiliate may use property, services or receive other benefits provided by utility ratepayers for utility purposes. With respect to the instant application, the relationship between the utility and a competitive energy affiliate calls into question whether NPT is in a position to demonstrate site control – specifically, whether NPT has complied with statutory and regulatory obligations related to the proposed use of its affiliate's property. This is a necessary question as the SEC considers the completeness of the NPT application and

whether it is ripe for further consideration.

Upon review of NPT's application, and in an effort to help establish an initial record on this matter, NEPGA provides the attached Memorandum of Law (Foley Hoag Memorandum) focusing on threshold issues related to whether NPT has demonstrated that it has appropriate access to and control of its proposed right-of-way and has properly addressed any and all relevant rules regarding commercial affiliate relationships. NEPGA asserts that NPT's application fails to demonstrate site control over the lands necessary for the development of the transmission facilities as required by statute and SEC regulations. *See, e.g.*, RSA 162-H:7 and N.H. Admin. Rule Site 301.03. Both RSA 162-H and N.H. Admin. Rule Site 301.03 establish clear standards for determining whether an application is complete, including requiring that an applicant hold the necessary site control rights to each aspect of the project. *See, e.g.*, N.H. Admin. Rule Site 301.03(b)(6). As set forth more fully in the Foley Hoag Memorandum, the application submitted by NPT fails to meet these requirements. NEPGA, therefore, respectfully requests that, pursuant to N.H. Admin. Rule Site 301.05, the Chairperson of the SEC determine that NPT's application in the above-referenced docket is incomplete.

As outlined in great detail in the Foley Hoag Memorandum, there can be no doubt that NPT is a competitive energy affiliate of Eversource as defined in N.H. Admin. Rule PUC 2102.03. As such, it is subject to the requirements set forth in N.H. Admin. Rules Chapter PUC 2100. For example, the nondiscrimination and separation provisions contained in that chapter apply to any agreement between PSNH and NPT, including but not limited to any agreement that would grant NPT the right to utilize or acquire interests in PSNH property, including rights-of-way. The rules also govern how

such assets transferred between affiliates are valued. *See, e.g.*, N.H. Admin. Rule PUC 2105.09. This requirement is an important protection for PSNH's ratepayers with respect to improper affiliate conduct and has substantial implications with respect to the goal of operating transparent and non-discriminatory markets. Despite more than five years of project development, NPT has still failed to resolve this critical issue of site control as it relates to its transmission lines, whether those line are installed above or below ground.

Moreover, in addition to extensive regulatory requirements that would govern any such agreements between NPT and Eversource, such agreements would also be subject to RSA 366. That statute expressly requires that, as affiliates, any agreement between PSNH-NPT, including ones relating to the use of rights-of-way, be filed with the PUC. *See, e.g.*, RSA 366:1. Although Eversource has very recently released a copy of a compensation agreement with NPT, the PUC has not issued any order that such an agreement satisfies either companies' requirements under RSA 366 or compliance with the affiliate transactions rules, especially those rules addressing non-discrimination and valuation of property transferred between affiliate entities. Failure to comply with these and other statutory and regulatory requirements further demonstrates that NPT's application is substantively deficient, and must be rejected as incomplete. It would be highly inefficient for the SEC to undertake a formal review of NPT's application until these affiliate requirements are met, because NPT cannot and will not be able to demonstrate site control until and unless these issues have been resolved.

Because NPT has failed to show compliance with the rules and regulations governing affiliate transactions, particularly as they relate to easements and rights-of-

way, the SEC should declare the application incomplete and avoid expending valuable agency time and resources on a project that may or may not ultimately be able to secure site control and meet its numerous and fundamental statutory and regulatory obligations.² Accordingly, for the reasons set forth above and those set forth more fully in the Foley Hoag Memorandum, we urge the SEC to deem the application incomplete.

Sincerely,



Dan Dolan
President

Encl.

cc: T. Burack
J. Rose
R. Scott
K. Bailey
E. Muzzey
V. Sheehan
P. Weathersby
R. Hawk
R. Whitaker
B. Buonamano
P. Roth
M. Iacopino
P. Monroe

² Moreover, although not discussed in the Foley Hoag Memorandum, site control is necessary for additional permits required by NPT for the development of this project, including but not limited to, Alteration of Terrain, Water Quality Certification, Wetlands and Shoreland permits. The permit applications submitted by NPT fail to demonstrate that NPT has the property interests in the lands necessary to support them. Failure to demonstrate such site control for these permits, by necessity, constitutes a lack of site control for the purposes of SEC review, since permit completeness is incorporated into the SEC's completeness determination under N.H Admin. Rule Site 301.03(d)(2). Failing to meet these requirements, therefore, constitutes an additional basis for an incompleteness determination.

Memo

Date: November 5, 2015

To: Dan Dolan, President, NEPGA

From: Mary Beth Gentleman
Tad Heuer

Regarding: NPT/PSNH NHSEC Application: Completeness Deficiencies

OVERVIEW

This memorandum summarizes two deficiencies we have identified in the Application for a Certificate of Site and Facility (“Application”) filed on October 19, 2015 by Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) with the New Hampshire Site Evaluation Committee (“SEC”).¹ The first is with respect to the new Affiliate Transaction Rules of the New Hampshire Public Utilities Commission (“PUC”), Chapter Puc 2100 (the “Rules”), and their applicability to the relationship between PSNH and NPT. The second pertains to the Application’s failure to make a threshold demonstration that PSNH or NPT currently have or will have adequate interests in the proposed right of way for NPT to construct the project as proposed.

As to the first deficiency, PSNH and NPT are “affiliates” as that term is defined by New Hampshire statute and rules. Based on our review of the Rules, we believe that, at minimum, the nondiscrimination, separation, and regulatory oversight provisions apply to any agreement between PSNH and NPT that would grant NPT the right to utilize or acquire interests in PSNH rights-of-way.^{2,3} We conclude that NPT’s application to the SEC must

¹ Joint Application of Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy, Docket No. 2015-06 (Oct. 19, 2015).

² The term “rights-of-way” as used herein includes both rights-of-way owed in fee by PSNH and easements granted to PSNH by other fee owners.

³ While we note the existence of parallel Federal Energy Regulatory Commission regulations governing certain utility-affiliate transactions, this memorandum does not address such regulations. The subject matter at issue here is not preempted by FERC. The question is instead how may an affiliate utilize or acquire retail distribution assets, specifically rights-of-way, and under what circumstances — exactly the issue the New Hampshire affiliate rules are intended to address.

include a demonstration of compliance with the Rules in order for the application to be deemed complete.

As to the second deficiency, it is our conclusion that in order to demonstrate that the requisite adequate site control necessary to commence an SEC proceeding, a detailed understanding of the specific rights granted to (or withheld from) PSNH in each individual easement along the proposed right-of-way — as well as the rights or approvals NPT may be required to obtain in order to underground portions of the right-of-way below public ways — is necessary. We conclude that the Application must include such a demonstration of adequate site control in order for the application to be deemed complete.

I. NPT IS A COMPETITIVE AFFILIATE OF PSNH

On May 22, 2015, the PUC adopted revised Affiliate Transactions Rules, N.H. Admin. Rules, Puc 2100 *et seq.*, which establish the standards of conduct “governing the relationship between a utility and its affiliates transacting business in New Hampshire,” *id.* at 2101.01.⁴ After receiving conditional approval from the Joint Legislative Committee on Administrative Rules, the PUC accepted the conditional changes and finalized the Rules on July 28, 2015.⁵ These Rules provide further detail and clarification regarding the existing statutory provisions governing affiliates of utilities (including but not limited to RSA 366).

PSNH is a subsidiary of Eversource Energy⁶, and operates in New Hampshire as a public utility as defined by RSA 362:2. NPT is owned by Eversource Energy Transmission Ventures, LLC, which is a wholly owned subsidiary of Eversource Energy.⁷ Thus, PSNH and NPT are “affiliates” as that term is defined in RSA 366.1, and as that term is applied under the Rules.

PSNH has itself expressly affirmed that NPT is its affiliate. In responding to inquiries of the PUC in Docket IR-14-196, PSNH acknowledged that “Northern Pass and PSNH are affiliated entities under the definition of RSA 366:1 II and Rule Puc 2102.01,” and that “as a

⁴ Minutes of the New Hampshire Public Utilities Commission (May 22, 2015), at <http://www.puc.state.nh.us/Regulatory/Agendas-Minutes/min052215.pdf>.

⁵ Letter of Martin P. Honigberg to Hon. Carol M. McGuire (July 28, 2015).

⁶ See Eversource Energy, Press Release (Feb. 2, 2015), (“All of the company's subsidiaries, including . . . Public Service Company of New Hampshire (PSNH) . . . will immediately adopt and operate under the Eversource brand.”), available at <http://www.psnhnews.com/content/eversource>; Letter of Robert A. Bersak to Debra A. Howland, New Hampshire Public Utilities Commission (Mar. 3, 2015) (noting that Eversource Energy is a “d/b/a” and that “the legal names of the operating companies [including] Public Service Company of New Hampshire . . . will remain unchanged.”) available at <http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202015-03-03%20NU%20REBRANDING%20TO%20EVERSOURCE.PDF>.

⁷ The Northern Pass, *Company Profile*, at <http://northernpass.us/company-profile.htm> (last accessed Aug. 23, 2015) (“All of the Northern Pass transmission lines and facilities in New Hampshire will be owned by Northern Pass Transmission LLC—a New Hampshire limited liability company owned by Eversource Energy Transmission Ventures, LLC, which is a wholly owned subsidiary of Eversource Energy.”).

result, the following substantive portions of PUC Chapter 2100 appear to apply to the relationship, between PSNH and Northern Pass: 2103.01, 2103.02, 2105.01 and 2105.09.”⁸ Similarly, in the PSNH *Powerline Change Application*, filed in 2013 with the United States Forest Service, PSNH stated that “[a]s described in this Application, Northern Pass Transmission LLC, a PSNH affiliate, has proposed to construct the Northern Pass Transmission Line within the Current WMNF PSNH ROW” (emphasis supplied).⁹

In a letter of October 16, 2012, PSNH issued a “Right-of-Way Access Authorization” to all property owners on PSNH rights-of-way, granting temporary “permission to Northern Pass Transmission, LLC . . . to access and enter upon PSNH’s right-of-way corridor on your property established by easement,” noting that NPT “is planning the potential routing and siting of a new electric power transmission line within PSNH’s right-of-way.”¹⁰ This “Site Access and Entry Agreement” between PSNH and NPT was executed on April 28, 2010, and amended on at least six subsequent occasions, although disclosed publicly only on March 17, 2014 in response to an investigation by the PUC.¹¹ Finally, on October 19, 2015, PSNH submitted to the PUC a petition for approval of a lease agreement between PSNH and NPT (“Lease Agreement”). Under the Lease Agreement, NPT would lease certain right-of-way real estate interests held by PSNH.¹² The fact that PSNH found it necessary (as a matter of law) to affirmatively authorize access across its easements to NPT and engage in a formal lease agreement indicates clearly that NPT is a distinct legal entity from PSNH.

Based on these written statements and acts by PSNH, we conclude that NPT and PSNH are affiliates as that term is defined in RSA 366.1, and as that term is applied in the Rules. In specific, under the Rules, NPT is a “competitive affiliate.” The Rules define a “competitive affiliate” as “any affiliate of a utility that is engaged in the sale or marketing of products or services on a competitive basis and includes any competitive energy affiliate,” *id.* at 2102.03 (emphasis supplied). A “competitive energy affiliate,” in turn, is defined as “any competitive affiliate of a utility that is engaged in . . . the development of an energy related generation, transmission, or distribution project . . .” *Id.* at 2102.04 (emphasis supplied). Notably, the prior version of Puc 2102.04 defined Competitive Energy Affiliate more

⁸ Report of Steven E. Mullen to Debra A. Howland, New Hampshire Public Utilities Commission (Nov. 5, 2013), at 8, *available at* <http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202013-11-05%20STAFF%20REPORT.PDF>

⁹ PSNH Powerline Change Application, Special Use Permits WTM0759 and WTM0771(Nov. 4, 2013) at 7, *available at* <http://northernpass.us/assets/permits-and-approvals/PSNH-Powerline-Change-Application-Final.PDF>.

¹⁰ Letter of PSNH, Right-of-Way Access Authorization, (Oct. 16, 2012), *at* http://media.northernpasseis.us/media/row_authorization_letter_10_16_2012.pdf.

¹¹ Letter of Robert A. Bersak to Debra A. Howland, New Hampshire Public Utilities Commission (Mar. 17, 2014) and Attachments, *available at* <http://www.puc.state.nh.us/Regulatory/Docketbk/2014/14-196/LETTERS-MEMOS-TARIFFS/14-196%202014-03-17%20PSNH%20RESPONSE%20TO%20SEC%20LTR%20REQUEST%20FOR%20INFORMATION.PDF>

¹² Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC, Docket No. DE 15-464 (Oct. 19, 2015), *available at* <http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-464.html>.

narrowly, only as “any competitive affiliate that is engaged in the sale or marketing of natural gas, electricity, or energy-related services on a competitive basis.” The 2015 amendments expressly include an affiliate engaged in development of a transmission project. On that basis we conclude that transactions between PSNH and NPT are subject to all provisions of the Rules applicable to dealings between a utility¹³ and a competitive affiliate.

II. COMPLIANCE WITH THE RULES IS A PREREQUISITE TO NPT’S USE OF RIGHTS-OF-WAY OF PSNH

NPT and PSNH have formally represented both in their public statements and to permitting authorities that NPT intends to locate a substantial portion of its proposed transmission facilities in rights-of-way of PSNH. According to NPT, 68.5 miles of the project will be installed in existing PSNH rights-of-way.¹⁴ In addition, as noted above, NPT obtained temporary access to PSNH’s rights-of-way in order to evaluate the viability of utilizing them for the construction of the NPT project, and has entered into the Lease Agreement with PSNH for long-term access to those rights-of-way.

However, before NPT can use those rights-of-way, both entities must comply fully with RSA 366 and the Rules. The Rules prohibit utilities from, among other things, taking any action “either directly or indirectly through an affiliate to circumvent these rules or RSA 366.” *Id.* at 2101.04(c). The Rules impose a number of important restrictions and process requirements on utility-affiliate transactions, including specific requirements for Nondiscrimination (Puc 2103), Separation (Puc 2105), and Regulatory Oversight (2106).

While PSNH and NPT have submitted their petition for approval of the Lease Agreement to the PUC “pursuant to RSA 374:30, Puc 202.01(a), and Puc 203.06,”¹⁵ that petition makes no reference to — much less a demonstration of compliance with — the affiliate transaction rules. In the absence of demonstrated compliance with the affiliate rules, the petition before the PUC is incomplete, and should thus not be relied upon by the SEC as an indication that NPT either has (or is likely to obtain) access to the PSNH right-of-way. In the absence of a demonstration of compliance with the PUC’s Rules in this regard, we contend that any consideration by the SEC of the Joint Application is premature.

A. Nondiscrimination

One of the key principles articulated under the Rules is that of nondiscrimination. That principle is consistent with RSA 378:10 which provides that “No public utility shall make or give any undue or unreasonable preference or advantage to any person or

¹³ Under the Rules, a “utility” is a “public utility” as defined in RSA 362:2 that provides natural gas or electric distribution services subject to the commission’s jurisdiction.” As PSNH provides electric distribution services subject to the commission’s jurisdiction, it is a “utility” under the Rules.

¹⁴ See Executive Summary of Joint Application at http://blog.northernpass.us/wp-content/uploads/2015/10/NP_SEC_EXEC_SUMMARY_PRINT.pdf (last accessed Oct. 27, 2015).

¹⁵ Petition for Approval of Lease Agreement, at 1.

corporation, or to any locality, or to any particular description of service in any respect whatever or subject any particular person or corporation or locality, or any particular description of service, to any undue or unreasonable prejudice or disadvantage in any respect whatever.”

Puc 2103.02 expressly prohibits “preferences to competitive affiliates regarding products and services, distribution system information, and customer information.” In specific, the Rules require utilities to “provide its products and services, including but not limited to terms and conditions, pricing, and timing, to competitive affiliates, and to non-affiliated competitors in a non-discriminatory manner” (emphasis supplied). *Id.* at 2103.02(c). Similarly, the Rules require that if utilities provide their competitive energy affiliates with “any product or service,” the utilities “shall make the same products or services available to non-affiliated energy competitors in a non-discriminatory manner.” *Id.* at 2103.04. Turning to distribution facilities, Puc 2103.05 mandates that utilities “shall provide competitive energy affiliates and non-affiliated energy competitors access to its distribution facilities on the same terms and conditions,” *id.* at 2103.05(a). Finally, the Rules prohibit a utility from giving “preference of any kind for regulated utility services to its competitive energy affiliates or their customers.” *Id.* at 2103.07(b).

In order for NPT to file permit applications with the SEC and other agencies to locate its facilities on PSNH rights-of-way, PSNH would need to determine from an engineering, environmental and real estate perspective whether the colocation of NPT’s lines and PSNH’s lines in the same rights-of-way would be feasible. PSNH has conducted such analyses, which constitute a “service” provided to NPT.¹⁶ Even if that service was paid for by NPT, payment alone would not cure the obvious preference PSNH has given to its competitive affiliate. This is because, to our knowledge, that service has not been made available or provided to other transmission developers, pipeline companies or other industries that develop lateral facilities. Indeed, PSNH’s own appraiser declared in his prefiled testimony before the PUC that “there is no demonstrated demand that extends beyond Northern Pass Transmission LLC interest in this corridor” (emphasis supplied), without providing any indication or evidence that such interest had ever been solicited.¹⁷ In addition to any other requirements the PUC might impose, the cure for this exercise of preference by PSNH would be for PSNH to, at minimum, make the same services available to non-affiliated energy competitors. We believe that the absence of such a demonstration of compliance makes the review of the Joint Application at the SEC premature.

¹⁶ See, e.g., Petition for Approval of Lease Agreement, at 3 (“Prior to reaching agreement on the terms of the Lease, the PSNH Transmission Engineering Department conducted an extensive review of the proposed location and design of the NPT Line within the PSNH rights of way” and noting that “the review and approval of these matters was a coordinated process between PSNH and NPT engineers and designers. . . .” (emphasis supplied)).

¹⁷ Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, at 13, *available at* <http://www.puc.nh.gov/Regulatory/Docketbk/2015/15-464.html>.

B. Separation

In promulgating Puc 2105, the PUC draws upon its statutory authority to adopt rules governing “[s]tandards and procedures for matters related to the proper administration of RSA 366 relative to utility relations with affiliates.” RSA 365:8, VIII. In specific, the Rules require that in the event that a transfer of goods, services, or assets between a utility and an affiliate is not otherwise prohibited outright, such transfers are subject to certain detailed “pricing provisions.” *Id.* at 2105.09. Specifically, a utility may “sell, lease, or otherwise transfer to an affiliate an asset” or “provide services to the affiliate” only if the “price charged the affiliate is the highest of the [a] net book value, [b] fully loaded cost, and [c] the current market value,” as applicable. *Id.* at 2105.09(a)(1)-(2).

In order for NPT to locate its transmission facilities in rights-of-way of PSNH, it would need to acquire sufficient interests in those rights-of-way to finance and construct the project. Based on the facts cited above, we understand that a significant portion of the rights-of-way and easements that NPT intends to use are assets of PSNH. The assets involved are exceptionally unique: nearly two hundred linear miles of easements or other rights-of-way access across five counties, traversing private property, public property, and a National Forest.¹⁸ For PSNH to transfer an interest in those assets to its affiliate NTP, PSNH must abide by Puc 2105.09(a)(1)-(2) which requires that it charge the highest of net book value, fully loaded cost and the current market value. Importantly, Puc 2105.7 provides that “[f]or purposes of this section, the market value of any asset sold, leased or otherwise transferred, shall be determined based on the highest price that the asset could have reasonably realized after an open and competitive sale.”¹⁹

A prerequisite for complying with Puc 2105.09(a)(1)-(2) and 2105.7 is a determination of net book value, fully loaded cost and current market value for the interests that NPT seeks to acquire. While PSNH has provided an appraisal of what it asserts is the current market value of the PSNH right-of-way, we are not aware of any demonstration from PSNH that the interests in the PSNH rights-of-way required for the NPT project have been valued on all three parameters required by the Rules, or that PSNH intends to charge NPT (as required) at the highest of the three values.

Furthermore, while the Rules do not explicitly require that PSNH conduct an open and competitive sale or auction, an actual open and competitive sale process may be necessary in order for PSNH to overcome the presumption of preference for its affiliate that a sole-source transaction — such as that proposed by the Lease Agreement — would create.

¹⁸ See generally Draft EIS.

¹⁹ In the context of valuing public utility assets generally, the Court has observed that there are five general appraisal techniques: “original cost less depreciation (rate base or net book), comparable sales, cost of alternative facilities, capitalized earnings, and reproduction cost less depreciation,” conceding that “all of the enumerated approaches are valid, but all also have weaknesses.” *Appeal of Pennichuck Water Works, Inc.*, 160 N.H. 18, 38 (2010). However, the case of valuation of utility property in a proposed transaction between a utility and its affiliate, the more specific requirements of Puc 2105.09(a)(1) would apply.

Under these unique circumstances, any other substitute methodology used by PSNH may generate the basis for regulatory and judicial challenges under the affiliate transaction rules.²⁰

C. Regulatory Oversight

In order for the PUC to ensure that utilities and their affiliates are complying with the Rules, each utility is required to file a compliance plan with the PUC that identifies “all affiliates with which the utility has a contract or arrangement” subject to the Rules or RSA 366, as well as “copies of all written contracts and arrangements [and] detailed descriptions of all unwritten contracts and arrangements.” Puc 2106.01(d). The PUC retains the authority to investigate on its own motion, whether a “utility is in compliance with these [R]ules,” *id.* at 2106.05(a).

Per Puc 2105.09(a)(1), the transfer of interests in PSNH’s rights-of-way to NPT can only be made upon a filing of a contract or contracts with the PUC with a demonstration that NPT is being charged the higher of the net book value, fully loaded cost, or current market value of the asset. Absent a compliant PUC filing, any representation by NPT to the SEC that it has or will have the right to such interests would be premature, and should be deemed sufficient grounds to stay SEC proceedings until the PUC has either taken appropriate action or a filing compliant with the affiliate regulations is made with the PUC.

III. NPT MUST DEMONSTRATE REASONABLE LIKELIHOOD OF ACTUAL SITE CONTROL

It is our understanding that there are approximately 700 separate parcels involved in the right-of-way that NPT proposes to utilize for this project, including several hundred individually-negotiated easements. It is our opinion that without a detailed understanding of the specific rights granted to (or withheld from) PSNH in each individual easement along the proposed right-of-way, it is impossible to know whether NPT has the requisite adequate site control under the SEC regulations to construct what it wishes to construct, in the places where NPT wishes to construct it. It is also our understanding that while significant portions of the proposed right-of-way involves undergrounding below municipal ways, it is not evident that NPT has demonstrated a reasonable expectation of obtaining the necessary approvals to do so.

The burden should be on NPT, not on the individual landowners, to demonstrate prospectively that the easement and access rights NPT wishes to utilize are sufficient for its intended purposes. We believe that it is premature for the SEC to open this proceeding until at least a threshold demonstration has been made by NPT.

²⁰ A competitive auction process would not, however, extinguish the remaining legal question of whether PSNH can, under New Hampshire law, transfer material interests in land it acquired by eminent domain or otherwise, to entities that are not “utilities” as defined in RSA 362:2 and are not providing distribution service to the customers of PSNH.

A. Easements and Takings

While the Lease Agreement recites book and page numbers of hundreds of recorded rights,²¹ neither the lease nor any of the thousand-plus pages of supporting documentation provide any evidence that PSNH has sufficient rights in each property in the proposed right-of-way to enable the project NPT proposes to construct. Indeed, the PSNH appraiser concedes that it did not have such information available when it conducted its appraisal:

No legal description [of the parcels appraised] was provided or is available as of the writing of this report. Sample easement descriptions were provided by sample deeds from the assemblage of the existing easement corridor; excerpts of the easement rights obtained were previously shown.²²

It is clear from our review of even a small sample of PSNH easements that while the language used therein is occasionally boilerplate, it is frequently bespoke – indicating a negotiated position between the landowner and PSNH that reflects the specifics of the property in question and the extent of the rights that the landowner was willing to grant. For instance, we are aware of an easement from the 1950s that contains language granting PSNH and its successors the right to “erect, repair, maintain, rebuild, operate, patrol and remove electric transmission and distribution lines consisting of suitable and sufficient poles and towers, with suitable foundations, together with wires strung upon and extending between the same, for the transmission of electric current” (emphasis supplied) In sharp contrast, we are aware of a more recent easement from the mid-2000s granting PSNH the right to “construct, repair, rebuild, inspect, operate, patrol, maintain and remove overhead and underground lines and facilities . . .” (emphasis supplied).

As a sophisticated party bargaining with individual landowners for the property rights it wished to acquire, PSNH is presumed to have negotiated for (and more importantly, paid for, either via contract or through eminent domain), only the specific property rights it desired to obtain. The fact that one PSNH easement grants the express right to construct underground lines, while another PSNH easement refers only to “poles and towers,” indicates that PSNH was not only well aware of how to draft an easement to acquire undergrounding rights if so desired, but that PSNH recognized the legal importance of doing so expressly if it wished to acquire those rights.²³ It will thus be imperative for NPT to demonstrate that, at all points where they wish to underground the project or build it above ground, they have the legal right to do so. Similarly, it is imperative that NPT demonstrate that its proposed

²¹ Lease Agreement (Oct. 19, 2015), Appendix A.

²² Attachment to Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, Volume I, Northern Pass Transmission Project (Nov. 14, 2014) at 10; *see also* Prefiled Testimony of Robert P. LaPorte, Jr., DE 15-464, at 8 (noting that “[w]e also reviewed a sampling of the subject deeds to ascertain the property rights that are the subject of our appraisal.”).

²³ *See* Order Denying in Part and Granting in Part segTEL’s Motion for Rehearing, DT 08-146 (June 4, 2010) (crediting PSNH’s contention that where easement language is clear, “the Commission did not need to resort to extrinsic evidence in order to determine the reasonable meaning of the words used in the easement deeds.”).

activity over every parcel complies with conditions of the individual easements that it wishes to utilize — whether those easements limit the number of towers allowed on a property, the height of the towers allowed, the right to allow for transmission as well as distribution, or myriad other factors.

We also believe it likely that certain easements or fee transfers were not negotiated voluntarily, but were instead taken by PSNH via eminent domain. Because just compensation is required to be paid for property rights taken by eminent domain, *Appeal of Pennichuck Water Works*, 160 N.H. 18 (2010), we expect that PSNH — acting in the best interest of its ratepayers — would take only the minimum easement or fee necessary to accomplish its desired purpose, in order to minimize the expenditure of ratepayer funds necessary to acquire that easement or fee. *See Daly v. State*, 150 N.H. 277, 279 (2003) (just compensation in an eminent domain taking reflects “the price which in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy, taking into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining.”). To the extent that such takings limited or prohibited features of the project that NPT proposes, it is essential that the SEC have a clear understanding of the scope and terms of those takings at the outset of these proceedings.²⁴

B. Municipal Rights of Way and Trees

A separate but related issue is that NPT proposes to underground approximately 60.5 miles of the right-of-way below public ways in certain locations.²⁵ NPT claims that its authority to do so derives from RSA 231:160, which governs the placement of utilities on public highways.²⁶ To the extent NPT believes that its legal authority to underground under public ways derives from the public nature of the roadway, we note that there are myriad different types of way, road, and highway in New Hampshire, each laid out pursuant to different rules and each consisting of different rights.²⁷ The rights to the subsurface below the public way are often owned by the abutting landowners to the center-line of the way; as the New Hampshire Supreme Court has held, the presumption is that “conveyance of property bounded by a street or highway normally conveys title to the center of the boundary street.”²⁸

Although the municipality may have the authority to provide a grant of location under certain circumstances, the mere existence of a public way does not necessarily authorize such undergrounding.²⁹ Furthermore, in order to obtain such, an application for a permit or license must be made to the municipality (RSA 231:161), which has six months to “make a

²⁴ There is also an open legal question as to whether the 2012 amendments to RSA 371:1 (prohibiting public utilities from utilizing eminent domain for the construction or operation of a electric transmission projects ineligible for regional cost allocation) should be interpreted to prohibit PSNH from transferring certain recently-acquired easement rights to NPT. Without an understanding of the dates of each easements involved and the manner in which those easements were first acquired by PSNH, it is impossible for the SEC to know whether any easements within the proposed right-of-way would be potentially precluded by law from being transferred to NPT.

return of their proceedings and their decision thereon” (RSA 231:164). It is unclear whether NPT has commenced such proceedings, much less obtained approvals. In order for the Application to be deemed complete, we believe it must contain a demonstration that PSNH or NPT has the legal authority to underground below the public way in each such location where this issue is relevant and that where necessary, such authority can be lawfully assigned, leased or otherwise transferred to NPT.

Similarly, to the extent that NPT seeks to underground underneath a municipal right-of-way, in the event such undergrounding will adversely impact certain shade or ornamental trees located within the right-of-way, NPT would be required to comply with, among other statutory provisions, RSA 231:172, which requires “consent of the owner of the land on which such tree grows” prior to “erecting or maintaining poles or structures or installing wires or other attachments or appurtenances thereto.” Without owner consent, a public hearing before the board of Selectmen is required, who “shall determine whether the cutting, pruning, or removal is necessary.” In the absence of a comprehensive assessment of whether the proposed NPT route would adversely impact trees specifically protected by statute, an indication of the consent of the owners of those trees for such adverse impact, and (absent such consent) an indication of approval of the local Board of Selectmen for such adverse impact, the Application lacks a sufficient demonstration of either PSNH’s or NPT’s control of the proposed right-of-way.

Moreover, should the proposed right-of-way impact a scenic road as designated by RSA 231:157-158, the statute specifically bars any action by a utility or other party to “erect, install or maintain poles, conduits, cables, wires, pipes or other structures” that involves “the cutting, damage or removal of trees” in excess of fifteen inches in circumference or “the tearing down or destruction of stone walls” without the prior written consent of the planning board, following a public hearing. Each municipality is also authorized to “impose provisions with respect to such [scenic] road which are different from or in addition to those set forth” in RSA 231:158, including “protections for trees smaller than those described” therein. NPT

²⁵ Filing Letter for Joint Application at 1 (“Approximately 60.5 miles will be located underground in public roads in three separate segments.”).

²⁶ Joint Application at 6. The Joint Application also asserts that RSA 162 give “the SEC has exclusive authority to grant permission to an energy utility to utilize locally-maintained highways,” yet simultaneously acknowledges that “the authority to erect electric transmission lines and underground cables in state and local highways is codified at RSA 231:160” — which reserves this authority to municipal authorities. Joint Application at 82-83. The lack of clarity in NPT’s legal position in this regard appears to result from (among other things) a misreading of *Public Service Company of New Hampshire v. Town of Hampton*, 120 N.H. 68 (1980), and is a further reason for the SEC to deem the Application incomplete.

²⁷ See Paul J. Alfano, *Roads Revisited: Creation and Termination of Highways in New Hampshire*, N.H. BAR J. (Fall 2005), available at <https://www.nhbar.org/publications/display-journal-issue.asp?id=308>.

²⁸ *Duchesnaye v. Silva*, 118 N.H. 728, 732 (1978).

²⁹ In the event the municipality controls only the passage easement in the highway and the abutting landowner retains the fee under the highway to the center line, there is an open legal question as to whether the exercise of RSA 231:160 by the municipality without consent of the abutter effects a taking (and thus either requires just compensation and/or is barred entirely under these circumstances due to the 2012 amendments to RSA 371:1).

does not identify the locally-designated scenic roads that would be impacted by the proposed right-of-way. Instead, NPT complains that “there does not appear to be a master list of all locally-designated scenic roads in the State of New Hampshire,”³⁰ without making any effort to identify the scenic roads that it does know about that would be impacted, acknowledge its own burden to determine whether its proposed route impacts scenic roads absent the convenience of a “master list,” or explain the approvals that it may be required to obtain to construct the proposed route in such areas. In the absence of a comprehensive assessment of whether the proposed NPT route would adversely impact protected trees or existing stone walls along designated scenic roads, as well as an indication of the approval of the local planning board in each such instance, the Application is deficient.

IV. IMPLICATIONS FOR NH SEC APPLICATION REVIEW PROCESS

Our review of the newly-revised Rules has led us to conclude that NPT has no reasonable basis at this time for representing to the SEC that it has acquired or will acquire the necessary interests in PSNH’s rights-of-way to build the project if approved by the SEC. Under SEC rules (N.H. Admin. Rules Site 300), an application to the SEC must indicate “whether the applicant is the owner or lessee of the site or facility or has some legal or business relationship to it,” *id.* at 301.03(b)(6).³¹ The application must also contain information identifying all “state government agencies having jurisdiction . . . to regulate any aspect of the construction or operation of the proposed facility,” as well as “documentation that demonstrates compliance with the application requirements of such agencies.” *Id.* at 301.03(d)(1)-(2). If NPT is to utilize PSNH’s rights-of-way, the Rules require that any agreement between NPT and PSNH meet the substantive requirement of non-discrimination and separation (including pricing) under the PUC Rules. Where such a petition is pending before the PUC (and on its face makes no reference to the compliance with the affiliate Rules) NPT cannot demonstrate its “legal or business relationship” to the proposed right-of-way, rendering any SEC application premature.

Moreover, even if the SEC had the discretion to open such a proceeding, it would seem contradictory to basic principles of administrative law for the SEC to begin a lengthy and time-consuming process of granting a site assignment under RSA 162-H and N.H. Admin. Rules Site 100 et seq., only to subsequently learn that the site assignment was premature (or indeed, impossible) due to a lack of actual site control over the locus subject to the application, whether due to the inability of NPT to acquire such control from PSNH, or due to the fact that the rights to be obtained are insufficient to allow NPT to construct what it wishes to construct. Indeed, if a non-affiliate of PSNH applied to the SEC for a site assignment to site transmission lines within PSNH’s rights-of-way in the absence of such a

³⁰ Appendix 41, *Review of Land Use and Local, Regional and State Planning*, at 23.

³¹ Should the new SEC rules be approved in their current form, those rules will apply to this application, and will further require “[e]vidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site.” Proposed Admin. Rules Site 301.03(c)(6). While we believe for the reasons articulated above that the Joint Application fails to comply with even the existing SEC rules pertaining to site control, the clarifications provided by the proposed rules make the lack of such compliance even more pronounced.

demonstration, such an application would properly be rejected as premature. Under the SEC's regulations, there is no basis for providing preferential treatment to affiliates of PSNH. Indeed, affiliates and non-affiliates should be treated exactly the same as they are required to be under the PUC's Rules.

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