

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

No. 2015-06

Joint Application of Northern Pass Transmission, LLC and Public Service Company
of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility

**OBJECTION OF COUNSEL FOR THE PUBLIC TO
APPLICANTS' REQUEST FOR PARTIAL WAIVERS
UNDER THE NEWLY ADOPTED SEC RULES**

Counsel for the Public, by his attorneys, the office of the Attorney General and
Primmer, Piper, Eggleston & Cramer, P.C., hereby objects to the Applicants' Request
For Partial Waivers Under the Newly Adopted SEC Rules (the "Waiver Request").

Counsel for the Public responds as follows:

1. On December 7, 2015, the Committee determined after public
deliberation that Northern Pass's Joint Application was administratively complete
pursuant to RSA 162-H:7, VI. A written order memorializing this decision was
published December 18, 2015 (the "Completeness Order").

2. After the hearing but prior to the Completeness Order, new rules
became effective on December 16, 2015. Among other things, the new rules required
applicants to make certain additional disclosures in their application submittals.

3. Pursuant to RSA 162-H:10, VII, the new rules apply to the Joint
Applicants because the adjudicative hearing had not commenced. In addition, "if the
rules require the submission of additional information by an applicant, such applicant
shall be afforded a reasonable opportunity to provide that information while the
processing of the application continues." *Id.*

4. On December 28, 2015, the Administrator informed counsel to the Joint Applicants that the new rules had been adopted and requested to be informed as to whether “any additional information is required in order to comply with the rules” and the amount of time needed to make the additional submittal.

5. On January 15, 2016, counsel for the Joint Applicants informed the Committee that there would be additional submittals and that they would be delivered by March 15, 2016.

6. On February 26, 2016, the Joint Applicants delivered thumb drives containing 833 MB of new information including over 400 pages of new maps, and 391 pages of new visual impacts analysis.

7. In their Waiver Request, the Joint Applicants ask to be excused from complying with several sections of the new rules concerning mapping and identification of property lines and structures, wetlands and surface waters resources, and historic sites, Site 301.03(c), arguing that they are onerous and excessively burdensome.¹

8. In addition, at various points in the Waiver Request, the Joint Applicants argue that compliance with 301.03(c) would not add any additional pertinent information and that the issues about which the rules are concerned are not consequential in these proceedings. *See* Waiver Request, pp. 5-6.

¹They have also sought waiver of the mapping and identification requirements for an alternative route that they assert will not be used. If the Joint Applicants agree that they will not, without submitting a new application, attempt to seek certification of the alternative route, Counsel for the Public does not object to that waiver request.

9. The Joint Applicants also seek waiver of the rules requiring a description of the decommissioning plan, Site 301.08(c)(2). Their argument here is that a general requirement for decommissioning provided in their Transmission Services Agreement with Hydro Quebec should be adequate and the rules do not apply because this is not a generating facility. The Joint Applicants also suggest that the decommissioning activities required under the new rules are impractical because it is uncommon for high voltage lines to be completely removed.

10. Counsel for the Public believes that the Waiver Request is unwarranted under the circumstances and should be denied.

A. The Joint Applicants Have Not Demonstrated That The Mapping And Resource Identification Requirements Are Onerous Or Inapplicable.

Under Site 202.15 the Sub-Committee may waive application of a particular rule if it is in the public interest and will not disrupt the orderly and efficient resolution of the case. The rule provides that the public interest is determined by considering whether compliance would be “onerous” or inapplicable “given the circumstances of the affected person” or if the purpose of the rule can be satisfied by an alternative method proposed. The Joint Applicants have not shown how the mapping and resource identification requirements are onerous to them as they have not specified what the extent of those requirements are, nor how, given their substantial resources, compliance is in some way especially challenging or unfair. The plain meaning of the term “onerous” is “involving an amount of effort and

difficulty that is oppressively burdensome.” Oxford American English Dictionary²; *see also* Black’s Law Dictionary (5th ed.) (“unreasonably burdensome or one-sided”).

The Joint Applicants are proposing a project that they state will cost them approximately \$1.6 billion. If compliance with the Sub-Committee’s mapping and resource identification rules is burdensome, it is just a consequence of a 192 mile long project. It appears that the burden they object to is in printing the appropriate sized maps with satisfactory resolution to show the features required. *See* Waiver Request at 6 (requiring compliance will require applicants to “completely re-work the size and scale of their Project Maps”). The Joint Applicants have not suggested that this is technically unfeasible or oppressively expensive. Instead, this appears to be an effort to limit the review of the project’s effects by the public and the Sub-Committee. *See* Waiver Request at 6-7 (limiting information shifts focus to those resources that the Joint Applicants believe are the ones “expected to be impacted.”) This is especially troubling when one takes into account the second argument made which is the claim that it will not be necessary to map or inventory out beyond 1/4 mile because the Applicants believe that there will be no effects beyond that boundary. The Joint Applicants assume the conclusion of the entire process and miss the point of the rule — to provide information so that the Sub-Committee can ultimately make impacts determinations based upon the evidence with the entirety of the information required by the rules.

² http://www.oxforddictionaries.com/us/definition/american_english/onerous.

With respect to historic resources the Joint Applicants cite to their Area of Potential Effect of 1 mile used with the section 106 work and then argue that this justifies limiting historic resource identification to 1/4 mile. Neither the Sub-Committee nor most of the other parties in this case are consulting parties to the nascent section 106 process. The Joint Applicants have introduced testimony in *this* case presumably to obtain a determination from the Sub-Committee that the project will not have an unreasonable adverse impact on historic sites. *See* RSA 162-H:16, IV(c). It would seem then that the mapping and identification of those resources to the same 1 mile distance they employed in the APE *at a minimum*³ should be part of their basic case on that issue here.

B. The Joint Applicants Should Not Be Allowed To Avoid The Requirement Of Producing A Compliant Decommissioning Plan.

The Joint Applicants do not claim that the project will in fact exist in perpetuity. While it may exist for a very long time, it would not be correct to accept that the transmission lines and towers will always and forever exist or that there is no set of circumstances where the project may become technically or economically obsolete. As a result, the Joint Applicants cannot credibly claim that the decommissioning plan requirement is inapplicable. They try, but the comparison to wind energy projects is inapt, unsupported by any evidence, and is at odds with the plain and unambiguous language of the rule. *See* Site 301.08(c) (decommissioning plans as specified required “For all energy facilities”). The drafters of the rules knew

³ Counsel for the Public does not at this time concede that 1 mile is the limitation of the actual potential impacts to historic sites by the project and expressly reserves the right to assert that a greater distance may be appropriate with respect to particular resources.

how to make requirements that were particularly applicable to wind projects, and not others, when it wanted to — decommissioning was one of those occasions. *See* Site 301.08(a)(8) (requirements for decommissioning of wind facilities). Clearly, the legislature meant what it said that “all energy facilities” must have appropriate decommissioning plans. Instead, the thrust of the argument appears to be that “the Transmission Services Agreement provides a satisfactory alternative” for seeing to appropriate decommissioning. The Joint Applicants also argue that requiring decommissioning as the rule mandates would be more harmful environmentally. However, there is nothing in the waiver rule that suggests such a problem, if there is one, would constitute a basis for a waiver. There is no evidence to support this idea and if there were, it may be the subject of the adjudicative hearing and should not simply be assumed as true because it is asserted in the Waiver Request.

Critically, the Waiver Request on the basis of an alternative to a decommissioning plan does not comply with the letter or intent of the waiver rule. A waiver could be granted if the “purpose of the rule would be satisfied by an alternative method proposed.” Site 202.15(b)(2).

Decommissioning plans required by Site 301.08(c)(2) must:

- (i) be prepared by an independent qualified person;
- (ii) describe sufficient and secure funding to implement it;
- (iii) provide financial assurances in the form of irrevocable securities by third parties or an unconditional parent guaranty;
- (iv) provide that all transformers be removed off-site; and
- (v) provide for the removal of underground infrastructure.

The Joint Applicants instead urge the acceptance of their alternative proposal which relies upon the broad terms of the TSA which defaults to unspecified “Applicable Law.” The general commitments under the TSA, however, meet none of the five requirements specified in the rules. By asking the Committee to allow them to wait until decommissioning actually occurs before providing a plan for decommissioning (a plan to be developed by their “own highly trained and experienced personnel” —unidentified and likely not yet born) the Joint Applicants are not proposing an alternative that would satisfy the purpose of the rule, they are asking to propose no actual decommissioning plan at all. A non-plan that meets none of the criteria cannot be said to satisfy the purpose of the decommissioning plan rule.

On its face, the decommissioning plan rule’s purpose is to provide solid financial assurance, determined by a disinterested party, *before* the project is constructed. The reason for setting it up this way is fairly obvious — if the Joint Applicants determine to abandon the project or become insolvent (not unheard of for one of the Joint Applicants, *see In re Public Serv. Co. of N.H.*, 114 B.R. 820 (Bankr. D.N.H. 1990) (confirming chapter 11 bankruptcy plan of reorganization for PSNH)) it may be too late to create and fund a meaningful decommissioning plan for such a massive project. The Joint Applicants have not brought Hydro Quebec into the case and there is no evidence in the record at the moment about its financial affairs. The unmistakable purpose of the decommissioning plan requirement is to secure that the people of New Hampshire are not left exposed to the many uncertainties that no doubt lie between the date a certificate may be granted and the possibly distant future, including what the people of Quebec might lawfully do with their Crown-owned

entity. *Accord Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (Act of State Doctrine precluded United States courts from inquiring into the validity of the public acts that a recognized foreign sovereign power committed within its own territory).⁴ While almost certainly the Joint Applicants will take all necessary steps to protect their interests in dealing with Hydro Quebec, the purpose of the Sub-Committee's rule requiring a funded decommissioning plan is not met by leaving the people of New Hampshire to enforce the TSA in the event of abandonment of the facility and non-cooperation by Hydro Quebec. Nothing in the Joint Applicants' "wait-and-see" alternative proposal provides the kind of knowledge and certainty that are the embodied purposes of the rule. As a result, the Joint Applicants have not met their burden for a waiver and the Waiver Request must be denied.

Counsel for the Public prays that the Sub-Committee deny the Waiver Request, and grant such other and further relief as may be just.

⁴ The inherent and tremendous difficulties in recovering on foreign sovereign debt cannot be overstated. See *NML Capital, Ltd. v. Republic of Argentina*, 2016 U.S. Dist. LEXIS 26355 (S.D.N.Y. Mar. 2, 2016) (describing litigation to recover on Argentine government bonds defaulted in 1994 and as yet unpaid); see also MacDonald-Laurier Institute, *Provincial Solvency and Federal Obligations* (2012) at 5 (finding a probability of debt default by Quebec over 30 years to be 1 in 3).

Respectfully submitted,

COUNSEL FOR THE PUBLIC

By his attorneys





Dated: March 7, 2016

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Dated: March 7, 2016

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Certificate of Service

March 7, 2016

I hereby certify that a copy of the foregoing Objection of Counsel for the Public to Applicants' Request For Partial Waivers Under the Newly Adopted SEC Rules has been forwarded this day to persons named on the Service List in this docket.

/s/ Peter C.L. Roth
Peter C.L. Roth