

MCLANE MIDDLETON

BARRY NEEDLEMAN
Direct Dial: 603.230.4407
Email: barry.needleman@mclane.com
11 South Main Street, Suite 500
Concord, NH 03301
T 603.226.0400
F 603.230.4448

Via Electronic Mail/Hand Delivery

April 7, 2016


New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

Re: NH Site Evaluation Committee Docket No. 2015-06: Joint Application of Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) for a Certificate of Site and Facility for Construction of a New High Voltage Transmission Line in New Hampshire

Dear Ms. Monroe:

Enclosed for filing in the above-referenced docket, please find an original and one copy of the Applicants’ Response and Objection to Various Requests from Interveners For Review of Their Status as Determined by the Presiding Officer in the March 18, 2016 Order.

Sincerely,



Barry Needleman

Enclosures

cc: Distribution List

McLane Middleton, Professional Association
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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**

**APPLICANTS' RESPONSE AND OBJECTION TO VARIOUS REQUESTS FROM
INTERVENERS FOR REVIEW OF THEIR STATUS AS DETERMINED BY THE
PRESIDING OFFICER IN THE MARCH 18, 2016 ORDER**

I. Introduction

1. On March 18, 2016, the Presiding Officer issued an Order on Petitions to Intervene (Order) pursuant to RSA 162-H:4, V. Since March 18, 2016 various individuals, groups, towns and other organizations have filed motions requesting review or rehearing of the Order. In addition, a number of individuals submitted late-filed petitions to intervene in this proceeding.

2. As a general matter, Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") (collectively the "Applicants") believe the March 18, 2016 Order was a well-conceived effort to start managing this complex case efficiently. The Order balances the competing due process interests of all the parties and takes measured steps to help ensure that the Application can be processed in a timely manner while allowing interveners to participate in a way that will help to avoid interference with the orderly conduct of the proceedings. That said, the Applicants are quite concerned that the number of parties now admitted pursuant to the Order is at the outer bounds of what can be accommodated and still ensure the timely and orderly conduct of the proceedings. Even with these numbers, it will be a challenge.

3. The March 18, 2016 Order granted the intervention of a majority of the petitioners. In certain instances, where appropriate, the Presiding Officer grouped similarly situated interveners and/or limited their participation pursuant to RSA 541-A:32, III and Site 202.11(d). The Presiding Officer explained, “More than 160 motions to intervene were filed, many of which were on behalf of multiple entities ...[I]t is simply not possible, however, to administer a proceeding of this nature with that number of individual, separate parties.” Order at 47. A number of petitioners have filed pleadings with the Committee objecting to the limitations and/or groupings and/or request review of their Petition to Intervene.

4. The Applicants believe that the Presiding Officer properly exercised his discretion under RSA 541-A:32, III. The establishment of 22 parties in addition to the Applicants and Counsel for the Public, sorted among individuals, businesses, towns, and non-governmental organizations, including the recognition of geographic distinctions, fairly represents the interests of all the parties while assuring the prompt and orderly conduct of the proceeding. The Applicants therefore urge the Committee to deny all the requests for review or rehearing.

II. Standard of Review

5. RSA 162-H:4, V provides that “Any party aggrieved by a decision on a petition to intervene may within 10 calendar days request that the committee review such decision.” RSA 162-H:4, V. In this case, the parties aggrieved by the Order take two forms: (1) those parties that were granted intervention but object to the limitations imposed on their participation and (2) those parties that were denied intervention in this proceeding.

6. The Presiding Officer is acting as the trier of fact in this situation and has been delegated the authority to decide the issues. The Committee is therefore sitting as an appellate reviewer. In such circumstances, the factual findings of the Presiding Officer are treated

deferentially and overturned only when there is an error of law or there is substantial evidence that the result is unjust or unreasonable. *See* RSA 541:13.

7. Alternatively, the review may be treated as a motion for rehearing, in which case the purpose of rehearing “is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision” *Damais v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted when the Committee finds “good reason” or “good cause” has been demonstrated. *See O’Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). “A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome.” *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 at 4 (Sept. 8, 2015).

8. In either case, review of the Presiding Officer’s decision should be limited insofar as there is clear and demonstrable error and not result in the Committee simply substituting its judgment for that of the Presiding Officer’s.

III. Combinations of Interveners

9. A number of interveners whose petitions to intervene were granted now request review of the Presiding Officer’s grouping and/or limiting of their intervention. Some interveners fundamentally challenge the authority of the Presiding Officer to group/limit their participation, arguing that such conditions deny them due process. Some also argue that grouping interveners compromises the ethical duties of counsel representing those parties.

10. Both the New Hampshire statutes and rules governing intervention in administrative proceedings grant broad discretion to the Presiding Officer to impose conditions upon interveners’ participation in SEC proceedings including, but not restricted to, limiting the

issues pertaining to a particular intervener, limiting the procedures in which a particular intervener may participate, or combining interveners. *See* RSA 541-A:32, III; Site 202.11(d). The presiding officer may impose such conditions to the extent that they are not “so extensive as to prevent the intervener from protecting the interest which formed the basis of the intervention.” RSA 541-A:32, IV.

11. Moreover, both the New Hampshire Supreme Court and the New Hampshire Public Utilities Commission have recognized that due process, in the context of administrative proceedings, “is a ‘flexible’ concept varying with the nature of the governmental and private interests that are implicated.” *See Kearsarge Telephone Co.*, Order No. 24,802, at 5 (2007); *See also State v. Mwangi*, 161 N.H. 699, 703 (2011) (“[t]he requirements of due process are flexible and call for such procedural protections as the particular situation demands.”). “[W]here issues of fact are presented for resolution by an administrative agency, due process requires a meaningful opportunity to be heard.” *Appeal of Londonderry Neighborhood Coalition*, 145 N.H. 201, 205 (2000). Presumably, the requesting interveners assert that the Presiding Officer’s conditions will deny them the meaningful opportunity to be heard.

12. In *Mathews v. Eldridge* the United States Supreme Court held that, when reviewing administrative procedures, courts will generally balance three factors:

[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) (citations omitted); *see also Appeal of Office of Consumer Advocate*, 148 N.H. 134, 138 (2002) (applying same standard in context of both New Hampshire and federal constitutions).

13. In this case, prior to the Order, over 160 different petitions to intervene were filed with the SEC, many of which, as the Order illustrates, were “able to identify direct and substantial interests in this matter and have a right to intervene.” Order at 47. While these interveners have a right to participate in the proceeding, the Applicants also have due process rights that include ensuring the proceeding occurs in a timely, orderly and efficient manner. The Presiding Officer was tasked with balancing these interests. The Applicants believe that, in light of the case law cited herein governing due process in these types of proceedings, the Presiding Officer accomplished this task. The groupings and limitations imposed on the interveners in the Order are fair given the circumstances and represent a proper balance of the factors governing due process analysis.

14. With regard to the claim that grouping interveners somehow compromises the ethical responsibilities of an attorney in representing their client, the Applicants disagree. As a threshold matter, interveners have been grouped in other proceedings before the PUC and SEC, and their attorneys have had no problem complying with their ethical responsibilities.

15. The New Hampshire Rules of Professional Conduct (Rules) are also instructive on this issue: “Together with the law and other regulations governing lawyers, the Rules establish the boundaries of permissible and impermissible lawyer *conduct*.” Rules of Professional Conduct, *Statement of Purpose* (emphasis supplied). The Rules are not a means of subverting otherwise sound and constitutional provisions of law. On the contrary, the Rules work in harmony with the law, including the type of SEC administrative practice at issue here.¹

16. As the docket stands today, in addition to the Applicants and Counsel for the Public, there will be more than 20 separate individuals and groups who will be participating as

¹ See Model Rules of Professional Conduct, Preamble and Scope at ¶ 15 (“The Rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general.”).

parties to the proceeding. The Applicants believe that administering the proceeding even with this number of parties will prove challenging for the Committee and represents the upper limit of a workable number of parties. Therefore, the Applicants urge the Committee to deny all requests regarding the conditions and groupings of the interveners.

IV. Limitations on Participation

17. The Order combined the Appalachian Mountain Club (AMC), Conservation Law Foundation (CLF), Ammonoosuc Conservation Trust (ACT) and New Hampshire Sierra Club (NHSC) as a single party and requires the group to designate a single spokesperson/attorney for the purposes of filing pleadings, conducting discovery and the examination of witnesses at evidentiary hearings. *See* Order at 34. In response to the Order, AMC, CLF and ACT (“NGOs”) filed a joint request asking the Committee to grant each organization “flexibility to coordinate among themselves” or, in the alternative, to allow them to proceed as individual parties. Toward that end the NGOs make a number of requests regarding their participation in the proceeding:

- a. They request that they be allowed to designate two points of contact for purposes of sending and receiving information from the Committee and other parties.
- b. They argue that they should not be required to appoint a single spokesperson/attorney for the purposes of filing pleadings. Rather, they argue they should be provided “flexibility” regarding which organization or spokesperson/attorney files a given pleading.
- c. They argue that they should be allowed to file separate pleadings in the event there is disagreement on a matter and to submit pleadings on behalf of some, but not all, members of the group.

- d. They argue the group should not be required to designate one attorney/spokesperson for the purposes of propounding data requests, participating in technical sessions, or the cross-examination of witnesses.
- e. They request that the group be granted up to 100 data requests for discovery.

18. The NGOs claim that “By providing our organizations flexibility in the manner in which we conduct our participation, the SEC will not in any way compromise the desired objective of ensuring an orderly proceeding.” Joint Request at 4. In fact, granting the NGOs’ requests would accomplish exactly that – it would effectively dismantle the objective of grouping the organizations and limiting their participation in the first place and would add unnecessary disruption to the proceedings.

19. Taken together, these requests, while purporting to ask only for increased flexibility, in actuality have the effect of undoing the SEC’s Order and granting the organizations the freedom to participate as independent parties. For example, the NGOs argue that they should not be required to designate an attorney/spokesperson for the purposes of propounding data requests, participating in technical sessions, or the cross-examination of witnesses. Each of these stages is critical to preserving the orderly and efficient conduct of the proceeding. Granting the NGOs autonomy in each of these stages has the potential to delay or otherwise disrupt the proceeding through the duplication of data requests and cross-examination of witnesses.

20. Given the substantial resources each of the NGOs has at its disposal and given the shared interests and objectives of these organizations, grouping and limiting the NGOs in accordance with the Order will not be so extensive as to prevent each NGO from protecting the

interest that formed the basis of intervention. Therefore, the Committee should affirm the Presiding Officer's decision and deny the NGOs' request for review.

21. NHSC filed a separate request for rehearing in which it requests review of the grouping in the Order. NHSC asserts that the grouping will "diminish and impede NHSC's ability to voice its concerns and represent its members and supporters." NHSC Request at 1. NHSC also claims that AMC, CLF and ACT have declined to collaborate with NHSC and that will prevent NHSC from fully participating as a member of the group as ordered. The Applicants object to this request.

22. Pursuant to the Order, AMC, CLF, ACT and NHSC are required to coordinate for the purposes of filing pleadings, conducting discovery and the examination of witnesses at evidentiary hearings. *See* Order at 34. These organizations' failure to do so in this instance does not, as NHSC argues, exemplify a need to review the grouping order. Rather, it demonstrates a simple failure to adhere to the procedures that each group is required to uphold in order to participate in this proceeding. In addition, as discussed above, requiring multiple similarly situated organizations to work together for certain aspects of this proceeding will not deprive NHSC of the opportunity to protect its interests.

23. The Applicants urge the Committee to deny the request and require the four organizations to hereafter coordinate their efforts as required by the Order.

V. Timely Petitions to Intervene

A. New England Power Generators Association

24. The New England Power Generators Association (NEPGA) filed a request for reconsideration of the Order denying its petition to intervene in this proceeding. NEPGA argues that the Presiding Officer (1) "failed to correctly interpret and apply the intervention standards

articulated” in the rules and (2) “erroneously concluded that the rights, duties, privileges, immunities or other substantial interests of NEPGA and its members are not adversely affected” by the proceeding. NEPGA Motion at 2. The Presiding Officer denied NEPGA’s petition to intervene because “Ensuring fair or competitive markets is not a reason for intervention and is not within the purview of the Site Evaluation Committee.” Order at 46. The Applicants agree with this determination and object to NEPGA’s request for rehearing.

25. NEPGA’s argument that the Presiding Officer effectively “got it wrong” with regard to its petition to intervene is without merit. NEPGA first claims that the Presiding Officer is incorrect in stating that ensuring fair and competitive markets is not within the purview of the Committee. To support this assertion, NEPGA points to statements made by the Applicants regarding the Project’s economic benefits to the State. It asserts that the Applicants included this information “with the express purpose of demonstrating that the project satisfies the public interest standard” of Site 301.016. NEPGA Motion at 4 (quotations omitted). However, NEPGA has failed to identify any error of fact, law or reasoning on the part of the Presiding Officer. Whether or not the Applicants include information about the financial benefits of the Project has no bearing on whether the Committee has authority to review issues relating to ensuring fair or competitive markets.

26. Next, NEPGA claims that denial of its intervention “potentially handicaps the SEC’s development of an adequate record on” the issues NEPGA included in its original petition to intervene. Ostensibly, the specific issue NEPGA alludes to here is its interest in “any proposed public interest stated by the project.” *See* NEPGA Petition at 4. In support of this claim NEPGA attaches two reports, the first examining the potential costs of the Project and the second

examining the potential costs and implications of the Project on both consumer electricity costs and the wholesale electricity market. NEPGA Motion at 5.

27. Despite these reports and claims, NEPGA has failed to demonstrate how the decision denying its petition is unlawful, unjust or unreasonable. That is, NEPGA has not demonstrated that the Presiding Officer erred in finding that NEPGA failed to establish a particular interest in the proceeding. Rather, NEPGA simply reiterates the same generalized interests it alleged in its petition to intervene with regard to the “public interest.” As the PUC has noted, and as the Applicants explain in their Objection to NEPGA’s petition to intervene, “[i]t should be recognized that being interested in such a proceeding is not the same as having a legal interest of some nature that may be affected by the proceeding.” *Re North Atlantic Energy Corporation*, 87 NHPUC 455, 456 (2002). “Merely expressing a concern about a relevant issue, no matter how well-intentioned, does not confer party status.” *Id.* The Applicants therefore urge that NEPGA’s request be denied.

B. Thomas N.T. Mullen (On behalf of himself and Peter W. Powell)

28. Mr. Mullen, in his request for rehearing, fails to demonstrate that the Presiding Officer’s decision is unlawful, unjust or unreasonable. As alleged grounds for rehearing, Mr. Mullen argues that he and Mr. Powell are the only individuals who have sought to intervene representing the real estate industry. In the Order denying Mr. Mullen’s petition to intervene, the Presiding Officer determined that “[i]nterests that are general to all residents of a community, *i.e.* effect on tourism, property values, and business, without more, are not sufficiently specific to warrant intervention.” Order at 30. Mr. Mullen has failed to provide the needed specificity required in order to establish an interest in this proceeding. His request for rehearing adds

nothing of value to his original petition to intervene. Rather, Mr. Mullen makes a number of generalized and unsubstantiated claims about the New Hampshire real estate market. These are the same claims he lodged in his original petition. Therefore, a rehearing on his petition will be entirely superfluous. His request should be denied.

C. Kris Pastoriza

29. Ms. Pastoriza submitted a letter to Administrator Monroe in which she makes a number of requests, among which is a request that she, as an abutter to the Applicant's alternate route, be accepted as an intervener. In her letter Ms. Pastoriza fails to demonstrate that the Presiding Officer's decision is unlawful, unjust or unreasonable. In her original petition, Ms. Pastoriza based her case for intervention on "levels of expertise and knowledge that may be helpful to the Subcommittee in evaluating the Project." Order at 22. The Presiding Officer determined that she had failed to demonstrate that she had a right, duty, privilege or other substantial interest that is affected by these proceedings. *Id.* Ms. Pastoriza now asserts an interest based on her proximity to an alternative route included in the Application.

30. In the Order, the Presiding Officer held that "The impact of past designs for the Project on existing properties cannot be a basis for current intervention in this docket...Prior route alignments of the Project are not before this subcommittee." Order at 30. Ms. Pastoriza fails to include any information challenging the reasonableness of the Presiding Officer's decision. Rather, she points to the fact that the alternative route was included in the Application, and offers the unsupported assertion that as long as this route is listed, "the SEC must permit an abutter group be given intervener status." Pastoriza Letter at 2. Certainly, this is insufficient for a finding of "good cause." Moreover, Ms. Pastoriza has already conducted herself in a manner

that interferes with the orderly conduct of the proceedings.² Her request should therefore be denied.

D. State Legislators

31. The Presiding Officer denied the petition to intervene signed by 4 senators and 63 state representatives (collectively, “State Legislators”) because the interests asserted in the petition are “generalized and are not sufficient to warrant intervention.” Order at 45. The State Legislators filed a motion requesting review of their petition. However, they fail to include any additional information and merely repeat the arguments made in their original petition.

32. Primarily, the State Legislators argue that their “interest” in the Committee’s interpretation of the new ‘public interest’ standard should be recognized as a substantial interest under RSA 541-A:32, I(b). In so doing, the State Legislators reaffirm that their “interest ... is to suggest and argue for the concerns [they] believe should be considered by the Committee in making its determination of what constitutes the public interest.” State Legislators Motion at 3 (underlining in original). As the Presiding Officer stated in the Order, “[e]lection to the legislature does not create the type of right, privilege, or interest that is required to be demonstrated by an intervener in an administrative adjudicatory hearing.” Order at 45. The State

² On April 1, 2016, Committee Counsel Michael Iacopino sent an email to the SEC distribution list reminding all recipients that the purpose of the list is to file motions, objections or other pleadings. He stated that “The distribution list is not intended to be used to file public comments or for communication amongst the parties that does not involve the filing of documents with the Committee.” He further stated “The distribution list is not designed to be a means to debate the issues in the case. That debate should take place in the testimony and exhibits, cross examination, legal memoranda and public comment all of which constitute the legal record for this proceeding and will be considered by the Committee. *Please do not use this list for the purposes of communication with other parties or for the purpose of posting an argument for or against the project.*” [Emphasis added]. Ms. Pastoriza was an addressee on that email. Nevertheless, on April 6, 2016 Ms. Pastoriza, blatantly disregarding Mr. Iacopino’s email, sent an email to the SEC distribution list. Among her improper assertions, she falsely implied that NPT failed to give proper notice to necessary parties in a related PUC docket. In fact, NPT fully complied with all legal notice requirements in that docket. Ms. Pastoriza’s refusal to comply with Committee practice and procedures is a further reason to reject her individual intervention petition and also calls into question whether she should be permitted to continue to participate in this docket on behalf of the Easton Conservation Commission.

Legislators have failed to assert any justification for challenging this decision and their request should be denied.

E. Additional Requests By Petitioners Whose Petitions were Denied

33. To the extent that the Applicants overlooked a request by a petitioner whose petition to intervene was denied, the Applicants respectfully request that the Committee apply the appropriate standard in determining whether said petitioner has a right to rehearing. To the extent that such requests are procedurally improper, do not state the grounds for rehearing, or fail to demonstrate that the committee's decision is unlawful, unjust or unreasonable, the Applicants hereby object to the request for rehearing.

VI. Late-Filed Petitions to Intervene

34. A number of petitioners filed untimely petitions to intervene in which they assert an interest in the proceeding based on their proximity to an alternative route included in the Application.

35. The Applicants believe these late-filed petitions should be denied for two reasons. First, ensuring the orderly and prompt conduct of these proceedings given the unique nature of this case may be a challenge. To meet this challenge, it is imperative that deadlines and established procedures for case management be respected. Second, the petitioners each seek to intervene based on their property's proximity to an alternative route the Applicants included in the Application as well as the Additional Materials filed to supplement the Application. The petitioners assert that the reason they did not file by the February 5, 2016 deadline is that the Applicants did not submit this information until February 26, 2016. This claim is wrong.

36. In the original Application filed on October 19, 2015 the Applicants, as required at the time by Site 301.03(h)(2) and RSA 162-H:7,V(b), identified the former route identified in

its 2013 amended application to the DOE to be available. *See* Application at 44. Each late-filing petitioner had notice of this alternative route and should not be excused from failing to adhere to the procedural schedule set out by the Committee.

37. With regard to the alternative route argument, in the cover letter accompanying the Additional Information, the Applicants accurately explained that, while the rules require the inclusion of information about alternative routes, the prior proposed route is not actually under consideration before the Committee. Therefore, it cannot be a basis for intervention. The Presiding Officer noted as much in the Order stating “The impact of past designs for the Project on existing properties cannot be a basis for current intervention in this docket...Prior route alignments of the Project are not before this subcommittee.” Order at 30. Therefore, all late-filed petitions to intervene should be denied.

VII. Clarifying the Committee’s Intent Regarding Limitations

38. In light of the responses submitted relating to the Order, the Applicants request that the Committee clarify the rights and responsibilities of the parties subject to the limitations imposed. Specifically, the Applicants note that there was some confusion at the Prehearing Conference held March 22, 2016 regarding the requirement to appoint a spokesperson. It is apparent that some groups understand this to mean that each group is required to hire representation for purposes of filing pleadings, conducting discovery and for examination at evidentiary hearings. The Applicants believe it would benefit all parties to get a better understanding of the role the spokesperson will play and the responsibilities required of each spokesperson.

39. In addition, given the number of parties (and individuals making up those parties) in this proceeding, it would behoove the Committee to explain in detail the rights and

responsibilities of parties to this proceeding. Although a number of parties are familiar with the protocols for participating in SEC proceedings, others are wholly unfamiliar. For that reason, there exists substantial risk for delay if issues with procedure and substances continue to arise throughout the hearing process. The Applicants request that the Committee explain the responsibilities of the parties to adhere to the administrative rules and the consequences for failing to do so. *See e.g.* Footnote 2.

WHEREFORE, the Applicants respectfully request that the Presiding Officer:

- A. Deny the requests to review petitions to intervene;
- B. Deny all late-filed petitions to intervene;
- C. Confirm the interveners as laid out in the Order; and
- D. Grant such further relief as is deemed appropriate.

Respectfully submitted,

Northern Pass Transmission LLC and

Public Service Company of New Hampshire d/b/a


Eversource Energy

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: April 7, 2016

By: _____


Barry Needleman, Bar No. 9446
Thomas Getz, Bar No. 923
Adam Dumville, Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
thomas.getz@mclane.com
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on the 7th of April, 2016, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List.


Barry Needleman