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August 4, 2016

BY HAND

Eileen Fox, Clerk
New Hampshire Supreme Court
One Charles Doe Drive
Concord, NH 03301

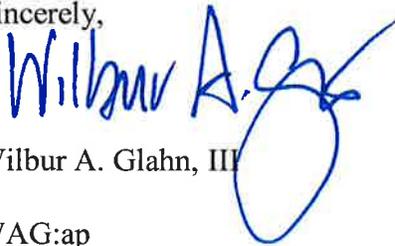
**Re: On Appeal from an Order of the State of New Hampshire Site Evaluation
Committee – No. 2015-16**

Dear Ms. Fox:

Enclosed for filing please find an original and seven copies of a Motion for Summary Affirmance of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy, with accompanying Memorandum of Law.

Thank you for your assistance, and please feel free to call me if you have any questions.

Sincerely,



Wilbur A. Glahn, III

WAG:ap
Enclosures

cc: Peter Roth, Esq.
Joseph A. Foster, Attorney General
Danielle L. Pacik, Esq.
Martin Honigberg, Site Evaluation Committee

SUPREME COURT OF NEW HAMPSHIRE

CASE NO. _____

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 for the Construction of
a New High Voltage Transmission Line in New Hampshire

On Appeal from an Order of the State of New Hampshire
Site Evaluation Committee
No. 2015-16

MOTION FOR SUMMARY AFFIRMANCE
OF NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

Pursuant to Rule 25 of this Court’s Rules, Northern Pass Transmission, LLC (“NPT”) and Public Service Company of New Hampshire, d/b/a Eversource Energy (“Eversource”) (collectively, the “Applicants”), move for summary affirmance of the orders of the New Hampshire Site Evaluation Committee (“NHSEC”) permitting the City of Concord to intervene in the Northern Pass Docket, but imposing reasonable conditions on that intervention. As grounds for this motion, the Applicants state as follows:

1. As explained in the accompanying memorandum of law, in the face of more than 160 requests to intervene in the pending docket at the NHSEC, that Committee required most intervenors, including municipalities, to combine with other intervenors for purposes of discovery, the filing of pleadings and cross examination while also allowing each individual intervenor to file direct testimony to protect individual interests. Moreover, although requiring

each group to appoint a spokesperson, the NHSEC permitted any individual intervenor that could not reach agreement within its group to file a motion stating its disagreement and to file a motion for alternative relief. Assuming that the motion for alternative relief was granted, any individual intervenor would thus be allowed to file separate pleadings, to seek discovery or to cross-examine on issues of import to the intervenor. These reasonable limitations on the participation of intervenors are expressly permitted by RSA 541-A: 32, I and III and incorporated into the NHSEC's recently revised (December, 2015) regulations at N.H. Admin. Rule, Site Rule 202.11. Nevertheless, Concord appealed to this Court, contending that the requirement that it combine with three other towns to promote the efficient and orderly process of the proceedings is unlawful.

2. In order to prevail in this discretionary appeal under Rule 10 of this Court's Rules, Concord must show that the orders of the NHSEC are clearly unreasonable and unlawful because the limitations placed on its intervention "are so extensive as to *prevent* [it] from protecting the interests which formed the basis of its intervention." RSA 541-A:32, IV (emphasis added); *Campaign for Ratepayers' Rights*, 162 N.H. 246, 249 (2011). Concord's appeal does not come close to meeting that standard and thus presents no substantial question of law. Indeed, Concord does not even assert that it is prevented from protecting its interest, contending that it can only "effectively be heard" through its lawyers or that the limitations in its intervention "could impair" the ability of its lawyers.

3. Concord first argues that its inability to act as a single party with the right to full participating in proceedings is improper. But Concord has no right to that status under RSA 541-A:32, I or III. Next, although Concord complains that it was should not be required to conduct proceedings through a single spokesperson, its notice of appeal shows that Concord *is the*

spokesperson for its group and thus will have an ample opportunity to make its points. Finally, Concord contends that even if required to participate in a group, it should be permitted to take discovery and conduct cross-examination on issues not addressed by the group spokesperson and to file supplemental pleadings on “issues of specific concern.” This is precisely what the NHSEC allowed it to do if it could establish the need for such alternative relief.

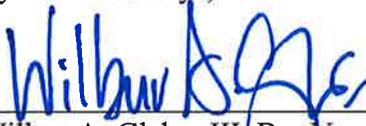
4. Concord has suffered no present harm. It has no right to the status of an individual intervenor by statute or otherwise. There is no final order to appeal. Its claim that it is prevented from protecting its interests is speculative. Any such claim would arise only if it cannot advance those interests as the spokesperson for its group; only if it establishes a need to file separate pleadings and discovery or to cross-examine a witness (assuming that its direct testimony is insufficient) to protect its interests; and only if the NHSEC then denies that request. Accordingly, the order of the NHSEC should be summarily affirmed and this appeal should be dismissed.

Respectfully submitted,

NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE d/b/a EVERSOURCE ENERGY

By their attorneys,

Dated: August 4, 2016

By: 

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Rule 10(7) Certification

In accordance with Rule 10(7), I certify that I have provided a copy of the foregoing Motion by sending copies thereof by first class mail, postage prepaid, to the following:

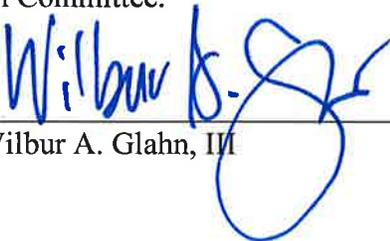
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All other counsel and intervenors have been notified by the distribution list per the process adopted by the New Hampshire Site Evaluation Committee.



Wilbur A. Glahn, III

SUPREME COURT OF NEW HAMPSHIRE

CASE NO. _____

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 for the Construction of
a New High Voltage Transmission Line in New Hampshire

On Appeal from an Order of the State of New Hampshire
Site Evaluation Committee
No. 2015-16

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SUMMARY AFFIRMANCE
OF NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

This Memorandum supports the Motion of Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire, d/b/a Eversource Energy (“Eversource”) (collectively, the “Applicants”) for summary affirmance of the orders of the Site Evaluation Committee (“NHSEC”) pursuant to Rule 25 of this Court’s Rules. Those orders granted the Petition to Intervene of the City of Concord (“Concord”) in the above referenced Docket No. 2015-06 and placed statutorily permitted conditions on that intervention.

This is a discretionary appeal pursuant to Rule 10 of this Court’s rules. No substantial question of law is presented by this appeal, and Concord has not met, and cannot meet, its burden of showing that the decisions of the NHSEC are “clearly unreasonable and unlawful.” *In Re*

Campaign for Ratepayers' Rights, 162 N.H. 246, 249 (2011). Indeed, Concord has suffered no present injury as a result of the NHSEC orders since those orders permit Concord to file motions seeking the very alternative relief Concord requested at the NHSEC. Thus, the NHSEC has not issued a final order or decision on the merits. Concord may well have the opportunity to participate by the filing of additional pleadings, discovery and cross-examination, and the NHSEC may rule in its favor on issues of interest to it.

Background

The Applicants filed their application for a Certificate of Site and Facility with the NHSEC in October 2015, seeking approval to construct a 192 mile transmission line from the Canadian Border to Deerfield, New Hampshire. Appendix (“A”) at 42. More than 160 municipalities, entities, and individuals filed petitions to intervene in the NHSEC proceedings prior to the February 2016 filing date set by the NHSEC. *Id.*

Concord petitioned to intervene in November 2015. A.1. Its Petition asserted an interest in the Docket based on the length of the proposed line in Concord, the number and size of the new structures, the “visual and audio impact of transmission lines and large structures,” and the impact of the project on the “City’s character and property values.” *Id.* Those interests were virtually identical to the interests of most municipal entities, including Canterbury, Pembroke, and Deerfield, with which the NHSEC eventually combined Concord’s intervention.¹

By Order dated March 18, 2016 (the “3/18 Order”), the Chairman of the NHSEC (Martin Honigberg) ruled on all of the outstanding petitions for intervention. A.42-53. Noting that “this matter is without precedent in New Hampshire” and that “it is simply not possible to administer a

¹ The Petitions to Intervene of Canterbury (motion dated Jan. 27, 2016), Pembroke (motion dated Jan. 27, 2016), and Deerfield (motion dated Feb. 1, 2016) are found on the NHSEC website at <http://www.nhsec.nh.gov/projects/2015-06/2015-06.htm>. Each Petition asserted an interest in the Docket based on the length of the line, the number and size of the towers, the visual and audio impact, and the impact on the character of the town and the property values.

proceeding of this nature” with 160 intervenors (including 27 municipal intervenors, some of which intervened on behalf of several entities), the 3/18 Order granted intervention but grouped the intervenors into combinations for purposes of the proceedings. Concord was grouped initially with eight towns. A.49.

Requiring intervenors to combine their efforts is expressly permitted by RSA 541-A:32, III. A.49-50. While finding that each of the municipalities had some characteristics that were unique, the 3/18 Order found that there were common interests raised by each, including the impact on the environment, aesthetics, property values and the residents. A.6, 48. Although the 3/18 Order required each combined group to “designate a single spokesperson for the purposes of filing pleadings, conducting discovery, and for examining witnesses at evidentiary hearings,” it also expressly provided that each governmental agency within a group would be permitted to file separate testimony to protect its interests if it chose to do so. A.49-50.

Concord moved for Review of the 3/18 Order by a subcommittee of the NHSEC and, for the first time, asserted new interests for intervention it considered unique to the City and that allegedly required its participation as a single party. A.96-99, 103. With the exception of a stated interest in protecting the Karner Blue butterfly, each of these interests were covered by the original petition, *i.e.* impact on residents, aesthetics, property values, and the character of the City. *Id.* Concord further objected to requiring it to choose one spokesperson, contending that the City Solicitor could not represent other towns, and that by having to make decisions for other entities, Concord lawyers might violate the Rules of Professional Conduct. A.100-101.

By Order dated May 20, 2016 (the “5/20 Order”), the Subcommittee reviewed Concord’s Petition (and many others). A.121-156. That Order denied Concord’s motion to participate as a single intervenor, finding that Concord had “failed to demonstrate that its interests are so unique

that they cannot be addressed” within a group and noting that all of the towns with which Concord was grouped had raised similar concerns about the project’s impact on “residents, the natural environment, wetlands, aesthetics, orderly development of the region and property values.” A.130–132. However, the Subcommittee reconfigured the groupings so that Concord was grouped with only three towns, as set out above. In addition, in responding to concerns about how the groupings would participate, the 5/20 Order stated as follows:

[I]t is a matter of internal governance as to the process for group decisions and how to communicate with the Subcommittee, the Applicant and the other parties. All groupings should attempt, in good faith to reach decisions on representation, discovery, pleadings and other issues raised by this docket. *Any individual intervenor, however, if unable to agree with the group, has a right to file a motion stating its disagreement and a motion for alternative relief.*

A.148 (emphasis added).

Concord then moved for a rehearing, contending that the limitation on intervention denied it due process. It claimed that it could only be “effectively” heard through its own counsel and that “the spokesperson designation could impair” its attorneys from “carrying out strategic activities.” A.157-161. It further asserted that the NHSEC should allow all municipalities to participate individually, with the burden on the NHSEC to “impose limitations during hearings . . . to avoid duplication of evidence and testimony.” A.160. Concord also proposed alternative relief in the form of an order allowing it to participate in technical (discovery) sessions, conduct cross-examination, and to file supplemental pleadings on issues of specific interest to Concord and that were not addressed by the group. A.160-161. This is substantially what the Subcommittee had allowed by the italicized language in the 5/20 Order set out above. By Order dated July 21, 2016 (A.167-174), the Subcommittee denied Concord’s request for rehearing, specifically referencing this language. A.172.

Concord's Appeal Should Be Dismissed

Concord's premature appeal is from orders that have not yet restricted any right of the City, let alone *prevented* it from protecting its interests. Put simply, Concord has suffered no harm. It has merely been required to coordinate its activities with three other similarly situated municipalities as permitted under RSA 541-A:32, III.

In order to prevail in this appeal, Concord must show that the orders of the NHSEC are clearly unreasonable and unlawful because the limitations placed on its intervention "are so extensive as to *prevent* [it] from protecting the interests which formed the basis of its intervention." RSA 541-A:32, IV (emphasis added).² Since each of the limitations placed on the City are expressly permitted by RSA 541-A:32, III, it cannot meet this burden.

While recognizing this standard in its Notice of Appeal ("NA"), the City does not even attempt to contend that it will be prevented from protecting its interests. Rather, it says only that it cannot be "effectively heard" by its own attorneys and that the requirement of a spokesperson "could" impair its attorneys from protecting its interests. NA.20. Absent some clear evidence that the orders clearly prevent Concord from protecting its interests, the NHSEC has broad discretion under RSA 541-A:32 and 541-A:31, V (Supp. 2015) to structure the conduct of its proceedings, and this Court will not disturb the order.

Concord complains that each municipality is "primarily concerned with the project impacts within its own borders" (*id.*), but it does not say why grouping it with three towns in close geographic proximity somehow prevents it from advancing its interests, which on the face of its petition to intervene are nearly identical to those of the other municipalities. Nor are Concord's complaints about the unfairness of a designated spokesperson valid. *Id.* As the

² The NHSEC rules go further than RSA 541-A: 32, III and *require* that the presiding officer impose conditions on intervenors identical to those in RSA 541-A:32, III. ("The presiding officer . . . shall impose conditions on upon an intervenor's participation.") Site 202.11 cited at NA.13.

certificate of service in the Notice of Appeal demonstrates, Concord's Deputy City Solicitor is the spokesperson for the group. NA.3. Concord will thus have plenty of say in pleadings, cross-examination, and discovery. If Concord were correct, every municipality would be denied due process unless it was a sole intervenor. But nothing in RSA 541-A:32 requires such a result, and Concord has identified no case law supporting it, especially in this "unprecedented" case with hundreds of intervenors.³ Indeed, even where an intervenor demonstrates a right that would lead to mandatory intervention within RSA 541-A:32, the presiding officer is required to grant such intervention only where he or she determines that the "orderly and prompt conduct of the proceedings would not be impaired." RSA 541-A:32, I (c). If Concord's argument were accepted and every municipality were allowed sole intervenor status, the number of intervenors permitted to have full participation in the Docket would more than double to over 50 parties. As the NHSEC recognized, that number is unworkable.

³ At the NHSEC, Concord cited other NHSEC decisions for the proposition that the Committee regularly allows municipalities to intervene as full parties without consolidation with other parties. A.102. Apart from the fact that this Docket is unprecedented, the cited dockets actually stand for the opposite proposition. Even in smaller matters with fewer intervenors, the NHSEC has required consolidation of otherwise full intervenors. In the Antrim dockets, for example, there were never more than 25 intervenors. Moreover, even in granting abutting property owners full intervenor status, the SEC noted:

[T]heir ownership and residence on land abutting the proposed Facility requires that they be permitted to fully participate. However, each of the residential abutters do have interests similar to each other. None is represented by counsel. This causes a concern about duplicative arguments and ineffective process. Therefore, in the first instance, the residential abutters shall be combined as a full party in this proceeding. Although they may work together and each may testify (if they choose), they must designate a single spokesperson for the purposes of filing pleadings, conducting discovery, and examining witnesses at evidentiary hearings. This will assure the prompt and orderly conduct of the proceedings. Should any individual residential abutter feel that he or she has an interest that is different from the others, the Chair will hear a motion to allow that party to proceed separately on that particular issue.

Petition for Jurisdiction over Renewable Facility by Antrim Wind Energy, LLC, Docket No. 2014-05 (order dated Mar. 13, 2015). Furthermore, in each of the Antrim Wind dockets Concord cited, only two municipalities sought intervention and in the Groton Wind docket only eleven intervenors were at issue while six were at issue in the Laidlaw Biomass project. The sheer scope of this matter required the SEC to apply its consolidation rules, like it did in the Antrim 2014-05 docket and as it is permitted to do by statute and its rules.

The fatal flaw in Concord's appeal lies in the fact that despite being required to participate with three towns, Concord has not been denied any of its rights. As shown above, the 3/18 Order allowed every municipality to file its own testimony and thus protect its interests in that manner. A.49.⁴ But more importantly, the 5/20 Order specifically provided that if any intervenor could not reach agreement within the group, it could file a motion with the NHSEC seeking "alternative relief," which would thus permit Concord to request that it be allowed to file pleadings, take discovery, and cross-examine on issues of import to the City. In fact, this is essentially the "alternative" relief Concord sought in its June 17, 2016 Motion for Rehearing. A.160.

At its core, what Concord seeks from this Court is a mandate that every municipality is free to participate as it wants unless or until the Committee finds reasons to restrict it during the hearing. Concord thus endeavors to reverse the NHSEC's statutory and regulatory authority to limit intervenor participation in the first instance unless or until intervenors can show that the limitation prevents it from protecting its interests as to specific discovery, pleadings, or during the hearings.⁵

Put simply, Concord has not been denied any opportunity to protect its interests by being grouped with Canterbury, Pembroke, and Deerfield. If, despite its status as spokesperson for this group, Concord has issues of specific concern on which it feels it needs additional discovery, pleadings, or some cross-examination, it is free to file a motion requesting such relief. Until that

⁴ For example, if Concord believes that protection of the Karner Blue butterfly, or of the Gateway Performance District (Loudon Road – with which the Court is undoubtedly familiar) requires specific consideration, direct testimony could be submitted on those matters.

⁵ Due process considerations in the administrative context also contradict Concord's position. *See, e.g., Petition of Grimm*, 138 N.H. 42, 46 (1993) (discussing the lesser requirements for procedural due process in the administrative context). Likewise, the U.S. Constitution does not require all the procedural freedoms Concord is demanding by way of its appeal. *See Walters v. Nat'l. Ass'n. of Radiation Survivors*, 473 U.S. 305, 326 (1985) ("[L]egislatures are to be allowed considerable leeway to formulate [administrative] processes without being forced to conform to a rigid constitutional code of procedural necessities.")

situation arises, Concord has been denied no process in this Docket and this matter is not ripe for appeal. No formal order has been issued. In fact, until it is determined that the NHSEC's orders have actually prevented Concord from protecting an interest, Concord has suffered no injury giving it standing to appeal. *See, e.g., Appeal of New Hampshire Right to Life*, 166 N.H. 308, 314 (2014) (denying standing where appellant failed to allege a specific injury in fact and discussing that standing before administrative agencies requires injury in fact, which must be more than mere speculation of potential harm).⁶

This Court should avoid the chaos that would result from piecemeal review of each decision of the NHSEC in the “unprecedented” Northern Pass Docket. If ever there was a case justifying reasonable limitations on intervention, this is it. Moreover, Concord has offered no reason for this Court to hear its discretionary appeal. The limitations the NHSEC imposed on Concord's intervention are authorized by statute, do not prevent protection of its interests, and the NHSEC has given Concord the right to seek all the alternative means of raising issues that the City itself requested. Accordingly, the NHSEC orders should be summarily affirmed under Rule 25 and the appeal should be dismissed.

⁶ *Weeks Rest. Corp. v. City of Dover*, 119 N.H. 541, 543 (1979) (“In appeals from decisions of administrative agencies, any person or entity who “has sustained the requisite ‘injury in fact’ ” has standing to appeal.”); *see United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688–89 (1973) (“Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.”)

Respectfully submitted,

NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE d/b/a EVERSOURCE ENERGY

By their attorneys,

Dated: August 4, 2016

By: 

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