STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

Docket 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

JOINT MOTION FOR REHEARING BY MUNICIPAL GROUPS 1 SOUTH, 2, 3 SOUTH, 3 NORTH AND THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS OF THE OCTOBER 24, 2016 ORDER ON MOTION TO COMPEL DEPOSITION OF JAMES A. MUNTZ

Municipal Groups 1 South, 2, 3 South, 3 North, and the Society for the Protection of New Hampshire Forests (the "Movants") submit this Motion for Rehearing, regarding the New Hampshire Site Evaluation Committee's (the "Committee") October 24, 2016, Order denying the Motion to Compel Deposition of James A. Muntz. The Movants state the following in support:

STANDARD FOR REHEARING

1. The Movants, as parties to this proceeding, may move for a rehearing of the October 24, 2016, Order. RSA 541:3; N.H. Code Admin. R. Ann. Site 202.29.

2. Rehearing is warranted when there is "good reason" to conclude the Committee's decision is "unlawful or unreasonable." RSA 541:3.

BACKGROUND

3. The Applicants applied to the Committee for a Certificate of Site and Facility to construct a 192-mile high-voltage transmission line from the Canadian border at Pittsburg to a substation located in Deerfield, commonly referred to as the Northern Pass Project (the "Project").

4. As part of their October 16, 2015 Application, the Applicants included pre-filed direct testimony of Mr. Muntz.

5. In his testimony, Mr. Muntz stated:

> My testimony describes the Project's inception and route selection process, how the Project design was modified over time, the federal permitting process, and NPT's participation in the expected request for clean energy proposals from the States of Connecticut, Massachusetts, and Rhode Island ("Tri-State Clean Energy RFP"). In addition, I offer information about the Applicants' technical and managerial capability to construct and operate the Project.

(Volume II of Application, Pre-filed Testimony of James A. Muntz, p. 1, Lines 23–27.)

6. Parties in the above-referenced docket number held a series of technical sessions during the months of September and October 2016.

7. Mr. Muntz was scheduled (with William Quinlan) for a technical session on September 21, 2016, the description of which was "Project Route Selection, Forward NH Plan, NH-Specific Benefits, Clean Energy RFP, etc." Technical Session Agenda, August 5, 2016.

8. On September 15, 2016, the Applicants submitted a letter announcing that Mr. Muntz would no longer be a witness and that Kenneth Bowes and Mr. Quinlan would be adopting Mr. Muntz's testimony.

9. On September 29, 2016, the Movants filed a Motion to Compel Deposition of James A. Muntz, which the Committee denied by on October 24, 2016.

10. The Muntz/Quinlan technical session scheduled for September 21 was postponed until October 11, 2016, on which day it was held and completed.

ANALYSIS

11. Site 202.12(l) allows for depositions as follows:

> The presiding officer or any hearing officer designated by the presiding officer shall authorize other forms of discovery, including technical sessions, requests for admission of material facts, depositions, and any other discovery method permissible in civil judicial proceedings before a state court, when such discovery is necessary to enable the parties to acquire evidence admissible in a proceeding.

12. With regard to obtaining the information known to Mr. Muntz described in the Motion and herein, standard discovery procedures are inadequate. The deadline for data requests passed several months ago, and it would not have been reasonable for parties to have used their limited data requests to ask questions that they believed they would have the opportunity to ask Mr. Muntz at a technical session, and it would not have been reasonable for other parties to have anticipated Mr. Muntz's exit from the Project.

13. The October 11 technical session was also inadequate given that Mr. Muntz did not appear, and that Mr. Quinlan and Mr. Bowes were only able to broadly answer questions about the inception of the Project, how the project design was modified over time, the route selection process, etc., at the technical session.

14. In its Order, the Committee appeared to base its decision on a few superficial facts: (1) "The Applicant has provided two witnesses to substitute for Mr. Muntz."; (2) "Those witnesses have adopted his pre-filed testimony"; and (3) "the Applicant has notified the Parties and the Subcommittee that those witnesses will be available to address 'all questions relating to the topics discussed in Mr. Muntz's testimony." Order at 5.

15. The Committee's stated reasoning constitutes an error of reasoning in that it accepts those facts and assertions at face value without considering how Mr. Quinlan and Mr. Bowes would be able to answer questions about considerations and processes that they were not involved in.

16. The Committee's decision also includes an error of fact in that Mr. Quinlan and Mr. Muntz were not able to address "all questions relating to the topics in Mr. Muntz's testimony" despite the Applicants' statement that they could.

17. The Committee also committed an error of law in failing to recognize that the information possessed by Mr. Muntz with regard to the inception of the project, the route selection project, and how the design was modified over time is admissible evidence relevant to the criteria of RSA 162-H:16, IV (b) and (c).

18. The Movants understand that a deposition is the exception rather than the rule. However, announcing the replacement of an important witness six days before the technical session that leaves a significant knowledge void is also the exception and not the rule. Such an extraordinary replacement justifies an extraordinary remedy.

19. As the Applicants state, it is an applicant's prerogative "to choose who they will sponsor as witnesses to support the application and prove that a Project complies with RSA 162-H:16, IV." Objection at ¶ 11.

20. Mr. Muntz was held out by the Applicants in the pre-filed testimony to possess certain information about "the Project's inception and route selection process, how the Project was modified over time, the federal permitting process, and [the RFP]." (Mr. Muntz's Testimony at p. 1, Lines 23–27.)

21. No other witness was held out to have such information. For example, the Applicants did not submit pre-filed testimony of Mr. Bowes, and the stated purpose of Mr. Quinlan's pre-filed testimony is to "provide an overview of the [Project] . . . and explain the benefits of the Forward New Hampshire Plan." (Mr. Quinlan's Testimony at p.1, Lines 28–30.) Mr. Quinlan did not begin working on the Northern Pass until mid-2014, and Mr. Bowes did not begin working on Northern Pass until December 2015 (as stated by Mr. Quinlan at the October 11, 2016 technical session and by Mr. Bowes at the September 12, 2016 technical session).

22. That only Mr. Muntz had certain information (described herein and in the Motion) was underscored by the Applicants during the technical sessions. On several occasions in the earlier technical sessions, a witness responded to a question by saying that Mr. Muntz would be the proper person to answer the question. For example, as described in the Motion, at the September 22, 2016 technical session, the panel suggested asking Mr. Quinlan the question asked, but the Applicants' attorney stepped in to clarify that Mr. Muntz—not Mr. Quinlan—is the person who made the high-level decisions regarding the Project that was the subject of the technical session questioning. See Motion at ¶ 9. Evidently, the Applicants' attorney felt that Mr. Quinlan was not an equivalent stand-in for Mr. Muntz regarding certain information.

23. The admissible information that the Movants seek from Mr. Muntz that Mr. Quinlan and Mr. Bowes do not possess is the extent of the Applicants' consideration of alternatives and, if the full extent was minor, why that was the case.

24. In his pre-filed testimony, Mr. Muntz describes the evolution of the proposed route. He also provides a "summary" of the 24 potential alternatives in the Draft Environmental Impact Statement, describing that "[s]ome of those 24 alternatives represented partial variations" including "a variety of possible underground routes." (Mr. Muntz's Testimony at p. 6, Lines 14–18.)

25. Only this "summary" of the Applicants' consideration of these alternatives is in the pre-filed testimony, and at the October 11, 2016 technical session neither Mr. Quinlan nor Mr. Bowes were able to provide much more beyond that which is contained in Mr. Muntz's testimony.

26. In their Objection, the Applicants argue that "Mr. Muntz's testimony does not reach any ultimate conclusions about the findings that the Committee is required to make" under RSA 162-H:16, IV and is simply "historical grounding for the Project and its associated benefits."

Objection at ¶ 12. It is remarkable that in order to prevent Mr. Muntz from being deposed, the Applicants argue that they have introduced a witness and testimony that is not relevant to the case.

27. The Applicants are wrong that the information known by Mr. Muntz regarding "the Project's inception and the route selection process [and] how the Project design was modified over time" (as stated in his pre-filed testimony) is not relevant to whether the Applicants satisfy the requirements of RSA 162-H:16, IV(b) and (c), specifically whether the project would "have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety" and whether it would "unduly interfere with the orderly development of the region." Impacts on these categories that would be caused by the proposed route are unreasonably adverse, in part, *because* alternatives exist which would entail little to no impact. For example, in its evaluation of the effects on the natural environment and water quality, if the alternative routes considered remain unknown, it cannot be determined whether the proposed project is the "least impacting" on wetlands, as required by NHDES administrative rules. The Committee should not consider the impacts of the proposed route in a vacuum; they should have information about alternatives to adjudge the relative impacts of the proposed route to determine whether they are unreasonably adverse.

28. The Committee erred by not allowing the Movants to depose Mr. Muntz on these issues. This error is unlawful and unreasonable because it deprives the Movants and the Committee the opportunity to fully evaluate the criteria in RSA 162-H:16, IV.

29. Although RSA 162-H:7 does not require an applicant, in its application, to present the details of alternative routes it does not "consider[ ] available," RSA 162-H:16, IV allows other parties to introduce evidence regarding potential alternative routes.

30. Prior to the 2015 amendment, the introductory language of RSA 162-H:16, IV read as follows: "The site evaluation committee, after having considered available alternatives and fully reviewed the environmental impact of the site or route . . . ." (Emphasis added).

31. The language about alternatives was removed, and the statute now reads as follows: "After due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits . . . ." (Emphasis added). Had the legislature intended that the Committee only consider information about routes that an applicant "considers available," that same language could have been included in RSA 162-H:16, IV, but it was not.

32. The amended language "all relevant information regarding the potential siting or routes" is a broader category of information than just the routes that an applicant considers available under RSA 162-H:7. Also, there is no bar either in the statute or rules limiting "all relevant information" to information presented by an applicant, which would be unreasonable in light of the fact that Committee proceedings are adjudicative in nature and involve multiple parties.

33. In their Objection, the Applicants cite certain legal standards that do not apply, including that movants did not make a good-faith effort to resolve this issue informally and that depositions are not appropriate because this matter does not involve "the prudence of . . . decision making." Objection ¶ 18, 20.

34. Site 202.12(l) has no requirement to make a good-faith effort to resolve a dispute informally prior to moving to depose a witness. As the Applicants are well aware, such a requirement is found in Site 202.12(k), which exclusively applies to motions to compel responses to data requests. Site 202.12(k) is inapplicable to a motion to take a deposition. As the Committee

did not mention this matter in the Order, it is presumed that the Committee agrees that there is no such good-faith-effort requirement applicable to requests for depositions. To the extent that the Committee's Order implicitly found that a good-faith-effort requirement applies to Site 202.12(l), this constitutes a legal error because no such requirement is in the plain language of the Rule.

35. In its Order, the Committee noted the Applicants' discussion of prudence, stating: "The Applicant suggests that the relevant inquiry here is whether the Applicant satisfies the requirements of RSA 162-H:16, IV, not the prudence underlying decision making."

36. The issue of "prudence" was raised by the Applicants only because it was the subject matter of the particular PUC case the Applicants chose to cite in their Objection, a case in which a deposition was ordered by the PUC in order for the movants to probe the prudence of PSNH's president's decision making regarding the "scrubber" at Merrimack Station. See Order No. 25,556, NH PUC, Investigation of Scrubber Costs and Cost Recovery, Public Service Company of New Hampshire, Docket DE 11-250 (Aug. 27, 2013).

37. In their Objection, the Applicants argue that because "prudence is not an element of the case" under RSA 162-H:16, IV, a deposition is not appropriate. Objection at ¶ 14. The Applicants' argument is off the mark. First, "prudence" happened to be the issue in the Scrubber case cited by the Applicants, but "prudence" is not part of RSA 162-H, Site 202.12(l) or any other legal standard applicable here, and the Scrubber case does not have the effect of modifying either the PUC or Committee administrative rules to allow a deposition only when the prudence of decision making is at issue. Second, if a deposition is only allowed when "prudence" is the issue, a deposition would almost never be allowed in a Committee adjudicative docket in which discovery is involved because most—if not all—of the Committee's

adjudicative dockets involve the criteria of RSA 162-H:16, IV, which do not include "prudence."

38. The Applicants' position would render Site 202.12(l)'s reference to depositions essentially meaningless.

39. To the extent that the Committee denied the Motion, in whole or in part, on whether the information sought from Mr. Muntz involves "prudence," the Committee committed a legal error because no such standard exists, causing the Committee's decision to be unlawful, unjust, and unreasonable.

CONCLUSION

40. At a rehearing, the Committee should (i) correct its errors of reasoning, fact, and law; (ii) conclude that the information sought from Mr. Muntz with regard to the inception of the Project and route selection (including routes identified in the DEIS) and how the Project was modified over time constitutes admissible evidence relevant to the criteria in RSA 162-H:16(b) and (iii); and order that Mr. Muntz appear for a deposition.

41. The Movants incorporate by reference all arguments they made in the Motion.

42. The parties below take the following positions with respect to this request:

A. The following parties concur:

Grafton County Commissioners
Joanna and Robert Tuveson
Mark Orzeck
Susan Schibanoff
Non-Abutter Property Owners—Stark to Bethlehem
Kelly Normandeau

B. The Applicants object.

C. No parties have stated that they take no position.

D. On this Thanksgiving eve, most parties have not responded, and many responded by way of an automatic "out of office" email.

WHEREFORE, the Movants respectfully request that the Committee:

A. Grant this Motion for Rehearing;

B. Order that Mr. Muntz appear for a deposition; and

C. Grant such further relief as it deems appropriate.

Respectfully Submitted,

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By its Attorneys,

BCM Environmental & Land Law, PLLC

Date: November 23, 2016

By: _____

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TOWNS OF BRIDGEWATER, NEW HAMPTON, LITTLETON, WOODSTOCK, DEERFIELD, and ASHLAND WATER & SEWER DISTRICT

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TOWNS OF BETHLEHEM, BRISTOL, EASTON, FRANCONIA, NORTHUMBERLAND, PLYMOUTH, SUGAR HILL and WHITEFIELD

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2016, a copy of the foregoing Motion for Rehearing was sent by electronic mail to persons named on the Service List of this docket and sent via first-class mail to the Committee.

_____
Jason Reimers