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March 7, 2017

Via Electronic Mail & Hand Delivery

Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**Re: 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 (the "Applicants") for a Certificate of
Site and Facility
Motion to Clarify Use of "Friendly" Examination**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of a Motion to Clarify Use Of "Friendly" Examination.

Please contact me directly should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas B. Getz".

Thomas B. Getz

TBG:slb

cc: SEC Distribution List

Enclosure

**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**

**MOTION TO CLARIFY USE OF
“FRIENDLY” EXAMINATION**

NOW COME Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) (collectively the “Applicants”), by and through their attorneys, McLane Middleton, Professional Association, and respectfully submit this motion asking the Presiding Officer to clarify the use of friendly examination (so-called “friendly cross”) in this proceeding.¹ The Applicants contend that there is no right to friendly cross and they believe that permitting it as a matter of course will disrupt the prompt and orderly conduct of the proceeding and unfairly prejudice their ability to present their case.

I. BACKGROUND

1. As a general matter, RSA 541-A:33, IV provides that a party to an adjudicative proceeding may conduct cross examination. At the same time, RSA 541-A:32, III (b) provides that the presiding officer in an adjudicative proceeding may limit an intervenor’s use of cross examination to promote the prompt and orderly conduct of the proceeding. In addition, RSA 541-A:33, II provides that the rules of evidence do not apply in adjudicative proceedings.

2. The Administrative Procedures Act, RSA Chapter 541-A, does not define cross examination. Black’s Law Dictionary, however, defines cross-examination as “the questioning

¹ Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, Energy L.J. v. 36, 1, 29 (Apr. 26, 2015)(“*Friendly cross*: This is cross of witnesses for allied parties. It is usually prohibited by tribunals because it either repeats points already made, or risks introducing new testimony that should have been offered in writing as pre-filed testimony.”)

of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has testified. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways.” Black’s Law Dictionary (10th ed. 2014). Express in this definition is an exchange between parties that are adverse. The essence of cross examination, therefore, is the questioning of an opposing party, which is an obvious concept in a proceeding in which there is a single plaintiff and a single defendant who oppose one another.

3. The notion of friendly cross arises in the context of multi-party litigation and involves the questioning of a party that one does not oppose. An example of friendly cross in this proceeding would be the questioning of a witness for the Applicants by the City of Franklin, which supports the Project, or the questioning of a witness for the City of Concord by the Society for the Protection of New Hampshire Forests, that is, questions between opponents to the Northern Pass Project.

4. Friendly cross can be viewed as the functional equivalent of further direct examination or re-direct examination² insofar as it permits a sympathetic examiner to ask a witness questions designed to allow the witness to expand on or correct statements. These forms of examination do not constitute cross examination, because they are not adverse, and there is no right under the Administrative Procedures Act for such examination.³ In regard to such examination, it is not an adequate remedy that friendly cross precede actual cross-examination, inasmuch as friendly cross prejudices the opposing party by allowing a friendly party to ask

² Counsel for the SEC noted during the final pre-hearing conference in the Antrim Wind Docket, 2015-02, “cross-examination, when it’s a party that you support, is not really cross-examination at all.” *Final Structuring Conference Tr.*, 109 (Sept. 7, 2016).

³ In the context of certain federal administrative proceedings, “friendly cross-examination” is prohibited. *See 46 CFR 201.132(e)(1)*. In the context of maritime proceedings cross examination is limited to the scope of direct examination and “except for Public Counsel...to witnesses whose testimony is adverse to the party desiring to cross-examine – this being intended specifically to prohibit so-called ‘friendly cross-examination.’” The intent is to prohibit cross-examination “which is not necessary to test the truth and completeness of the direct testimony and exhibits.”

questions that the sponsor of the witness could not. Additionally, friendly cross undermines the purpose of pre-filed testimony in administrative proceedings insofar as it positions parties to introduce new testimony during the hearing that should have been included in pre-filed testimony.

5. Questioning of witnesses by Counsel for the Public (“CFP”) presents a different issue. Conceptually, CFP can be viewed either as opposing all parties, or not opposing any party, even when it is clearly taking a position adverse to the applicant for a Certificate. In any case, CFP has a statutory role, pursuant to RSA 162-H:9, that distinguishes it from the Applicants and the intervenors. Accordingly, the Applicants do not ask to limit questions by CFP as a matter of course. On the other hand, CFP witnesses may be taking positions adverse to the Applicant and there is a substantial likelihood that intervenor questions of such CFP witnesses would constitute friendly cross.

6. For the reasons explained further below, the Applicants ask that the Presiding Officer clarify that there is no right to friendly cross, that friendly cross is subject to the discretion of the Presiding Officer, and that it will not be permitted without a compelling showing that the interests of justice require it.

II. DISCUSSION

7. Site 202.11 permits the Presiding Officer broad authority to impose conditions upon intervenors either at the time that intervention is granted “or at any subsequent time, including the following conditions, if such conditions promote the efficient and orderly process of the proceeding.” The conditions include “[l]imitation of such intervenor’s use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceeding.” Site 202.11(d)(2).

8. During the pre-hearing conference held on March 22, 2016, Chairman Honigberg noted that, with respect to management of intervenor groups, “anything that helps bring efficiency to this process is worth exploring.” *Prehearing Conference, Tr.* p. 126 (March 22, 2016). Further, pursuant to SEC rules, the Presiding Officer “shall...exclude irrelevant, immaterial or unduly repetitious evidence.” Site 202.02(c)(4). Although not binding, the SEC has previously considered the parallels and applicability of the New Hampshire Rules of Evidence, particularly Rule 611. *See Order Denying Motion to Reconsider and Reopen the Record*, Docket 2015-02, p. 7 (December 2, 2016). Rule 611 makes clear that the mode and order of interrogating witnesses should be controlled to “make the interrogation and presentation effective for the ascertainment of the truth” and to “avoid needless consumption of time.”

9. Similarly, the New Hampshire Public Utilities Commission (“PUC”) rules state that the purpose for cross examination is “to develop a full and true disclosure of the facts.” Puc 203.24(a). The PUC rules permit the limitation of cross-examination if “such limitation is necessary to avoid repetitive lines of inquiry.” Puc 203.24(b). The PUC rules mirror the language found in RSA 541-A:33, which state that cross-examination is intended “for a full and true disclosure of the facts.” RSA 541-A:33(IV).

10. Friendly cross has been defined by the PUC as “cross examination by any party who is in the same group as the party sponsoring the witness.” *Re Pub. Serv. Co. of New Hampshire*, 69 N.H.P.U.C. 679 (Dec. 6, 1984). In the past, the PUC has limited the use of friendly cross because “we don’t want the parties to pile on bolstering a particular witness’ testimony through friendly cross-examination.” *Public Service Company of New Hampshire: Investigation of Scrubber Costs and Cost Recovery*, DE 11-250, Tr. Day 1/Afternoon Session, p.

76. Allowing this method of examination does not further the intended purpose, which is to ascertain truth without needless consumption of time and redundancy.⁴

11. Finally, given the number of intervenors and parties in this proceeding, many of whom represent similar positions and have filed testimony expressing similar views and concerns, the Applicants request that the Presiding Officer restrict the use of friendly cross during the adjudicative hearings in order to minimize the presentation of unduly repetitious evidence. Restricting this type of examination does not create a due process violation and, in fact, ensures that the Applicants are able to have the Application processed in an orderly manner.

12. The following parties object to this motion: Abutters and Non-Abutters Group 1 North--Pittsburg, Clarksville and Stewartstown; McKenna's Purchase; Grafton County Commissioners; Society for the Protection of New Hampshire Forests; New England Power Generators Association; Counsel for the Public; Municipal Group 3 South; Pemigewasset River Local Advisory Committee; Abutters--Bethlehem to Plymouth; Abutters--Whitefield, Dalton and Bethlehem; Towns of Bethlehem, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill and Whitefield; Towns of Woodstock, Bridgewater, Littleton, Deerfield, Pembroke, New Hampton, and Ashland Water & Sewer Department; Environmental Non-Governmental Organizations ("NGOs"); Southern Non-Abutters--Ashland to Deerfield; Non-Abutters--Stewartstown to Bethlehem; Cities of Berlin and Franklin; Abutters--Dummer, Stark and Northumberland; Deerfield Abutters; and Historic NGOs. The International Brotherhood of Electrical Workers concur with the motion.

⁴ The D.C. Court of Appeals has held that "[an] agency, like a trial court, 'should permit cross examination to explore any matters which tend to contradict, modify, or explain testimony given on direct.'" *Cathedral Park Condo. Comm. v. D.C. Zoning Comm'n*, 743 A.2d 1231, 1250 (D.C. 2000). Friendly cross does not serve or promote any of these purposes.

III. CONCLUSION

13. To the extent a party to an adjudicative hearing has a right to cross examine a party, that right is limited to an opposing party, and even then the Presiding Officer may limit it. The Applicants are not asking to limit the ability of intervenors to conduct legitimate cross-examination. Rather, the Applicants seek to ensure the orderly conduct of the proceeding and preserve their rights to due process by restricting questions that do not qualify as cross-examination. Consequently, while rulings were made in prior dockets at the time of the hearing on the use of friendly cross, in this case the Applicants request clarification at the outset in order to ensure an efficient and orderly process.

WHEREFORE, the Applicants respectfully request that the Presiding Officer:

- A. Clarify that intervenors are not permitted to conduct friendly cross of the Applicants or one another as a matter of right; and
- B. Grant such further relief as is deemed just and appropriate.

Respectfully submitted,

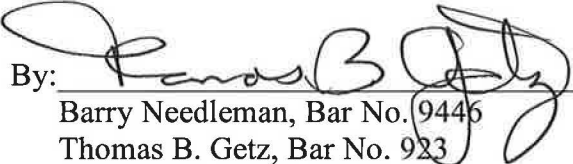
Northern Pass Transmission LLC and Public
Service Company of New Hampshire d/b/a
Eversource Energy

By Its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: March 7, 2017

By:



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Certificate of Service

I hereby certify that on the 7th of March, 2017, 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 Distribution List.



Thomas B. Betz