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March 15, 2017

**By E-Mail & U.S. Mail**

Pamela G. Monroe, Administrator  
New Hampshire Site Evaluation Committee  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429  
pamela.monroe@sec.nh.gov

**Re: 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**

Dear Ms. Monroe:

Enclosed is Counsel for the Public's Motion to Compel Production of London Economics International, LLC's Economic Model From the Applicants, or, Alternatively, Motion to Strike Testimony.

Thank you.

Sincerely,



Thomas J. Pappas

TJP/scm - 2766002\_1

Enclosure

cc: Peter C.L. Roth, Esq.  
Elijah J. Emerson, Esq.

**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

**COUNSEL FOR THE PUBLIC’S MOTION TO COMPEL PRODUCTION OF LONDON  
ECONOMICS INTERNATIONAL, LLC’S ECONOMIC MODEL FROM THE  
APPLICANTS, OR, ALTERNATIVELY, MOTION TO STRIKE TESTIMONY**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby moves to compel the Applicants to produce the economic model used by London Economics International, LLC (“LEI”) to develop Julia Frayer’s Pre-filed Testimony and attached report, or, alternatively, to strike Julia Frayer’s Pre-filed Testimony and attached report. In support of this motion, Counsel for the Public states as follows:

**BACKGROUND**

1. On October 19, 2015, Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”), submitted a Joint Application for a Certificate of Site and Facility (the “Application”) to the New Hampshire Site Evaluation Committee (the “Committee” or “SEC”) to construct a 192-mile transmission line to run through New Hampshire from the Canadian border in Pittsburg to Deerfield (the “Project”).

2. The Applicants have submitted the report of LEI and the profiled testimony of Ms. Frayer on October 15, 2015. On February 15, 2017, pursuant to order of the presiding officer dated September 22, 2016 Ms. Frayer updated her testimony and report to address changes in the electricity markets since the original testimony was filed. Among the assertions

made by LEI and Ms. Frayer is that the Project's effects on the forward capacity market will produce significant cost savings and economic benefits for New Hampshire ratepayers.

3. To investigate the effects of the Project on the electricity markets and to verify the claims made by the Applicants about benefits arising therefrom the Committee authorized Counsel for the Public to retain The Brattle Group, recognized experts in energy markets.

4. Counsel for the Public has requested, in his original data requests as well as in requests made at technical sessions, including that held on February 27, 2017, that the Applicants produce LEI's economic model, which was used by LEI to develop Ms. Frayer's testimony and report.

5. The Applicants have refused to produce the economic model used by LEI and Ms. Frayer on the grounds that such is proprietary to LEI's and Ms. Frayer's business, even though Counsel for the Public is afforded access to all the same confidential material that the Committee itself may have. In that sense, the refusal to produce the model for Counsel for the Public and his experts is the same as refusing to produce it for the Committee.

6. Counsel for the Public has deemed it necessary and appropriate to investigate the underlying economic model used by LEI because without access to the model, Counsel for the Public cannot test or understand the judgment embedded into the model with respect to a critical opinion of Ms. Frayer concerning the value of the capacity market benefits that she claims that the Project will produce for New Hampshire. The value of the capacity market benefits is 90% of the electricity market benefits that Ms. Frayer claims would result from the Project, and drives a significant part of the claimed local benefits in New Hampshire as well, including the claim to reduced electric bills for New Hampshire customers.

7. The following are examples of the issues and judgments embedded in LEI's economic model that Counsel for the Public can investigate by examining LEI's model:

- (a) Whether LEI properly applied the mechanics of ISO-NE's capacity market clearing, based on the supply curve and demand curve.
- (b) How LEI determined that the Project would cause so few Base Case resources to exit the market (thus leading to a large price impact of the Project with little moderation by other suppliers' responses).
- (c) What criteria LEI applied for retiring a resource, such as, mothballing a resource through a static or dynamic de-list bid.
- (d) Whether LEI found that resources remaining in the market would remain profitable even under prices depressed by the Project.
- (e) Whether LEI's analysis used realistic assumptions on the going-forward fixed costs of aging resources
- (f) Whether LEI's analysis used realistic estimates about the net revenues generators would earn from energy and ancillary services markets.
- (g) Whether LEI's analysis properly accounted for the costs to the Project of taking on a capacity supply obligation, and how those costs would change over time as ISO-NE increases its performance penalty rates.
- (h) Why the Merrimack and Schiller plants are projected to retire in LEI's Base Case as well and the Project Case, including what were LEI's assumptions on those plants' costs, revenues, and penalty exposures that led LEI to conclude they would retire even without the Project, and that the Project's impact on prices would not be the deciding factor.

- (i) Why the gas-fired generators that LEI projected to retire in 2024 – 2026 in its original analysis are no longer retiring in either the Base Case or the Project Case in LEI’s updated report, even though capacity and energy prices are lower in the updated analysis than in the original report.
- (j) What is the basis for LEI’s projection that certain imports from New York chose to exit the ISO-NE capacity market for four, and only four, years following the Project’s entry into the market, and what capacity prices LEI is assuming would be available in New York.
- (k) Whether LEI properly evaluates when a new generator would enter the market, both with and without the Project.

Without investigating, testing, or understanding these and other judgments embedded in LEI’s model, Counsel for the Public cannot determine whether Ms. Frayer’s opinions about economic benefits are reliable. Since that information is critical to Counsel for the Public’s understanding of the Project’s projected impacts and Counsel for the Public’s statutory investigatory obligation, the Applicants should be compelled to produce the model.<sup>1</sup>

## **ARGUMENT**

### **I. Applicants Should Be Compelled to Produce the Economic Model Used By LEI.**

#### **A. RSA 162-H:10, V Requires Applicants to Produce the Economic Model Used by LEI to Counsel for the Public so that Counsel for the Public Can Comply With His Statutorily Mandated Investigatory Role.**

8. RSA 162-H:10, V explicitly directs that “[t]he site evaluation committee and counsel for the public *shall* conduct such reasonable studies and investigations as they deem

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<sup>1</sup> Counsel for the Public inquired about LEI’s model at technical session, but Ms. Frayer declined to adequately describe the model or LEI’s embedded judgments and assumptions in the model.

necessary or appropriate to carry out the purposes of this chapter ... .” RSA 162-H:10, V (emphasis added).

9. That statutory directive, employing the critical “shall” imperative, *requires* Counsel for the Public to conduct any investigation he “deem[s] necessary or appropriate to carry out the purposes of [Chapter 162-H].” *Id.*; see also *In re Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) (“It is the general rule that in statutes the word ‘may’ is permissive only, and the word ‘shall’ is mandatory.”) (quoting *Appeal of Rowan*, 142 N.H. 67, 71 (1997)).

10. Counsel for the Public has deemed it necessary and appropriate to investigate the underlying bases for Julia Frayer’s Pre-filed Testimony and attached report to ascertain the reliability of the opinions expressed in those documents and what weight or consideration they should be given in this proceeding. Without the underlying economic model used by LEI to generate those documents, Counsel for the Public cannot fully perform his investigatory responsibilities as mandated by RSA 162-H:10, V.

11. Accordingly, Applicants should be compelled to provide the economic model used by LEI so that Counsel for the Public can properly proceed with the investigation he has deemed necessary and appropriate.

**B. The Economic Model Used by LEI is Discoverable Under New Hampshire Law and its Production Should be Compelled as it Would Before the Public Utilities Commission.**

12. Site 202.24(b) provides that “[a]ll documents, materials and objects offered as exhibits shall be admitted into evidence, unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged.” Site 202.12(l) requires “[t]he presiding officer or any hearing officer designated by the presiding officer” to authorize discovery that “is necessary to enable the parties to acquire evidence admissible in a proceeding.”

13. Under New Hampshire law, parties are entitled to discovery of “[t]he facts or data considered by” other parties’ expert witnesses “in forming the[ir] opinions.” RSA 516:29-b(II)(b). In fact, Rule 37(d) of the Standing Pre-trial Orders for New Hampshire Superior Courts specifically provides that where an expert is going to testify at trial, he or she shall “be advised by counsel to bring their original records and notes to court with them.”

14. These dictates are sensible extensions of the overarching general rule under New Hampshire law, which “takes a liberal view of discovery,” that “[a]bsent some privilege and subject to control to prevent harassment, full discovery is favored even against third parties and State agencies.” *Yancey v. Yancey*, 119 N.H. 197, 198 (1979); *see also City of Nashua*, NH PUC Order No. 24,681 (October 23, 2006) (noting PUC discovery policies are consistent with superior court rules relating to the scope of discovery and requires a party to show the information sought is “reasonably calculated to lead to admissible evidence”).

15. Ultimately “discovery is an important procedure ‘for probing in advance of trial the adversary’s claims and his possession or knowledge of information pertaining to the controversy between the parties. [The] underlying purpose is to reach the truth ... .’” *Johnston by Johnston v. Lynch*, 133 N.H. 79, 94 (1990) (quoting *Scotsas v. Citizens Insurance Co.*, 109 N.H. 386, 388 (1969)).

16. The request made by Counsel for the Public in data requests and at technical session seeks information that is relevant to this proceeding. Access to the economic model is necessary for Counsel for the Public to understand LEI’s analytic process, as well as Ms. Frayer’s Pre-filed Testimony and her attached report. Without the economic model, Counsel for the Public, as well as the Committee, will have no way of knowing the judgments made by LEI as to how markets will work in the future that were embedded into the model. This information

is not only relevant but critical to this proceeding because access to the judgment calls LEI made in developing the economic model are necessary to determine whether Ms. Frayer's testimony and report are reliable.

17. Accordingly, "full discovery [of the economic model] is favored" here and any concerns of disclosure of sensitive information can be addressed by a confidentiality agreement or protective order. *Yancey*, 119 N.H. at 198.

18. While the PUC has declined to directly adopt RSA 516:29-b, it has explained that "Subject to a valid privilege,

'[d]isclosure of facts or data underlying expert opinions is permissible in discovery. In superior court, a party is entitled to disclosure of the opposing party's experts, the substance of the facts and opinions about which they are expected to testify, and the bases of those opinions. Failure to supply this information may result in exclusion of the expert testimony unless good cause is shown to excuse the failure to disclose.'"

*Investigation of Scrubber Costs & Cost Recovery*, Order No. 25,646 at 4-5, available at 2014 WL 1826771, at \*4-5 (Apr. 8, 2014) (quoting *City of Nashua*, Order No. 24,681 at 9 (Oct. 23, 2006) (citations omitted) ("*Investigation of Scrubber Costs*")).

19. Declining specifically to adopt the requirements of RSA 516:29-b, the PUC nevertheless "generally agree[d] with its requirements that a party must provide, either through pre-filed testimony or discovery, 'a complete statement of: (a) All opinions to be expressed and the bases and reasons therefor; (b) The facts or data considered by the witness in forming the opinions; [and] (c) Any exhibits to be used as a summary of or support for the opinions.'" *Id.* (quoting RSA 516:29-b, II).

20. The Committee should follow New Hampshire law on this issue, or at a minimum adopt the same approach as the PUC and compel production of the critical economic model data underlying Julia Frayer's Pre-filed Testimony and attached report.



21. Production of LEI's economic model is necessary to Counsel for the Public's understanding of the Applicants' predictions related to the future of energy markets. It is important that the model is reviewed and subject to analysis by The Brattle Group and ultimately, the Committee. The economic model is unquestionably relevant and certainly reasonably calculated to lead to the discovery of admissible evidence.

22. The economic model also cannot be withheld on the basis of privilege because a proprietary interest "does not rise to the level of a recognized privilege and must yield to the needs of the case." *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99CV118, 2001 WL 34059032, at \*6 (W.D. Mich. Feb. 13, 2001); *Matter of Midland Asphalt Corp.*, 616 F. Supp. 223, 226 (W.D.N.Y. 1985); *Atlantech, Inc. v. Am. Panel Corp.*, No. 11-50076, 2011 WL 2078222, at \*3 (E.D. Mich. May 24, 2011); *In re Pelvic Mesh/Gynecare Litig.*, 426 N.J. Super. 167, 185, 43 A.3d 1211, 1221 (App. Div. 2012).

23. Where the "information sought could be directly relevant to establishing" facts relevant to the proceeding it must be produced notwithstanding its sensitive nature. *Carfagno*, 2001 WL 34059032, at \*6. Any concerns regarding the proprietary nature of the information can be addressed by a protective order or confidentiality agreement. *See, e.g., Ultimate Corp. v. Computer Remarketing Corp.*, No. 90-0239, 1990 WL 99166, at \*2 (E.D. Pa. July 11, 1990).

**II. Alternatively, Julia Frayer's Pre-filed Testimony, Report and any Further Testimony Should be Stricken and/or Excluded by Operation of New Hampshire Rule of Evidence 702.**

24. New Hampshire Rule of Evidence 702 provides that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

25. Critically, “[s]ubsumed in the requirements of Rule 702 is the premise that expert testimony must be reliable to be admissible [because] only if the expert’s testimony is reliable can it assist the jury in understanding the evidence or determining a fact in issue.” *State v. Cressey*, 137 N.H. 402, 404–05 (1993).

26. But that reliability cannot be judged without full and proper consideration and analysis of the methodology and assumptions underlying the expert’s testimony. This is because “[t]he opinions expressed by any expert are only of value insofar as they are based upon factual assumptions which are fairly supported *in the record*.” *Bartlett Tree Experts Co. v. Johnson*, 129 N.H. 703, 707 (1987) (emphasis added) (quoting *Johnson v. Califano*, 434 F. Supp. 302, 309 (D. Md. 1977)).

27. Indeed, “the bases of expert testimony must be carefully considered,” for expert testimony to be admitted and where, as here, those bases could not be considered at all the proper remedy is exclusion. *Id.*; see also *Investigation of Scrubber Costs*, at 4-5 (“Failure to supply this information may result in exclusion of the expert testimony unless good cause is shown to excuse the failure to disclose.”).

28. Permitting LEI to withhold the economic model it used to generate Julia Frayer’s Pre-filed Testimony and report renders that “expert’s conclusions [] as impenetrable as they are unverifiable,” and such conclusions cannot be submitted to the trier of fact. *Cressey*, 137 N.H. at 410; see also *In re Katrina Canal Breaches Consol. Litig.*, No. 10-866, 2012 WL 3815672, at \*2 (E.D. La. Sept. 4, 2012) (“In the event evidence is adduced at trial that indeed the experts did in some way rely on the model and the model was not produced, the Court would be compelled to strike the entire testimony, which would be a Draconian remedy which will be avoided by the production of the model.”).

29. Accordingly, if LEI is permitted to withhold the economic model as it presently insists it must, Applicants must accept that Julia Frayer's Pre-filed Testimony and report be stricken and that she be excluded from any further testimony in these proceedings.

WHEREFORE, Counsel for the Public respectfully requests that the SEC:

- A. Order the Applicants to produce LEI's economic model; or
- B. Alternatively strike Julia Frayer's Pre-filed Testimony and report and exclude her from any further testimony in these proceedings; and
- C. Grant such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,



Dated: March 15, 2017

By:


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Dated: March 15, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MOTION TO COMPEL PRODUCTION OF LONDON ECONOMICS INTERNATIONAL, LLC'S ECONOMIC MODEL FROM THE APPLICANTS, OR, ALTERNATIVELY, MOTION TO STRIKE TESTIMONY has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: March 15, 2017

By:

  
\_\_\_\_\_  
Thomas J. Pappas, Esq. (N.H. Bar No. 4111)