

PRIMMER PIPER EGGLESTON & CRAMER PC

Attorneys at Law

200 Elm St., 15th Floor | P.O. Box 3600 | Manchester, NH 03105-3600

THOMAS J. PAPPAS
ADMITTED IN NH AND DC
tpappas@primmer.com
TEL: 603-626-3301
FAX: 603-626-0997

March 17, 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 Objection to Applicants' Motion to Clarify Use of "Friendly" Examinations.

Thank you.

Sincerely,



Thomas J. Pappas

TJP/scm - 2767922_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 OBJECTION TO APPLICANTS'
MOTION TO CLARIFY USE OF "FRIENDLY" EXAMINATION**

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer
Piper Eggleston & Cramer PC, hereby objects to Applicants' Motion to Clarify Use of
"Friendly" Examination (the "Motion"). In support of this objection, Counsel for the Public
states as follows:

BACKGROUND

1. Northern Pass Transmission LLC and Public Service Company of New
Hampshire d/b/a Eversource Energy ("PSNH") (collectively the "Applicants") seek by their
motion to prevent the intervenors from cross-examining witnesses presented by other intervenors
that have similar interests in this proceeding.

2. Applicants carve out Counsel for the Public from the Motion and do not attempt
to constrain the ability of Counsel for the Public to cross-examine witnesses, but given the
importance of cross-examination for the full and true disclosure of facts in this proceeding
Counsel for the Public objects to this request.

ARGUMENT

**I. Applicants' Motion is Premature as this Issue has Consistently Been Addressed
during the Course of Actual Adjudicative Proceedings and it should be no Different
Here.**

3. RSA 541-A:33, IV mandates that a party to an adjudicative proceeding "may
conduct cross-examinations required for a full and true disclosure of the facts."

4. RSA 541-A:33, II further directs that “[t]he rules of evidence shall not apply in adjudicative proceedings” and broadly permits “[a]ny oral or documentary evidence” subject to the limitation that “the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.” Site 202.11 permits the Presiding Officer to limit an intervenor’s “use of cross-examination and other procedures so as to promote the orderly and prompt conduct of the proceeding.”

5. The statutory and regulatory authority of the Presiding Officer together with the officer’s experienced judgment is more than sufficient to address the concerns raised by Applicants as to the potential for “friendly cross.” The established practice for adjudicative proceedings in this State is for context-specific determinations to be made as to whether a party’s cross-examination should be curtailed during the course of the adjudicative hearing itself as the issue arises. A broad prohibition based solely on the Applicants’ belief as to a particular party’s position regarding the Project at the outset is premature and contrary to established practice.

6. When PSNH previously sought the same relief before the Public Utilities Commission back in 1996 in *In re Statewide Elec. Util. Restructuring Plan*, the Commission held that it was not “appropriate to deny parties the opportunity to conduct cross-examination during the adjudicative portions of th[e] proceeding.” 81 N.H.P.U.C. 564 (July 22, 1996). Addressing PSNH’s same concerns more than 20 years ago, the Commission explained that “[p]arties should understand, however, that [the Commission] will limit cross-examination that is redundant or unproductive.” *Id.*

7. That approach to defer any rulings limiting the right of parties to cross-examine witnesses in the adjudicative portions of administrative proceedings has been consistently

maintained in administrative proceedings in this State since that time, including before the Site Evaluation Committee (“SEC”).

8. While Applicants reference that Counsel for the SEC noted during the final pre-trial hearing conference in the *Antrim Wind Energy* Docket, 2015-02, that “cross-examination, when it’s a party that you support, is not really cross-examination at all,” they fail to appreciate that Counsel for the SEC in that case adopted the same approach taken by the PUC in *In re Statewide Elec. Util. Restructuring Plan. In re Application of Antrim Wind Energy LLC*, no. 2015-02, Final Structuring Conference Tr. at 109 (Sept. 7, 2016)

9. In the course of making the comment concerning “friendly cross,” Counsel for the SEC specifically rejected the idea of a motion at the outset “to eliminate friendly cross” primarily given the due process concerns it would generate. *Id.* Counsel for the SEC explained that the potential for essentially extended direct testimony would be addressed by the ability of the Chair to cut such questioning short at the time and the negative impression it would have on the Committee generally. *Id.* at 109-110.

10. Counsel for the SEC also addressed the concern of new information coming out that should have been in pre-filed direct testimony or technical sessions, explaining that “any time that that occurs, it’s incumbent upon you to object and make the objection and let the Chair make the ruling ... it’s just the nature of the beast.” *Id.* at 111. Ultimately the concerns of “friendly cross” raised prior to the adjudicative hearings themselves were concerns that Counsel for the SEC explained could be addressed by the Chair during the adjudicative hearings themselves because the Chair “knows friendly cross when he hears it. And, if it’s not something that is admissible, or if it is just duplicative or a waste of time, he’s going to stop it.” *Id.* at 112.

11. That position was consistent with the position the same Counsel for the SEC had previously taken. In *Antrim Wind Energy*, Docket 2012-01, Counsel for the SEC noted that “we have friendly cross in every case” and in that proceeding it was addressed by letting the applicant cross-examine last and “bat clean-up on all of the other parties.” *In re Application of Antrim Wind Energy, LLC*, no. 2012-01, Prehearing Conference Tr., at 54 (October 25, 2012).

12. The parties to these proceedings are entitled to cross-examine other parties’ witnesses and they should not be curtailed at the outset from doing so. *See* RSA 541-A:33, IV.

13. Any concerns of potential “friendly cross” interfering with the orderly and prompt adjudication can be addressed during the course of the proceedings by way of a contemporaneous objection by Applicants and a contemporaneous ruling by the Presiding Officer in a particular instance if such friendly cross *in fact* interferes with the orderly and prompt conduct of the proceedings. In the Motion, the Applicants are asking the Subcommittee to address this issue in a vacuum and as a legal matter without knowing whether a problem will ever actually arise and instead simply assuming a problem will arise.

14. The *Public Service Company of New Hampshire Investigation of Scrubber Costs and Cost Recovery* proceeding that Applicants reference in their motion illustrates the wisdom of addressing this issue on a case-by-case basis during the proceeding. DE 11-250, Tr. Day 1/Afternoon Session, at 76; Applicants’ Mtn. at 4-5. While the Presiding Commissioner did note the concern that “we don’t want the parties to pile on bolstering a particular witness’ testimony through friendly cross-examination,” the Presiding Commissioner then immediately further explained, “[t]hat doesn’t mean a party can’t ask a witness of another party who tends to be aligned with them on topics that will help them otherwise, that the witness didn’t address in his or her own testimony.” *Id.* at 76-77.

15. The Presiding Commissioner appropriately considered *contemporaneous* objections in the context of the adjudicative proceedings themselves and twice overruled “friendly cross” objections because the questions did not in fact constitute “friendly cross.” *See, e.g., id.* at 67, 81.

16. New Hampshire has many years of successful experience addressing any potential issues with “friendly cross” at the time those issues actually arise in adjudicative proceedings where context provides the Presiding Officer the ability to appropriately address any objections. The relief sought by the Applicants is unprecedented in SEC cases since at least 2006. There is no reason to depart from that approach here, especially in light of the strong public response to the matter, the fact that many intervenors are not represented by counsel, they have already been grouped together in ways that they did not all agree with, and the overall concern that the proceeding should be one where public participation is encouraged, not obstructed.

II. Applicants’ Motion Assumes a Perfect Alignment of Interests between Intervenors that is not Supported by the Record.

17. While some parties tend to be aligned with others in this proceeding, that does not mean they align perfectly on all issues. It would be inappropriate to constrain a party’s ability to cross-examine other parties’ witnesses just because they tend to be aligned with that party.

18. As the Presiding Commissioner in the *Public Service Company of New Hampshire Investigation of Scrubber Costs and Cost Recovery* proceeding recognized, just because one party “tends to be aligned with” another party, does not mean that their interests are perfectly aligned or that they should be precluded from cross-examining the other party’s witnesses “on topics that will help them otherwise, that the witness didn’t address in his or her own testimony.” DE 11-250, Tr. Day 1/Afternoon Session, at 76-77.

19. Different parties have different interests, and a blanket prohibition on cross-examination ignores those differences and assumes a homogeneity that simply does not exist.

20. The Applicants' Motion demonstrates this lack of perfect alignment. The Motion states that "[a]n 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" Applicants' Mtn. at 2. However, the City of Franklin has objected to Applicants' motion. *See* Applicants' Mtn. at 5, ¶ 12.

21. Only context-specific objections during the course of the adjudicatory proceedings will be able to fully explore the nuances present here and ascertain whether particular questioning is appropriate. *See also In re Statewide Elec. Util. Restructuring Plan*, 81 N.H.P.U.C. 564 (July 22, 1996) ("We will note that an agreement to consolidate some aspects of presentation and cross-examination will not preclude parties from offering separate presentations on particular issues should their interests diverge.").

III. The Intervening Parties Have Already Been Restricted and Consolidated in this Proceeding, Addressing the Chief Concern of Duplicative Testimony.

22. By orders dated March 18, 2016 and May 20, 2016, the Subcommittee ruled on the numerous petitions to intervene in this proceeding. In doing so, the Subcommittee grouped together various intervenors and consolidated and restricted their activities in furtherance of the goal of prompt and orderly conduct of the proceedings.

23. The Subcommittee specifically ordered that certain groups of intervenors "must designate a single spokesperson for the purposes of filing pleadings, conducting discovery, *and for examining witnesses at evidentiary hearings* [to] assure the prompt and orderly conduct of the proceedings." *See, e.g.,* Order on Petitions to Intervene at 8-9, 17, 19, 21, 23-25 (March 18, 2016) (emphasis added).

24. The intervenors in those groups have already seen their participation constrained in the furtherance of the prompt and orderly conduct of the proceedings. That participation should not be artificially constrained further in service of Applicants' belief that the intervenors all share aligned interests and will interfere with the orderly and prompt conduct of the hearing.

25. In specifically grouping together various intervenors, the Subcommittee has made determinations of alignment. What the Subcommittee determined sufficient to organize the groups of intervenors should be sufficient to permit them to cross-examine the other groups' witnesses.

IV. Restricting Parties' Rights to Cross-Examine Witnesses at the Outset Raises Due Process Concerns.

26. The New Hampshire Constitution provides that no person may be denied life, liberty or property except in accordance with the "law of the land." N.H. CONST. Part 1, art. 15. The New Hampshire Supreme Court has consistently interpreted "law of the land" to mean due process of law. *See Appeal of Portsmouth Trust Co.*, 120 N.H. 753, 756 (1980).

27. While the due process requirements that apply to administrative fact-finding procedure differ from those that govern judicial procedure, a pre-hearing blanket prohibition on cross-examination without inquiry into whether such cross-examination would actually interfere with the orderly conduct of the hearing would deprive the intervenors of their right to due process.

28. To the extent issues arise concerning potential "friendly cross" questioning, the intervenors are entitled as a matter of due process to the opportunity to be heard on offers of proof as to the purpose of the questioning involved and a case-specific determination by the Presiding Officer as to whether the questioning should be permitted. Without a showing of

abuse or an actual problem with permitting intervenor cross-examinations, those intervenors would be denied due process.

V. Exempting Counsel for the Public is not An Appropriate Solution.

29. The Applicants note in their Motion that they do not intend for the ruling they seek to apply to Counsel for the Public. Implicit in this is that Counsel for the Public can perform the cross examination of other parties that may be necessary for a full and true disclosure of the facts.

30. While Counsel for the Public plays an important role in this matter in protecting the public interest, he is not in a position to adequately protect the individual rights of the other intervenors. There may be and likely are profound differences between the interests of the numerous private parties involved and those of the public at large which counsel for the Public represents. Despite what the Motion says, Motion at 3, ¶ 5, Counsel for the Public has not taken a position on the Project at this time, so the implication that intervenor cross of Counsel for the Public's witnesses is friendly is unfounded.

31. The SEC should not enter an order that may cause confusion among other parties by suggesting that Counsel for the Public's unfettered right cures any ills that the order Applicants seek may inadvertently cause.

32. Finally, the Applicants' approach places a near impossible burden on Counsel for the Public to manage cross-examination of all the witnesses in the case in such a way as to protect the due process rights of all of the intervenors.

CONCLUSION

33. As has been the consistent past practice in this State, any issues related to potential "friendly cross" examinations should be addressed contemporaneously in the course of

the adjudicative hearing based on the context in which objections arise. A pre-mature ruling artificially constraining the ability of the intervenors to cross-examine witnesses inappropriately assumes an identity of interests that may not exist, a problem that may never arise, and an inability of the Presiding Officer to address such concerns contemporaneously that is not borne out by past practice.

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

- A. Deny Applicants' Motion to Clarify Use of "Friendly" Examination; and
- B. Grant such other and further relief as may be just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,

Dated: March 17, 2017

By:

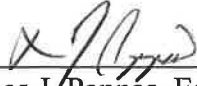


Peter C.L. Roth, Senior Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3679
Peter.roth@doj.nh.gov

PRIMMER PIPER EGGLESTON & CRAMER PC,

Dated: March 17, 2017

By:


Thomas J. Pappas, Esq. (N.H. Bar No. 4111)
P.O. Box 3600
Manchester, NH 03105-3600
(603) 626-3300
tpappas@primmer.com

-and-

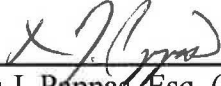
Elijah D. Emerson, Esq. (N.H. Bar No. 19358)
PRIMMER PIPER EGGLESTON & CRAMER PC
P.O. Box 349
Littleton, NH 03561-0349
(603) 444-4008
eemerson@primmer.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OBJECTION TO APPLICANTS' MOTION TO CARLIFY USE OF "FRIENDLY" EXAMINATION has this day been forwarded to all persons named on the Distribution List of this docket.

Dated: March 17, 2017

By:


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