

THE 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

**OBJECTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE
FORESTS TO THE APPLICANTS' MOTION TO CLARIFY USE OF
"FRIENDLY" EXAMINATION**

The Society for the Protection of New Hampshire Forests (the "Forest Society"), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully requests that the Presiding Officer of the Site Evaluation Committee (the "SEC") deny Northern Pass Transmission LLC's and Public Service Company of New Hampshire d/b/a Eversource Energy's (collectively the "Applicants") Motion requesting that the Presiding Officer clarify that intervenors are not permitted to conduct so-called "friendly cross-examination" of the Applicants or one another as a matter of right ("Motion to Clarify"). In support of this Objection, the Forest Society states as follows:

BACKGROUND

1. On March 7, 2017, Applicants filed the pending Motion to Clarify.
2. In so moving, Applicants contend that "there is no right to friendly cross and . . . believe that permitting it as a matter of course will disrupt the prompt and orderly conduct of the proceeding and unfairly prejudice [the Applicants'] ability to present their case." Motion to Clarify at 1.
3. Applicants' requested "clarification" is, in actuality, a request that the SEC create a *per se* rule that there is no right to friendly cross-examination and, therefore, intervenors are not

permitted to conduct friendly cross of the Applicants or one another.

ARGUMENT

4. The Forest Society respectfully requests that the SEC deny Applicants' requested clarification for several reasons. First, the clarification is not supported by the New Hampshire Administrative Procedure Act (APA) or the SEC administrative rules, which provide for broad cross-examination subject to certain limitations. Second, it is commonplace in multi-party litigation and administrative proceedings for one party to cross-examine another party's witness whose opinion is not adverse to the questioning party's own witnesses. Third, the requested relief is so extensive it would prevent the Forest Society and other parties from protecting the interests that formed the basis of their rights of intervention and violate their due process rights. Fourth, allowing friendly cross-examination, within the existing limitations, is especially appropriate in a docket of this scale and scope, and with an unprecedented number of *pro se* parties.
 - A. *The APA and SEC Rules Provide for Broad Cross-Examination Subject to Certain Limitations and do not Support Applicants Requested Narrow Definition of Cross-Examination*
5. The APA and the SEC rules anticipate broad cross-examination, in all its forms, so as to provide for a full and true disclosure of the facts, subject to certain limitations to be applied in regard to specific parties in the discretion of the Presiding Officer.
6. Neither the plain language of the APA nor the SEC rules support the Applicants' distinction between friendly and non-friendly cross-examination.
7. Section IV of RSA 541-A:33 states that a "party may conduct cross-examination required for a full and true disclosure of the facts."
8. The plain meaning of "cross-examination" is not necessarily limited to examination of a

witness by an attorney of an opposing party; it is generally also understood to include examination of a witness by an attorney of another party whose interests may, in part, align with the interests of the witness's party. *See, e.g., Legal Definition of Cross-Examination*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cross-examination> (last visited Mar. 14, 2017) (“The examination of a witness who has already testified in order to check or discredit the witness's testimony, knowledge, or credibility.”); *Cross-Examination*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/cross-examination> (last visited Mar. 14, 2017) (“At trial, the opportunity to question any witness who testifies on behalf of any other party to the lawsuit (in civil cases) or for the prosecution or other codefendants (in criminal cases).”)

9. If the Legislature had intended cross-examination be limited to adversarial examination by opposing parties only, it would have stated as much, especially in proceedings such as SEC proceedings that are not subject to the New Hampshire Rules of Evidence. *In re Juvenile*, 156 N.H. 800, 801 (2008) (“We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.”).
10. The SEC rules similarly make no such distinction between friendly and unfriendly cross-examination. *See* Site 202.11(d)(2).
11. That is not to say the parties may cross-examine each other for non-impeachment purposes without any limitation. The APA and the SEC rules authorize the Presiding Officer to limit cross-examination when necessary.
12. While the rules of evidence do not apply in adjudicative proceedings, “the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.” RSA 541-A:33, II.

13. When granting a party's intervention status, the SEC may, at either the time it grants that intervention or any subsequent time, impose conditions on the intervenor's participation, including limiting "intervenor's use of cross-examination . . . so as to promote the orderly and prompt conduct of the proceedings." RSA 541-A:32, III; Site 202.11(d).
14. The Presiding Officer's discretion is not without limitation, though, as any limitations on cross-examination "shall not be so extensive as to prevent the intervenor from protecting the interest which formed the basis of the intervention." RSA 541-A:32, III; Site 202.11(d).
15. The APA and the SEC rules do not authorize the Presiding Officer to issue sweeping, *per se* limitations on the use of cross-examination that, although not binding precedent, would likely lead to applicants routinely asking for such limitations in future cases. Rather, the APA and the SEC rules anticipate the Presiding Officer consider limiting cross-examination on case-by-case and party-by-party basis. *See* RSA 541-A:32, III (employing such phrases as "a petitioner" and "the intervenor's"); Site 202.11(d).
16. Here, should an intervenor's use of cross-examination result in unduly repetitious testimony, the Presiding Officer can, at that time and in regards to that intervenor, limit the scope of cross-examination.
17. As such, the requested *per se* rule is contrary to the intent of the APA and the SEC rules and no clarification on the Presiding Officer's authority on this topic is warranted.

B. The Use of Cross-Examination is a Common Feature of Multi-Party Litigation and Administrative Proceedings

18. Cross-examination is a common feature of multi-party litigation and administrative proceedings, and is not always adversarial in nature.
19. In their Motion to Clarify, acknowledging that neither the APA nor the SEC rules define cross-examination in any way that makes a distinction between friendly and unfriendly cross-

examination, the Applicants rely on selective citations to a scattering of secondary sources and commentary in New Hampshire and out-of-state administrative proceedings to support their narrow, preferred definition of cross-examination. Motion to Clarify at ¶¶ 2, 4, 8–10.

20. For example, Applicants second footnote refers to a comment by the Counsel for the SEC made during the final pre-hearing conference in the Antrim Wind Docket, 2015-02, in which he characterized what he understood to be cross-examination. *Id.* at p.2 n.2 (citing Tr. of Final Structuring Conference, at p. 109 (Sept. 7, 2016)).
21. While the isolated comment Applicants quote may be read to support their argument, a reading of the same quote in the context in which Counsel made it does not. Counsel made the quoted comment in the context of his larger point that he did not think the parties agreed on the issue of whether or not friendly cross-examination should be permitted. In regard to a hypothetical motion to “eliminate friendly cross,” Counsel further stated that “I highly doubt it would be granted, only because of due process concerns.” *Id.* at 107–110.
22. Moreover, Counsel to the SEC, the SEC Administrator, and Chairman Honigberg have acknowledged that friendly cross-examination is an accepted part of the SEC administrative hearing process.
23. When the applicant in an Antrim Wind, LLC, docket expressed concern about friendly cross-examination, Counsel to the SEC stated as follows: “I’m sure there will be—I mean, we have friendly cross in every case, you know its going to happen. Hopefully is will be done quickly.” Application of Antrim Wind, LLC, Docket No. 2012-01, Tr. of Prehearing Conference held on 10/25/12, at p. 54.
24. In the present docket, in an email exchange with an intervenor, the SEC’s Administrator stated that the only limitations on the intervenor’s questioning of any witness was that the

questions must be relevant and that the intervenor could only cross-examine intervenors who filed pre-filed testimony. *See* Exhibit A.

25. The PUC proceedings Applicants cite are similarly unsupportive of Applicants' arguments.

26. The PUC rules mirror the SEC rules cited and analyzed above. The purpose of cross-examination is for a "full and true disclosure of the facts," subject to the limitations necessary to prevent repetitive lines of inquiry. Puc 203.24(a), (b).

27. To support its contention that "[i]n the past, the PUC has limited the use of friendly cross," Applicants cite a comment made by the PUC Commissioner in *Public Service Company of New Hampshire: Investigation of Scrubber Costs and Cost Recovery. Motion to Clarify*, at ¶ 10 (quoting DE 11-250, Tr. of hearing held on 10/14/14-Day 1 Afternoon Session, at p. 76–77).

28. But this so-called limitation, which was made in the context of a specific objection during the hearing, is not as broad as the Applicants assert. The full comment is as follows:

CMSR. HONIGBERG: Well, I think there was a -- I think what we have in mind is we don't want the parties to pile on bolstering a particular witness' testimony through friendly cross-examination. That 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. Is that a distinction that people can appreciate?

Id.

29. The Commissioner did not *per se* limit all cross-examination of one party by a similarly aligned party. Rather, upon an objection to a particular line of questioning, he drew a distinction between cross that sought to elicit testimony unduly repetitious of direct testimony and cross that may be friendly but also covers something the witness didn't address in his or her own direct or pre-filed testimony. *Id.*

30. Not only is this isolated ruling on a single objection in a PUC docket not binding on this SEC docket, it does not support the Applicants' broad-sweeping and chilling requested relief. Rather, it shows that, in order to provide for a full and true disclosure of facts, the Presiding Officer should permit cross-examination, friendly or not, and limit it only if he deems the testimony it seeks to elicit unduly repetitious.

C. The Applicants' Requested Ruling on the Use of Cross-Examination is so Extensive it Would Prevent the Forest Society and Other Intervenors from Protecting the Interests Which Formed the Bases of Their Intervention and Violate Their Due Process Rights

31. The APA and the SEC rules state that the Presiding Officer may impose limitations on cross-examination only so long as said limitations do not prevent an intervenor from protecting the interest which formed the basis of its intervention. RSA 541-A:32, IV; Site 202.11(e).

32. The requested *per se* rule, if granted, would prevent the Forest Society and other intervenors from protecting their interests, and would violate their due process rights.

33. First, there is no clear principle of law whereby the Presiding Officer can objectively determine which intervenors will be friendly or unfriendly to a particular witness. Any attempt to do so prior to the start of the adjudicatory hearings by virtue of a *per se* rule is necessarily subjective and risks characterizing the evidence before all members of the SEC have had a chance to consider it.

34. Second, each intervenor has a separate basis for intervention and, therefore, each intervenor or group of intervenors may have different goals and purposes in cross-examining.

35. Third, cross-examination is not the equivalent of redirect examination. Unlike on redirect, an intervenor does not have control over the testimony prepared by the other intervenor.

36. It would be unfair to prohibit an intervenor from cross-examining the witness of another intervenor or the intervenor-witness who offers seemingly favorable testimony because

cross-examination is a key tool in evaluating the content and credibility of testimonial evidence.

37. Allowing all types of cross-examination will allow for a more true and full disclosure of the facts of a given testimony than would be revealed through only cross-examination by hostile parties.

38. In the 2015-02 Antrim Wind Docket, Counsel for the SEC himself remarked that he highly doubted a motion to eliminate friendly cross-examination would be granted because of due process concerns. Tr. of Final Structuring Conference at 109 (Sept. 7, 2016).

39. These due process concerns outweigh the Applicants' concerns of unduly repetitious evidence. If a particular cross-examination needlessly repeats points that were made on direct examination, or introduces new evidence not relevant to the pre-filed testimony of the witness being examined, any party can object and the Presiding Officer can limit that intervenor's scope of cross-examination for that witness, either in response to such an objection or *sua sponte*. As compared to the Applicants requested ruling, this is a more reasonable and less prejudicial procedure for ensuring both an efficient adjudicatory hearing and a full and true disclosure of the facts. Further, this has been the established practice of the SEC. The Applicants' requested ruling would mark a stark break from SEC practice and establish a chilling-effect precedent in future dockets.

D. Allowing Cross-Examination, Within Already-Existing Limits, is Necessary in a Case of Such Uniquely Large Scale and Scope and with Numerous Underrepresented Parties

40. Lastly, Applicants' point to the number of intervenors and parties involved in this proceeding as reason to restrict cross-examination. Motion to Clarify at ¶ 11.

41. To the contrary, the scale and scope of this project, and the high number of *pro se* parties further underscores the need for broad cross-examination, subject to the case-by-case limitations, in order to facilitate the full and true disclosure of the facts.
42. In fact, past chairs of the SEC, including the author of the Applicants' Motion to Clarify, have acknowledged the importance of friendly cross-examination in administrative matters with *pro se* participants.
43. In an Antrim Wind Energy, LLC docket, Thomas B. Getz, presiding as Chairman, issued the following order regarding cross-examination, including friendly cross, as follows:

CHAIRMAN GETZ: And, what I would expect, in terms of as a general matter for order of cross, we're going to start with -- our order of witnesses would be those in favor of the Petition They will be crossed in turn, . . . starting with [the applicant's witness], then crossed by, which is commonly called "friendly cross", by parties who share the same position, and then cross by persons adverse, and then prepared to have the Public Counsel go last.

Petition for Jurisdiction Over Renewable Energy Facility Proposed by Antrim Wind Energy, LLC, SEC Docket No. 2011-02, Tr. of hearing held on 6/1/11-Day 1 Morning Session, at p. 27.

44. Later in that docket, a participant objected to an attorney's cross-examination of a witness, objecting that the questions were leading and objecting because the attorney was "examining a friendly witness." *Id.* at 48. Chairman Getz overruled both objections, explaining that "[t]his is an administrative hearing, and we'll permit the examination in this manner, not the least of which is we're going to hear from *pro se* examiners." *Id.* at 49.

CONCLUSION

45. Applicants' Motion to Clarify requests a *per se* rule restricting the scope of cross-examination that is not supported by the APA or the SEC rules, is contrary to administrative law practice in New Hampshire, violates Forest Society's due process rights, and is particularly prejudicial in a docket of this scale and scope with so many *pro se* intervenors.

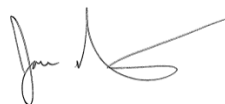
WHEREFORE, the Forest Society respectfully asks that the Subcommittee deny the Applicants' requested relief and grant such other and further relief as may be reasonable and just.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,

BCM Environmental & Land Law, PLLC



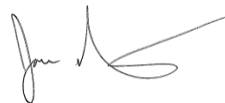
Date: March 17, 2017

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day, March 17, 2017, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.



Jason Reimers

EXHIBIT A

----- Forwarded message -----

From: **Monroe, Pamela** <Pamela.Monroe@sec.nh.gov>

Date: Mon, Mar 13, 2017 at 12:44 PM

Subject: RE: procedure

To: David Van Houten <davidgvanhouten@gmail.com>

David-

I should have been more specific in my answer. When you asked if there was a limitation on who you could question, I assumed (my bad) that you knew that it applied to people that have submitted pre-filed testimony. Those that have not, are not witnesses to the proceeding. They are still intervenors, but cannot be witnesses.

See the answers to the rest of your questions below.

Yes, I am planning on conducting training so that folks are prepared for the pre-hearing conference.

Please give me a call at any time to discuss.

Sincerely,

Pam

Pamela G. Monroe

Administrator

Site Evaluation Committee

21 S. Fruit Street, Suite 10

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<http://www.nhsec.nh.gov/index.htm>

From: David Van Houten [mailto:davidgvanhouten@gmail.com]

Sent: Monday, March 13, 2017 10:06 AM

To: Monroe, Pamela

Subject: Re: procedure

Dear Pam,

I encourage you to follow up on the thought to offer some training on what is ahead of us in the adjudicative hearing. I also ask you to consider circulating a document to everyone involved that describes the “baseline” rules. I realize that there will be some jockeying by attorneys filing motions to gain an advantage, but those of us who are approaching this in a more straightforward way need to know the rules and sequence. It would serve the desire we all have for an efficient and orderly process.

The answers you gave me to my inquiries about questioning at the adjudicative hearing lead me to believe that all the following statements are true.

- As spokesperson for my group, I can question any or all other interveners in my group, whether or not they submitted pre-filed testimony. **See my comment above**
- Another member of my group, standing in as spokesperson, can question me, whether or not I submitted pre-filed testimony. **See my comment above.**
- A spokesperson from our group will have the opportunity to question every other individual or entity that was granted (and still enjoys) intervener status. **See my comment above.**
- A spokesperson from our group will have the opportunity to question anyone who submitted pre-filed testimony, including expert witnesses introduced by anyone. **Correct**

➤ It is our responsibility to keep our lines of questioning consistent with the concerns we have put forward in our petitions to intervene and pre-filed testimony. **I am not sure that I understand what you are asking/saying??**

Please confirm or correct this.

Thank you,

David

On Mon, Mar 6, 2017 at 9:25 AM, Monroe, Pamela <Pamela.Monroe@sec.nh.gov> wrote:

David-

The answer to both questions is no. The questions must be relevant.

I am hoping to do some training sometime in March.

Pam

From: David Van Houten [davidgvanhouten@gmail.com]

Sent: Sunday, March 05, 2017 12:13 PM

To: Monroe, Pamela

Subject: procedure

Hello Pam,

Believe it or not, I am trying to prepare for the adjudicative hearings, and have a few questions. I hope you can answer them.

Is there any limitation on whom I can question?

Is there any limitation on who can question me?

thanks,

David