

The 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 to Construct a New Voltage Transmission Line and
Related Facilities in New Hampshire**

Motion

Kevin Spencer and Mark Lagasse, dba Lagaspence Realty, LLC, (Lagaspence) respectfully move the Site Evaluation Committee for the following Orders:

1. An Order postponing the merit hearings on the Joint Application for a Certificate of Site and Facility for the reason that Joint Applicants have not established the property right to construct the Northern Pass on Lagaspence land as required by RSA 162-H:7 and Site 301(c)(6)a.¹
2. An Order barring the merit hearing testimony of Joint Applicant witness Kenneth Bowes regarding the use of Lagaspence land as the Northern Pass route because Mr. Bowes is not a party to the proposed lease from PSNH to NPT and has no first-hand knowledge of the legal and factual basis underlying the subject matter² of the lease.

The Pending Federal Court Litigation

**Public Service Company of New Hampshire Does Not Own a “Transmission Corridor”
That It Can Lease to Northern Pass Transmission LLC**

¹ Lagaspence requested the identical relief on January 17, 2017. The Committee Chair has not ruled upon the January 17, 2017, Motion.

² The subject matter of the lease includes the easement on Lagaspence property. The right of Joint Applicants to use that easement for the construction of the Northern Pass is in litigation. That litigation cannot be resolved prior to the merit hearings in the case at bar.

Northern Pass Transmission LLC Cannot Enter a Deal with Hydro-Quebec to Transmit Electricity on Lands for a Fee It Does Not and Cannot Own Without a Grant from Property Owners

On August 4, 2016, Lagaspence filed suit in the United States District Court, District of New Hampshire, Spencer et al. v. Eversource Energy Service Company, No. 16-cv-353-PB. The suit asks the court for a declaration that the easement burdening their property does not permit the construction of the Northern Pass and that the use by Northern Pass will be unreasonable. The suit is pending.

The New Hampshire Law of Easements

Northern Pass Transmission LLC (NPT) and Public Service Company of New Hampshire (PSNH), allege in their Joint Application that they have the right to use the power line easement burdening Lagaspence property as a “transmission corridor”. The Joint Applicants have represented to the Site Evaluation Committee that they can use the “transmission corridor” to construct the Northern Pass and make a deal with Hydro-Quebec for a fee all without the express permission of landowners such as Lagaspence.

The Joint Applicants are wrong. PSNH does not own a “transmission corridor” it can lease to NPT for the construction of the Northern Pass. NPT does not own a “transmission corridor” it can use as a basis for a deal with Hydro-Quebec. Hydro-Quebec has no rights whatever in Lagaspence land that it can use as the basis of a deal with NPT.³

What PSNH and NPT allege is a “transmission corridor” is an assemblage of power line easements acquired by PSNH in the late 1940’s and early 1950’s to bring electricity to rural New Hampshire. PSNH paid token land owners a token consideration for the easements. There is no historical data that PSNH paid more than \$20 per acre for the easements. The land owners, business and farmers were anxious to have the needed electricity.⁴

³ Hydro-Quebec is not a party to this docket. Any claim asserted on its behalf by Joint Applicants is immaterial and incompetent as evidence in this docket.

⁴ Joint Applicants confirmed that the easements are used to distribute local electricity in their responses to the Stark, Dummer and Northumberland Data Requests. The Lagaspence easement is occupied by a 115 kV alternating current (AC) line with nearby substations that reduce the voltage to 34.5 kV for local distribution.

Those early post-war land owners *never intended* that the easements be used for a massive transmission project to import high voltage direct current electricity from Canada. Those land owners did not grant PSNH the right to construct a Northern Pass upon which its Connecticut parent will earn a 12.56% return.

New Hampshire law on the interpretation of easements is clear.

An easement is the grant of a right to use another's land for the uses specified in the grant. Easements do not grant possessory rights or rights beyond those specified in the grant. Arcidi v. Town of Rye, 150 NH 694 (2004). In a case in which dealt directly with a utility easement Lussier v. New England Power, 133 NH 753 (1990), the Supreme Court held that the use granted must be ascertained by determining the intent of the parties at the time of the grant. In Ettinger v. Pomeroy Limited Partnership, 166 NH 447, 449-450 (2014), the New Hampshire Supreme Court ruled that the interpretation of a deed is a question of law for the court. "In interpreting a deed, we give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time. We base our judgment on this question of law upon the trial court's findings of fact. If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence. *Id.* If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms. Flanagan v. Prudhomme, 138 NH 561, 566 (1994)...."

The intent of Stella Lunn, the grantor of the power line easement on the Lagaspence property, was to bring needed electricity to Stark, New Hampshire.

Further, notwithstanding the grant language of an easement, an easement may not be used in an unreasonable manner. In Lussier v. New England Power, *supra*, the New Hampshire Supreme Court, at page 758 held: "Lest our holding be interpreted to permit unlimited expansion by New England Power of its easement, we wish to emphasize that the parties involved must still act reasonably under the terms of the grant so as to not interfere with the use and enjoyment of each others' estates. See Donaghbey v. Croteau, 119 NH 320 (1979)...." The easement in Lussier, *supra*, has far

The Northern Pass is an up to 640+ kV (+/- 320 kV) direct current (DC) line with no distribution capability whatever.

broader terms than the easements that are before the Commission. See also Ettinger, *supra*, page 451. "... The purpose undergirding the rule is that the owner of the easement appurtenant may not materially increase the burden of the easement upon the servient estate or impose a new or additional burden. II Giardino, LLC, 757 A. 2d at 1111. "The doctrine was intended to protect the servient estate from the use of an easement in a manner or to an extent not within the reasonable expectations of the parties at the time of its creation." *Id.*"

Kevin Spencer and Mark Lagasse, the Lagaspence owners, are fighting the project and ask that the merit hearings on the Joint Application be postponed until they have their day in court.

Status of Case

The Joint Applicants Testimony Improperly Assumes the Right to Build the Northern Pass on Lagaspence Property

On October 19, 2015, Applicants filed their Joint Application for Certificate of Site and Facility to construct the Northern Pass on lands owned by Lagaspence and others before the Site Evaluation Committee (Committee). Applicants represented to the Committee that Northern Pass Transmission, LLC (NPT) had entered a lease with Public Service Company of New Hampshire (PSNH) granting NPT the right to use easements owned by PSNH for the construction of the Northern Pass.

The Applicants witness regarding the Northern Pass preferred route and route selection process was identified as James A. Muntz, a Connecticut Eversource Energy executive and President of NPT. (Joint Application, page 99). Mr. Muntz submitted pre-filed testimony.

The Joint Application included the representation that PSNH and NPT submitted the lease to the New Hampshire Public Utilities Commission (NHPUC) for approval pursuant to RSA 374:30. (Joint Application, page 6).

The lease was signed on behalf of NPT by James A. Muntz, the Connecticut Eversource Energy executive acting as President, NPT.⁵

⁵ The PSNH lease signatory was Ellen K. Angley a PSNH property management employee. Ms. Angley is not a witness in the case at bar.

The land owned by Lagaspenca is the servient estate of one of the easements subject to the proposed lease.

On October 19, 2015, the same date that the Joint Application for Certificate of Site and Facility was filed, PSNH filed a Petition with the NHPUC asking that the lease between PSNH and NPT be approved. (NHPUC docket DE 15-464, the “lease docket”).

On December 18, 2015, the Committee, based upon Applicants’ representations, determined that the Joint Application was complete and issued its Order Accepting Application.⁶

On February 9, 2016, Lagaspenca filed to intervene in the NHPUC lease docket and challenged the right of PSNH to lease their lands to NPT.

On April 15, 2016, the NHPUC issued an Order that the NHPUC cannot adjudicate property rights, that property owners who wish a determination of their rights in the easements on their lands should seek redress in the courts. The NHPUC noted specifically that its Order is “not binding on individual property owners”. The NHPUC has not approved the lease between PSNH and NPT.

On August 4, 2016, as earlier stated, Lagaspenca filed suit in the United States District Court, District of New Hampshire, Spencer et al. v. Eversource Energy Service Company, No. 16-cv-353-PB. The suit asks the court for a declaration that the easement burdening their property does not permit the construction of the Northern Pass and that the use by Northern Pass will be unreasonable. The jurisdictional basis of the Lagaspenca suit against Eversource Energy Service Company is based upon diversity of citizenship. The diversity jurisdiction is grounded upon the fact that James A. Muntz, a Connecticut based Eversource Energy executive, controlled all the major decisions regarding the Northern Pass. The suit is pending.

On September 15, 2016, the Committee was advised by NPT attorney Barry Needleman that James A. Muntz was withdrawing as a witness in the docket.

⁶ The Committee completeness determination is not proof of ownership.

On January 17, 2017, Lagaspence filed its Motion to Postpone the Merit Hearing on the Joint Application for Certificate of Site and Facility until the Lagaspence property rights issue was adjudicated in the courts including any appeals.

On January 26, 2017, NPT, filed an Objection to the Lagaspence Motion to Postpone arguing *inter alia* that the Committee, on December 18, 2015, found the Joint Application complete and that Lagaspence cannot re-litigate the completeness issue before the Committee.⁷

The Committee has not issued an Order on the Lagaspence Motion to Postpone the Merit Hearing.

On February 22, 2017, Lagaspence enquired of NPT the identity of the NPT witness who would provide testimony about the lease between PSNH and NPT as required by Site 301.03(c)(6)a in view of the fact that James A. Muntz, the NPT signatory to the lease, would not be made available at the hearings on the merits of the Joint Application.⁸

On February 22, 2017, NPT attorney Thomas Getz identified Kenneth Bowes as the NPT Site 301.03(c)(6)a witness.⁹

On March 1, 2017, the Committee issued an Order on Pending Motions (Procedural Schedule) that described two “Tracks” that will be the subject of various motions and conferences. The “Track 1” topics do not include property rights. The “Track 2” topics do not include property rights.

Memorandum

The Joint Applicants have the burden to prove that they have the right to construct the Northern Pass on Lagaspence property. RSA 162-H:7. Site 301.03(c)(6)a. Joint Applicants cannot provide the Committee the required proof.

⁷ Lagaspence is not re-litigating the completeness issue. That issue has been resolved by the Committee. Lagaspence is litigating the Joint Applicants claim it can build the Northern Pass on its property. The litigation is pending in court.

⁸ Site 301.03(c)(6)a requires that NPT have the current property right to construct the Northern Pass as required by RSA 162-H:7.

⁹ Mr. Bowes testimony was pre-filed by NPT on February 26, 2016. His testimony regarding the NPT claim that it has the current property right to build the Northern Pass on the Lagaspence property and others is a simple repetition of the claim that PSNH and NPT will seek approval by NHPUC of a lease that will allow NPT to use existing PSNH right of way. (Bowes testimony, page 5).

The Joint Applicants putative witness Kenneth Bowes identified by Joint Applicants' attorney Thomas Getz as the person who will offer the required property rights testimony is incompetent to testify on that matter in the absence of James A. Muntz. Mr. Muntz was the NPT signatory to the PSNH to NPT lease. Mr. Muntz made all the important decisions about the Northern Pass, including route selection and the use of the Lagaspence property. The absence of James A. Muntz as a witness before the Committee on the route selection/property rights issue is an unacceptable condition on a matter on which Joint Applicants have the burden of proof.¹⁰

Joint Applicants Do Not Concur

Joint Applicants do not concur in this motion.

Wherefore

Lagaspence respectfully requests:

1. That the merit hearing on the Joint Application be postponed until the Lagaspence suit is finally adjudicated, including any appeals.
2. That Kenneth Bowes be barred as a witness on the matter of the PSNH to NPT lease and the Lagaspence property as the subject matter of that lease.

March 20, 2017

Respectfully submitted,

/s/ Arthur B. Cunningham

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¹⁰ The Committee should ask the Joint Applicants why Mr. Muntz cannot be made available to testify. The Committee may draw inferences adverse to Joint Applicants in his absence.

Certificate

I certify that this document was served in accordance with the New Hampshire Site Evaluation Committee.

March 20, 2017

/s/ Arthur B. Cunningham

Arthur B. Cunningham