

# MCLANE MIDDLETON

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**Via Electronic Mail & Hand Delivery**

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

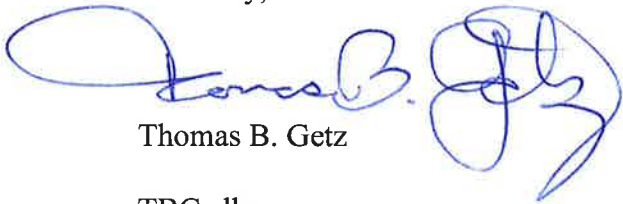
**Re: Site Evaluation Committee Docket No. 2015-06  
Joint Application of Northern Pass Transmission LLC and Public Service Company  
of New Hampshire d/b/a Eversource Energy (the "Applicants") for a Certificate of  
Site and Facility  
Objection to Pre-Hearing Motion of SPNHF**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of the Applicants' Objection To Pre-Hearing Motion Of The Society For The Protection Of New Hampshire Forests To Exclude Statements From Technical Sessions.

Please contact me directly should you have any questions.

Sincerely,



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**

**APPLICANTS' OBJECTION TO PRE-HEARING MOTION OF THE SOCIETY FOR  
THE PROTECTION OF NEW HAMPSHIRE FORESTS TO EXCLUDE STATEMENTS  
FROM TECHNICAL SESSIONS**

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 Objection to the Pre-Hearing Motion of the Society for the Protection of New Hampshire Forests (“SPNHF”) to Exclude Statements from Technical Sessions (“Motion”) filed on March 29, 2017. As described below, based on due process grounds the Applicants oppose a blanket prohibition against the use of all statements from the technical sessions. Preventing the Applicants from using relevant information in the adjudicative hearings would compromise their ability to meet their burden of proof in this proceeding and deprive them of a decision “after consideration of all relevant information.” RSA 162-H:16, IV.

**I. BACKGROUND**

1. The Applicants filed an Application for a Certificate of Site and Facility with the Site Evaluation Committee (“SEC” or “Committee”) on October 19, 2015, for a 192-mile electric transmission line with associated facilities (the “Project”). The Subcommittee designated for this proceeding accepted the Application pursuant to RSA 162-H:7, VI, on December 18, 2015.

2. On August 5, 2016 the Committee issued an agenda for technical sessions, which began on September 6, 2016. The technical session agenda was revised a number of times to accommodate the parties. The SEC held roughly twenty-five (25) technical sessions during which the parties had the opportunity to “ask questions of the Applicant’s witnesses who have filed testimony.” Technical Session Agenda, August 5, 2016, p. 1. Additionally, the SEC held roughly twenty (20) technical sessions during which the Applicant, as well as other parties, had the opportunity to question Counsel for the Public and Intervenor witnesses who filed testimony in this proceeding. In total, approximately forty-five (45) technical sessions were held between September, 2016 and March, 2017.

## II. DISCUSSION

3. SPNHF’s Motion seeks to bar the use of all statements made by witnesses during the technical sessions, requesting as follows:

The Forest Society respectfully requests the Presiding Officer issue a pre-hearing ruling barring *any* use during the adjudicatory hearing of *any* statement made by witnesses during the technical sessions. To allow otherwise would be contrary to the intent of the technical sessions as shaped by the order denying transcription of the technical sessions.

SPNHF Motion at 1 (emphasis supplied).

The Motion merges two separate issues regarding (1) the purpose of technical sessions and (2) the use of statements made during the technical sessions.

4. In determining whether to permit the transcription of the technical sessions, the Presiding Officer explained that technical sessions “present a form of informal discovery. Their purpose is for the parties and their experts to involve in a mutual dialog in order to get a better understanding of their testimony.” Order on Motions to Transcribe Technical Session, Docket No. 2015-06, at 2 (August 29, 2016). To emphasize the informal purpose of technical sessions,

he explained that “[t]he dialog and information provided by the witnesses and experts at technical sessions is not designed and should not be used for impeachment.” Id. In addition, he reasoned that “[t]here may be circumstances in which transcribing a technical session is appropriate,” but that those “circumstances have not been shown to be present here.” Id.

5. The Presiding Officer’s analysis of whether to transcribe technical sessions in this case centered on preserving the informal nature of technical sessions and promoting the open exchange of information. He noted that Counsel for the Public “has the better argument in general” that transcribing the technical sessions would “transform them into a formal and potentially controversial proceeding.” Id. SPNHF, however, appears to take the analysis a step further and contend that, because of the informal nature of technical sessions, none of the information learned during technical sessions should be used during adjudicatory hearings under any circumstances.

6. SPNHF’s Motion raises some fundamental questions about the conduct of the proceeding and due process. Is relevant information gained during the sessions meant to be cordoned off from use during the adjudicative hearings? For example, must parties ignore relevant information they learn from technical sessions during the cross examination of witnesses during the adjudicative hearings? For that matter, may supplemental pre-filed testimony rely on information learned during technical sessions? SPNHF’s Motion does not consider valid reasons that statements made, and information learned, during technical sessions should be allowed during the adjudicatory hearings that would be impacted by its request.

7. In support of its position, SPNHF makes several arguments. First, it argues that information from technical sessions is unreliable. *See* Motion at 2. To illustrate the point, SPNHF posits a hypothetical where a questioner refers to his or her notes from a technical

session in order to refresh the witness's memory as to what he or she said during a technical session. SPNHF argues that such questioning is unreliable because the questioner's notes "do not possess the same indicia of reliability that are automatically attributed to a formal transcript." Id. The information is not inherently unreliable. Instead of showing or reading a statement to a witness, it will be necessary to ask a witness if they recall a conversation and proceed from there. If the witness does not recall or recalls differently then he or she simply says so. The lack of a transcript, however, need not prevent relevant questioning.

8. SPNHF also argues that allowing statements made during technical sessions "would, in technical sessions in future cases, create a legalistic atmosphere that will disadvantage parties, especially unrepresented ones, and stymie the sharing of information." Id. at 3. There is no evidence to suggest, in this case or otherwise, that the sharing of information has been diminished or that parties, represented or unrepresented, will be disadvantaged in the future if some statements from the technical sessions in this case are used for impeachment purposes.

9. SPNHF also argues that parties have unequal access to what it calls informal transcripts, which the Applicants interpret as notes and audio recordings of the technical sessions. With regard to the former, the technical sessions were open to the public and parties were free to take notes. The Applicants also made clear that they intended to record the technical sessions and would make copies of the recordings available to parties that requested them. In fact, SPNHF requested and received such recordings. Furthermore, in his September 9, 2016 Order on Motion to Clarify Regarding Transcription of Technical Sessions, the Presiding Officer noted that parties may take notes or make lawful recordings for their convenience, which presumes some future use of the information, presumably including the preparation of supplemental testimony and cross-examination.

10. Finally, SPNHF argues that statements from technical sessions “are not necessary” because “the record contains numerous past statements covering much, if not all, of the substantive topics and statements that may have been made during technical sessions.” Motion at 4. This position ignores the purpose of technical sessions, which is to gain information not provided in testimony, discovery, or any other materials relevant to the proceeding. If the "record," as SPNHF suggests, were self-sufficient as the basis for the parties to conduct cross-examination at the adjudicatory hearings, then there would not be much point in holding technical sessions in the first place. Accepting SPNHF’s position would suggest that the SEC held roughly forty-five (45) technical sessions for little reason.

11. The espoused purpose of technical sessions is clear. They are an informal method of discovery designed to allow the “parties and their experts to involve in mutual dialog in order to get a better understanding of their testimony.” Order on Motions to Transcribe Technical Session, Docket No. 2015-06, at 2 (August 29, 2016). Restricting the use of information properly obtained in a technical session, however, would directly and negatively affect the ability of the Applicants to present their case and potentially deprive the Committee of information critical to its review of the Project.

### **III. CONCLUSION**

12. The Applicants agree with the Presiding Officer’s approach to using technical sessions as informal discovery designed to foster dialog in order to gain a better understanding of testimony. However, it does not follow ineluctably from the decision not to transcribe the technical sessions that the parties should, perforce, be precluded from using every statement made during such discovery during the hearings. It is entirely possible, for example, that a witness could say something in a technical session contrary to, or inconsistent with, his or her

testimony. Although the technical session was not designed for impeachment, a questioning party simply seeking in good faith to understand the witness's testimony could evoke a statement that is appropriate for exploration in the adjudicative hearings, even though that was not the original purpose of the questioning.

13. Finally, the Applicants bear the burden of proof in this proceeding. Barring the use of information from technical sessions unnecessarily narrows the record and violates the Applicants' fundamental right to a decision by the Committee "[a]fter due consideration of all relevant information regarding the potential siting or routes" of the proposed Project. RSA 162-H:16, IV. SPNHF's Motion is over-inclusive and would infringe on the Applicants' due process rights by limiting opportunities for meaningful cross-examination.

WHEREFORE, the Applicants respectfully request that the Site Evaluation Committee:

- A. Deny the Motion; 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: April 10, 2017

By: 

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Certificate of Service

I hereby certify that on the 10<sup>th</sup> day of April, 2017, an original and one copy of the foregoing Objection was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List.

  
Thomas B. Getz