

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 STRIKE
CERTAIN TRACK 1 TESTIMONY**

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 To Strike Certain Track 1 Testimony (“Motion to Strike”). In support of this Objection, the Forest Society states as follows:

BACKGROUND

1. On March 29, 2017, Applicants filed the pending Motion to Strike.
2. Applicants argue that the following four broad categories of the approximately 140 pieces of testimony that Intervenors and Counsel for the Public have filed are inadmissible: (1) Unauthenticated Video Testimony; (2) Immaterial Direct Testimony; (3) Irrelevant Direct Testimony; and (4) Improper Supplemental Testimony.

ARGUMENT

- I. The Administrative Procedure Act and the SEC Rules do not Support Applicants’ Interpretation of “Evidence” and “Testimony,” an Interpretation that Underlays Applicants’ Entire Motion**

3. Recognizing that the unambiguous provisions of the Administrative Procedure Act (the “APA”) and SEC rules do not support its requested relief, Applicants reach for the dictionary. Applicants structure all of their arguments on the dubious premise that although the rules of evidence do not apply in these adjudicatory hearings, the Presiding Officer should rely on the definitions of “testimony” and “evidence” in Black’s Law Dictionary to exclude *in limine* entire swaths of testimony, much of which is the testimony of *pro se* Intervenors.

4. The APA and SEC rules, as well as the Presiding Officer’s previous interpretations of these rules, do not support Applicants’ position.

5. The SEC rules provide that the “receipt of evidence shall be governed by the provisions of RSA 541-A:33.” Site 202.24. RSA 541-A:33, II states that the rules of evidence do not apply. Rather, “[a]ny oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence.” RSA 541-A:33, II.

6. In the March 31, 2017, Order denying Applicants’ previous request for a sweeping prehearing determination that testimony elicited by “friendly” cross-examination should be excluded for one or more of the reasons permitted by the above rules, the Presiding Officer stated that such “determination[s] must be made during the course of the proceeding.” *See* Order on Applicants’ Motion to Clarify Use of “Friendly” Examination at 4, Docket 2015-06.

7. The Presiding Officer may determine if evidence, testimony, or lines of inquiry are admissible on a case-by-case basis in accordance with the provisions of RSA 541-A:33, II. There is no authority to support Applicant’s reliance on Black’s Law Dictionary to categorically exclude entire swaths of testimony prior to the hearing.

8. In addition to this foundational flaw in Applicants' argument, Applicants' specific reasoning for why each particular category of evidence should be excluded is unpersuasive.

II. Video Testimony is an Admissible Form of Testimony

9. Applicants' argument to strike the video testimony submitted by two groups of Intervenors is unfounded; video testimony is a permissible form of testimony and evidence.

10. Section II of RSA 541-A:33 provides that “*any oral or documentary evidence may be received,*” subject to the limitations previously discussed. It does not define or otherwise limit what is oral or documentary.

11. Applicants cite to Site 202.06 and 202.22. Motion to Strike at ¶ 12. These two isolated rules are taken out of context and do not support Applicants' argument.

12. Site 202.22(b), in pertinent part, provides that parties may submit pre-filed testimony and exhibits as determined by a procedural order issued by the presiding officer. Site 202.22(b).

13. Neither this rule nor any procedural orders in this Docket discuss any relevant limits on the physical format of such pre-filed testimony or exhibits.

14. Site 202.06 concerns the format of “correspondence, pleadings, motions, petitions or other documents;” it has nothing to do with the formatting of pre-filed testimony or exhibits, such as the videos in question. This is true regardless of whether the groups who submitted the videos characterize them as evidence or testimony.¹

15. Much of Applicants other arguments, such as the fact that the testimony does not contain the opinions of experts, are arguments of weight, not relevance. *See, e.g.,* Motion to

¹If one were to ignore the canons of statutory interpretation and read Site 202.06's “other documents” so broadly as to include testimony and exhibits, the result would be absurd. Would any hand-drawn or sketched submission, or a handwritten but not “clearly printed” piece of evidence, be excluded because it was not “typewritten or clearly printed”?

Strike at ¶ 19 (“The oral component of the CICS video is not testimony but consists of public statements or comments, which should be given no evidentiary weight in this proceeding.”). The Subcommittee—not the Applicants—is tasked with weighing the evidence. Applicants can address the credibility and weight of evidence through cross-examination and in their post-trial memorandum. Further, there is no rule or authority to support the position that opinions of non-experts must be excluded.

16. Finally, Applicants also attempt to shift the burden to Intervenors. Applicants argue that the videos should be excluded because they do not “meet any of the requirements established by the SEC rules with respect to visual impact analyses.” *Id.* at ¶ 16.

17. This argument lacks merit because the specific requirements for a visual impact analysis apply only to visual impact analyses. *See* Site 301.05.

18. Therefore, the Presiding Officer should not exclude this category of testimony.

III. Applicants’ Arguments that Certain Pre-Filed Testimony is Immaterial or Non-Testimony are Unpersuasive

19. Applicants seek to exclude the following pre-filed testimonies as “Immaterial or Non-Testimony”: (1) Individual Personal Pre-Filed Testimony of Bradley J. Thompson, November 15, 2016; (2) Pre-Filed Testimony of Tim and Brigitte White, November 13, 2016; Pre-Filed Testimony of Carl Lakes,² November 15, 2016; (3) Pre-Filed Testimony of Mark and Susan Orzeck, November 15, 2016; and (4) Pre-Filed Testimony of Phil and Joan Bilodeau, November 15, 2016. *Id.* ¶¶ 21-24.

20. Applicants do so because, they claim, these testimonies consist of argumentative conclusions, beliefs, or concerns, which Applicants assert are not evidence.

² Presumably Applicants’ reference to “Cark” Lakes is a typographical error.

21. Again, Applicants' argument relies on a narrow definition of "evidence" found in a dictionary, not the APA, SEC rules, or rules of evidence. Absent a more specific definition, the phrase "any oral or documentary evidence" must be given its plain and ordinary meaning.

22. These individuals have been granted intervention status and are entitled to submit "any oral or documentary evidence." The members of the Subcommittee are tasked with interpreting and weighing the testimony. Parties can use cross-examination and closing arguments to aid the Subcommittee in performing this task.

23. Therefore, the Presiding Officer should not exclude this category of testimony.

IV. Testimony Regarding Alternative Routes is Admissible

24. For their third category, Applicants seek to exclude portions of the following testimonies that they claim reference the availability of alternative routes for siting the Project: (1) Pre-Filed Testimony of George Sansoucy; (2) Pre-Filed Testimony of Sharon A. Penney, November 15, 2016; and (3) Pre-Filed Testimony of Will Abbott, November 15, 2016. *Id.* ¶¶ 25-27.

25. Applicants maintain that all testimony discussing alternatives should be excluded prior to the hearing because the September 22, 2016, Order concerning certain motions to compel, in which the Presiding Officer denied a request that Applicants produce documents that concerned certain alternative routes, should be read so broadly as to prohibit any testimony referencing any alternative route for siting the project. *Id.*

26. The applicable rules and statute do not support such an expansive reading of the Presiding Officer's Order, which was narrowly limited to the context of discovery. *See* Order on Motions to Compel, Docket No. 2015-06, 40 (Sept. 22, 2016).

27. An applicant for site approval must include information about its preferred choice and “other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant’s preferred choice.” RSA 162-H:7, V(b). Testimony regarding the alternatives Applicants discuss or other available alternatives goes towards the credibility of Applicants’ conclusions on what alternative routes were “available.”

28. The SEC may consider relevant information concerning all “potential siting or routes,” which is an even broader scope of routes than what an applicant may propose pursuant to RSA 162-H:7, V(b). RSA 162-H:16, IV.

29. The information concerning alternative routes that the Applicants seek to exclude is relevant that the SEC must consider and goes towards the credibility of Applicants’ determinations of what routes are available.

30. Further, Applicants themselves have inserted the “alternatives” issue. *See, e.g.*, Supplemental Pre-Filed Testimony of Kenneth Bowes (Track 1 Topics Only), Attachment A, “An Evaluation of All UG Alternatives for the Northern Pass Transmission Project.”

31. Therefore, the Presiding Officer should not exclude this category of testimony.

V. The Supplemental Testimonies Applicants Seek to Exclude are Relevant and Admissible

32. The final category of evidence Applicants seek to exclude is supplemental testimony that Applicants claim contain information that was available to parties at the time of the original pre-filed testimony and, therefore, is inadmissible. Motion to Strike, ¶¶ 28-41.

33. This argument is based on an erroneous reading and application of an SEC Order in a prior docket. Order on Motions to Strike, Docket No. 2015-02, Antrim Wind Energy LLC (Sept. 19, 2016).

34. The order cited does not *per se* exclude any supplemental testimony that is based on information that was not known before the filing of direct testimony. The Presiding Officer notes that “[s]upplemental testimony *usually* addresses matters that were not known before the filing of direct testimony or to address evidence, issues and arguments that arise during the discovery phase of the matter.” *Id.* at 3–4 (emphasis added).

35. Applicants cite to this sentence of the Order out of context. After this sentence, the Presiding Officer goes on to say, “[h]owever, there is no statute or rule that specifically defines or specifies the requirements of supplemental testimony.” *Id.* Therefore, the Presiding Officer cited to the standard for admissibility of evidence found in RSA 541-A:33, II, and applied that standard of “relevance and the avoidance of immaterial or unduly repetitious evidence” to each of the supplemental testimony that the applicant in that docket sought to exclude. *Id.* at 4. He then denied or granted the motion to strike each of the testimonies on the basis of relevance. *Id.* at 4–6 (striking only one testimony). No testimony was stricken on the ground that the information in the supplemental testimony was known to the witness at the time of the initial pre-filed testimony. *Id.*

36. Here, the Presiding Officer should follow RSA 541-A:33, II and do the same. With the exception of one statement that the information included in the testimonies relates to the non-relevant issue of alternative routes (an argument addressed in the above section), Motion to Strike at ¶ 37, all of Applicants’ arguments for each of the testimonies concern whether or not the information was available prior to the submission of direct testimony and are not based on relevance or any of the other reasons contained in RSA 541-A:33, II. Because there is no basis in law to exclude the testimony for this reason, Applicants’ arguments are meritless.

37. Regarding the specific supplemental testimony targeted for striking by Applicants, Mr. Abbott's testimony is based on financial information contained in a February 24, 2017 letter from Northern Pass to the Town of Sugar Hill. *See* Attachment 5 to Supplemental Pre-Filed Direct Testimony of Will Abbott. Obviously, Mr. Abbott could not have been aware of this letter when he filed his initial pre-filed testimony.

38. Finally, Applicants' supplemental pre-filed testimony is not without "testimony [that] is based on information that was available to [the witness] at the time he filed his Pre-Filed Testimony." Motion to Strike at ¶ 42.

39. For example, William Quinlan's Supplemental Testimony includes discussion of "a Guarantee Program . . . designed to ensure that owners of those properties [Applicants' consultant James] Chalmers identified as most likely to see property value impacts." Quinlan Supplemental Pre-Filed Direct Testimony of William J. Quinlan at 9.

40. Mr. Chalmers's report and the predicted impacts to property values were known to Applicants at the time of Mr. Quinlan's initial pre-filed testimony, as Mr. Chalmers's report and Mr. Quinlan's testimony were both filed with the application.

41. For these reasons, the Presiding Officer should not exclude this category of testimony.

WHEREFORE, the Forest Society respectfully asks that the Presiding Officer 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



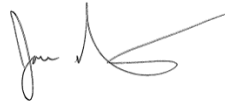
Date: April 10, 2017

By: _____

Amy Manzelli, Esq. (17128)
Jason Reimers, Esq. (17309)
Elizabeth Boepple, Esq. (20218)
Stephen Wagner, Esq. (268362)
3 Maple Street
Concord, NH 03301
(603) 225-2585
manzelli@nhlandlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, April 10, 2017, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.



Jason Reimers