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April 24, 2017

Via Electronic Mail

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
Applicants' Motion For Protective Order and Confidential Treatment Regarding
Certain Exhibits**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find the Applicants' Motion for Protective Order and Confidential Treatment Regarding Certain Exhibits.

Please contact me directly should you have any questions.

Sincerely,

Adam M. Dumville

AMD:slb

cc: SEC Distribution List

Enclosure

**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**

**APPLICANTS' MOTION FOR PROTECTIVE ORDER AND
CONFIDENTIAL TREATMENT REGARDING CERTAIN EXHIBITS**

NOW COME Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the "Applicants") by and through their attorneys, McLane Middleton, Professional Association, and respectfully request that the Site Evaluation Committee ("SEC" or "Committee") issue a protective order to preserve the confidentiality of certain exhibits that contain (a) confidential information related to the Section 106 consultation process, and (b) confidential information related to the location of rare, threatened and endangered plant and animal species and exemplary natural communities.

In support of their Motion, the Applicants state as follows:

1. Governmental records, as defined by RSA 91-A:1-a, are generally made available for public inspection pursuant to the Access to Governmental Records and Meetings Statute (a.k.a. the Right-to-Know Law). *See* RSA 91-A:4; *see also* N.H. Admin Rule Site 104.01. There are certain exemptions, however, from the requirement that public agencies or public bodies produce government records. One such exemption applies to "confidential, commercial, or financial information . . . and other files whose disclosure would constitute invasion of privacy." RSA 91-A:5. The Applicants respectfully request that the Committee issue a protective order and that it treat the above-described information as confidential pursuant to RSA 91-A:5. *See also* Site

104.01(b) (presiding officer or chairman may protect documents that are exempt from disclosure pursuant to RSA 91-A:5).

Archeological Reports

2. In connection with their Application for a Certificate of Site and Facility, the Applicants have included the required information regarding archaeological resources data and archaeological sites within or adjacent to the Project area. However, under New Hampshire's Historic Preservation Act, all information that may identify the location of archaeological sites must remain confidential and the disclosure of such information is exempt from RSA 91-A,

3. New Hampshire's Historic Preservation Act specifically provides that:

Information which may identify the location of any archaeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.

RSA 227-C:11.

2. In conjunction with RSA 91-A:5, IV, which specifically provides that records pertaining to confidential information are exempt from the public disclosure requirements of the Right-to-Know Law, RSA 227-C:11 mandates that information that identifies the location of archaeological sites remain confidential. Therefore, the Applicants believe such information contained in Applicants' Exhibit 108, listed on Applicants' Exhibit List for Final Hearings Phase II, should not be disclosed to the general public during the SEC proceedings.¹ *See also* Order on

¹ Federal law has a substantially similar provision under the federal Freedom of Information Act ("FOIA") that protects archaeological sites. Under FOIA, "information concerning the nature and location of any archaeological

Motion for Protective Order and Confidential Treatment, Docket 2015-06 (May 25, 2016)
(granting Applicants' motion for confidential treatment of archeological survey information).

Confidential Information on Historic Sites

3. There are other confidentiality concerns about documents relating to the separate review process directed by the U.S. Department of Energy ("DOE") as required by Section 106 of the National Historic Preservation Act of 1966. The Section 106 process "requires federal agencies to consider the potential effects of a proposed undertaking that requires federal funding, approvals or permits on historic properties through a collaborative framework called Section 106 consultation." As part of this process, "federal agencies identify historic properties, determine potential adverse effects on those historic properties from the proposed undertaking, and determine how the adverse effects should be resolved." *See* <http://www.northernpasseis.us/consultations/section106/>.

4. With respect to the Northern Pass Project, the DOE has issued confidentiality/sensitive information guidance for the Consulting Parties that precludes the distribution of work product documents and communications arising out of DOE's Section 106 consultation to non-consulting parties. NPT is a Consulting party in the Section 106 process and is subject to the DOE directives to all Consulting Parties on the confidential treatment of documents.

5. The documents that DOE has directed NPT to maintain as confidential among the Consulting Parties include the archeological reports discussed above, the above-ground resources eligibility evaluations and effects assessments, and e-mails and related material on Consulting Party input in the Section 106 review process.

resource for which the excavation or removal requires a permit or other permission under this Act or under any other provision of Federal law may not be made available to the public under [FOIA]." 16 U.S.C. § 470hh(a).

6. Most of this information, however, is also relevant to the Application and the testimony presented by the Applicants and other parties on the issue of whether the Project will have an unreasonable adverse effect on historic sites.

7. NPT desires to respect the DOE directives while still providing the parties in the SEC proceeding access to the Section 106 material. NPT thus proposed to DOE that these documents be reviewable by the SEC parties in the same manner as Consulting Parties are allowed access to them in the Section 106 process. DOE has agreed to this approach, and NHDHR also concurs. Furthermore, most of the intervenors in the SEC proceeding with an interest in the issue of historic sites are also Consulting Parties in the Section 106 process.

8. The process in place for the Section 106 document review is to allow parties to review the documents at the NHDHR offices at 19 Pillsbury Street, Concord, NH, between the hours of 8:30am and 4:00pm Monday by contacting Tanya Krajcik at Tanya.krajcik@dcr.nh.gov or 603-271-3483.

9. Accordingly, the Applicants respectfully request that the materials subject to the Section 106 confidentiality requirements, as enumerated in the Applicants' Exhibit List for Final Hearings Phase II, namely, App. Ex.108, 109, 110, 112, and 119 be treated as confidential, with access allowed as described above in Paragraph 8.

Confidential Information Regarding Native Plants, Animal Species and
Natural Communities

10. Applicants also seek a protective order and confidential treatment of materials relating to New Hampshire's native plants, animals and natural communities, as well as those documents containing information subject to a data sharing agreement between the Applicant's expert, Normandeau, and the New Hampshire Natural Heritage Bureau ("NHNHB").

11. RSA 162-H:16, IV (c) requires that an application for a Certificate of Site and Facility, must *inter alia*, demonstrate that the project will not have an unreasonable adverse effect on the natural environment. Similarly, N.H. Admin. Rule Site 301.03(c) requires an applicant to identify "natural and other resources at or within or adjacent to the site," which typically includes the identification of native plants and natural communities. Site 301.03(i) also requires an applicant include information "regarding the effects of the facility on, and plan for mitigation of any effects" on the natural resources in the application.

12. As part of its work, the Applicants' expert, Normandeau Associates, Inc., has coordinated with NHNHB regarding information on known locations of rare species and exemplary natural communities. NHNHB provided Normandeau with digital data for the Project pursuant to data sharing agreements. The NHNHB data includes information on known locations of rare, threatened and endangered plant and animal species and exemplary natural communities that would potentially be impacted by the Project. In agreeing to provide this data to Normandeau, the NHNHB restricted its distribution and required that specific locational information not be publicly disclosed.

13. Applicants' Exhibit 124, the update to Appendix 48, Regulatory Agency Consultation Summary Table, submitted by the Applicants includes information regarding natural resource data and natural resource sites within or adjacent to the Project Area as required. This information includes maps, surveys and other material relating to the specific location and type of native plant and animal species and natural communities. Based upon the importance of protecting and preserving New Hampshire's native species and natural communities, as well as the specific restrictions placed upon the distribution of this information by NHNHB, the Applicants assert this information should be exempt from RSA 91-A.

14. Producing information about the type and location of sensitive native species could negatively affect those resources. In addition, producing such information stands in stark contrast to the legislative intent of the New Hampshire Native Plant Protection Act of 1987:

Because there are no laws protecting any of our native plants, every year hundreds of our native plants are dug up and removed without permission from public and private property. Many of these are taken out-of-state and sold for profit. Therefore, the legislature finds and declares that...For human needs and enjoyment, the interests of science, and the economy of the state, native plants and natural communities throughout this state should be protected and conserved; and that native plant numbers should be maintained and enhanced to insure their perpetuation as viable components of their ecosystems for the benefit of the people of New Hampshire. Native species of plants within this state and the nation that are endangered, threatened, or otherwise reduced in number or may become so because of loss, modification, or severe curtailment of their habitats, or because of exploitation for commercial, scientific, educational, or private use, should be accorded protection as is necessary to maintain and enhance their numbers.

RSA 217-A:2.

15. Disclosure of such information would be in direct contradiction of the NHHB requirements and could result in the intentional disturbance or removal of native plants and natural communities. The benefits of non-disclosure to the general public largely outweigh any public interest in obtaining these documents. Therefore, in furtherance of the legislative intent expressed in RSA 217-A:2, the Applicants request that certain communications and documents relating to natural resources, included in Applicants' Exhibit 124, the update to Appendix 48, be treated as confidential. *See also* Order on Motion for Protective Order and Confidential Treatment, Docket 2015-06 (May 25, 2016) (granting Applicants' motion for confidential treatment of rare, threatened and endangered native plants, animal species, and natural communities).

Protective Order

16. All of the above-described information in the Applicants' Exhibit List for Final Hearings Phase II, App. Ex. 108, 109, 110, 112, and 119 have been marked confidential and have been only provided to the Committee and Counsel for the Public.

17. The confidential plant and animal species and exemplary natural communities information, Applicants' Exhibit 124, the update to Appendix 48, has been marked confidential and has been only provided to the Committee and Counsel for the Public. The Applicants note the summary table portion of this Exhibit includes a description of the confidential documents.

18. The Applicants respectfully request that the Committee issue an order consistent with the terms and conditions contained in its prior Order on Motion for Protective Order and Confidential Treatment, dated May 25, 2016 protecting similar types of information and to grant parties access to the confidential archeological and historic sites only as described in Paragraph 8 above.

19. At the time of the filing of this Motion, the Non-Abutting Property Owners from Stark, Lancaster, Whitefield, Dalton, and Bethlehem concurred with the relief sought. No further responses were received to the Applicants' request for positions.

WHEREFORE, the Applicants respectfully request that this Committee:

A. Grant the Applicants' request that the materials identified in Applicants' Exhibits 108, 109, 110, 112, 119, and 124 be treated as confidential;

B. Issue a protective order, similar to those issued in this docket, that preserves the confidentiality of the documents identified in Applicants' Exhibits 108, 109, 110, 112, 119, and 124;

C. Authorize the Applicants to submit proposed redacted versions of Applicants' Exhibits 108, 109, 110, 112, 119, and 124; and

D. Grant such further relief as it deems 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 24, 2017

By: 

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Certificate of Service

I hereby certify that on the 24th of April, 2017, this Motion electronically served upon the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List.


Adam Dumville