

July 10, 2017

VIA HAND DELIVERY AND EMAIL

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
Pamela.Monroe@sec.nh.gov

**RE: 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 for Construction of
a New High Voltage Transmission Line in New Hampshire**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned matter with the New Hampshire Site Evaluation Committee is the following:

**Objection of the Society for the Protection of New Hampshire Forests to the
Applicants' Motion for Protective Order and Confidential Treatment
Business Directory.**

Copies of this letter and its enclosure have this date been forwarded via email to all parties on the Distribution List.

If you have any questions or concerns, please do not hesitate to contact us.

Very truly yours,



Virginia Pastuszczak
Clerical Support

Enclosure

cc: Distribution List (Rev. 6/2/17) via email
Client



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 FOR PROTECTIVE ORDER AND
CONFIDENTIAL TREATMENT BUSINESS DIRECTORY**

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 and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”) Motion for Protective Order and Confidential Treatment Business Directory. The Forest Society states as follows in support of its Objection:

I. Background

1. In their Motion, Applicants request a protective order and confidential treatment for a Business Directory, claiming the Directory contains confidential, commercial, financial, and proprietary information, the disclosure of which would be an invasion of privacy of the Applicants and business owners who have participated in the Directory (“Business Owners”). *Motion for Protective Order and Confidential Treatment Business Directory*, Docket No. 2015-06, ¶ 3 (June 30, 2017) (hereinafter *Applicants’ Motion*).

II. Legal Standard

2. New Hampshire’s Right-to-Know Law provides that “every citizen . . . has the right to inspect all public records . . . except as otherwise prohibited by statute or RSA 91-A:5.” RSA 91-A:4, I; *see also* N.H. ADMIN. R. Site 104.01.

3. The law provides a limited exemption for “confidential, commercial, or financial information . . . and other files whose disclosure would constitute an invasion of privacy.” RSA 91-A:5, IV.

4. In evaluating whether this exemption applies, the Presiding Officer must employ a three-step analysis to determine whether the information should be withheld from disclosure. *See Lambert v. Belknap County*, 157 N.H. 375, 382-83 (2008); *Lamy v. Pub. Utils. Comm’n*, 152 N.H. 106, 109 (2005). The Supreme Court recently summarized the analysis as follows:

First, we evaluate whether there is a privacy interest that would be invaded by the disclosure. If no privacy interest is at stake, the Right-to-Know Law mandates disclosure. Whether information is exempt from disclosure because it is private is judged by an objective standard and not by a party’s subjective expectations.

Next, we assess the public’s interest in disclosure. Disclosure of the requested information should inform the public about the conduct and activities of their government.

Finally, we balance the public interest in disclosure against the government interest in nondisclosure and the individual’s privacy interest in nondisclosure.

N.H. Right to Life v. Dir., N.H. Charitable Trs. Unit, 169 N.H. 95, 110-11, (2016) (internal citations omitted).

5. A motion for a protective order and confidential treatment should be denied when the balance tips in favor of the public’s interest in disclosure. *See Union Leader v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 556 (1997).

6. “The party resisting disclosure bears [the] heavy burden to shift the balance toward nondisclosure.” *N.H. Right to Life*, 169 N.H. at 111 (quotation marks omitted). Its burden is two-fold: it must show “that the records sought will not inform the public” about the State’s activities, “or that a valid privacy interest, on balance, outweighs the public interest in

disclosure.”¹ *Id.*

7. The Presiding Officer shall “resolve questions regarding the Right-to-Know Law with a view to providing the utmost information.” *See Lambert*, 157 N.H. at 379.

III. Applicants Fail to Identify a Sufficient Privacy Interest to Warrant Confidential Treatment

8. Applicants claim the Directory contains confidential, commercial, financial, and proprietary information, the disclosure of which would be an invasion of privacy of the Applicants and Business Owners. *Applicants’ Motion*, ¶¶ 3, 6. Applicants have not substantiated these conclusory statements.

9. “When the exemption is claimed on the ground that disclosure would constitute an invasion of privacy, we examine the nature of the requested document and its relationship to the basic purpose of the Right-to-Know Law.” *N.H. Right to Life*, 169 N.H. at 111 (quotation marks omitted).

10. The stated purpose of the Directory is for it to be used by the “hundreds of workers who will be in and around the towns along the proposed Northern Pass route during construction” and who will be “spending money that will boost [the towns’] local econom[ies].” *See Applicants’ Motion*, Attachment A. Based on this purpose, as well as the redacted version of Attachment B, it appears the only information contained in the Directory would be a listing of businesses and their contact information.

11. A list of business names and contact information that will be freely distributed to non-governmental employees does not constitute commercial or financial information protected by RSA 91-A:5, IV. Information that is not commercial or financial in nature is not protected by

¹ Where a party resisting disclosure has not articulated a clear argument, the information must be disclosed. *See Lamy*, 152 N.H. at 109 (“The PUC makes no further argument concerning PSNH’s business customers. Accordingly, we hold that it has failed to establish that these customers have a privacy interest at stake.”).

this exemption. The SEC order to which Applicants cite in their Motion recognizes this distinction, conferring considered treatment to *financial* statements and an applicant's capacity factor profile. *See Order on Pending Motions and Further Procedural Order*, NH SEC Docket No. 2010-01 (Dec. 14, 2010).

12. And even if it did, business owners do not share the same expectation of privacy interests as an individual. *See Lamy*, 152 N.H. at 109 (2005) (the PUC admits that "the privacy interest of a business customer is not necessarily coextensive with that of a residential customer") (quotation marks omitted).

13. Applicants also do not articulate why the Directory is proprietary or what provision of the Right-to-Know Law exempts disclosure of proprietary information.

14. Furthermore, even if this was the type of information the exemption may protect, neither the Applicants nor the Business Owners have a reasonable expectation of privacy in this information. This information is already presumably public, and the Business Owners knowingly chose to include their information in a document that Applicants told them would be shared with at least hundreds of workers across all towns impacted by the 192-mile proposed project.

15. Applicants do not articulate why disclosure of the Directory would "unnecessarily subject the business owners to adverse financial or commercial impacts." *Id.* ¶ 6. Presumably Applicants are suggesting that Business Owners may be perceived as supporting Northern Pass by participating in this Directory, and may in turn face retribution from customers or members of the public opposed to Northern Pass.

16. This is not a sufficient privacy interest.

17. First, this is not a true or well-founded fear. A Business Owner's participation in the Directory does not necessarily equate with its support for the Project. A shrewd business

opposing Northern Pass may simply wish to hedge its bets and ensure that it is in a position to capture a business opportunity in the event Northern Pass is approved. Further, to address this concern, Applicants could include a disclaimer on the Directory that the Business Owners do not necessarily support the project by choosing to be included in the Directory.

18. Second, if a Business Owner's inclusion on the Directory is an objectively reasonable indication of their support of Northern Pass, that Owner would not have a privacy interest. *N.H. Right to Life*, 169 N.H. at 113 (citing *Planned Parenthood v. Town Bd.*, 154 Misc.2d 971, 587 N.Y.S.2d 461, 463 (Sup. Ct. 1992) (concluding that disclosure of police department photos of members of "Operation Rescue" would not constitute an unwarranted invasion of privacy because "[t]hese individuals seek notoriety in order to highlight and publicize their position against abortion"))).

19. Applicants' similar concern that disclosure of the Directory "may negatively affect the Applicants to the extent other Business Owners may be discouraged from participating in this effort" does not constitute a privacy interest. *Applicants' Motion*, ¶ 6.

20. For purposes of this exemption, a privacy interest must be commercial, financial, or other similar information. *N.H. Right to Life*, 169 N.H. 95, 113. Applicants' self interest in successfully recruiting a large number of businesses to include in a Directory that Applicants have offered for the purpose showing the Project's construction will have beneficial impacts is not a privacy interest.

IV. There is a Compelling Public Interest in Disclosure

21. Applicants have not satisfied their burden of articulating why there is no public interest in disclosure of the Directory. Applicants merely suggest, *arguendo*, that a public interest may exist, and then conclusively state that such theatrical interest is outweighed by the

Applicants' privacy interest. *Applicants' Motion*, ¶ 7 ("To the extent that there is public interest in disclosure of this information, that interest is not significant enough to outweigh the interest in protecting the privacy of business owners.") This alone is sufficient reason to deny the Motion.

22. Nevertheless, disclosure of the Directory serves a compelling public interest.

23. "Disclosure of the requested information should inform the public about the conduct and activities of their government." *Lamy*, 152 N.H at 109.

24. Here, RSA 162-H places great value on the public interest and public participation. *See, e.g.*, RSA 162-H:1 (stating that it is in the "public interest" to maintain the balance between impacts and benefits of proposed projects and "that all entities planning to construct facilities in the state be required to provide *full and complete disclosure to the public of such plans*") (emphasis added); RSA 162-H:16, IV(e) (requiring the Subcommittee to determine whether a proposed project "will serve the public interest").

25. The Forest Society, as well as all parties and members of the public, has an interest in viewing all information the Applicants and/or Applicants' witnesses have relied on or referenced in their testimony. This is especially true where, as here, the Applicants' witness effusively volunteered the Directory during cross examination at the hearing, and a member of the Subcommittee officially requested it. *See Transcript for Hearing Day 12, June 2 2017, Morning Session*, at 114-16. As this is a document the Subcommittee has shown interest in and may consider in rendering a decision, its disclosure will inform the public about the conduct and activities of their government.

26. The Applicants cite to this Directory as support for their claim that the Northern Pass will benefit the impacted local communities. Members of those local communities have a right to evaluate the information that will supposedly be used to benefit them.

V. This Public Interest Outweighs Applicants' Claimed Privacy Interest

27. The New Hampshire Supreme Court has already found that the legislature provided the weight to be given one side of the balance: "Openness in the conduct of public business." *Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) (quoting RSA 91-A:1 (1990)).

28. Here, the balance tips clearly in favor of the public interest.

29. The public interest in disclosure of the Directory is substantial, whereas the claimed privacy interests are considerably less significant than the privacy interests that the SEC has recognized in prior orders in this docket, such as information concerning sensitive archeological sites and the location of rare plant species.

30. The privacy interest is not commercial, financial, proprietary, or even privacy-related. Rather, it is a concern that disclosure will discourage businesses from joining the Directory out of fear they may face backlash, which in turn will negatively impact the credibility of Applicants' claims.

31. Further, Applicants and Business Owners knew or should have known of New Hampshire's strong policy in favor of disclosure when they respectively created and participated in the Business Directory.

32. And finally, as for Intervenorors that have signed confidentiality agreements, working within the confines of the confidentiality agreements is unnecessarily limiting in ways that strain, if not violate, the Intervenorors' due process rights. It limits the people with whom the "confidential" information may be shared and makes the sharing process cumbersome. It prohibits the Intervenorors from discussing the information with anyone who has not signed a confidentiality agreement.

33. Therefore, on balance, and in light of the strong presumption in favor of disclosure, the public interest outweighs any privacy interests, and the Presiding Officer should deny Applicants' Motion.

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: July 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, July 10, 2017, a copy of the foregoing Response and Objection was sent by electronic mail to persons named on the Service List of this docket.



Amy Manzelli, Esq.