

August 16, 2017

Via Electronic Mail & Hand Delivery

Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
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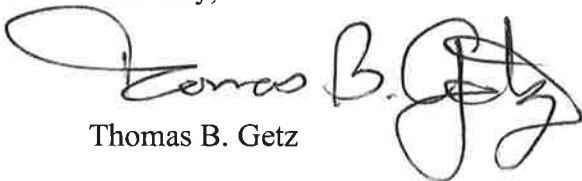
**Re: Site Evaluation Committee Docket No. 2015-06
Joint Application of Northern Pass Transmission LLC and Public Service Company
of New Hampshire d/b/a Eversource Energy (the "Applicants") for a Certificate of
Site and Facility
Motion To Determine Extent of "Friendly Cross"**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of a Motion To Determine Extent of "Friendly Cross".

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**

MOTION TO DETERMINE EXTENT OF “FRIENDLY CROSS”

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 Motion to Determine Extent of “Friendly Cross” (“Motion”). As discussed below, the Applicants have reviewed the August 15, 2017 Report of Third Prehearing Conference and they believe that the extraordinary amount of time allocated for friendly cross-examination (“Friendly Cross”)¹ is not required for a full and true disclosure of the facts pursuant to RSA 541-A:33, IV, and that limitation of Friendly Cross would promote the orderly and prompt conduct of the proceeding pursuant to RSA 541-A:32, III (b).

The Applicants therefore request that the Presiding Officer: (i) prior to issuing a procedural schedule for the balance of these proceedings, schedule a prehearing conference (to be conducted before the completion of the Applicants’ direct case) for the purpose of determining the extent of allowable Friendly Cross; and (ii) require that parties proposing to engage in what appears to be Friendly Cross make an offer of proof at such prehearing

¹ Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, Energy L.J. v. 36, 1, 29 (Apr. 26, 2015)(“*Friendly Cross*: This is cross of witnesses for allied parties. It is usually prohibited by tribunals because it either repeats points already made, or risks introducing new testimony that should have been offered in writing as pre-filed testimony.”)

conference that clearly establishes that their proposed examination will neither repeat points already made by the witness in pre-filed testimony nor introduce new testimony that the examining party or witness should have offered in writing and that such examination is required for a full and true disclosure of the facts.²

I. BACKGROUND

1. On March 7, 2017, the Applicants filed a Motion to Clarify Use of “Friendly” Cross Examination, seeking clarification that Friendly Cross would be permitted during final adjudicative hearings only when there is good reason. In support of their position, the Applicants asserted that there is no right to Friendly Cross and that permitting it *as a matter of course* would disrupt the prompt and orderly conduct of the proceeding and unfairly prejudice their ability to present their case.

2. On March 31, 2017, the Presiding Officer issued an Order on Applicants’ Motion to Clarify Use of “Friendly” Examination. Among other things, at p. 4, he stated: “The Presiding Officer cannot, as requested by the Applicant, make a prehearing determination that *all* Friendly Cross-examination will impede the prompt and orderly conduct of the proceeding. Such a determination must be made during the course of the proceeding.” (Emphasis added.)³ The Presiding Officer also observed that “the possibility of testimony becoming unduly repetitive is real” and he noted that if an objection were made during the hearings “the party conducting the examination should expect to be asked to explain why its line of questioning should be allowed.” In light of the volume of what appears to be unduly repetitive Friendly Cross identified at the Third Prehearing Conference, the Applicants believe that it would promote the orderly and

² The Applicants note that they are not asking to limit the ability of intervenors to conduct legitimate cross-examination, or prevent friendly cross where the interests of justice require it, but are seeking to preserve their rights to due process and ensure the orderly conduct of the proceeding by limiting unjustified friendly cross.

³ The Applicants note that the Order overstates their position. See paragraph 1 above.

prompt conduct of the proceeding to hold an additional prehearing conference before the completion of the Applicants' direct case for the purpose of requiring Intervenors to explain why their questioning of parties they are allied with or do not oppose should be allowed.

3. The Third Prehearing Conference was conducted on August 9, 2017, and the Report of Third Prehearing Conference ("Report") was issued on August 15, 2017. Among other things, the Report, estimates approximately 235 hours (39 days assuming six hours per day⁴) of hearings for the examination of witnesses for parties other than the Applicants, about two-thirds of which would be consumed by what appears to be Friendly Cross. Specifically, after deducting the cross-examination estimates provided by Counsel for the Public (approximately 42 hours) and the Applicants (approximately 35 hours), it appears that the Committee would need to schedule 26 hearing days for approximately 157 hours of Friendly Cross by Intervenors, despite SEC Counsel's admonition at the prehearing conference that such examination is disfavored. Remarkably, the estimated time to examine CFP and Intervenor witnesses, the bulk of which would be consumed by Friendly Cross, would take longer than the cross-examination of all the witnesses for the Applicants, who carry the burden of proof.

4. The Report, at p. 9, also pointed out that the "estimated time needed for cross-examination by similarly aligned intervenors suggests that some intervenors are anticipating cross-examination that would be improper friendly cross-examination." The Report further makes clear that Friendly Cross will be impermissible if it simply repeats a witness's direct testimony and that it should not go beyond direct testimony, which comports with Mr. Hempling's description of Friendly Cross set forth above. *See supra* Footnote 1.

⁴ The estimated hours per day may be conservative but, in any event, the Applicants continue to believe that consideration should be given to longer hearing days in an effort to avoid further delay.

5. A clear example of Friendly Cross by aligned or allied parties, which is not required for a full and true disclosure of the facts, concerns the Municipal Groups who reserved time to examine other municipal witnesses, all of which share the same positions on the Project. In addition, the Grafton County Commissioners reserved time to "cross-examine" municipalities both within Grafton County and outside of Grafton County, all of which opposed the Project and share similar views and concerns. Furthermore, the Deerfield Abutter group reserved time to "cross-examine" witnesses from their own town as part of Municipal Group 3 South who also oppose the Project and raise similar, if not identical, issues. It is difficult to imagine how such examinations, and many other contemplated examinations, could be anything other than improper Friendly Cross. The most orderly and effective way to sort this out, though labor intensive for the Presiding Officer, is through a prehearing conference, possibly the first week of September. Absent an effort to determine the amount of time required for truly appropriate Friendly Cross, any procedural schedule would almost certainly require significant revision with all that entails for the Committee members, parties and their witnesses.

6. Given the amount of time estimated by the Intervenors for Friendly Cross, the Applicants believe that the relief requested herein is necessary to ensure the prompt and orderly conduct of the proceeding. Applicants further submit that the relief requested in this Motion will assist the Presiding Officer in establishing a more realistic procedural schedule for the balance of the final adjudicative hearings.

I. DISCUSSION⁵

A. Friendly Cross Defined

7. Black's Law Dictionary defines cross-examination as "the questioning of a witness at a trial or hearing by the party opposed to the party in whose favor the witness has

⁵ The Applicants summarize below some of the arguments made more fully in their March 7, 2017 Motion.

testified. The purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways.” Black’s Law Dictionary (10th ed. 2014). Express in this definition is an exchange between parties that are adverse. The essence of cross-examination, therefore, is the questioning of an opposing party. Friendly Cross, on the other hand, involves the questioning of a party that one does not oppose.

8. Friendly Cross can be viewed as the functional equivalent of further direct examination or re-direct examination insofar as it permits a sympathetic examiner to ask a witness questions designed to allow the witness to expand on or correct statements. These forms of examination do not constitute cross-examination, because they are not adverse.⁶ Furthermore, Friendly Cross allows an aligned party to ask questions that the sponsor of the witness could not and positions a witness to introduce testimony during the hearing that should have been included in pre-filed testimony. Friendly Cross by Intervenors clearly occurs here with other Intervenor witnesses but also occurs with Counsel for the Public’s witnesses.

9. Friendly Cross has been defined by the New Hampshire Public Utilities Commission (“PUC”) to include “cross examination by any party who is in the same group as the party sponsoring the witness.” *Re Pub. Serv. Co. of New Hampshire*, 69 N.H.P.U.C. 679 (Dec. 6, 1984). Moreover, Counsel for the SEC noted, during the final pre-hearing conference in the Antrim Wind Docket, 2015-02, that “cross-examination, when it’s a party that you support, is not really cross-examination at all.” *Final Structuring Conference Tr.*, 109 (Sept. 7, 2016).

B. NH Law Expressly Authorizes Limitations on Cross-Examination

⁶ In the context of certain federal administrative proceedings, “Friendly Cross-examination” is prohibited. *See 46 CFR 201.132(e)(1)*. In the context of maritime proceedings cross examination is limited to the scope of direct examination and “except for Public Counsel...to witnesses whose testimony is adverse to the party desiring to cross-examine – this being intended specifically to prohibit so-called ‘Friendly Cross-examination.’” The intent is to prohibit cross-examination “which is not necessary to test the truth and completeness of the direct testimony and exhibits.”

10. In the past, the PUC has limited the use of Friendly Cross because “we don't want the parties to pile on bolstering a particular witness' testimony through Friendly Cross-examination.” *Public Service Company of New Hampshire: Investigation of Scrubber Costs and Cost Recovery*, DE 11-250, Tr. Day 1/Afternoon Session, p. 76. Friendly Cross in such circumstances does not further the intended purpose of cross-examination, which is to ascertain truth without needless consumption of time and redundancy.⁷

11. Similarly, the PUC rules state that the purpose for cross examination is “to develop a full and true disclosure of the facts.” Puc 203.24 (a). At the same time, the PUC rules permit the limitation of cross-examination if “such limitation is necessary to avoid repetitive lines of inquiry.” Puc 203.24 (b).

12. The PUC rules mirror the language found in RSA 541-A:33, IV, which provides that cross-examination may be conducted when it is “required for a full and true disclosure of the facts.” RSA 541-A:32, III (b) further provides that the presiding officer in an adjudicative proceeding may limit an intervenor’s use of cross-examination to promote the prompt and orderly conduct of the proceeding. In addition, RSA 541-A:33, II provides that the rules of evidence do not apply in adjudicative proceedings, but expressly authorizes the presiding officer to “exclude irrelevant, immaterial or unduly repetitious evidence.”

13. Site 202.11 permits the Presiding Officer broad authority to impose conditions upon intervenors either at the time that intervention is granted “or at any subsequent time, including the following conditions, if such conditions promote the efficient and orderly process of the proceeding.” The conditions include “[l]imitation of such intervenor’s use of cross-

⁷ The D.C. Court of Appeals has held that “[an] agency, like a trial court, ‘should permit cross examination to explore any matters which tend to contradict, modify, or explain testimony given on direct.’” *Cathedral Park Condo. Comm. v. D.C. Zoning Comm'n*, 743 A.2d 1231, 1250 (D.C. 2000). Friendly Cross does not serve or promote any of these purposes.

examination and other procedures so as to promote the orderly and prompt conduct of the proceeding.” Site 202.11(d)(2).

14. During the pre-hearing conference held on March 22, 2016, Chairman Honigberg noted that, with respect to management of intervenor groups, “anything that helps bring efficiency to this process is worth exploring.” *Prehearing Conference, Tr.* p. 126 (March 22, 2016). It is precisely for this purpose that the Applicants submit this Motion.

15. The following parties object to this motion: Municipal Groups 1 South, 2, 3 South and 3 North; Grafton County Commissioners; Society for the Protection of New Hampshire Forests; Pemigewasset River Local Advisory Committee; Whitefield to Bethlehem Abutters; Bethlehem to Plymouth Non-Abutters; and, Deerfield Abutters.

II. CONCLUSION

16. Given the number of intervenors and parties in this proceeding, many of whom represent similar positions and have filed testimony expressing similar views and concerns, and the fact that approximately 26 days would be consumed by the Intervenors’ Friendly Cross, the Applicants request that the Presiding Officer take steps to limit the use of Friendly Cross prior to issuing a procedural schedule for the balance of these proceedings. The Applicants propose requiring an offer of proof at a prehearing conference conducted by the Presiding Officer that gives non-adverse parties a full and fair opportunity to establish that their contemplated examination will neither repeat points already made by the witness in pre-filed testimony nor introduce new testimony that the examining party or witness should have offered in writing and that such examination is required for a full and true disclosure of the facts. Granting such relief is squarely within the statutory authority of the Presiding Officer, and is essential to ensure the

prompt and orderly conduct of the balance of this proceeding, which has already been extended nine months beyond the statutory timeframe.

WHEREFORE, the Applicants respectfully request that the Presiding Officer enter an Order:

- A. Scheduling a prehearing conference, prior to issuing a procedural schedule for the balance of these proceedings, for the purpose of determining the extent of Friendly Cross;
- B. Requiring parties proposing to engage in Friendly Cross to make an offer of proof at such prehearing conference that clearly establishes that the proposed examination will neither repeat points already made by the witness in pre-filed testimony nor introduce new testimony that the examining party or witness should have offered in writing and that such examination is required for a full and true disclosure of the facts; and
- C. Granting 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: August 16, 2017

By: 

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Certificate of Service

I hereby certify that on the 16th of August, 2017, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the Distribution List.


Thomas B. Getz