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August 21, 2017

**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 Grafton County Commissioners' Renewed Pleading**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of an  
Objection to Grafton County Commissioners' Renewed Pleading.

Please contact me directly should you have any questions.

Sincerely,

A handwritten signature in black ink that reads "Thomas B. Getz". The signature is stylized with a large, looped "T" and "G".

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**

**OBJECTION TO GRAFTON COUNTY COMMISSIONERS' RENEWED PLEADING**

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 object to the pleading filed by the Grafton County Commissioners (“GCC”) on August 11, 2017, seeking once again to halt the adjudicative hearings and also to recall the Applicants’ construction panel (“Renewed Pleading”). As explained herein, the Renewed Pleading is without merit because GCC continues to misapprehend the permitting role of the Department of Transportation (“DOT”) in the Site Evaluation Committee (“SEC”) process. Furthermore, the Presiding Officer has already denied effectively the same request for delay.

**I. Background**

1. The Applicants filed an Application for a Certificate of Site and Facility on October 19, 2015, for a 192-mile electric transmission line with associated facilities (“Northern Pass” or “Project”). As part of their Application, pursuant to Site 301.03 (d), the Applicants included, as Appendix 9, their petition to the New Hampshire Department of Transportation (“DOT”) for Aerial Road Crossings, Railroad Crossings, and Underground Installations in State-Maintained Public Highways.

2. On November 13, 2015, the DOT notified the SEC that the Application contained sufficient information for DOT's purposes, as required by RSA 162-H:7, IV, and the SEC accepted the Application pursuant to RSA 162-H:7, VI on December 18, 2015. On May 25, 2016, DOT filed its progress report pursuant to RSA 162-H:7, VI-b which, among other things, stated that the Applicants were "continuing to progress the design of the proposed route and will be submitting updated plans for NHDOT's review." On April 3, 2017, DOT issued its final decision pursuant to RSA 162-H:7, VI-c, stating that it would "issue a permit for the application subject to conditions." The DOT also said that it was confident that the necessary documents for the Project would be executed and that the Applicants would conform to the required conditions. Moreover, the DOT pointed out that "the review process is iterative in nature" and that it "will not be complete until the design is finalized and documented on final construction drawings."

3. On December 15, 2016, the Applicants filed revised design packages addressing the underground portion of the Project as part of the DOT's permitting process, provided the information to all the parties to the SEC proceeding, and participated in a technical session on February 21, 2017. The Applicants continue to comply with the requirements of the DOT permitting process and to make available to all parties on ShareFile their filings with DOT and the DOT's responses.

4. On February 24, 2017, GCC filed a pleading titled Further Response to Motions Regarding Scheduling and Motion to Continue Adjudicatory Hearing ("Initial Pleading"). The Applicants objected on March 6, 2017. The Presiding Officer denied the Initial Pleading on April 7, 2017. At p. 4 of the Order on Lagaspence Motion to Postpone and Grafton County Commissioners' Motion to Continue ("Original Order"), he observed that:

It is customary for developers to supplement their design plans in response to agency comments and to accommodate newly discovered facts. The effect of the project on

orderly development, environment, aesthetics, historic resources, air and water quality, aesthetics, public health and safety and the public interest can be evaluated based on the plans provided. Intervenor in this docket can argue that the Applicants' plans are insufficient to carry their burden of proof. Postponing the adjudicative hearings is not necessary and will cause undue delay.

5. Through its Renewed Pleading, GCC, focusing on DOT comments as part of the DOT process for reviewing exception requests made by the Applicants, wants the Presiding Officer to suspend the SEC hearings until the DOT determines the accuracy of the Applicants' plans and resolves other issues. GCC also argues for suspension based on a request by the Towns of Easton and Franconia that the DOT reestablish rights-of-way in their communities pursuant to RSA 228:35. In addition, GCC asks that the Applicants' construction panel be recalled to answer questions, as part of the SEC process, about the exception requests submitted to the DOT.

## **II. Discussion**

6. As the Applicants noted in their February 27, 2017 Response to Various Procedural Schedule Proposals, and reiterate here, "GCC does not appreciate the relationship of the DOT's regulatory authority over the design of the underground portion of the Project to the [SEC's] issuance of a Certificate." As noted above, the DOT process is iterative and, as part of that iterative process, the Applicants continue to comply with DOT requests in order to produce a final design that will meet the standards set forth in the DOT's *Utility Accommodation Manual*.

7. While the Renewed Pleading adds to the Initial Pleading, GCC's essential argument that the adjudicative hearings should be delayed is unchanged, and it is unconvincing because it runs contrary to the integrated procedure established by the Legislature, which requires that the SEC incorporate in any Certificate the terms and conditions specified by a state agency with permitting authority, such as the DOT. RSA 162-H:16, I. Despite the Presiding

Officer's clear stance on the issue, GCC blurs the demarcation between the DOT's regulatory authority and the SEC's regulatory authority, and attempts to use RSA 162-H:1, the Purpose Section, as the basis for ignoring the DOT's independent role. As noted above, the Presiding Officer recognized the two separate processes. In the DOT process, the Applicants respond to agency comments and provide additional information over a time period that may extend beyond the issuance of a Certificate. In the SEC process, Intervenors can argue whether the Applicants have carried their burden of proof with respect to the required findings that the SEC must make, subject to the statutory time period for issuance of a Certificate.

8. As for GCC's argument for delay based on the requests by Franconia and Easton that the DOT re-establish rights-of way, GCC neglects to report the DOT's August 8, 2017 response, which did not find a need to reestablish rights-of-way.<sup>1</sup> Specifically, in response to the Town of Easton's July 17, 2017 letter, the DOT stated:

In your letter, you request that the DOT reestablish the ROW in accordance with RSA 228:35. Formal reestablishment of the ROW in this manner is typically only considered when, after thorough investigation, the location of the ROW is not defined and/or there are questions on its location. Before a reestablishment is considered there are many steps in collection of evidence of the existing ROW limits... While we continue to review and question the accuracy of the information provided by Northern Pass, this is different than needing to formally reestablish the ROW.

9. Finally, with respect to GCC's request to recall the Applicants' construction panel, GCC contends that the Applicants need to be questioned about the exception requests. In fact, the Applicants are being questioned about their exception requests by the appropriate entity, i.e., the DOT. As for questioning before the SEC, the Presiding Officer has already concluded that the Applicants provided sufficient information for the SEC to consider the Project and the

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<sup>1</sup> GCC also refers to a "recently discovered" DOT email that "arguably would preclude the type [of] underground burial envisioned in this case." First of all, the email in question has been public for a number of years. More importantly, the argument that GCC floats has been resolved by the Courts. See Attachment A and Attachment B.

Intervenors may argue whether that information is sufficient for the Applicants to carry their burden of proof. Thus, there is no basis for the GCC request to recall the construction panel.

### **III. Conclusion**

10. The Renewed Pleading proceeds from the flawed premise that the DOT's exercise of its permitting authority should be overseen by the SEC, or should be exercised in the same way. The DOT, however, is an independent permitting agency and it exercises its regulatory authority subject to its own statutes and rules and will therefore assure, among other things, that the Project "will not interfere with the safe, free and convenient use for public travel of the highway." RSA 231:168. As explained before, the DOT process has been constructed in such a way that it allows for a petitioner to refine its design over time and conform it to the agency's specific requests, which is entirely appropriate in the context of a complex engineering project.

11. Ultimately, GCC is arguing that the Legislature should have designed the process for siting energy facilities differently, and that the DOT and SEC processes should be melded together in a way that would unnecessarily and improperly extend this proceeding. The Applicants ask that the Presiding Officer find, as he did before, that: "Postponing the adjudicative hearings is not necessary and will cause undue delay." Original Order, p.4.

WHEREFORE, the Applicants respectfully request that the Presiding Officer:

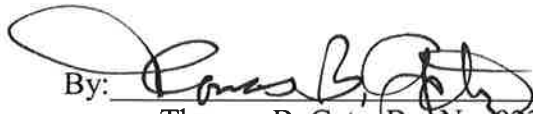
- a. Reject GCC's Renewed Pleading; and
- b. Grant such further relief as it deems appropriate.

Respectfully submitted,

Northern Pass Transmission LLC and  
Public Service Company of New Hampshire d/b/a  
Eversource Energy

By Their Attorneys,  
McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: August 21, 2017

By:   
Thomas B. Getz, Bar No. 923  
Barry Needleman, Bar No. 9446  
Adam Dumville, Bar No. 20715  
11 South Main Street, Suite 500  
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Certificate of Service

I hereby certify that on the 21<sup>st</sup> day of August, 2017 the foregoing Objection was electronically served upon the SEC Distribution List and the original and one copy will be hand delivered to the Site Evaluation Committee.

  
Thomas B. Getz

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

Coos Superior Court  
55 School St., Suite 301  
Lancaster NH 03584

Telephone: 1-855-212-1234  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF DECISION**

**Bruce W. Felmly, ESQ  
McLane Middleton Professional Association  
900 Elm Street  
PO Box 326  
Manchester NH 03105-0326**

**Society for the Protection of New Hampshire Forests v Northern Pass**

Case Name: **Transmission LLC**  
Case Number: **214-2015-CV-00114**

Enclosed please find a copy of the court's order of May 25, 2016 relative to:

Order on Defendant's Motion for Summary Judgment

May 26, 2016

David P. Carlson  
Clerk of Court

(285)

C: Thomas N. Masland, ESQ; Adam M. Hamel, ESQ; Frank Kenison, ESQ



STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

COÖS, SS.

Docket No. 15-CV-114

Society for the Protection of New Hampshire Forests

v.

Northern Pass Transmission, LLC

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiff, the Society for the Protection of New Hampshire Forests ("SPNHF"), brought suit against the defendant, Northern Pass Transmission, LLC ("NPT"), seeking a declaratory judgment and injunctive relief pertaining to NPT's plan, known as the Northern Pass Project, to build an electric power transmission line extending from the Canadian province of Quebec through New Hampshire to southern New England. NPT now moves for summary judgment as to all of SPNHF's claims. SPNHF objects. The court held a hearing on the matter on March 31, 2016. Based on the pleadings, the parties' arguments, and the applicable law, the court GRANTS NPT's Motion for Summary Judgment.

**I. Factual Background**

The record supports the following relevant and undisputed facts. In October 2015, NPT and its co-applicant, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH"), submitted their Joint Application for a Certificate of Site and Facility to Construct a New High Voltage Transmission Line and Related Facilities in New Hampshire (the "Application") to the New Hampshire Site Evaluation Committee. (Bellis Aff. ¶ 5, Jan. 4, 2016; NPT's Mem. Law, Ex. A.) The proposed

CLERK'S NOTICE DATED

5/26/16

CC: Felmy / Hemen  
Kensan / Masland

Northern Pass Project consists of a high voltage electric transmission line extending approximately 192 miles from the Canadian border through New Hampshire to southern New England. (*See* NPT's Mem. Law, Ex. A.) The proposed transmission line is comprised of a single circuit 320 kV high voltage direct current ("HVDC") transmission line linked to a 345 kV alternating current ("AC") transmission line via an HVDC/AC converter terminal located in Franklin, New Hampshire. (*See id.*) In conjunction with the filing of the Application, NPT and PSNH also submitted a petition to the New Hampshire Department of Transportation ("DOT") seeking permission, pursuant to RSA 231:160 (2009), to install the electric transmission line, and related facilities, across, over and under certain state highways. (Bellis Aff. ¶ 6; NPT's Mem. Law, Ex. B.)

SPNHF owns land (the "Washburn Family Forest") on both sides of a section of Route 3 in Clarksville, New Hampshire. (Bellis Aff. ¶ 9; SPNHF's Mem. Law 2.) As part of the Northern Pass Project, NPT is seeking the necessary permission, licenses, and permits from the DOT to bury a portion of the transmission line approximately fifty to seventy feet below the section of Route 3 that runs through SPNHF's property. (Bellis Aff. ¶ 9; NPT's Mem. Law, Ex. B; SPNHF's Mem. Law, Ex. C.)

The stretch of Route 3 that passes through the Washburn Family Forest is a four-rod road currently maintained as a "Class I" state highway.<sup>1</sup> The selectmen of Clarksville, Stewartstown and Pittsburgh laid out this section of road in 1931, after determining that there was "occasion for a new highway" for the "accommodation of the public." (*See* SPNHF's Mem. Law, Ex. D.) The selectmen paid SPNHF's predecessor-in-

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<sup>1</sup> In its Complaint, SPNHF mistakenly identified Route 3 as a "Class II" state highway. In its memorandum of law in support of its Objection to Motion for Summary Judgment, however, SPNHF clarified that this segment of Route 3 is currently a "Class I" state highway. (*See* SPNHF's Mem. Law 3 n.1.)

interest, Lyman Lombard, \$1000 to establish the public highway right-of-way through the Washburn Family Forest. (*See id.*; SPNHF's Mem. Law, Ex. E.)

NPT has not asked SPNHF for, and SPNHF has not granted NPT, permission to install, use, or maintain the proposed transmission line through the Washburn Family Forest, contending that SPNHF's permission is not required because the DOT has exclusive power to authorize NPT's proposed use of the public right-of-way. (*See* NPT's Mem. Law 5.) As of the date of this order, the DOT has not granted the necessary permits, licenses, and permissions authorizing NPT to install the proposed transmission line underneath Route 3. (*See* NPT's Mem. Law, Ex. C.)

On November 19, 2015, SPNHF brought the present suit against NPT. SPNHF seeks a declaratory judgment that NPT's proposed use of Route 3 through the Washburn Family Forest, "whether it involves a buried line or above-ground towers, exceeds the scope of the public right-of-way and cannot be undertaken without [SPNHF's] permission." (Compl. 6.) Moreover, SPNHF seeks a permanent injunction "preventing NPT from conducting any activities on the [Washburn Family Forest property] to advance or implement the [Northern Pass Project], without first obtaining [SPNHF's] permission." (*Id.*) NPT now moves for summary judgment as to all claims asserted by SPNHF.

## **II. Standard of Review**

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits filed, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III (2010 & Supp. 2013). The moving party has the burden of proving both elements. *Concord Grp. Ins. Co. v. Sleeper*, 135 N.H. 67,

69 (1991). A “material” issue of fact is one that “affects the outcome of the litigation.” *Weeks v. Co-Operative Ins. Co.*, 149 N.H. 174, 176 (2003) (citation omitted). To demonstrate a genuine dispute regarding a material fact, the non-moving party “may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial.” RSA 491:8-a, IV.

When considering the evidence, the court must draw all inferences “in the light most favorable to the non-moving party.” *Sintros v. Hamon*, 148 N.H. 478, 480 (2002). The court may not “weigh the contents of the parties’ affidavits and resolve factual issues,” but must simply determine “whether a reasonable basis exists to dispute the facts claimed in the moving party’s affidavit at trial.” *Iannelli v. Burger King Corp.*, 145 N.H. 190, 193 (2000) (citations omitted); *Sabinson v. Tr. of Dartmouth Coll.*, 160 N.H. 452, 460 (2010).

### **III. Discussion**

NPT moves for summary judgment on the grounds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because (1) its proposed use of the segment of Route 3 at issue is “squarely within the scope of the right of way easement,” (NPT’s Mem. Law 6–9), and (2) because the DOT has the sole power to authorize the proposed use and therefore NPT is not required to obtain SPNHF’s permission prior to installing its transmission line. (*Id.* 9–11.) Specifically, NPT contends that New Hampshire has long recognized that utilities are a proper use of public highway easements and that the General Court, pursuant to RSA 231:160, has given “express statutory authorization for the installation and maintenance of underground conduits and cables underneath public highways.” (*Id.* 6–8.) NPT

maintains that RSA 231:160 does not limit permits for the installation of utilities in public highways to only public entities or to specific public purposes, and thus NPT's proposed use of the stretch of Route 3 at issue is expressly authorized by statute. NPT also asserts that the DOT has the "exclusive power to authorize installation of utilities in state-maintained highways" under RSA 231:160 and 161, and thus NPT is not required to obtain SPNHF's permission before installing its transmission line underneath the segment of Route 3 at issue. (*Id.* 9–11.)

SPNHF counters that a public highway easement is "a right-of-way for 'viatic' use only—in essence, for passage over the land" and that "[a]ny other use exceeds the scope of the easement." (SPNHF's Mem. Law 6.) SPNHF contends that the question of whether NPT's proposed use exceeds the scope of the highway easement over the Washburn Family Forest must be decided by applying the "rule of reason" and only after both parties have had "a full opportunity to develop and present pertinent evidence" as to whether this proposed use was beyond what was contemplated by the landowners in 1931 when they created the public highway easement at issue. (SPNHF's Mem. Law 7–8, 10.) SPNHF also asserts that there are important private property rights at issue in this case that must be decided by this court; not the DOT. That is, SPNHF argues that the DOT does not have jurisdiction to decide this private property dispute. Additionally, SPNHF maintains that, to the extent the proposed use of the right-of-way exceeds the scope of the highway easement, the DOT would effect a taking of SPNHF's "property interest in the freehold underlying the highway" if it granted NPT the licenses to install its electric transmission line under the stretch of Route 3 at issue. (*Id.* 13.)

At the outset, the court notes that NPT has not yet received any permits from the DOT, nor has any construction actually commenced. Thus, whether the DOT would

effect a taking of SPNHF's property *if* it granted NPT a license to install the transmission line underneath the stretch of Route 3 at issue is purely speculative and the court declines to address this issue. The extent of NPT's *actual* use of the public right-of-way and whether such use exceeds the scope of the public highway easement is similarly speculative. Nonetheless, the court finds that under the plain language of RSA 231:160 NPT's proposed use is a proper use of the public highway easement. Moreover, pursuant to RSA 230:161, the DOT has exclusive jurisdiction over whether to grant NPT a permit to install the proposed transmission line below the stretch of Route 3 at issue.

Pursuant to RSA 231:160:

Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:161 provides: "any person, copartnership or corporation desiring to erect or install any such poles, structure, conduits, cables or wires in, under or across any such highway, shall secure a permit or license therefore in accordance with the following procedure." The statute grants the DOT "exclusive jurisdiction of the disposition" of "petitions for such permits or licenses concerning all class I and class III highways."

In *King v. Town of Lyme*, the New Hampshire Supreme Court interpreted RSA 231:160 and 161, explaining "RSA 231:160 grants the *authority* to erect utilities and specifies that utility facilities may be installed or erected 'in any public highway.' RSA 231:161 sets out the *procedure* by which a person, natural or legal, makes application for a permit or license to erect such facilities in 'any such highway.'" 126 N.H. 279, 282 (1985). The Court concluded that "[t]hese two provisions, read together, *clearly*

*authorize persons to be permitted to install utility facilities in any public highways.*” *Id.* (emphasis added). The Court noted that that in *Opinion of the Justices* it had opined: “In this state we have never considered a highway purpose to be limited solely to the transportation of persons and property on the highways.” *Id.* at 284 (quoting *Opinion of the Justices*, 101 N.H. 527, 530 (1957)). The Court also acknowledged that “because both the legislature and this court have determined that the installation of utility facilities is a proper highway use, the use of a highway for such facilities does not constitute an additional servitude which would require the payment of damages to abutting landowners.” *Id.* at 284–85 (citing *United States v. Certain Land in City of Portsmouth*, 247 F. Supp. 932, 934–35 (D.N.H. 1965)).

This court finds that under New Hampshire law a public highway easement is not limited solely to “viatic” use. Rather, as the Court stated in *King*, in enacting 231:160 and 161, the legislature “determined that the erection of utility facilities is a proper highway use.” *Id.* at 284; *see also id.* at 284–85. Here, it is undisputed that the stretch of Route 3 at issue is a “class I” state highway. It is also undisputed that NPT seeks to install an electric transmission line underneath this stretch of Route 3. The court finds that RSA 231:160 “clearly authorize[s NPT] to be permitted to install [its] utility [line and/or] facilities in [this] public highway[.]” *See King*, 126 N.H. at 284–85. The court further finds that RSA 231:161 plainly grants to the DOT exclusive authority over whether to permit NPT to install its proposed transmission line beneath the stretch of Route 3 at issue. *See RSA 231: 161* (stating that the DOT “shall have exclusive jurisdiction of the disposition” of petitions for permits or licenses to install utilities in class I state highways).

SPNHF contends that the Northern Pass Project is not a traditional public utilities project and is beyond the scope of the public highway easement because NPT is a private, for-profit company. The court finds this argument unavailing. RSA 231:160 does not limit authorization for the installation of utilities to only public entities. Rather, as NPT asserts, the statute authorizes “*any person, copartnership or corporation*” to install utilities in public highways, provided they have the necessary permits and/or licenses. RSA 231:160.

SPNHF also argues that the Northern Pass Project is different and beyond the scope of the public highway easement because the proposed transmission line would be direct current (“DC”) from Quebec, Canada to Franklin, New Hampshire. SPNHF analogizes the proposed DC transmission line to an extension cord running from Quebec to southern New England, with no flow of electric current branching off to benefit New Hampshire communities along the way. SPNHF contends that because there is no immediate benefit to New Hampshire communities, the proposed transmission line exceeds the scope of the public highway easement. In effect, SPNHF is arguing that the proposed Northern Pass Project will not serve the public good.

The court finds that, under RSA 231:161, the determination as to whether this project will serve the public good must be made, in the first instance, by the DOT. Under RSA 231:161, the General Court gave the DOT “exclusive jurisdiction” over the disposition of permits and licenses for utility projects in public highways. The legislature further provided that the DOT “shall grant” a requested permit or license “[i]f the public good requires.” RSA 231:161. Thus, the DOT, not this court must decide, in the first instance, whether a proposed project meets the “public good” requirement of RSA



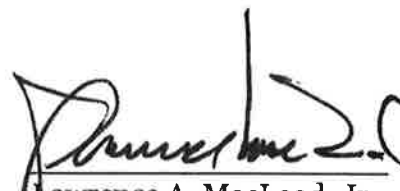
231:161.<sup>2</sup> As the court noted above, the DOT has not yet decided whether to grant NPT the necessary licenses and permits for the Northern Pass Project. As such, the court declines to address whether the proposed project serves the public good.

Accordingly, the court finds that there is no genuine issue as to any material fact and NPT is entitled to judgment as a matter of law because NPT's proposed use is within the scope of the highway easement and because the DOT has exclusive jurisdiction over whether to grant NPT the necessary permits and licenses for the Northern Pass Project.

#### **IV. Conclusion**

For the foregoing reasons, the court GRANTS NPT's Motion for Summary Judgment. Consequently, SPNHF's February 25, 2016 Motion for Joinder of the State of New Hampshire Department of Transportation as Party and to Amend Petition is MOOT and will not be addressed.

SO ORDERED, this 25<sup>th</sup> day of May 2016.



Lawrence A. MacLeod, Jr.  
Residing Justice

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<sup>2</sup> To the extent SPNHF asserts that granting the DOT exclusive authority to decide this issue constitutes a "rubber stamp" the court does not agree. In the event DOT makes a determination with respect to this project that either party believes to be erroneous, that party may then appeal the DOT's decision to the DOT Appeals Board, *see* RSA 21-L:14-15, 18. Thereafter, the party may appeal the Appeals Board's decision to the Supreme Court. *See* RSA 21-L:18; RSA 541:6.

**THE STATE OF NEW HAMPSHIRE****SUPREME COURT**

**In Case No. 2016-0322, Society for the Protection of New Hampshire Forests v. Northern Pass Transmission, LLC, the court on January 30, 2017, issued the following order:**

Having considered the briefs and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The plaintiff, Society for the Protection of New Hampshire Forests, appeals an order of the Superior Court (MacLeod, J.) granting summary judgment in favor of the defendant, Northern Pass Transmission, LLC. In its petition for declaratory and injunctive relief, the plaintiff sought to establish that the defendant's proposed plan, for which the defendant has not yet received regulatory approval, to install an underground electrical transmission line within a state highway easement over a portion of the plaintiff's land, exceeds the scope of the highway easement. In granting summary judgment, the trial court ruled that use of the right-of-way for the electrical line would, as a matter of law, fall within the scope of the easement. On appeal, the plaintiff argues that the trial court erred by: (1) declining to address, on ripeness grounds, whether the proposed installation will result in inverse condemnation, and not finding that it in fact will result in inverse condemnation; (2) not finding that a genuine issue of material fact exists as to whether the proposed installation will exceed the scope of the easement pursuant to the "rule of reason"; (3) not ruling that the anticipated installation will exceed the scope of the easement as a matter of law; (4) stating that the easement is not limited to "viatic" use; (5) allegedly "treat[ing] the dispute as a simple licensing matter"; and (6) allegedly denying the plaintiff a forum and remedy.

In reviewing an order granting summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from such evidence, in the light most favorable to the nonmoving party. Pike v. Deutsche Bank Nat'l Trust Co., 168 N.H. 40, 42 (2015). We review the trial court's application of law to the facts de novo. Id. If our review of the evidence discloses no genuine issue of material fact and demonstrates that the moving party is entitled to judgment as a matter of law, we will uphold the trial court's order. Id. An issue of fact is "material" if it affects the outcome of the case under applicable substantive law. Lynn v. Wentworth By The Sea Master Ass'n, 169 N.H. 77, 87 (2016).

The record in this case establishes that the defendant has submitted an application to the New Hampshire Site Evaluation Committee to install a high voltage transmission line and related facilities. The proposed project would consist of a single circuit 320 kV high voltage direct current transmission line carrying hydroelectric-generated power from the Canadian border to Franklin, where it would be linked to a 345 kV alternating current transmission line that terminates in Deerfield. In total, the line would extend 192 miles from the Canadian border to Deerfield. A portion of the line would be buried underground within the bounds of existing public highway easements.

The buried portion of the proposed project would include a section of Route 3 in Clarksville that passes through land owned by the plaintiff. At that point, Route 3 is a four-rod road, and is maintained as a Class I state highway. The section of Route 3 at issue was laid out by the selectmen of Clarksville, Stewartstown, and Pittsburgh in 1931 after finding that “for the accommodation of the public there is occasion for a new highway.” The plaintiff’s predecessor-in-title was paid \$1,000 for the right-of-way. The defendant has applied for a license from the New Hampshire Department of Transportation (DOT) to bury the proposed transmission line between fifty and seventy feet below the surface of Route 3. See RSA 231:160, :161 (2009).

The plaintiff filed the present action seeking a declaratory judgment that the proposed use of the right-of-way “exceeds the scope of the public right-of-way and cannot be lawfully undertaken without [the plaintiff’s] permission,” and an injunction “preventing [the defendant] from conducting any activities on [the plaintiff’s property] to advance or implement” the proposed project. The plaintiff did not specify in its petition any specific harm or unreasonable burden that the proposed use will impose upon its property. In granting the defendant summary judgment, the trial court ruled that, pursuant to statute and longstanding precedent, an underground utility is within the scope of a public highway easement as a matter of law, and that the DOT has exclusive authority to determine whether to allow the proposed use.

At the outset, we agree with the trial court that “whether the DOT would effect a taking of [the plaintiff’s] property if it granted [the defendant] a license to install the transmission line underneath the stretch of Route 3 at issue is purely speculative” and, thus, is not ripe for adjudication. “Ripeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record.” Univ. Sys. of N.H. Bd. of Trs. v. Dorfsman, 168 N.H. 450, 455 (2015) (quotation and brackets omitted). In determining whether a claim is ripe, we evaluate the fitness of the claim for judicial determination and the hardship to the parties caused by the court’s decision not to address an issue. Id. A claim is fit for determination when it raises primarily legal issues, it does not require further factual development, and the challenged action is final. Id. In evaluating hardship on the parties, we examine whether the contested action imposes an

impact upon the parties that is sufficiently direct and immediate to render the issue appropriate for judicial review at this stage. Id.

Whether any regulatory action results in an unconstitutional taking of private property is a question that turns upon the specific facts of that case. See Burrows v. City of Keene, 121 N.H. 590, 598 (1982). Here, because the DOT has not yet acted upon any license application, whether its potential approval of a license might result in inverse condemnation is too speculative a question to be fit for judicial determination. Moreover, as the trial court observed, the parties have the right both to an administrative appeal and an appeal to this court from any adverse licensing decision. See RSA 21-L:14-:15, :18 (2012 & Supp. 2016); RSA 541:6 (2007). Thus, the decision not to address whether a future licensing determination might result in inverse condemnation does not result in hardship. Under the circumstances, we conclude that the trial court did not err by declining to address the constitutionality of a future licensing decision by the DOT. We, likewise, decline to address whether any future license granted by the DOT might result in inverse condemnation.

By contrast, whether the defendant's proposed use of the public highway easement falls within the scope of the highway easement, as discussed below, does not require significant factual development. Thus, although the trial court observed that "[t]he extent of [the defendant's] actual use of the public right-of-way and whether such use exceeds the scope of the public highway easement is similarly speculative," we conclude that it properly addressed whether the proposed use would exceed the scope of the easement.

We have long recognized that public highway easements may be used for the placement of public utilities, including electrical transmission lines. See McCaffrey v. Company, 80 N.H. 45, 45-46 (1921); Trust Co. v. Electric Co., 71 N.H. 192, 200 (1901). As we have explained:

In this state we have never considered a highway purpose to be limited solely to the transportation of persons and property on the highways. "The public easement includes all reasonable modes of travel and transportation which are not incompatible with proper use of the highway by others. It is not restricted to the transportation of persons or property in moveable vehicles but extends to every new method of conveyance which is within the general purpose for which highways are designed." . . .

In view of the plenary power of the State over its highways, it may allow the location therein of any facilities not inconsistent with the superior rights of the traveling public. As science develops highways may be used for any improved methods for the transmission of persons, property, intelligence or other means to promote sanitation, public health and welfare. Such use of the

public highways constitutes a proper highway purpose even though it may be new and is subordinate to the primary use of the highways for the traveling public.

Opinion of the Justices, 101 N.H. 527, 530 (1957) (quoting State v. Scott, 82 N.H. 278, 279 (1926)) (citations omitted).

Thus, in King v. Town of Lyme, 126 N.H. 279 (1985), we summarily rejected the plaintiff's argument that "a utility easement is not a proper highway use in a rural area," id. at 284, and observed that, because "the installation of utility facilities is a proper highway use, the use of a highway for such facilities does not constitute an additional servitude which would require the payment of damages to abutting landowners," id. at 285. We decline the plaintiff's invitation to disregard King as mere dicta. To the contrary, it is consistent with longstanding New Hampshire law.

Similarly, we long ago recognized that "[w]hether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is, in either case, of the essence of the street that it is public, and hence under the paramount control of the legislature as the representative of the public." State v. Kean, 69 N.H. 122, 128 (1896). Thus, we have observed that in RSA 231:160, the legislature has "grant[ed] the authority to erect utilities and specif[e]d that utility facilities may be installed or erected 'in any public highway,'" while in RSA 231:161, it has "set[] out the procedure by which a person makes application for a permit or license to erect such facilities in 'any such highway.'" King, 126 N.H. at 284. RSA 231:160 specifically provides:

Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

Under RSA 231:161, I(c), "[a]ny such person, copartnership or corporation desiring to erect or install any such . . . conduits, cables or wires in, under or across any" class I state highway "shall secure a permit or license therefor" by submitting a petition with the commissioner of the DOT, "who shall have exclusive jurisdiction of the disposition of such petitions."

We conclude that use of the Route 3 right-of-way for the installation of an underground high voltage direct current electrical transmission line, with associated facilities, falls squarely within the scope of the public highway easement as a matter of law, and that such use is within the exclusive

jurisdiction of the DOT to regulate. Through RSA 231:160 and RSA 231:161, the legislature has definitively found, consistent with our case law, that the use of highway easements for utility transmission lines is a reasonable use of the easement.

We also conclude that, upon this record, there is no genuine issue of material fact. The mere fact that the public utilities regulatory environment may have changed since 1931, and that the defendant may profit from the sale of electricity transmitted through the proposed line to out-of-state buyers, does not create a genuine issue of material fact as to whether use of the right-of-way for an underground electrical transmission line is within the scope of the highway easement. Cf. King, 126 N.H. at 284 (finding argument that electrical utility was not proper use of public highway in rural area to be without merit based upon RSA 231:160 and this court's case law). Nor does the record provided on appeal contain any evidence, by affidavit or otherwise, establishing how the proposed use of the highway easement will specifically harm or otherwise unreasonably burden the plaintiff's property beyond the burden already created by the presence of Route 3, or any affidavit "showing specifically and clearly reasonable grounds for believing" that the plaintiff will be able to produce such evidence at trial. RSA 491:8-a, II (2010); see Heartz v. City of Concord, 148 N.H. 325, 332 (2002); Lussier v. N.E. Power Co., 133 N.H. 753, 758 (1990). Because use of the easement for an underground electrical line falls within the scope of the public highway easement, because there is no dispute that the 1931 highway layout created a public highway easement, and because there is no evidence that the proposed use will unreasonably burden the plaintiff's property, there is no need to apply the "rule of reason." See Heartz, 148 N.H. at 331-32; Lussier, 133 N.H. at 757-58.

We reject the plaintiff's argument that RSA 231:167 (2009), which provides that "any person . . . damaged in his estate by . . . the installation of any such underground conduits or cables or by installing any wire . . . or other apparatus in or under the highway . . . may apply to the selectmen to assess his damages . . . [in the manner] provided [for] in the . . . laying out [of] highways," is inconsistent with this analysis. As the defendant correctly observes, this provision "presupposes that utilities are within the scope of the public highway easement," and "merely recognizes that there may be instances when persons . . . may incur some impact or injury in connection with a utility's use of the easement, . . . and provides a statutory remedy in those instances." See Darling v. Company, 74 N.H. 515, 516 (1908) (noting that predecessor to RSA 231:167 applied "only to acts done by virtue of a license" and provided for "compensation for injuries done to property . . . by virtue of a license" to install a utility in a public highway). As noted above, the plaintiff has not offered proof in the summary judgment record that the proposed project will specifically harm its property.

Likewise, we reject the plaintiff's arguments that the trial court treated the dispute as a "licensing matter," and denied the plaintiff a forum and a remedy. To the contrary, it addressed, and properly rejected, the merits of the plaintiff's argument that use of the Route 3 right-of-way for the proposed project was beyond the scope of the public highway easement, and it correctly declined to address whether the proposed project will serve the public good because that question is for the DOT to decide in the first instance. See RSA 231:161, I(c), II; Kean, 69 N.H. at 128. As noted above, the plaintiff will have an opportunity to challenge any "public good" licensing determination rendered by the DOT. See RSA 21-L:14-:15, :18; RSA 541:6.

Finally, we reject the plaintiff's argument that the trial court erred by stating that "a public highway easement is not limited solely to 'viatic' use." Rather, it properly rejected the plaintiff's argument that a highway easement is "a right-of-way for 'viatic' use only – in essence, for passage over the land," and that any other use necessarily "exceeds the scope of the easement." As discussed above, the plaintiff's claim that use of a public highway is limited to "passage over the land" is contradicted by well-established New Hampshire law.

Affirmed.

Dalianis, C.J., and Hicks, Lynn, and Bassett, JJ., concurred.

**Eileen Fox,  
Clerk**