STATE OF 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

OBJECTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS TO THE APPLICANTS' MOTION TO DETERMINE EXTENT OF "FRIENDLY CROSS"

The Society for the Protection of New Hampshire Forests (the "Forest Society"), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully requests that the Presiding Officer of the Site Evaluation Committee (the "SEC") deny Northern Pass Transmission LLC's and Public Service Company of New Hampshire d/b/a Eversource Energy's (collectively, the "Applicants") Motion requesting that the Presiding Officer schedule an additional prehearing conference for the purpose of "determining the extent of allowable Friendly Cross" and require to "parties proposing to engage in what appears to be Friendly Cross make an offer of proof at such 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." Motion to Determine Extent of "Friendly Cross," at 1-2 ("Motion"). In support, it states as follows:

ARGUMENT

I. Applicants' Motion is a Second Attempt to Preemptively Restrict the Scope of Intervenors' Cross Examination Rights Despite a Clear Order in this Docket, and Consistent Procedure in Past Dockets, Prohibiting Such Preemptive Restrictions

1. Applicants' Motion is little more than a second attempt to obtain the same result that they failed to get the first time they tried to limit the Intervenors' rights to cross-examination

with their March 7, 2017, Motion to Clarify Use of "Friendly" Cross Examination. Specifically, Applicants seek a broad prehearing prohibition of cross-examination of one intervenor by another based on the Applicants' idea of each party's positions and beliefs.

2. In their prior Motion, Applicants unsuccessfully sought a *per se* ruling stating that there is no right to friendly cross-examination and, therefore, intervenors are not permitted to conduct friendly cross of one another. Although Applicants' second motion seeks slightly different relief (a pre-hearing conference and an order requiring intervenors to make a showing of proof) than its prior Motion, it effectively raises the same question that has already been answered: whether the SEC can make a prehearing determination that all friendly cross-examination will impede the prompt and orderly conduct of the proceeding.[1]

3. Applicants don't even attempt to hide this; their present Motion consists of a near-verbatim summary of the arguments raised in their prior Motion. In an ironic attempt to address the ever-growing length of the hearing. Applicants' overly litigious behavior yet again wastes the time of the Subcommittee and intervenors and contributes to further delay.

4. In its Order on Applicants' earlier Motion, after reciting RSA 541-A:33, IV and Site 202.11, the Presiding Officer rightfully concluded, "[t]he 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." Order on Applicant's Motion to Clarify use of "Friendly" Examination, at p. 3-4 (Mar. 31, 2017).

[1] In the present Motion, Applicants point to their use of the phrase "as a matter of course" and assert that the Order overstates the Applicants' position in the earlier Motion as seeking to prevent all friendly cross examination. Motion, n. 3. The Forest Society struggles to understand how else to interpret that earlier motion, the conclusion of which states, "the Applicants respectfully request that the Presiding Officer . . . Clarify that intervenors are not permitted to conduct friendly cross of the Applicants or one another as a matter of right." Motion to Clarify Use of "Friendly" Examination, ¶ 13 (Mar. 7, 2017).

5. Seeing as the law has not changed, this Order continues to control this case and there exists no more legal justification for the Presiding Officer to issue a prehearing limitation on cross-examination than there was the first time Applicants made this request.

6. In fact, if the Presiding Officer were to do this, it would be an even greater violation of the Forest Society's due process rights than if the preemptive limitation on friendly cross was issued in March, because intervenors generally adverse to the Applicants' position would be subject to a rule that would restrict their ability to conduct cross that intervenors favorable to Applicants' position were not subject to during cross of Applicants' witnesses.

7. Applicants justify their unfair and duplicative request by pointing out the delay that has occurred thus far already and delay that will be caused by the additional hearing days likely needed to accommodate the estimates reported in Report of Third Prehearing Conference.

8. Applicants did not show this same concern for timeliness when many of their witnesses took countless opportunities to give extensive testimony in response to questions which could easily have been answered in a quick and concise way.

9. Also, if one were to accept Applicants' definition of friendly cross-examination and beliefs regarding the positions of parties, Applicants' Motion misrepresents the percentage of estimated time attributable to allegedly improper friendly cross-examination. While Applicants subtract the cross-examination estimates provided by Counsel for the Public (approximately 42 hours) and the Applicants (approximately 35 hours) from the approximately 235 total hours estimated for the examination of witnesses for parties other than the Applicants, they do not subtract the cross-examination estimates that parties other than the Applicants gave regarding Counsel for the Public's witnesses (approximately 45 hours).

10. If, as Applicants suggest in their prior Motion, Counsel for the Public occupies a

unique statutory role that allows it to be viewed as opposing all parties or no parties at all, then it logically follows that Counsel for the Public's Witnesses cannot be assumed to be for or against the project. Therefore, all estimates of cross-examination of Counsel for the Public's witnesses cannot be considered friendly cross.[2] Accounting for this time that Applicants' did not subtract, the amount of time that can be attributed to improper friendly cross examination—to use, without accepting, Applicants' definition of friendly cross-examination—is 112 hours or approximately 18 and one-half days. This is seven and one-half days less the total Applicants calculated.

II. The APA and SEC Rules Provide for Broad Cross-Examination Subject to Certain Limitations and do not Support Applicants' Requested Narrow Definition of Cross-Examination[3]

11. Neither the plain language of the APA nor the SEC rules support the Applicants' distinction between friendly and non-friendly cross-examination. Rather, the guiding principle of the statute and rules is for the hearing to provide for a "full and true disclosure of the facts," subject to certain limitations issued by the Presiding Officer, as applied to specific parties and specific lines of questioning, during the course of the hearing.

12. Section IV of RSA 541-A:33 states that a "party may conduct cross-examination required for a full and true disclosure of the facts."

13. The plain meaning of "cross-examination" is not necessarily limited to examination of a witness by an opposing party; it is generally also understood to include examination of a witness by a party whose interests may, in part, align with the interests of the witness's party. *See, e.g., Legal Definition of Cross-Examination*, MERRIAM-WEBSTER,

[2] It may, of course, be subject to limitation by the Presiding Officer in accordance with the statute and rules.
[3] As the Forest Society is compelled to respond to the same arguments, it hereby incorporates and summarizes its prior arguments.

https://www.merriam-webster.com/dictionary/cross–examination (last visited Aug. 21, 2017) ("The examination of a witness who has already testified in order to check or discredit the witness's testimony, knowledge, or credibility."); *Cross-Examination*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/cross-examination (last visited Aug. 21, 2017) ("At trial, the opportunity to question any witness who testifies on behalf of any other party to the lawsuit (in civil cases) or for the prosecution or other codefendants (in criminal cases).")

14. If the Legislature had intended for cross-examination in SEC proceedings to be limited to adversarial examination by opposing parties only, it would have stated as much, especially considering these proceedings are not subject to the New Hampshire Rules of Evidence. *In re Juvenile*, 156 N.H. 800, 801 (2008) ("We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

15. The SEC rules similarly make no such distinction between friendly and unfriendly cross-examination. *See* Site 202.11(d)(2).

16. As the Presiding Officer recognized in his Order on the prior Motion, this is not to say that the parties may cross-examine each other for non-impeachment purposes without limitation. The APA and the SEC rules authorize the Presiding Officer to limit cross-examination when necessary.

17. "The presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence." RSA 541-A:33, II.

18. As the Presiding Officer noted, a ruling on an objection to certain friendly cross-examination questions "will be made after considering the arguments of the parties as applied to each line of questioning and after considering the subject matter and purpose of the questioning."

Order on Applicants' Motion to Clarify "Friendly" Examination, at 4.

19. By requesting the Presiding Officer order intervenors to submit an offer of proof, the Applicants are again requesting a prehearing determination of what is and what is not permissible cross-examination.

20. The APA and the SEC rules do not authorize the Presiding Officer to issue sweeping, *per se* limitations on the use of cross-examination that, although not binding precedent, would likely lead to applicants routinely asking for such limitations in future cases. Rather, the APA and the SEC rules anticipate the Presiding Officer consider limiting cross-examination on case-by-case and party-by-party basis. *See* RSA 541-A:32, III (employing such phrases as "a petitioner" and "the intervenor's"); Site 202.11(d).

21. The Order on the prior Motion concludes that appropriate objections to a particular line of questioning are to be made "during the course of the hearing." Order on Applicants' Motion to Clarify "Friendly" Examination, at 4.

22. Just as it was in March, Applicants' requested relief is contrary to the intent of the APA and the SEC rules, and no clarification on the Presiding Officer's authority on this topic is warranted.

III. The use of Cross-Examination is a Common Feature of Multi-Party Litigation and Administrative Proceedings

23. Cross-examination is a common feature of multi-party litigation and administrative proceedings, and is not always adversarial in nature. As in their prior Motion, because neither the APA nor the SEC rules define cross-examination in any way that makes a distinction between friendly and unfriendly cross-examination, Applicants rely on selective citations to a scattering of secondary sources and commentary in New Hampshire and out-of-state administrative proceedings to support their narrow, preferred definition of cross-

examination.

24. In fact, past SEC and other administrative proceedings in New Hampshire do not support Applicants' position. At the final prehearing conference of the Antrim Wind Docket, 2015-02, Counsel for the SEC noted it would be highly unlikely for a motion to eliminate friendly cross to be granted. Docket No. 2015-02, Tr. of Final Structuring Conference, at 107-110 (Sept. 7, 2016). *See also* , Docket No. 2012-01, Tr. of Prehearing Conference held on 10/25/12, at. 54.

25. According to research by Counsel for the Public, Applicants' relief is unsupported by SEC precedent going back to at least 2006. Counsel for the Public's Objection to Applicants' Motion to Clarify the use of "Friendly" Examination, ¶ 16 (Mar. 17, 2017).

26. As before, Applicants again selectively pull from PUC precedent to support their favored position.

27. The PUC rules mirror the SEC rules cited and analyzed above. The purpose of cross-examination is for a "full and true disclosure of the facts," subject to the limitations necessary to prevent repetitive lines of inquiry. Puc 203.24(a), (b).

28. Applicants cite a comment made by the PUC Commissioner in DE 11-250. DE 11-250, Tr. of hearing held on 10/14/14-Day 1 Afternoon Session, at 76–77.

29. But this so-called limitation, which was made in the context of a specific objection during the hearing, is not as broad as the Applicants assert. The full comment is as follows:

> CMSR. HONIGBERG: Well, I think there was a -- I think what we have in mind is we don't want the parties to pile on bolstering a particular witness' testimony through friendly cross-examination. That doesn't mean a party can't ask a witness of another party who tends to be aligned with them on topics that will help them otherwise, that the witness didn't address in his or her own testimony. Is that a distinction that people can appreciate?

Id.

30. The Commissioner did not *per se* limit all cross-examination of one party by a similarly aligned party. Rather, upon an objection to a particular line of questioning, he drew a distinction between cross that sought to elicit testimony unduly repetitious of direct testimony and cross that may be friendly but also covers something the witness didn't address in his or her own direct or pre-filed testimony. *Id.*

31. Not only is this isolated ruling on a single objection in a PUC docket not binding on this SEC docket, it does not support the Applicants' broad-sweeping and chilling requests for relief. Rather, it shows that, in order to provide for a full and true disclosure of facts, the Presiding Officer should permit cross-examination, friendly or not, and limit it only if he deems the testimony it seeks to elicit is unduly repetitious.

IV. A Preliminary Ruling Limiting the Scope of Intervention Would Prevent the Forest Society and Other Intervenors from Protecting the Interests Which Formed the Bases of Their Intervention and Violate Their Due Process Rights

32. The APA and the SEC rules state that the Presiding Officer may impose limitations on cross-examination only so long as said limitations do not prevent an intervenor from protecting the interest which formed the basis of its intervention. RSA 541-A:32, IV; Site 202.11(e).

33. Applicants' Motions seek preliminary rulings that would unfairly shift the burden and prevent the Forest Society and other intervenors from protecting their interests, and would violate their due process rights.

34. First, there is no clear principle of law whereby the Presiding Officer can objectively determine which intervenors will be friendly or unfriendly to a particular witness. Holding another prehearing conference and requiring certain parties to make offers of proof

would, like Applicants' first request, require the Presiding Officer make a subjective determination of the positons of the parties and risks characterizing the evidence before all members of the Subcommittee have had a chance to consider it.

35. Second, each intervenor has a separate basis for intervention and, therefore, each intervenor or group of intervenors may have different goals and purposes in cross-examining.

36. Applicants' are asking the Presiding Officer to make assumptions about separate and unique municipalities based upon a grouping birthed out of administrative convenience and necessity.

37. Even if most of the municipalities in question do oppose the project, this does not mean they necessarily do so for the same reasons or share the same concerns. *See, e.g.*, Public Service Company of New Hampshire Investigation of Scrubber Costs and Cost Recovery, DE 11-250, Tr. Day 1/Afternoon Session, at 76-77 (noting that just because one party "tends to be aligned with" another party, does not mean that their interests necessarily align or that they should be precluded from cross-examining each others' witnesses "on topics that will help them otherwise, that the witness didn't address in his or her testimony").

38. The fact that municipal groups may be coordinating their efforts during the hearing is less a reflection of their positions on the project than it is a reflection of the reality that these municipalities have only so much taxpayer funds to devote to the legal costs associated with participating in this hearing.

39. Moreover, by grouping Intervenors in distinct groups, the Presiding Officer has already implicitly recognized distinctions and different interests amongst the groups. *See* Order on Petitioners to Intervene at pp. 8-9, 17, 19, 21, 23-25 (Mar. 18, 2016).

40. Third, cross-examination is not the equivalent of redirect examination. Unlike on

redirect, an intervenor does not have control over the testimony prepared by the other intervenor.

41. It would be unfair to prohibit an intervenor from cross-examining the witness of another intervenor or the intervenor-witness who offers seemingly favorable testimony because cross-examination is a key tool in evaluating the content and credibility of testimonial evidence.

42. Allowing all types of cross-examination will allow for a truer and fuller disclosure of the facts of a given testimony than would be revealed through cross-examination only by hostile parties.

43. Fourth, this present Motion seeks to unfairly shift the burden to make offers of proof to only Intervenors the Applicants understand to oppose to project. This is not necessary. The prior Order, the Report of the Prehearing Conference, and comments made by the SEC Counsel at the prehearing conference provide more than enough guidance to parties concerning the standards the Presiding Officer will apply to each line of questioning. Further, an additional prehearing conference is not necessary because it is now clear that the parties do not agree on this issue and it is unforeseeable that any sort of agreement would be reached or would be enforceable at such a hearing. Indeed, the parties already attempted, and failed, to reach such an agreement at the pre-hearing conference held on August 9, 2017.

CONCLUSION

44. Yet again, Applicants' have filed a motion to express their dismay at the delay caused by the participation of a huge number of intervenors, many of whom are participating *pro se*. The fact that scale and scope of this application has motivated an outpouring or opposition and participation by parties from across the state cannot justify prehearing limitations on the right of certain Intervenors to ask questions based on the Applicants' characterizations of their views. This is especially true where Applicants' requested relief is not supported by the APA or

the SEC rules, administrative law practice in New Hampshire, and would violate the Intervenors' due process rights. Ultimately, the guiding principle of the procedure of this hearing is and must remain the "full and true disclosure of the facts."

Respectfully Submitted,

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By its Attorneys,

BCM Environmental & Land Law, PLLC

Date: August 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on this day, August 28, 2017, a copy of the foregoing Objection was sent by electronic mail to persons named on the Service List of this docket.

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Amy Manzelli