

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

**MOTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE  
FORESTS FOR REHEARING OF THE SEPTEMBER 12, 2017 PROCEDURAL ORDER**

The Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, moves to rehear the September 12, 2017, Procedural Order regarding the scope of cross-examination. In support, it states as follows:

**BACKGROUND**

1. On March 7, 2017, Applicants filed their Motion to Clarify Use of “Friendly” Examination. It was their first attempt to limit the cross-examination rights of the intervenors.
2. The Forest Society objected.
3. In its Order on Applicants’ 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).
4. On August 16, 2017, Applicants moved for an order “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 prefiled testimony nor introduce new testimony that the examining party or witness should have offered in writing.”

5. On September 12, 2017, the Presiding Officer denied Applicants’ request for a prehearing conference, but otherwise, in effect, granted Applicants’ request, providing as follows:

On before September 22, 2017, each intervenor shall file a list identifying each witness that the intervenor seeks to cross-examine (excluding the remaining Applicant witnesses). Regarding each witness or witness panel, the list shall include the following information:

1. Whether the examining party believes that its position is adverse to the witness including all reasons; and
2. If the examining party is not adverse to the witness, the examining party must identify the areas of cross-examination and why the cross-examination is necessary to a full and true disclosure of the facts.

Procedural Order, at 3-4.

6. Based on the Administrative Procedures Act, the SEC’s Administrative Rules, and the Supreme Court Rules, to preserve this issue for appeal, the Forest Society files this Motion for Rehearing.

### **LEGAL STANDARD**

7. A motion for rehearing serves a two-fold purpose: first, it permits the reviewing authority to reconsider its decision, and second, it may be a requirement prior to filing an appeal to the New Hampshire Supreme Court. Site 202.29; N.H. Super. Ct. R. 10.

8. Pursuant to RSA 541:3, “any person directly affected” by an order or decision has the right to file a motion for rehearing.

9. Site 202.29(c) allows such a party to submit a motion for rehearing within 30 days of the decision or order.

10. The Forest Society is directly affected by the September 12, 2017 Order because, as explained in more detail subsequently: absent notice of limitations on intervenor cross-examination during the conduct of Forest Society's cross of Applicants' witnesses, the Forest Society is now foreclosed from extracting certain testimony from the Applicants' witnesses; the Forest Society's ability to cross-examine intervenors is restricted; and the relief the Forest Society sought in multiple pleadings concerning the issue of cross-examination was, in effect, denied, all of which violates the Forest Society's due process rights.

11. A party may apply for a rehearing by "specifying in the motion all grounds for rehearing," RSA 541:3, and "set[ting] forth fully every ground upon which it is claimed that the decision or order complained of is unlawful and unreasonable." RSA 541:4.

12. The SEC rule on rehearings further provides that a motion for rehearing shall: "(1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered; (2) Describe how each error causes the committee's order or decision to be unlawful, unjust or unreasonable; (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and (4) Include any argument or memorandum of law the moving party wishes to file." Site 202.29(d).

### **ANALYSIS**

#### **I. The Presiding Officer Erred by Recognizing a Distinction Between Friendly and Non-Friendly Cross-Examination that is Not Recognized in New Hampshire Law**

13. The New Hampshire Administrative Procedures Act and the SEC rules provide for broad cross-examination and do not support the Presiding Officer's distinction between friendly and non-friendly, or adverse and not adverse, cross-examination.

14. The guiding principle for the scope of cross-examination is the “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.

15. 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.”

16. 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. *See Fisher v. Minichiello*, 155 N.H. 188, 191 (2007) (“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.”).

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

18. Especially given that the administrative rules have recently been subject to a comprehensive overhaul, and that RSA 162-H has also been the subject of recent amendments, and none of these legal changes sought to add into New Hampshire law the concept of “friendly” cross examination, the Presiding Officer should not add this standard into the law.

19. Making new New Hampshire law in the midst of this proceeding, especially when it is inconsistent with the prior law of this case upon which the Forest Society has relied thus far, violates the Forest Society’s due process rights.

## **II. The Procedural Order Conflicts with the Lawful Standard for Limiting the Scope of Cross-Examination, which the Presiding Officer Correctly Identified in his Prior Order on Cross-Examination**

20. Cross-examination in SEC practice is not unlimited. The Presiding Officer correctly articulated the standard for limiting it in his prior order, but has now erred by issuing a

procedural order that directly contradicts that prior order and that is unsupported by the SEC standard for limiting cross-examination and evidence.

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

22. The Presiding Officer’s prior order correctly held that a ruling on an objection to certain 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 Use of “Friendly” Examination, at 4.

23. In other words, the Presiding Officer may consider when a line of questioning is intended to elicit irrelevant, immaterial or unduly repetitious testimony or otherwise will not foster a “full and true disclosure of the facts” only as applied to each line of questioning during the actual cross-examination.

24. Further, the Presiding Officer’s prior order explained in detail the legal standards and limits of cross-examination such that all parties knew, or should have known, the limits of cross-examination since the beginning of the hearings.

25. Parties were yet again made aware that they must be judicious in their cross-examinations or face objections from other parties and have their questions orally restricted by the Presiding Officer during the third prehearing conference.

26. The Presiding Officer’s explanation of both the limits of cross-examination and when those limits would be determined, based on particular questions posed during the hearing, was the correct approach.

27. The above-articulated approach guided all parties during the hearing for all of Applicants’ witnesses.

28. Now, the Presiding Officer's Procedural Order, with little explanation beyond "something must be done," does away with this approach and orders all parties, aside from Applicants and Counsel for the Public,<sup>1</sup> to file a document setting forth for each witness that party intends to cross-examine the reason that party believes the witness is adverse, or, if not adverse, identifying the areas of cross-examination and why the cross-examination is necessary for a full and true disclosure of the facts. Procedural Order, at 3-4.

29. The Procedural Order is unlawful, unjust, and unreasonable because it will result in the Presiding Officer making prehearing limitations on the scope of cross-examination which conflicts with the lawful standard correctly identified in the prior order on cross-examination.

30. It is also unlawful because it flips on its head the long-standing practice that the burden to challenge whether a particular cross-examination question may be asked lies with any party that objects to the question, following which the examiner seeking to ask the question must justify why the question should be allowed, concluding with a ruling from the Presiding Officer. Instead, pursuant to the Procedural Order, any intervenor seeking to ask cross-examination questions must make certain kinds of justifications about their cross-examination, before the hearing, and in the complete absence of both the context of a particular cross-examination question or an objection particularized to the question.

31. This limitation and reversal of burden violates the Forest Society's due process rights.

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<sup>1</sup> The Presiding Officer orally clarified that this requirement will not apply to the examination of Counsel for the Public's witnesses. Therefore, Forest Society does not raise in this Motion for Rehearing arguments concerning the issue of whether Counsel for the Public's witnesses are friendly or non-friendly from the Forest Society's perspective.

### **III. It is a Violation of the Forest Society's Due Process Rights to Require it to Effectively Preview its Cross Examination**

32. The New Hampshire Constitution provides that no citizen “shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, without the protection of the law, exiled or deprived of his life, liberty, or estate, but the judgement of his peers, or the law of the land.” N.H. Const. pt. I, art. 15; *In re Bagley*, 128 N.H. 275, 282 (1986) (noting that “law of the land” has long been held to be synonymous with “due process of law”).

33. In administrative proceedings, due process requires a meaningful opportunity to be heard. *Soc’y for Prot. of N.H. Forests v. Site Evaluation Comm.*, 115 N.H. 163, 168 (1975).

34. The New Hampshire Supreme Court has implicitly recognized that a party’s due process right to meaningful cross-examination may be violated where the length of the examination or topics subject to examination are limited. *Appeal of Sch. Admin. Unit # 44*, 162 N.H. 79, 86 (2011) (finding there was no due process violation where the SAU Board did not limit McGann in either the length of examination or the topics on which the witness could be examined).

35. While the Subcommittee has discretion to limit the scope of cross-examination, the limitations cannot be arbitrary nor serve to prevent the full disclosure of the facts. *See In re Sprague*, 132 N.H. 250, 260 (1989).

36. This Order violated the Forest Society’s due process right for several reasons.

37. First, it requires the Forest Society and other intervenors to make an offer of proof that will effectively preview for the Applicants, the SEC, and all other parties, their plan for cross-examination and result in a pre-hearing determination of what is and what is not permissible cross-examination.

38. Even if requiring an offer of proof well in advance of the day of the examination is permissible under the rules, it is unfair to announce such requirement half-way through the proceeding, effectively requiring only some parties and not others to comply with it by previewing their cross-examination. The Forest Society found no precedent in New Hampshire law where an administrative officer has issued such an order.

39. Note that intervenors that support the project had none of the requirements now thrust upon the intervenors who oppose the project when the supportive intervenor cross-examined the Applicant.

40. Second, this order prevents the Forest Society from protecting the interests that formed the basis for its intervention.

41. 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).

42. 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.

43. Even if most of the intervenors 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 other's witnesses “on topics that will help them otherwise, that the witness didn’t address in his or her testimony”); *see also* Order on Petitioners to Intervene at pp. 8-9, 17, 19, 21, 23-25 (Mar. 18, 2016).



44. It is 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.

45. Third, this Order is arbitrary because there is no clear principle of New Hampshire law whereby the Presiding Officer can objectively determine which intervenors will be friendly or unfriendly to a particular witness, and the Presiding Office has not articulated a standard by which he will determine whether a party is or is not adverse to a witness—other than asking the intervenors themselves to make such a determination.

46. Further, the Presiding Officer has acted arbitrarily by contradicting his prior order and guidance on cross-examination, which parties relied on throughout the first two tracks of the hearings. While the Forest Society is aware of the great strain on the Subcommittee caused by the unprecedented scope of this project, the high number of intervenors, many of whom are *pro se*, and outside political pressures, those facts cannot justify an arbitrary, unprecedented restriction on the intervenors' rights to cross-examination.

47. Ultimately, as the Forest Society has stated in its numerous prior objections on this topic,<sup>2</sup> 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.

48. In short, rehearing is necessary because the Procedural Order unlawfully misapplies the standard for limiting the scope of cross-examination, and the requirements it sets forth violate the Forest Society's due process rights.

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<sup>2</sup> The Forest Society hereby incorporates by reference the arguments made in its prior objections to Applicants' two motions to limit cross-examination.

**WHEREFORE**, the Forest Society respectfully requests that the Subcommittee:

- A. Grant this Motion for Rehearing; and
- B. Grant such further relief as it deems appropriate.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF  
NEW HAMPSHIRE FORESTS**

By its Attorneys,  
BCM Environmental & Land Law, PLLC

Date: October 2, 2017

By: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, October 2, 2017, a copy of the foregoing Motion for Rehearing was sent by electronic mail to persons named on the Service List of this docket.

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Amy Manzelli, Esq.