

October 11, 2017

**Via Electronic Mail & Hand Delivery**

Pamela Monroe, Administrator  
New Hampshire Site Evaluation Committee  
21 South Fruit Street, Suite 10  
Concord, NH 03301-2429

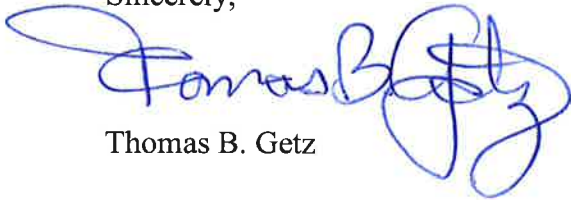
**Re: Site Evaluation Committee Docket No. 2015-06  
Joint Application of Northern Pass Transmission LLC and Public Service Company  
of New Hampshire d/b/a Eversource Energy (the "Applicants") for a Certificate of  
Site and Facility  
Objection to SPNHF Motion for Rehearing of Procedural Order**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find an original and one copy of an  
Objection to Society for Protection of New Hampshire Forests' Motion for Rehearing of  
Procedural Order.

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**

**OBJECTION TO SOCIETY FOR PROTECTION OF NEW HAMPSHIRE FORESTS'  
MOTION FOR REHEARING OF PROCEDURAL ORDER**

Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (the "Applicants"), by and through their attorneys, McLane Middleton, Professional Association, hereby object to the motion for rehearing filed by the Society for the Protection of New Hampshire Forests ("SPNHF") on October 2, 2017, as well as the companion motion asking for expedited treatment. As explained below, SPNHF fails to demonstrate good cause for rehearing regarding the procedure adopted by the Presiding Officer to avert unnecessary and inefficient friendly cross-examination in this proceeding.

1. On September 12, 2017, the Presiding Officer properly recognized that cross examination is normally conducted of witnesses who take an adverse position on a relevant issue and that "friendly cross" concerns examination of witnesses of an allied party. Furthermore, he made clear that examination of witnesses with whom one agrees, insofar as it repeats points made in pre-filed testimony or provides an opportunity to testify about matters not addressed in pre-filed testimony, is not necessary to ensure a full and true disclosure of the facts. Procedural Order, p. 2.

2. On rehearing, SPNHF's leading complaint is, essentially, that had it known that its friendly examination would be limited it would have extracted "certain testimony from the Applicants' witnesses." Motion for Rehearing, p.3. It also argues 1) that New Hampshire law

does not recognize a distinction between cross-examination and friendly examination; 2) the Procedural Order unlawfully limits cross-examination; and 3) the offer of proof violates due process because it previews SPNHF's cross examination for the Applicants. SPNHF's leading complaint is illogical and its other three arguments are ill-founded.

3. The purpose of rehearing "is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision." *Dumais v. State Pers. Comm'n*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted when the Committee finds "good reason" or "good cause" has been demonstrated. *O'Loughlin v. New Hampshire Pers. Comm'n*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981). "A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome." *Public Service Co. of N.H.*, Order No. 25,676 at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 at 4 (Sept. 8, 2015).

4. If anything is mistakenly conceived here, it is SPNHF's notion that it should be permitted to conduct friendly cross because it can no longer "extract" testimony from the Applicants' witnesses. There are at least two problems with this notion. First, there can be no doubt that SPNHF had a full opportunity to cross-examine the Applicants' witnesses, to whom SPNHF is adverse. If SPNHF had something to extract it should have extracted it when it had the opportunity. Moreover, inasmuch as SPNHF is not adverse to Counsel for the Public or to other intervenors, examination of those witnesses would be friendly cross (not cross-examination) and any restriction on such examination would not deny them due process. Second, what SPNHF is really saying is that it seeks to make its case through the witnesses for a party to whom it is not adverse, namely, Counsel for the Public ("CFP") and other intervenors, by allowing such witnesses to (a) bolster their positions, which confirms the Presiding Officer's

observations regarding “tactics that are unnecessary to ensure a full and true disclosure of the facts,” and (b) supplement their testimony in a manner incompatible with the approved procedural schedule.

5. It appears that SPNHF does not seek to cross-examine CFP or other intervenor witnesses to challenge their testimony (the essence of cross-examination) but to give those witnesses another opportunity to respond to the Applicants’ witnesses. The effect of such friendly examination is to provide another party’s witness the opportunity to give sur-rebuttal testimony without the sponsoring party having followed the proper course of filing a motion for leave to respond to the Applicants supplemental, i.e., rebuttal testimony. In that regard, the most flagrant form of such friendly examination is to ask another party's witness for an opinion on the Applicants’ supplemental/rebuttal testimony. The response, however the question may be finessed, leads to improper sur-rebuttal testimony.<sup>1</sup>

6. On a related issue, during the hearings on October 6, 2017, SPNHF and others made the claim that they should be able to ask questions on cross that CFP could have asked, but did not ask, in its direct examination of Messrs. Kavet and Rockler; an argument ostensibly based on the SEC’s December 2, 2016 order in the Antrim Wind Energy, LLC proceeding, SEC Docket No. 2015-02 (“Antrim Order”). In the first place, it is difficult to discern any theory under which a “right” foregone by one party to a proceeding would default to another party. More important, there is no right for a party, including CFP, to elicit sur-rebuttal testimony from a witness as part of the direct examination in which a witness is qualified for purposes of cross-

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<sup>1</sup> This issue is highlighted by the examination of Messrs. Kavet and Rockler by attorneys for the Municipal Groups on October 6, 2017. Asking those witnesses, for example, whether their opinions were affected by Ms. Frayer’s supplemental/rebuttal testimony may not be unreasonable conceptually, in and of itself, if the answer were confined to yes or no. Allowing the witnesses to expand, however, opens the door to sur-rebuttal testimony without notice and an opportunity for the Applicants to consult with their experts, defeats the purpose of requiring pre-filed written testimony, and permits the friendly examiner to manipulate the process in a way that prejudices the Applicants.

examination, and the Antrim Order does not stand for such a proposition. Rather, the Antrim Order stands for the proposition that a party must seek permission to present sur-rebuttal testimony, which CFP failed to do in Antrim Wind. Neither has CFP in this case sought such permission, nor has any intervenor.

7. As for SPNHF's other three arguments, first, the Presiding Officer is not "making" new law but interpreting existing law in the normal course while exercising the discretion accorded to him under RSA 541-A:32 and 33. Second, the Procedural Order does not conflict with the standard under RSA 541-A:33, II but applies it in a manner faithful to the statute as evidenced by the conduct of the proceedings on October 6, 2017. Third, the Procedural Order does not require SPNHF to "effectively preview its cross examination" in any way that violates due process. Most important, SPNHF is not being asked to divulge its strategy for cross examining the parties to which it is adverse, i.e., the Applicants. Furthermore, it was only asked to identify areas of friendly examination and explain why such examination is necessary.<sup>2</sup>

8. The Procedural Order concluded, at p.3, that something must be done "to ensure that the proceedings are not bogged down by unnecessary and inefficient friendly cross-examination." Accordingly, the Presiding Officer adopted a procedure to forestall intervenors from examining witnesses by repeating points made in pre-filed testimony or providing an

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<sup>2</sup> The lists provided by the Intervenor on October 2 and 3, 2017, uniformly confirm the hazards of friendly cross that the Procedural Order intended to rout out. By way of example, the Municipal Groups provided the following explanation, which served as a template for others. "The examination is necessary to a full and true disclosure of the facts because it will provide an opportunity to further examine and/or clarify information provided in intervenor pre-filed testimony; respond to relevant issues that were raised by applicants and counsel for the public in their supplemental pre-filed testimony; address information about the proposed project that has been submitted since the filing of the pre-filed and supplemental testimony; and respond to relevant facts and exhibits introduced during trial during cross-examinations and redirect examinations." In other words, they would use friendly cross to repeat points already made, provide witnesses the opportunity to testify about matters that they should have included in their pre-filed testimony, and provide witnesses the opportunity to offer sur-rebuttal testimony without having sought leave to do so.

opportunity to testify about matters not addressed in pre-filed testimony, which constitute tactics unnecessary to ensure a full and true disclosure of the facts and such examination should not be allowed.

9. The Procedural Order is fully consistent with the requirements of due process. Judge Friendly determined, in *National Nutritional Foods Association v. Food and Drug Administration*, 504 F. 2d 761 (1974), that cross-examination necessary for a full and true disclosure of facts extended to parties that were adverse but that examination by parties that are not adverse may be curtailed. In fact, Judge Friendly endorsed a process substantially similar to the process adopted in this case. See also, *N. Plains Res. Council v. Bd. of Nat. Res. & Conservation*, 181 Mont. 500, 533-35 (1979) (Noting that cross-examination may be limited to witnesses of the opposing party or adverse party and that administrative bodies must be allowed, and encouraged, “to take steps to avoid repetitious or aimless cross-examination.”)

10. In conclusion, the Presiding Officer has not overlooked or mistakenly conceived anything and there is no infirmity in the way the Procedural Order treats friendly cross. What SPNHF and others seek to do through their examination is to use another party’s witnesses to pile on in a way that repeats points already made, gives witnesses the opportunity to testify orally on matters they should have included in written testimony, and facilitates the last word through oral sur-rebuttal testimony, despite a procedural schedule that provided for the contemporaneous filing of supplemental testimony by all parties. Accordingly, by rejecting such tactics the Procedural Order protects the Applicants’ due process rights. At the same time, rejecting such tactics does not violate the due process rights of SPNHF or other intervenors.

WHEREFORE, the Applicants respectfully request that the Presiding Officer:

- A. Deny the Motion for Rehearing; and
- B. Grant such further relief as is deemed just and appropriate.

Respectfully submitted,

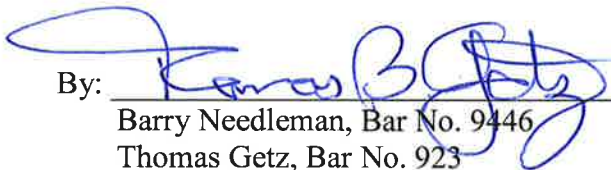
NORTHERN PASS TRANSMISSION LLC AND  
PUBLIC SERVICE COMPANY OF NEW  
HAMPSHIRE D/B/A  
EVERSOURCE ENERGY

By Its Attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: October 11, 2017

By:



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Certificate of Service

I hereby certify that on the 11<sup>th</sup> of October, 2017, an original and one copy of the foregoing Objection was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC Distribution List.

Thomas B. Getz

