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May 2, 2018

Pamela G. Monroe, Administrator
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429
pamela.monroe@sec.nh.gov

Re: 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

Dear Ms. Monroe:

Enclosed for filing in the above-referenced matter is Counsel for the Public's Objection to the Motion to Recuse Filed by the Business Group Intervenors.

A copy of the within motion has been forwarded by e-mail to all parties listed on the Distribution List for this Docket.

Thank you.

Sincerely,

Thomas J. Pappas

TJP/scm - 3347394_1

Enclosure

cc: Distribution List

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

COUNSEL FOR THE PUBLIC'S OBJECTION TO THE MOTION TO RECUSE FILED BY THE BUSINESS GROUP INTERVENORS

Counsel for the Public, by his attorneys, the Office of the Attorney General and Primmer Piper Eggleston & Cramer PC, hereby responds to the Business Intervenor Group's Motion for Recusal (the "Motion").

INTRODUCTION

The Motion is legally and factually flawed. It should be denied because the alleged basis for recusal is that the judicial (or quasi-judicial) officials formed an opinion concerning the merits of the case that our system of justice not only expects but asks those individuals to form. Were it otherwise, each and every judge would find him or herself forced to recuse themselves after each and every ruling in a case because the judge would be alleged to have thereby formed an opinion on the case as a result of a prior adverse ruling. That is not the law in this State, nor in the analogous 28 U.S.C. § 455(a) context.

BASIS OF THE MOTION

The Motion seeks recusal of two Subcommittee Members, Ms. Weathersby and Ms. Bailey, based on selected portions of comments those members made in the course of post-hearing deliberations. With respect to Subcommittee Member Bailey, the Motion recites a portion of her comments offered during post-hearing deliberations on the merits "[f]ollowing 70 days of hearings on this Application" and the close of evidence. *See* Mtn. at 1-2. With respect to Subcommittee Member Weathersby, the Motion recites a portion of her comments even later in

these proceedings, following the oral decision on the merits and following further briefing on Applicants' preliminary motion for rehearing. Mtn. at 2-3. The Motion asserts, as the only alleged basis for recusal, statements made in the judicial (or quasi-judicial) context of the actual case before the members following completion of 70 days of hearings and the submission of all evidence in the record. The Motion does not assert any other basis for alleged bias, such as a personal outcome in the proceedings or a conflict of interest.

LEGAL STANDARD

The Motion appropriately recognizes that the relevant inquiry is the "pertinent and analogous federal statute" 28 U.S.C. § 455(a), but the Motion itself rests on the wrong test with respect to Section 455(a) precedents. *See* Mtn. at 4. As noted, the alleged biased comments relate to deliberations made by the relevant members following the completion of the adjudicative hearings and the close of the record. *See* Mtn. at 1-3. None of the cases cited in the Motion addresses that unique context, nor the uniquely stringent test for recusal under such circumstances. *See* Mtn. at 1-7. The Motion instead cites cases with pre-existing conflicts of interest, but as noted there is no allegation here of a conflict of interest. *See, e.g., Appeal of City of Keene*, 141 N.H. 797 (1997); *Appeal of Cheney*, 130 N.H. 589 (1988). The Motion also cites cases with prior extra-judicial statements concerning the matters at issue in the litigation, but there is likewise no allegation of such statements here. *See, e.g., Appeal of Lathrop*, 122 N.H. 262 (1982); *New Hampshire Milk Dealers' Ass'n v. Milk Control Board*, 107 N.H. 335 (1973). Virtually all of the decisions cited in the Motion pre-date the Supreme Court's seminal decision on the issue in *Liteky v. United States*, 510 U.S. 540 (1994), which explained the judicial and extra-judicial distinction for recusal motions and held that when allegedly biased statements are made in the course of judicial proceedings they must display "deep-seated and unequivocal

antagonism that would render fair judgment impossible." *Id.* at 556. *See also Yosd v. Mukasey*, 514 F.3d 74, 78 (1st Cir. 2008) (quoting *Liteky*, 510 U.S. at 555) (the "[o]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."). That exceptionally high standard for recusal simply cannot be met on the basis of the alleged biased statements here.[1] This is not surprising because "after all, a judge is expected to make judgments, a process which entails forming opinions about the credibility of witnesses and the intrinsic merit (or lack of merit) of cases that he [or in this case she] hears." *United States v. Caramadre*, 807 F.3d 359, 374 (2015).

Simply put, it is the very purpose of a judge (or quasi-judge as here) to hear and consider submitted evidence, which will inevitably lead to forming an opinion as to the merits of a case. As the Supreme Court has explained:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.
>
> As Judge Jerome Frank pithily put it: 'Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.' *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943). Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what

[1] The Supreme Court also has directed that even "judicial remarks during the course of a trial that are critical or disapproving of, *or even hostile to, counsel, the parties, or their cases,* ordinarily do not support a bias or partiality challenge." *Liteky*, 510 U.S. at 555 (emphasis added). The motion does not allege such remarks.

> they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Id. at 550-51.

ARGUMENT

Taken at face value and strained to the farthest possible inferences, the selected excerpts of the comments made by Subcommittee Members Weathersby and Bailey at best express an opinion formed by them that the likelihood of an ultimate reversal of their prior decision on rehearing would be very low. Such an opinion, although not directly expressed, would have been formed as a result of 70 days of hearings, the submission and close of the record in these proceedings, and 3 days of deliberations. It is not only expected that the Subcommittee members would believe an important decision that they had rendered was the right decision, it is the desired outcome of our legal system.

Most critically for the purposes of the Motion, however, nothing in the comments of Subcommittee Members Weathersby or Bailey contained even a hint or suggestion of animus, hostility, anger or any other indication that could possibly rise to the level of actions "so extreme as to display [a] clear inability to render fair judgment." *Liteky*, 510 U.S. at 551. To the contrary, the full transcript of the relevant proceedings reveals that both Subcommittee members demonstrated a neutral detachment that enabled them to reconsider their previously held positions and consider the Applicants' request to deliberate on the other required findings of RSA 162-H:16, IV.

For example, Subcommittee Member Bailey was the member of the Subcommittee who made the motion to deny the Application for a Certificate of Site and conclude deliberations. (NPT Deliberations, Day 3 PM Tr. 3:12-5:6). In the section of her initial comments omitted by

the Business Intervenor Group, she explained that the Subcommittee should "keep it simple. We've reached a point where we know we can't grant the certificate, if everybody votes the way that we articulated on orderly development." (NPT Deliberations, Day 3 PM Tr. 4:17-:20). Subcommittee Member Bailey's reasoning was sound and reasonable: if the Subcommittee could not grant the certificate due to Applicants' failure to meet its burden of proof on orderly development, logic dictated concluding the deliberations and denying the certificate.

Despite holding that position, *and in fact prevailing on her motion to end deliberations based on her reasoning in that regard*, Subcommittee Member Bailey kept an open mind and during deliberations on the first motion for rehearing she ultimately "was persuaded by Counsel for the Public's pleading that said that it's better public policy to deliberate on all the issues." (NPT Deliberations on Mtn Rehearing, Tr. 19:4-:7); *see also* (NPT Deliberations on Mtn Rehearing, Tr. 19:21-:24) ("what I was thinking is that we would finish the deliberations that people have criticized us for not finishing."). Notably, as the Business Intervenor Group acknowledges in their Motion, reopening deliberations was one of the requests they made of the Subcommittee. *See* Mtn. at 2. Additionally, while continuing to believe in the correctness of the Subcommittee's ultimate decision, Subcommittee Member Bailey nevertheless acknowledged the possibility of a change in the outcome. *See* (NPT Deliberations on Mtn Rehearing, Tr. 19:7-:13) ("I'm not sure it's going to change the outcome, but from a process-wise what makes sense.").

The Motion also takes issue with Subcommittee Member Bailey's comments concerning the likelihood of appeal and claims that she focused on appeal concerns "rather than focusing on the appropriate procedure for evaluating the Application." Mtn. at 4. This is not accurate, as demonstrated during the morning session wherein the decision to deny the Application due to

Applicants' failure to meet their burden was reached. In that session, Subcommittee Member Bailey discussed at length the numerous issues with the Application as it related to the requisite orderly development finding. (NPT Deliberations, Day 3 AM Tr. 25:7-29:9.) Not once in that discussion did she reference the possibility of appeal. (NPT Deliberations, Day 3 AM Tr. 25:7-29:9.) She related her analysis to the actual language of the statute. *See* (NPT Deliberations, Day 3 AM Tr. 29:3-:9) ("let me get the statute right".) Nothing in her subsequent appeal-related comments contained even a hint or suggestion of animus, hostility, anger, or any other indication that could possibly rise to the level of actions "so extreme as to display [a] clear inability to render fair judgment." *Liteky*, 510 U.S. at 551.[2]

The Motion also seeks to recuse Subcommittee Member Weathersby for her comments concerning her belief that further deliberations would not remedy the Applicants' failure to meet their burden on a required finding pursuant to RSA 162-H:16, IV. *See* Mtn. at 5-6. As noted, the Motion cites the wrong standard for statements made in the course of the proceedings and thereby fatally infects the analysis set forth in the Motion. Additionally, the Motion is factually incorrect in claiming that "her statements demonstrate that she has foreclosed any possibility that a motion for rehearing may shed light on substantive facts and argument that she and the Subcommittee may have overlooked or misapprehended." Mtn. at 5. The Motion itself quotes Subcommittee Member Weathersby's lack of certitude on the issue. *See* Mtn. at 2 ("I don't think

[2] Subcommittee Member Bailey was not the only member who discussed potential appeals during the deliberative session cited by the Motion. *See* (NPT Deliberations, Day 3 PM Tr. 9:16-14:23.) Chairman Honigberg discussed the potential appeal considerations and fleshed out Subcommittee Member Bailey's concerns by explaining that if numerous unnecessary issues were decided in further deliberations, appeals and cross appeals would "increase the length of time, increase the briefs, the briefing lengths, the consideration of the issues that the Supreme Court will have to engage in." (NPT Deliberations, Day 3 PM Tr. 14:13:14-14:23.) Chairman Honigberg had the legal expertise to flesh out the substance of what Subcommittee Member Bailey was likely trying to express from an engineer's perspective. Given the law on this issue, neither comment should have led to the filing of a motion for recusal.

we should vacate our oral decision. I'm *pretty confident* that that decision was well-reasoned, lawful, made in accordance with the statute and the administrative rules.") (quoting NPT Deliberations on Mtn Rehearing, Tr. 11:2-:10) (emphasis added). "Pretty confident" demonstrates belief in the decision, but does not foreclose any possibility of changing one's position.

Moreover, the context of Subcommittee Member Weathersby's comments is important. Those comments were made during deliberations on the Applicants' motion for rehearing wherein a dispute existed between the parties as to: (a) whether the Subcommittee was legally required to reopen deliberations and (b) whether the Applicants' motion for rehearing inappropriately sought to enter newly proposed conditions into the record after 70 days of hearings and the close of the record, among other things. In that context, the comment that she was unwilling to "reopen the record and then get new conditions and all of that put on" was perfectly appropriate and expected because that issue was before the Subcommittee. (NPT Deliberations on Mtn Rehearing, Tr. 21:12-:14.)

Ultimately, opinions such as these "formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Yosd*, 514 F.3d at 78 (quoting *Liteky*, 510 U.S. at 555). The Business Intervenor Group offers no evidence of a "deep-seated favoritism or antagonism that would make fair judgment impossible." Consequently, the Motion for Recusal should be denied.

WHEREFORE, Counsel for the Public respectfully requests that the Site Evaluation Subcommittee:

A. Deny the Motion; and

B. Grant such other relief as the Court deems just.

Respectfully submitted,

COUNSEL FOR THE PUBLIC,

By his attorneys,

Dated: May 2, 2018 By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OBJECTION TO THE MOTION TO RECUSE FILED BY THE BUSINESS GROUP INTERVENORS has this day been forwarded via e-mail to persons named on the Distribution List of this docket.

Dated: May 2, 2018

By: _____
Thomas J. Pappas, Esq. (N.H. Bar No. 4111)