

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 BUSINESS INTERVENOR GROUP'S MOTION FOR RECUSAL**

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 Site Evaluation Committee (SEC) deny the Motion for Recusal (the "Motion") filed by the International Brotherhood of Electrical Workers and the Coos County Business and Employers Group (collectively, "Business Intervenor Group"), stating as follows:

1. The Business Intervenor Group's Motion seeks the recusal of SEC Members Bailey and Weathersby from further proceedings on the Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy's (collectively, the "Applicant") Application because, the Business Intervenor Group argues, their continued participation in this docket would deprive the Business Intervenor Group of its due process rights. For the reasons discussed below, the Motion is not supported by law or fact.

**BACKGROUND**

2. On February 1, 2018, after presiding over 70 days of the adjudicative hearing and considering the testimony of 154 witnesses and 2,176 exhibits, the SEC voted to deny the Application based on its unanimous finding that the Applicant failed to meet its burden of proof concerning the orderly development standard of RSA 162-H:16, IV.

3. Following this vote, the SEC discussed whether to proceed to deliberate on the remaining statutory standards. It ultimately decided, by a vote of five to two, not to continue deliberations on the other requirements of RSA 162-H:16, IV. The SEC issued its final written decision on March 30, 2018.

4. Between the time of the oral vote and the issuance of the written decision, the Applicant and other parties in favor of the proposed project moved to rehear the oral decision. The SEC deliberated on the Applicant's motion on March 12, 2018 and as a result voted to suspend its oral decision.

5. The Business Intervenor Group now moves for the recusal of two members of the SEC based entirely on the Group's preferred interpretation of isolated statements made *after* the SEC reached its oral decision.

## ARGUMENT

### **I. Per the Standard for Recusal of an Administrative Official Serving in a Quasi-Judicial Capacity, the Moving Party Must Present Sufficient Evidence to Rebut the Presumption that the Official is of Conscience and Capable of Reaching a Just and Fair Result**

6. Administrative officials serving in a quasi-judicial capacity are "presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." *Webster v. Town of Candia*, 146 N.H. 430, 441–42 (2001) (citations omitted).

7. This evidence must show the "existence of bias, the likelihood of bias, or an appearance of such bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of a party." *In re Tapply & Zukatis*, 162 N.H. 285, 296–97 (2011) (citations omitted). "The test for the appearance of partiality is an objective one, that is,

whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case.” *Id.* (citations omitted).

8. “[R]easons for disqualification do not include . . . knowledge of the facts involved gained in the performance of the member's official duties.” *Webster*, 146 N.H. at 442 (quoting RSA 673:14, I (Supp. 2000)). “Opinions 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.” *In re Tapply*, 162 N.H. at 296–97 (citations omitted).

## **II. The Evidence Offered is Wholly Insufficient**

9. The Business Intervenor Group alleges SEC Members Weathersby and Bailey lack impartiality and that both have “a predetermined purpose to reach a determined end.” *Motion* at ¶ 10 (quoting, but not attributing to, *Appeal of Lathrop*, 122 N.H. 262, 265 (1982)). Rather than repeat the excerpts in this Objection, all of the evidence of alleged bias can be summarized as the Members’ real-time reasoning of whether the SEC should continue with deliberations or re-open deliberations *after* having unanimously voted to deny the Application.

10. These remarks, without even considering the decontextualized way in which the Business Intervenor Group presented them, are wholly insufficient. No objective and disinterested observer, fully informed of the facts and circumstances presented in the Motion, would entertain significant doubt that justice would be done in the case. *See In re Tapply*, 162 N.H. at 296–97.

11. First, all of the cited remarks are statements made after public hearings in all counties in which the project would be located, after several days of site visits, after the conclusion of 70 hearing days with 154 witnesses, after the close of the record, after the

submission of post-trial memoranda hundreds of pages long, and after the SEC deliberated and reached its oral decision on the merits. There is no question that the Members' comments were based on their "knowledge of the facts involved gained in the performance of the member[s'] official duties." *Webster*, 146 N.H. at 442.

12. The complained-of statements made by Member Bailey on February 1, 2018, following the SEC's oral vote on the merits of the Application concern whether the SEC should deliberate conditions regarding statutory criteria other than the orderly development criterion.

13. The Business Intervenor Group complains that Member Bailey should have instead been "focusing on the *appropriate procedure* for evaluating the Application," which is an allusion to the Business Intervenor Group's and the Applicant's incorrect legal assertion that the SEC was required to deliberate on all four statutory criteria even though the SEC found that the Applicant failed to satisfy its burden on the orderly development criterion. *Motion* at ¶ 8 (emphasis added). The Business Intervenor Group's legal argument regarding bias on the part of Member Bailey lacks substance. *See id.*

14. The Business Intervenor Group also complains of the following statement of Member Weathersby during deliberations on the Applicant's premature motion for rehearing, which the Business Intervenor Group quoted with emphasis in its Motion: "I think that understanding where the Committee sits on the other factors that we didn't address would be instructive. I don't think it would be dispositive at all . . . my opinion still stands, that they did not meet their burden concerning orderly development of the region." Tr. 3/12/18, at 20–21.

15. The Business Intervenor Group argues that this statement shows Member Weathersby has foreclosed any possibility that the Applicant or another party may shed light through a motion for rehearing on facts or argument the SEC overlooked. Put differently, the Business Intervenor Group simply complains that Member Weathersby continued to believe that

the February 1, 2018 oral decision was correct. The Business Intervenor Group fails to appreciate the difference between a decision-maker denying a motion for rehearing because the moving party failed to persuade her and a decision-maker who has predetermined the outcome prior to a hearing.

16. Second, the case the Business Intervenor Group most relies on in its Motion—*Appeal of Seacoast Anti-Pollution League*—does not support its argument. 152 N.H. 465 (1984). In that case, the Court held a PUC member’s public criticism of Public Service Company of New Hampshire’s (PSNH) financial requests in a speech given knowing that PSNH would subsequently be in front of the PUC in a matter concerning future financing requests was problematic because of the “time, place and content” of the speech. The time, place, and content of the statements in question here are far different. They were made *after* a decision on the merits was reached, during public deliberations, and concerning procedural matters.

17. Third, contrary to the Business Intervenor Group’s assertions, none of the statements show that either Member Weathersby or Member Bailey stated that they would not consider whether any mitigating conditions imposed by the SEC could address concerns raised during the course of the proceeding. *Motion* at ¶ 9. It is clear that Members Weathersby and Bailey were explaining their respective opinion that because the SEC concluded the Applicant failed to meet its burden on one standard, no conditions on any other standard could change this conclusion. This is legal conclusion, not a basis for recusal.

### **III. The Motion for Recusal is Untimely**

18. The Business Intervenor Group correctly states that a party should raise impartiality issues “at the earliest possible time.” *Motion* at ¶ 6 (citing *Appeal of Cheney*, 130 N.H. 589, 594 (1988)). The Business Intervenor Group has not done exactly what it asserts must be done. Here, the Business Intervenor Group complains of comments made on February 1,

2018 and March 12, 2018, but did not raise these issues until April 24, 2018, which obviously was not the earliest possible time.

**WHEREFORE**, the Forest Society respectfully requests that the Presiding Officer:


- A. Deny the Business Intervenor Group's Motion for Recusal; and
- B. Grant such further relief as deemed appropriate.

Respectfully Submitted,

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

By its Attorneys,  
BCM Environmental & Land Law, PLLC

Date: May 2, 2018

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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, May 2, 2018, 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, Esq.