

**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

**MCKENNA’S OBJECTION TO MOTION FOR REHEARING OF DECISION AND
ORDER DENYING APPLICATION FILED BY NORTHERN PASS TRANSMISSION
LLC AND PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY**

NOW COMES McKenna’s Purchase Unit Owners Association (“McKenna”), by and through its attorneys, Wadleigh, Starr & Peters, P.L.L.C. and files the following Objection to the April 27, 2018 Motion for Rehearing (“Motion 2”) filed by Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire (“PSNH,” and together with NPT, the “Applicants”), stating as follows:

I. INTRODUCTION

1. McKenna previously filed an objection (“Objection”) to a February 26, 2018 Motion for Rehearing (“Motion 1”). That Objection is incorporated by reference into this pleading, and McKenna continues to rely upon all of the arguments set forth in that previous Objection even if all of those arguments are not repeated herein.

2. In that Objection, at paragraph 11, the following argument was presented:

The Applicants also appear to set forth and rely upon arguments and evidence – including those contained in the Attachments to the Motion – that are entirely new and not part of the record before the SEC. The Applicants are prohibited from doing this pursuant to the plain language of N.H. Code Admin. R. Site 202.26(a), which applies to a Motion for Rehearing, and which states that “[a]t the conclusion of a hearing, the record shall be closed and no other evidence, testimony, exhibits, or arguments shall be allowed into the record.” (Emphasis added.) The only exception to this rule is that, prior “to the conclusion of the hearing, a party may request that the record be left open to accommodate the filing of evidence, exhibits or arguments not available at the hearing.”

N.H. Code Admin. R. Site 202.26(b). The Applicants here, however, did not make such a request, and, in fact, in their Motion they explicitly state that they “are not seeking to reopen the record.” Motion, p. 2, footnote 3. Accordingly, it is too late for the Applicants to offer any new evidence and arguments, and, therefore, the SEC should not entertain such as part of the Applicants’ Motion.

3. The record in this matter was closed on December 22, 2017.¹

II. ARGUMENT

4. In both Motions, the Applicants request that the SEC “expand” their proposed Property Value Guarantee (“PVG”).

5. This request is not only a violation of applicable statutes and rules, but it is also a violation of due process as guaranteed by the New Hampshire Constitution, Part 1, Article 15. See In re Pennichuck Water Works, Inc., 160 N.H. 18 (2010).

6. In Pennichuck, the respondent water utilities claimed that the PUC “deprived them of an opportunity to be heard with respect to the conditions the PUC imposed.” In re Pennichuck Water Works, Inc., 160 N.H. at 36. In response, the New Hampshire Supreme Court recognized that “[w]here governmental action would affect a legally protected interest, the due process clause of the New Hampshire Constitution guarantees to the holder of the interest the right to be heard at a meaningful time and in a meaningful manner.” Id. (quotation omitted).

7. The Pennichuck Court held that the respondents “had ample opportunity to be heard about the concerns and the proposed solutions to them. Under these circumstances, we conclude that, in imposing the nine conditions, the PUC did not deprive the [respondents] of their constitutional right to an opportunity to be heard.” Id. at 36-37.

¹ The Town of Bethlehem sought to reopen the record. Ironically, in an objection dated January 9, 2018, the Applicants asserted “[f]urther bites of the apple are not justified.” Applicants’ Objection to Motion to Reopen Record, p. 4. The SEC denied the motion to reopen the record in an order dated January 22, 2018.

8. In the SEC process, McKenna and all the intervenors have a property interest. Yet, unlike the respondents in Pennichuck who had an opportunity to be heard with respect to the conditions imposed, McKenna and the intervenors have had no opportunity to be heard on the record regarding the expanded PVG. There is no witness or testimony supporting the expansion. There was no ability to cross examine any witnesses.

9. To the contrary, the Applicants' position throughout the proceeding was that the Project would have no economic consequences on the condominiums at McKenna and all properties 100 feet from the right-of-way.

10. The PVG was provided in Attachment L to Mr. Quinlan's testimony.

11. Under cross examination, Mr. Quinlan admitted that the PVG, which was designed by Mr. Chalmers, does not apply to McKenna and that he was unaware of any program that would apply to condominiums. Mr. Quinlan testified:

Q. And there's an Attachment L to your exhibit, which I think is Exhibit 40 from Public Counsel.

A. Yes, that's the Guarantee Program overview.

Q. Did I hear correctly that you asked for this and Mr. Chalmers designed it?

A. The Company asked for it, yes, under my direction.

Transcript of Testimony, Day 1 Afternoon, p. 170.²

....

Q. Do you believe [Attachment L] accurately describes the program [PVG]?

A. As it stands today, yes.

Q. Do you believe the program is fair and reasonable?

A. Based upon the views of our expert, yes.

² The transcripts are all available at <https://www.nhsec.nh.gov/projects/2015-06/2015-06.htm>.

Transcript of Testimony, Day 1 Afternoon, p. 171.

....

A. It does not apply to McKenna's Purchase. This is targeted towards single-family homes based upon Mr. Chalmers' study. That's correct.

Q. I understand that. But this is your proposal.

A. This is my proposal based upon his study.

Q. There is no other proposal that deals with condos.

A. Not that I'm aware of.

Transcript of Testimony, Day 1 Afternoon, p. 174.

....

Q. In terms of this particular program, it does not apply to McKenna's Purchase.

A. Correct.

Transcript of Testimony, Day 1 Afternoon, p. 175.

12. Mr. Chalmers, the expert who designed the PVG, failed to even consider McKenna or any condominiums in his 1700-page study. Mr. Chalmers testified:

Q. Were you aware of McKenna's Purchase when you submitted your Original Testimony and Report?

A. Again, I may have heard it discussed, but I didn't know much about it at that point. It was a condominium project, and our research didn't address condominium projects so it wouldn't have been an object of investigation or something that I was really familiar with at that time.

Q. Who decided that your project did not address condominium projects?

A. I did.

Transcript of Testimony, Day 25 Morning, p. 65.

13. After McKenna and other Intervenors filed testimony identifying this glaring omission, Mr. Chalmers filed supplemental testimony stating his opinion that there is no reason

to expect value effects to McKenna due to the Project. See Chalmers' Supplemental Testimony, p. 10, lines 10-11, and lines 15-16.

14. Under cross examination, Chalmers admitted that he did not use comparable properties in reaching his supplemental conclusion:

Q. . . . You didn't answer the question as to whether or not sales of condominiums would be affected by a high voltage transmission line by comparing sales of properties that are encumbered by it with sales of properties that are not encumbered, that happened to be in the same city. You did not do that.

A. That's correct.

Transcript of Testimony, Day 25 Morning, p. 119.

15. Mr. Chalmers faced extensive cross examination challenging his opinion that there is no basis to conclude that the Project will have an adverse effect on property values.

16. In the face of this examination, he adhered to his original opinion that there is no basis upon which to conclude that the Project will have a discernible adverse impact on property values – or marketing times – and his supplemental opinion that there is no reason to expect value effects for McKenna due to the Project. See Chalmers' Supplemental Testimony, p. 10, lines 10-11, and lines 15-16.

17. This cemented the Applicants' position during the hearing that there would be no economic consequences for McKenna and no expansion of the PVG for any property more than 100 feet from the ROW. The record was closed.

18. With the possible exception of eleven property owners, the Applicants drove this point home in their final brief, in which they stated:

[T]he research conducted and the evidence presented by Dr. Chalmers demonstrates that there is no basis upon which to conclude that the Project will have a discernible adverse impact on property values -- or marketing times.

Applicants' Final Brief, p. 103.

....

The Property Value Effects on Multi-family [sic] Developments Have Been Fully Considered, and the Results Indicate No Price Effects.

Id. at p. 108 (italics omitted).

....

From [Chalmers'] assessment of past sales, and from the fact that Northern Pass will not affect proximity of units to the ROW or materially affect the visibility of the HVTL corridor, Dr. Chalmers concludes that the value of the units at McKenna's Purchase will be unaffected by the Project.

Id.

19. In addition, the Applicants contemplated and responded to potential conditions suggested by the parties in Parts E and F of their final brief. None of these conditions involved a recognition of economic consequences for McKenna or the other affected property owners. There was no discussion of an expansion of the PVG.

20. The SEC deliberated and on February 1, 2018, based upon the evidence before it, voted unanimously that "the Applicant has failed by a preponderance of the evidence to demonstrate that the Site and Facility, the Project, will not unduly interfere with the orderly development of the region, having given due consideration to municipal views and regional planning commissions and municipal governing bodies." Transcript of Deliberations, Day 3 Afternoon, p. 24-26.

21. The SEC then voted unanimously to deny the application. Id.

22. The Application was denied, in part, because Mr. Chalmers' opinion was not credible. See McKenna's prior Objection, p. 6-7 (containing portions of the Deliberations Transcript).

23. The Applicants then filed their first Motion for Rehearing.

24. In Motion 1, at footnote 16, the Applicants repeated Chalmers' hard line that there would be no economic consequences, explaining that the "Applicants firmly believe Dr. Chalmers' conclusion that the Project will only have a limited impact." Motion 1, p. 10, n.16.

25. At the same time, the Applicants argued that if "the Subcommittee wished to expand the Property Value Guaranty Program to cover more homeowners, including those adjacent to ancillary facilities, it could have done so." Motion 1, p. 10.

26. There is no factual support for this argument in Motion 1.

27. Applicants cited to testimony from Mr. Quinlan which is contained in Motion 1, p. 3, footnote 5; however, Applicants admitted in that same footnote that the "purpose of citing to the transcript of the hearings in this motion is not (at this point) to address the merits of the Subcommittee's decision but rather, to demonstrate that evidence concerning conditions was, in fact, available to the Subcommittee when it ended its deliberations."

28. Nevertheless, it is worth examining Mr. Quinlan's testimony because it is ultimately offered as evidence on the merits of the SEC's authority to expand the PVG. See Motion 2, p. 3.

29. Mr. Quinlan testified in response to questions from Chairman Honigberg:

Q. To the extent that, as it currently exists, like the work-in-progress Guaranty Program, that may need some refinement before it can be rolled out and implemented. Would you agree?

A. Yes, if you're referring to the property value.

Q. That's the one.

A. Again, right now it's a concept. I think we have the framework of a program, to the earlier question, that probably could use some further development before it's ready for execution, if you will.

Q. And since we're not going to be done here tomorrow, there's time even through these proceedings and then through deliberations to work through how that might get improved

or how other commitments might be refined and make their way into conditions. Would you agree with that?

A. Yes.

Transcript of Testimony, Day 2 Afternoon, p. 85; see also Motion 2, p. 3, n.3.

30. The “evidence” is that the PVG “may need some refinement . . . could use some further development . . . might get improved . . . might be refined.”

31. In Motion 2, the Applicants submit that this testimony supports “their expectation that the program could be expanded as deemed appropriate by the SEC.” Motion 2, p. 3.

32. The Applicants have the burden of proof. There is no such thing as an evidentiary “expectation.”

33. There was no further development, there was no improvement, there was no refinement during the 70 days of the SEC proceedings.

34. Following the hard line taken in the Applicants’ final brief, there was no room for further development or improvements in deliberations.

35. In addition, as discussed above, the SEC has no legal authority to “expand” the PVG where the record is closed and the Applicants have adamantly insisted that there is no evidence to support expanding the program.

36. The requested “expansion” is presented as “a potential additional condition.” It is definitely something additional, but, again, there is no such thing as “potential” evidence.

37. The expanded PVG adds condominiums and takes the 100 foot from ROW limit in the PVG and increases it to 200 feet:

Property Value Guaranty. Further Ordered that the Applicants shall expand eligibility for the Property Value Guaranty Program described in Attachment L to the March 24, 2017 Supplemental Testimony of William J. Quinlan to include any detached residence or condominium unit located within 200 feet of the Project right of-way along the

overhead segments of the route, and including all transition stations, substation expansions, and the AC-DC converter terminal.

Motion 2, Attachment B, paragraph 9; see Attachment C, paragraph 23.

38. The supplemental testimony of Mr. Quinlan is quoted by the Applicants: Mr. Quinlan described the PVG, which is “designed to ensure that that owners of those properties Mr. Chalmers identified as most likely to see property value impacts do not incur an economic loss in the event of a sale within 5 years after construction begins.” William Quinlan Supplemental Pre-Filed Testimony, p. 9.

39. As previously discussed, Mr. Quinlan subsequently testified that the PVG did not apply to McKenna and that it was fair and reasonable in its original form. The PVG identified eleven possible property owners that were “most likely” to have impacts.

40. The expansion of the PVG is not supported by his testimony and is completely contradicted by the testimony of Mr. Chalmers.

41. Moreover, there is no support in the record for the arbitrary measurement of 200 feet.

42. The procedural context described above completely supports the conclusion that the “evidence presented by the Applicant is inadequate for the Subcommittee to determine which properties should actually be included in the program and the extent of the remuneration that should be available.” Order at p. 198-99.

III. CONCLUSION

43. The NH Constitution, laws, and rules prohibit an expansion of the PVG because there is no evidentiary basis for it.

WHEREFORE, McKenna's Purchase respectfully requests that the SEC:

- A. Deny the Applicants' Motion and refuse to grant any of the relief sought therein; and
- B. Grant such further relief as is equitable and just.

Respectfully submitted,

MCKENNA'S PURCHASE

By their attorneys,

WADLEIGH, STARR & PETERS P.L.L.C.

Dated: May 7, 2018

By: _____/s/
Stephen J. Judge, Esq., NH Bar # 1292
95 Market Street
Manchester, NH 03101
603-669-4140
sjudge@wadleighlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2018, an original and one copy of the foregoing pleading was mailed to the New Hampshire Site Evaluation Committee, and an electronic copy was served upon the Distribution List.

_____/s/
Stephen J. Judge, Esq.