

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

**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**

Docket No. 2015-06

**ORDER ON COUNSEL FOR THE PUBLIC’S MOTION FOR LEAVE TO RETAIN
PRIMMER PIPER EGGLESTON & CRAMER PC**

This Order grants Counsel for the Public’s motion to retain outside counsel. It is appropriate for Counsel for the Public to retain outside counsel to assist Counsel for the Public in fulfilling his duties under RSA 162-H:9. Counsel fees and costs incurred by Counsel for the Public are properly payable by the Applicants on the terms contained in this order and are not chargeable to the Site Evaluation Committee Fund. This Order approves a process for reviewing outside counsel’s bills to ensure appropriate levels of activity and involvement in this matter.

I. Background and Positions of the Parties

On October 19, 2015, Northern Pass Transmission, LLC, and Public Service Company of New Hampshire d/b/a Eversource Energy (together, “the Applicants”) submitted a Joint Application for a Certificate of Site and Facility with the Committee for the construction and operation of a proposed electric transmission line from the Canadian border in Pittsburg, New Hampshire, to Deerfield, New Hampshire. With their Joint Application, the Applicants paid a filing fee in the amount of \$626,000, in accordance with RSA 162-H:8-a. The filing fee was deposited into the Site Evaluation Committee Fund established under RSA 162-H:21 (“SEC Fund”).

On October 28, 2015, the Attorney General appointed Counsel for the Public pursuant to RSA 162-H:9. As stated in the statute, Counsel for the Public “shall represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy.” RSA 162-H:9, I.

On November 6, 2015, after consultation with the Applicants, Counsel for the Public filed a motion for leave to retain Primmer Piper Eggleston & Cramer PC (“Primmer”) as legal counsel, and for an order directing the Applicants to bear the costs and fees of legal counsel and to reimburse Counsel for the Public for all amounts reasonably incurred during the proceeding in this case (the “Motion”).

On November 13, 2015, the Applicants filed a response to the Motion in which they indicated their support of the Motion and in which they raised a question about the source of funds for payment of outside counsel, and also raised issues relating to budgeting, staffing and oversight of Primmer (the “Response”).

Applicants and Counsel for the Public agree that Counsel for the Public should be permitted to hire legal counsel. The Applicants, however, argue that the legal fees charged to Counsel for the Public should be charged against the SEC Fund and not charged to the Applicants.

II. Analysis

As explained below, I grant the Motion and agree with Counsel for the Public that Primmer’s fees and expenses should be paid by the Applicants, subject to significant review and oversight by the SEC.

A. Retention of Outside Counsel to Assist Counsel for the Public

The Application before the Committee is complex. The Application with its appendices contains more than 27,000 pages. It involves the siting, construction, and operation of a 192 mile electric transmission line that will extend from the Canadian border at Pittsburg to Londonderry. The transmission line is proposed to include both overhead and underground facilities and implicates a number of different areas of the law. Counsel for the Public’s desire to hire legal counsel is prudent and appropriate, and thus is hereby granted.

B. Payment of Outside Counsel's Fees and Expenses

While the Applicants agree with Counsel for the Public's desire to retain outside counsel, they disagree about who should bear the cost. Counsel for the Public relies on RSA 162-H:10, V, which authorizes Counsel for the Public to employ such consultants and legal counsel as necessary to further his duties under RSA 162-H. It further provides the cost of such consultants and legal counsel shall be borne by the applicant "in such amount as may be approved by the committee." The Applicants, on the other hand, point to RSA 162-H:22, which provides a mechanism for reimbursement from the SEC Fund of state agencies, including the Department of Justice, for time spent and expenses incurred by their representatives on the Committee and for the time spent and expenses incurred by Counsel for the Public.

The Applicants' argument that payment of Counsel for the Public's legal counsel should be charged to the SEC Fund does not comport with the plain language of the statute. Retention of outside counsel is specifically contemplated in RSA 162-H:10, V, which states that the fees of consultants and legal counsel for Counsel for the Public shall be charged to and paid by the applicant once approved by the Committee. RSA 162-H:22, on the other hand, is silent on the topic of outside counsel. It provides only that the Department of Justice is entitled reimbursement from the SEC Fund for the time expended by Counsel for the Public. Therefore, to the extent that the Response seeks to charge the fees and expenses of Counsel for the Public's legal counsel to the SEC Fund that request is denied.

C. Confidentiality and Oversight

Under RSA 91-A:5, IV, communications protected under the attorney-client privilege fall within the exemption for confidential information. *Professional Fire Fighters of N.H. v. N.H. Local Gov't Center*, 163 N.H. 613, 614-15 (2012). The Supreme Court has recognized that the need for legal counsel in complex and novel matters is "readily apparent." *Society for the*

Protection of New Hampshire Forests v. Water Supply and Pollution Control Comm., 115 N.H. 192, 194 (1975) (right to know request for attorney client communications regarding the Seabrook nuclear power plant.) In this case, the need to ensure that Counsel for the Public receives the full benefit of legal counsel outweighs any slight interest that the public may have in the communicative contents of legal invoices or other communications between Counsel for the Public and his legal consultants. See *Lambert v. Belknap County*, 157 NH 375 (2008); *Lamy v. Public Utilities Commission*, 152 NH 106 (2005).

RSA 162-H:3, IX provides that the “chairperson [of the Committee] shall serve as chief executive of the committee and may ... [p]erform administrative actions for the committee, as may a presiding officer.” Review and approval or denial of invoices from consultants and legal counsel retained by Counsel for the Public are administrative actions which may be performed by the chairperson.

Given Counsel for the Public’s needs and the Applicants’ legitimate concerns about oversight, it is appropriate for there to be some review by the SEC of outside counsel’s fees and expenses. As set forth in the Order section below, Primmer’s bills will be subject to review by the Chairperson or the Administrator of the SEC.

III. Order

It is hereby Ordered that the Motion is granted and that Counsel for the Public is given leave to retain Primmer as outside legal counsel.

It is hereby Further Ordered that Primmer’s fees and costs shall be paid by the Applicants and shall not be charged to the SEC Fund. The following procedure shall be employed for the payment of Primmer’s fees and costs:

1. Counsel for the Public shall submit to the Chairperson monthly invoices from Primmer Piper Eggleston & Cramer PC. The Chairperson or the Administrator shall review said

invoices “in camera” for reasonableness and shall approve, in whole or in part, said monthly invoices. The monthly invoices from Primmer Piper Eggleston & Cramer PC are deemed protected by the attorney-client privilege between Counsel for the Public and Primmer Piper Eggleston & Cramer PC and shall not become part of the public record in this case pursuant to RSA 91-A:5. After the Chairperson or Administrator reviews the monthly invoice from Primmer Piper Eggleston & Cramer PC, the Chairperson shall instruct in writing that the Applicants pay the amount of the invoice approved by the Chairperson, and the Applicants shall promptly pay that amount directly to Primmer Piper Eggleston & Cramer PC.

2. On a quarterly basis, Counsel for the Public shall provide to the Applicants, with a copy to the Chairperson only, a summary of the services provided in the prior three (3) months by Primmer Piper Eggleston & Cramer PC, in reasonably sufficient detail to allow the Applicants to determine the services that Primmer Piper Eggleston & Cramer PC provided to Counsel for the Public (the “Quarterly Report”). Said Quarterly Reports shall not be deemed to constitute a waiver of the attorney-client privilege between Counsel for the Public and Primmer Piper Eggleston & Cramer PC.

3. When Counsel for the Public provides the Quarterly Reports to the Applicants, Counsel for the Public also will provide to the Applicants a report on the types of activities that Outside Legal Counsel expects to provide during the following phases of this case: (1) the Prehearing Phase; (2) the Discovery Phase; and (3) the Trial Phase, together with an estimated range of legal costs that Counsel for the Public expects to incur during the then applicable phase which will allow the Applicants to plan for these future costs. Counsel for the Public will notify Applicants if it expects any material deviations from its estimated range of costs and provide an explanation for all such expected deviations. The additional report described in this paragraph

shall not be deemed to constitute a waiver of the attorney-client privilege between Counsel for the Public and Primmer Piper Eggleston & Cramer PC.

By Order of the Site Evaluation Committee this tenth day of December, 2015.



Martin P. Honigberg, Presiding Officer
NH Site Evaluation Committee