

**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**

**ORDER ON MOTION FOR
PROTECTIVE ORDER AND CONFIDENTIAL TREATMENT**

I. BACKGROUND AND DESCRIPTION OF THE PROJECT

On October 19, 2015, Northern Pass Transmission, LLC, and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively Applicant) submitted an Application to the New Hampshire Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Application) to construct a 192-mile transmission line. The transmission line is proposed to have a capacity rating of up to 1,090 MW; and to run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

Contemporaneously with the Application, the Applicant filed an Unassented-To Motion for Protective Order and Confidential Treatment.

II. APPLICANT'S MOTION AND OBJECTIONS

A. Motion

The Applicant requests that the Committee issue a protective order to preserve the confidentiality of the following information: (i) archeological resources data; (ii) information on the status, location, and distribution of native plant and animal species and natural communities; and (iii) information which was redacted from Julia Frayer's pre-filed testimony and report titled "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project."

a. Archeological Resources

The Applicant asserts that the following documents contain information regarding archeological resources data and archeological sites within or adjacent to the Project area:

- Appendix 19 - Results of Phase I-A Archeological Survey – Existing ROW Corridor and Franklin Converter Terminal (2013);
- Appendix 20 - Results of Phase I-A Archeological Survey – Proposed Northern Route: Northumberland, Stark, Dummer, Millsfield, Dixville, Stewartstown, Clarksville and Pittsburg, Coös County, NH (2013);
- Appendix 21 - Results of Phase I-A Archeological Survey – AC System Transmission Line Upgrades (PSNH 373 Line): Deerfield, Candia, Raymond, Chester, Auburn, Derry and Londonderry, NH (2014);
- Appendix 22 - Results of Phase I-A and Phase I-B Archeological Survey –Proposed Expansion of Deerfield Substation, Proposed Expansion of Scobie Pond Substation and AC System Transmission Line Upgrades (PSNH 373 Line): Deerfield, Candia, Raymond, Chester, Auburn, Derry and Londonderry, NH (2015);
- Appendix 23 - Results of Phase I-A Archeological Survey – Northern Underground Route: Stewartstown and Clarksville, Coös County, NH (2015);
- Appendix 24 - Results of Phase I-A and Phase I-B Archeological Survey Transition Stations and Connecting Routes: Stewartstown, Clarksville and Pittsburg, NH (2015);
- Appendix 25 - Results of Phase I-A Archeological Survey Off Right-of-Way Access Roads: Clarksville, Dixville, Dix’s Grant, Dummer, Errol, Franklin, Millsfield, New Hampton, Stark, Stewartstown, Pittsburg and Wentworth’s Location, NH (2015);
- Appendix 26 - Results of Phase I-A Archeological Survey – Underground Route: US Route 3 - Bridgewater, Plymouth, Campton, Thornton and Woodstock, NH Route 112 - Woodstock and Easton, NH Route 116 - Easton and Franconia, NH Route 18 - Franconia, Sugar Hill and Bethlehem, and US Route 302 - Bethlehem, NH (2015);
- Appendix 27 - Results of Phase I-A and Phase I-B Archeological Survey Bridgewater and Bethlehem Transition Stations (2015);
- Appendix 28 - Results of Phase I-A Archeological Survey Off Right-of-Way Lay Down Areas: Millsfield and Clarksville, NH (2015);
- Appendix 29 - Results of Phase I-B Archeological Survey Existing ROW Corridor: Deerfield, Allenstown, Pembroke, Concord and Canterbury, NH (2014); and

- Appendix 30 - Results of Phase I-B Archeological Survey – Northern Route: Stark, Millsfield, Dixville, Stewartstown and Pittsburg, NH (2015).

The Applicant argues that the information is confidential and should not be disclosed to the members of the general public pursuant to the following provision of New Hampshire's Historic Preservation Act:

[i]nformation which may identify the location of any archeological site on state land, or under state waters, shall be treated with confidentiality so as to protect the resource from unauthorized field investigations and vandalism. Toward this end, state agencies, departments, commissions, institutions and political subdivisions, permittees and private landowners with preservation and conservation agreements shall consult with the commissioner before any disclosure of information to insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk. Such information is exempt from all laws providing rights to public access. Disclosure for the public record for tax assessment, transfer, sale or other consideration of the property shall receive careful consideration to minimize the risk to the resource.

RSA 227-C:11.

b. Native Plants, Animal and Natural Communities Within and Adjacent to the Site

The Applicant asserts that the following documents contain information relating to native plants, animal and natural communities, within and adjacent to the Site:

- Appendix 35 - Rare, Threatened and Endangered Plants and Exemplary Natural Communities Report; and
- Page 333 of Appendix 36 - Wildlife Report and Impact Assessment.

The Applicant argues that these documents should be confidential in order to preserve and protect native plant and animal species and natural communities. The Applicant further asserts that non-disclosure is consistent with the legislative purpose of the New Hampshire Plant Protection Act of 1987:

Because there are no laws protecting any of our native plants, every year hundreds of our native plants are dug up and removed without permission from public and private property. Many of these are taken out-of-state and sold for profit. Therefore, the legislature finds and declares that:

I. For human needs and enjoyment, the interests of science, and the economy of the state, native plants and natural communities throughout this state should be protected and conserved; and that native plant numbers should be maintained and enhanced to insure their perpetuation as viable components of their ecosystems for the benefit of the people of New Hampshire.

II. Native species of plants within this state and the nation that are endangered, threatened, or otherwise reduced in number or may become so because of loss, modification, or severe curtailment of their habitats, or because of exploitation for commercial, scientific, educational, or private use, should be accorded protection as is necessary to maintain and enhance their numbers.

RSA 217-A:2.

c. “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project” and Julia Frayer’s Pre-Filed Testimony

Originally, the Applicant asks the Subcommittee to treat as confidential the pre-filed testimony of Julia Frayer and Appendix 43 containing the “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project.” The Applicant asserted that the documents contained the following “confidential, commercial, or financial information,” that should be protected under RSA 91-A:5, V:

- London Economics International, LLC’s proprietary modeling suite and other proprietary models used in assessing the economic effects of the Project;
- Business assumptions related to that analysis; and
- All analysis and conclusions that may be used to inform the Applicant bidding strategy in the Tri-State Clean Energy RFP process.

On March 28, 2016, the Applicant filed a revised and redacted version of Ms. Frayer's testimony and Appendix 43. The accompanying letter corrected earlier statements and asserted that neither the report nor Ms. Frayer's testimony contained London Economics International, LLC's, proprietary modeling suite or other proprietary models used in assessing the economic effects of the Project. The Applicant further advised the Subcommittee that it was seeking confidential treatment of the documents on a temporary basis only, in order to protect the Applicant's bidding strategy in the Tri-State Clean Energy RFP process. Finally, the Applicant asserted that it was seeking to protect only limited information that relates to the assumptions for wholesale power market simulations and related information contained in discussions of stress tests conducted by Ms. Frayer.

The Applicant argues that such information should be protected because its disclosure would give the Applicant's competitors "unwarranted insight into the Applicants' business strategy." The Applicant concludes that its interests in non-disclosure substantially outweigh public's interests in having access to the limited information it seeks to protect.

B. Objections

Counsel for the Public does not object to the confidential treatment of archeological data and information on native plants, animal species, and natural communities, as long as the Parties get access to said information under "appropriate and reasonable" non-disclosure terms. Counsel for the Public objects, however, to the non-disclosure of redacted information from Ms. Frayer's pre-filed testimony and report. Counsel for the Public asserts that he and his experts reviewed the entire report and pre-filed testimony. They disagree that all of the information for which the Applicant seeks confidential treatment should be protected as confidential, commercial and financial information under RSA 91-A:5, IV. Counsel for the Public argues that Ms. Frayer's

entire pre-filed testimony and report should be disclosed to the public. In support, Counsel for the Public asserts that it is critically important for the public to access these documents in order to ascertain and analyze the economic benefits of the Project claimed by the Applicant. Counsel for the Public also claims that such interest is especially strong, considering the size and potential impact of the Project on the State. Counsel for the Public concludes that public interest in disclosing these documents in their entirety outweighs the Applicant's interests in keeping them confidential.

The Society for the Protection of New Hampshire Forests (Forest Society) states that the Applicant agreed to disclose information relative to archeological, plant, animal, and natural communities to the Forest Society. Therefore, the Forest Society does not object to the Applicant's request to keep such information otherwise confidential. The Forest Society objects, however, to the Applicant's request for protective treatment of redacted information from Ms. Frayer's pre-filed testimony and report. In support, the Forest Society argues that public's interest in having access to the entire testimony and report is significant considering the magnitude of the Project and the benefits claimed by the Applicant. The Forest Society asserts that access to the entire report and testimony is necessary for the public to ascertain their accuracy and confirm or refute the findings. The Forest Society further argues that public interest substantially outweighs interests asserted by the Applicant, because the Applicant has already submitted its bid and the only remaining interest asserted by the Applicant is its desire to avoid disclosure to competitors.

The City of Concord does not object to the Applicant's request to protect information relating to archeological resources, plants, wildlife, and natural communities as long as the City receives access to the unredacted documents under protective order and is given an opportunity

to share said documents with its relevant employees, City Council, and Conservation Commission, any other necessary boards, commissions, consultants, and experts. Concord argues that Ms. Frayer's entire pre-filed testimony and report should be disclosed to the public so that the public can verify the information and conclusions contained in those documents. In support, the City of Concord asserts that the public interest in disclosing the documents is particularly high, considering the Applicant's reliance on them to support its claim that the Project is in the public interest and will have positive effects on the economy and the environment.

The City of Berlin does not object to the Applicant's Motion as long as the Order will allow the City and other Parties to obtain unredacted copies of the documents that the Applicant seeks to protect, upon executing a standard non-disclosure agreement.

The Town of Bethlehem Board of Selectmen, Planning Board, and Conservation Commission object to the Applicant's request. They argue that the public will not be able to evaluate and ascertain the impact of the Project without having an opportunity to review the information that the Applicant seeks to protect.

The Abutting Property Owners: Bethlehem-Plymouth Group of Intervenors argues that it should be allowed to review Ms. Frayer's testimony and report, and agrees to execute a protective agreement, if required. The Grafton County Commissioners and Coos County Commissioner Samson concur.

The Abutting Property Owners: Ashland-Deerfield object to the Applicant's request.

The Non-Abutting Property Owners: Ashland-Deerfield Group of Intervenors argues that Ms. Frayer's report cannot be addressed and analyzed without the information that the Applicant seeks to protect. This Group of Intervenors further argues that the Applicant should be required to disclose the entire pre-filed testimony of Ms. Frayer and her report. In the alternative, the Group requests that the Subcommittee allow limited disclosure of said documents to the Parties in this docket.

Jo Anne Bradbury, Bruce Brekke, and Mary Lee also filed objections to the Applicant's Motion requesting that the Subcommittee order the Applicant to disclose the entire pre-filed testimony of Ms. Frayer and her report.

III. STANDARD OF REVIEW

A state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure pursuant to the Right to Know law, RSA 91-A:5, IV. *See Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first prong of the analysis is to determine if the Applicant has identified a privacy interest. *Lambert*, 157 N.H. at 382. If a privacy interest is invoked then the agency must assess whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government. *Id.* at 383. If disclosure does not serve that purpose then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

IV. ANALYSIS

A. Archeological Resource Data

In support of the Motion as it pertains to archeological resource data, the Applicant relies on RSA 227-C:11, which exempts archeological resource information "from all laws providing

rights to public access.” *See* RSA 227-C:11. The Applicant also argues that the archeological resource data is exempted from RSA 91-A, the New Hampshire “Right to Know” statute.

RSA 227-C:11 also provides that state agencies, institutions, political subdivisions, permittees, and private landowners should consult with the Commissioner of the Department of Cultural Affairs before any disclosure of such information. *Id.* The purpose of this consultation is to “insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk.” *Id.* Information regarding the nature and location of archeological resources is similarly protected under federal law. *See* 16 U.S.C. § 470hh (a). The archeological data sought to be protected is contained in Appendices 19-30 of the Application.

The Right to Know statute also exempts information from public disclosure that is “confidential, commercial or financial.” *See* RSA 91-A:5. Data regarding archeological sites appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Archeological sites are considered to be among the “most important environmental assets of the state.” RSA 227-C:1-a. The statute recognizes that social and economic development threatens such assets and recognizes the need for protection. *Id.* Understanding the importance ascribed to archeological resources by the legislature and the need to protect such resources, it follows that such archeological data qualify as confidential information under RSA 91-A:5.

However, a determination that information is “confidential” does not end the analysis. As stated above, a state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure pursuant to the Right to Know law, RSA 91-A: 5, IV. In this case, the public benefit of disclosing the archeological information in Appendices 19-30 is slight and in fact, disclosure would be detrimental to the public interest in

protecting archeological resources. Therefore, Appendices 19-30 are exempt from disclosure under RSA 91-A: 5, IV.

Accordingly, the Motion is granted as to archeological resources and Appendices 19-30 will not be disclosed or made available to the public. Any party to this docket seeking disclosure of Appendices 19-30 they may file a motion setting forth the reason for the requested disclosure and follow the procedures set forth below.

B. Native Plants, Animal and Natural Communities Within and Adjacent to the Site

Data regarding the status, location, and distribution of rare, threatened and endangered native plants, animal species and natural communities appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Rare, threatened and endangered native plants as well as animal species and natural communities are protected by a number of statutes. *See* RSA 217-A:2; RSA 212-A:3; RSA 212-B:2. The State recognizes that said resources are “in jeopardy” and require protection by the State. *See id.* Considering the importance ascribed to rare, threatened and endangered native plants, animal species, and natural communities by the legislature and the need to protect such resources, it follows that documentation identifying said resources and their location qualifies as confidential information under RSA 91-A:5.

In addition, the disclosure of rare, threatened and endangered native plants, animal species, and natural communities is exempt under the Right to Know law. Specifically, in this case, the public benefit of disclosing information relating to the status, location, and distribution of the rare, threatened and endangered native plants, animal species and natural communities is slight, and in fact, disclosure would be detrimental to the public interest in protecting said resources. Therefore, the following documentation is exempt from disclosure under the

exemption provisions of the Right to Know law: (i) Appendix 35 - Rare, Threatened and Endangered Plants and Exemplary Natural Communities Report; and (ii) Page 333 of Appendix 36 - Wildlife Report and Impact Assessment. The Motion is granted as to Appendix 35 and Page 333 of Appendix 36 and said documentation will not be disclosed or made available to the public. Any party to this docket seeking disclosure of said documentation, may file a motion setting forth the reason for the disclosure and follow the procedures set forth below.

C. “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project” and Julia Frayer’s Pre-Filed Testimony

The public’s interest in obtaining Ms. Frayer’s pre-filed testimony and “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project” report is significant. On number of occasions, the Applicant has asserted that the Project will have a large positive effect on the environment and economy of the State. In support, the Applicant cites Ms. Frayer’s report and testimony. The public can now review a redacted version of Ms. Frayer’s report and testimony. The Applicant seeks to protect only the portions of those documents that relate to the assumptions for wholesale power market simulations and related information contained in discussions of “stress tests” conducted by Ms. Frayer. The Applicant’s interest in protecting said limited information is substantial, since the Applicant is involved in bidding in the Tri-State Clean Energy RFP and disclosure of the information the Applicant seeks to protect may expose the Applicant’s bidding strategy, may provide an unfair advantage to the Applicant’s competitors, and may ultimately jeopardize the Applicant’s ability to be awarded the bid. Considering the current status of the bidding, the Applicant’s interests in keeping this information confidential outweighs the public’s interest in disclosure. The Applicant’s request to protect the redacted information in Ms. Frayer’s pre-filed testimony and in the “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project” report is

granted, but only on a temporary basis. The Applicant shall advise the Subcommittee when the Tri-State Clean Energy RFP bid and award process has concluded and shall either disclose the unredacted versions of Ms. Frayer's pre-filed testimony and "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project" report, or file a further motion seeking confidential treatment of said documents. Pending the Applicant's notice, unredacted versions of Ms. Frayer's pre-filed testimony and "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project" report shall not be disclosed or made available to the public. Any party seeking disclosure of said documentation may file a motion setting forth the reason for the requested disclosure and follow the procedures set forth below.

V. TREATMENT OF CONFIDENTIAL INFORMATION

The following documentation and information shall be treated as confidential and shall not be disclosed to the public: (i) Appendix 19 - Results of Phase I-A Archeological Survey – Existing ROW Corridor and Franklin Converter Terminal (2013); (ii) Appendix 20 - Results of Phase I-A Archeological Survey – Proposed Northern Route: Northumberland, Stark, Dummer, Millsfield, Dixville, Stewartstown, Clarksville and Pittsburg, Coös County, NH (2013); (iii) Appendix 21 - Results of Phase I-A Archeological Survey – AC System Transmission Line Upgrades (PSNH 373 Line): Deerfield, Candia, Raymond, Chester, Auburn, Derry and Londonderry, NH (2014); (iv) Appendix 22 - Results of Phase I-A and Phase I-B Archeological Survey – Proposed Expansion of Deerfield Substation, Proposed Expansion of Scobie Pond Substation and AC System Transmission Line Upgrades (PSNH 373 Line): Deerfield, Candia, Raymond, Chester, Auburn, Derry and Londonderry, NH (2015); (v) Appendix 23 - Results of Phase I-A Archeological Survey – Northern Underground Route: Stewartstown and Clarksville,

Coös County, NH (2015); (vi) Appendix 24 - Results of Phase I-A and Phase I-B Archeological Survey Transition Stations and Connecting Routes: Stewartstown, Clarksville and Pittsburg, NH (2015); (vii) Appendix 25 - Results of Phase I-A Archeological Survey Off Right-of-Way Access Roads: Clarksville, Dixville, Dix's Grant, Dummer, Errol, Franklin, Millsfield, New Hampton, Stark, Stewartstown, Pittsburg and Wentworth's Location, NH (2015); (viii) Appendix 26 - Results of Phase I-A Archeological Survey – Underground Route: US Route 3 - Bridgewater, Plymouth, Campton, Thornton and Woodstock, NH Route 112 - Woodstock and Easton, NH Route 116 - Easton and Franconia, NH Route 18 - Franconia, Sugar Hill and Bethlehem, and US Route 302 - Bethlehem, NH (2015); (ix) Appendix 27 - Results of Phase I-A and Phase I-B Archeological Survey Bridgewater and Bethlehem Transition Stations (2015); (x) Appendix 28 - Results of Phase I-A Archeological Survey Off Right-of-Way Lay Down Areas: Millsfield and Clarksville, NH (2015); (xi) Appendix 29 - Results of Phase I-B Archeological Survey Existing ROW Corridor: Deerfield, Allenstown, Pembroke, Concord and Canterbury, NH (2014); (xii) Appendix 30 - Results of Phase I-B Archeological Survey – Northern Route: Stark, Millsfield, Dixville, Stewartstown and Pittsburg, NH (2015); (xiii) Appendix 35 - Rare, Threatened and Endangered Plants and Exemplary Natural Communities Report; (xiv) Page 333 of Appendix 36 - Wildlife Report and Impact Assessment; and (xv) redacted information contained in “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project” and Julia Frayer’s Pre-Filed Testimony.

The confidential information contained in said documents will be available for review by the members of the Subcommittee without needing to sign a confidentiality agreement. Subcommittee members may review the confidential material at the offices of the Site Evaluation Committee without participation by the parties.

A party seeking access to the documents must file a motion identifying the reason for such access and execute a confidentiality agreement in the form set forth and attached hereto. A true copy of the Motion and confidentiality agreement shall also be forwarded to the Applicant. Only Parties authorized by the presiding officer, after receipt of the executed confidentiality agreement, shall be afforded access to the confidential information. The parties shall not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket.

Unless otherwise ordered, the parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the parties shall destroy any notes referencing the confidential information and return all confidential information to the Applicant. Within sixty days thereafter, each party shall certify to the Applicant, with a copy to the Administrator of the Committee, that said notes have been destroyed and all confidential information has been returned. The rights of the parties under this Order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order that are subsequently granted by the presiding officer will be handled with the same procedures detailed above.

If a party is granted authority to review the confidential material, then such review shall occur at the offices of the Site Evaluation Committee during normal business hours. Copies of the confidential materials shall not be made available to any party to the proceeding without an explicit order from the presiding officer.

By Order of the Site Evaluation Committee, this twenty-fifth day of May, 2016.



Martin P. Honigberg, Presiding Officer
New Hampshire Site Evaluation Committee

EXHIBIT A

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC Docket No. 2015-06

CONFIDENTIALITY AGREEMENT

I, _____, hereby certify that I am a Party to the above-captioned proceeding and in connection with my interests therein, I request access to the following Confidential Information maintained by the Site Evaluation Committee:

I further certify that I have read the Site Evaluation Committee's protective order issued in the above-captioned matter, understand it and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above Confidential Information until I have signed and delivered it to counsel for Northern Pass Transmission, LLC and Public Service Company of New Hampshire, and until it has been provided to the Site Evaluation Committee by said counsel.

Date: _____

Signature of Party to Docket No. 2015-06

¹ A "Party" or "Parties" to the SEC Proceeding include Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervenor status in the SEC Proceeding by the presiding officer or chair, pursuant to Site 202.11.