

**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**

October 28, 2016

**ORDER DENYING THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE
FORESTS MOTION TO COMPEL PRIVILEGE LOG**

I. Background

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 run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

In accordance with various procedural orders, discovery through data requests has been ongoing. Several parties, including the Society for the Protection of New Hampshire Forests (Forest Society) filed motions to compel, to which the Applicant objected.

On September 2, 2016, the Applicant submitted a privilege log to all parties identifying documents being withheld on the basis of attorney-client privilege and/or work-product doctrine.

On September 22, 2016, an Order on Motions to Compel was issued, wherein the Applicant was ordered, among other things, to produce certain documents to the Forest Society and to produce a privilege log for documents withheld.

On September 9, 2016, the Forest Society and Municipal Group 3 (South) filed a Motion to Compel Production of Documents Withheld, seeking *inter alia*, an order compelling the Applicant to produce documents listed in a privilege log produced by the Applicant in response to data requests. The Applicant objected, and the request for production of documents listed in the privilege log was denied by Order dated October 4, 2016.

On October 7, the Applicant provided another privilege log in accordance with the Order on Motions to Compel, issued on September 22, 2016.

On September 28, 2016, while the Motion to Compel Production of Documents Withheld was still pending, the Forest Society filed its Motion to Compel with respect to the privilege log provided by the Applicant (Motion to Compel Privilege Log). The following parties concur in the Motion to Compel Privilege Log: New England Power Generators Association, Inc.; Ammonoosuc Conservation Trust; Appalachian Mountain Club; Conservation Law Foundation; Pemigewasset River Local Advisory Committee; Town of Holderness Town of Littleton; Town of Woodstock; Town of Bridgewater; Town of New Hampton; Town of Deerfield; Ashland Water and Sewer; Town of Sugar Hill; Town of Franconia; Town of Easton; Town of Plymouth; Town of Bethlehem; Town of Bristol; Town of Northumberland; Town of Whitefield; Mark Orzeck; Susan Schibanoff; Abutting Property Owners: Ashland to Allenstown; Abutting Property Owners: Dummer, Stark, and Northumberland; Abutting Property Owners: Deerfield; Non-Abutting Property Owners: Clarksville-Stewartstown.

On October 11, 2016, the Applicant objected to the Motion to Compel Privilege Log. On October 19, 2016, The Forest Society filed its Reply to the Objection to Motion to Compel Privilege Log.

II. Standard

Motions to compel responses to data requests shall:

- (1) Be made pursuant to N.H. Code of Admin. Rules Site 202.14;
- (2) Be made within 10 days of receiving the applicable response or objection, or the deadline for providing the response, whichever is sooner;
- (3) Specify the basis of the motion; and
- (4) Certify that the movant has made a good-faith effort to resolve the dispute informally.

N.H. CODE ADMIN. RULES, Site 202.12(k).

RSA 162-H:10, IV provides:

The site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.

III. Positions of the Parties

The Forest Society seeks an order compelling the Applicant to revise its privilege log provided in response to the data requests. The Forest Society argues that in its current form, it is not possible to sufficiently identify from the privilege log whether the attorney-client privilege or work-product doctrine are applicable. The Forest Society notes that “every single item in the log is labeled “Attorney-Client Privilege” and some items are also labeled “Work Product Privilege.” The Forest Society argues that it is highly unlikely that every single item in the privilege log is actually protected by the attorney-client privilege and/or work-product doctrine. By way of example, the Forest Society notes that the minutes from meetings between the Applicant and state agencies or regional/municipal entities, such as the Department of Environmental Services and the Deerfield Conservation Commission, are labeled in the log as privileged, however the

substance of any meeting with such entities is not typically protected by the attorney-client privilege. The Forest Society also argues that the lack of keyed information in the log renders it a virtually useless list that tells parties little about the basis for asserting either privilege. The Forest Society notes that the Applicant indicated that some of the e-mails listed in the log were previously provided in response to some data requests, but that the log does not clearly identify those items and for which data responses they were provided. The Forest Society states that absent more information in the log the process of trying to identify which attachment was provided and to whom, would be a needlessly and unreasonably time-consuming and laborious exercise. Finally, the Forest Society argues that several items in the log reference state agency permits or applications, and that permits or applications are typically public filings, so it is not clear how the substance of the application would be protected under either the attorney-client privilege or the work-product doctrine. Through its Motion, the Forest Society reserved the right to request additional technical sessions, data requests, and any other forms of discovery.

The Applicant submits that the privilege log satisfies the requirements of the Order on Motions to Compel issued on September 22, 2016. The Applicant further indicates that it believes that the Presiding Officer's Order on the Forest Society and Municipal Group 3 (South)'s Motion to Compel Documents Withheld issued on October 4, 2016, effectively resolved the issue and renders the Motion moot. The Applicant has agreed to refine the privilege log to include a column identifying the specific documents and/or attachments to the e-mail communication where the Applicant asserts privilege, and provided this information on October 25, 2016.

The Forest Society replies that the Applicant's efforts to refine the privilege log will not fully address the Forest Society's perceived deficiencies with the log, and extends its arguments

with respect to the September 2 privilege log and the second privilege log provided on October 7, in response to the Order issued on September 22, 2016. The Forest Society argues that although the Presiding Officer's October 4, 2016 Order addressed arguments with respect to the privilege log, that Order does not render this issue moot. Finally, the Forest Society clarifies that it does not request that the Applicant provide a "new privilege log," but rather requests an order compelling the Applicant to provide a key to the privilege log or to revise it.

IV. Analysis

As a preliminary matter, although the Presiding Officer did address the privilege log in the October 4, 2016, Order, that Order does not render the Forest Society's Motion moot. The October 4 Order involved a request for production of the documents listed in the privilege log. That request was denied. Here, the Forest Society requests a more detailed privilege log. While similar arguments and substance were addressed in each Motion, it is clear that the requests differ. Notwithstanding that distinction, the Forest Society has not demonstrated that the documents listed in the privilege log were wrongfully withheld on grounds of attorney-client privilege or work-product doctrine. Further, the Forest Society has not demonstrated that the privilege log is deficient in that it identifies what was withheld and states the reason for nondisclosure. It therefore satisfies the requirements of the September 22, 2016, Order on Motions to Compel. The Forest Society's Motion to Compel Privilege Log is denied.

SO ORDERED this twenty-eighth day of October, 2016.



Martin P. Honigberg, Presiding Officer
NH Site Evaluation Committee