

**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 ON APPLICANT'S MOTION REGARDING TREATMENT
OF MATERIAL PRODUCED INADVERTENTLY**

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.

On September 22, 2016, an Order addressing various Motions to Compel was issued in this docket.

On October 7, 2016, the Applicant filed a Motion Regarding Treatment of Material Produced Inadvertently. On October 17, 2016, the Society for the Protection of New Hampshire Forests (Forest Society) and the City of Concord¹ filed a partial objection to the Applicant's request.

This Order grants in part and denies in part the Applicant's Motion.

¹ The City of Concord is the spokesperson for Municipal Group 3 South.

II. Discussion

The Applicant asserts that, pursuant to the Order on Motions to Compel, it provided numerous documents to the parties in these proceedings. The Applicant further asserts that some of the documents provided may contain personal, confidential, or otherwise privileged information, and requests that the Presiding Officer issue an Order that addresses the treatment of such inadvertently produced information. Specifically, the Applicant asks the Presiding Officer to issue an Order providing for the following:

- Inadvertent production is not deemed a waiver of the attorney-client privilege or work product doctrine;
- Inadvertent production is not deemed a waiver of any argument that the documents or information should be treated confidentially;
- Inadvertent production is not deemed a waiver of any argument that the Applicant may make with respect to the relevance or materiality of the documents or information;
- The Applicant may make a written request to the receiving party within seven days after discovery of the inadvertent production to obtain the return of the produced documents or information. Within ten days of receiving the Applicant's request, a receiving party must return such materials and provide written assurance that any and all copies of such materials have been returned, destroyed, or deleted;
- If the receiving party determines that disclosed materials contain attorney-client privileged or work product information, the receiving party shall promptly notify the Applicant and shall not examine the disclosed materials;
- If the receiving party had provided any inadvertently disclosed materials to third parties, the receiving party shall take reasonable necessary steps to retrieve disclosed materials; and
- The Applicant shall retain disclosed materials returned to it until the parties have resolved any dispute concerning such materials and shall provide such materials to the Presiding Officer for *in camera* review, if requested. Each party shall have the right to challenge the disclosure as other than inadvertent. If any such challenge is successful, the Applicant shall have an obligation to produce the disclosed materials originally produced.

The Forest Society and the City of Concord filed a partial objection to the Applicant's request. The Forest Society and the City of Concord do not dispute that a procedure for

treatment of inadvertent disclosure of confidential or privileged information should be established. The Forest Society and the City of Concord, however, assert that the Applicant's request should be granted subject to the following conditions:

- The Applicant should make a reasonable sorting of documents, using specialized discovery software, if needed, prior to the production to determine and screen the documents that contain confidential or privileged information;
- In the alternative, the Applicant should provide the documents without conducting a comprehensive screening and notify the receiving party, within 30 days of the production, which documents are privileged or confidential;
- If the receiving party notifies the Applicant of inadvertent disclosure of confidential or privileged information, the Applicant should respond with instructions within three days of receipt of such notification; and
- The parties do not waive their right to challenge the Applicant's claims of privilege with respect to any documents inadvertently produced.

The Applicant is required to produce a significant amount of documents in the limited time allotted by the Order on Motions to Compel. It is not in the Applicant's interests to disclose confidential or privileged information. Therefore, it is presumed that the Applicant, acting in its interests, will deploy reasonable measures to prevent inadvertent disclosure of such information. No additional order is needed to direct the Applicant regarding its own review of information being produced. It is reasonable to assume, however, that regardless of the Applicant's efforts, some confidential or privileged information may be disclosed. The Applicant's request and proposed procedure for treatment of such information is generally reasonable and in accordance with practices currently used for treatment of inadvertently produced confidential or privileged information. The Applicant's proposal specifically addresses the receiving party's right to challenge the confidential or privileged nature of disclosed information by bringing it to the Presiding Officer's attention and no modification to that part of the proposed procedure is needed.

The Forest Society and the City of Concord's are right to ask that a time limit be set for the Applicant's response to a notification of a possible inadvertent production. Any and all issues concerning inadvertent disclosure of confidential or privileged documentation or information should be resolved as early and quickly as possible. Considering, however, the complicated nature of issues in dispute and the potentially complicated analyses and discovery that will need to be performed in order to confirm or deny the confidential or privileged nature of the information, it is unreasonable to require the Applicant to respond to such notice within three business days. Therefore, the Applicant's Motion is granted in part and denied in part. The following procedure shall apply to the documentation containing confidential or privileged information that may be inadvertently produced by the Applicants:

- Inadvertent production shall not be deemed a waiver of the attorney-client privilege or work product doctrine;
- Inadvertent production shall not be deemed a waiver of any argument that the documents or information should be treated confidentially;
- Inadvertent production shall not be deemed a waiver of any argument that the Applicant may make with respect to the relevance or materiality of the documents or information;
- The Applicant shall make a written request to the receiving party within seven days after discovery of the inadvertent production to obtain the return of the produced documents or information. Within ten days of receiving the Applicant's request, the receiving party must return such materials and provide written assurance that any and all copies of such materials have been returned, destroyed, or deleted;
- If the receiving party determines that disclosed materials contain attorney-client privileged or work product information, the receiving party shall promptly notify the Applicant and shall not examine the disclosed materials. The Applicant shall make a written request to the receiving party within ten days after receiving notification from the receiving party. Within ten days of receiving the Applicant's request, a receiving party must return such materials and provide written assurance that any and all copies of such materials have been returned, destroyed, or deleted;
- If the receiving party had provided any inadvertently disclosed materials to third parties, the receiving party shall take reasonable necessary steps to retrieve disclosed materials; and

- The Applicant shall retain disclosed materials returned to it until the parties have resolved any dispute concerning such materials and shall provide such materials to the Presiding Officer or his designee for *in camera* review, if requested. Each party shall have the right to challenge the disclosure as other than inadvertent. If any such challenge is successful, the Applicant shall have an obligation to reproduce the disclosed materials originally produced.

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



Martin P. Honigberg, Presiding Officer
NH Site Evaluation Committee