

**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**

March 13, 2017

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

This Order denies confidential treatment of documents that have been produced during discovery, but have not been filed with the Subcommittee.

I. Background

On January 30, 2017, the Applicant, Municipal Group 1 South, Municipal Group 2, Municipal Group 3 North, Municipal Group 3 South, and the Society for the Protection of New Hampshire Forests filed a Joint Motion for Protective Order and Confidential Treatment.

II. 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.*

III. Discussion and Analysis

The Joint Motion requests issuance of a protective order covering documents produced by the parties “under claims of confidentiality pursuant to RSA 91-A:5.” The documents referenced in the Joint Motion include documents produced during discovery between the parties as well as pre-filed witness testimony (and presumably attached exhibits.) In essence, the Motion requests an order treating as confidential any and all documents that Counsel for the Public and Intervenors, determine to be confidential at their own discretion.

Documents produced during discovery are generally not part of the record of the proceedings and are usually not filed with the Committee. The Applicant, Counsel for the Public, and Intervenors are free to independently enter into confidentiality agreements protecting documents from disclosure during the discovery process to those that are not parties to the agreement. The Motion relies only on the Right to Know law to support the relief requested. Because discovery documents are not governmental records as that term is defined in RSA 91-A:1-a, III the motion is denied as to the request for an order protecting discovery documents.

Documents filed with the Subcommittee such as prefilled testimony and exhibits are subject to RSA 91-A once in the possession of the agency. The fact that the parties have determined that some documents are confidential and should be exempt from public disclosure is not dispositive for the Subcommittee. The three-step analysis must be conducted to determine whether information should be exempt from public disclosure pursuant to 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). Without knowing the documents that the parties seek to protect, it is

impossible to determine if they are exempt from disclosure. The Joint Motion for Protective Order and Confidential Treatment is denied.

Parties seeking confidential treatment of documents filed in this docket shall mark them as "confidential," and file a contemporaneous motion seeking a protective order with an explanation of why the documents are exempt from disclosure under RSA 91-A. After considering the nature and subject of the documents and conducting the three step analysis required by law, a decision will be made whether to grant the motion on a case-by-case basis.

SO ORDERED this thirteenth day of March, 2017.



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee