

**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**

April 12, 2017

**ORDER ON COUNSEL FOR THE PUBLIC'S
MOTION TO COMPEL PRODUCTION OF LONDON ECONOMICS
INTERNATIONAL, LLC'S ECONOMIC MODEL FROM THE APPLICANT, OR,
ALTERNATIVELY, MOTION TO STRIKE TESTIMONY**

This order denies Counsel for the Public's motion to compel or strike the testimony of the Applicant's witness, consistent with prior orders issued in this docket.

I. Background

In accordance with various procedural orders, discovery through data requests has been ongoing. Unsatisfied with certain information provided by the Applicant, on March 15, 2017, Counsel for the Public filed a Motion to Compel Production of London Economics International, LLC's Economic Model from the Applicant, or, Alternatively, Motion to Strike Testimony (Motion).

The following parties filed Notices of Joinder in the Motion:

- Society For the Protection of New Hampshire Forests (March 17, 2017);
- Grafton County Commissioners (March 17, 2017);
- The Towns of Bridgewater, New Hampton, Littleton, Deerfield, Pembroke, Bethlehem, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill, Whitefield, the Ashland Water & Sewer District, and the City of Concord (March 17, 2107) and
- New England Power Generators Association, Inc. (March 20, 2017)

On March 20, 2017, Counsel for the Public filed an Addendum to the Motion to Compel or Strike noting the concurrence of certain parties.

The Applicant objected on March 20, 2017.

II. Standard

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

III. Positions of the Parties

A. Counsel for the Public

Counsel for the Public moves to compel the Applicant to produce the economic model used by London Economics International, LLC (LEI), to develop Julia Frayer's pre-filed testimony and attached report, or, alternatively to strike Ms. Frayer's pre-filed testimony. The Applicant submitted the LEI Report and the pre-filed testimony of Ms. Frayer on October 15, 2016. On February 15, 2017, pursuant to the Presiding Officer's September 22, 2016, Order, Ms. Frayer updated her testimony and report to address changes in the electricity markets that had occurred after she had prepared her testimony. Among the assertions made by Ms. Frayer and LEI, is the claim that the Project's effects on the forward capacity market will produce significant cost savings and economic benefits for New Hampshire ratepayers.

Counsel for the Public notes that in order to investigate the effects of the Project on the electricity markets and to verify the claims made by the Applicant about benefits arising therefrom, he was authorized to retain The Brattle Group, recognized experts in energy markets. Counsel for the Public has requested, through data requests and requests made at technical sessions, that the Applicant produce LEI's economic model, which was used to develop Ms. Frayer's testimony and report. Counsel for the Public submits that the Applicant has refused to produce the economic model used by LEI and Ms. Frayer on the grounds that it is proprietary to LEI's and Ms. Frayer's business, even though Counsel for the Public is afforded access to all of the same confidential material that the Subcommittee itself may have. Counsel for the Public argues that refusing to provide Counsel for the Public with the economic model is equivalent to refusing to provide the information to the Subcommittee.

Counsel for the Public asserts that access to the LEI model is necessary because without it, he cannot test or understand the judgment embedded into the model with respect to a critical opinion of Ms. Frayer concerning the value of the capacity market benefits that Ms. Frayer claims the Project will produce in New Hampshire. Counsel for the Public argues that production of the LEI model would allow Counsel for the Public to investigate, a long list of issues listed in his motion *inter alia*:

- (a) Whether LEI properly applied the mechanics of ISO-NE's capacity market clearing, based on the supply curve and demand curve.
- (b) How LEI determined that the Project would cause so few Base Case resources to exit the market (thus leading to a large price impact of the Project with little moderation by other suppliers' responses).
- (c) What criteria LEI applied for retiring a resource, such as, mothballing a resource through a static or dynamic de-list bid.
- (d) Whether LEI found that resources remaining in the market would remain profitable even under prices depressed by the Project.

- (e) Whether LEI's analysis used realistic assumptions on the going-forward fixed costs of aging resources.
- (f) Whether LEI's analysis used realistic estimates about the net revenues generators would earn from energy and ancillary services markets.
- (g) Whether LEI's analysis properly accounted for the costs to the Project of taking on a capacity supply obligation, and how those costs would change over time as ISO-NE increases its performance penalty rates.
- (h) Why the Merrimack and Schiller plants are projected to retire in LEI's Base Case as well as the Project Case, including what were LEI's assumptions on those plants' costs, revenues, and penalty exposures that led LEI to conclude they would retire even without the Project, and that the Project's impact on prices would not be the deciding factor.
- (i) Why the gas-fired generators that LEI projected to retire in 2024 – 2026 in its original analysis are no longer retiring in either the Base Case or the Project Case in LEI's updated report, even though capacity and energy prices are lower in the updated analysis than in the original report.
- (j) What is the basis for LEI's projection that certain imports from New York chose to exit the ISO-NE capacity market for four, and only four, years following the Project's entry into the market, and what capacity prices LEI is assuming would be available in New York.
- (k) Whether LEI properly evaluates when a new generator would enter the market, both with and without the Project.

Counsel for the Public argues that without investigating, testing, or understanding judgments embedded in LEI's model, he cannot determine whether Ms. Frayer's opinions about economic benefits are reliable; and that the information is critical to his understanding of the Project's projected impacts and his statutory investigatory obligation. Specifically, Counsel for the Public argues that RSA 162-H:10, V, requires that "[t]he site evaluation committee and counsel for the public shall conduct such reasonable studies and investigations as they deem necessary or appropriate to carry out the purposes of this chapter" Counsel for the Public argues that the statutory directive, through its use of the term "shall," mandates that he conduct

any investigation he deems necessary and appropriate to carry out the purposes of RSA 162-H.

Counsel for the Public also asserts that the LEI model is discoverable under New Hampshire Law and that its production should be compelled as it would be before the New Hampshire Public Utilities Commission. Counsel for the Public notes that N.H. CODE ADMIN. RULES Site 202.24(b) provides that “[a]ll documents, materials and objects offered as exhibits shall be admitted into evidence, unless excluded by the presiding officer as irrelevant, immaterial, unduly repetitious or legally privileged[,]” and Site 202.12(l) requires “the presiding officer or any hearing officer designated by the presiding offer” to authorize discovery that “is necessary to enable the parties to acquire evidence admissible in a proceeding.” Counsel for the Public cites to RSA 516:29-b, II(b) regarding disclosure of expert testimony in civil cases and argues that the parties in this docket are entitled to discovery of the facts or data considered by the Applicant’s expert witnesses in forming their opinions. Counsel for the Public also cites to Rule 37(d) of the Standing Pre-trial Orders for New Hampshire Superior Courts, providing that where an expert is going to testify at trial, he or she shall “be advised by counsel to bring their original records and notes to court with them.” Counsel for the Public submits that while the PUC has declined specifically to adopt the requirements of RSA 516:29-b, it has nevertheless “generally agree[d] with its requirements that a party must provide, either through pre-filed testimony or discovery, “a complete statement of: (a) All opinions to be expressed and the basis and reasons therefor; (b) The facts or data considered by the witness in forming the opinions; [and] (c) Any exhibits to be used as a summary of or support for the opinions.” Motion, p. 7 (citing *Investigation of Scrubber Costs & Cost Recovery*, Order No. 25,646 at 4-5). Counsel for the Public argues that the Subcommittee should at least follow the approach of the PUC and that the PUC

approach would require production of the economic model data underlying Ms. Frayer's pre-filed testimony and report.

Counsel for the Public argues that the economic model cannot be withheld on the basis of privilege because a proprietary interest "does not rise to the level of a recognized privilege and must yield to the needs of the case." Motion, p. 8 (quoting *Carfagno v. Jackson Nat'l Life Ins. Co.*, No. 5:99CV118, 2001 WL 34059032, at *6 (W.D. Mich. Feb. 13, 2001)). Counsel for the Public also argues that any concerns regarding the sensitive nature of the proprietary information sought in the LEI model can be addressed by a confidentiality agreement or protective order.

In the alternative, Counsel for the Public claims that the testimony and report of Ms. Frayer should be struck and/or excluded by operation of New Hampshire Rule of Evidence 702. New Hampshire Rule of Evidence 702 provides, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Counsel for the Public asserts that subsumed within Rule 702 is the requirement that expert testimony be reliable. Counsel for the Public argues that the reliability of Ms. Frayer's testimony and report cannot be judged without full and proper consideration and analysis of the methodology and assumptions underlying her testimony. Counsel for the Public argues further that where the basis of expert testimony cannot be carefully considered, the proper remedy is exclusion. Counsel for the Public states that permitting LEI to withhold the economic model it used to generate Ms. Frayer's pre-filed testimony and report renders her expert conclusions impenetrable and unverifiable. Counsel for the Public concludes that absent production of the

LEI model, the pre-filed testimony and report of Ms. Frayer must be struck and excluded from these proceedings.

B. Applicant

The Applicant argues that the matter of producing the LEI report has already been decided. Specifically, the Applicant argues that, the September 22, 2016, Order on Motions to Compel denied a request by the Forest Society for the same information sought by Counsel for the Public. The Applicant argues that Counsel for the Public has premised its request on a mistaken contention that RSA 162-H:10, provides it with unfettered access to whatever information it deems necessary, even if the request is unreasonable. The Applicant submits that Counsel for the Public has failed to explain why the information it has received to date is insufficient to allow it to evaluate the LEI report or to cross-examine Ms. Frayer. The Applicant argues that Counsel for the Public has failed to distinguish its request in any way from the Forest Society's request that was denied in the September 22, 2016, Order, which decided that the model is not necessary to evaluate the LEI report or Ms. Frayer's testimony.

The Applicant argues that the Motion also fails to acknowledge that the LEI report and Ms. Frayer's pre-filed testimony include references to the inputs, outputs and assumptions made by LEI in its "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project" submitted on October 16, 2015; and the supplemental report entitled "Update of the Electricity Market Impacts Associated with the Proposed Northern Pass Transmission Projects," submitted on February 15, 2017. The Applicant argues that the data relied on by LEI and the assumptions it made are spelled out in significant detail in the report and the pre-filed testimony of Ms. Frayer, including in three appendices filed with the October 16, 2015, report and entitled "Detailed assumptions for wholesale power market simulations"

(Appendix C), the “Calculation for retail cost impact” (Appendix D), and an “Introduction to REMI PI+,” the “dynamic forecasting and policy analysis” utilized in the Report (Appendix E). The Applicant argues that the mechanics of the simulation model for capacity and the simulation model for energy have also been described in those reports and in the technical sessions with Ms. Frayer.

The Applicant also argues that Counsel for the Public failed to note that, in responding to the Forest Society’s Motion to Compel, which was subject to the September 22, 2016 Order on Motions to Compel, the Applicant submitted 229 pages of data detailing the inputs and outputs LEI used in its analysis, with each separate input and output labeled and provided in a readable and usable format.

The Applicant contends that Counsel for the Public is seeking highly proprietary information developed by LEI to be given to its expert, The Brattle Group, a direct competitor of LEI. The Applicant submits that if an expert has all of the inputs, outputs, and assumptions of the opposing expert, the expert can run the information in its own model or can attack the inputs and assumptions. The Applicant argues that it is unclear why Counsel for the Public’s expert has not done so in this proceeding. With respect to each example provided by Counsel for the Public as to information it could determine with access to the LEI model, the Applicant has provided a response including where, in the documents and testimony previously provided, such information may be obtained.

The Applicant argues that none of RSA 162, the Committee’s Rules, or New Hampshire’s civil litigation discovery rules compels production of LEI’s model. The Applicant cites to federal case law regarding New Hampshire Rule of Evidence 702, which largely mirrors the Federal Rule of Evidence 702, noting that the appropriate remedy for Counsel for the

Public's concern regarding Ms. Frayer's testimony and the LEI report is to scrutinize the information in through rebuttal expert testimony and cross-examination.

IV. Analysis

Counsel for the Public's request is similar to the request that was denied by the Presiding Officer in the September 22, 2016, Order on Motions to Compel. The Presiding Officer reiterates the September 22, 2016 ruling. The Applicant has represented that it has provided both the inputs and outputs employed in LEI's modeling as well as a description of the approach and the assumptions upon which the model relies in generating the results. With this information, Counsel for the Public's expert should be able to test the data utilizing its own modeling approach and assumptions and provide rebuttal expert testimony, and he will also have the opportunity to cross-examine Ms. Frayer. Counsel for the Public's right to access information in this docket is not limitless. Revealing proprietary information and software is unnecessary. Counsel for the Public has failed to indicate how the information provided by the Applicant is inadequate to allow his experts to analyze, scrutinize, and test the data with its own modeling approach and/or by testifying about any weaknesses perceived in LEI's inputs, output, or assumptions. Counsel for the Public's Motion to Compel is denied.

SO ORDERED this twelfth day of April, 2017.



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee