

**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 24, 2017

ORDER DENYING APPLICANT’S MOTION TO STRIKE

This order denies the Applicant’s Motion to Strike Certain Track 1 Testimony.

I. Background

On March 29, 2017, the Applicant filed a Motion to Strike Certain Track 1 Testimony. The Motion seeks to strike, in its entirety, the pre-filed testimony of the following witnesses in this docket:

- Clarksville to Stewartstown Group of Intervenors (video);
- Abutting Property Owners Bethlehem to Plymouth (video);
- Bradley J. Thompson – November 15, 2016;
- Tim and Brigitte White – November 13, 2016;
- Carl Lakes – November 15, 2016;
- Mark and Susan Orzeck – November 15, 2016;
- Phil and Joan Bilodeau – November 15, 2016;
- Linda Lauer on behalf of the Grafton County Commissioners (supplemental testimony);
- Stephan T. Nix (supplemental testimony);
- F. Maureen Quinn (supplemental testimony);
- George E. Sansoucy (supplemental testimony);

- Carl Martland (supplemental testimony); and
- Linda Lauer (supplemental testimony).

The Motion also seeks to strike parts of the pre-filed testimony of the following witnesses:

- George Sansoucy;
- Sharon A. Penney; and
- Will Abbott.

The Subcommittee received the following pleadings addressing the Applicant's Motion to Strike:

- F. Maureen Quinn's Objection to the Applicant's Motion to Strike – March 30, 2017;
- Southern Non-Abutters Group of Intervenors' Objection to the Applicant's Motion to Strike – April 1, 2017;
- Intervenors of Group 1 North Intervenors' Objection to the Applicant's Motion to Strike the Pre-Filed Video Testimony of the Combined Intervenors Group of Pittsburg, Clarksville and Stewartstown – April 2, 2017;
- Grafton County Commissioners' Objection to the Applicant's Motion to Strike – April 3, 2017;
- Combined Group Clarksville-Stewartstown, Group 1 North's, Objection to the Applicant's Motion to Strike – April 4, 2017;
- The Municipalities'¹ Objection to the Applicant's Motion to Strike – April 5, 2017;
- Abutting Property Owners, Bethlehem to Plymouth, Group of Intervenors' Objection to the Applicant's Motion to Strike – April 7, 2017;
- Society for Protection of New Hampshire Forests' (Forest Society) Objection to the Applicant's Motion to Strike – April 10, 2017; and

¹ The City of Concord and the Towns of Bethlehem, Bristol, Easton, Franconia, Northumberland, Plymouth, Sugar Hill, Whitefield, New Hampton, Littleton, Deerfield, Pembroke, and Ashland Water & Service District.

- Counsel for the Public’s Objection to Motion to Strike – April 10, 2017.

II. Standard of Review

RSA 541-A: 33, II provides the foundation for the admissibility of evidence in administrative proceedings:

The rules of evidence shall not apply in adjudicative proceedings. Any oral or documentary evidence may be received; but the presiding officer may exclude irrelevant, immaterial or unduly repetitious evidence. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidence offered may be made and shall be noted in the record. Subject to the foregoing requirements, any part of the evidence may be received in written form if the interests of the parties will not thereby be prejudiced substantially.

The touchstone for admissibility in administrative proceedings is relevance and the avoidance of immaterial or unduly repetitious evidence. *See id.*

III. Analysis

The Applicant relies on the following arguments in support of the Motion:

(i) unauthenticated videos do not constitute testimony; (ii) the testimony is immaterial and amounts to unsupported opinion; (iii) the testimony addressing alternative routes is irrelevant; and (iv) certain filings that are called “supplemental” are not supplemental in nature and should have been filed at an earlier time.

A. Videos

The two videos were filed by the Clarksville to Stewartstown Group of Intervenors and the Abutting Property Owners Bethlehem to Plymouth Group of Intervenors. The Clarksville to Stewartstown video depicts portions of the Project site and contains interviews of witnesses and parties stating their opinions about the Project and its potential impacts. The Abutting Property Owners Bethlehem to Plymouth video shows businesses and residences, and the proximity of buildings to the construction site in Franconia and Easton. It also compares the proposed Project

route with an alternative route that, according to the Intervenors, could have been chosen for constructing the Project.

The Applicant asserts that videos filed by the intervenors are unauthenticated and, therefore, unreliable. The Applicant further argues that depiction of the Project route and surroundings do not constitute testimony and should be struck. Finally, the Applicant asserts that interviews contained within the videos are merely public comments that should not be filed as testimony in this docket.

The Clarksville to Stewartstown Intervenors assert that the video is relevant to this docket because it depicts the proposed site of the Project and provides comments of the people who will be affected by construction and operation of the Project. They also claim that the video will assist the Subcommittee with visualizing the area and the extent of potential impact.

The Bethlehem to Plymouth Abutters assert that their video is relevant because it depicts the anticipated location of the Project as it relates to their properties, and addresses issues of health and safety as well as public interest. They also argue that the video is not repetitious and, therefore, should be allowed.

The Municipalities' position is that the Subcommittee should deny the Applicant's request to strike the videos. The Municipalities argue that neither the Committee's rules nor the statute states that pre-filed testimony cannot be filed in the form of a video. The Forest Society argues that the video should be allowed and is a permissible form of testimony.

The videos presented by the intervenors contain information that is relevant to the subject matter of this docket, and may be helpful to show the potential impacts of the Project on aesthetics, tourism, orderly development, and health and safety. Evidence may be presented in different forms, including recorded oral statements and exhibits or video recorded statements

with visual exhibits. The fact that this information has been presented in the form of video does not render it inadmissible.

The rules of evidence do not apply in these proceedings. *See* RSA 541-A: 33, II. Even if the rules of evidence did apply, the requirement of authentication or identification is not a high bar. *See State v. Ruggiero*, 163 N.H. 129, 136, 35 A.3d 616 (2011). “The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.”

N.H.R.E. 901(a). While the videos will be admitted, it will be up to the Subcommittee to determine the weight to accord the videos in the context of this proceeding. The Applicant’s request to strike the videos filed by the Clarksville to Stewartstown Group of Intervenors and Abutting Property Owners Bethlehem to Plymouth Group of Intervenors is denied.

B. Opinion Testimony

The Applicant argues that testimonies of Thompson, White, Lakes, Orzeck, Bilodeau, and Lauer (for the Grafton County Commissioners) should be struck because they include the unsupported and unverified opinions.

The Southern Non-Abutters argue that the testimony listed above should be allowed regardless of whether it constitutes opinion or belief as long as it is relevant to the resolution of issues raised in this docket. They argue that the testimony that the Applicant seeks to strike is relevant and, therefore, should be allowed. The Municipalities and the Forest Society similarly argue that witnesses should be allowed to express their beliefs and opinion and that their testimony should be allowed.

The testimony presented by the Intervenors in this docket does contain references to the opinions and beliefs of the witness. In some cases those opinions and beliefs may not be

admissible in a trial in court. As stated above, however, the rules of evidence do not apply in administrative proceedings. *See* RSA 541-A:33, II. The touchstone of admissibility in administrative proceedings is relevance. The testimony presented by the Intervenors is relevant because it has a tendency to make consequential facts more or less probable that they would be without the testimony. *See* N.H.R.E. 401 (general definition of the evidentiary term “relevance”). The Subcommittee is capable of recognizing whether witnesses have sufficient credentials and/or expertise to support the opinions expressed in the testimony. The weight of the contested testimony will be considered by the Subcommittee after it has been tested through cross-examination.

Accordingly, the Applicant’s motion to strike the pre-filed testimony of Bradley J. Thompson, Tim and Brigitte White, Carl Lakes, Mark and Susan Orzeck, Phil and Joan Bilodeau, and Linda Lauer on behalf of the Grafton County Commissioners (supplemental testimony) is denied.

C. Alternative Route Testimony

The Applicant asserts that portions of the testimony filed by Sansoucy, Penney, and Abbott should be struck because those portions address alternative routes and therefore are irrelevant and immaterial to the resolution of issues raised in this docket. The Applicant argues that a discovery order pertaining to Motions to Compel dated September 22, 2016, has already determined this issue by holding that “[t]he requests seek information that does not pertain to the proposed route. The requested information is not relevant nor is it likely to lead to the discovery of admissible evidence.” Order on Motions to Compel, Docket 2015-06, p. 40 (September 22, 2016) (Discovery Order).

The Municipalities and the Forest Society assert that, under RSA 162-H:16, IV, the Subcommittee is required to consider “all relevant information regarding the potential siting or routes of a proposed energy facility.” The Municipalities and the Forest Society argue that the plain language of the statute requires that the Subcommittee consider evidence and testimony about alternative routes because it is relevant to the Project’s siting. The Municipalities also argue that the information is relevant to a finding of whether construction and operation of the Project is in the public interest.

Prior to July 1, 2014, the Committee was required to consider “available alternatives” in deciding whether the objectives of RSA 162-H would best be served by the issuance of a Certificate. *See* RSA 162-H:16, IV (2014). Consequently, prior to July 1, 2014, when deciding whether to issue a Certificate, the Committee considered the evidence of alternatives presented by the Applicant, as well as any other evidence in the record pertaining to the alternative sites. *See, e.g.,* Decision, Application of Granite Reliable Power, LLC, 2008-04, at 23 (July 15, 2009).

Effective July 1, 2014, the legislature amended RSA 162-H:16, IV. The current version of the statute does not require the Subcommittee to consider “available alternatives” as a separate statutory criterion for making a decision whether to issue or deny a Certificate. *See* RSA 162 H:16, IV (2016). However, the statute does require that an Application “[i]dentify both the applicant’s preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant’s preferred choice.” RSA 162-H:7, V(b). The administrative rules echo the statutory requirement, *See* N.H. CODE ADMIN. RULES, Site 301.03(h)(2), and require the Applicant to file extensive information about the proposed site and “alternative locations the applicant considers available for the proposed facility” N.H. CODE ADMIN. RULES, Site 301.03(c).

In deciding whether the objectives of RSA 162-H would be best served by the issuance of a Certificate, the Subcommittee is required to give “due consideration to all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits.” RSA 162-H:16, IV (2016).

The Application contains a description of the route selection process employed by the Applicant and the alternatives analysis undertaken by the U.S. Department of Energy as part of the Presidential Permit process. *See* Application, pp. 43-46. The Project, as presented in the Application, does not identify alternative routes that the Applicant considers to be “available.” Presumably the Applicant considers only the proposed route to be available.

The Applicant, however, misunderstands and misapplies the Discovery Order. The Discovery Order denied motions to compel answers to data requests pertaining to the costs and feasibility of use of the Interstate 93 corridor and the feasibility of using the Hydro Quebec Phase 2 corridor. The Applicant did not present either alternative as part of its Application. In responding to the motions to compel, the Applicant pointed out that the information sought for Interstate 93 and the Phase 2 corridor was publically available and stated that it had “fully responded to these data requests and do not have additional responsive documents or information in their care, custody or control.” *See* Applicant’s Response and Objection to Certain Motions to Compel, pp. 37-38 (August 25, 2016). Each request was found to be irrelevant because it did not seek information about the route as presented by the Applicant. Since the Applicant did not offer either alternative as part of the Application the requests were not relevant in the context of a discovery dispute. The Discovery Order, however, does not prevent the parties from submitting their own evidence about alternatives.

As part of its consideration, the Subcommittee is required to decide whether construction and operation of the Project will interfere with the orderly development of the region, is in the public interest, and/or will have an unreasonable adverse effect on aesthetics, historic sites, natural environment, and water and air quality. *See* RSA 162-H:16. At this juncture we cannot say that all evidence of alternative routes or sites is irrelevant to these considerations. Evidence of alternatives might be relevant to the statutory factors that must be considered by the Subcommittee in granting or denying a Certificate or conditions that may be imposed if a Certificate is granted. The Applicant's request to strike portions of the pre-filed testimony addressing alternative routes of the Project filed by George Sansoucy, Sharon A. Penney and Will Abbott is denied.

D. Supplemental Testimony

The Applicant requests to strike the supplemental pre-filed testimony filed by the following intervenors: (i) Stephan T. Nix; (ii) F. Maureen Quinn; (iii) George E. Sansoucy; (iv) Carl Martland; (v) Linda Lauer; and (vi) Will Abbott.

1. Stephan T. Nix' Supplemental Testimony

The Applicant argues that Mr. Nix' supplemental pre-filed testimony should be struck because it is based on, and addresses, the design package that was prepared by the Applicant's experts in response to the request of the Department of Transportation. The Applicant argues that the information contained in Mr. Nix' supplemental pre-filed testimony was available to him at the time of his original pre-filed testimony and, therefore, should have been included when it was filed.

The Combined Group of Intervenors, Clarksville and Stewartstown, argue that Mr. Nix' supplemental pre-filed testimony should be allowed because it addresses evidence, issues, and

arguments that arose during the discovery phase of this matter. Specifically, the intervenors argue that the Applicant asked Mr. Nix during technical sessions to identify each and every claimed deficiency of the Applicant's right-of-way plans. Mr. Nix' supplemental pre-filed testimony was developed to answer those questions.

Since Mr. Nix' supplemental pre-filed testimony addresses issues that were raised during the discovery phase of this matter in response to the Applicant's questions, it is allowed and the Applicant's request to strike Mr. Nix supplemental pre-filed testimony is denied.

2. F. Maureen Quinn's Supplemental Testimony

The Applicant claims that reports provided with Ms. Quinn's supplemental pre-filed testimony were published and available to Ms. Quinn at the time of her original testimony. For that reason, the Applicant argues that the reports should have been provided as part of Ms. Quinn's original testimony and asks to strike Ms. Quinn's pre-filed testimony.

Ms. Quinn argues that her supplemental pre-filed testimony was developed and provided in response to the Applicant's questioning during the technical sessions. She argues that during the technical sessions, the Applicant made certain inquiries about her position that the Project and its associated electromagnetic field will have an adverse effect on public health and safety. She claims that her supplemental pre-filed testimony clarifies her position and provides additional supporting documentation that was produced in response to the Applicant's inquiry.

Ms. Quinn's supplemental pre-filed testimony was prepared and submitted in response to the Applicant's questions submitted during the technical sessions. Ms. Quinn's testimony should be allowed as testimony that clarifies and further supplements original testimony in response to the Applicant's inquiry. The Applicant's request to strike Ms. Quinn's supplemental pre-filed testimony is denied.

3. George E. Sansoucy's Supplemental Testimony

In addition to the argument dealt with above regarding alternative routes, the Applicant claims that information contained in Mr. Sansoucy's supplemental testimony was available to him at the time his original testimony was submitted and should have been addressed then.

The Municipalities object and assert that Mr. Sansoucy's supplemental pre-filed testimony addresses the following issues: (i) information related to the results of ISO-New England's Forward Capacity Auction; (ii) information related to the Massachusetts Clean Energy RFP; (iii) testimony regarding alternatives such as the Hydro-Quebec Phase 1 and 2 lines; and (iv) testimony addressing the Public Utilities Commission's decision in Order 25,953 addressing Northern Pass Transmission, LLC's, request to operate as a public utility.

The Municipalities assert that, at the time of original pre-filed testimony, Mr. Sansoucy did not and could not know about the results of the ISO-New England's Forward Capacity Auction that were released after he submitted his pre-filed testimony. The Municipalities also argue that, at the time of his original testimony, Mr. Sansoucy did not and could not realize the significance of the Massachusetts Clean Energy RFP and, therefore, could not address it prior to submitting his supplemental testimony. Finally, as to the Hydro-Quebec Phase 1 and 2 lines and the Public Utilities Commission's decision, the Municipalities argue that the Applicant inquired into the Project's alternatives and passing the costs of the Project to the ratepayers during the technical session and information addressing these alternatives and Public Utilities Commission's decision was included in Mr. Sansoucy's supplemental testimony in response to the Applicant's inquiry.

Mr. Sansoucy's supplemental pre-filed testimony addresses information that became available to him or the relevance of which became apparent following submittal of his original

testimony. It also addresses the Applicant's questions presented during the technical sessions that followed the submittal of Mr. Sansoucy's pre-filed testimony. In addition, as indicated above, information related to alternative routes and/or projects is relevant to these proceedings. The Applicant's request to strike Mr. Sansoucy's testimony is denied.

4. Carl Martland's Supplemental Testimony

The Applicant asserts that Mr. Martland's testimony should be struck because it was developed in response to the Applicant and Counsel for the Public's inquiries made during the technical sessions and, in effect, is late direct testimony that should have been filed earlier.

The Applicant admits that Mr. Martland's testimony was developed and submitted in response to inquiries made during technical sessions. Mr. Martland's testimony was developed as a result of concerns raised in the discovery phase of this matter and is proper. The Applicant's motion to strike Mr. Martland's supplemental pre-filed testimony is denied.

5. Linda Lauer's Supplemental Testimony

The Applicant claims that Ms. Lauer supplemented her testimony by including the "Lincoln – Woodstock Workforce Survey & Program Report," that was available to her at the time of her original pre-filed testimony.

The Grafton County Commissioners argue that the study was provided to the Applicant in response to the Applicant's request during technical sessions and, therefore, should be allowed to be filed as supplemental testimony as evidence that was developed during the discovery following submittal of original pre-field testimony.

Ms. Lauer's supplemental testimony was developed in response to the Applicant's request during the technical sessions and is allowed. The Applicant's request to strike Ms. Lauer's supplemental testimony is denied.

6. Will Abbott's Supplemental Testimony

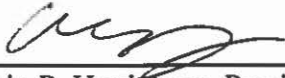
The Applicant claims that Mr. Abbott's supplemental pre-filed testimony addresses the Transmission Service Agreement and the cost of burying the Project and that this information was available to Mr. Abbott at the time of his original testimony.

The Forest Society claims that Mr. Abbott's supplemental testimony is based on the letter that was disclosed by the Applicant following submittal of his original testimony. The Forest Society also claims that the rules do not support a conclusion that supplemental testimony can be struck if it is not based on newly discovered evidence.

A review of Mr. Abbott's testimony indicates that it addresses the validity of the Transmission Service Agreement based on reports that became available to him following submittal of his original pre-filed testimony. Without having those reports available to him, Mr. Abbott could not address the issues of the validity of the Transmission Service Agreement raised in his supplemental testimony. As to the reference to the burial costs, Mr. Abbott's testimony articulates the inconsistencies between the Applicant's statements. Although it is not clear when such inconsistencies were identified, the supplemental testimony presents and addresses limited information that could be identified only after completing discovery addressing this issue. The Applicant's motion to strike Mr. Abbott's pre-filed testimony is denied.

SO ORDERED this twenty-fourth day of April, 2017 by the Site Evaluation

Subcommittee:



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee