

**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 27, 2017**

**ORDER DENYING MOTION TO COMPEL APPLICANT  
TO PROVIDE REQUESTED INFORMATION**

This Order denies the Intervenor's request to compel the Applicant to produce certain information related to discovery requests.

**I. Background**

In accordance with various procedural orders, technical sessions and discovery through data requests has been taking place. Unsatisfied with certain responses provided by the Applicant, the Abutting Property Owners, Bethlehem to Plymouth Intervenor Group (Intervenor) filed a Motion to Compel the Applicant to Provide Requested Information And to Suspend the Timeframe for Supplemental Testimony and Adjudicative Hearings (Motion) on March 31, 2017. The Applicant objected on April 5, 2017.

The portion of the Motion that requests an order compelling discovery information is procedural. Pursuant to RSA 162-H:4, V, procedural motions may be decided by the presiding officer. A request to suspend the statutory time frame pursuant to RSA 162-H:14, however, must be decided by the entire Subcommittee. A hearing before the Subcommittee was held on April 6, 2017, regarding that portion of the Motion seeking suspension of the statutory timeframes. On April 25, 2017, the Subcommittee memorialized the decision it made at the hearing and issued a

written decision on the request to suspend. This order addresses only the procedural discovery issue.

## **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. Intervenors**

The Intervenors request an order compelling the Applicant to provide certain information regarding the underground portion of the Project that has previously been sought through data requests and during technical sessions. Specifically, the Intervenors request that the Applicant be compelled to provide the following information to all parties in this docket:

- The width of highway easements on all portions of the State highways within which the Applicant proposes to construct underground transmission lines;
- The location of easement boundaries on both sides of the highway easements, on all portions of the State highways within which the Applicant proposes to construct underground transmission lines; and
- The documentary and legal basis for the stated easement width and easement boundary locations.

The Intervenors note that, in response to various motions to compel information regarding the underground portion of the Project, an Order was issued on October 28, 2016,

requiring that the Applicant provide supplemental responses to data requests addressing the underground portion of the Project on or before December 15, 2016. The Intervenor acknowledges that on December 18, 2016, the Applicant provided a document titled: "*SHEBS Estate Bypass (SHEB) Underground Alignment Permit Package – NH DOT District 1*" (SHEB). The Intervenor argues that while SHEB purports to provide, among other things, the exact alignment of the underground portion of the Project between Bethlehem and Plymouth, and the exact locations of ancillary facilities, SHEB is deficient as it fails to respond to Counsel for the Public's data requests, and does not comply with the application requirements of RSA 162-H:7 and the N.H. CODE ADMIN. RULES Site 301.03.

The Intervenor indicates that they requested information from the Applicant pertaining to the underground portion of the Project at a technical session held on February 21, 2017. Those requests were documented in a Technical Session Memorandum issued on February 24, 2017. The Applicant was required to submit responses by March 6, 2017. The Intervenor acknowledges that the Applicant filed responses to the requests on March 6, 2017, but they note that the Applicant objected to some requests and declined to provide responsive information, indicating that additional information would be provided within approximately six to eight weeks (i.e., between April 17 and May 1, 2017).

The Intervenor argues that the information provided by the Applicant regarding the underground portion of the Project in Franconia, Easton, and Plymouth does not include the width of highway easements. The Intervenor argues that this is basic information required by N.H. CODE ADMIN. RULES Site 301.03(c)(3) and (4) and is critical to understanding the alignment of the proposed Project with respect to Project work zones that may encroach on abutting property and impact the abutters. The Intervenor argues that while many of the SHEB

diagrams depict easement boundaries, SHEB is deficient, in that: (1) the legal or documentary basis of these boundaries is not provided, and therefore the validity of the depicted boundaries cannot be assessed; (2) the online version of SHEB made available to the Intervenor does not have usable scales in most diagrams, and it is therefore impossible to determine the width of easements depicted or the distance of depicted easement boundaries from features on abutting properties; (3) notwithstanding the measurement difficulties, it is clear that many of the easement boundaries shown in SHEB are incorrect, and do not agree with the easement widths indicated in historic road deeds, land deeds, and road layout records, which establish the easement widths for the related highway segments; and (4) the Applicant states that SHEB is a “preliminary” design document, suggesting that the easement boundaries and locations of proposed work zones and Project components are not final, and are subject to change.

The Intervenor asserts that the information provided by the Applicant thus far indicates that the Project will encroach on private land. The Intervenor notes inaccuracies in the information provided in SHEB, which in some instances indicate that easements are larger than the recorded width, resulting in a greater encroachment on private property than is depicted by SHEB.

The Intervenor argues the Applicant failed to provide basic information such as accurate, documented easement widths and boundaries for all proposed underground portions of the Project as required by N.H. CODE ADMIN. RULES Site 301.03(c)(3) and (6), and as requested by various parties in this docket. The Intervenor asserts that the Applicant’s alleged failure makes it impossible for the Intervenor to determine with any certainty the proposed alignment or location of the Project, and further that this lack of information erodes the reliability of all of the Project alignments and layouts depicted in SHEB, thus denying the Intervenor the opportunity to assess

the potential impacts of the Project on their property until such time as accurate highway easement widths and boundary locations have been established and final alignments and locations specified. The Intervenor's argue that, in light of the Applicant's proposed timeframe to provide additional responsive information between April 17 and May 1, 2017, and under the current procedural schedule, the Intervenor's will be denied the opportunity to review and scrutinize this information, or to conduct any further discovery regarding the same, prior to the deadline for filing pre-filed or supplemental pre-filed testimony and the start of the adjudicative proceeding. The Intervenor's assert that not having the information prior to the adjudicative proceedings deprives them of the opportunity to prepare for the portions of the adjudicative hearing that address the impacts of the underground portion of the Project, thus denying them due process.

**B. Applicant**

The Applicant argues that the Motion is based on the flawed premise that the DOT permitting process must be complete prior to the discovery and hearing process in this docket. Specifically, the Applicant contends that the Motion is based on the mistaken notion that the Applicant's underground engineering, design and construction plans must amount to final construction plans before the adjudicative hearing begins. The Applicant argues that the Motion misses the mark in that it seeks to limit DOT's exercise of its permitting authority and that DOT applies its own processes, requiring that a petitioner refine its design over time and conform it to the agency's specific requests.

With respect to the Intervenor's concerns regarding the impact of the Project on their property, the Applicant submits that, in response to several data requests in this docket, the Applicant has indicated that the Project will not, and cannot, be constructed outside of the road

right-of-way and that the Applicant has been working with the DOT on an ongoing basis to address such concerns. The Applicant indicates that, in response to a DOT request, the Applicant is preparing a right-of-way drawing that will delineate the widths and boundaries of the highway easements. To that end, DOT conditioned its approval of the Project on the following:

The Applicant shall provide a certified survey report delineating means and methods of determining the right-of-way shown on the plans. The report shall include notations on all records and plans used and the monumentation held to control the right-of-way lines. The report will be certified by the Licensed Land Surveyor in charge that the right-of-way lines shown on the submitted plans are accurate locations defined by ground survey and all pertinent research.

Applicant's Objection to Motion to Compel and Suspend, p. 4-5 (quoting DOT Final Decision, April 3, 2017, p. 3).

The Applicant has stated that it will produce a copy of the drawing once it is submitted to DOT, which will include the requested widths and boundaries of the highway easements proposed for the Project. Ultimately, the Applicant argues that the Intervenors' concerns are addressed in that the Applicant is required by law to construct the Project within the bounds of highway easements; and DOT has expressly conditioned its approval of the Project on the Applicant demonstrating that they will abide by that requirement. The Applicant argues that compelling such information is unnecessary inasmuch as the Applicant has already committed to providing the information when it becomes available.

The Applicant also argues that the Intervenors' Motion fails on the following procedural grounds: (1) the Motion is untimely to the extent the Motion seeks information responsive to the February 24, 2017, technical session memorandum, as the Applicant provided responses and objections on March 6, 2017, thus any motion to compel would have been due March 16, 2017; (2) the Motion seeks to compel information responsive to data requests made by Counsel for the

Public, which the Intervenors have no standing to compel; and (3) the Intervenors failed to make a good faith effort to resolve the discovery dispute informally as required by N.H. CODE ADMIN. RULES Site 202.12(k)(4).

#### **IV. Analysis**

The Intervenors essentially seek final construction plans, but they fail to realize the iterative nature of the DOT process. The Applicant has identified its ongoing efforts to address the Intervenors' concerns and has committed to providing the requested information when it becomes available. The Applicant has indicated that it is preparing the information in response to a DOT request and will produce it upon submission to DOT. Compelling the Applicant to produce the information requested by the Intervenors is unnecessary in that the Applicant has not refused to provide it, and has in fact committed to providing it upon completion. The Applicant will not be compelled to produce information that it does not yet have readily available to it.

On April 3, DOT submitted a cover letter with 12 pages of draft conditions to the Subcommittee. The DOT letter stated that concerns raised during its review process will be resolved before DOT allows construction to begin. The letter explained the iterative nature of the process, which will not be complete until the design is finalized and documented on final construction drawings. It is not necessary for an Applicant to have final construction plans in hand for an adjudicative proceeding to proceed, or for parties to the proceeding and the Subcommittee to question the Applicant regarding its construction plans. The Subcommittee is authorized to delegate authority to state agencies in a Certificate of Site and Facility. *See* RSA 162-H: 4, III-a. In addition, RSA 162-H:16, VII, permits the Subcommittee to "condition the certificate upon the results of required federal and state agency studies whose study period exceeds the application period." In any event, if the Subcommittee finds that the Applicant has

failed to provide construction plans that meet the burden of proof, the Certificate will not be granted.

To the extent that the Motion seeks information requested by Counsel for the Public, the Intervenor's do not have standing to compel further responses to data requests that they did not propound.

The Intervenor's request to compel is denied.

SO ORDERED this twenty-seventh day of April, 2017.



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Martin P. Honigberg, Presiding Officer  
Site Evaluation Committee