

**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 24, 2017**

**ORDER DENYING MOTION FOR REHEARING  
(September 12, 2017, Procedural Order)**

This Order denies a motion for rehearing filed by the Society for the Protection of New Hampshire Forests (Forest Society).

**I. Background**

On September 12, 2017, a Procedural Order was issued that, among other things, denied a motion filed by the Applicant to determine the extent of friendly cross-examination. The Procedural Order, in relevant part, stated:

On or before September 22, 2017, each intervenor shall file a list identifying each witness that the intervenor seeks to cross-examine (excluding the remaining Applicant witnesses). Regarding each witness or witness panel, the list shall include the following information:

1. Whether the examining party believes that its position is adverse to the witness including all reasons; and
2. If the examining party is not adverse to the witness, the examining party must identify the areas of cross-examination and why the cross-examination is necessary to a full and true disclosure of the facts.

Procedural Order, at 3-4. The Procedural Order continued: “[t]he Subcommittee will use the lists in determining whether the proposed friendly cross-examination is necessary to a full and true disclosure of the facts.” *Id.* at 4.

On September 15, 2017, the Deerfield Abutters filed a Motion to Reconsider and modify that part of the Procedural Order addressing friendly cross-examination and the Applicant objected.

On October 2, 2017, the Forest Society filed a Motion for Rehearing of the Procedural Order. Municipal Group 1 South; Municipal Group 2; Municipal Group 3 North; Municipal Group 3 South; Grafton County Commissioners; Non-Abutting Property Owners Bethlehem to Plymouth Group of Intervenors; and Clarksville and Stewartstown–Abutting and Non-Abutting Property Owners Group of Intervenors joined in the Forest Society’s motion. The Applicant objected.

On September 21, 2017, all parties agreed to revise the deadline for the filing the information required by the Procedural Order and the Presiding Officer orally approved the agreement. *See* Transcript, September 21, 2017 (Day 37, Morning Session), p. 7. Following that decision, the Deerfield Abutters withdrew their motion. *Id.*

## **II. Standard**

N.H. CODE ADMIN. RULES Site 202.29 provides that a motion for rehearing shall:

- (1) Identify each error of fact, error of reasoning, or error of law which the moving party wishes to have reconsidered;
- (2) Describe how each error causes the committee’s order or decision to be unlawful, unjust or unreasonable;
- (3) State concisely the factual findings, reasoning or legal conclusion proposed by the moving party; and
- (4) Include any argument or memorandum of law the moving party wishes to file.

A request for a rehearing may be made by “any party to the action or proceeding before the commission, or any person directly affected thereby.” RSA 541:3. Motions for rehearing

must specify “all grounds for rehearing, and the commission may grant such rehearing if in its opinion good reason for the rehearing is stated in the motion.” *Id.* Any motion for rehearing “shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” RSA 541:4.

“The purpose of a rehearing is to direct attention to matters said to have been overlooked or mistakenly conceived in the original decision, and thus invite reconsideration upon the record to which that decision rested.” *Dumais v. State of New Hampshire Pers. Comm.*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing may be granted upon a finding of “good reason.” *See* RSA 541:3. A motion for rehearing must be denied where no “good reason” or “good cause” has been demonstrated. *See O’Loughlin v. N.H. Pers. Comm.*, 117 N.H. 999, 1004 (1977); *see also In re Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

### **III. Positions of the Parties**

The Forest Society asserts that the Procedural Order is unlawful and unreasonable because it deprives it and other intervenors of due process. The Forest Society argues that the Procedural Order is unreasonable or unlawful because it identifies and addresses “friendly” cross-examination by the parties while RSA 541-A, and the Committee’s rules do not recognize such a distinction and that this effectively limits the parties from protecting the interests that formed the basis for intervention. The Forest Society asserts that the Procedural Order unlawfully limits scope of the parties’ cross-examination prior to the hearing, undermines the right to conduct cross-examination and violates due process because it requires the parties to preview for the Applicants its cross-examination strategy. The Forest Society also argues that the Procedural Order is arbitrary because it contradicts prior orders issued in this docket.

The Applicant argues that there is not good cause for rehearing and that the Order is not unjust and unreasonable, since it does not require the intervenors to identify each and every question on cross-examination, but requests that they identify the subject areas about which they seek to cross-examine witnesses whose positions are not adverse. The Applicant also asserts that the Order does not violate due process because it is simply designed to identify cross-examination that will be redundant and unnecessary for the full and true disclosure of the facts. The Applicant asserts that the Procedural Order is consistent with existing law.

#### **IV. Analysis**

The Forest Society overstates the requirements in the Procedural Order and fails to state a good cause for rehearing. The Procedural Order does not preclude any line of cross-examination. While the Procedural Order defines “friendly” cross-examination for the benefit of the parties, it does not preclude cross-examination whether characterized as “friendly” or not. The Procedural Order specifically states that the information provided by the parties will assist the Subcommittee in determining “whether the proposed friendly cross-examination is necessary to a full and true disclosure of the facts.” The Subcommittee’s ultimate determination on whether cross-examination is necessary for a full and true disclosure of the facts is specifically authorized under RSA 541-A:33, IV, and N.H. CODE ADMIN. RULES Site 202.24(a). Limitation of cross-examination that is “irrelevant, immaterial, or unduly repetitious ... [or] is not required for a full and true disclosure of the facts” is specifically authorized by RSA 541-A:33, II and N.H. CODE ADMIN. RULES Site 202.02(c)(4).

The Procedural Order was issued because of the time estimates provided by Counsel for the Public, the Forest Society, and other intervenors at the Third Prehearing Conference held on August 9, 2017. *See* Report of Third Prehearing Conference, August 15, 2017. Those time

estimates indicated that the various parties intended to conduct lengthy friendly cross-examination and demonstrated a misunderstanding of the purpose and scope of cross-examination.

Cross-examination should be allowed to the extent that it is required for a full and true disclosure of facts. *See* RSA 541-A: 33, IV. Friendly cross-examination is improper when it is used as a means to simply repeat prefiled direct testimony or when it is used to introduce new opinions and/or testimony that should have been included in prefiled direct testimony. The concern that parties intended to conduct lengthy and improper examinations contributed to the decision to require the parties to submit lists explaining the areas of expected cross-examination.

The Procedural Order did not require the parties to provide specific outlines of cross-examination, but required the parties to describe “areas” of cross-examination of non-adverse witnesses and state why such examination is necessary. The identification of areas of cross-examination of witnesses that are not adverse to the intervenors gives no advantage to the Applicant, who will be doing its cross-examinations after the intervenors, nor does it jeopardize any intervenor’s ability to present a case.

The argument that similar information was not required of the parties that generally support the Applicant is unpersuasive. The intervenors who support the Applicant conducted little, if any, cross-examination of the Applicant’s witnesses. Their estimates of the time needed for cross-examination were reasonable and did not raise the same concerns as the estimates provided by the parties that oppose the Project.

The Forest Society’s argument that the Procedural Order limits the ability of parties to protect the interests that formed the basis of intervention is without merit. There is nothing in the Procedural Order that limits the rights of intervenors or limits participation in this docket. The

intervenors in this docket have been accorded all of the rights and privileges that any party in an administrative proceeding would enjoy. As of the date of this Order, there have been fifty (50) days of evidentiary hearings. Every participant in the proceedings has been afforded the ability to fully cross-examine witnesses about matters that are relevant to a full and true disclosure of the facts.

It is worth noting that the parties have since filed information in response to the Procedural Order. The information that was provided by most intervenors was conclusory and generally not helpful. Many of the filings did nothing but repeat the criteria the Subcommittee must consider in reviewing the Application and did not explain why friendly cross-examination would be required for a full and true disclosure of the facts. With a few exceptions, compliance with the Procedural Order was in form only.

That said, since the Procedural Order was issued, the Applicant has rested its case, Counsel for the Public has presented testimony and evidence from expert witness panels, and a number of intervenors have testified as well. During the recent hearing sessions, the parties have asked hundreds of questions, some of which have drawn objections from the Applicant as being improper friendly cross-examination. Those objections have been resolved on a question-by-question basis. In addition, with the experience of having been through the recent witness examinations, a large number of the parties have provided the Administrator with revised and more realistic time estimates for their cross-examinations.

Under the circumstances as they have unfolded, the majority of the parties appear to understand the proper scope of cross-examination necessary to a full and true disclosure of the facts. There is no need at this point to issue a further order requiring the parties to comply with

the Procedural Order as it relates to friendly cross-examination. Objections will continue to be resolved as they are made during the hearing. The Motion for Rehearing is denied.

SO ORDERED this 24th day of October, 2017.

A handwritten signature in black ink that reads "Martin P. Honigberg". The signature is written in a cursive style with a horizontal line underneath the name.

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Martin P. Honigberg, Presiding Officer  
Site Evaluation Committee