

**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 25, 2017

**ORDER DENYING MOTIONS TO COMPEL APPLICANT'S UNREDACTED BID
INTO THE MASSACHUSETTS REQUEST FOR PROPOSALS**

This Order denies the Joint Motion to Compel Applicant's Unredacted Bid into the Massachusetts Request for Proposals filed by the Society for the Protection of New Hampshire Forests (Forest Society) and the NGO Intervenors, and the Motion to Compel Unredacted Bid Submitted in Response to the Massachusetts Clean Energy Request for Proposals filed by Counsel for the Public.

I. Background

On August 28, 2017, the Society for the Protection of New Hampshire Forests (Forest Society) and the NGO Intervenors filed a Joint Motion to Compel Applicant's Unredacted Bid into the Massachusetts Request for Proposals (Joint Motion to Compel). On September 8, 2017, Counsel for the Public filed a Motion to Compel Unredacted Bid Submitted in Response to the Massachusetts Clean Energy Request for Proposals. The Applicant objected to both motions.

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.

RSA 162-H:10, IV provides:

The site evaluation committee shall require from the applicant whatever information it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.

III. Position of the Parties

A. Forest Society & NGO Intervenors Motion

i. Joint Movants

The Joint Movants argue that the Massachusetts Request for Proposals (Mass RFP) bids “are relevant to these proceedings because the success of Applicant's bids into the Mass RFP relate directly to the financial capability and claimed benefits of the Project.” Joint Motion to Compel, p. 3. The Joint Movants state that the Applicant was required to produce information related to the Tri-State Clean Energy RFP bid to parties that had signed confidentiality agreements, and that the Presiding Officer has repeatedly affirmed that the Mass RFP bids are relevant. The Joint Movants argue that there is a significant public interest in the unredacted disclosure.

According to the Joint Movants, “[b]ecause the Mass RFP bids are just as relevant as the Tri-State Clean Energy RFP bid, and the Applicants are participating in the Mass RFP only because their bid for the Tri-State Clean Energy RFP failed, the prior Orders requiring production (subject to confidentiality agreements) of the Clean Energy RFP apply to the Forest

Society's present request that the Presiding Officer compel the Applicant to produce unredacted versions of the Mass RFP bids." Joint Motion to Compel, p. 6.

The Joint Movants cite the Order on Motions to Compel issued on September 22, 2016, granting (subject to the provisions in the May 25, 2016, Confidentiality Order) a request that the Applicant produce additional responsive documents and/or information to the Forest Society's Data Request 26, which sought information pertaining to the recoupment of the costs of the Canadian portion of the Project. The Joint Movants note that their Motion to Compel requested that the "SEC order the Applicants to submit unredacted versions of the Tri-State Clean Energy RFP." The Joint Movants next point to the October 4, 2016, Order granting the Forest Society's request to compel the Applicant to produce responsive documents and information that had previously been provided only to Counsel for the Public. The Joint Movants argue that those two Orders demonstrate that the Applicant had to produce an unredacted copy of the Tri-State Clean Energy RFP. Finally, the Joint Movants cite the Presiding Officer's Order dated December 13, 2016, on the Applicant's Motion for Clarification, which concluded that the Applicant must provide unredacted versions of Ms. Frayer's pre-filed testimony and her report titled: "Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Project (LEI Report)" to those parties that signed confidentiality agreements.

ii. Applicant

The Applicant argues that the Joint Motion to Compel is deficient for two reasons. First, the Applicant argues that the Motion to Compel is not linked to any specific underlying data request propounded by either the Forest Society or the NGO Intervenors. Second, the Applicant argues that, contrary to the assertions of the Joint Movants, no order of the SEC directed the Applicant to produce an unredacted version of the Applicant's Tri-State Bid, and there is no basis for compelling production of the Mass Bid.

The Applicant argues that the Forest Society's Data Request 26 pertains only to costs on the Canadian side of the Project, and therefore, the Applicant has no obligation under Site 202.12(m) to supplement its response with information pertaining to the Mass RFP Bid. The Applicant notes that in its Motion to Compel dated August 15, 2016, the Forest Society went beyond the scope of the data request and asked that the Applicant be ordered to produce an unredacted version of their Tri-State Clean Energy RFP proposal.

The Applicant further notes that on October 21, 2016, the Applicant moved for clarification insofar as the September and October Orders:

Might be interpreted to require production of documents related to the Tri-State Clean Energy Request for Proposals ("Clean Energy RFP") process. Specifically, the Applicants ask the Presiding Officer to clarify that they are not required to produce the Delivery Performance Agreements ("DPA") dated January 22, 2016, the Amended and Restated Transmission Service Agreement ("Amended TSA") dated January 22, 2016, and Section 5.2 of Eversource Energy's Proposal to the Tri-State Clean Energy RFP.

On December 13, 2016, the Presiding Officer issued an Order on the Applicant's Motion for Clarification (Clarification Order). The Applicant notes that the Clarification Order provides:

The Applicant has noted potential inconsistencies between prior orders in this docket with respect to the Applicant's obligation to produce the DPA, Amended TSA, and Section 5.2. *This Order is intended to clarify any perceived inconsistencies between prior orders and shall supersede such orders.* In accordance with the Order on Applicants' Further Motion for Confidential Treatment, the Applicant is not required to produce unredacted copies of Ms. Frayer's pre-filed testimony and the LEI Report to [the] public. The documents, however, must be provided to parties that have entered into confidentiality agreements with the Applicant.

Applicant's Objection, p. 3 (emphasis as in Objection). The Applicant argues that the Clarification Order superseded the prior order and submits that under the Clarification Order, it had to produce three specific documents: (1) the DPA; (2) the Amended TSA; and (3) Section 5.2 of the Tri-State Bid, which responded to a data request propounded by Counsel for the

Public. The Applicant argues that as a further consequence of the Clarification Order, to the extent the prior orders could possibly have been interpreted to apply to the unredacted Tri-State Bid, a point which the Applicant does not concede, the Presiding Officer made clear that the Clarification Order superseded such orders.

B. Counsel for the Public's Motion to Compel

i. Counsel for the Public

Counsel for the Public supports the arguments in the Joint Motion to Compel. Counsel for the Public argues that his unique role in representing the public in energy siting proceedings warrants compelling disclosure of the Mass Bids to Counsel for the Public. Counsel for the Public argues that he is tasked with seeking to protect the quality of the environment and assuring an adequate supply of energy; and in fulfilling his role, Counsel for the Public should understand how the supply of energy crossing New Hampshire for consumption in the New England markets will benefit the public in New Hampshire. Counsel for the Public notes that Hydro-Quebec is not a party to this proceeding and argues that the Applicant's primary understanding as to how Hydro-Quebec would utilize the capacity on the Project is by analyzing specific transactions like the Power Purchase Agreement (PPA) or participation in RFPs.

Counsel for the Public argues that the largest single benefit claimed by the Applicant is the Project's impact on wholesale energy prices and how those savings affect New Hampshire retail rates. Counsel for the Public submits that there are two fundamental questions that the Subcommittee and Counsel for the Public must address when evaluating the Project: (1) How will Hydro-Quebec utilize the transmission capacity for the Project; and (2) How will that use benefit New Hampshire residents? Counsel for the Public argues that another critical question to answer is what resources Hydro-Quebec might use to satisfy its commitments to supply energy market products over the Project. Counsel for the Public notes that the Applicant has continually

stated that the Project would carry hydroelectric power; however, one of the Mass Bids contains commitments from both hydroelectric and wind power. Counsel for the Public argues this change is critical because it could have a meaningful impact on the benefits that the Project will have in the New England energy markets and specifically to New Hampshire's electric ratepayers.

Counsel for the Public submits that he hired the Brattle Group specifically to address these questions. The Brattle Group has reviewed unredacted copies of the HRE PPA and the proposals into the Tri-State RFP. Counsel for the Public argues that the unredacted versions of those documents contain the key commercial terms explaining how the products being transmitted across the Project will be utilized in the New England energy markets. Counsel for the Public also argues that his witnesses on local economics, Kavet, Rockler & Associates (Kavet Rockler), depend on answers to the questions listed in the previous paragraph to determine potential local benefits of the Project. Counsel for the Public argues that the Brattle Group and the Kavet Rockler witnesses must understand the terms of the proposals to inform their testimony. Counsel for the Public states that when the Applicant withdrew the PPA from consideration in this docket, the only remaining proposal for how Hydro-Quebec would utilize the capacity on the transmission line was the bid into the Mass RFP. Counsel for the Public asserts that the Mass RFP bids are therefore the only actual proposals that may assist in answering the fundamental questions at issue in this docket.

Counsel for the Public argues that the Mass RFP proposals are directly relevant to the central findings that Counsel for the Public must address and that the Subcommittee must make in this docket. Counsel for the Public notes that the Applicant acknowledged that this type of information is relevant by relying on the PPA's benefits as evidence in this docket and providing the Tri-State RFP bid to Counsel for the Public. Counsel for the Public notes that both William

Quinlan and Julia Frayer discussed the Mass RFP extensively during live testimony, and that at least one of the Applicant's witnesses indicated that the Project would likely not proceed without being successful in a solicitation like the Mass RFP. Counsel for the Public argues there is a real question about whether the Project will ever move forward without a successful bid into the Mass RFP.

Counsel for the Public notes that the request for RFP-related documents came as part of informal requests for information that preceded formal discovery. Counsel for the Public states that, because of the Applicant's willingness to provide information informally, Counsel for the Public made no formal data request for RFP-related documents and argues that the Applicant should be compelled to provide the unredacted copies of the Mass RFP proposals as a supplement to Counsel for the Public's informal request. Counsel for the Public further argues that regardless of whether the requested documents are a supplement to an existing request, the documents are of such a fundamental nature to the statutory conclusions and analysis in this docket that the Subcommittee, Counsel for the Public, and the parties should have an opportunity to review the proposals and understand how they impact the Applicant's claims regarding the project benefits. Finally, Counsel for the Public argues that the public interest in allowing the parties to view the information in the Mass RFP bids outweighs the Applicant's need for privacy, especially if the documents are provided under the restrictions in the existing protective order.

ii. Applicant

The Applicant argues that Counsel for the Public failed to link its Motion to Compel to a specific data request or Subcommittee Order and that the Presiding Officer has clarified that informal data requests are not subject to the rules governing Motions to Compel. The Applicant acknowledges that Counsel for the Public has a unique role differentiating him from other

participants in the proceeding, but argues that this role does not afford Counsel for the Public any special privileges in the traditional discovery practice.

The Applicant asserts that Counsel for the Public misconstrues the operation of the regional electricity market when he argues that he must understand how the supply of energy crossing New Hampshire for consumption in Southern New England markets will benefit the public in New Hampshire. The Applicant states that, regardless of what happens with the Mass RFP bids: (1) the electricity from the Project will enter the New England regional grid in Deerfield, N.H., suppressing wholesale energy prices in New Hampshire and the rest of New England, and the electricity will not “cross” into Massachusetts for consumption in Southern New England without providing benefits in New Hampshire; (2) the electricity market operated by the Independent System Operator–New England (ISO-NE) performs in such a way that the wholesale electricity market benefits from the Project depend on physical deliveries and not contractual arrangements; and (3) the Mass RFP is intended to procure energy, not capacity, and HRE will therefore be in the same place when it bids into future ISO-NE capacity auctions irrespective of how the Mass RFP bid progresses.

The Applicant argues that Counsel for the Public is simply wrong about the fundamental questions in this docket, and that the Project’s impact on wholesale energy prices and retail rates in New Hampshire is unaffected by the success of the Mass RFP bids.

The Applicant argues further that Counsel for the Public strains to equate the Mass Bids to the PPA as a basis for requiring production. The Applicant submits that the PPA would have delivered benefits directly to New Hampshire through an agreement with PSNH, and that the Mass RFP is not a substitute for the PPA and takes nothing away from New Hampshire ratepayers.

The Applicant takes issue with the contention that the Mass RFP bids are relevant based on statements attributed to the Applicant's witnesses, Mr. Quinlan, Ms. Frayer, and Mr. Auseré. The Applicant argues that clear testimony contradicts Counsel for the Public's conclusion that there is a real question about whether the Project will ever move forward without a successful bid into the Mass RFP. The Applicant submits that the witnesses have unequivocally stated that the development of the Project is not predicated on any one solicitation and that, regardless of the outcome of the Mass RFP, the Applicant intends to move forward with development of the Project.

IV. Analysis

The Mass RFP bids have not been offered as evidence in this proceeding and the Site Evaluation Committee does not have these documents. The request is purely a discovery request and does not implicate RSA 91-A.

Under RSA 162-H:10, IV, the Site Evaluation Committee "shall require from the applicant whatever information *it deems necessary to assist in the conduct of the hearings, and any investigation or studies it may undertake, and in the determination of the terms and conditions of any certificate under consideration.*" The Joint Movants and Counsel for the Public have failed to demonstrate the information requested is necessary to assist in the conduct of the hearings.

The Applicant does not claim any benefits associated with the Mass RFP bids as part of its Application for a Certificate of Site and Facility and does not seek admission of the Mass RFP bids as part of the record in support of the Application. The prior confidentiality orders in this docket acknowledge the Applicant's substantial interest in protecting competitively sensitive information relevant to RFP bids. Specifically, the information sought may expose the Applicant's bidding strategy to competitors, may provide an unfair advantage to the Applicant's

competitors, and may ultimately jeopardize the Applicant's ability to win the bid. As the Applicant has noted, there is no underlying data request tied to the requests for an order compelling production of the two Mass RFP bids. Counsel for the Public has identified no special interest in the Mass RFP bids warranting disclosure to him to the exclusion of all others.

Finally, if further clarification is necessary, the Applicant is correct in noting that the Clarification Order superseded prior orders and was limited to requiring the Applicant's production of those documents outlined in that Order to parties that have signed confidentiality agreements with the Applicant. The Order did not require the Applicant to produce an unredacted version of the Tri-State Clean Energy RFP. The Joint Motion to Compel and Counsel for the Public's Motion to Compel are denied.

SO ORDERED this twenty-fifth day of October 2017 by the Site Evaluation Subcommittee:



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee