

**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**

December 22, 2017

**ORDER ON MOTION FOR REHEARING
OF RULINGS FROM THE BENCH**

This Order denies a motion filed by the Society for the Protection of New Hampshire Forests (Forest Society) for Rehearing of the October 6, 2017, and Subsequent Rulings from the Bench Limiting the Intervenors' Cross-Examination.

I. Background

On September 12, 2017, a Procedural Order was issued that, in part, addressed "friendly" cross-examination during the adjudicative hearing.

On October 2, 2017, the Forest Society requested rehearing of that part of the Procedural Order addressing friendly cross-examination. The request for rehearing was denied on October 24, 2017.

On November 6, 2017, the Forest Society filed the pending Motion for Rehearing. The Applicant objected.

II. Standard

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.

See N.H. CODE ADMIN. RULES Site 202.29.

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 argues that the Presiding Officer’s rulings from the bench, starting on October 6, 2017, are inconsistent, erroneous, and are not supported by law. Specifically, the Forest Society claims the Presiding Officer’s rulings: (i) unequally treat parties that are represented and not represented by counsel in these proceedings; (ii) unequally treat parties that support and oppose the Project; (iii) are inconsistent; (iv) erroneously assume that all parties that

oppose the Project and Counsel for the Public are “friendly” to each other for cross-examination; and (v) limit cross-examination in a manner that is not supported by the law (i.e. bars inquiry into the matters that could be but were not covered by direct prefiled testimony). The Forest Society also argues that limitations on cross-examination shift the burden of proof to the Intervenors and hinder a full and true disclosure of the facts.

The Applicant objects to the Motion and argues that the Forest Society fails to state good cause for rehearing, fails to articulate the specific relief requested, and simply reiterates arguments already considered and denied by the Order on Motion for Rehearing, issued on October 24, 2017. The Applicant asserts the Presiding Officer has allowed more “friendly” examination than was warranted and required to assure a full and true disclosure of the facts.

IV. Analysis

The Forest Society’s Motion for Rehearing of the Presiding Officer’s rulings is procedurally improper. The Forest Society does not seek specific relief. The only relief requested by the Forest Society is a request to grant the Motion. The Forest Society appears to believe that a written motion for rehearing is required every time it disagrees with an evidentiary ruling from the bench during the course of the proceeding. A proper and procedurally accepted avenue for the Forest Society’s request on evidentiary rulings is through filing a motion for rehearing of the final decision.

Procedural problems aside, the Forest Society has identified no error of fact or law that warrants rehearing. The Forest Society says that the Presiding Officer treated the parties unequally and his rulings on evidentiary issues were inconsistent and erroneous. The Forest Society’s characterization of the Presiding Officer’s rulings, and disagreement with the rulings, do not constitute good cause warranting rehearing.

The examples of unfair and inconsistent rulings cited in the Forest Society's Motion do not support its argument. The Forest Society argues that inconsistencies in the Presiding Officer's rulings are evidenced by the fact that the Presiding Officer did not allow Counsel for the Public's witnesses to testify about their conversation with the road agent that took place after they filed their testimony; but did allow them to testify about the exemptions filed with the Department of Transportation after submitting their prefiled testimony. The Forest Society mischaracterizes the record. The record indicates that the conversation with the road agent could have been conducted prior to filing the prefiled testimony and could have been addressed there. Counsel for the Public decided not to do so. The conversation with the road agent was not addressed in the witnesses' prefiled testimony and cross-examination addressing such conversations was outside the scope of the witnesses' direct testimony. In contrast, Counsel for the Public's construction panel unambiguously addressed construction of the Project under municipal roads and identified potential difficulties that pertain to such construction in their prefiled testimony. Testimony about exceptions filed with the Department of Transportation falls squarely within subject matter of their original testimony and addresses the information that was not available and could not be addressed by this panel during their testimony. The other examples or alleged unfair treatment of the parties pertain to the instances when the Presiding Officer granted the Applicant's objection upon the finding that subject matter of cross-examination was outside the scope of the witnesses' original testimony. Those arguments are similarly meritless.

The Forest Society's argument that the Presiding Officer erroneously assumed that all parties that oppose the Project and Counsel for the Public are "friendly" to each other for cross-examination is contrary to the record. The Forest Society argues that it is "implied" in limits on

cross-examination. The record attached to the Motion to support that “implication” discusses limits on cross-examination and the conduct of the proceedings. The discussion about the limits of cross-examination does not “imply” that Counsel for the Public and Intervenors that oppose the Project are “friendly.”

The Forest Society’s allegation that the Presiding Officer determined and “has explicitly” stated that all Intervenors that oppose the Project and Counsel for the Public are “friendly” is also not supported by the record:

Mr. PAPPAS: Let me just make one final point, that Counsel for the Public is not aligned with any party. We’re an independent party. So we’re not friendly or unfriendly with any particular party. We have a statutory role, and I’m reminded that we’re an independent party, not aligned with any of the parties.

CHAIRMAN HONIGBERG: Understood as a legal matter. But the positions you articulate and your witnesses articulate are agreeable to the folks who are opposed to this project.

MR. PAPPAS: Well, on some issues they may be, on other issues they’re not.

CHAIRMAN HONIGBERG: Oh, I acknowledge that. That is clearly true. There are areas where I think burial versus non-burial is one where there are places where some people say bury the line and others say don’t, and that’s an area where the parties are actually adverse to each other. The intervenors who are generally opposed to the Project, there are areas where on specific issues they are aligned. This does not appear to be one of those issues, however.

Tr., 10/23/17, Afternoon Session, at 139.

The Presiding Officer recognized Counsel for the Public’s special role in these proceedings and acknowledged that some witnesses may share the same position and some may not. This is hardly an “explicit” statement that Counsel for the Public and the Intervenors are “friendly” to each other. Contrary to the Forest Society’s arguments, the record demonstrates

that Counsel for the Public and Intervenors that oppose the Project are not treated as “friendly.”

The Procedural Order dated October 2, 2017 (Page 2), specifically states:

Cross-examination is normally conducted with witnesses that take an adverse position on a relevant issue. Friendly cross-examination is broadly defined as cross-examination of the witnesses of an allied party. *See* Scott Hempling, *Litigation Adversaries and Public Interest Partners: Practice Principles for New Regulatory Lawyers*, Energy L.J. v.36, 1, 29 (April 26, 2015). Friendly cross-examination may also extend to examination of the witness on issues about which the examining party and the witness agree. In some types of matters, friendly cross-examination is used to repeat points made in prefiled testimony or to provide a witness the opportunity to testify about matters not addressed in the prefiled direct testimony. In this case, however, both tactics are unnecessary to ensure a full and true disclosure of facts.

Consistent with this Order, each objection and reply to the objection made during the adjudicative hearing was addressed on case-by-case basis. Evidentiary rulings were made after consideration of the subject matter of cross-examination and a finding of whether it should be limited because it constitutes improper “friendly” cross-examination that is unnecessary to ensure a full and true disclosure of facts. The determination was made regardless of the position of the parties posing questions. The Forest Society’s disagreement with the Presiding Officer’s rulings does not constitute good cause for rehearing. The Motion for Rehearing is denied.

SO ORDERED this 22 day of December, 2017.



Martin P. Honigberg, Presiding Officer
Site Evaluation Committee