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Via Electronic Mail & Hand Delivery

Pamela Monroe, Administrator
New Hampshire Site Evaluation Committee
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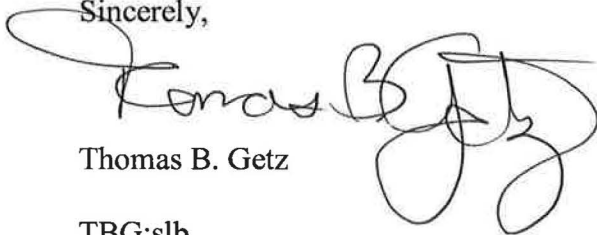
**Re: Site Evaluation Committee Docket No. 2016-03
Petition for Declaratory Ruling
Motion to Dismiss**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned proceeding, please find, consistent with Site 203.01 (a), an original and ten copies of a Motion to Dismiss filed by Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") (collectively, the "Applicants" in SEC Docket No. 2015-06). Pursuant to Site 202.07 (a) and (c), a copy of the Motion to Dismiss has been provided by electronic email to the parties on the service list.

Please contact me directly should you have any questions.

Sincerely,



Thomas B. Getz

TBG:slb

cc: SEC Distribution List

Enclosure

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

SEC DOCKET NO. 2016-03

**MOTION TO DISMISS
PETITION FOR DECLARATORY RULING**

Northern Pass Transmission LLC (“NPT”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) (collectively the “Applicants”),¹ by and through their attorneys, McLane Middleton, Professional Association, move to dismiss the Petition for Declaratory Ruling (“Petition”) filed by nineteen municipal entities, the Appalachian Mountain Club and the Society for the Protection of New Hampshire Forests (collectively, the “Petitioners”).

Introduction

1. This Petition is an unnecessary attempt to start a new proceeding to address an issue that has already been raised in SEC Docket 2015-6, the application by NPT and PSNH for a Certificate of Site and Facility for the Northern Pass Project (the “NPT Docket”), and that is being addressed in that Docket. The Committee has jurisdiction to consider this request in the NPT Docket but not separately, and should not – indeed cannot – rule on the request as stated.

2. First, the Petitioners are intervenors in the NPT Docket and most, if not all, of them have directly raised the issue of whether the construction of the Northern Pass line will interfere with public travel in that Docket. Thus, in this proposed docket, they ask the Committee to find that it cannot consider an issue they have previously asked it consider. Second, while the Petitioners can seek a declaratory ruling in the NPT Docket, where the

¹ Although not “Applicants” in this proceeding, NPT and PSNH are Applicants in SEC Docket 2015-6, where this request should have been made and are thus referred to in this Motion as the Applicants.

Committee has already asserted jurisdiction, the New Hampshire Supreme Court has ruled that they are not permitted to initiate a docket at the SEC by a petition for declaratory ruling except to seek a ruling on whether a project is an “energy facility” or a sizable addition to such a facility. This Committee is an agency of limited jurisdiction and cannot open a separate docket to rule on a general issue of law like the one the Petitioners request it to decide, any more than it could open a docket to rule on a general issue of municipal governance. Third, the Petitioners admit that the ruling they seek through the Petition is related to the NPT Docket, but also “broader than a single project.” This Committee has no jurisdiction to decide issues of law unrelated to a specific energy facility. Except as to the NPT Project, there is no live dispute that would permit even a court, let alone this Committee, to enter a declaratory ruling which amounts to an advisory opinion. Put simply, if the Petition seeks a ruling on a particular issue relating to the NPT Project, it must be filed in the NPT Docket or not at all. If it seeks a broader ruling, it raises issues for the courts and not this Committee, and even the court would not rule on such a request. The Petition should be dismissed.

The Petition Is Unnecessary and Redundant. Issues relating to Local Highways are Before the Committee in the NPT Docket

3. Petitioners ask the Committee to rule that RSA 231:160 grants the selectmen of the various municipalities exclusive jurisdiction over the construction of the NPT line “on, across, or under locally maintained highways.” Petition at 1. More specifically, they request that:

[t]he Committee issue a ruling declaring that pursuant to RSA 231:160 *et seq*, only municipalities have the authority to authorize or not authorize the erection, installation, or maintenance of electric power poles or structures or underground conduits or cable, or their respective attachments or appurtenances, on, across, or under locally maintained highways, regardless of whether the New Hampshire Department of Transportation (the “NHDOT”), the SEC or other agencies have authority to permit or license other portions of any proposed facility.

Petition at 14.

4. The authority of the selectmen under RSA 231:160 *et seq.* is limited solely to a consideration of whether electric lines “interfere with the safe, free and convenient use for public travel of the highway.” RSA 231:168. *Town of Rye v. Public Serv. Co. of N.H.*, 130 N.H. 365, 370 (1988). That issue is currently under consideration by this Committee in the NPT Docket and has been raised by a number of the Intervenorers in that Docket who are also Petitioners in this one.

5. RSA 162-H: 16, IV (b) provides that in order to issue a certificate, the Committee *shall find that*: “The *site* and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of regional planning commissions and *municipal governing bodies*.” (Emphasis added.) Putting aside the question of preemption, as intervenors in the NPT Docket each of the municipal petitioners is free to raise issues concerning whether the placement of the NPT line “on, across or under” a roadway will interfere with “public travel.” In fact, many of the intervenors have done so in that Docket. For example, the petitions for intervention of the Towns of Easton, Bristol and Northumberland each state that “[t]he project raises concerns regarding the safety of travelers and the public.” Petitions for Intervention at ¶¶ 2. The petitions for intervention of Woodstock, New Hampton, Bristol, Easton, Northumberland also contain a document entitled “Municipalities’ Platform for Intervention in the Northern Pass Transmission Line Development” which specifically identifies as an objective: “Safety concerns expressed by municipal fire, police, *highway & EMT* Departments.” (Emphasis added). The petition to intervene of the Town of Franconia states that “[t]he project as proposed would restrict the free flow of emergency, safety, industrial, commercial, local and visitor traffic.”

6. There is no question that the Petitioners can express views relating to possible interference with public travel in the NPT Docket or that the Committee can address issues of public health and safety of the line in the grant of a certificate. As a result, a ruling in a separate docket as to whether only the selectmen of the towns may address those concerns is both unnecessary and redundant. The Petitioners' attempt to initiate a separate docket to address this issue begs the question of why they did not raise it in the NPT Docket.²

A Separate Proceeding to Address the Issues in the Petition Is Outside the Committee's Jurisdiction

7. Petitioners assert that they are entitled to ask the Committee to open a docket to consider the question of whether the general authority of selectmen to address issues of public safety relating to road crossings in RSA 231:160 *et seq.* preempts this Committee's authority under RSA Ch. 162-H to deal with crossings resulting from construction of an "energy facility." As support for the initiation of this new docket they cite to the Committee's rules on declaratory rulings, Site 203.01 *et seq.* and to RSA 541-A:16, I (d). Neither the Rule nor the statute may be used to create jurisdiction in the Committee where it does not otherwise exist.

8. In *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245 (2011), the New Hampshire Supreme Court found that neither Site 203.01 nor RSA 541-A:16 allow for the filing of petitions for declaratory rulings *except in matters over which the Committee already had*

² It is likely that the Petitioners have pursued this improper strategy of attempting to invoke the Committee's jurisdiction in a transparent effort to avoid bringing their claims in court, a course that has already failed one of the Petitioners. The Society for the Protection of New Hampshire Forests filed a Petition for Declaratory Judgment against Northern Pass Transmission, LLC (NPT) in the Grafton County Superior Court in November, 2015, seeking a ruling that NPT's planned use of a section of Route 3 constituted an "unreasonable expansion of the scope of a public highway easement." In making such claims the Society sought to overturn or circumvent over 150 years of legal authority recognizing that utility use of road rights of way is a proper use of public highway easements. The Superior Court granted summary judgment to NPT, finding that "RSA 231:169 clearly authorizes [NPT] to be permitted to install [its] utility [line and/or] facilities in [this] public highway." The Society has appealed this adverse judgment to the New Hampshire Supreme Court, where the case has been fully briefed and awaits oral argument and decision. *Society for the Protection of New Hampshire Forests v. Northern Pass Transmission, LLC*, Docket No. 2016-0322, New Hampshire Supreme Court.

jurisdiction. The Committee’s jurisdiction is limited to two matters. It has jurisdiction to open a docket to decide whether a project under consideration constitutes an “energy facility” as defined in RSA 162-H:2, VII and therefore requires a certificate. It also has jurisdiction to decide whether changes to an existing facility constitute “sizable changes or additions” and thus require a certificate. RSA 162-H:5, I. That is all. *Campaign for Ratepayers’ Rights*, 162 N.H. at 251. (“We agree that the committee exercises jurisdiction over certain projects based upon whether they meet the statutory definition of ‘[e]nergy facility’” or are found to be a sizeable change or addition thereto, see RSA 162-H:2, VII,;5, I.”)³ Indeed, the Petitioners concede the point, stating that: “The jurisdiction of the SEC is to evaluate and issue or deny a certificate or site and facility approval for certain energy generation and transmission projects.” Petition at ¶ 3.

9. Like the Petitioners here, the parties seeking to qualify as Petitioners in the *Campaign* case claimed that Site 203.01 conferred independent jurisdiction on the Committee. The Supreme Court rejected that assertion, stating: “Where the appellants lacked standing under RSA 162-H:2, XI the committee could not, by rule, confer standing upon them to bring the functional equivalent of a ‘petition’ under the name ‘motion for declaratory ruling.’” *Id.*, 162 N.H. at 252.⁴ Likewise, RSA 541-A:16 does not confer the right to initiate a proceeding before this Committee: “[w]e interpret RSA 541-A:16, I(d) to authorize the promulgation of rules for

³ Where the SEC has applied its rule on declaratory rulings in the past, it has ruled as to the specific applicability of a particular statute, for example, RSA 162-H:5 relative to sizable additions, to particular facts, such as the Granite State Gas Transmission request in SEC Docket No. 2014-01 regarding the replacement of a section of pipeline. In that case, the SEC ruled that the proposed replacement was not subject to its jurisdiction.

⁴ In this case, some of the Petitioners have standing to bring a petition before the Committee to open a docket, but only to address the issue of whether the NPT Project is an energy facility. They could bring this request in the NPT Docket. But *Campaign for Ratepayers’ Rights* is dispositive of the attempt by the Appalachian Mountain Club and the Society for the Protection of New Hampshire Forests to initiate a proceeding under RSA Ch. 162-H. 162 N.H. 245, 250-251. Neither entity is a “Petitioner” as defined in RSA 162-H: 2, XI and thus neither has standing to bring a petition before the Committee. Likewise, because the Ashland Water and Sewer Department is not a “governing body of a host [or abutting] community” it has no standing under the statute. Those entities might be granted status as an intervenor in an appropriate proceeding, but they may not initiate a proceeding before this Committee.

entertaining motions for declaratory rulings in proceedings over which the agency is already validly exercising jurisdiction.” *Id.*

10. The problem for the Petitioners is that the docket they propose to create does not involve the question of whether the NPT Project is an “energy facility” or a “sizable addition” to such a facility. Thus, the Committee cannot open a separate docket to address this issue, as opposed to dealing with it in the NPT Docket.

11. The Committee’s rules support this conclusion. Site 203.01 permits the filing of a “petition for declaratory ruling from the committee on matters within its jurisdiction.” Site 203.02,⁵ on which Petitioners rely, states as follows:

The committee *may dismiss* a petition for declaratory ruling that:

- (1) Fails to set forth factual allegations that are definite and concrete;
- (2) Involves a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case;
- (3) Does not implicate the legal rights of the petitioner; or
- (4) *Is not within the committee’s jurisdiction.*

(Emphasis added.) As the Rules make clear, the Committee may only rule on matters within its jurisdiction.

12. The Petitioners misstate the rule in an apparent effort to suggest that the Committee must deal with their Petition. They reverse the polarity of Site 203.02, contending that it states that the Committee “may not dismiss a petition that:

- (1) *sets forth* factual allegations that are definite and concrete;
- (2) *does not* involve a hypothetical situation or otherwise seek advice as to how the committee would decide a future case;
- (3) *implicates* the legal rights or responsibilities of the petitioner; *and*
- (4) *is within* the committee’s jurisdiction.”

Petition at ¶ 3. By adding the italicized words to the Rule and leaving others out, the Petitioners apparently assert that the Committee’s discretion to dismiss their Petition is limited. But that is

⁵ The Petition mistakenly cites the Rule as Site 203.03(c).

not what the Rule says, and the Committee has substantial discretion to dismiss this Petition because it cannot rule on matters outside its jurisdiction.

Petitioners Improperly Seek an Advisory Opinion

13. To the extent that the Petitioners want a ruling on the NPT Project, they must proceed in the NPT Docket. But the Petitioners admit that their request for a ruling from the Committee is intended to set general precedent. As they put it: “[t]he Petitioners request this ruling because resolution of this issue *would impact their interests generally.*” They further state that “[w]hile the Northern Pass project provides the impetus for this petition, the interpretation of the statute, issues raised and relief sought *are broader than a single project.*” Petition at ¶ 4. (Emphasis added). This request is improper no matter where it is filed.

14. The SEC Rule on which Petitioners rely, Site 203.02 (c), makes clear that the Committee will not rule on a Petition that: “Involves a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case” or “[d]oes not implicate the legal rights of the petitioner.” But this is exactly what Petitioners request. Apart from the NPT Docket, there is no current controversy as to the crossing of any town road and no rights of any board of selectmen or municipal body are at issue.

15. Nor could this request for a ruling that “impact[s] their interests generally” be brought in a New Hampshire court. The distinguishing element between a declaratory ruling and an advisory opinion is that the declaratory ruling is a judicial function designed to resolve an actual case or controversy. While the former can provide legal certainty by way of a binding judgment, the latter cannot. It is for this reason that rules governing declaratory rulings are grounded in the concept of justiciability requiring the existence of a case or controversy. *See Town of Orford v. New Hampshire Air Res. Comm’n*, 128 N.H. 539, 541 (1986). *See also* RSA

491:22, I “Declaratory Judgments” (“Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties.”)

Preemption

16. Because the present Petition is improper, and for the other reasons addressed in this Motion, Applicants do not address fully the merits of the preemption issue. But if it were necessary to do so, the preemptive effect of RSA Ch. 162-H is clear. The issue was resolved by the New Hampshire Supreme Court 36 years ago: “We regard it as inconceivable that the legislature, after setting up elaborate procedures and requiring consideration of every imaginable interest, intended to leave the regulation of transmission lines siting to the whim of individual towns. Towns are merely subdivisions of the State and have only such powers as are expressly or impliedly granted to them by the legislature.” *Public Serv. Co. of N.H. v. Hampton*, 120 N.H. 68, 71.⁶ However, if the Committee decides that it has jurisdiction over this matter by way of this separate docket, Applicants request that the Committee establish a briefing schedule to fully address the preemption issue raised by the Petitioners at the outset of any proceedings in the new docket. The Petition raises an issue of law that does not require the development of a factual record.

⁶ RSA 231:160 merely establishes a procedure under which municipalities can review the siting of utility lines, and RSA 162-H: 1 makes specific findings and “establishes a procedure for the review, approval, monitoring, and enforcement of compliance in the...siting...of energy facilities.” The findings of this Committee following that procedure and when issuing a certificate are “conclusive on all questions of siting.” RSA 162:16, II. This is express preemption. Nor does the conclusion that RSA Ch. 162-H preempts RSA 231:160 cause the two statutes to be in conflict. RSA 231:160 continues to apply regarding the siting of all utility lines that are not related to an “energy facility” governed by RSA 162-H. But where the SEC has jurisdiction, municipalities no longer have any authority over that issue. Of course, the towns retain the authority to control traffic to ensure safe use of the roadways when an energy facility is being constructed.

Conclusion

17. Petitioners fail to explain why this separate docket is necessary or proper to resolve questions they have put in issue in the NPT Docket and that can be decided there. Whatever their reasoning, the Petition is unnecessary, outside this Committee's jurisdiction as framed in the Petition, and seeks an advisory opinion that neither this Commission nor a court can render. Accordingly, the Petition should be dismissed.

WHEREFORE, the Applicants respectfully request that the Committee enter an order:

- (A) Dismissing the Petition; and
- (B) Granting such further relief as may be just, equitable and appropriate.

Respectfully submitted,


NORTHERN PASS TRANSMISSION, LLC AND
PUBLIC SERVICE COMPANY OF NEW
HAMPSHIRE d/b/a EVERSOURCE ENERGY

By their attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

Dated: January 9, 2017

By:


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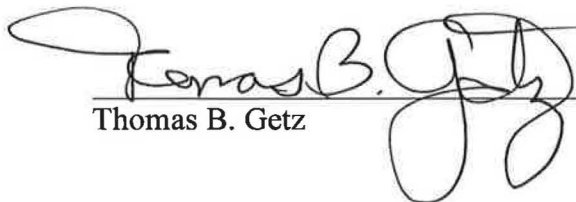
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Certificate of Service

I hereby certify that on the 9th of January, 2017, an original and ten copies of the foregoing Motion was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the Distribution List.


Thomas B. Getz