

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2016-03

**PETITION OF THE TOWN OF BETHLEHEM *et al.*
FOR DECLARATORY RULING**

March 7, 2017

ORDER DISMISSING PETITION FOR DECLARATORY RULING

I. Background

On December 19, 2016, the Towns of Bethlehem, Bridgewater, Bristol, Clarksville, Deerfield, Easton, Franconia, Littleton, New Hampton, Northumberland, Pembroke, Pittsburg, Plymouth, Stewartstown, Sugar Hill, Whitefield, and Woodstock; the City of Concord; the Ashland Water and Sewer Department; the Society for the Protection of New Hampshire Forests (Forest Society); and the Appalachian Mountain Club (Petitioners), filed a Petition for Declaratory Ruling (Petition) pursuant to Site 203.

On January 9, 2017, Northern Pass Transmission, LLC (NPT), and Public Service Company of New Hampshire d/b/a Eversource Energy (PSNH) filed a Motion to Dismiss the Petition. During the pendency of the proceeding, the Committee received a number of written comments from municipalities and the public.

On January 12, 2017, the Committee held a hearing on the Petition. After considering the positions of the parties, the Committee dismissed the Petition on its own motion. The Committee vote was 7-1.

This Order memorializes the Committee's decision.

II. Positions of the Parties

A. Petitioners

The Petitioners request that the Committee issue a declaratory ruling stating 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 “NH DOT”), the SEC, or other agencies have authority to permit or license other portions of any proposed facility.” *Petition* at p. 14.

The Petitioners argue that RSA 231:160, requires approval from municipalities before public utilities and their appurtenances may be placed above ground or below ground in the public right of way of a locally-maintained highway. The Petitioners further assert that the authority to approve these structures is statutorily limited to municipalities because RSA 231:160 states that such utilities can be installed “as provided in this subdivision and not otherwise.” *See* RSA 231:160. The Petitioners conclude that the term “and not otherwise” is dispositive of the issue.

The Petitioners acknowledge the Committee’s authority to regulate the siting, construction and operation of energy facilities under RSA 162-H. The Petitioners argue, however, that RSA 162-H and RSA 231:160 *et seq.*, can be read to be reasonably consistent with each other and vest the authority to authorize the placement of utilities in the right of way of locally-maintained highways to municipalities.

The Petitioners further argue that local control over the installation of utilities in the municipal right of way is consistent with the Committee’s administrative rules that require

applications to contain evidence that an applicant has a current right, option, or other legal basis to acquire the right to construct, operate and maintain the facility in the form of a license, permit, easement, or other permission from a federal, state, or local government agency, or an application for such a license, permit, easement, or other permission from a state governmental agency that is included with the application. *See* NH CODE ADMIN. RULES, Site 301.03 (c)(6).

The Petitioners further assert that *Public Service Company v. Town of Hampton*, 120 N.H. 68 (1980) is not dispositive on the issue of preemption of local regulation of the installation of utilities along and under locally-maintained highways. Petitioners claim that the *Hampton* case is limited to its facts and distinguishable, because the case involved municipal ordinances enacted five years after the Committee issued a certificate of site and facility to construct and operate the transmission lines.

The Petitioners argue that a statutory scheme authorizing municipalities to issue permits or licenses for installing utility infrastructure along or below locally maintained highways is consistent with a strong public policy that municipalities have the authority to protect the health, safety, and financial sustainability of their own citizens.

In response to the Motion to Dismiss the Petition, the Petitioners assert that the issues raised in this docket are universal to all dockets involving transmission lines that were considered or will be considered by the Committee and, therefore, should be addressed by the Committee in this docket. Transcript at p. 5-6.

The Petitioners also request that the Committee grant additional time to submit an objection to the Motion to Dismiss.

B. NPT and PSNH

Because the Committee acted on its own motion, the arguments made by NPT and PSNH are not directly relevant to the decision. We provide a summary of them here in the interest of completeness.

NPT and PSNH assert that the Petition is unnecessary because the issue raised in the Petition has already been raised in the application for the Northern Pass project that is under consideration by a duly-appointed Subcommittee in SEC Docket No. 2015-06. They further claim that all issues relevant to construction of the transmission lines can be, and should be, litigated and resolved within the context of the Northern Pass docket.

NPT and PSNH also argue that the Committee does not have jurisdiction to grant the relief sought by the Petitioners. They assert that the New Hampshire Supreme Court in *Appeal of Campaign for Ratepayers' Rights*, 162 N.H. 245 (2011), specifically found that the Committee's authority to issue a declaratory ruling is limited to matters over which the Committee already has jurisdiction, and that these matters are limited to: (i) whether a facility is an energy facility; and (ii) whether a modification of an existing facility constitutes a sizable change or addition to a facility.

NPT and PSNH also assert that the Petition seeks an advisory opinion that does not implicate the legal rights of the Petitioners, except within the context of the Northern Pass docket, and that 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."

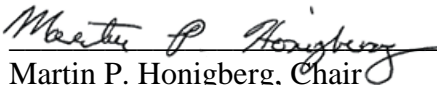
III. Analysis

In the Northern Pass docket, the Applicants seek approval to install conduit, cable, wires, poles, structures and devices across, over, under, and along certain locally-maintained highways. See SEC Docket No. 2015-06, Application at 82. The NH CODE OF ADMIN. RULES, Site 203.02(c)(2), specifically provides that the Committee may dismiss a petition for declaratory ruling if it involves a hypothetical situation or otherwise seeks advice as to how the committee would decide a future case. The issue of whether the Subcommittee will approve the siting of the Northern Pass project across, over, under, and along locally-maintained highways is squarely before the Subcommittee in the Northern Pass docket. The Petitioners' request is redundant and contrary to notions of administrative efficiency. The Committee finds that it is unnecessary to issue a declaratory ruling on matters that are pending in an existing proceeding.

The Petition for Declaratory Ruling is dismissed.

In light of the fact that the Committee dismissed the Petitioners' request on its own motion, the Petitioners' request to grant it additional time to file an Objection to the Motion to Dismiss is denied.

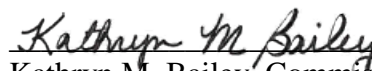
SO ORDERED this seventh day of March, 2017 by the Site Evaluation Committee:



Martin P. Honigberg, Chair
Site Evaluation Committee
Commissioner
Chair, Public Utilities Commission



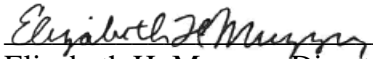
Clark Freise, Vice-Chair
Site Evaluation Committee
Acting Commissioner
Dept. of Environmental Services



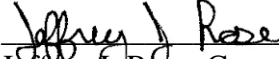
Kathryn M. Bailey, Commissioner
Public Utilities Commission



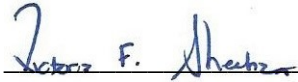
Paul B. Dexter, Esq., Designee
Public Utilities Commission



Elizabeth H. Muzzey, Director
Dept. of Cultural Resources
Division of Historic Resources



Jeffrey J. Rose, Commissioner
Dept. of Resources & Economic Dev.



Victoria Sheehan, Commissioner
Department of Transportation