THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015–06

JOINT APPLICATION OF NORTHERN PASS TRANSMISSION LLC &
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR A CERTIFICATE OF SITE AND FACILITY

APPLICANTS' OBJECTION TO MOTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS REGARDING APPLICATION COMPLETENESS

NOW COME Northern Pass Transmission LLC ("NPT") and Public Service Company of New Hampshire ("PSNH") d/b/a Eversource Energy (collectively the "Applicants") by and through their attorneys McLane Middleton, Professional Association, and respectfully submit this objection to the November 19, 2015 motion of the Society for the Protection of New Hampshire Forests ("SPNHF") to determine incomplete the Joint Application for a Certificate of Site and Facility for the construction of the 192-mile electric transmission line known as the Northern Pass Project (the "Project").

I. INTRODUCTION

The SPNHF motion may not be considered. The Site Evaluation Committee ("SEC" or "Committee") could not have been more clear with respect to motions of this type when it issued its decision in SEC Docket No. 2013-02, *Application of Atlantic Wind LLC* (January 13, 2014). In that case, Wild Meadows Legal Fund and New Hampshire WindWatch urged the Committee to find the application for a Certificate for a wind energy facility incomplete. Not only were the motions denied, they were declared *out of order* and were filed as public comment. The SEC found nothing in its governing statutes or rules that required it to "entertain litigation over

completeness" and it observed that the statutory time frames made such litigation impossible. The SPNHF motion, therefore, is not properly before the SEC.

RSA 162 H:7 sets forth the process for reviewing an application and subsection VI specifies that an application will be rejected when the SEC determines it administratively incomplete. It is clear from the statute and from the SEC's interpretation of the statute that the acceptance process was not intended to be an adjudicative process but a ministerial act where the pertinent agencies and the Committee expeditiously review a filing to see if there is sufficient information to proceed. Nonetheless, SPNHF argues that New Hampshire law allows for challenges to completeness. Among other things, it offers a strained reading of the SEC's rules to arrive at the conclusion that its motion is not prohibited and is thus allowed. The SEC, however, has unequivocally settled this issue; the motion is not allowed.

Although the SPNHF motion has no legal status before the SEC, the Applicants nevertheless provide the following observations regarding SPNHF's arguments

II. SITE CONTROL

SPNHF's chief, and erroneous, contention is that the Applicants have not shown adequate site control. Neither RSA 162-H:7 nor the SEC's rules, however, employ the term "site control." Site 301.03 (b) (6) requires an applicant to indicate whether it is the "owner or lessee of the site or facility or has some legal or business relationship to it." SPNHF attempts to transform this straightforward administrative requirement into a litigated contest not contemplated by RSA 162-H:7.

The SEC discussed Site 301.03 (b) (6) in *Application of Atlantic Wind.* There it reviewed the application and discovered that a portion of the transmission line associated with the proposed project was outside the leased boundary area set forth in the site plans. As a result, the

application was deemed administratively incomplete because it did not identify the relationship of the applicant to that particular portion of land. The applicant was directed to identify its legal relationship to all parcels within the project site whether as owner, lessee, or by way of easement, or describe the progress toward obtaining such legal relationship. *Application of Atlantic Wind*, at 12.

In this instance, the Applicants have fully complied with Site 301.03 (b) (6) by identifying, for example, those areas where NPT has option agreements for leasehold interests, where it has executed a lease with PSNH that is subject to New Hampshire Public Utilities Commission ("PUC") approval, where it has an agreement with a privately-owned railroad, and where the United States Army Corps of Engineers will issue an easement. The Applicants have also identified those areas where crossing approvals are required from the PUC and the Department of Transportation ("DOT"). *See* Application, Volume I, pp. 6, 7. Nothing more is required.

SPNHF also makes the mistaken argument that the Applicants have failed to show progress toward obtaining site control—taking a statement out of context from the *Application of Atlantic Wind* decision to support its claim. In that case, after determining administrative incompleteness, the SEC directed the applicant to identify its legal relationship to all the parcels of land within the site, or in the alternative, to describe its progress towards obtaining a legal relationship. As explained above, the Applicants have already satisfied the requirement of Site 301.03 (b) (6) and as explained below the Applicants do not need to obtain a legal relationship with SPNHF.

III. PROPERTY RIGHTS

SPNHF asserts that the application is incomplete because Northern Pass has not obtained SPNHF's approval to use public highways abutting land that SPNHF either owns or has conservation easements over. Further, SPNHF argues that the use of public highways for electric transmission lines exceeds the scope of legitimate highway use. However, the New Hampshire Legislature and the New Hampshire Supreme Court have specifically and unequivocally rejected both positions. Indeed, the historical, statutory and legal evidence contradicting SPNHF's view of the law is overwhelming.

The notion that highway users, including electric transmission lines, must obtain approval of abutters in order to pass along, underneath or over a public road cuts against the very purpose of public highways—to provide free, safe and convenient passage of persons, vehicles, goods, services, intelligence and commodities of all kinds. Our society depends upon full access to public roads for free and productive commerce. SPNHF offers, and can offer, no citation for the remarkable premise that its particular mission entitles it to some elevated status among all highway abutters such that it may exert unique control over particular highway users it disapproves of. SPNHF's property rights are unquestionably subject to the superior rights of the public in the highways. SPNHF may no more obstruct lawful highway uses it disagrees with than an adjoining house of worship may object to different denominations using the public highway or a feuding landowner may prohibit a neighbor from passing along the adjoining street.

Furthermore, SPNHF's argument that it is entitled to vet travelers or other highway users according to its particular views ignores 150 years of clear law. New Hampshire has long recognized that public highways are not subject to the dictates of landowners. It does not matter whether the highway is owned by the public in fee or easement. Rather, our Supreme Court has

stated, "Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence under the paramount control of the legislature as the representative of the public." *State v. Kean*, 69 N.H. 122, 128 (1897). Here, the Applicants have appropriately applied to use the pertinent public highways pursuant to express legislative authority under RSA 231:160. The Applicants are not required to obtain SPNHF's approval for the ability to use public rights that are clearly established.

Moreover, legislative authority to place utilities in public highway easements is hardly new. In 1850, the legislature granted several gas companies the "right to lay gas pipes in any public streets or highways" within specified territories. *U.S v. Certain Land in Portsmouth*, 247 F. Supp. 932, 934 (D.N.H. 1965) (citations omitted). If any doubt existed regarding the appropriateness of electric transmission lines in highway corridors, it was resolved in 1957. *Opinion of the Justices*, 101 N.H. 527 (1957), upheld the utilities' presence as proper within the scope of the public highway easement. The Court expressly stated, "[Utilities] use of the public highways constitutes a proper highway purpose even though it may be new and is subordinate to the primary use of the highways for the traveling public." *Id.* at 530. Furthermore, the Court wrote:

> In this state we have never considered a highway purpose to be limited solely to the transportation of persons and property on the highways. The public easement includes all reasonable modes of travel and transportation which are not incompatible with proper use of the highway by others. It is not restricted to the transportation of persons or property in movable vehicles [citation omitted] but extends to every new method of conveyance which is within the general purpose for which highways are designed. . . . As science develops highways may be used for any improved methods for the transmission of persons, property, intelligence or other means to promote sanitation, public health and welfare.

Id. (emphasis added) (internal quotations and citations omitted). It is unclear why SPNHF failed to consider and address this binding law, which squarely contradicts its unsupported legal assertions.

It is similarly unclear why SPNHF fails to address New Hampshire case law that expressly contradicts the claim that abutter approval is required to install electric transmission lines within public highways. In *King v. Town of Lyme*, 126 N.H. 279 (1985), the Supreme Court upheld a determination that "utilities of all kinds and descriptions" could properly be installed on a non-maintained Class VI public highway without payment to abutting landowners who objected. *Id.* at 280. The Court expressly rejected as "without merit" claims that electric and other facilities were not appropriate "in rural areas" or on Class VI public highways. *Id.* at 284. Since Class VI highways remain public highways by definition, "the installation of utility facilities . . . does not constitute an additional servitude which would require the payment of damages to abutting landowners." *Id.* at 284–85 (emphasis added).

The United States District Court has similarly ruled. In *U.S v. Certain Land in Portsmouth*, 247 F. Supp. 932 (D.N.H. 1965), a gas company's claim that it obtained prescriptive property rights to an underground gas line from abutting landowners was rejected. The District Court held that since gas pipelines are a proper "viatic use" of the highway under New Hampshire law, abutting landowners cannot properly complain about buried gas lines within the public street. *Id.* at 934. As reasonable and proper uses of a highway, therefore, no trespass against abutters occurred. *Id.*

For the reasons set forth above, SPNHF's claims are meritless and must be rejected. *See also* Appendix 9 to the Application, Petition for Aerial Road Crossings and Underground

Installations to Commissioner Victoria Sheehan (Oct. 16, 2015) (detailing the legal and statutory authority underlying Northern Pass' use of public highways).

IV. OTHER GROUNDS

A. Special Use Permit

SPNHF asserts that the SEC Application does not contain an application for a Special Use Permit from the United States Forest Service ("USFS") for the Project because Appendix 8 to the Application for the Project, which contains the Special Use Permit filed with the USFS, does not reflect the current configuration of the proposed Project. SPNHF is wrong.

Site 301.03 (d) (3) requires than an applicant include a copy of the completed application form for each state and federal government agency having jurisdiction to regulate the construction or operation of a project. Appendix 8 contains the required application. The USFS process continues subject to the requirements for a Special Use Permit. The SEC does not require anything further to find an application administratively complete.

B. Department of Environmental Services

Based on the same flawed arguments made above with respect to property rights, SPNHF contends that the alteration of terrain, wetlands, and shoreland permits submitted to the Department of Environmental Services ("DES") are incomplete. SPNHF also offers additional technical arguments regarding the wetlands permit. SPNHF states that DES deemed the applications incomplete on November 12, 2015. While DES did determine incompleteness, it did so in only a very limited regard. As directed by the SEC's Administrator in her letter of November 16, 2015, the Applicants have provided a further explanation of the interests in property supporting their applications in a letter on November 20, 2015.

C. Consideration of Alternatives

RSA 162-H:7, V (b) requires an applicant to identify both its "preferred choice and other alternatives it considers available for the site and configuration of each major part of the proposed facility and the reasons for the applicant's preferred choice." In Volume I of their Application at pp. 43–46 the Applicants do so. By contrast, SPNHF constructs a different requirement out of whole cloth and declares that the Applicants have failed to meet it. Specifically, SPNHF complains that the Applicants have failed to adequately consider alternatives, including burying the entire line. Again, SPNHF is wrong.

The Applicants complied with the law by identifying their preferred choice and other alternatives they consider available and supplied their reasons. Nothing more is required to establish administrative completeness.

D. Department of Transportation

In a variation on its property rights and site control arguments, SPNHF maintains that the DOT cannot authorize the Applicants to locate the project under public highways. It seems to make a similar argument with respect to authorizations from the PUC with respect to crossings over or under public waters and land owned by the state. The DOT and the PUC, however, have determined their respective portions of the Application complete.

E. "Omitted" Municipalities

Finally, SPNHF says the Application is incomplete because the towns of Candia, Auburn, and Derry were not notified of the Application. As SPNHF recites, RSA 162-H:7, V (f) and Site 301.03 (h) (7) require an applicant to provide written notification to each community in which the facility is proposed to be located. As explained in the Application, Volume I, at p. 41, two existing transmission lines will be thermally upgraded, which will require the replacement of 10

existing structures. None of these structures are located in Candia, Auburn, or Derry. Consequently, no part of the facility, no new line, or no other structure is proposed to be located in the respective towns; hence, no notice is required. This result is entirely consistent with the purpose of the notice provision because nothing will change in the three towns as a result of the Project.

V. CONCLUSION

As part of SPNHF's attempt to delay the progress of the Northern Pass Project, it cites a January 15, 2010 letter from then SEC Chairman Thomas Burack in SEC Docket No. 2009-02, *Application of Laidlaw Berlin BioPower LLC*. In that letter, Commissioner Burack notified the applicant that DES had identified certain deficiencies and advised the applicant of its opportunity to cure them. On January 26, 2010, Laidlaw Berlin BioPower's application was accepted. In fact, the precedent SPNHF cites stands for exactly the opposite of the proposition it puts forth.

The *Application of Laidlaw Berlin BioPower* acceptance order noted that the applicant had supplied the required information to DES, which is precisely what the Applicants will do in this case. That acceptance order also noted that the Division of Historical Resources ("DHR") had filed a letter, dated January 13, 2010, saying that it did not have sufficient information to make a final determination. The application was nevertheless deemed complete because the applicant had filed a Request for Project Review with the DHR, which, as the acceptance order pointed out, is the first stage of the DHR process, meaning that the applicant had provided sufficient information to initiate the DHR application process. The acceptance order further provided that: "Neither RSA 162-H:6-a nor 162-H:7, IV, require the Applicant to complete the entire review process with a state agency prior to the filing of an Application with the

Committee. The advancement through the DHR review process should not delay Committee review of the Application." Order Accepting Application, at 3 (Jan. 26, 2010).

Lastly, SPNHF argues for a *de facto*, "back door" injunction, asking the Committee to find the Application incomplete until after SPNHF's lawsuit in Superior Court is resolved. Such injunctions are extraordinary remedies, and those who seek them are held to a very high standard. It is telling, therefore, that SPNHF has not sought a preliminary injunction in its filing with the Superior Court. Instead, it seeks to obtain from the SEC what it plainly cannot obtain from the court. Because SPNHF's property rights arguments run contrary to well established law, SPNHF could not demonstrate a likelihood that it would succeed on the merits of its claim. Moreover, SPNHF could not meet the superior court bonding requirement for a preliminary injunction. *See* Superior Court Rule 48(c). Given that there is no way SPNHF could obtain a preliminary injunction in superior court, it should not be permitted to obtain essentially the same relief here.

The Applicants' burden before the SEC is to provide the information required by Site 301.03. The Applicants have unquestionably done so. Even if SPNHF were permitted to comment on completeness, it would have the burden to show that its property rights arguments are supported by New Hampshire law. SPNHF did not, and cannot do so.

The bottom line is that there is no basis for the Committee to delay its review based on SPNHF's assertions. The acceptance process should continue on its normal course and culminate in timely acceptance.

WHEREFORE, the Applicants respectfully request that the Committee:

A. Refuse to consider SPNHF's motion and reject it as an improper pleading; and

B. Grant such further relief as it deems appropriate.

Respectfully Submitted,

Northern Pass Transmission LLC and
Public Service Company of New Hampshire

By its attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: November 24, 2015 By: _____

Barry Needleman, Esq. Bar No. 9446
Adam Dumville, Esq. Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
adam.dumville@mclane.com

Thomas B. Getz, Esq. Bar No. 923
Devine Millimet
111 Amherst Street
Manchester, NH 03101
(603) 669-1000
tgetz@devinemillimet.com

Certificate of Service

I hereby certify that on the 24th of November 2015, an original and one copy of the foregoing objection was hand-delivered to the New Hampshire Site Evaluation Committee and an electronic copy was served upon the SEC distribution list.

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Barry Needleman