

COÖS, ss.

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Docket No. 214-2015-CV-114

Society for the Protection of New Hampshire Forests

v.

Northern Pass Transmission, LLC

**MEMORANDUM OF LAW IN SUPPORT OF  
NORTHERN PASS TRANSMISSION, LLC'S MOTION FOR SUMMARY JUDGMENT**

NOW COMES the Respondent, Northern Pass Transmission, LLC ("NPT"), through its attorneys, McLane Middleton, Professional Association, and respectfully submits this memorandum of law in support of its Motion for Summary Judgment.

**I. INTRODUCTION**

This action arises out of NPT's plan, known as the Northern Pass Project (the "Project"), to deliver 1,090 MW of clean, renewable electricity to New England and New Hampshire through a transmission line (and related facilities) extending approximately 192 miles from the international border between Canada and Pittsburg, New Hampshire to Deerfield, New Hampshire. The Petitioner, the Society for the Protection of New Hampshire Forests ("SPNHF"), owns land on both sides of a section of Route 3 in Clarksville, New Hampshire, under which NPT proposes to bury a portion of the transmission line as part of the Project.

SPNHF brought this action seeking a declaratory judgment that NPT's proposed use of Route 3 constitutes an unreasonable expansion of the scope of the highway easement, and that SPNHF's permission is required for NPT to use the easement as proposed. SPNHF also seeks a permanent injunction preventing NPT from conducting activities on the portion of Route 3

running through its property in furtherance of the Project without first obtaining SPNHF's permission.

As explained in greater detail below, there are no genuine issues as to any material fact, and NPT is entitled to judgement as a matter of law. It has long been recognized in New Hampshire that use of the highways for utility purposes is squarely within the scope of right-of-way easements, and in fact the use proposed by NPT, the burying of a transmission line under the roadway, is expressly authorized by statute. Moreover, SPNHF's permission is not required for the proposed use because state statute provides for the exclusive procedure for permitting the type of use proposed by NPT, and the Legislature has given the New Hampshire Department of Transportation ("DOT") the sole power to authorize such uses within state-maintained highways. Accordingly, the Court should grant summary judgment in favor of NPT, and against SPNHF, finding that NPT's proposed use of Route 3 is within the scope of the easement, and authorized by statute, and that SPNHF's permission is not required for the use, and the Court should deny SPNHF's request for permanent injunctive relief.

## **II. STATEMENT OF MATERIAL FACTS**

All of the facts material to the Court's adjudication of the claims asserted in SPNHF's Petition are undisputed. To the extent that any facts are disputed, they are not material to the determination of the claims.

1. SPNHF is a non-profit, publicly-supported 501(c)(3) corporation. Its headquarters is at 54 Portsmouth Street, Concord, New Hampshire, 03301. SPNHF's stated mission includes protecting New Hampshire's landscapes and promoting the wise use of renewable resources. Among its other activities, SPNHF acquires fee simple and conservation easement interests in real property. Petition at ¶2.

2. NPT is a New Hampshire limited liability company with a principal place of business at Energy Park, 780 North Commercial Street, Manchester, New Hampshire, 03101. NPT is a wholly-owned subsidiary of Eversource Energy Transmission Ventures, LLC, which is itself a wholly-owned subsidiary of Eversource Energy. Affidavit of Marvin P. Bellis (“Bellis Affidavit”) at ¶3; Petition at ¶3.

3. The Northern Pass Project (the “Project”) aims to deliver 1,090 MW of clean, renewable electricity to New England and New Hampshire through a transmission line (and related facilities) consisting of a single circuit 320 kV high voltage direct current (“HVDC”) transmission line linked to a 345 kV alternating current (“AC”) transmission line via an HVDC/AC converter terminal located in Franklin, New Hampshire. The entire transmission line will extend approximately 192 miles from the international border between Canada and Pittsburg, New Hampshire to Deerfield, New Hampshire. Bellis Affidavit at ¶4; Petition at ¶6.

4. In October 2015, NPT and its co-applicant, Public Service Company of New Hampshire d/b/a Eversource Energy, submitted their Joint Application for a Certificate of Site and Facility to Construct a New High Voltage Transmission Line and Related Facilities in New Hampshire (the “Application”) to the New Hampshire Site Evaluation Committee (“SEC”). Bellis Affidavit at ¶5, and Exhibit A (Executive Summary to the Application); Petition at ¶9. The complete Application is available at <http://www.nhsec.nh.gov/projects/2015-06/index.htm>.

5. In conjunction with the filing of the Application, NPT and PSNH also submitted a petition to the New Hampshire Department of Transportation (“DOT”) seeking permission, pursuant to RSA 231:160, to install an electric transmission line, and related facilities, across, over, under and along certain state highways, including the segment of Route 3 in Clarksville at issue in this action. Bellis Affidavit at ¶6 and Exhibit B (NPT’s petition to DOT); Petition at

¶10. The complete NPT petition to the DOT is available at

[http://www.nhsec.nh.gov/projects/2015-06/application/Volume-X/2015-06\\_2015-10-19\\_nptilc\\_psnh\\_app\\_9\\_dot\\_aerial\\_rr\\_crossings\\_underground\\_installations%20state\\_highways.pdf](http://www.nhsec.nh.gov/projects/2015-06/application/Volume-X/2015-06_2015-10-19_nptilc_psnh_app_9_dot_aerial_rr_crossings_underground_installations%20state_highways.pdf).

6. On November 13, 2015, the DOT wrote to the SEC confirming that the information provided by NPT and PSNH in their petition is sufficient for the DOT to initiate the permitting process for the requested uses. Bellis Affidavit at ¶7 and Exhibit C (DOT letter to SEC).

7. On December 7, 2015, a subcommittee of the SEC determined that the Application is complete, and on December 18, 2015, the SEC issued its written Order Accepting Application (the “Order”). In the Order, the SEC memorialized its determination that the Application contains sufficient information to satisfy the application requirements of each state agency—including the Department of Transportation—having jurisdiction to regulate aspects of the construction or operation of the proposed facility. The SEC also made the independent determination that the Application contains sufficient information to carry out the purposes of the SEC’s enabling statute, RSA 162-H. Bellis Affidavit at ¶8 and Exhibit D (SEC Order).

8. As is relevant to this action, the Project includes plans to extend a buried portion of the transmission line within the Route 3 right-of-way in Clarksville, New Hampshire, immediately south of the Connecticut River. The buried portion of the transmission line will be between fifty to seventy feet below the surface of the roadway in the bedrock, and underneath the existing bridge footings in the segment of Route 3 at issue. Bellis Affidavit at ¶9 and Exhibit B.

9. SPNHF owns the fee interest in the land on both sides of the segment of Route 3 at issue. SPNHF's land is known as the "Washburn Property." See Petition at ¶10.

10. NPT has not asked SPNHF for, and SPNHF has not granted, permission to install, use or maintain the proposed transmission line through the Washburn Property. See Petition at ¶10. As explained below, SPNHF's permission is not required, because, as a matter of law, the DOT has exclusive power to authorize NPT's proposed use of the right-of-way.

11. The segment of Route 3 that passes through the Washburn Property is a four-rod road laid out by the Town of Clarksville in 1931, establishing a public right-of-way easement for highway use, but not a fee interest in favor of the government. Bellis Affidavit at ¶10; Petition at ¶11.

12. In its Petition, SPNHF maintains that the segment of Route 3 at issue is a "Class II" state road. Petition at ¶ 11. This is incorrect, because Route 3 is a "Class I" state highway. Bellis Affidavit at ¶11. However, as explained below, this dispute is not material to the determination of the case because, the DOT has the exclusive power to authorize the proposed use in any state-maintained highway, and, regardless of whether Route 3 is a Class I state highway or a Class II state road, it is undisputed that the section of Route 3 at issue is state-maintained.

### **III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT**

Summary judgment is appropriate to save time, effort and expense by allowing an immediate final judgment in cases where there is no genuine issue of material fact. *Xerox Corp. v. Hawkes*, 124 N.H. 610, 620 (1984). Summary judgment is "an excellent device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts or if only a question of law is involved." *Omiya v.*

*Castor*, 130 N.H. 234, 236 (1987). Summary judgment should be granted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. RSA 491:8-a, III. *See also D'Amour v. Amica Mut. Insur. Co.*, 153 N.H. 170, 171 (2006); *Phillips v. Verax Corp.*, 138 N.H. 240, 243 (1994) (summary judgment must be granted when viewing the facts in a light most favorable to the non-movant, there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law). Summary judgment should be entered when, in viewing the facts and considering all pleadings, affidavits and all proper inferences drawn therefrom “in a light most favorable to the non-moving party,” the court finds that there is no genuine issue of material fact in dispute. *Phillips v. Verax Corp.*, 138 N.H. 240, 243 (1994) (citations omitted); *see* RSA 491:8-a, III.

#### IV. ARGUMENT

**a. NPT’s proposed use of the segment of Route 3 at issue is squarely within the scope of the right-of-way easement.**

SPNHF’s argument that NPT’s proposed use of the segment of Route 3 at issue would constitute an unreasonable expansion of the scope of the existing public easement ignores a well-established history, going back more than 150 years, of recognizing utilities as a proper use of public roadway easements. Additionally, the New Hampshire Legislature has established an express statutory authorization for the installation and maintenance of underground conduits and cables underneath public highways.

New Hampshire has long recognized that the use of public highways for utilities purposes is proper. As far back as 1850, the New Hampshire Legislature granted several gas companies the “right to lay gas pipes in any public streets or highways” within specified territories. *See U.S. v. Certain Land in Portsmouth*, 247 F.Supp. 932, 934 (D.N.H. 1965) (citations omitted). Almost sixty years ago, the New Hampshire Supreme Court held that “use of public highways

[by utilities] 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.” *Opinion of the Justices*, 101 N.H. 527, 530 (1957). The Court acknowledged that:

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 the proper use of the highway by others. *Graves v. Shattuck*, 35 N.H. 257, 265. It is not restricted to the transportation of persons or property in moveable vehicles (*Cater v. Northwestern Telephone Exchange Co.*, 60 Minn. 539, 544, 63 N.W. 111, 28 L.R.A. 310), but extends to every new method of conveyance which is within the general purpose for which highways are designed.’ *State v. Scott*, 82 N.H. 278, 279, 132 A. 685, 686. To the same effect see *American Loan & Trust Co. v. General Electric Co.*, 71 N.H. 192, 200, 51 A. 660. In view of the plenary power of the State over its highways, it may allow the location therein of any facilities not inconsistent with the superior rights of the traveling public. 10 McQuillin, *Municipal Corporations* (3rd ed.) § 30.44. 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.

*Opinion of the Justices*, 101 N.H. 527, 530 (1957).

Moreover, the New Hampshire Legislature has expressly exercised its “plenary power,” *Id.* at 530, and “paramount control,” *State v. Kean*, 69 N.H. 122, 128 (1897), over the proper use of public highways by authorizing the installation and maintenance of underground cables and conduits under all public highways. *King v. Town of Lyme*, 126 N.H. 279, 284 (1985) (“The legislature has determined that the erection of utility facilities is a proper highway use and has authorized their installation in *any* public highway.” (Emphasis in original)). Notably, the statutory authorization for underground installations is not limited to public utilities or public entities. Rather, the State statute provides:

Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

RSA 231:160. The legislature chose to retain broad access to the public easement for power line installations by extending its reach to “any person, copartnership or corporation”. And, the legislature did not limit permits to specific public purposes. Consequently, SPNHF’s mischaracterization of NPT’s status and the purpose of the project are immaterial. NPT’s proposed use fully comports with the statute’s clear and unambiguous requirements.

Nonetheless, any suggestion by SPNHF that the use proposed by NPT—burying a high voltage transmission line in bedrock fifty to seventy feet below the roadway—is somehow different in character to other utility uses of the right-of-way is irrelevant, as well as inaccurate. SPNHF’s claim that NPT proposes an unreasonable expansion of the scope of the easement ignores the clear statement of the New Hampshire Supreme Court that new and improved methods of transmission are properly within the scope of a highway easement. *Opinion of the Justices*, 101 N.H. 527, 530 (1957).

NPT also disputes SPNHF’s characterization of the Project as not being a “traditional utilities project,” which is somehow outside of the scope of the public highway easement. *See* Petition at ¶ 7. The Northern Pass Project is plainly an electric transmission project for utility purposes to improve the flow and availability of clean, renewable and lower-cost energy to New Hampshire and New England. *See* Exhibit A to Bellis Affidavit (Executive Summary from the SEC Application) at ES-1 – ES-3. The fact that the Project’s transmission line may or may not be larger and buried deeper underground than “typical” utility projects does not change the analysis. The New Hampshire Supreme Court has made clear that “[a]s 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.” *Opinion of the Justices*, 101 N.H. 527, 530 (1957). This has always been the case. For example, there was no

need to change the scope of highway easements when horse-drawn carriages gave way to large diesel-powered tractor trailers for the transport of commercial goods along the public highways. Likewise, improved means of moving other goods and services, such as electricity are still an appropriate use of highway easements by utilities and within the scope of the “viatic” purposes of the rights-of-way.

**b. NPT is not required to obtain SPNHF’s permission, because the DOT has the exclusive power to authorize the proposed use.**

The notion that NPT must obtain SPNHF’s permission before it can install its transmission line below the portion of Route 3 at issue flies in the face of the Legislature’s grant of exclusive power to the DOT to authorize such use, not to mention the very purpose of public highway easements. SPNHF has offered no support for the position that the permission of a private landowner is a prerequisite for the state-approved use of a public right-of-way, and nor could they. The very notion that a private landowner could veto the use of a public highway easement by a utility is inconsistent with the entire concept of a public right-of-way, and would have untenable consequences for utilities in New Hampshire going forward.

New Hampshire statutory law expressly allows the installation and maintenance of utilities, including underground conduits and cables, in public highways, and provides for the exclusive means of permitting such uses. RSA 231:160. “[U]nderground conduits and cables, with their respective attachments and appurtenances may be ... placed under any such highway by any person, copartnership or corporation *as provided in this subdivision and not otherwise.*” *Id.* (emphasis added).

The Legislature has delegated to the DOT the exclusive power to authorize installation of utilities in state-maintained highways. Section 161 of RSA Chapter 231 provides the procedure for obtaining a permit or license to erect or install utility poles, structures, conduits, cables or

wires in, under or across a highway. For state-maintained highways, the Legislature has granted the DOT exclusive authority to grant permits.

Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the commissioner of transportation who shall have exclusive jurisdiction of the disposition of such petitions

RSA 231:161, I(c) (emphasis added).

In its Petition, SPNHF alleges that the section of Route 3 at issue is a Class II state road. This is incorrect. It is a Class I state highway. However, this dispute is immaterial to the Court's determination of the issues in this case, because, pursuant to RSA 231:161, I(c), the DOT is the exclusive permitting authority for both Class I highways and state-maintained portions of Class II highways. It is undisputed that, whether the portion of Route 3 at issue is a Class I or Class II highway, it is under the State control. Therefore, only the DOT has authority to grant or deny permission to install utilities in the right-of-way under the statute. Even if Route 3 were not state-maintained, SPNHF, nor any other private landowner owner, would have the ability to interfere with the permitting process, since it is the municipal authorities (the selectmen or the mayor and city council, as the case may be) who have the exclusive permitting authority over municipally maintained roads under RSA 231:161,I(a) & (b).

SPNHF has also noted in its petition that when the section of Route 3 at issue was laid out by the Town of Clarksville in 1931, it was established as a public right-of-way for highway use, and fee interest in the property was not taken. Petition at ¶11. This is correct, however, it has long been recognized that the nature of the government's interest in the roadway, whether by easement or fee simple ownership, is irrelevant to the government's control of the use of the right-of-way. "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 legislature has clearly exercised its “paramount control” by delegating authority to the DOT and providing broad access to the easement.

Nothing in the statute requires or even contemplates a utility seeking permission from the landowners through whose property the highway easement runs. And the fact that RSA 231:160 & 161 provide for the exclusive procedure for obtaining a permit for such use precludes any assertion by SPNHF that its assent is necessary, or that it has standing to assert otherwise.

Beyond that, the suggestion that the owners of land through which highway rights-of-way pass have the right to approve or deny a proposed use of the right-of-way—especially one that is expressly authorized by statute—is contrary to the very purpose of such rights-of-way, which is to provide for the free, safe and convenient passage of persons, vehicles, goods, services, intelligence and commodities of all kinds. *See Opinion of the Justices*, 101 N.H. 527, 530 (1957)

## **V. CONCLUSION**

For the reasons set forth above, there is no genuine issue as to any material fact, and NPT is entitled to judgment as a matter of law because NPT’s proposed use is squarely within the scope of the public right-of-way easement, and because SPNHF’s permission is not required since, under state law, the DOT has the sole power to authorize the use proposed by NPT. Therefore, the Court should grant summary judgment in favor of NPT and against SPNHF on all counts.

Respectfully submitted,

NORTHERN PASS TRANSMISSION, LLC

By their Attorneys,

McLANE MIDDLETON,  
PROFESSIONAL ASSOCIATION

Dated: Jan. 4, 2016

By:



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**Certificate of Service**

I hereby certify that on this 4 day of January, 2016, a copy of the foregoing pleading was sent by First Class Mail to counsel for the Petitioner, Thomas N. Masland and Frank E. Kenison, Ransmeier & Spellman, Professional Corporation, One Capitol Street, P.O. Box 600, Concord, NH 03302-0600.



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