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Debra Howland
Executive Director
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
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RE: Docket No. DE 15-464
Public Service Company of New Hampshire d/b/a Eversource Energy

Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC

Dear Director Howland:

On November 17, 2015, the Commission issued a secretarial letter in the above-captioned docket that contained the Commission's finding that the petition from Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") was "deficient" pursuant to Puc 203.05(b). Puc 203.05(a) sets out specific criteria for "[a]ll petitions and motions" filed with the Commission. In its petition, PSNH provided information and documentation consistent with each criterion in the rule. Nonetheless, the Commission deemed the petition deficient under Puc 203.05(b). Without acquiescing to any such deficiency, PSNH hereby provides the information requested by the Commission including deeds and source easement deeds, as well as the legal basis permitting the leased use and the transferability of the easement rights.

As to the copies of the relevant deeds, given their volume, PSNH has compiled an electronic version that will be provided to the Commission along with this submission. As for printed copies of the deeds, consistent with the Commission's November 17 letter, PSNH has conferred with the Staff and reports that given their volume, Staff has agreed that a single paper copy of the deeds would be sufficient, and Staff supports a waiver of the Commission's rules to the extent necessary to permit filing a single paper copy of the deeds. That copy will be provided on December 7. Additionally, PSNH notes that in preparing the deeds it identified the need for minor corrections to some of the deed references in Appendix A to the lease. A supplement to that appendix will be filed at a later date setting out the minor corrections. PSNH's legal analysis is set out later in this submission. PSNH herein requests that the Commission accept this filing and issue an order of notice commencing the docket.

For clarity, and before addressing the legal analysis, by this letter PSNH also addresses one other issue related to this submission. It is not clear to PSNH for what purpose the Commission has requested this information. In its petition, PSNH clearly stated that the proposed lease is not forbidden by law, and PSNH is not aware of any restriction on its ability to transfer its real estate rights that materially differs from the ability of any other entity to do the

same. To the extent there may arise some dispute or difference of opinion about the extent of PSNH's rights or obligations under one or more of the deeds covered by the proposed lease, resolution of such disputes would be more appropriately handled in the courts, rather than by the Commission. Therefore, PSNH clarifies that by agreeing to provide the requested information, PSNH is not agreeing that the Commission, in fact, has jurisdiction over any decisions relating to the underlying real estate rights as they exist or as they may exist if and when the lease is approved.

The following legal analysis sets out PSNH's position demonstrating that the leased use is permitted under PSNH's easements, and that PSNH's easement rights are transferable by lease to Northern Pass Transmission.

Use Permitted

The proposed use of the Northern Pass line as provided in the PSNH lease is firmly within the scope of the easements at issue and the intended use will not create an unreasonable burden for the servient landowners.

This conclusion is supported squarely by the New Hampshire Supreme Court's decision in *Lussier v. New England Power Co.*, 133 N.H. 753 (1990). In *Lussier*, New England Power Company held easement deeds along an electricity transmission route, and proposed to place within the easement area a third transmission line and a switching station. *Id.* at 755-756.¹ Two owners of parcels comprising the servient estates challenged these actions, arguing that the proposed uses were outside the scope of the existing easements. *Id.* at 755. In analyzing the issue, the Court held "[t]he beginning and end of our inquiry is found in the words of the easement deeds . . . [when] the words of the deed are clear and their meanings unambiguous, there is neither a need to resort to extrinsic facts and circumstances to aid our determination, nor a need to rely on [a] 'rule of reason.'" *Id.* at 756. Specifically, the court analyzed the pertinent language of the deeds which stated as follows:

We, the Grantors, do hereby . . . convey unto the Grantee . . . the perpetual right and easement to construct, reconstruct, repair, maintain, operate and patrol, for the transmission of high and low voltage electric current and for telephone use, lines of towers or poles or both . . . with wires and cables strung upon and from the same, and all necessary foundations, anchors, guys, braces, fittings, equipment and appurtenances . . .

Id. at 757. The court held this language to be "clear and controlling" as it "describe[d] the grantee's right to construct as 'perpetual,' [and] . . . made clear that the permitted construction is not limited to just transmission lines, but includes 'all necessary . . . appurtenances' for the transmission of electricity." *Id.* Significantly, the court held:

Contrary to the plaintiffs' argument, nothing in the deeds indicates that the intended use of the easement was to be limited by the

¹ Though not stated expressly by the Court, the *Lussier* case appears to involve the so-called Hydro-Quebec Phase II high voltage direct current line. The Court describes the third transmission line at issue as a 450 kV line placed with 90-foot transmission structure in the middle of the right of way between two other 115 kV lines.

construction or the long and continued use of the two original transmission lines. In fact, we find that the drafters expressly contemplated and provided for future construction and expanded use of the easement.

*Id.*²

As in *Lussier*, the language in the easement deeds for the Northern Pass Transmission project clearly and unambiguously provides for the intended uses, namely the addition of a transmission line, structures, and related appurtenances, as well as any necessary tree clearing. While the form and language of the PSNH easements vary, the deeds all recognize in some fashion the utility's right to build, operate and maintain multiple electric transmission lines and the appurtenances for such lines.

As the Court in *Lussier* also held, the holder of an easement is also required to exercise its rights in a reasonable manner. *Lussier* at 758 (“[T]he parties involved must still act reasonably under the terms of the grant so as not to interfere with the use and enjoyment of each others’ estates.”); *see also Donaghey v. Croteau*, 119 N.H. 320, 324 (1979) (the easement holder “must take care not to exceed the reasonable tolerance that can be expected of the [servient landowners].”). In determining whether a proposed use of an easement is reasonable, “[t]he test to determine the right to make a particular alteration is whether the alteration is so substantial as to result in the creation and substitution of a different servitude from that which previously existed,” and allowing alteration where “the nature of the use did not substantially change.” *Duxbury-Fox v. Shakhnovich*, 159 N.H. 275, 284-285 (2009). For the Northern Pass Transmission project, the unambiguous language of the easement deeds specifically provides for the intended use.

Several courts outside of New Hampshire have found new additional electric transmission lines to be reasonably within the scope of the pertinent easements. In *McGurk v. Connecticut Light and Power Co.*, No. HHD-CV-13-6044598-S, 2015 WL 4098248 (Conn. Super. Ct. June 4, 2015), a Connecticut utility sought to add a second, higher voltage transmission line to a pre-existing right of way, along with additional poles. The owners of the servient estates challenged the project to no avail. Based on analysis of language that closely mirrors the language included in the PSNH easements leased to Northern Pass, the court noted that the deeds “do[] not authorize only a single line of structures, structures of only a certain height, or only transmission lines that operate at a specific voltage. Rather, it authorizes, without limitation, the construction, operation, and maintenance of ‘poles, towers . . . foundations . . . fixtures and appurtenances useful for conducting electricity.’” *Id.* at *7. The court therefore held that “in constructing the second line, [the utility] was exercising legitimately the rights granted to it in the . . . easement[s].” *Id.* at *8. Similar holdings in Vermont, *Farrell v. Vermont Elec. Power Co., Inc.*, 193 Vt. 307 (Vt. 2012) (holding that utility’s addition of transmission line and replacement towers did not result in overburdening), and Illinois, *Talty v. Commonwealth Edison Co.*, 38 Ill. App. 3d 273 (Ill. App. Ct. 1976) (permitting utility to construct replacement line of higher voltage and new towers, finding it did not increase burden on underlying estates),

²In addition to the NH Supreme Court’s decision in *Lussier* affirming the proposed use of the New England Power easement for the new transmission line, the PUC approved the two leases of easement rights to New England Hydro-Transmission Corporation for the Phase II line, one from New England Power Company and a second from PSNH. *New England Hydro-Transmission Corp.*, Order No. 19,058, 73 NH PUC 161 (April 11, 1988).

also serve to bolster the New Hampshire Supreme Court's analysis in *Lussier*, and its applicability to the Northern Pass Transmission project.

Transferability

Each of the easements subject to the PSNH lease is at least a commercial easement in gross and transferable as a matter of law absent any contrary intention set forth in the deed. The New Hampshire Supreme Court has defined easements in gross as follows:

An easement in gross is . . . a nonpossessory right to the use of another's land, but it is a mere personal interest. There is a servient estate, but no dominant estate, because the easement benefits its holder whether or not the holder owns or possesses other land. An easement in gross grants to the holder the right to enter and make use of the property of another for a particular purpose.

Arcidi v. Town of Rye, 150 N.H. 694, 698-99 (2004) (citations and quotations omitted).

As explained in *The Law of Easements & Licenses in Land*, a treatise relied upon by the New Hampshire Supreme Court in *Arcidi*, "American courts initially adopted the position that [easements in gross] could not be transferred. Today, however, courts generally recognize that easements in gross are transferable in certain situations . . ." J. Ely & J. Bruce, *The Law of Easements & Licenses in Land* § 9:4 (September 2015) (footnotes omitted). "The widespread use of easements in gross for such commercial activities as telephones, pipelines, transmission lines, and railroads caused judges to reconsider the rule prohibiting transfer. . . . [T]he modern American view is that commercial easements in gross are freely alienable as a matter of law, unless the instrument of creation provides to the contrary." *Id.* § 9:5 (footnotes omitted).

Numerous other sources of authority confirm the exception for commercial easements in gross. *See Restatement (First) of Property* § 489 (1944) ("Easements in gross, if of a commercial character, are alienable property interests."); *Restatement (Third) of Property (Servitudes)* § 4.6(1)(c) & cmt. b (providing that all "benefit[s] in gross [are] freely transferable" and commenting that, "[a]lthough historically courts have often stated that benefits in gross are not transferable, American courts have long carved out an exception for profits and easements in gross that serve commercial purposes. Under the rule stated in this section, the exception has now become the rule"); 28A C.J.S., *Easements* § 128 (June 2015); *Canova v. Shell Pipeline Co.*, 290 F.3d 753, 757 (5th Cir. 2002) ("At common law, easements in gross were historically presumed to be non-transferable, but the almost universally accepted rule is now that easements in gross taken for commercial purposes, particularly public utility purposes such as railroads, telephone lines, and pipelines, are freely transferable property interests."); *Johnston v. Michigan Consol. Gas Co.*, 60 N.W.2d 464, 468 (Mich. 1953) ("While we are not directed to any cases involving the latter type of easements among our own decisions, we have carefully examined those of our sister States and find that according to the weight of authority easements for pipe lines, telephone and telegraph lines and railroads are generally held to be assignable even though in gross."); *Geffine v. Thompson*, 62 N.E.2d 590, 592 (Ohio App. 1945) ("these interests should be freely assignable wherever it appears that the grantor did not restrict them to a designated person").

At least one New Hampshire decision reflects the historic transferability of commercial easements in gross. In *Cross v. Berlin Mills Co.*, 79 N.H. 116 (1918), a landowner sued a company who had constructed piers and operated a boom in the river opposite the plaintiff's land. The company defended itself by pointing to an assignment of easement rights given by the landowner to an earlier company. The landowner challenged the assignability of the easement rights. The Court held that the easement rights were assignable, placing emphasis on the commercial nature of the rights at issue:

[T]he deed conveyed a valuable and inherent part of the grantor's real estate, which presumably extended to the middle of the river. It invested the grantee with the right to erect and maintain booms therein, and to use the surface of the river for the floating of logs. The right to erect and maintain booms necessarily includes the right to make such use of the bed of the stream as is reasonably necessary for the proper and useful booming of logs—the essential purpose of the grant. If the building of piers in the river, to which the booms may be attached, is reasonably necessary for the purpose of rendering them secure and useful, that right passed by the deed, not merely as a personal accommodation to the grantee, but as a part of the grantor's real estate.

Cross, 79 N.H. at 118.

Compelling public policy reasons support the transferability of commercial easements. As one author explains, “Courts readily acknowledge the distinction between commercial and noncommercial easements in gross when evaluating whether to permit the transfer of public commercial easements in gross. . . . In addition to the policy that traditionally supports the transferability of commercial easement interests, the courts have noted another reason for justifying the free transferability of public commercial easements in gross: the benefit that the easement provides inures to the entire community, rather than to one individual or business.” Alan David Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 Vand. L. Rev. 109, 118-19 (1986) (footnotes omitted). Indeed, this Commission has likewise found the public good benefited by projects involving transfers of commercial easement rights. See, e.g., *EnergyNorth Natural Gas, Inc. d/b/a Liberty Utilities*, Order No. 25,572, 2013 WL 5488735 (September 19, 2013) (concerning petition to construct new natural gas pipeline to service asphalt plant operated by Continental, and stating that Continental had secured all necessary easements which, after the pipeline's construction, would be transferred to Liberty).

Finally, while many of the PSNH easement deeds involve rights expressly granted to PSNH and its “successors and assigns”, the fact that some of the deeds lack the “successors and assigns” language does not preclude assignability. As discussed, the modern view is that commercial easements in gross “are freely alienable as a matter of law, unless the instrument of creation provides to the contrary.” J. Ely & J. Bruce, *supra* § 9:5 (emphasis added). By default, therefore, commercial easements in gross are assignable absent some intent to the contrary. None of the PSNH easement deeds here contains an indication of intent to prohibit assignment of the interests. In New Hampshire, the absence of “assigns” or similar language, which is referred to in real estate law as “words of inheritance”³, is not evidence of intent to withhold

³ See, e.g., *Gephart v. Daigneault*, 137 N.H. 166, 170 (1993).

transferability. Although in the distant past certain outlier decisions may have considered such “words of inheritance” necessary to establish assignability, *see Wilder v. Wheeler*, 60 N.H. 351 (1880) (holding that easement deed to take water could not be assigned without reference to “successor or assigns”), the New Hampshire Supreme Court has more recently confirmed “that the lack of words of inheritance in a deed, devise or trust has no legal effect, nor does it create an inference as to the intent of the parties.” *Burcky v. Knowles*, 120 N.H. 244, 249 (1980). The *Burcky* Court further explained: “Words of inheritance originated with the introduction of the feudal law into England by William the Conqueror. . . . Words of inheritance were never adapted to or suited for the land system of New Hampshire, and never became part of the law of this State.” *Id.*; *see also Glines v. Auger*, 93 N.H. 340, 341 (1945); 6 Am. Jur. 2d *Assignments* § 16 (“[T]he absence of the term “assignment” or the word “assign” in an agreement does not support a finding of an express or implied intention of the parties to prohibit an assignment of the agreement.”); *cf.* RSA 477:24 (“In a conveyance or reservation of real estate, the term ‘heirs,’ ‘assigns’ or other technical words of inheritance or succession shall not be necessary to convey or reserve an estate in fee.”). Accordingly, the deeds subject to the PSNH lease are assignable by default given their commercial nature and the lack of any limitations on transferability set forth in the deeds. For all these reasons, the easements subject to the PSNH lease are transferrable.

Conclusion

As stated at the outset of this submission, PSNH has supplied all information required by the Commission’s regulations and believes its initial filing was fully compliant with the requirements of Puc 203.05(a) and not deficient in any respect. PSNH clarifies that by providing the information identified by the Commission it does not intend to waive any rights it may have to challenge the Commission’s initial decision to declare the petition deficient. Nevertheless, by this submission PSNH has complied with the Commission’s request for additional information and requests that the Commission accept this filing and issue an order of notice commencing the docket.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance with this matter.

Very truly yours,



Matthew J. Fossum
Senior Counsel

CC: Service List