

**The State of New Hampshire**

**Public Utilities Commission**

**DE 15-464**

**Public Service Company of New Hampshire dba Eversource Energy**

**Petition for Approval of Lease Agreement with Northern Pass Transmission LLC**

**Memoranda of Law of Interveners Kevin Spencer and Mark Lagasse dba Lagaspence Realty, LLC**

**Status of Case**

Public Service Company of New Hampshire (PSNH) has petitioned the Public Utilities Commission (Commission) for the right to lease power line easements to its affiliate Northern Pass Transmission, LLC (NPT) for the construction of the Northern Pass. Those easements include an easement burdening interveners' property.

On April 15, 2016, the Commission, in Order 25,882, ruled that it did not have the jurisdiction to determine individual property rights "because we cannot and do not intend to adjudicate their respective property rights. ... As such, our review will not be binding on individual property owners. Property owners who wish a determination of their rights in the easements on their lands with respect to Eversource and NPT should seek redress in the courts".

On September 27, 2016, in Order No. 25,946, the Commission ordered that the parties to the docket provide a legal memorandum addressing the property rights issues identified by the Commission in Order No. 25,943. The Commission in Order 25,943 determined that it cannot complete a "facial review" of the easements and their transferability by PSNH to NPT without consideration of the legal issues as identified.

**Memorandum**

**The Substantive Issue Before the Commission Is Whether PSNH Owns a Property Right in the Easements That It Can Lease to NPT for the Construction of Infrastructure to Import High Voltage Electricity from Canada**

**The Phrase "Facial Review" That the Commission Has Ordered Briefed Is an Artificial Construct That Has No Meaning Whatever in Property Law and Will Not Address the Property Rights Issue - That Issue Must Be Adjudicated in the Courts**

A grant of an interest in real estate cannot be determined "facially". Property rights are granted or they are not. The commission ordered briefing of the words "successors and assigns". The words "successors and assigns" are technical words of succession or inheritance rooted in ancient English common law and have nothing to do with the interest granted and whether an interest is

transferable. RSA 477:24 Unnecessary Words; Construction of Certain Words was enacted in 1951 to abolish the requirement that these unnecessary words be included in a grant.

The property rights conveyed by a grant are not determined by the ancient words and phrases such as “successors and assigns” or “heirs and assigns” but by the language of the grant instrument and the intent of the parties at the time of the grant. An easement is the grant of a right to use another’s land for the uses specified in the grant. Easements do not grant possessory rights or rights beyond those specified in the grant. Arcidi v. Town of Rye, 150 NH 694 (2004). In a case in which dealt directly with a utility easement Lussier v. New England Power, 133 NH 753 (1990), the Supreme Court held that the use granted must be ascertained by determining the intent of the parties at the time of the grant. In Ettinger v. Pomeroy Limited Partnership, 166 NH 447, 449-450 (2014), the New Hampshire Supreme Court ruled that the interpretation of a deed is a question of law for the court. “In interpreting a deed, we give it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at that time. We base our judgment on this question of law upon the trial court’s findings of fact. If the language of the deed is clear and unambiguous, we will interpret the intended meaning from the deed itself without resort to extrinsic evidence. *Id.* If, however, the language of the deed is ambiguous, extrinsic evidence of the parties’ intentions and the circumstances surrounding the conveyance may be used to clarify its terms. Planagan v. Prudhomme, 138 NH 561, 566 (1994). . . .”

Further, notwithstanding the grant language of an easement, an easement may not be used in an unreasonable manner. In Lussier v. New England Power, *supra*, the New Hampshire Supreme Court, at page 758 held: “Lest our holding be interpreted to permit unlimited expansion by New England Power of its easement, we wish to emphasize that the parties involved must still act reasonably under the terms of the grant so as to not interfere with the use and enjoyment of each others’ estates. See Donaghey v. Croteau, 119 NH 320 (1979). . . .” The easement in Lussier, *supra*, has far broader terms than the easements that are before the Commission. See also Ettinger, *supra*, page 451. “. . .” The purpose undergirding the rule is that the owner of the easement appurtenant may not materially increase the burden of the easement upon the servient estate or impose a new or additional burden. II Giardino, LLC, 757 A. 2d at 1111. “The doctrine was intended to protect the servient estate from the use of an easement in a manner or to an extent not within the reasonable expectations of the parties at the time of its creation.” *Id.*”

**The Commission Cannot Determine the Meaning of Easements on the Basis of How the Easements Were Acquired -Whether by Eminent Domain or Negotiation**

**The Commission Must Order That a Data Request Process Be Invoked to Determine the Purpose of the Easements When Acquired**

Data requests will demonstrate that the easements sought to be used for the construction of the Northern Pass were acquired to bring needed electricity to rural New Hampshire. The Commission cannot distinguish the easements acquired by eminent domain from those acquired by negotiation

and purchase. The easements were not acquired for a massive transmission project that has no distribution capability.

In the late 1940s and early 1950s, as a regulated public utility, PSNH, under Chapter 294 of the New Hampshire Revised Laws, was permitted by law to take power line easements by eminent domain if the easement could not be acquired by negotiation. The law required that PSNH demonstrate to the Commission that the taking was a public necessity. In the late 1940s and early 1950s, particularly after Schiller Station in Portsmouth, New Hampshire, went online, PSNH sought to upgrade its transmission and distribution infrastructure to bring electricity to rural New Hampshire. Most of the easements PSNH acquired were acquired by negotiation and purchase. Some easements were acquired outright, some had to be widened. Some easements, such as those referred to in Order 25,943, were taken by eminent domain. The going rate for the acquisitions, whether by purchase or eminent domain, was \$20 per acre, \$15 per 1000 board feet for lumber pine, and \$2.00 per cord for cordwood.

Most easements were acquired by purchase as people wanted electricity. The easements acquired during that late 1940s and early 1950's time period had grant language providing for transmission and distribution. Some lines were 66 kV AC and were upgraded to 110 kV AC. The lines were subsequently upgraded to 115 kV. All the lines were served by substations that reduced the voltage to 34.5 kV for local distribution to homes, farms and businesses.

It can be said with absolute certainty that none of these old easements were acquired, by eminent domain or purchase, for the construction of massive infrastructure on monopole or lattice towers carrying up to 600 kV DC current with no distribution capability. None of the people or PSNH contemplated that the easements would be used to import high voltage electricity from Canada for sale into Massachusetts, Connecticut and Rhode Island on the wholesale market.

The Commission cannot distinguish between easements based on how the easements were acquired. All the easements, whether by eminent domain or negotiation and purchase, were acquired for the same purpose and that was to bring needed electricity to rural New Hampshire. None were acquired for a project such as the Northern Pass.

**The PSNH Petition to Lease the Easements to NPT Conflicts with Its Own  
Representations to the Commission About Easements on Private Property in segTEL,  
Request for Arbitration Regarding Access to Utility Poles, DT 08-146.**

**In segTEL , PSNH Told the Commission That It Could Not Allow Such Use Because the  
Poles Were Located in Easements on Private Property and That It Would Be Necessary for  
segTel to First Secure the Necessary Private Property Rights to Allow It to Install and  
Operate Its Facilities on PSNH Poles**

In DT 08-146, segTel sought a license from PSNH to attach its fiber optic lines to PSNH power poles located in easements on private property. PSNH represented to the commission that because the poles were located in easements on private property that PSNH had no authority to grant

segTEL authorization by license to attach to PSNH poles. Brief of Public Service Company of New Hampshire, pages 4-9, Tab 28, DT 08-146.

In its Brief at page 4, PSNH offered this sweeping statement about the New Hampshire law of easements: "...There is not a single reported case in New Hampshire which supports such a presumptive trampling of the private rights of the underlying landowners whose land is encumbered by a power line right of way."

The PSNH view of private property rights shifts with company circumstances. By PSNH lights, New Hampshire law of easements does not permit stringing fiber optic cable on its poles located on private property but New Hampshire easement law does allow the construction of massive transmission towers beside existing poles.

PSNH argued in segTEL that segTEL had to obtain the permission of private landowners to hang fiber optic cable on existing PSNH poles but PSNH does not have to obtain the permission of private landowners to construct the massive Northern Pass infrastructure alongside the existing poles.

What makes the PSNH pliable view of easements depending on company interests particularly offensive to the rule of law is that the company cites Lussier v. New England Power, *supra*, as the leading case on the permissible use of easements in segTEL.

Lussier was the principal citation that interveners provided to the Commission in its Motion to Dismiss the PSNH Petition in the docket at bar. (Tab 18).

PSNH made the identical argument in segTEL. Lussier, as argued by PSNH in segTEL at its Brief, page 5, stands for the rule that the use of an easement is one of determining the intent of the parties at the time of the original easement grant.

When the matter is fully litigated on the merits in the courts, the intent of the parties to the easements will be of record. The original intent of the parties for the easements that PSNH proposes to lease to NPI for the Northern Pass was to bring needed electricity to rural New Hampshire, not to import HVDC power from Canada for sale into the New England wholesale market.

**The Substantive Property Rights Issue That Must Be Judicially Determined Before the  
Commission Can Approve a Lease of the Easements Is Pending in the United States  
District Court, District of New Hampshire**

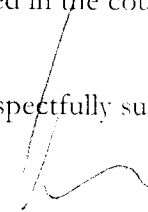
Interveners Kevin Spencer and Mark Lagasse dba Lagaspence Realty, LLC have commenced an action in the United States District Court, District of New Hampshire seeking a declaration that the easement traversing Percy Lodge and Campground does not allow the construction of the Northern Pass and that the project will be an unreasonable burden on the property. Spencer et al. v. Eversource Energy Service Company, Civil Action No. 16-cv-353-PB. Defendant Eversource Energy Service Company has filed a motion to dismiss challenging the Court's diversity jurisdiction. The motion is pending.

**Conclusion**

Intervenors respectfully request that the Commission defer disposition of the Petition for Approval of Lease Agreement until such time as the property rights issue is fully adjudicated in the courts on the merits, including appeals, if any.

10/24/10

Respectfully submitted,

  
Arthur B. Cunningham

Attorney for Intervenors Kevin Spencer and Mark Lagasse dba Lagaspence Realty, LLC

PO Box 511, Hopkinton, NH 03229

603-746-2196 (O); 603-219-6991 (C)


[gilfavor@comcast.net](mailto:gilfavor@comcast.net)

Bar # 18301

**Certificate**

I certify that this document was filed and served in accordance with the New Hampshire Public Utilities Commission Rules.

10/24/10

  
Arthur B. Cunningham