THE STATE OF NEW HAMPSHIRE
before the
PUBLIC UTILITIES COMMISSION

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

Docket No. DE 15-464

LEGAL MEMORANDUM OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY TO QUESTIONS RAISED BY THE COMMISSION IN ORDER NOS. 25,943 AND 25,946

I. Background

In October 2015, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH") petitioned for approval of a lease between PSNH and Northern Pass Transmission LLC ("NPT") of land and easements within existing PSNH rights-of-way. By Order No. 25,943 ("Order") as clarified by Order No. 25,946 ("Clarification Order") (the Order and Clarification Order may collectively be referred to as the "Orders"), the Commission directed the parties to this docket to provide legal memoranda on eight specific questions relating to the ability of PSNH to lease easements acquired by PSNH to NPT and the scope of such easements. With the exception of three easements acquired by eminent domain in the mid-1950s, the easements in question were obtained by negotiation with private landowners. This memorandum constitutes PSNH's response to those questions.[1]

II. Summary

As discussed below, PSNH has the legal right to lease all or a portion of its rights-of-way, including both negotiated and condemned easements, to NPT pursuant to the express language of

[1] By letter dated September 23, 2016, Question 3 in the Order has been answered by PSNH as requested by the Commission and is thus moot. There are no underground electric transmission lines proposed to be constructed within the negotiated easements and condemned easements which comprise the leased right-of-way.

those easements and applicable law. All of the easements obtained by PSNH (whether by negotiation or condemnation) are easements in gross that are freely transferable or alienable absent some indication in the easement grant restricting that transfer. None of the easements includes such a restriction. To the contrary, because the easements grant rights to PSNH and its "successors and assigns," this language plainly allows PSNH to transfer its interest in the easements to a third party by any means or mode of transfer, including a lease.[2]

In New Hampshire and elsewhere, the touchstone for the interpretation of every easement deed (whether obtained by negotiation or condemnation) is the intent of the parties determined first by the language of the instrument. *Lussier v. New England Power Com.*, 133 N.H. 753, 756 (1990). Only when the language of a conveyance document, such as a negotiated easement deed or condemnation order, is found to be ambiguous will a court resort to extrinsic evidence to evaluate its intent or purpose. However, even if this Commission were to find the grants of the condemnation orders to be ambiguous and thus look to the underlying condemnation proceedings for guidance, it is clear that the general purpose of these takings was for "the transmission of electric energy."[3] October 19, 2015 Petition of PSNH in Docket No. DE 15-464 at ¶5. Thus, construction of the NPT line "for the purpose of carrying hydroelectric power produced in Canada to customers in New Hampshire and in the New England energy market" is fully consistent with that purpose.

Indeed, the Commission has permitted the transfer of easement rights by lease in circumstances nearly identical to those present in this proceeding – even absent specific

[2] PSNH submits that Questions 1 and 2 in the Order were expressly addressed by the submission PSNH made to the Commission on December 4, 2015, which is referred to in this memo as the "12/4/15 Letter." For the convenience of the Commission, a copy of the letter is attached to this memorandum as Exhibit "A." These same arguments hold true for both negotiated easements and condemned easements. PSNH may, in fact, lease all or part of its right-of-way to a third party pursuant to applicable law and the express language of the underlying easements.

[3] In each of the condemnation proceedings referenced in Question 5, the stated purpose of the taking was "for the transmission of electric energy."

reference in the easements to "successors and assigns." In 1988, the Commission approved a lease of 112 miles of New England Power Company's right-of-way and a lease of a nine-mile portion of PSNH's right-of-way to New England Hydro Transmission Corporation as part of the Hydro-Quebec Phase II project.[4] The PSNH lease included negotiated easements that did not specifically include a grant to successors and assigns, and also included an easement acquired by condemnation. Further, RSA 374:30, pursuant to which that lease was approved, plainly contemplates that utilities may and will lease their franchise, works and systems or any part thereof.

In sum, the answer to questions 1, 2, 4, 6, and 7 posed by the Commission is "yes," and the answer to Question 8 is "no." The answer to question 5 is that the NPT line is entirely consistent with the transmission of electricity and thus the findings of public necessity in each of the condemnation dockets. Accordingly, PSNH requests that the Commission commence proceedings under RSA 374:30 to determine whether the terms of the lease between PSNH and NPT are in the "public good."

III. Legal Authority

A. PSNH Is Entitled to Alienate, Transfer and Lease, the Negotiated Easements (Questions 1-2)[5]

Question 1: Does the language "successors and assigns" in a utility easement deed, without any additional prohibition or express grant, allow the lease of the easement to a third party?

Applicable case law and other authority cited in the 12/4/15 Letter[6] establish that where the plain language of an easement grant provides for the construction of more than one line, the

[4] See Order No. 19,058 dated April 11, 1988 in Docket No. D-E 87-124.

[5] Questions 1 and 2 in the Order are addressed to the negotiated easements. However, the answer to these questions, and the analysis used by courts to answer them, also answer Questions 7 and 8. The interpretation of condemnation easements is identical to negotiated easements.

construction of additional lines is permitted and is consistent with the general intent identified in the easement document: namely, the transmission of electric energy. 12/4/15 Letter at 1–4. Easements in gross of a commercial nature are freely transferable and thus assignable. *Id.* at 4–6. Given that the language in the easement deeds grants rights to PSNH and its "successors and assigns," the easement rights are assignable. *Id.; see also, Sinclair Trans. Co. v. Sandberg*¸ 2014 COA 76M, ¶¶ 39–41, 350 P.3d 924, 931–32 (Colo. Ct. App. 2014) ("Successors and assigns" in conveyance of a pipeline easement unambiguously reflects an intent to make the property freely alienable, citing cases from Maine, Oregon, South Carolina, and Texas for the proposition that the language "successors and assigns" indicates free transferability).[7] Moreover, even where the easement grant is silent and does not include such language, the easement is assignable as a matter of New Hampshire law. 12/4/15 Letter at 6.

Given this authority, and as demonstrated by the following discussion, it is clear that the right to assign an easement includes the right to lease it. The right to assign is the right to transfer. A lease is simply a means of transfer.

Commercial easements in gross are presumed to be transferable as a matter of law, and have been so treated since the 1940s. *See* 12/4/15 letter at 4, citing RESTATEMENT (FIRST) OF PROPERTY § 489 (1944); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 4.6(1)(c); *see also, Champaign Nat'l Bank v. Illinois Power Co.*, 465 N.E.2d 1016, 1021 (Ill. Ct. App. 1984). ("Easements in gross for railroads or public utility purposes have been uniformly held to be alienable by modern American courts").[8] BLACK'S LAW DICTIONARY at 88 (10th Ed.) defines

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[6] The Letter addresses two issues: how the easements within the PSNH rights-of-way may be used, and that the easement rights are freely transferable.

[7] The *Sinclair* court cites to the *Southtex 66* decision, which explicitly finds that a lease is simply a form of transfer and thus included within an assignment. The *Southtex 66* decision is discussed below.

[8] Intervenors Bradbury, Menard, Berglund, Cote, and Adami discuss easements in gross generally, failing to distinguish between commercial and personal easements. That failure is fatal to their argument for the reasons

"alienable" as "capable of being transferred" and "alienate" as "to transfer or convey." Absent specific language in an easement deed restricting the right to transfer to a specific form of transfer, or some public policy to that effect, there is no reason to believe that the right to transfer is limited at all. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) §§ 4.1 and 4.6(1).

In the easement deeds in question, and as addressed by the Commission, the right to alienate or transfer is expressly found in the words "successors and assigns," which plainly contemplate that rights will – or may in the future – be held by a third party (an "assignee") by an assignment (a form of transfer). The dictionary definition of "assignment" is "the transfer of rights or property." *Id.*, BLACK'S at 142. In turn, "transfer" is defined to include "*[a]ny mode* of disposing of or parting with an asset or an interest in an asset, including a gift, the payment of money, release, ***lease***, or creation of a lien or other encumbrance." *Id.* at 1727 (emphasis added). Black's then defines "lease" as "a contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration" (*id.* at 1024) and "convey" as "to transfer or deliver (something, such as a right or property) to another, esp. by deed or other writing." *Id.* at 407. Thus, the definition of assignment includes the right to transfer, which includes *any form of transfer,* including a lease. Put simply, absent language to the contrary, the grant of a commercial easement with the right to assign includes all forms of transfer.

This is precisely the analysis used by at least one court in rejecting a landowner's claim that a commercial easement that included the right to assign prohibited the lease of the easement.

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discussed in this memo. The Bradbury intervenors also cite *Burcky* for the proposition that easements in gross are not transferable. In *Burcky*, the New Hampshire Supreme Court relied on Am. Jur. 2d Easements and Licenses. Today, Am Jur states that easements in gross are transferable if the parties clearly intended they be. 26 Am. Jur. 2d Easements and Licenses in Real Property § 79 (2016). As noted above, commercial easements in gross are freely transferable absent language to the contrary. Restatement (Third) of Property § 4.6 cmt. b; *see also Canova v. Shell Pipeline Co.*, 290 F.3d 753, 757 (5th Cir. 2002); *Wentworth v. Sebra*, 2003 ME 97, ¶ 13, 829 A.2d 520, 524 ("[W]hen evidence demonstrates that the parties clearly intended that an easement in gross be assignable, it is. This policy is grounded in the general principle of property law favoring free alienability of property.)

In *Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538, 546 (Tex. Ct. App. 2007), the landowner challenged the right of a pipeline company to transfer rights in the pipeline by lease to another pipeline company, notwithstanding that the easement (in that case acquired by condemnation) was granted to the company and to its "successors and assigns." *Id.* at 546. After finding that easements in gross that contained language allowing assignment were freely assignable, and that the use contemplated by the lease related to the purpose of the condemnation (the general transportation of crude oil and refined petroleum products), the court addressed the landowner's claim that "a lease is not an assignment." *Id.* at 547. The Appeals Court flatly rejected the argument, citing Black's for the proposition that the term "transfer" "embraces every method – direct or indirect, absolute or conditional, voluntary or involuntary – of disposing of or parting with property or an interest in property." *Id.* at 547–48. The Court thus concluded that the pipeline company's disposition of its easement by lease was valid given its right to assign the easement rights.[9]

A construction of the right to assign or transfer as preventing the right to lease would create absurd results. Excluding all forms of transfer from one form of conveyance or transfer unless specifically set out in the deed would mean that unless an easement deed identified every type of permitted transfer (instead of simply using the word "assigns"), all forms of transfer would be prohibited, including the right to mortgage easement rights[10] or grant liens on such interests.[11] Yet, utilities commonly issue bonds and mortgage their entire property interests –

[9] *See also, Canova v. Shell Pipeline Co.*, 290 F.3d 752, 755 (5th Cir. 2002) (landowner challenging the use of an easement from the government to a private party did not challenge the right to lease).

[10] Black's defines "mortgage" as: "1. a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms. 2. A lien against property that is granted to secure an obligation." at 1163; *see also Am. Loan & Trust Co. v. Gen. Elec. Co.*, 71 N.H. 192, 51 A. 660, 664 (1901) (discussing the right of electric utilities to mortgage their works and franchises).

[11] Black's defines "lien" as "a legal right or interest that a creditor has in another's property…[t]ypically the creditor does not take possession of the property."

including easements – to do so. Indeed, PSNH's existing First Mortgage Indenture with U.S. Bank National Association, dated as of August 15, 1978, as amended by Twenty-One Supplemental Indentures, expressly mortgages and subjects to the lien of said Indenture, and includes in the mortgaged property covered by said Indenture, all of PSNH's real estate and rights and interests in real estate, including easements and rights-of-way used or useful in connection with its electricity business. Alternatively, excluding only the right to lease from the right to assign would mean that a utility could sell, license,[12] mortgage or place liens on easement rights, but could not lease them. This would be an arbitrary distinction that serves no logical purpose.

Moreover, a presumption that certain forms of transfer are prohibited unless spelled out in the deed would be contrary to the general rule in this State that a conveyance of an interest in real estate conveys all rights (including easements) *unless excluded* in the instrument of conveyance. For example, RSA 477:26, entitled "Easements, Appurtenances, Etc." provides as follows: "In a conveyance of real estate or any interest therein, all rights, easements, privileges and appurtenances belonging to the granted estate or interest shall be deemed to be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary in order for their inclusion to enumerate or mention them either generally or specifically." If it is unnecessary to enumerate the substantive rights that are being transferred by a conveyance in order to transfer those rights, surely it is unnecessary to "enumerate or mention" all procedural means of transfer. Thus, a rule that certain forms of transfer are excluded unless specifically enumerated would be directly contrary to the normal statutory presumption in this State concerning instruments of conveyance. To implicitly impose a restraint on PSNH's ability to

[12] *Henley v. Continental Cablevision of St. Louis*, 692 S.W.2d. 825, 828 (Mo. Ct. App. 1985) ("The owner of an easement may license or authorize third persons to use its right of way for purposes not inconsistent with the principal use granted.")

lease its easements would create an unreasonable restraint on alienation of its interests, contrary to well established policy in New Hampshire law. *Winecellar Farm, Inc. v. Hibbard*, 162 N.H. 258 (2011) (citations and quotation omitted) ("[M]uch of modern property law operates on the assumption that freedom to alienate property interests which one may own is essential to the welfare of society.")[13]

Indeed, New Hampshire law recognizes that utilities have a right to transfer or lease all or part of their regulated assets, including property rights. RSA 374:30, I provides in part as follows:

> Any public utility may transfer or lease its franchise, works, or system, or any part of such franchise, works, or system, exercised or located in this state, or contract for the operation of its works and system located in this state, when the commission shall find that it will be for the public good and shall make an order assenting thereto, but not otherwise….

Easements that are part of the PSNH rate base, including the three identified condemned easements, are part of PSNH's "franchise, works and system." See *In re Appeal of Verizon New England, Inc.*, 153 N.H. 50, 62, 899 A2d 1027, 1037 (2005) in which the Supreme Court of New Hampshire concluded that assets included in a company's rate base are part of the company's "franchise, works, or system." If easements containing the words "successors and assigns" could not be leased, the statute would have little practical effect. Moreover, PSNH would not be entitled to contract with any third party for the construction of a reliability project in its rights-of-

[13] *See also*, RSA 477:24.

> Unnecessary Words; Construction of Certain Words. – The word "grant" in a conveyance of real estate or any interest therein shall be a sufficient word of conveyance without the use of the words "give, bargain, sell, alien, enfeoff, convey and confirm" or the words "remise, release and forever quitclaim." No covenant shall be implied from the use of the word "grant." 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. A deed or reservation of real estate shall be construed to convey or reserve an interest in fee simple unless a different intention clearly appears in the deed.

way and such project might be forced to take separate property by eminent domain for that purpose.

Past actions of this Commission are consistent with this law and have been premised upon the right of PSNH to lease its right-of-way or a portion thereof, and that it may do so even when the easement deeds do not specifically grant rights to PSNH and its "successors and assigns." In Order No. 19,058 dated April 11, 1988 in Docket No. DE 87-124, the Commission approved the lease of 112 miles of New England Power Company's right-of-way, and a lease of a nine-mile portion of PSNH's transmission right-of-way to New England Hydro-Transmission Corporation as part of the Hydro-Quebec Phase II project. Although the Order provides few details, the lease between PSNH and New England Hydro-Transmission dated April 6, 1987 establishes that PSNH was leasing 135 feet of its 270-foot right-of-way corridor in Pelham and Hudson for the construction of the "HQ II" line. *See* Lease, Definition of "The Right-of-Way" and of "PSNH Line Number 326" (a copy of the lease is attached as Exhibit "B"). The Lease granted New England Hydro the right to construct (among other rights) overhead and underground lines across the right-of-way (Section 2.01) and granted New England Hydro the right to further assign "the whole or any portion of its lease" with PSNH approval (Section 10.01).

The right-of-way leased by PSNH to New England Hydro was comprised of 48 negotiated easements and one easement taken by condemnation. A copy of a representative easement deed is attached as Exhibit C. As is evidenced by Exhibit C, the negotiated easements granted PSNH the "right and easement to construct, repair, rebuild, operate, patrol and remove overhead and underground lines." The grant language contains no specific reference to "successors and assigns," although the easement deeds contain a covenant that "Grantee [PSNH],

its successors and assigns" will not undertake certain actions in the easement (*e.g.*, construct buildings) thereby implying a right to assign. The condemnation easement was acquired by PSNH in Docket No. DE-5748 and Order No. 10,346, dated July 29, 1971. Copies of the Petition, Report and Order in Docket No. DE-5748 are attached as Exhibits "D-1," "D-2," and "D-3" respectively. Unlike the other negotiated easements in the leased right-of-way, Order No. 10,346 granted rights to PSNH and its successors and assigns.[14]

In sum, this Commission has previously approved as in the "public good" under RSA 374:30, the lease by PSNH of a right-of-way consisting of 49 easements, only one of which specifically contained a grant to PSNH and its successors and assigns.[15] This approval is consistent with New Hampshire law that specific reference to the terms "successors and assigns" is not required to allow alienability. 12/4/15 Letter at 6. Clearly, the right to transfer an easement by lease or other means is equally permissible where the easement *explicitly* grants rights to PSNH and its successors and assigns. Likewise, the lease of the condemned easement granted by Order No. 10,346 demonstrates that the Commission has approved the lease of rights secured by eminent domain.[16]

A common sense reading of the rights granted by easement deeds, particularly those including a grant to successors and assigns, as confirmed by case law, other authorities, and the

[14] The Commission has also previously approved a lease of transmission easement rights under RSA 374:30 from one corporate affiliate to another in the same holding company for the purpose of construction and operation of transmission facilities as in the public good. *Re New England Electric Transmission Corp.*, Order No. 16,060, 67 NHPUC 910, 915 (1982).

[15] Apropos to this case, this Commission has already granted NPT conditional public utility status having determined that it was in the public good to do so. *See* DE 15-459, Order No. 25,953 dated October 14, 2016.

[16] Rejection of such authority by the Commission in this docket would undermine the rights of the existing Hydro-Quebec Phase II project to operate, as utilities in this state have no ability to obtain property rights for "the privilege of having or maintaining wires and their supports and appurtenances in, upon, over, or attached to any building or land of other persons" by prescription (RSA 231:174), and the use of eminent domain for non-reliability projects has been eliminated.

orders of this Commission demonstrate that easement rights may be leased absent specific language to the contrary in the deed.

<u>Question 2:</u> Does the holder of a utility easement have the right to lease less than all of the easement rights to a third party?

Given that PSNH has the right to transfer (by lease or otherwise) its rights in the negotiated easements and that the grantors of the easement have not reserved to themselves any right to engage in the type of use granted to PSNH, *i.e.*, the transmission of electric energy, PSNH has the right to divide or apportion the easement grant. "Courts have generally concluded that an easement in gross is capable of division when the instrument of creation so indicates or when the existence of an exclusive easement gives rise to an inference that the servitude is apportionable." J. BRUCE & J. ELY, THE LAW OF EASEMENTS AND LICENSES IN LAND § 9:9. *See also Zhang v. Comm's Enters., Inc.*, 866 A.2d 588, 596 (Conn. 2005).[17]

A use is "exclusive" when the "easement holder has the sole right to engage in the type of use authorized by the servitude. . . . In other words, the grantor does not retain common rights with the easement holder to engage in the same activity for which the easement is granted." *Zhang*, 866 A.2d at 596. *See also, Hoffman v. Capitol Cablevision Sys., Inc.*, 52 A.D.2d 313, 317 (N.Y. Sup. Ct. 1976); *Eureka Real Estate and Inv. Co. v. S. Real E. & F. Co.*, 200 S.W.2d 328, 332 (Mo. 1947) (opining that the owner of an easement may license or authorize third persons to use its right-of-way for purposes not inconsistent with the principal use granted). Where the right is exclusive, the right to apportion or divide is presumed.

> It is well settled that where the servient owner retains the privilege of sharing the benefit conferred by the easement, it is said to be "common" or non-exclusive and therefore not subject to apportionment by the easement owner. Conversely, if the rights granted are exclusive of the servient owners' participation therein, divided

[17] The issue of divisibility or apportionment most commonly arises today in connection with efforts by landowners to prevent cable companies from installing cables in easements granted for the transmission of electricity. Bruce and Ely § 9.9 at 9-20-21; *Heydon v. Mediaone*, 275 Mich. App. 267 (Ct. App. Mich. 2007).

> utilization of the rights granted are presumptively allowable. This principle stems from the concept that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others. On the other hand, if the grantor intends to participate in the use or privilege granted, then his retained right may be diminished if the grantee shares his right with others. Thus, insofar as it relates to the apportionability of an easement in gross, the term "exclusive" refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land.

Henley v. Continental Cablevision of St. Louis, 692 S.W. 2d. 825, 828–29 (Mo. Ct. App. 1985) (citing 3 POWELL, THE LAW OF REAL PROPERTY at 344-224-25 (1984)). The rule makes sense. If the grantor has no right to use the easement in common with the grantee, a use by another – for the same purpose for which it was granted (particularly when the easement grant allows a transfer to successors and assigns) does not affect the grantor beyond the terms of the grant, and thus does not overburden the easement *per se.* The right to divide or apportion the easement is therefore presumed.

Consistent with this authority, RSA 374:30 explicitly recognizes that a public utility may lease "any part of" its "franchise, works or system," including easements that are part of rate base. The utility may, therefore lease a part of and not just the whole of an easement. In fact, this Commission approved the lease of a portion of the PSNH right-of-way to New England Hydro-Transmission pursuant to this statute.

Accordingly, where easement deeds permit a transfer to successors and assigns, either explicitly or otherwise, such deeds permit a transfer to a third party by any and all means. Likewise, unless a grantor retains the right to engage in the same activity as the grantee, the easements are exclusive and allow third parties (successors and assigns) to use the easement for the purpose granted (in this case the transmission of electricity). That right may be conveyed to

a third party by any means of transfer. An assignment by lease of the easement to an "assignee" for the same purpose for which the easements were granted is therefore permitted. Thus, PSNH is entitled to lease a portion of its easement rights to NPT, consistent with the Commission approved lease of a portion of the PSNH right-of-way to New England Hydro-Transmission.

B. <u>PSNH Is Entitled to Alienate, Transfer and Lease the Condemned Easements. Construction of the NPT Line is Consistent With the Purpose of Those Takings (Questions 4-8).</u>

As shown below, the condemnation orders in each of the identified dockets unambiguously allow for the construction of more than one line in the condemned easement. The granting orders provide that PSNH "shall be entitled to construct and maintain lines of poles and towers, or both poles or towers."

Because the orders unambiguously allow for the construction of more than one line, it is unnecessary to examine extrinsic evidence to establish the "purpose" or "intent" of those condemnation proceedings. However, if the Commission does look to those proceedings for evidence of intent, they strongly support the construction of additional lines in the condemned easement areas. The petitions in each proceeding request the right "to construct *one or more lines* for the transmission of electric energy." Finally, although case law does not support the contention that the "purpose" of the condemnation taking must be examined to determine the scope of condemnation orders, that purpose was, in fact, consistent with NPT's proposed use. As evidenced by the condemnation proceedings, the easements were acquired for the transmission of electricity and were not limited to the construction of one line.

<u>Question 4</u>: Does the scope of the rights granted pursuant to the three orders permit Eversource to construct more than one transmission line within the physical boundaries of the right-of-way?

1. The Interpretation of Condemnation Easements Does Not and Should Not Differ From Negotiated Easements.

A negotiated easement, like any ordinary contract, is construed to effectuate the intent of the parties at the time of conveyance. An easement acquired by condemnation or prescription is construed to effectuate the purpose for which it was acquired. *Arcidi v. Rye*, 150 N.H. 694, 701 (2004) (discussing that New Hampshire courts ask what was the intent of the parties at the time of contracting when interpreting easements). In either case, if the purpose or intent can be discerned from the face of the instrument, New Hampshire courts will not look to extrinsic evidence. *See Lussier v. New England Power Co.*, 133 N.H. 753, 756 (1990) ("The beginning and end of our inquiry is found in the words of the easement deeds.").

Easements, whether negotiated, obtained by prescription, or by condemnation, are interpreted by resort to the plain language of their terms. *Near v. Dep't of Energy*, 259 F. Supp.2d 1055, 1059 (E.D. Cal. 2003) (interpreting California property law); *City of Huntsville v. Rowe ex rel. Dimitriu Family Trust*, 889 So.2d 553, 558 (Ala. 2004); *Banyan Const. Co. v. Union Elec. Co.*, 840 S.W.2d 298, 302 (Mo. Ct. App. 1992); *State v. Brownlow*, 319 S.W.3d 649, 652–53 (Tex. 2010); *Wisconsin Pub. Serv. Corp. v. Andrews*, 2009 WI App 30, ¶¶ 13–14, 316 Wis.2d. 734, 742, 766 N.W.2d 232 (Wis. Ct. App. 2009). The federal courts take a similar approach when interpreting condemnation easements acquired pursuant to federal law. *See Canova v. Shell Pipeline*, 290 F.3d 753, 758 (5th Cir. 2002).[18]

[18] Only two jurisdictions treat condemnation easements differently from negotiated easements in the first instance, regardless of ambiguity. Kansas looks to the appraiser's report – the content of which is statutorily prescribed – prepared as part of the condemnation proceedings. *Kansas Power & Light Co. v. Ritchie*, 722 P.2d 1120, 1123 (Kan. Ct. App. 1986). Massachusetts looks to the language of the taking order *and* the circumstances surrounding the taking. *Gen. Hosp. Corp. v. Massachusetts Bay Transp. Auth.*, 672 N.E.2d 521, 525 (Mass. 1996). Yet even in

Although the New Hampshire Supreme Court has not had occasion to answer the question of whether condemnation easements are interpreted differently from other easements, the Vermont Supreme Court recently addressed this issue. In *Farrell v. Vermont Electric Power Company*, the Court considered whether condemnation easement language permitted the erection of a second line for the transmission of electricity for one project after the property had been taken in connection with the construction of a different line for a different project. 193 Vt. 307, 313, 68 A.3d 1111, 1116 (2012). The majority in *Farrell* looked to the plain language of the condemnation easement, just as it would interpret a negotiated easement. *Id.* The court concluded that because the easement language permitted the construction of multiple lines, it was unambiguous and there was no need to look at extrinsic evidence, including the condemnation proceedings, to conclude that construction of the second line was permitted. The Court concluded that the purpose for which the property had been condemned was the transmission of electricity, and that this purpose was broad enough to allow the construction of a second line within the easement. Additionally, because the second line was permitted by the very language of the easement grant, the *Farrell* majority concluded as a matter of law that the second line did not impose any further burden on the easement.[19]

By contrast, the dissent in *Farrell*, although agreeing that the utility had the right to construct the second line, opined that the proper inquiry for interpreting condemnation easements is to look to the condemnation petition *and* the order approving condemnation to determine whether the second line constituted an overburdening of the easement. *Id.* at 1119. However, even if the dissent's view in *Farrell* were applied here, the same conclusion would be reached

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these jurisdictions, in discerning the purpose of condemnation easements, courts look to broad purposes for which the property was taken. In the condemnation dockets at issue here, that purpose is the transmission of electricity.

[19] In *Farrell*, the second line had been built when the landowner brought suit. As a result, the issue was whether that line overburdened the easement *per se* and thus constituted an additional taking. *Id.*, 68 A.3d. at 1115 n. 1. The Court addressed that issue notwithstanding that the claim was arguably moot after the line had been constructed.

because the condemned easements, as evidenced by the petitions and orders in each case, provide for the construction of more than one transmission line.

The majority of jurisdictions that have interpreted condemnation easements follow the majority in *Farrell*, interpreting condemnation easements as they would any negotiated easement pursuant to their property law doctrines. *See Near*, 259 F. Supp.2d at 1059; *City of Huntsville*, 889 So.2d at 558; *Banyan Const. Co.*, 840 S.W.2d at 302; *Brownlow*, 319 S.W.3d at 652–53; *Wisconsin Pub. Serv. Corp.*, 2009 WI App 30, ¶¶ 13–14; *see also Canova*, 290 F.3d at 758. Under New Hampshire law, "[i]n only two cases is a court justified in placing itself in the situation of the parties at the time of the conveyance and taking into consideration all the facts and surrounding circumstances to determine their intentions: (1) where the extent and reasonable use of the easement is at issue; (2) where the language used is ambiguous." *Burcky v. Knowles*, 120 N.H. 244, 248 (1980). This Commission has interpreted utility easements by resort to the plain language of the easement. *SegTel Inc. Request for Arbitration*, DT 08-149, Order No. 25,090 (Apr. 7, 2010) (Order Denying Request for Arbitration).[20] Here, the language of the condemnation grant is clear on its face, and the Commission need look no further. Whether the Commission follows the majority or dissent in *Farrell*, it is clear that a second line is permitted by the very language of the condemnation easements.

[20] In a filing dated October 24, 2016, Intervenors Kevin Spencer and Mark Lagasse d/b/a Lagaspence Realty, argue that PSNH's position in this Docket is inconsistent with the position it took in *SegTel*. The Intervenors are wrong. In *SegTel*, SegTel contended that the plain language of easement deeds granted to PSNH and its successors and assigns in 1915 "for the transmission of high or low voltage electric current" permitted or required PSNH to allow SegTel to place its privately owned fiber optic cable for the transmission of SegTel's "telecommunications and information services" on PSNH's poles in the PSNH right-of-way. The Commission also considered whether easement grants from 1972 granting rights "for transmitting electric current and/or intelligence" permitted or required the installation of SegTel's fiber optic cable. PSNH argued that the express language of the easement deeds prohibited PSNH from authorizing or allowing SegTel's installation, and the Commission agreed with PSNH's position. PSNH's argument in *SegTel* is consistent with its position in this Docket that the easement deeds unambiguously allow for the lease in question. Moreover, the Commission could not have reached its decision in *SegTel* if the words successors and assigns had prevented a transfer by license to SegTel. Likewise, there would have been no need to discuss the language of the easement deeds if easement grants were limited to the specific lines installed, as opposed to the more general purpose of the transmission of electricity.

2. The Condemnation Orders in Docket Nos. DE 3231, DE 3232 and DE 3314 Unambiguously Permit the Construction of Additional Lines.

Because the condemnation orders the Commission has identified clearly grant the right to construct and maintain "lines," there is no need to resort to extrinsic evidence. However, even if the Commission did resort to extrinsic evidence, New Hampshire law informs us to look for the purpose for which the easement was created. *Burcky*, 120 N.H. at 248. In the dockets of the identified proceedings, the uses set forth in the condemnation petition, and the report to the Commission expressly contemplate the installation of multiple lines. So even if one resorted to such extrinsic evidence, PSNH or its assignees would be permitted to install multiple lines.

The language of each of the orders in the three identified condemnation dockets is identical and provides as follows:

> ORDERED, that in the matter of the petition of the Public Service Company of New Hampshire v. [name of the landowners and date of the petition] praying for rights for its pole ***lines*** over land of said respondents, situate in [location of the land] this Commission having, upon due notice to all parties in interest, heard and determined the necessity for the rights prayed for, now [date of order], order, adjudges, and decrees, as follows:
>
> [1] That it is ***necessary in order to meet the reasonable requirements of service to the public*** that said Public Service Company of New Hampshire, a public utility subject to supervision under Chapter 294 of the Revised Laws, should erect, repair, maintain, rebuild, operate and patrol ***an electric transmission line*** consisting of suitable and sufficient poles and towers with suitable foundations, together with wires strung upon and extending between the same for the transmission of electric current, together with the necessary crossarms, braces, anchors, wires and guys over and across lands of said Bernice D. Kelley, as hereinafter more specifically set forth, [2] ***and*** that said Public Service Company of New Hampshire, ***it successors and assigns,*** by virtue of its said petition and this decree thereon, shall be entitled to construct and maintain ***lines of poles or towers***, or both poles and towers, in the location hereinafter specifically set forth, and to place upon said poles and towers the necessary crossarms, braces, anchors, wires and guys, [3] also, that in constructing and maintaining said ***line of poles and towers*** with wires, fixtures, guy wires, and supports, as herein after set forth, it shall have the right to cut down or keep trimmed all trees and bushes upon certain tracts of land as hereinafter described and located, also, that it shall have the right at any time to pass and repass with men, teams, and other vehicles along

and under said line of wires across tracts of land.

Orders Nos. 6195 (Sanborn, Truelson and Ryan, Docket No. DE 3232) 6196 (Kelley Docket No. DE 3231), and 6392 (Sleeper, Docket No. DE 3314) (emphasis and numbering added).

As is evident from this language, the grant to PSNH, its successors and assigns was for the entitlement "to construct and maintain lines of poles or towers, or both poles and towers" (plural) within the condemned easement. Likewise, the first sentence of the condemnation orders makes clear that the petition requested the right to construct lines (plural) within the right-of-way to be condemned. Since the express language of the grant allows the construction of multiple lines, additional lines may be constructed in the condemned easement.

While the language of the order refers to "an electric transmission line" and the right to cut and trim "said line of poles and towers," the use of the singular language does not change the broad terms of the grant, which follows number "2" in the insert above. The reference to "an electric transmission line" is simply a statement of why the taking was necessary to meet the "reasonable requirements of service" at the time of the petitions, which follows number "1" above. Likewise the reference to "said line of poles" (item "3" in the orders) describes the work that is permitted when the specific line then contemplated was built. The actual grant, to PSNH and its successors and assigns, expressly provides for the construction and maintenance of more than one line. *Lussier*, 133 N.H. at 757 (finding that language in an easement deed providing for the construction of "lines of towers or poles or both," expressly provided for the construction of more than one line); *Farrell*, 63 A.3d at 1113 (construing language in a condemned easement providing the right to construct "lines of poles" as expressly allowing the construction of an additional line within the condemned right-of-way.); *see also* cases cited in Section 4(A) above.

Yet even if the grant language was considered to be ambiguous, the entire docket in each case demonstrates that the grant was intended to allow the construction of multiple lines within the condemned easements. The orders reference the petitions: "by virtue of its said petition and this decree thereon, shall be entitled to construct and maintain lines of poles." The petitions in each of the dockets identified by the Commission state as follows: "In order to meet the reasonable requirements of service to the public, it is necessary for the Company to construct *one or more lines* of the transmission of electric energy between [two locations]." (Emphasis added). The prayer for relief in each petition does not refer to the construction of a specific line, but instead asks that the Commission grant the Company "permission to take the right-of-way as set forth above in paragraph '3'" (which is the metes and bounds description of the entire right-of-way). Thus, the petitions are consistent with the grant language in the orders. They provide that the stated necessity to serve the public requires the construction of "one or more lines" and request an order for that construction.

In addition to the petitions, nothing in the reports filed by the Commissioners of the Commission in each of the identified dockets, or in the hearings conducted on the taking, is inconsistent with the right to construct more than one line. The Reports in Docket Nos. DE 3231 and 3232 contain representations from PSNH that the specific line to be built is sought for the purpose of interconnecting generating facilities and generating capacity.[21] Yet in all three Reports, despite reference to a specific line, the finding of the Commissioners was that "the right of way is necessary to meet the reasonable requirements of service to the public." Put simply, the Reports indicate that a grant of the right-of-way, not the construction of a specific line within it, is what is being awarded. Finally, with respect to the hearing transcripts, the testimony of

[21] In Docket No. DE 3314, the necessity for the line was conceded.

appraisers demonstrates that the value assigned to the taking was for the value of the right-of-way being acquired, not for the value of a specific portion of the right-of-way occupied by a line.[22]

Finally, in each condemnation docket, the Orders of Notice specify that PSNH seeks the right to construct "*one or more lines"* and the transcript of the hearing in each case opens with the Chairman stating that the hearing is upon the PSNH "*petition for a right-of-way for construction and maintenance of transmission lines. . ."* Based on the plain language of the three orders, additional lines may be constructed in the condemned easements and this language is supported by the proceedings in the PUC in each of these dockets.

<u>Question 5</u>: May Eversource construct a transmission line that is not for the purposes stated during the conduct of the proceedings in D-E 3231, D-E 3232, and D-E 3314 and upon which the Commission based its findings of public necessity in the three orders?

Contrary to the presumption in this question, the proposed NPT line is fully consistent with the stated purpose of the condemnation proceedings, that being the "transmission of electric energy." As the Vermont Supreme Court ruled in *Farrell*, where the language of a condemnation grant expressly permits a utility to install and operate transmission lines, it "does not confine [the utility's] use for that purpose to the [first constructed] line alone." 68 A.3d. at 1116. The *Farrell* Court found the purpose expressed in the condemnation order to be "the transmission of electric energy," not the construction of a specific line. *Id.* at 1117. *See also*,

[22] The Commission should consider the practical results of a finding, contrary to the express language of the orders in the three dockets, that the language in the orders does not permit the construction of additional lines within the condemned easements. It is apparent from the identical language of the orders in the identified dockets that the language set out above was the standard grant language used by the Commission in the 1950s. If this language were construed to limit all such condemned easements to one line, then no future reliability project could be built in an existing PSNH right-of-way without a second condemnation proceeding or the taking of additional land where condemned easements were included in that right-of-way and contained this standard grant language. Likewise, the same language has been commonly used in PSNH negotiated easements, so the effect of such a ruling would devalue hundreds of miles of existing PSNH rights of way.

Southtex 66, 238 S.W.3d at 546 (holding condemned property taken for pipeline may be leased and used for the general purpose contemplated by the condemnation but not for an independent use unrelated to that general purpose).

For the Commission's purposes in interpreting the condemned easements, the broad public interest of electric transmission is the purpose for which the right-of-way property was condemned unless specifically limited in the condemnation easement. Every use of the easement thereafter is evaluated through that lens. Is the property being used for the same type and kind of purpose for which the easement was taken? Is it for electric transmission? If yes, then it is allowed. *See* 3 NICHOLS ON EMINENT DOMAIN §§ 9.02[11–12] & 11.08[2] (3rd Ed. 2013).

PSNH submits that the Vermont Supreme Court's conclusion in *Farrell*, and the general rule concerning the interpretation of condemnation easements as containing a broad purpose, applies with equal force to the three identified condemnation dockets. First, as discussed in the response to Question 4 above, the petitions in those dockets were not limited to the construction of one line between two specified points. Each petition referred to the construction of "one or more lines for the transmission of electric energy" "in order to meet the reasonable requirements of service to the public" and requested the grant of the right-of-way to build a specific line or future lines for that purpose. This is entirely consistent with the eminent domain statute in effect in 1953 and 1954, when these takings occurred. That statute provided in pertinent part as follows: "The petition of a public utility shall set out the title and description of the land to be involved, the rights to be taken therein, and the *public use* for which the same are desired." R.L. 294:7 (1951) (emphasis added). R.L. 294:1 further described the necessity supporting the taking as the general necessity of meeting "the reasonable requirements of service to the public." Thus,

the statute made clear that the purpose of the taking was a broad public purpose served by public utilities.

The testimony of the appraisers at the hearings in these dockets shows that the value of the land taken was not based on the construction of a specific line, but rather, on the value of the entire parcel taken. Tr. in Docket No. DE 3314 at 30–52. The fee owner has been paid for the entire width of the right-of-way. Restricting construction to only one line would result in landowners receiving compensation for property rights that the utility cannot use.[23]

Fourth, the language of the condemnation orders, as set out above, specifically identifies the purpose of the taking namely, the construction of the applicable lines "for the transmission of electric current."

An interpretation of the purposes of these (or other electric utility condemnation takings) as being limited only to the construction of one line for the purpose of transmitting electric power between two points (unless specifically so limited by the condemnation documents) would create undesirable results. For example, if the taking was limited to the construction of one line for the transmission of a particular kilovolt (kV) design voltage between two points, no kV upgrade of the line would be possible without an additional taking. In the event that the beginning or end point of the line needed to be changed, that could not be done without a further

[23] As Nichols points out:

> After a public easement in private land has been taken by eminent domain, and the land has been devoted to the use for which it was taken for a number of years, a change or an increase in the necessities and requirements of the public may lead to an altered or increased use of the land. If the new use is of the same character as the use for which it was originally taken, and it advances the original purpose, there is an uncompensable (for the fee owner) difference in degree of use. This means no additional taking or condemnation is required.. . .
>
> The owner is deemed to have been compensated for all these damages when the original easement was taken. The owner's good fortune in escaping for several years an injury for which he or she had been fully paid is not the basis of a property right protected by the Constitution. The owner is not entitled to compensation both when the right to inflict the damage was acquired by the public and when the damage is actually inflicted.

3 NICHOLS ON EMINENT DOMAIN § 9.02(11)(b) (3 Ed. 2013).

taking notwithstanding that the change in location had no impact whatsoever on the condemned parcel. Obviously, the owner of the condemned property has little interest in where the line begins or ends, only that it crosses his or her land.

In sum, the petitions in Docket Nos. DE 3231, DE 3232, and DE 3314 explicitly state that additional lines may be necessary and the orders grant the right for PSNH and its successors and assigns to construct those lines for the general public purpose of "the transmission of electric currents." Only by assuming an extremely narrow purpose of these takings – and by ignoring the purpose actually set out in the proceedings – could one conclude that the NPT line is inconsistent with the purposes stated in the identified dockets. Such a conclusion would also be directly at odds with the Commission's determination in Order No. 19,058 in Docket No. DE 87-124, approving the PSNH lease of right-of-way for construction of the HQ Phase II line for the purpose of transmitting electricity.

Question 6: Does the scope of the rights granted pursuant to the three orders permit Eversource to construct a transmission line in any location within the physical boundaries of the right-of-way or only as depicted on plans submitted to the Commission to obtain a grant of eminent domain?

As demonstrated by the discussion above, the grant clauses in the condemnation orders expressly allow for the construction of multiple lines within the condemned easement areas for the general purpose of the transmission of electricity. The grant language provides that PSNH "shall be entitled to construct and maintain lines of poles or towers, or both poles and towers, in the location hereinafter specifically set forth." The only location "hereinafter specifically set forth" is the description of the entire condemned easement area by metes and bounds, and thus allows for the construction of the "line or lines" at any location within the described easement area. Any contention that the scope of the rights granted in the condemnation easements is

limited solely to one location is therefore directly contradicted by the language of the condemnation orders in the three dockets.

Question 7: If the answers to questions 4, 5, or 6, are in the affirmative, does Eversource have the right to lease some or all of the rights it holds by virtue of eminent domain to a third party?

See the answer to Question 8 below.[24] As discussed above, the grants in the condemnation orders grant rights to PSNH and its successors and assigns. As a result, PSNH has the right to transfer its easement rights by any means. This includes the right to transfer by lease, a right this Commission approved in Order No. 19,058.

Question 8: Does the term "successors and assigns" in a utilities easement obtained by eminent domain differ in construction and effect from the term "successors and assigns" in a utility easement deed obtained through agreement of the parties?[25]

As discussed above, condemnation easements are interpreted in the same manner as negotiated easements. *See e.g. Farrell*, 68 A.3d at 1116; *see* Section 4(A) above**.** As a result, and as also discussed above, the right to assign a condemned easement includes the right to transfer – and therefore lease – all or any portion of the easement for a use consistent with the original use. *See e.g., Southtex 66*, 238 S.W.3d. at 546. There is no authority holding that the term "successors and assigns" varies in meaning according to whether it is included in a voluntary grant of authority or in a condemnation document.

Conclusion

As set forth above, the law in New Hampshire is clear. The express language of the negotiated easements and condemnation orders that comprise the leased rights-of-way allow PSNH to lease to a third party such as NPT. New Hampshire law does not expressly

[24] The Commission's question assumes an affirmative answer to question 5. In fact, the NPT line may be constructed because it is consistent with the purposes identified in the identified condemnation dockets.

[25] Questions 7 and 8 should be considered in reverse order.

differentiate the interpretation of negotiated easements from those acquired by eminent domain and, in jurisdictions where the question has been raised, easements obtained by condemnation are more broadly construed than those acquired through a negotiated transaction.

The foregoing demonstrates that the proposed lease is not forbidden by law, and accordingly, PSNH requests that the Commission determine the lease is in the public good, as set forth in the petition and the supporting testimony and should be approved pursuant to RSA 374:30.

Respectfully submitted this 28th day of October, 2016.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
d/b/a EVERSOURCE ENERGY

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CERTIFICATE OF SERVICE

I certify that on this date I caused this pleading to be served to parties on the Commission's service list for this docket.

October 28, 2016