

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

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

Petition to Lease Rights-of-Way to Northern Pass Transmission, LLC

DE 15-464

**SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS, CITY OF
CONCORD AND THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC**
JOINT LEGAL MEMORANDUM

The Society for the Protection of New Hampshire Forests, the City of Concord and the New England Power Generators Association, Inc. (NEPGA)¹ (collectively, Intervenors) file the following joint legal memorandum pursuant to Order Nos. 25,943 (September 15, 2016) and 25,946 (September 27, 2016) in the above-referenced docket, stating as follows:

Preliminary Statement

This docket involves the purported transfer of property rights from Eversource Energy (Eversource) to its affiliate, Northern Pass Transmission, LLC by way of a lease agreement (Lease Agreement) dated October 19, 2015. It is undisputed that the purpose of the transfer of these property rights is to allow Northern Pass Transmission to use the easements and rights-of-way acquired by Eversource for the sole purpose of constructing a 192 mile transmission line, known as Northern Pass, stretching from New Hampshire's border from Canada to Deerfield. As discussed more fully below, Eversource's limited property rights in the existing right-of-way, obtained through voluntary easements and condemnation actions, do not allow it to transfer rights to a third party as it is attempting to do through the Lease Agreement to Northern Pass Transmission. This determination is based on well-established property law throughout the

¹ The New England Power Generators Association joins in this legal memorandum with respect to the issues that are relevant to its intervention. The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

country, the Commission's rules governing transactions between affiliated entities, as well as the State of New Hampshire's clearly articulated standard, expressed in both its Constitution and its statutes, that private property cannot be taken for a private benefit.

With respect to the rights that Eversource obtained by voluntary easements and condemnation orders, the language "successors and assigns" in the easement deeds only allows the right to transfer the easements in limited instances. This language does not allow Eversource to apportion and lease to a third party the right to use the easements when it creates an additional physical burden on the servient estate. Here, Eversource leased to Northern Pass Transmission the right to construct and operate an additional line through the properties. This Lease Agreement violates the terms of the easements because it increases the physical burden on the underlying landowners, and it overreaches the limited property rights Eversource holds by attempting to convey rights that it does not own. Indeed, Eversource itself argued in another case addressing this identical issue that allowing a third party to use the right-of-way corridor for a different purpose would result in the "trampling of private property interests."²

Eversources's rights with respect to property obtained by eminent domain is even more limited. Decades of precedent exists regarding the power of eminent domain, the exercise of that power and the rights, privileges and responsibilities of parties relative to properties condemned. This is especially true with respect to public utilities. More recently, due to the introduction of competition into the electricity markets and the dismantling of the regulated monopoly protection for many of the functions and responsibilities of electric utility companies, the principles that once governed utility property assets, including both their use and their transfer, when

² This was addressed in segTEL's Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire, Docket No. DT 08-146. Eversource raised this argument in its motion to dismiss at 6-7, and in its brief at 4-11. Ex. 1. In that case, Eversource asserted that segTEL's request to locate cable in the right-of-way corridor exceeded the rights it held in the right-of-way.

reexamined, no longer apply in certain circumstances. The fundamental changes brought about by the restructuring of the electricity markets call into question the continued viability of the precedents rendered under the former regulated utility paradigm.

In the years following the restructuring of the electricity market, the legislature and New Hampshire citizens have repeatedly and unambiguously made clear their intent to prohibit the use of private property for private development. In 2006, the citizens of New Hampshire took the extraordinary action of approving a constitutional amendment to offer the greatest protection possible against the derogation of private property rights. In 2012, the legislature chose to underscore the constitutional referendum by amending New Hampshire statutes to prevent the direct or indirect condemnation of private property by a utility for private development. The legislative history relative to the statutory enactment provides crucial context for the Commission in this proceeding. Moreover, in just the last year, the Commission itself has taken steps to provide greater protections against abuse in transactions between affiliated entities.³

Given the clearly evolving law in this area over the last ten years, the Commission has appropriately requested the participants in this docket to address these changes and their impact on the proposed Lease Agreement between Eversource and its competitive electricity affiliate, Northern Pass Transmission. The eight questions posed by the Commission are grouped below into two general categories for the purpose of the legal analysis. Section I addresses the rights conveyed by voluntary easements containing the language “successors and assigns,” and is responsive to Questions 1 through 3. Section II addresses whether rights obtained through eminent domain may be used for purposes *other than* a project necessary for reliability and is responsive to Questions 4 through 8. This legal memorandum provides a detailed review of

³ See, e.g., N.H. Code of Admin. Rules Puc Ch. 2100. The Commission’s sensitivity to and focus on affiliate transactions is evident in its Order in this and other dockets. See, e.g., Order No. 25,860 at 5 (January 19, 2016) (stating concern for affiliate abuse, necessity for transparency and requiring competitive bidding to prevent same).

applicable legislative enactments, administrative rules and caselaw that Intervenors assert allow for only one viable answer to whether Eversource's actions relative to the transfer of utility property rights are permissible, and that the answer to that general question is clearly "no."⁴

Analysis

I. Property Rights Obtained Through Voluntary Easements

A. Question No. 1: The language "successors and assigns" does not allow the lease of an easement in gross to a third party

Under New Hampshire law, an easement is "an incorporeal, nonpossessory right to the use of another's land." *Burcky v. Knowles*, 120 N.H. 244, 247 (1980). Easements do not confer title to the land, and, therefore, the holder of an easement does not own the land. 25 Am. Jur. 2d Easements And Licenses § 11 (2d ed. 1996).

The ability to transfer an easement generally depends on whether it is "in gross" or "appurtenant." An easement appurtenant is "generally created for the purpose of benefiting the owner of the dominant estate [and] . . . runs with the land, is incapable of existence separate and apart from the dominant tenement, and is inheritable." *Cricklewood on the Bellamy Condo. Assoc. v. Cricklewood on the Bellamy Trust*, 147 N.H. 733, 737 (2002). In contrast, an easement in gross belongs personally to a specific individual. *Burcky*, 120 N.H. at 247. The holder of an easement in gross has the right to use the land encompassed by the easement independent of ownership or possession of other land. *Id.*

An easement in gross "is generally not inheritable, and vests only in the person to whom it is granted." *Id.* For that reason, the language "successors and assigns" in an easement in gross is utilized to ensure that the personal property rights are transferrable and will run with the land. *See, e.g., Wilder v. Wheeler*, 60 N.H. 351 (1880) (holding that easement in gross was not

⁴ See generally, Memorandum of Law prepared by Foley Hoag, dated November 5, 2015, and attached hereto as Ex. 2.

transferrable because it did not include the words “successors and assigns”); *Cross v. Berlin Mills Co.*, 79 N.H. 116, 123 (1918) (holding that easement in gross was assignable because it contained the words “heirs and assigns”). The language “successors and assigns” does not by itself support a determination that the easement can be apportioned to a third party. Rather, the easement grant language needs to specify that the grantee may sublease an interest in the easement by using terms such as “lessees” and “tenants.” *See, e.g., Joliff v. Hardin Cable Television Co.*, 269 N.E.2d 588 (Ohio 1971) (holding that the words “lessees and tenants” indicate that it was intended by the parties that the easement holder could lease some portion of its interests to third parties).

It is undisputed that this case involves an easement in gross.⁵ In New Hampshire, the grant to a public utility of a right to use another’s land for maintaining underground and overhead utilities is considered an easement in gross because the right to use the land is itself the benefit. RSA 672:14, III (2002). The words “successors and assigns” in the easement deeds only indicates that the easement in gross can be transferred to a successor or assign. No such type of transfers has occurred, as discussed below.

Transfer to successor: First, this case does not involve a transfer of rights to a successor corporation of PSNH. Although PSNH is doing business as “Eversource,” PSNH is still a company in good standing in New Hampshire, and no corporate success has replaced PSNH through a merger, acquisition or other reorganization.

Transfer by assignment: There has also been no assignment of rights. An assignment is a transfer of property or some other right from one person to another which confers *a complete and present right* in the subject matter to the individual(s) to whom property is transferred. 6

⁵ Eversource acknowledges that the easements are “in gross” as indicated in its correspondence to Executive Director Debra Howland in the letter dated December 4, 2015 at 4.

Am. Jur. 2d Assignments § 1 (2d ed. 1999). An assignment is an absolute, unconditional, and completed transfer of all right, title, and interest in the property that is the subject of the assignment. *Id.* at n. 2.

Here, Eversource did not divest itself of all control over their easements in the Lease Agreement with Northern Pass Transmission, and therefore the leasehold interest acquired by Northern Pass Transmission cannot be considered an assignment. The transaction instead must be considered as an attempt to apportion the easements. Eversource's attempt to apportion the easements to allow Northern Pass Transmission to construct an entirely new line is impermissible, as discussed further in response to Question 2.⁶

B. Question No. 2: The holder of a utility easement does not have the right to lease less than all of the easement rights to a third party when it results in an additional burden to the landowner

It is often stated that property ownership can be described as a bundle of rights analogous to a bundle of sticks. *State v. Boyer*, 168 N.H. 553, 562 (2016). A property owner's right to exclude others from his or her land has been recognized as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Ogg v Mediacom, LLC*, 142 SW3d 801, 807 (Mo. Ct. App. 2004) (quoting *Loretto v Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 433 (1979)). Eversource has decided to trample upon this "essential stick" as it relates to the property of the landowners who granted easements by allowing Northern Pass Transmission to construct another transmission line across their properties.

Eversource may argue that *Lussier v. New England Power Company* allows the lease of the easement rights to Northern Pass Transmission. The *Lussier* case only addressed whether the

⁶ Nor does Eversource's purported transfer of these easements comport with N.H. Code Admin. Rules Puc Ch. 2100 governing affiliate transactions. As discussed more fully in Ex. 2 at 4-7 and Section II *infra*, any transfer of property between affiliated entities must comport with the Commission's rules relating to transparency in valuation, nondiscrimination and non-preferential treatment of an affiliate over other competitors in the market; the Lease Agreement negotiated between the parties simply does not comply with these rules.

scope of the easement allowed New England Power Company, which was the easement holder, to construct a third line through the right-of-way. There was no discussion regarding whether a *third party* could use the easement held by New England Power Company to construct the line. Although New England Hydro-Transmission Company was involved in the project being addressed by *Lussier*, the case does not include any discussion regarding whether New England Hydro-Transmission Company could lease the property and/or construct the line. There is also no indication in the *Lussier* case there was a lease agreement and/or other transfer of rights to New England Hydro-Transmission Company, all of which are required under today's standards.⁷ For that reason, the *Lussier* case cannot be used to support a determination that a public utility is allowed to lease less than all of its rights to a third party.

Eversource has previously recognized that there is no presumption that its right-of-way may be made available to third parties. In a response to a request by segTEL to attach fiber optic telecommunications cables and related hardware to the existing poles owned by Eversource in a right-of-way corridor, Eversource argued that it would be inappropriate to allow a third party to use Eversource's private property easements for telecommunication purposes. Eversource asserted that:

There is no presumption under New Hampshire law that a right of way owned and used by an electric utility for power line purposes may be made available to third parties for telecommunication uses unrelated to the electricity utility's business. There is not a single reported case in New Hampshire which supports such a presumptive trampling of the private property ownership rights of the underlying landowners whose land is encumbered by a power line right of way.

⁷ The rules relative to energy affiliates were significantly different in the 1990s. With the restructuring of the wholesale electricity markets and the introduction of competition, the concern for and desire to protect against preferential treatment by a utility towards its competitive affiliate increased. *See generally* RSA chapter 366; RSA 378:10; N.H. Code of Admin. Rules Puc Ch. 2100 (statutory and regulatory provisions designed to protect against affiliate abuse by requiring nondiscrimination, separation and regulatory oversight in transactions between affiliated entities). For this reason, a formal separation must exist between energy affiliates, and Eversource is acting solely as the lessor.

Brief of Public Service Company of New Hampshire at 4. The Commission agreed that Eversource did not have the necessary authority to grant segTEL a license to attach telecommunication lines to the poles. *See* Order No. 25,090 at 21-24 (April 7, 2010).

Although the segTEL case primarily involved the scope of the easement and whether it could be used for telecommunication purposes, in making its arguments to this Commission, Eversource recognized that an easement holder is not allowed “to act under its easement as if it were the owner of the land” or to “voluntarily provide access to a third party and [] be entitled to compensation for doing so.” Brief of Public Service Company of New Hampshire at 5, 7.⁸ This is exactly what Eversource purports to do by virtue its Lease Agreement with Northern Pass Transmission, and exactly the transaction Eversource seeks the Commission to sanction in this docket. It cannot and should not be permitted.

It is nonetheless anticipated that Eversource will attempt to rely on cases from other jurisdictions that have addressed the issue of apportionment. The majority of those cases have limited applicability because they arose in the context of whether cable or fiber optics used for television and other communications can be installed on electric utility poles pursuant to an agreement with the easement holder, which is similar to the issue already addressed by this Commission in segTEL.

Moreover, the decisions relative to apportionment in other jurisdictions are split. The court in *City of Orlando v. MSD–Mattie, L.L.C.*, 895 So.2d 1127, 1129-31 (Fla. Dist. Ct. App. 2005) held that excess capacity on fiber optic lines could not be leased to a third party because it

⁸ Eversource relied on the case *Gill v. Gerrato*, 154 N.H. 36 (2006) to support those arguments. In that case, an easement holder had granted a third party to use the access road over another landowner’s property. *Id.* at 40-41. The New Hampshire Supreme Court held that only the only way for the third party to have a right to use the easement was to obtain it from the landowners. *Id.* at 40 (“the only way for the Gills to use the easement over the Cots property would be for the Gills to have their own right to that easement”). That case involved an easement appurtenant.

would amount to a “confiscatory nullification” of the landowner’s property rights, even though the installation of fiber optic lines was allowed under the easement. In that case, the court explained that the transfer was improper because the landowners “only contracted to convey some, but not all, of the sticks in the bundle.” *Id.* at 1130.

In comparison, a number of courts have determined that the easement can be apportioned to allow the installation of the communication lines and cables, however all of those decisions were based on a finding that the addition of a line or cable to the existing poles ***did not increase the burden on the servient tenement***. See, e.g., *Centel Cable Television Co. of Ohio v. Cook*, 567 N.E.2d 1010, 1015 (Ohio 1991) (holding that stringing of coaxial cable along an easement constitutes no additional burden to the owner of the servient estate); *Henley v. Continental Cablevision of St Louis County, Inc.*, 692 S.W.2d 825, 828 (Mo. Ct. App. 1985) (“it can hardly be said that the addition of a single coaxial cable to the existing poles . . . increases the burden on the servient tenement”); *Salvaty v. Falcon Cable Television*, 212 Cal. Rptr. 31, 35 (Cal. Ct. App. 1985) (holding that installation of cable television equipment on surplus space on telephone pole permissible because “we fail to see how the addition of cable equipment to a preexisting utility pole materially increased the burden on appellants’ property”); *Hoffman v. Capitol Cablevision System, Inc.*, 52 A.D.2d 313, 317 (N.Y. App. Div. 1976) (explaining that apportionment of utility easement to install cable on existing poles was permissible, but a license to cable company to install new poles “could be construed as imposing an additional burden”).

There are no cases that have been identified that allow apportionment of utility lines in the factual situation analogous to the one presented in this case; that is, the lease of easement rights to a third party to construct a transmission facility consisting of new poles and other infrastructure. It is telling that the only case with an analogous factual situation identified is

from 1916, and in that case, the court rejected the request because the new poles would create an additional servitude. *See Postal Telegraph & Cable Co. v. Gulf & S.I.R. Co.*, 70 So. 833, 834-35 (Miss. 1916) (holding that telephone company might be allowed to lease a wire, but could not lease the right to a telegraph company to construct its own telegraph line along the right-of-way). The court relied upon the case *Ft. Worth & Rio Grande R.R. Co. v. Jennings*, 13 S.W. 270 (Tex. 1890), which held that an easement could not be apportioned to allow a railroad company to build a new track on a portion of an unused right-of-way. *Id.* In contrast to cases that allowed a railroad to lease the right to use an existing track, the *Ft. Worth* case held that the construction of an additional track resulted in an additional servitude that required consent of the landowner and compensation for damage. The foregoing cases indicate that it has been settled law for over one hundred years that the type of apportionment sought in the Lease Agreement in this matter, which involves the construction of a new transmission line by a third party, is impermissible. A similar analysis should be applied in this case.

C. Question No. 3: Whether the language “over and across” in a utility easement grants the right to install an underground electric transmission line

The undersigned Intervenors do not take a position regarding whether the language “over and across” in a utility easement is sufficient to grant the right to install an underground electric transmission line. It should be noted that Eversource represented in its letter dated September 23, 2016 that underground lines are not planned within any easement covered by the lease that is the subject of this docket. Accordingly, this issue may be moot but in the event that any property comes to light that is covered by the Lease Agreement that is subject to this docket that includes burial, then Intervenors reserve the right to further address this question.

II. Property Rights Obtained Through Eminent Domain

D. **Question No. 4: Eversource May Be Permitted To Construct More Than One Transmission Line Within The Right-of-Way Under Limited Circumstances**

With respect to the rights granted pursuant to the three condemnation orders (Dockets D-E 3231, D-E 3232, and D-E 3314), the Intervenors do not dispute that Eversource may have the right to construct more than one transmission line within the physical boundaries of the right-of-way. This right is only permitted to the extent that it does not result in an overburdening of the property. Moreover, Eversource's right to construct and use any additional transmission lines must also satisfy other conditions, including that its use be for a "public purpose." These latter limitations are addressed in detail in response to the remaining questions posed by the Commission.

E. **Question No. 5: Eversource's use of properties acquired pursuant to condemnation orders must be (1) for a public purpose; (2) consistent with the original scope and terms of the condemned properties; and (3) deemed necessary for reliability and eligible for regional cost recovery by ISO New England**

1. Historic Precedent Relating to Public Utility's Use of Condemned Property

It is well settled law in New Hampshire that public utilities have been delegated power by statute to condemn private property, with the Commission's approval, in specific circumstances. *See* RSA 371:1.⁹ Because the taking of private property is considered an extreme measure, this statutory grant of eminent domain power to public utilities is not absolute. At a minimum, a prerequisite to the exercise of that power requires that it be used only when "necessary, in order

⁹ **371:1 Petition.** – Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a line, branch line, extension, pipeline, conduit, line of poles, towers, or wires across the land of another, or should acquire land, land for an electric substation, or flowage, drainage, or other rights for the necessary construction, extension, or improvement of any water power or other works owned or operated by such public utility, and it cannot agree with the owners of such land or rights as to the necessity or the price to be paid therefor, such public utility may petition the public utilities commission for such rights and easements or for permission to take such lands or rights as may be needed for said purposes. *No public utility may petition for permission to take private land or property rights for the construction or operation of an electric generating plant or an electric transmission project not eligible for regional cost allocation*, for either local or regional transmission tariffs, by ISO--New England or its successor regional system operator.

to meet the reasonable requirements of service to the public.” RSA 371:1. The New Hampshire Supreme Court has confirmed in the past that, “under . . . settled law in this jurisdiction, powers of eminent domain may constitutionally be delegated by general act.” *State v. 4.7 Acres of Land*, 95 N.H. 732 (1948) (citations omitted). “It has long been established that supplying electricity is a public purpose for which the power of condemnation may be delegated.” *Public Service Co. v. Shannon*, 105 N.H. 67, 69 (1963) (citation omitted). Historically, with respect to the provision of electricity, “public purpose” has been interpreted to cover not only current demand, but what may be reasonably expected in the future. *Exeter & Hampshire Electric Co. v. Harding*, 105 N.H. 317 (1964).

These historic perspectives, while important as a starting point, are of limited value because they rely primarily on outdated principles developed at a time when utilities carried the privileges and responsibilities of a regulated monopoly, being the sole providers of transmission, distribution and generation of electricity. Eversource’s rights to use these properties must now be examined in today’s restructured environment, consistent with the statutory scheme, including the enumerated policy principles, of electric restructuring. Intervenors assert that what might have once been a permissible use for a public utility of property condemned to meet the “requirements of service to the public” must now be understood as being more limited. Order No. 6195 (D-E 3232, March 3, 1953); Order 6392, (D-E 3314, May 10, 1954).

Recent legislative and regulatory actions provide important clarity on the scope of permissible use of such properties. While, historically, a vertically integrated utility has been authorized to use property once condemned, those rights are not unfettered, and even more so in a restructured market. With the advent of restructuring, and the intervening changes in regulatory, statutory and constitutional law discussed more fully below, a utility’s subsequent use

of condemned properties must be limited to a use that (1) is consistent with the scope and terms of the original condemnation; (2) is for a public purpose and (3) is deemed necessary for reliability by ISO New England.

2. Intervening Regulatory, Legislative and Constitutional Changes Limiting the Use of Property Condemned for Public Necessity

a. New Hampshire's Electric Restructuring Act (1996)

When it adopted the Electric Restructuring Act in 1996, the legislature expressly recognized that, in order to achieve the key elements of restructuring, *i.e.*, increasing customer choice and developing competitive markets for wholesale and retail electricity services, “. . . a restructured industry . . . will require . . . at least functional separation of centralized generation services from transmission and distribution services.” RSA 372-F:1, I. The Restructuring Policy Principles, where the legislature has given voice to the “policy” and “purposes sought” by the Act and which necessarily govern the Commission’s implementation of the electric market, directed the Commission to “monitor companies providing transmission of distribution services and take necessary precautions to ensure that no supplier has an unfair advantage.” RSA 372-F:3,V. Moreover, the legislature sought to promote “non-discriminatory open access to the electric system for wholesale and retail transactions.” *Id.* at IV. These measures represent the legislature’s clear directive to the Commission to promote competition for the benefit of consumers and to be vigilant against the exercise of vertical market power that might unfairly affect the level playing field that restructuring, at its core, sought to create.

b. New Hampshire Constitutional Amendment (2006)

In 2006, the citizens of New Hampshire took the extraordinary step of amending the New Hampshire Constitution to provide additional protections against the taking of private property for private development and added Article 12-a.

[Art.] 12-a. [Power to Take Property Limited.] No part of a person’s property shall be taken by eminent domain and transferred, directly or indirectly, to another person if the taking is for the purpose of private development or other private use of the property.

The adoption of Part I, Article 12-a followed the United States Supreme Court’s decision in *Kelo v. City of New London*, in which the Court upheld the taking of private homes for transfer to a private developer in connection with a redevelopment project. *Kelo*, 545 U.S. 469 (2005). The parties opposing the taking in *Kelo* claimed that the City’s proposed project did not qualify as a “public use” within the meaning of the Takings Clause of the Fifth Amendment to the U.S. Constitution.¹⁰ The case was controversial due to the Supreme Court’s expansive view of “public use,” which was based exclusively on an economic benefit to the City of New London, Connecticut. The Supreme Court noted that its cases have defined the concept of “public use” broadly, reflecting a longstanding policy of deference to legislative judgments. *Id.* at 480.¹¹

While finding for the City of New London, the Supreme Court noted that there are limits on the use of eminent domain for private purposes. “A purely private taking would not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” *Id.* at 477-478, citing *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896). In addition, the Supreme Court reaffirmed the rights of the States to set their own limits with respect to the use of eminent domain. It stated:

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose “public use” requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of State constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which taking may be exercised. *Id.* at 489.

¹⁰ The Fifth Amendment to the United States Constitution provides, among other things, that private property shall not be taken for public use without just compensation being paid to the property owner.

¹¹ The Connecticut statute “expresses a legislative determination that the taking of land, even developed land, as part of an economic development project is a ‘public use’ and ‘in the public interest.’”

In response to *Kelo*, a number of states reevaluated their eminent domain laws.¹²

Courts in several states have held that economic development alone does not constitute a “public purpose” supporting the use of eminent domain. *See, e.g., Board of County Com’rs of Muskogee County v. Lowery*, 136 P.3d 639, 650-51 (Okla. 2006) (absent governmental goal of remedying existing blight, right of private property ownership outweighs governmental interest in promoting potential economic development); *City of Norwood v. Horney*, 110 Ohio St.3d 353 (Ohio 2006) (economic benefits to community may be considered, but do not by themselves satisfy “public use” requirement of Ohio Constitution).

As noted above, the citizens of New Hampshire responded to *Kelo* and voted overwhelmingly (by a margin of 85% to 15%)¹³ to amend the State Constitution to prohibit the taking of private property for private purposes. The express terms of the amendment make clear that any taking, *direct or indirect*, cannot be used to support private development.

Even prior to the 2006 amendment, however, the New Hampshire Supreme Court had been clear that takings of private property must be for a public purpose. The Court had held that:

Under part I, article 12 of the State Constitution, the power of eminent domain may be exercised only if the condemned property is applied to public uses. Whether a particular use is a public use is a question of law to be resolved by the courts. In gauging the constitutionality of a proposed condemnation, we must determine whether the expenditures will be primarily of benefit to private persons or private uses, which is forbidden, or whether they will serve public purposes for the accomplishment of which public money may properly be used.

Merrill v. City of Manchester, 127 N.H. 234, 236 (1985), *citing Opinion of the Justices*, 99 N.H. 528, 530 (1955) (citations and quotations omitted).

¹² *See generally*, Senate President’s Task Force on Eminent Domain, Final Report, Adopted January 4, 2006; CACR 30 (2006) and CACR 44 (2006).

¹³ *See* Constitutional Amendment Questions, Manual for the General Court, 2007 ed., at 335. (316,005 votes in the affirmative and 52,893 opposing the measure.).

In a more recent case involving the City of Nashua’s proposed condemnation of Pennichuck Water Works (“PWW”), the New Hampshire Supreme Court reviewed the PUC’s net public benefit analysis regarding the taking of certain PWW assets. The Court stated:

In determining whether the purpose for which property is being condemned is a public use, we must accordingly consider the extent to which the proposed project will benefit the public. The net benefit to the public will consist of the benefits of the proposed project and the benefits of the eradication of any harmful characteristics of the property in its present form, reduced by the social costs of the loss of the property in its present form. If the social costs exceed the probable benefits, then the project cannot be said to be built for a public use. In such a case, the true benefits of the project will accrue only to its private sponsors and participants, and the use of the power of eminent domain will violate the public use requirement of part I, article 12 of the State Constitution.

Appeal of Pennichuck Water Works, Inc. and another (New Hampshire Public Utilities Commission), 160 N.H. 18, 30-31 (2010).¹⁴

In that same case, the New Hampshire Supreme Court analyzed whether Nashua had a right not only to condemn water company assets within the city limits, but whether it could, as well, condemn for public use, the Pennichuck companies operating in neighboring towns. In its analysis of the condemnation, it used a similar constitutional provision, Part I, Article 12, that provides in pertinent part:

[Art.] 12. [Protection and Taxation Reciprocal.] Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property. . . . But no part of a man’s property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people.

While authorizing Nashua’s right to take, by eminent domain, the property within the city limits, the Court did not allow Nashua to use eminent domain with respect to the Pennichuck companies operating *in other municipalities* because a municipal taking of property outside the municipal boundaries did not constitute a “public purpose.” *In re Pennichuck*, 160 N.H. at 28.

¹⁴ Although this case was decided after the adoption of Part 1, Article 12-a, the Court referred only to Part I, Article 12 in its decision.

Similarly, Eversource's ability to use properties condemned for public purpose for a subsequent project must be examined in light of the New Hampshire Constitution as amended in 2006, as well as the New Hampshire Supreme Court's "public purpose" requirement. To remain consistent with the constitutional provisions, any subsequent use by Eversource of the properties condemned in the 1950s must be for a public purpose and consistent with the scope and purpose of the original taking.

c. Amendments to New Hampshire RSA 371:1 (2012)

In addition to the restrictions imposed by the 2006 constitutional amendment, other limitations on a utility's use of condemned property were imposed in 2012 when the legislature amended RSA chapter 371, the statute conferring rights on utilities to take properties by eminent domain.

The language added by RSA chapter 371 set forth in bold and italics below provides:

371:1 Petition. – Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a line, branch line, extension, pipeline, conduit, line of poles, towers, or wires across the land of another, or should acquire land, land for an electric substation, or flowage, drainage, or other rights for the necessary construction, extension, or improvement of any water power or other works owned or operated by such public utility, and it cannot agree with the owners of such land or rights as to the necessity or the price to be paid therefor, such public utility may petition the public utilities commission for such rights and easements or for permission to take such lands or rights as may be needed for said purposes. *No public utility may petition for permission to take private land or property rights for the construction or operation of an electric generating plant or an electric transmission project not eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO--New England or its successor regional system operator.*

This statutory language recognizes the interplay between the jurisdictional authority of the state over issues of siting and eminent domain and the jurisdictional authority of the Federal Energy Regulatory Commission which approves a regional open access transmission tariff

(“OATT”) that is filed by ISO New England. In adopting this language, the legislature was clearly cognizant of the regional cost allocation afforded under the OATT which by its terms is only available for upgrades to the regional transmission network that are found to be needed for reliability. Reading RSA 371:1 against this same backdrop, the express language and the manifest intent of the 2012 statutory amendment are unmistakably clear: Any subsequent use of property condemned must be for a project that is eligible for cost allocation by ISO New England, or in other words, the project is needed for the reliability of the system. Allowing Eversource to use property condemned for public necessity without requiring Eversource to demonstrate that it has met the OATT criteria for regional cost allocation would permit Eversource to circumvent the express statutory requirements of RSA 371:1 entirely, effectively permitting it to achieve indirectly that which it could not achieve directly.

Thus in analyzing Eversource’s rights to use condemned properties for some other purpose, the electric restructuring policies, statutory amendments to the laws of eminent domain, recent court precedent and the amendment in 2006 of the New Hampshire Constitution make it clear that a utility has only limited rights to use a property acquired through condemnation. The use of the properties by Eversource must be: (1) for a public purpose; (2) consistent with the original scope and terms of the condemned properties; and (3) deemed necessary for reliability and eligible for regional cost recovery by ISO New England under the OATT. Here, Eversource may not use properties acquired through condemnation for a project not based on system reliability because such a use would overburden the original taking, would constitute an indirect taking for private purposes, prohibited by Part I, Article 12-a of the New Hampshire Constitution and RSA 371:1.¹⁵

¹⁵ Since the Lease Agreement between the parties was executed on October 19, 2015, there can be no doubt that any purported transfer of property rights is subject to this provision.

F. Question No. 6: Any construction that deviates from the approved plans within the right-of-way may only be done for a public purpose and deemed necessary for the reliability of the electric system and not for a private benefit

With respect to the location of whether Eversource is limited to the construction of transmission lines in locations depicted in the plans submitted to the Commission in the condemnation proceedings (Dockets D-E 3231, D-E 3232, and D-E 3314), the Intervenor do not dispute that Eversource may have the right to construct additional transmission lines in locations that extend beyond the original plans. However, similar to the response to Question 4, the additional locations of the transmission lines cannot result in overburdening of the property. Also, similar to the response to Question 5, Eversource's right to construct these additional transmission lines must satisfy the condition that it is being used for a "public purpose."

G. Question No. 7: Even assuming the answer to Questions 4, 5 and 6, are in the affirmative, Eversource does not have the right to lease some or all of the rights it holds by virtue of eminent domain to a third party for the Northern Pass project

Where property is taken by eminent domain for public necessity in the construction of a project, allowing Eversource to lease those rights for the sole purpose of furthering a merchant project constitutes an indirect taking of private property for private development, and violates N.H. Constitution Part I, Article 12-a and RSA 371:1. In addition, the Lease Agreement between Eversource and its competitive affiliate is prohibited by the Commission's rules governing affiliate transactions. Finally, the limitations to lease property that apply to the property rights obtained by Eversource through voluntary easements similarly apply to the property rights it holds by virtue of eminent domain. Each of these issues is discussed below.

First, as discussed more fully above in response to Question 5, a utility's right to use condemned properties subsequent to the original taking has been limited by the restructuring of the electricity market as well as constitutional and statutory changes affecting the taking of

private land for private development. In addition, any transfer that occurs between a utility, such as Eversource, and its affiliate, such as Northern Pass Transmission, warrants additional scrutiny under the Commission's affiliate transaction rules.¹⁶

For Northern Pass Transmission to use the properties taken by eminent domain, it would have to show that the project is a reliability project consistent with RSA 371:1 and that project satisfies the constitutional requirement that it be for "public purpose" consistent with N.H. Constitution Part I, Article 12-a. As set forth more fully below, Northern Pass Transmission cannot meet its burden under either of those standards. Absent such a showing, if the Commission approves the Lease Agreement and sanctions the transfer of these assets from Eversource to Northern Pass Transmission, it will functionally allow Northern Pass Transmission to circumvent the constitutional safeguards overwhelmingly adopted by the citizens of New Hampshire and the legislative enactments, both expressly enacted to prevent this type of "indirect" taking for the purposes of private development. Where, as here, the Lease Agreement between the parties was executed on October 19, 2015, there can be no doubt that any purported transfer of property rights is subject to its provisions. Since it is indisputable that Northern Pass could not, consistent with constitution or statute, take these properties directly for the construction of its merchant project, any action by the Commission sanctioning such a transfer by Eversource permits Northern Pass Transmission to achieve indirectly that which it is certainly constitutionally and statutorily prohibited from achieving directly.

¹⁶ In a recent Order, the Commission confirmed the affiliate status between Eversource and Northern Pass Transmission. *See* Order No. 25,693 (October 14, 2016) (authorizing Northern Pass Transmission to operate as a public utility, but also expressly recognizing its affiliate relationship with Eversource).

1. A For-Profit Merchant Project Northern Pass Cannot Meet the Reliability Requirement of RSA 371:1

Whereas the *Kelo* decision prompted the 2006 constitutional amendment, it is indisputable that the impetus for the 2012 amendment to RSA chapter 371 was the Northern Pass project, and the legislature's desire to protect against the derogation of private property rights in the development of the Northern Pass project. The legislative history is replete with references to the Northern Pass project, with legislators and citizens alike seeking to shore up protection to prevent the taking of private property for the private development of a transmission line along the proposed route of this merchant project.¹⁷ When considering the amendment to RSA 371:1 in 2012, there was palpable concern regarding the Northern Pass project, and the legislative history makes it clear that the amendment was intended to give effect to the legislative desire to protect New Hampshire citizens from the derogation of property rights.

Specifically, legislators and citizens voiced their concerns that, despite its status as an elective transmission project (as opposed one required for system reliability), Northern Pass Transmission would take property along the proposed route by eminent domain. To ensure against this, when RSA 371:1 was amended, the legislature included the requirement that unless the project qualified for regional cost allocation by ISO New England under the OATT, *i.e.*, that the project was one required for system reliability, a utility could not exercise its power of eminent domain. And if that requirement was not prohibitive enough, the legislature also affirmatively included language that prohibited such a taking "directly or indirectly." By including this language, the legislature sought to protect against exactly the type of transfer contemplated by the Lease Agreement between Eversource and Northern Pass Transmission—

¹⁷ See generally, Senate Journal, January 25, 2012 at 120-134 (comments by Senators Forrester, Forsythe and Bradley discussing the importance of eminent domain in the context of Northern Pass).

the indirect transfer of private property by a utility for the development of a private, for-profit transmission line.

There can be no doubt that Northern Pass Transmission is a private, for-profit, entity, and the construction of its transmission line is for economic or other public policy reasons, not to address ISO New England reliability. Although Northern Pass Transmission has been granted public utility status,¹⁸ by Eversource's own admission the Northern Pass project is considered a merchant project and not one grounded in system reliability. As representatives of Northern Pass Transmission have stated, projects such as theirs are not meant to "keep the lights on," to address regional operational criteria or to improve reliability. Instead, the primary motivation behind the project appears to be "underlying economic conditions beneficial to the participants." *See, e.g.*, Comments of Northeast Utilities and NSTAR Electric Company, FERC Docket No. AD11-11-000. To be clear, as a profit-seeking entity that intends to sell transmission services to Hydro Quebec into the New England electric grid, Northern Pass Transmission will ultimately be responsible to its shareholders, and not the citizens of New Hampshire.

As a merchant project, there is no doubt that Eversource could not, consistent with RSA 371:1, exercise its eminent domain authority to take these properties for this merchant project. Intervenors assert that, to the extent the terms of the Lease Agreement permit Northern Pass Transmission to use properties condemned for public necessity, it contravenes the express intent of the legislature. By approving such a transfer, the Commission would effectively allow Northern Pass Transmission and Eversource to circumvent express statutory provisions, designed to prevent exactly such an occurrence, and to achieve indirectly that which they could not achieve directly.

¹⁸ *See* Order No. 25, 953 (October 14, 2016).

In addition to falling short of statutory and legislative requirements, it is clear that the Lease Agreement between Eversource and its competitive affiliate, Northern Pass Transmission, is prohibited by Commission regulation. *See* N.H. Admin. Rules Puc 2103.02 (disallowing “preferences to competitive affiliates regarding products and services, distribution system information, and customer information.”). The rule expressly requires utilities to “provide its products and services, including but not limited to terms and conditions, pricing, and timing, *to competitive affiliates, and to non-affiliated competitors in a non-discriminatory manner*” (emphasis supplied). *Id.* at Puc 2103.02(c). Similarly, the Commission’s regulations require that if utilities provide their competitive energy affiliates with “any product or service,” the utilities “shall make the same products or services available to non-affiliated energy competitors in a non-discriminatory manner.” *Id.* at Puc 2103.04; *see also* RSA 378:10 (prohibiting public utility from making or giving any undue or unreasonable preference or advantage to any person or corporation). No “open season,” request for proposals or other mechanism has ever been provided by Eversource that would have enabled other merchant transmission developers to offer potentially better alternative uses to the utility rights of way. It is difficult to imagine the utility ever doing so and yet in this case it offers its merchant affiliate with access to these valuable properties.¹⁹

2. As a Merchant Energy Venture, the Northern Pass Project Cannot Meet the “Public Purpose” Requirement of N.H. Constitution Part I, Article 12-a

Separate and apart from its inability to satisfy the statutory requirements and qualify as a reliability project discussed above, or its inability to comply with Commission rules, Eversource cannot satisfy the constitutional requirements of “public purpose” as required by the New

¹⁹ See Ex. 2 at 4-7, discussing applicability of Commission’s rules to any purported transfer of property rights between Eversource and its competitive affiliate, Northern Pass Transmission.

Hampshire Constitution Part 1, Article 12-a. Property taken for “public necessity” by Eversource in the 1950s cannot be subsequently used unless the project proponent can show that it is for a “public purpose.” Eversource cannot meet its burden with respect to the Northern Pass project. Eversource claims the Northern Pass project will provide an economic benefit in the form of jobs for the duration of construction of the project, as well as tax revenues to the affected communities.²⁰ These are precisely the sort of public benefits that may be proffered with any sort of private redevelopment projects similar to those offered to support the taking in *Kelo*. However, New Hampshire’s adoption of Part I, Article 12-a was a direct response to the *Kelo* decision, and the New Hampshire Constitution now expressly prohibits the taking of private property, directly or indirectly, by eminent domain if the purpose is for private development or other private use of the property. As such, the incidental economic benefits of construction jobs and tax revenues are insufficient to meet the constitutional requirement of “public purpose.”²¹

The New Hampshire Supreme Court’s ruling denying the City of Nashua’s authority to exercise eminent domain with respect to water assets located *outside* the City limits because such a taking would not be for a “public purpose” is on point to the situation posed by the condemned properties that are the subject of the Lease Agreement. Although authorized in the 1950s to take properties for “public necessity,” Eversource’s right to transfer those properties for promoting anything other than a reliability project, would violate the express language of the constitutional amendment adopted in 2006, prohibiting against the “indirect” use of private property for private development. Although the original takings were necessary to meet the “requirements of service to the public,” Eversource does not have an unfettered right to then

²⁰ See generally, Testimony of Julia Frayer, N.H. Site Evaluation Committee, Docket 2015-06.

²¹ While this provision has yet to be tested, other states have determined that economic development alone do not constitute a “public purpose.” See e.g. *Board of County Com’rs of Muskogee County v. Lowery*, 136 P.3d 639 (2006) and *City of Norwood v. Horney*, 110 Ohio St.3d 353 (2006).

transfer the rights to these parcels to its affiliate for the construction of a merchant transmission line. Such action contravenes the express language of a constitutional provision adopted to prohibit these types of “indirect” transfers contemplated by the amendment.

Nor can any claim that the Northern Pass project is for a “public purpose,” be afforded any credibility. There can be no doubt that the project’s primary purpose is as a profit-seeking venture to benefit Eversource shareholders. While there is nothing inherently wrong with that motive, it cannot be used as a basis to support the transfer of the interests in property condemned for public necessity without violating express statutory and constitutional provisions explicitly adopted to prevent such transfers. Indeed, the Commission’s affiliate transaction rules were expressly designed to promote transparency in conduct between affiliated entities and to ensure a level playing field in the competitive marketplace. The Lease Agreement between Eversource and Northern Pass Transmission contravenes both those purposes. There can be no doubt that an action by a utility that confers a benefit to or favors its affiliate over other competitors in the market cannot withstand scrutiny under the Commission’s rules. This is especially so where, as here, the transaction is completely lacking in transparency. *See, e.g.*, N.H. Admin. Rules Puc 2103.02 (prohibiting “preferences to competitive affiliates”) and 2103.04 (requiring non-discrimination between affiliate and other market participants); *see also* RSA 378:10 (prohibiting public utility from making or giving any undue or unreasonable preference or advantage to any person or corporation).

Accordingly, given New Hampshire’s fundamental reluctance to sanction the taking of private property absent a public purpose, and the Commission’s regulations prohibiting undue preference in transactions between affiliated entities, Intervenors assert that the answer to Question 7 is “no.” Accordingly, the Commission cannot uphold and must reject Eversource’s

attempt to end-run the constitutional, statutory and regulatory provisions prohibiting the transfer of property taken by condemnation to support a merchant project to its affiliate.

Finally, the limitations to lease property that apply to the property rights obtained by Eversource through voluntary easements similarly apply to the property rights it holds by virtue of eminent domain. *See, e.g., Cousin v. Ala. Power Co.*, 597 So. 2d 683, 686-87 (Ala. 1992) (interpreting voluntary easements and condemnation orders in the same manner); *Jackson v. City of Auburn*, 971 So. 2d 696, 707-08 (Ala. Civ. App. 2006) (discussing difference between property rights acquired through voluntary easements, condemnation easements and prescriptive easements). Accordingly, it is impermissible for the property rights to be leased to a third party if it will result in an additional burden on the property. This issue is addressed in response to Question 2.

H. Question No. 8: The Language Successors and Assigns in a Utility Easement Deed Obtained by Eminent Domain is Controlled by the Same Strictures Imposed by All Other Limitations on Property Obtained by Eminent Domain And Voluntary Easements

The language “successors and assigns” in a utility deed obtained by eminent domain does not differ in construction and effect from the term “successors and assigns” in a utility deed obtained through agreement of the parties. *See Cousins*, 597 So.2d at 686-87; *Jackson*, 971 So. 2d at 707-08. Accordingly, for the reasons set forth in responses to Questions 1 and 2, the transfer of property rights from Eversource to Northern Pass Transmission are impermissible and cannot be upheld.

Conclusion

Eversource’s limited property rights in the existing right-of-way, obtained through voluntary easements and condemnation actions, does not allow it to transfer rights to a third party as it is attempting to do through the Lease Agreement with its affiliate, Northern Pass

Transmission. Moreover, well established property right law and the state of New Hampshire's clearly articulated standard that private property cannot be taken for a private benefit supports the conclusion that the property right Eversource hold by virtue of eminent domain cannot be transferred to Northern Pass Transmission. Finally, the Commission's regulations governing transactions between affiliates prohibit this transfer.

Respectfully submitted,

CITY OF CONCORD

October 28, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by electronic mail or U.S. Mail, postage prepaid, to those parties listed on the Service List of this docket, as well as the Office of Consumer Advocate, pursuant to N.H. Code Admin Rule Puc 203.11.

October 28, 2016

By: 

Danielle L. Pacik, Deputy City Solicitor