The State of New Hampshire

Public Utilities Commission

DE 15-464

Public Service Company of New Hampshire dba Eversource Energy
Petition for Approval of Lease Agreement with Northern Pass Transmission LLC

MEMORANDUM OF INTERVENOR MCKENNA'S PURCHASE

Introduction

By Order No. 25,943 entered September 15, 2016, the PUC posed questions for memoranda, two of which are pertinent to the McKenna's Purchase: (1) whether the language "successors and assigns" in a utility easement deed, without additional prohibition or express grant, allows the lease of the easement to a third party; (2) Whether the holder of a utility easement has the right to lease less than all of the easement rights to a third party?

Analysis

1. The use of the language "successors and assigns" in an easement in gross does not alter the common law rule that such easements are personal interests of the grantee and not alienable.

The language used in both of Intervenor McKenna's Purchase deeds is that the easement is granted to "Grantee and its successors and assigns forever". Without this language, the easements in gross created by the deeds are not alienable. This verbiage is contained in the preprinted form language used by PSNH, Eversource's predecessor. While Eversource relies upon *Cross v Berlin Mills Co*.[1], in its December 4, 2015 letter to the NHPUC for the proposition that the inclusion of this language makes the property interest alienable, there is no New Hampshire Supreme Court case holding that an easement in gross is alienable. *Cross* did not

[1] 79 NH 116 (1918).

involve an easement in gross. The *Cross* Court stated that the interest granted "...was a right to use the bed of the stream for the support of permanent structures, and to derive therefrom such pecuniary benefits as might result from the prosecution of the business of transporting logs in the river adjacent to the grantor's premises. Such a right has been deemed to be a real estate right in the nature of a profit à prendre. Wash. Easm. 14."[2] Furthermore, if an easement in gross with words of assignability were alienable, there would be no point to the Cross plaintiff's contention that there was no evidence of physical attachment to the riverbed[3]. Without the attachment, the interest would be a profit à prendre in gross. See, 25 Am.Jur.2d, *Easements* §4 (2014). The issue is immaterial if an interest in gross could be made assignable by adding the magic language to the deed.

Modernly, Eversource claims in its December letter, easements in gross are alienable, citing *Arcidi v Rye*[4]. However, Eversource's reliance upon *Arcidi* goes too far. *Arcidi v Rye* did not address that issue. Instead, in *Arcidi*, a third party, VPI, was grantee of an appurtenant access easement (which is clearly alienable with the dominant estate), and granted an easement in gross to the Town of Rye. There was no issue of Rye trying to alienate that right, so the Supreme Court never reached the alienability of an easement in gross. But it did comment, based upon its ruling in *Burcky v Knowles*,[5] that "An easement in gross is also a nonpossessory right to the use of another's land, but it is a mere personal interest." *Arcidi* at 698. The language employed by the Court in *Burcky* confirms that an easement in gross is not alienable: "An easement in gross is also an incorporeal, nonpossessory right to the use of another's land, but it is a mere personal interest. 2 Thompson, Real Property supra. It belongs to its owner independently of his ownership or

[2] *Cross v. Berlin Mills Co.*, 79 N.H. at 118.
[3] Id.
[4] 150 NH 694 (2004).
[5] 120 NH 244 (1980).

possession of other land; it is generally not inheritable, and vests only in the person to whom it is granted. Id.; 3 Powell, Real Property, supra at 34-22 to 34-23; 25 Am.Jur.2d supra, s 12 at 426-27."[6] However, the Supreme Court overruled the trial court ruling that the easement rights in issue were rights in gross that did not run with the land, and held that the rights were "a classic example of an appurtenant easement". Id. Accordingly, it did not determine whether easements in gross were alienable, but, again, that was the seminal issue in the trial court. If both easements in gross and appurtenant were alienable under New Hampshire law, there would be no reason for the appeal. The trial court's ruling that the easement was in gross would be immaterial to alienability of the property interests.

As the easement deeds in our case do not benefit a dominant estate, they are easements in gross. The New Hampshire Supreme Court's statements concerning the nature of easements in gross are current New Hampshire law. The *Burcky* case was decided in 1980, and the *Arcidi* case in 2004. In the absence of contrary New Hampshire law, they are controlling.

2. The holder of a utility easement has no right to lease less than all of the easement rights to a third party.

The *Arcidi* case stands for the proposition that a holder of an appurtenant easement may grant part of its rights to a third party, in that case, the Town of Rye. However, the rights granted arose from VPI's right to use the servient estate to access the dominant estate.

> In addition, the dominant estate holder "may license or authorize third persons to use its right of way" so long as the use is reasonable. *Henley v. Continental Cablevision*, 692 S.W.2d 825, 828 (Mo.Ct.App.1985). Reasonable use may include use by tenants, guests and invitees of the dominant estate holder. *Gowen v. Cote*, 875 S.W.2d 637, 641 (Mo.Ct.App.1994); *Bruce*, supra § 8:4, at 8-15; see also 28A C.J.S. Easements § 164 (1996) (stating that an appurtenant easement may be used "by all persons lawfully going to or from [the dominant estate]").
>
> Here, VPI, as the dominant estate holder, may authorize others, such as the town, to use the appurtenant easement over the plaintiff's property. Thus, the town has the

[6] Burcky v. Knowles, supra at 247.

> right to use the easement over the plaintiff's property because VPI has permitted it to do so.

Arcidi v. Town of Rye[7]. The lessor, VPI, held an appurtenant easement. The lessee, Rye, did not attempt to alienate its leasehold interest. There is no New Hampshire case where the holder of an easement in gross attempted to lease or divide up its interest.

In addition to *Arcidi*, the Supreme Court has recognized the dominant estate's right to share its appurtenant easement rights with "non-dominant, third-party tenements" in two other cases. In *Heartz v City of Concord*, 148 NH 325 (2002), the Court held that the dominant estate holder could grant the neighbor the right to use a right of way across its property and the servient estate. In *Gill v Gerrato*, 156 NH 36 (2006) the Court held that no such right existed in the abutting property at the end of a right of way absent a deeded grant of such a right by the dominant estate holder. There is no New Hampshire case holding that the owner of an easement in gross can apportion its easement rights.

3. The rule of reason cases.

New Hampshire follows the rule of reason to balance the rights of the easement holder against the rights of the servient estate.

> We apply the rule of reason from *Sakansky* in determining whether a particular use of an easement would create an unreasonable burden. *Flanagan*, 138 N.H. at 574, 644 A.2d 51; *Delaney v. Gurrieri*, 122 N.H. 819, 821, 451 A.2d 394 (1982). Reasonableness is a question of fact that is determined by considering the surrounding circumstances, such as location and the use of the parties' properties, and the advantages and disadvantages to each party. *Downing House Realty v. Hampe*, 127 N.H. 92, 96, 497 A.2d 862 (1985); *Delaney*, 122 N.H. at 821, 451 A.2d 394; *Crocker v. Canaan College*, 110 N.H. 384, 387, 268 A.2d 844 (1970); see *Nadeau v. Town of Durham*, 129 N.H. 663, 667-68, 531 A.2d 335 (1987). However, reasonableness is not a static concept. *Downing House*, 127 N.H. at 96, 497 A.2d 862; *Sakansky*, 86 N.H. at 341, 169 A. 1. If the proposed use of the easement is a normal development from conditions existing at the time of the grant, the use is not considered to be unreasonably burdensome. See *Downing House*, 127 N.H. at 96, 497 A.2d 862. Also, if the complaining party fails to make sufficient factual

[7] 150 N.H. 694, 700–01 (2004).

> allegations of unreasonable use or burden, we need only consider the unambiguous language in the deed. See *Lussier*, 133 N.H. at 758, 584 A.2d 179.

Hearst v Concord.[8] In *Arcidi*, the Court applied the rule as follows:

> Based upon the evidence presented at trial and a view of the properties, the trial court concluded that the construction of the access road within the geographical bounds of the easement and the limited use of the road by the town was reasonable. In determining that the town's limited use of the road was reasonable, the trial court noted that "[t]heoretically, if [VPI] had constructed and used the roadway for the Farragut Hotel, there likely would have been as much or more motor vehicle use than that which now occurs." Because the evidence supports the trial court's findings, we conclude that the trial court did not err in finding that the town's construction and use of the access road was reasonable.

Arcidi v Town of Rye[9].

Eversource could have acquired the fee to the land when it acquired the rights of way. It chose not to do so. The consideration stated in the deeds reflects the fact that Eversource took less than the entire bundle of rights. McKenna's Purchase reserves the right to contest the reasonableness of the lease pursuant to the Rule of Reason expressed in these and other New Hampshire cases. If the rights granted are an unreasonable expansion of Eversource's rights and an unreasonable burden on the Intervenor's property interests, the lease should not be approved.

[8] 148 NH at 332.
[9] 150 NH at 702.

Respectfully submitted,

McKenna's Purchase
By its attorneys

WADLEIGH, STARR & PETERS PLLC

Dated: October 28, 2016

By: _____

Stephen J. Judge
95 Market St
Manchester, NH, 03101
(603) 669-4140
sjudge@wadleighlaw.com

Certificate of Service

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

_____

Stephen Judge