

**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

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY'S SUPPLEMENTAL OBJECTION
TO FEBRUARY 10, 2016 SUBMISSION OF LAGASPENCE REALTY, LLC**

Following the February 22, 2016 Staff letter and March 3, 2016 secretarial letter in the above-referenced docket, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH" or the "Company") hereby supplements its February 19, 2016 objection to the combined "Reply to the Public Service Company of New Hampshire dba Eversource Energy Partial Objection to the Intervention Motion of Kevin Spencer and Mark Lagasse dba Lagaspence Realty, LLC" and "Motion for Dismissal of this Docket Pending Adjudication by a Court of Competent Jurisdiction of the Property Rights of Interveners" (collectively, the "Motion") submitted by Kevin Spencer and Mark Lagasse through Lagaspence Realty, LLC (the "Movants") on February 10, 2016. To the extent necessary, PSNH incorporates by reference the substance and arguments of its February 19, 2016 objection. In support of this supplement, PSNH states the following:

1. On February 10, 2016, the Movants submitted the Motion and on February 19, 2016 PSNH objected. Following the prehearing conference on February 19, 2016 the Staff filed a letter proposing that parties make filings or supplemental filings relating to the request to dismiss as contained in the Motion. The Commission approved that proposal

by secretarial letter on March 3, 2016. In making this supplemental filing, PSNH notes that the request to dismiss this proceeding appears to be premised upon the argument that PSNH does not have a legal right to convey the easement it owns over the Movants' land. As PSNH has already stated in this proceeding, both in its initial petition, and in its December 4, 2015 response to the Commission's deficiency letter, PSNH has demonstrated that it has the requisite legal authority to lease its rights in the various easements included in this petition, including that of the Movants, and the Commission is thoroughly justified in continuing with the docket and in rendering decisions on the matters within the scope of its authority. The fact that there is, or may be, some disagreement about PSNH's rights in a particular easement, or that there is, or may be, some disagreement about the scope of a particular easement are not reasons to dismiss or stay this proceeding and the Commission should continue this proceeding.

2. First, in paragraphs 17 and 18 of its petition in this matter, PSNH stated:

17. This Commission's standard of review of this Petition is set out in RSA 374:30, which provides 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, except that commission approval shall not be required for any such transfer, lease, or contract by an excepted local exchange carrier. The commission may, by general order, authorize a public utility to transfer to another public utility a part interest in poles and their appurtenances for the purpose of joint use by such public utilities.

RSA 374:30, I.

18. The New Hampshire Supreme Court has interpreted the "public good" standard by which such transactions are to be judged as "equivalent to a declaration that the proposed action must be one not forbidden by law, and that it must be a thing reasonably to be permitted under all the

circumstances of the case.” *Grafton County Electric Light & Power Co. v. State*, 77 N.H. 539, 540 (1917). Furthermore, the Court has concluded that:

If it is reasonable that a person or a corporation have liberty to take a certain course with his or its property, it is also for the public good. It is the essence of free government that liberty be not restricted save for sound reason. Stated conversely: It is not for the public good that public utilities be unreasonably restrained of liberty of action, or unreasonably denied the rights as corporations which are given to corporations not engaged in the public service.

Id.; see also, *Eastern Utilities Associates*, 76 N.H. P.U.C. 236, 252 (1991). Accordingly, the Commission’s review of the Lease is to be based upon its determination that the transaction is not forbidden by law and is otherwise reasonably to be permitted under all the circumstances of the case.

3. RSA 374:30 has only been minimally amended since its initial passage, and though it was amended in 2012 to remove incumbent local exchange carriers from its coverage, it has been substantively the same for decades.¹ Therefore, there is no basis to conclude that the standard for approval under RSA 374:30 is any different now than it has been.
4. Further, the “public good” standard as contained in that statute and identified in PSNH’s petition has been supported in repeated interpretations and applications, both by this Commission and by the Supreme Court. For example, following its confirmation that the Commission “is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute,” and that “the authority of the PUC . . . is limited to that specifically delegated or fairly implied by the legislature and may not be derived from other generalized powers of supervision,” the

¹ Given that this recent amendment occurred following the imposition of restructuring in New Hampshire, and given that the legislature was presumed to be aware of the restructuring law, RSA chapter 374-F, at the time of the 2012 amendment, see, e.g., *Prof. Fire Fighters of Wolfeboro v. Town of Wolfeboro*, 164 N.H. 18, 22 (2012) (“We generally assume that when the legislature enacts a provision, it has in mind previously enacted statutes relating to the same subject matter”), it would strain credulity to suggest, as some may, that RSA 374:30 somehow does not apply to electric utilities following the adoption of restructuring.

Supreme Court cited the *Grafton County* standard with approval and noted that “This court has long recognized as public policy that the owners of a utility do not surrender to the PUC their rights to manage their own affairs merely by devoting their private business to a public use.” *Appeal of Public Serv. Co. of N.H.*, 122 N.H. 1062, 1066-67 (1982). The Court likewise noted, following its quotation of the “public good” standard from *Grafton County*, that under part two, article eighty-three of the New Hampshire Constitution “in a public utilities case . . . the PUC’s role is to regulate so that the constitutional right of free trade and private enterprise are disrupted as little as possible.” *Id.* at 1067 (internal quotation omitted). Similarly, in a case relating to the application of the public good standard by the Commission, after noting that *Grafton County* is the “leading case” on that standard, the Commission concluded that the language of *Grafton County* “speaks in terms of the liberty of public utilities to act as other corporations if the action is not forbidden by law and warranted under the circumstances.” *Pennichuck Water Works, Inc., et al.*, Order No. 20,668, 77 N.H. P.U.C. 708, 712-13 (November 16, 1992). The Commission further stated that “Corporate liberty should not be restrained if the public good is not harmed by the proposed transaction” and that “The evidence in the record [of that case] supports a finding that the proposed transaction is ‘one not forbidden by law’ and one that is ‘reasonably to be permitted under all the circumstances of the case’ and therefore is in the public good.” *Id.* at 712-13. The *Grafton County* standard for interpretation of the “public good” applies to this case. Accordingly, in this matter, the Commission is to determine whether the proposed transaction is: (1) forbidden by law; and (2) reasonably to be permitted under all the circumstances of the case.

5. The proposed lease transaction is not forbidden by law. In its December 4, 2015 filing in response to the Commission's deficiency letter, PSNH plainly stated "The proposed use of the Northern Pass line as provided in the PSNH lease is firmly within the scope of the easements at issue and the intended use will not create an unreasonable burden for the servient landowners." December 4, 2015 Response of PSNH at 2. The response went on to discuss the history of easement law in New Hampshire relative to both the proposed use for electrical transmission lines and PSNH's right to transfer the easement rights that it owns, and recited long standing precedent in New Hampshire confirming that commercial easements are transferable as a matter of law, unless a particular easement specifically restricts such transfer. PSNH's ability to transfer the rights that it owns is no different than the rights any other entity might have to transfer similar rights, save for the requirement that PSNH, as a public utility, seek the permission of the Commission prior to making the transfer effective.² While the historical circumstances of individual property transfers have differed depending upon the particulars of a given transaction, the legal ability of a utility to transfer easement rights is not a strange, or new, matter for this Commission.³ Furthermore, to the extent it is relevant, the entity to which PSNH's property rights are to be leased will be, if its petition is approved, a New Hampshire public utility. Leases of property from one utility to another, particularly transmission

² The purpose of seeking the Commission's permission is to ensure that the lease is an appropriate use of utility property and that by giving up some rights under the lease, adequate service to customers is not imperiled. It is not for the purpose of determining whether PSNH, as a New Hampshire corporation, has the corporate right to actually lease property rights that it owns.

³ See, e.g., *Riverside Water Works, Inc.*, Order No. 24,713 (December 15, 2006); and *Pittsfield Aqueduct Company, et al.*, Order No. 24,606 (March 24, 2006)

property, is not new either.⁴ A lease of public utility property to another public utility for the provision of utility service is not forbidden by law.

6. Additionally, as stated on page 3 of PSNH's initial response to Mr. Spencer's petition to intervene:

As PSNH stated in its response to the Commission's deficiency letter, a dispute over the scope of the easement is a matter for the courts, and not the Commission. "The PUC is a creation of the legislature and as such is endowed with only the powers and authority which are expressly granted or fairly implied by statute." *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062, 1066 (1982). Although the Commission may review private real property rights in a few limited circumstances (*see, e.g.*, RSA 371:1 relative to the use of eminent domain by public utilities), it does not have general authority to adjudicate such rights. Instead, that authority rests with the superior court. *See, e.g., Gray v. Seidel*, 143 N.H. 327, 330 (1999) (noting that the legislature has specifically provided for petitions to be brought in superior court to resolve disputes between persons claiming an interest in real property, and that granting regulatory authority to a state agency does not vest that agency with authority to determine the relative rights of property owners), *see also, Gordon v. Town of Rye*, 162 N.H. 144, 150 (2011) (stating that by granting town selectmen the authority to regulate public roads and sidewalks, the legislature was not also vesting towns with authority to determine the underlying rights of property owners). Though the Commission may possess regulatory authority over PSNH as a public utility, that authority does not create in the Commission the jurisdiction to decide private real property rights.

This is not a case where PSNH is attempting to transact with an entity that is not permitted to do business in New Hampshire, or where it is attempting to use its property for an illicit purpose. The instant proposal is for PSNH to lease a property interest it owns to another commercial entity so that it might use that interest for an essentially identical purpose. Such activity is permitted by New Hampshire law, and the Commission need look no further on this issue.

⁴ *See, e.g., Florida Power & Light Co., et al.*, Order No. 25,105 (May 26, 2010); and *New England Electric Transmission Corporation, et al.*, Order No. 25,474 (March 19, 2013)

7. The Movants apparently contend that the Commission cannot address the merits of the proposed lease unless or until a court rules on its legality. All that is required for purposes of this docket, however, is a demonstration that the proposed lease is not forbidden by law, and it is not. Whether a proposed use is beyond the scope of the terms of a given easement, or whether the proposed use would result in an overburdening of the easement are not matters within the Commission's jurisdiction. As the Chairman noted at the pre-hearing conference on February 19th, if a party has some doubt about the scope of an easement or its intended use, it is free to seek a court ruling on the matter.⁵ In the interim, however, there is no cause for the Commission to sit on its hands and await a ruling on the presumption that such a ruling might someday be sought or that the result of such a ruling might limit PSNH's rights. The Commission should continue with investigating and ruling upon the matters within its ambit.
8. In moving forward with the docket, the remaining inquiry for the Commission would be whether the proposed lease is reasonable under the circumstances. That inquiry could include analysis of whether, for example: the terms and conditions of the lease are commercially reasonable; the property at issue was appropriately valued by PSNH's valuation expert; the lease payments received by PSNH will be appropriately credited to PSNH's customers; and/or the restriction on the use of the property by PSNH by virtue of the lease might impair PSNH's ability to provide safe and adequate service to its customers in New Hampshire. Those are matters reserved for the Commission and are

⁵ Without conceding that the Commission has authority to review the underlying rights, even if the Commission were to review the easement grant as provided with the Movants' petition to intervene it would find, at least: (1) language permitting construction of "electric transmission and distribution lines" and the necessary equipment to support multiple electric lines; (2) easement rights that are transferable to "successors and assigns" of PSNH; and (3) language specifically stating that any agreements or understandings different from the language of the grant are "waived and cancelled." Accordingly, even if the Commission believed it appropriate to look at the terms of easement upon which the Motion is based, it would find no justification for dismissing or staying this proceeding.

not within the purview of the courts. In that there is an inquiry for the Commission to undertake, and in that such inquiry does not depend upon a court ruling, the Commission should reject the motion to dismiss and continue with the docket.

WHEREFORE, PSNH respectfully requests that the Commission:

- (1) Accept this supplemental objection and deny the movant's motion to dismiss; and
- (2) Order such further relief as may be just and equitable.

Respectfully submitted,

**Public Service Company of New Hampshire d/b/a
Eversource Energy**

March 4, 2016

Date

By: 

Matthew J. Fossum
Senior Counsel
780 North Commercial Street
Post Office Box 330
Manchester, New Hampshire 03105-0330
(603) 634-2961
Matthew.Fossum@eversource.com

CERTIFICATE OF SERVICE

I hereby certify that, on the date written below, I caused the attached to be served pursuant to N.H. Code Admin. Rule Puc 203.11.

March 4, 2016

Date


Matthew J. Fossum