

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

Supplemental Memorandum in Support of Motion to Dismiss the Petition for Approval of  
Lease Agreement

Procedural History

Public Service Company of New Hampshire (PSNH) filed its Petition for Approval of Lease Agreement with Northern Pass Transmission LLC (NPT) on October 19, 2015.

On February 10, 2016, interveners filed a motion to dismiss the PSNH Petition for Approval of Lease Agreement. The basis of interveners' motion is that PSNH cannot lease a right it does not own, therefore, the Petition for Approval of Lease Agreement should be dismissed.

**RSA Chapter 366, Contracts Between Utilities and Affiliates, Imposes the Burden of Proof  
That a Contract Is Just and Reasonable on PSNH**

PSNH cannot provide proof that it owns any easement right traversing interveners' property that would allow NPT to build and operate of the structures described in paragraph 1.2 of the Lease Agreement.<sup>1</sup>

Unless and until PSNH establishes a right to construct the Northern Pass on interveners' property in a court of competent jurisdiction, PSNH cannot meet the burden of proof imposed by RSA 366.5 and Chapter Puc 2100 Affiliate Transaction Rules.<sup>2</sup>

RSA 366:5 expressly requires that PSNH prove that the proposed lease with NPT is just and reasonable: "...In any such investigation, the burden shall be on the public utility and affiliate to

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<sup>1</sup> At paragraph 1.5, of the Lease Agreement, PSNH expressly disclaims any warranties of title to the premises and states that the Lease is "AS IS". This highly unusual lessor disclaimer of title warranties buttresses interveners' position that PSNH does not have the rights it claims in both in the docket at bar and in SEC docket 2015-06. While PSNH and NPT, in paragraph 1.6 of the Lease Agreement, posit that the title disclaimer is not an admission, the unusual character of this lease language provides a basis for the Commission to dismiss the PSNH Petition for Approval of Lease Agreement.

<sup>2</sup> Chapter Puc 2100 Affiliate Transaction Rules will require the Commission to scrutinize the transaction between PSNH and NPT with the utmost skepticism. PSNH and NPT are affiliates within the meaning of the rules. The lease proposal is not an arm's length deal. The lease proposal has substantial implications not only for interveners but for PSNH ratepayers. When the late 1920's and late 1940's-1950's easements, such as interveners, were obtained, either by negotiation or by eminent domain, the ratepayers footed the bill. PSNH was a vertically integrated utility required by law to provide electricity to its customers. PSNH had to prove to the Commission that easement acquisition was a public necessity. It is certain that PSNH did not acquire more rights than were necessary to deliver electricity to its customers. The history of the easement acquisition by PSNH as a regulated utility, together with the case law cited in interveners' motion to dismiss, demonstrates that the Petition is not legally sufficient to survive a motion to dismiss because it lacks the necessary facts of ownership.

prove the reasonableness of any such contract, arrangement, purchase, or sale with, from, or to an affiliate...”.

**PSNH and NPT Filed a Joint Application for Certificate of Site and Facility with the New Hampshire Site Evaluation Committee (SEC docket 2015-06) Representing That They Have Entered a Lease That Would Permit NPT to Construct the Northern Pass on the Easement Burdening Intervener’s Property**

**The Joint Application Pending Before the SEC Cannot Proceed Without a Commission Approved Lease Agreement and the Lease Agreement Cannot Be Approved on the Title Evidence before the Commission**

NPT and PSNH, in their October 19, 2015, Joint Application filed with the New Hampshire Site Evaluation Committee (SEC) represented that: “NPT has executed an agreement with PSNH to lease approximately 100 miles of existing electric transmission ROW from PSNH pursuant to RSA 374:30 in three segments: Dummer to Bethlehem-approximately 41 miles; Bridgewater to Franklin-approximately 25 miles; and, Franklin to Deerfield-approximately 34 miles. PSNH will submit the lease to the New Hampshire Public Utilities Commission (“NHPUC”) for approval pursuant to RSA 374:30.” (See Joint Application, page 6).

The SEC must reject the applicants’ representation that a lease has been entered for that satisfies the requirements under RSA 162-H: 7 and Site 301.03(c) (6) a. for failure of proof of title. Without Commission approval of the Lease Agreement, the SEC cannot proceed. The Commission cannot approve the Lease Agreement because PSNH cannot prove that it has title to the rights it claims.

RSA 162-H: 7 requires that a project developer own or have the right to acquire the property upon which it proposes to construct the project. See Site 301.03 (c) (1)-(2) and Site 301.03 (c) (6) a. Site 301.03(6) a. places the *burden of proof* of the project developer to produce:

“(E)vidence that the applicant has a current right, an option, or other legal basis to acquire the right, to construct, operate, and maintain the facility on, over, or under the site, in the form of: a. Ownership, ground lease, easement, or other contractual right or interest.”

As in the case at bar, the Site Evaluation Committee has no jurisdiction to adjudicate property rights.

Neither regulatory body, the Commission nor the SEC, can cut off interveners’ property rights through the regulatory process.<sup>3</sup>

The lack of proof of title bars both the prosecution of the Petition for Approval of Lease before the Commission and Joint Application for Certificate of Site and Facility before the SEC. The SEC case cannot proceed without an approved lease and the lease cannot be approved by the Commission because PSNH cannot prove it owns the rights it claims.

**The PSNH Petition for Approval of Lease Agreement Must Be Dismissed**

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<sup>3</sup> Absent a judicial determination of the property rights issue, continuing to proceed with the docket at bar and the SEC docket with its multiplicity of interveners, thousands of pages of exhibits, expensive experts, the time consumed by the regulatory bodies and the permitting agencies, the regulatory processes are a waste of time, money and private and public resources.

The PSNH Petition for Approval of the Lease Agreement cannot withstand interveners' motion to dismiss in the docket at bar because PSNH cannot prove that it acquired the rights it seeks to lease.

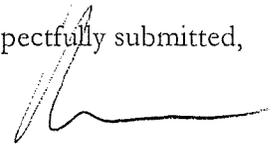
Unless and until a court of competent jurisdiction renders a determination that the easement burdening interveners' property permits the construction of the Northern Pass infrastructure, PSNH cannot establish the facts necessary for the Commission to consider the Petition for Approval of Lease Agreement.<sup>4</sup>

**Wherefore**

Interveners respectfully request that the Petition for Approval of Lease Agreement with Northern Pass Transmission LLC be dismissed.

3/3/16

Respectfully submitted,



Arthur B. Cunningham

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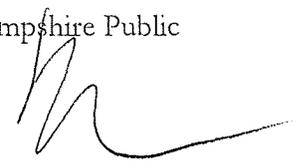
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Bar # 18301

**Certificate**

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

3/3/16



Arthur B. Cunningham

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<sup>4</sup> PSNH has not identified the current owners of the properties burdened by easements it claims it can lease to NPT in the docket at bar. This omission evidences why PSNH has not filed a lawsuit to establish its claim that the easements allow the construction of the Northern Pass. PSNH will be required in such suit to join each and every current property owner as necessary and indispensable parties to such an action. Neither PSNH nor NPT can fairly claim rights in the many easements without joinder. However, each landowner is free to assert property rights in both the docket at bar but also in the SEC. Should a property owner commence a suit asking that title be quieted against the PSNH and NPT claims, such suit would address only that property owner's claim of right. No joinder would be required.