

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

OBJECTION OF INTERVENOR NORTHERN PASS TRANSMISSION LLC
TO FEBRUARY 10, 2016 SUBMISSION OF KEVIN SPENCER AND MARK LAGASSE
d/b/a LAGASPENCE REALTY, LLC

Intervenor Northern Pass Transmission LLC¹ (“NPT”) files this Objection to the February 10, 2016 submission of intervenors Kevin Spencer and Mark Lagasse d/b/a Lagaspence Realty, LLC (collectively, the “Movants”). As grounds for this Objection, NPT states as follows:

1. Following the pre-hearing conference before the Commission on February 19th, Commission Staff filed a letter proposing that parties and intervenors file a response to the Movants’ “Motion for Dismissal of this Docket Pending Adjudication by a Court of Competent Jurisdiction of the Property Rights of Intervenors” (the “Motion”). This Objection constitutes that response. In a nutshell, the Motion asserts that this Commission cannot take any action concerning the proposed lease between Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) and NPT (the “Lease”) unless or until a court “adjudicate[s] the parties [sic] respective rights.” Motion at 4. But there is no pending court proceeding that addresses those rights.

¹ NPT petitioned to intervene in this Docket on February 10, 2016. At the pre-hearing conference with the Commission on February 19, 2016, neither PSNH, the Office of Consumer Advocate, nor any intervenor objected to NPT’s intervention, but as of the date of this filing, the Commission has not ruled on NPT’s Petition.

2. At the outset, NPT joins in PSNH's February 19, 2016 Objection to the Movants' Intervention and in PSNH's Supplemental Filing of even date herewith.

3. By arguing for dismissal in favor of a proceeding that does not exist, Movants misconstrue the Commission's role. The purpose of approval of the lease of utility assets under RSA 374:30 is to determine whether the lease is an appropriate use of those assets. Nothing in the statute suggests that the Commission cannot act until a court has first determined the extent of the utility's underlying property rights.

4. While the Commission's rules do not expressly contemplate motions to dismiss, in order to prevail on a motion to dismiss, the Movants should be expected to demonstrate that PSNH has failed to state a claim on which relief can be granted. PSNH, however, has explicitly stated a claim for relief under the provisions of RSA 374:30 to lease a part of its franchise, works, or system in the state. Furthermore, as the Commission pointed out in Order No. 25,801, at p. 6, issued July 29, 2015 in Docket No. DE 15-068 concerning a petition by Freedom Logistics, LLC, the Commission "review[s] motions to dismiss by asking whether the facts alleged in the petition and all reasonable inferences could support the relief sought." In that regard, as discussed further below, PSNH has presented a *prima facie* case and therefore the facts alleged effectively support the relief sought. Consequently, there is no basis for dismissing PSNH's petition.

5. Both the Movants and PSNH acknowledge that this Commission, as an agency of limited jurisdiction, *Appeal of Public Service Company of New Hampshire*, 122 N.H. 1062,1066 (1983), has no authority to determine property rights under the easements in question. But the General Court has given the Commission the authority to make determinations concerning whether the lease of certain property rights will be for the "public good." RSA 374:30. That

determination does not require a predicate finding (a finding the Commission has no jurisdiction to make) concerning the specific property rights at issue.² In a similar vein, given the number of approvals that must be obtained to construct this project, including those from the U.S.

Department of Energy and the New Hampshire Site Evaluation Committee, along with its other permitting agencies, it would never be constructed if each proceeding could be postponed on the assumption that some other or future court or agency challenge might be made to its completion.

6. The Motion further contends that “PSNH does not own the right to lease the[ir] easement to NPT” as that “right is owned by the intervenors.”³ Movants offer two reasons for this legal position: First, that their easement “bears no similarity whatsoever” to an easement found by the New Hampshire Supreme Court to permit construction of additional transmission lines, *Lussier v. New England Power Co.*, 133 N.H. 753 (1990), and second, that language in their specific easement unambiguously requires that the only lines that may be constructed in the easement are lines that *both* transmit and distribute power. The Movants are simply wrong, but in any event, they have put the cart before the horse in contending that the Commission has no authority to act until a court rules on the legality of the Lease.

7. As PSNH points out in its Supplemental filing, a determination of the public good requires this Commission to assess whether the proposed transaction is one that is “not forbidden by law.” This Commission plainly has the authority to proceed under RSA 374:30

² Movants’ position amounts to a claim that the Commission cannot make a public interest or public good determination regarding a petition filed by a utility unless and until all potential underlying legal issues have been adjudicated. This position is meritless and would accomplish a completely unworkable result. If the Commission applied such a test no utility project requiring a public interest determination could move forward until all underlying permits and other legal requirements for construction had been satisfied. See for example, Docket No. DE 03-166, in which the Commission proceeded to address public interest considerations under RSA 369-B:3-a, relating to the modification of Schiller Station, notwithstanding that PSNH the necessary permits and requirements for construction had not been obtained.

³ Two Intervenors from McKenna’s Purchase also raise the same issue, asserting that “PSNH does not have the legal right to lease the easement because the easement did not grant such rights to PSNH.” Motion to Intervene of McKenna’s Purchase Unit Owners Association.

where it can evaluate whether there is any statutory or other authority establishing that the proposed lease is “forbidden by law.” In that regard, there can be no dispute that PSNH is not forbidden by law to “transfer or lease its franchise, works or system,” or any part of it, subject to Commission approval. That is precisely what RSA 374:30 allows. In addition, in response to its initial inquiry concerning the legal authority to lease the easement rights, PSNH has provided the Commission with a memorandum of law explaining why it has such authority. *See* Letter from Matthew Fossum, Senior Counsel of PSNH to Executive Director Debra Howland dated December 4, 2015. Standing alone, this is enough to provide the Commission with a sufficient basis to go forward to make the determination it is required to make under RSA 374:30.

8. As the Chairman of the Commission also observed at the February 19th pre-hearing conference, the Commission is entitled to make a prima facie determination of whether PSNH has any property rights at all. In the example the Chairman offered, if PSNH sought to lease the Brooklyn Bridge, the Commission could determine that such a lease was not permitted. But where, as in this case, PSNH has filed deeds showing that it owns the easement, that prima facie determination is satisfied.

9. In this case, the prima facie test is satisfied as well by the terms of the Lease itself. Under the express terms of the Lease, the property subject to the Lease: is limited to PSNH’s rights under any easements (Section 1.4); without any warranty of title (Section 1.5(b)); with notice of the potential for third-party landowner disputes (Section 1.6). Thus, the Lease only covers property rights to the extent that PSNH has the legal ability to convey lease-hold interests over the property. Therefore, the Commission need not decide what rights PSNH may have to convey the desired property rights, as the conveyance by its own terms is limited to whatever rights PSNH may have.

10. While this Commission need not review (and has no obligation to review), the language of the more than 700 specific easements filed with it by the Movants, should it choose to do so, a review of those easements demonstrates that there is ample basis to conclude that PSNH has made a prima facie showing of property rights sufficient to proceed.

11. The Movants point to the language of the easement evaluated by the Superior Court in the *Lussier* case (language the Supreme Court found to allow the construction of an additional transmission line in the easement following a transfer from a predecessor company to NEPCO) and assert that the language there “bears no similarity whatsoever” to the easement owned by PSNH across Movants’ property.⁴ But a comparison of the language in the *Lussier* easement and the Movants’ easement proves the contrary. *See* Motion at 3. Both easements contain a grant to: “construct” (*Lussier*), “erect” (Movants); “repair, maintain, operate and patrol” (both); “reconstruct” (*Lussier*), “rebuild” (Movants); “**lines** of towers or poles or both” (*Lussier*), “transmission and distribution **lines** consisting of suitable and sufficient poles and tower, with suitable foundations” (Movants), “for the transmission of high and low voltage electric current” (*Lussier*), “for the transmission of electric current” (Movants) (bolded type added)⁵. As is evident from the bold-faced language, both the *Lussier* easement and that of the Movants specifically refer to construction or erection of transmission lines, in the plural, plainly contemplating the right to construct more than one line. Moreover, both easements grant the right in perpetuity: *Lussier* – “It is the intention of the Grantors to convey to the Grantee the perpetual right and easement;” Movants – “To have and to hold to the grantee, its successors and assigns forever.” Of particular relevance here, the Movants’ easement specifically provides for a

⁴ *Lussier* did not specifically address the question of whether the easement could be assigned or leased to a third party. Instead, the decision deals with whether a successor in interest could construct an additional line.

⁵ Language of the *Lussier* easement is found at 133 N.H. 753, 757. The Movants’ easement is attached to their Motion.

grant, sale and conveyance to PSNH and “its successors and assigns.” Thus, like the instrument in *Lussier*, Movant’s easement contains language that is “clear and controlling” on the scope of the easement grant. *Lussier* 133 N.H. 753, 757. It constitutes a grant, sale and conveyance of the right to construct **lines** to PSNH and its successors **and assigns**. PSNH thus owns the right to assign to NPT – for a reasonable price – the construction of additional lines. Lest there be doubt, PSNH does not contend that the Commission needs to – or even can – finally resolve this issue. But the language of the easements at issue in this Docket plainly establish that for purposes of the Commission’s RSA 374:30 analysis, the Lease is not “forbidden by law,” and that there is no basis to dismiss (or delay) this proceeding.

12. While the Motion is less than clear on this issue, Movants appear to contend that this Docket should be dismissed because the “grant provides an easement for *transmission and distribution*,” and thus “evidences the need to bring electricity to New Hampshire homes.” Motion at 3-4 (emphasis in original). Stating that “Northern Pass is a transmission only elective project with no distribution capability,” Movants seem to argue that unless the power transmitted on NPT lines is used in New Hampshire, the use is not permitted by the easement grant. This meritless argument is contrary to the plain language of the grant. Movants would read the words granting the right to construct “transmission and distribution lines” to mean that any line constructed must be both for transmission and distribution. But the reference in the grant to the construction of “lines” (plural) plainly indicates that the grant allows the construction of both transmission lines and distribution lines.⁶ If Movants were correct, an absurd result would occur, namely, the lines in every easement would not only have to transmit electricity, they would have to distribute it to the party granting the easement. Likewise, Movants’ argument that the

⁶ Movants mix apples and oranges by contending that construction in the easement grant must satisfy some public necessity. Motion at 4. If the use is permitted by the grant, public necessity is irrelevant.

electricity transmitted across the easement must be used in New Hampshire finds no support whatsoever in the language of the grant. The grant says nothing about where the power is transmitted to, and the consideration paid for the easement quite clearly was for the right to cross the property, not for some end use of the electricity. Had the easement been limited to transmitting property to the grantor, it would have said so.

13. In sum, while the Commission does not have jurisdiction to rule on property interests, the plain language of this easement establishes that the activity covered by the Lease is not forbidden by law. As the *Lussier* decision teaches, if the language of the grant is unambiguous, no further inquiry need be made. As a result, the Commission can proceed to address those issues that are within its jurisdiction under RSA 374:30. See PSNH Supplemental Objection at ¶ 7.⁷

14. At the pre-hearing conference, the Movants argued that it is PSNH's obligation to go to court to establish their property rights. PSNH's rights for purposes of this proceeding, however, are established by the deed itself. Accordingly, PSNH does not need to go any further, nor does the Commission.

15. Finally, Movants contended at the pre-hearing conference that the Lease is invalid because any lease payments relating to the easement belong to them. This simply begs the question of whether the easement permits the lease of the rights granted. If it does, then the consideration for the easement includes any future assignment of rights in the easement, and any payment made for that assignment.

⁷ Movants contend that the easement language must be assessed against a "rule of reason" in order to determine its meaning. Motion at 4. But the rule of reason is relevant only where the language of the grant is ambiguous, which is not the case here. *Lussier*, 133 N.H. at 757.

16. For all these reasons, and those set out by PSNH in its Supplemental Objection, the Motion to Dismiss should be denied.

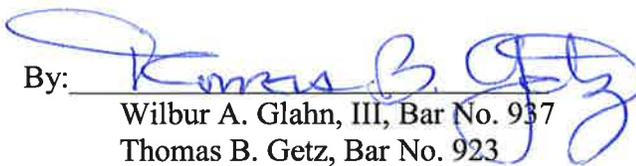
Respectfully submitted,

NORTHERN PASS TRANSMISSION, LLC

By its attorneys,

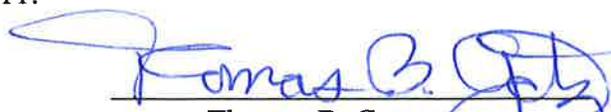
McLANE MIDDLETON, PROFESSIONAL ASSOCIATION

Dated: March 4, 2016

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CERTIFICATE OF SERVICE

I hereby certify that, on the March 4, 2016, I caused the attached Objection to be served pursuant to N.H. Code Admin. Rule Puc 203.11.


Thomas B. Getz