

**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 MOTION FOR CLARIFICATION AND/OR
RECONSIDERATION OF ORDER NO. 25,943**

Pursuant to New Hampshire Code of Administrative Rules Puc 203.07 and RSA chapter 541, Public Service Company of New Hampshire d/b/a Eversource Energy ("PSNH" or the "Company") hereby moves for clarification and/or reconsideration of Order No. 25,943 (September 15, 2016). In the alternative, PSNH moves for the Commission to amend the deadline for briefs by two weeks, to October 21, 2016, in the event reconsideration is not granted. In support of its motion, PSNH states the following:

1. On October 19, 2015, PSNH filed a petition for approval of a lease transaction between it and Northern Pass Transmission LLC ("NPT") whereby PSNH would lease to NPT certain real estate rights owned by PSNH. On November 17, 2015 the Commission determined that PSNH's submission was "deficient" and ordered PSNH to provide copies of the deeds underlying the lease and:

For each of the easement deeds listed in the attachment to the petition titled "Lease Agreement" on pages bates numbered 54-92 of the attachment, a legal opinion that the leased use is permitted under the easement and that the easement rights are transferrable to Northern Pass Transmission, LLC by lease.

November 17, 2015 Secretarial Letter in Docket No. DE 15-464 at 1. In a letter of December 4, 2015, PSNH provided the required legal opinion that the proposed use under the Lease Agreement was permitted and that the easement rights are transferrable as a matter of law.

2. On February 10, 2016, Kevin Spencer and Mark Lagasse d/b/a Lagaspence Realty, LLC, intervenors in the proceeding, moved to dismiss PSNH's petition on various grounds, and PSNH objected to that motion on February 19. Additional responses to the February 10, 2016 submission were filed by PSNH, NPT and Lagaspence Realty on March 4, 2016. On April 15, 2016, the Commission denied the motion to dismiss and concluded, in relevant part:

We find that Eversource has made sufficient allegations, both legal and factual, to go forward with its petition for approval of the Lease under RSA 374:30. . . . Our review of the easements, their ownership, and transferability is necessary, but will be limited to whether the easements on their face appear to be broad enough to allow for construction of the NPT project, and are transferrable in the manner claimed by Eversource.

Order No. 25,882 (April 15, 2016) at 5-6.

3. On September 15, 2016, and despite the conclusion in Order No. 25,882 that PSNH had made an adequate factual and legal showing to move forward with the petition, the Commission issued Order No. 25,943 and concluded that PSNH was required to make additional factual and legal showings to move forward with the docket. The Commission directed the parties to the docket to brief a series of questions relating to property rights generally, and three easements specifically. The Commission's requests appear to cover issues that: 1) are unclear; 2) have already been discussed, briefed, and decided in this case; 3) are beyond the scope of the Commission's jurisdiction; or 4) are not relevant to the issues pending before the Commission. Accordingly, and for the specific reasons set out below, PSNH requests that the Commission clarify or reconsider Order No. 25,943.

4. Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. *Public Service Company of New Hampshire*, Order No. 25,361 (May 11, 2012) at 4. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding or by identifying specific matters that were overlooked or mistakenly conceived by the deciding tribunal. *Id.* at 4-5. A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Id.* at 5. PSNH's specific arguments are set out below.

5. In Order No. 25,943, the first question the Commission asked is: "Does the language 'heirs and assigns' in a utility easement deed, without any additional prohibition or express grant, allow the lease of the easement to a third party?" It is unclear to PSNH which easement or easements the Commission may be referencing in this question. In general, easements obtained by PSNH do not contain the language "heirs and assigns" as it relates to PSNH for the simple fact that PSNH, as a corporation, has no heirs. Rather, easements relating to PSNH's rights contain language referencing PSNH's "successors and assigns." Accordingly, it is not clear to PSNH which easement deeds might be referenced in the Commission's question and PSNH requests that the Commission identify which of the easement deeds contain the language referred to in the Commission's question. This same issue exists with respect to question 7 in Order No. 25,943 and PSNH requests the same clarification be provided relative to that question.

6. Furthermore, in PSNH's December 4, 2015 response to the Commission, it set out an extensive discussion of New Hampshire law relating to the proposed use of the leased property and PSNH's ability to transfer its rights in that property.¹ PSNH described how the proposed use

¹ As PSNH noted in that document, it was not clear for what purpose the Commission was requesting the information sought, and PSNH was not aware of any restriction on its ability to transfer its real estate rights that materially differed from the ability of any other entity to do the same. And, therefore, PSNH clarified that by

was permitted, and concluded that “the deeds subject to the PSNH lease are assignable by default given their commercial nature and the lack of any limitations on transferability set forth in the deeds.” December 4, 2015 Letter of PSNH in Docket No. DE 15-464 at 6. Accordingly, and regardless of the clarifications requested above, PSNH has already submitted a document in this proceeding that answers the Commission’s questions regarding the assignability of the easements. Therefore, PSNH asks that the Commission reconsider its recent requests for information that has already been provided relative to the transferability of the easement rights. If the Commission’s more recent requests differ from the prior ones relative to the legal right to transfer the property and for NPT to use the rights transferred by PSNH, PSNH requests that the Commission clarify in what way the new requests differ from what was requested previously.

7. As an additional matter, the questions set out in Order No. 25,943 appear to seek information that goes beyond the jurisdiction of the Commission, as well as beyond the scope of review set out by the Commission in Order No. 25,882 and confirmed in its September 12, 2016 secretarial letter on pending interventions. In the Order the Commission stated that “Property owners who wish a determination of their rights in the easements on their lands with respect to Eversource and NPT should seek redress in the courts,” Order No. 25,882 at 6, and in the letter the Commission confirmed that it would not “determine property rights of intervenors in this proceeding.” September 12, 2016 Secretarial Letter at 1.² Further, as noted above, in Order No. 25,882 the Commission stated that its review would be limited to determining whether the

agreeing to provide the requested information, it was not agreeing that the Commission, in fact, had jurisdiction over decisions relating to the underlying real estate rights.

² Such redress in the courts has been, and is being, sought. Two lawsuits regarding claims for breach of easement terms and unreasonable interference and encroachment on easements relating to this matter have been filed. The first *Thomas Mullen, et al. v. Public Service Company of New Hampshire, et al.*, Docket No. 13-CV-343, was dismissed by the Grafton County Superior Court. The New Hampshire Supreme Court affirmed the dismissal in an unpublished order in its Case No. 2014-0797. The second, *Spencer, et al. v. Eversource Energy Service Co.*, Civil Action No. 1:16-cv-00353-AJ, was filed in the U.S. District Court for New Hampshire by intervenors Kevin Spencer, Mark Lagasse and Lagaspence Realty, LLC, and is currently pending before that Court.

easements “on their face” permitted the proposed use. Order No. 25,882 at 6. To the extent the Commission is now requesting information aimed at adjudicating the scope or transferability of PSNH’s easement rights beyond what the easements say “on their face,” such requests seem to go beyond the limitations in Order No. 25,882 because the information obtained would appear to serve only to determine the property rights of PSNH as the easement holder, and to aid in rendering “a determination of [the underlying landowners’] rights in the easements on their lands.” As PSNH has argued previously, *see* March 4, 2016 Supplemental Objection of PSNH at 4-7, the Commission’s inquiry here is a limited one. In Order No. 25,882 the Commission appeared to agree that its review is limited, and that it does not include rendering judgment on the property rights of the parties. Order No. 25,943 now seems to seek information and legal arguments on matters beyond that limitation, and upon which the Commission has already stated it will not render judgment. Accordingly, it is not clear to PSNH what the scope of the Commission’s review is, nor what authority the Commission intends to exert over the property rights of the parties. Accordingly, PSNH requests that the Commission clarify or reconsider Order No. 25,943.

8. Lastly, PSNH requests that pending the resolution of the matters set out above, the deadlines for responses set out in Order No. 25,943 be suspended. To be clear, in making this request, PSNH does not believe that the docket should be extended unnecessarily – indeed it has been pending for nearly a year already. Instead, PSNH makes the request to suspend the deadlines in Order No. 25,943 because: 1) PSNH believes that Order No. 25,943 is, in some ways, inconsistent with prior orders and with the scope of the Commission’s authority, and being required to respond to the matters within the order on the timeframe given may require unnecessary or duplicative effort, or may result in prejudice to PSNH; and 2) the redress to the

court system that the Commission found proper in Order No. 25,882 has taken place and is underway. The Commission should not undo its prior decision by now making the very determinations regarding rights in easements that the Commission has already said was the province of the courts. Alternatively, and as set out above, PSNH requests that the Commission amend the deadline for responsive briefs by two weeks to October 21, 2016 to allow adequate time to provide complete responses to the Commission's questions.

WHEREFORE, PSNH respectfully requests that the Commission:

- (1) Clarify or reconsider Order No. 25,943 as set out above;
- (2) To amend the date for submission of briefs to October 21, 2016, if reconsideration is not granted; and
- (3) Order such further relief as may be just and equitable.

Respectfully submitted,

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

September 22, 2016
Date

By: 

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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.

September 22, 2016
Date


Matthew J. Fossum