The State of New Hampshire

Public Utilities Commission

DE 15-464

Public Service Company of New Hampshire d/b/a Eversource Energy
Petition for Approval of Lease Agreement with Northern Pass Transmission, LLC

DEERFIELD INTERVENORS – MOTION FOR REHEARING

NOW COME Jo Anne Bradbury, Robert Cote and Bruce Adami, Jeanne Menard, and Erick Berglund ("Deerfield Intervenors"), by and through their attorneys, Wadleigh, Starr & Peters, P.L.L.C., and say as follows by way of this Motion for Rehearing pursuant to RSA 541:3:

In Order No. 26,001 (the "Order"), which is dated April 6, 2017, the Public Utilities Commission (the "Commission") unlawfully and unreasonably rejected clear New Hampshire precedent concerning the inalienability and non-divisibility of easements in gross when it ordered that the review of the proposed lease of easement rights by Eversource to NPT could proceed. According to the Commission, it was "not able to conclude that Eversource's easements are not transferable and divisible." Order p. 15. Thus, the Commission found that there was nothing precluding Eversource "from dividing and leasing a portion of its easement rights to NPT for the purpose of transmitting electricity." Id. This conclusion, however, is directly contrary to New Hampshire case law. Additionally, to the extent that the issue has not been decided in New Hampshire, the Commission lacks the authority to render such a legal conclusion, as only the courts – not the Commission – can decide such matters of law.

RSA 541:3 provides that a party can apply for a rehearing within 30 days of the decision of the Commission, which motion shall specify "all grounds for rehearing." Such a motion "shall set forth fully every ground upon which it is claimed that the decision or order complained of is

unlawful or unreasonable." RSA 541:4. Here, the Commission's Order was unlawful and/or unreasonable for several reasons.

In prior pleadings, McKenna's Purchase and the Deerfield Intervenors set forth applicable New Hampshire law concerning easements in gross, which are the only types of easements at issue in this matter.[1] For the sake of brevity, such case law and arguments will not, except to the extent necessary, be repeated here; nonetheless, the Deerfield Intervenors continue to rely upon them. At bottom, those prior pleadings clearly demonstrated that: (1) easements in gross are not alienable; (2) such easements cannot be divided or apportioned; and (3) the rule of reason cannot be satisfied in this matter.

Despite unambiguous New Hampshire precedent on these issues, the Commission unlawfully and unreasonably insisted in its Order that no such New Hampshire case law exists. For example, the Commission wrote in its Order that "[r]egarding the division and transfer of Eversource's easement rights, despite briefing on these issues and our own review of case law, we find no case on point in New Hampshire governing the issue whether utility easements in gross are divisible and transferable." Order at p. 14.

This conclusion ignores the law as set forth in several cases decided by the New Hampshire Supreme Court. For instance, in Tanguay v. Biathrow, 156 N.H. 313 (2007), the New Hampshire Supreme Court explained that easements in gross are non-transferable because they are personal in nature. See Tanguay, 156 N.H. at 315 (concluding that the easement in gross was a "personal, nontransferable interest in the land" that was not transferred to the respondents, who purchased adjoining land also owned by the owner of the easement in gross). The Court affirmed the trial court's decision that the easement in gross in that case terminated upon the death of the holder of

[1] There is no disagreement amongst the parties that the easements here are easements in gross.

that easement. See id. (stating that if "it appears from construction of the deed that the parties intended to create a right to be attached to the person . . . it will be deemed to be an easement in gross" (quotation and ellipsis omitted)); Burcky v. Knowles, 120 N.H. 244, 247 (1980) (explaining that an easement in gross is "an incorporeal, nonpossessory right to the use of another's land, but it is a mere personal interest" that is "generally not inheritable, and vests only in the person to whom it is granted"); see also Arcidi v. Town of Rye, 150 N.H. 694, 698-99 (2004) (concluding that the holder of an appurtenant easement could not transfer the right to use the easement to a third party without transferring the dominant estate). Contrary to the Commission's Order, all of the New Hampshire cases considering the transfer of an easement in gross have held that such an easement is not transferable.

Ignoring this settled case law, the Commission speculates as to how the New Hampshire Supreme Court may decide the issue, primarily turning to various provisions of the Restatement of Property for guidance. The Commission explained that "[w]hile we are not in a position to determine how the New Hampshire Supreme Court would rule, we find nothing on the face of the deeds that would render Eversource's easements inalienable." Order at p. 14-15. In light of the decisions by the New Hampshire Supreme Court noted above and described in prior pleadings, it is simply erroneous to reach such a conclusion and to rely upon provisions of the Restatement that contradict established precedent in this state.

The Commission followed the same unlawful and unreasonable pattern concerning the divisibility of easements when it stated that "[w]hile we are not aware of any controlling law here in New Hampshire, the Restatement (Third) of Property provides that . . . [t]ransferable benefits in gross may be divided unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate." The authority previously provided –

which shows that easements in gross in New Hampshire are not transferable or divisible – is controlling and determinative. Accordingly, the Commission's decision to the contrary is erroneous.

Even assuming that such authority is not determinative, and assuming that there is unsettled law in New Hampshire concerning the alienability and divisibility of easements in gross, the Commission does not have the authority to determine such issues of law. In fact, the legislature has created a vehicle for the Commission to seek review of such questions of law, which the Commission should have, yet failed, to pursue in this matter. RSA 365:20 provides that the "commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission." (Emphasis added.) By speculating how the New Hampshire Supreme Court may decide certain issues when it has the statutory ability to receive direct answers from the Supreme Court itself, the Commission exceeded its authority. The failure to utilize RSA 365:20 is particularly egregious when the Commission admits that it "lack[s] the jurisdiction to determine individual property rights, and [is] not empowered to determine the rights of the individual owners of the more than 500 servient estates." Order at p. 15. Thus, the Commission illogically and unlawfully created a presumption in favor of divisibility and alienability that it placed upon landowners to rebut, before it determined that it was "not able to conclude that Eversource's easements are not transferable and divisible." As explained above, such a conclusion lacks support in New Hampshire law.

Furthermore, by creating a "rebuttable presumption" that easements in gross are transferrable and divisible, the Commission unlawfully shifted the burden of proof onto landowners to rebut that presumption. According to administrative rule PUC 203.25, "[u]nless otherwise specified by law, the party seeking relief through a petition, application, motion or

complaint shall bear the burden of proving the truth of any factual proposition by a preponderance of the evidence." Because Eversource filed the petition here seeking approval of the lease at issue, Eversource has the burden to demonstrate that its easement in gross is in fact transferable and divisible. In other words, the landowners should not have the burden to prove the converse of that proposition. Yet, the Commission placed the burden upon the landowners to do just that when it unreasonably created the "rebuttable presumption," and then unlawfully ruled that they failed to demonstrate that the easements were not transferrable and divisible.

Moreover, the Commission did not describe in its order how Eversource has satisfied the rule of reason. See Heartz v. City of Concord, 148 N.H. 325, 331 (2002) (explaining that, "irrespective of the deed language, we use the rule [of reason] to determine whether a particular use of the easement would be unreasonably burdensome"). In the event that the Commission does not grant this motion for rehearing based upon the arguments raised herein, the Deerfield Intervenors request that they be permitted to exercise their reserved right (which reservation was acknowledged by the Commission on page 13 of its Order) to contest the lease pursuant to the rule of reason. As mentioned in prior pleadings, if it is determined that Eversource is able to divide and transfer its easement in contravention of established New Hampshire precedent, the rights transferred certainly cannot expand upon Eversource's rights. Such expansion would necessarily create an unreasonable burden upon the Intervenor's property interests, thereby invalidating any such lease.

Accordingly, the Deerfield Intervenors hereby respectfully request that the Commission reconsider its decision and grant this motion for rehearing. If the Commission disagrees, the Deerfield Intervenors respectfully request the opportunity to fully brief the issue concerning the rule of reason in regard to any easement rights leased by Eversource to NPT.

Respectfully submitted,

The Deerfield Intervenors
By their attorneys,

Wadleigh, Starr & Peters, P.L.L.C.

Dated: April 27, 2017

By: _____ for

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Certificate of Service

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

_____ for

Stephen J. Judge