

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-464

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY

Petition to Lease Rights-of-Way to Northern Pass Transmission, LLC

**SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS
AND THE CITY OF CONCORD**

JOINT MOTION TO REHEAR ORDER NO. 26,001

The Society for the Protection of New Hampshire Forests and the City of Concord (collectively, the “Intervenors”) file the following joint motion to rehear Order No. 26,001 of the Public Utility Commission (the “PUC” or “Commission”) issued on April 6, 2017. In support, the Intervenors state as follows:

LEGAL STANDARD FOR REHEARING

1. The Intervenors, as parties to this proceeding, may move for rehearing of the Order. N.H. ADMIN. RULES, PUC 203.07 and 203.33; RSA 541:3.
2. The Commission may grant rehearing for “good reason” if the moving party shows that an order is “unlawful or unreasonable.” RSA 541:3; RSA 541:4; *Rural Tel. Cos.*, Order No. 25,291 (Nov. 21, 2011).
3. A successful motion must establish “good reason” by showing that there are matters the Commission “overlooked or mistakenly conceived in the original decision,” *Dumais v. State*, 118. N.H. 309, 311 (1978) (quotations and citations omitted), or by presenting new evidence that was “unavailable prior to the issuance of the underlying decision,” *Hollis Tel. Inc.* Order No. 25,088, at 14 (Apr. 2, 2010).

4. A successful motion for rehearing must do more than merely restate prior arguments and ask for a different outcome. *Pub. Serv. Co. of N.H.*, Order No. 25,676, at 3 (June 12, 2014); *see also Freedom Energy Logistics*, Order No. 25,810 (Sept. 8, 2015).

BACKGROUND

5. On October 19, 2015, the Public Service Company of New Hampshire d/b/a Eversource Energy (“Eversource”) filed a petition for approval of a lease agreement between Eversource and Northern Pass Transmission, LLC (“NPT”).

6. On September 15 and 27 of 2016, the Commission directed the parties to brief eight issues relating to the legality of Eversource’s lease of easement rights to NPT, a directive it found might be necessary to complete a facial review of the transferability of the easements. *Pub. Serv. Co. of N.H.*, Order No. 25,943 at 2-3 (Sept. 15, 2016), *as clarified by*, Order No. 25,946 (Sept. 27, 2016).

7. In its April 6, 2017, Order, the PUC determined three issues: “(1) whether to apply different level of review to easements obtained by eminent domain, (2) whether Eversource has made a prima facie showing that it owns the easements it intends to lease to NPT, and (3) whether anything on the face of the easement deeds would prohibit their divisibility and lease to NPT as a matter of law.” Order No. 26,001, at 13.

8. The PUC did not “attempt to determine such matters as whether Eversource’s easements are exclusive, and whether the uses proposed in the lease would overburden the easements.” *Id.* It reasoned, “[s]uch determinations of individual property interests are the province of the Courts.” *Id.*

ANALYSIS

I. **The PUC’s Decision to Treat the Same Easements Voluntarily Acquired by Deed and Easements Acquired by Eminent Domain is Unlawful and Unreasonable**

9. Based on its reasoning that owners of servient estates burdened by easement rights obtained through eminent domain and the owners of servient estates burdened by easement rights obtained from negotiated deeds both remain free to establish their individual property rights and challenge the transfers in court, the PUC determined there is “no reason to treat the three easement deeds obtained by eminent domain differently from deeds obtained through negotiation.” *Id.* This determination is unlawful and unreasonable because it overlooks decades of applicable law.

10. As an initial matter, RSA 363:17(b) requires the PUC to provide the reasoning for its decisions. Other than the statement referenced above, the PUC did not offer analysis for its conclusion that there is no reason to differentiate between Eversource’s right to transfer easements reached by agreement and those resulting from the exercise of eminent domain.

11. Moreover, Eversource’s rights with respect to easements acquired by eminent domain are more limited than its rights with respect to easements voluntarily acquired. Unlike easements voluntarily acquired, decades of precedent, as well as recent regulatory, legislative, and constitutional changes, require Eversource’s use of easements acquired by eminent domain to be (1) for a public purpose, (2) consistent with the original scope and terms of the condemned properties, and (3) deemed necessary for reliability and eligible for regional cost recovery by ISO New England. *See* Society for the Protection of New Hampshire Forests, City of Concord and the New England Power Generators Association, Inc Joint Legal Memorandum, DE 15-464, at 11-26 (and citations therein) (hereinafter, “Intervenors’ Memorandum”).

12. The failure of the PUC to analyze the distinction of an easement obtained by eminent domain prior to the restructuring of the electricity market and the current state of the electricity market and therefore whether eminent domain may be used for purposes *other than* a project necessary for reliability, is unlawful and unreasonable.

II. The PUC’s Conclusion that Eversource Made the Requisite *Prima Facie* Showing that it Owns the Transmission Easements that it Intends to Lease to NPT

13. First, the PUC erred when it found that there is nothing in the easement deeds that bars Eversource from dividing and leasing a portion of its easement rights to NPT. Order, at 15.

14. As easements do not confer fee title to the land, an easement holder does not own the land. 25 Am. Jur. 2d Easements and Licenses § 11 (2d ed. 1996). An easement in gross “is generally not inheritable, and vests only in the person to whom it is granted.” *Burcky v. Knowles*, 120 N.H. 244, 247 (1980). The language “successors and assigns” in an easement in gross ensures the easement rights are transferable and run with the land. *See, e.g., Cross v. Berlin Mills Co.*, 79 N.H. 116, 123 (1918); *Wilder v. Wheeler*, 60 N.H. 351 (1880).

15. However, this language does not itself support a determination that an easement in gross can be apportioned to a third party. *See, e.g., Joliff v. Hardin Cable Television Co.*, 269 N.E.2d 588 (Ohio 1971).

16. It is undisputed that Eversource’s easements are easements in gross and the transfer of leasehold interest in these easements from Eversource to NPT is neither an assignment nor a transfer to a successor. As such, the transfer must be considered an attempt to apportion the easements. The PUC did not identify any language in any of the deeds that explicitly permits apportionment to a third party.

17. Second, the PUC erred when it did not determine if the attempted apportionments result in additional burdens to the servient landowners.

18. The holder of a utility easement in gross does not have the right to lease less than all of its easement rights to a third party when the transfer results in an additional burden to the servient landowner.

19. In *SegTEL*, Eversource recognized that “[t]here is no presumption under New Hampshire law that a right of way owned and used by an electric utility for power line purposes may be made available to third parties for telecommunication uses unrelated to the electricity utility’s business.” Brief of Public Service Company of New Hampshire, Docket DT 08-146, at 4 (May 15, 2009).

20. The extensive case law cited in the Intervenor’s Memorandum demonstrates that the rule in a majority of jurisdictions is that an easement can only be apportioned if it does not increase the burden on the servient tenement. Intervenor’s Memorandum, 8-9. Further, the Restatement provisions the PUC cites also reflect this requirement.¹ Order, at 15 (citing Restatement (Third) of Property: Servitudes § 5.9 (2000)).

21. Despite its recognition of this authority, the PUC ruled it cannot conclude that Eversource’s easements are not transferable and divisible because it lacks jurisdiction. *Id.*

22. This misapprehends the law and effectively creates a presumption in favor of transferability and divisibility of utility easements in gross when there is not one in law. The PUC does have jurisdiction to determine if the apportionment creates a burden on the servient tenements, because the PUC must determine if Eversource has the requisite property rights to lease the easement before it may analyze if the transfer satisfies RSA 343:30. *See* RSA 343:30.

23. Further, RSA 365:20 states 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

¹ The Intervenor’s make this point only to emphasize a national trend in the law. They do not concede that the New Hampshire Supreme Court has adopted this provision as controlling.

any matter for the commission.” By effectively creating a presumption in favor of Eversource, and not exercising its jurisdiction to decide this issue or certifying a question pursuant to RSA 365:30, the PUC unlawfully exceeded its authority.

24. Therefore, it was unreasonable and unlawful for the PUC to move forward with its consideration of the terms of the proposed lease and the valuation of the easement rights granted thereby without first determining if the apportionment of the easements resulted in an additional burden.

WHEREFORE, Intervenors respectfully request that the Committee:

- A. Grant this Motion;
- B. Expeditiously schedule a rehearing on Order No. 26,001; and
- C. Grant such further relief as it deems appropriate.

Respectfully submitted,

CITY OF CONCORD

 for

May 5, 2017

By: _____
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SOCIETY FOR THE PROTECTION OF NEW
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By its Attorneys,
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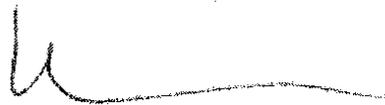
May 5, 2017

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing shall be served by hand, by facsimile, by email, or by other method such to ensure that they are received by the parties by 4:30 p.m. on the same day as they are filed with the Commission, pursuant to N.H. Code Admin Rule Puc 203.11(c).



May 5, 2017

By: _____

Elizabeth Boepple, Esquire