



ADAM M. DUMVILLE
Direct Dial: 603.230.4414
Email: adam.dumville@mclane.com
Admitted in NH and MA
11 South Main Street, Suite 500
Concord, NH 03301
T 603.226.0400
F 603.230.4448

Via Electronic Mail and US Mail

August 27, 2018

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

**Re: SEC Docket No. 2015-04: Public Service Company of New Hampshire d/b/a
Eversource Energy for a New 115 kV Transmission Line from Madbury Substation
to Portsmouth Substation
Applicant's Objection to Town of Durham's and UNH Motion Requesting A
Suspension of the Proceedings**

Dear Ms. Monroe:

Enclosed for filing in the above-captioned docket, please find the Applicant's Objection to Town of Durham's and the University of New Hampshire's Motion Requesting a Suspension of the Proceedings and that the Parties be included in DES/Applicant Discussion.

Please contact me directly should you have any questions.

Sincerely,

Adam M. Dumville

AMD:slb
Enclosure

cc: Distribution List

STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-04

**APPLICATION OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
D/B/A EVERSOURCE ENERGY
FOR A CERTIFICATE OF SITE AND FACILITY**

**APPLICANT'S OBJECTION TO TOWN OF DURHAM'S AND THE UNIVERSITY OF
NEW HAMPSHIRE'S MOTION REQUESTING A SUSPENSION OF THE
PROCEEDINGS AND THAT THE PARTIES BE INCLUDED IN DES/APPLICANT
DISCUSSION**

NOW COMES Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") (the "Applicant"), by and through its attorneys, McLane Middleton, Professional Association, and objects to the Town of Durham ("the Town") and the University of New Hampshire's ("UNH") (collectively the "Petitioners") Motion Requesting a Suspension of the Proceedings and that the Parties be included in DES/Applicant Discussion. The Motion should be denied for three reasons: (1) the Applicant has committed to ensure that all parties have a full and fair opportunity to cross-examine its witnesses on any issues that may be affected by modifications to the wetland permit; (2) suspension of the proceedings would significantly affect the orderly and prompt conduct of the proceedings; and (3) the Petitioners' grant of intervention does not confer any right upon the Petitioners to be engaged in permitting agency discussions.

I. Background

1. On April 20, 2018, the Presiding Officer issued a Notice of Adjudicative Hearing Dates establishing that final hearings would commence on August 29, 2018. The Notice provided that final hearings would occur on August 29 and 30, and September 17, 18, 20, 21, and 24. On August 1, 2018, the Presiding Officer issued a Revised Notice of Final Adjudicative Hearings adding October 15, 16, and 17 as additional hearing days. On August 20, 2018, the

Presiding Officer issued a Notice of Deliberations establishing November 15, 27, 28, and 29 for subcommittee deliberations following completion of the final adjudicative hearings.

2. On February 28, 2018, the New Hampshire Department of Environmental Services (“DES or the “Department”) issued its permitting decisions. As is customary, the permit applicant, in this case Eversource, asked to meet with the agency to clarify and discuss terms of the permits. Discussion and negotiations with the Department have been ongoing since April 2018. The discussions have been beneficial for the Applicant in understanding and clarifying permit conditions.

3. On July 27, 2018, the Applicant submitted supplemental pre-filed testimony of Sarah Allen, Ann Pembroke, and Kurt Nelson. The supplemental pre-filed testimony stated that the Applicant was in “general agreement with the conditions imposed” by the Department but had identified certain permit conditions of concern. Testimony at page 10. As further stated in the testimony, the Applicant hopes to resolve the concerns with the Department. *Id.* The Applicant requested that “to the extent an agreement with the Agency on permit conditions cannot be met . . . that the SEC . . . make an ultimate decision on what permit conditions are reasonably necessary to ensure the protection of the natural environment and water quality.” Testimony at page 11 to 12.

4. On August 10, 2018, the Presiding Officer sent a letter to DES asking DES to identify, among others, whether the concerns expressed by the Applicant have been satisfied.

5. On August 17, 2018, DES requested an extension to respond to the Presiding Officer’s letter until September 7, 2018.

6. On August 22, 2018, the parties held a pre-hearing conference. During the conference, the Applicant submitted its projected order of witnesses. Also at the conference,

certain parties raised concerns about their ability to cross-examine witnesses who support the construction and environmental aspects of the Little Bay crossing. The Applicant made clear that it was aware of these concerns and that it is committed to providing all parties with a full and fair opportunity to cross-examine the construction panel and the environmental panel about the DES permit, if and when, the DES modifies any of its permit conditions.

II. Discussion

A. The Parties Will have a Full and Fair Opportunity to Cross Examine the Applicant's Witnesses

7. The Applicant fully understands that all parties must have a full and fair opportunity to question witnesses who support the Application on issues that pertain to the statutory criteria found in RSA 162-H, such as, the Applicant's technical and managerial capability to construct and operate the Project and the Project's potential effects on the natural environment or water quality. The Applicant appreciates that parties in this proceeding may ask different questions of its witnesses or employ a separate cross-examination strategy based on whether the DES modifies some of its permit conditions.

8. As presented at the Pre-Hearing Conference and pursuant to the Applicant's Projected Witness Order, the construction panel will appear, in part, and the environmental panel will appear in its entirety, after DES has provided a response to the Presiding Officer's letter dated August 10, 2018. The Applicant commits to having the entire construction panel available on September 17 and the environmental panel on or after September 18 to answer questions about the DES permit conditions.

9. The Applicant also agrees that it would be appropriate for the parties to reserve all questioning regarding the DES permit conditions that relate to the underwater portion of the

project (or any questions relating to DES permit conditions that the Applicant has requested clarification and/or modification) until September 17.

10. Based on the foregoing, the Petitioners' first request for relief is essentially moot. All parties will be given a full and fair opportunity to ask questions of its construction panel and environmental panel after the DES issues its response.

B. The Requested Relief In The Motion Would Result in Impairing the Orderly and Prompt Conduct of the Proceedings

11. As a condition of intervention in matters before the SEC, the presiding officer must determine that the "interests of justice and the *orderly* and *prompt* conduct of the proceedings would *not be impaired* by allowing the intervention." RSA 541-A:32; Site 202.11(b)(3) (emphasis added). In addition, Site 202.16 requires that a party requesting a postponement must demonstrate that the postponement would "*promote* the orderly and efficient conduct of the proceeding." (emphasis added). The Petitioners have not and cannot demonstrate that their request would *promote* the orderly and efficient conduct of the proceeding. In fact, the opposite is the case.

12. As discussed above, the postponement would cause unreasonable and unfair delay. All parties will have a fair opportunity to cross-examine the Applicant's witnesses after DES issues a response on or before September 7, 2018.¹ In addition, it is well known and that

¹ Similar arguments to suspend or postpone the final adjudicative hearings were made in Docket 2015-05. In that docket, the Grafton County Commissioners filed a Motion to Suspend the Adjudicatory Hearings, in part, because the NH Department of Transportation had not completed its review of certain Exception Requests filed by the Applicant and the Department had not concurred with the Applicants' right-of-way drawings. *See Grafton County Commissioners Motion to Suspend the Adjudicatory Hearing*, Docket 2015-05 (Aug. 8, 2017). In the alternative, the Motion requested that the construction panel be recalled. *Id.* The SEC denied the request to suspend the hearings. and noted that final detailed construction plans and exception request decisions are not necessary to conduct adjudicative hearings. *Order on Motion to Suspend Adjudicatory Hearing and Recall Construction Panel*, Docket 2015-05 (Sept. 19, 2017). The SEC ruled that it could "delegate authority to state agencies" and "condition the Certificate upon the results of required federal and state agency studies who study period exceeds the application period." See RSA 162-H:16, VII. *Id.* at 3. Here, the Petitioners' Motion should be denied because both the construction panel and environmental panel will be available for cross-examination on the DES permits and because

hearing dates are difficult to schedule. Rescheduling the hearings at this time—when all parties have known about these dates since the Presiding Officer issued a Notice of Adjudicative Hearing Dates on April 20, 2018—risks prolonged delay and likely would inhibit the orderly conduct of the proceeding.² The Applicant has already voluntarily extended certain timeframes for this Project and incurred additional delays in an effort to respond to concerns raised by host communities and other stakeholders. A postponement of the hearings at this stage would ultimately affect the rest of the hearing schedule and the deliberation schedule; such a delay would unfairly prejudice the Applicant and risk violating its due process rights.³

C. The Petitioners Have No Inherent Right to Participate In All Permitting Discussions With Agencies

13. The SEC’s Order Granting the Petitioners’ Motion to Intervene did not confer upon the Petitioners any right to be a full participant in all of the Applicant’s discussions with other permitting agencies. The SEC’s order simply provided that the Petitioners be afforded “a *reasonable* opportunity to submit data, views, or comments with respect to the issuance of any permit, license, or any other action within its boundaries.” Order on Petitions to Intervene, Docket 2015-06 at 5 (Aug. 24, 2016) (emphasis added).

it is not unusual in SEC proceedings to not have complete and final decisions on all aspects of the permitting process. The SEC may condition the Certificate upon the results of additional studies.

² Indeed, this is not the first time that the Petitioners have sought to further delay these proceedings. *See Town of Durham / UNH Motion to Postpone Technical Sessions*, Docket 2015-04 (April 18, 2017).

³ The Petitioners’ Motion should also be denied as a matter of procedure. Site 202.14 (e)(4) requires that a party filing a motion seeking a postponement or an extension of time “make a good faith effort to obtain concurrence with the relief sought from other parties.” Here, the Petitioners did not make a “good faith effort” to obtain concurrence from the Applicant. The Petitioner merely sent an email at 10:00 AM to the Applicant stating: “Attached is a draft of a motion Durham/UNH plan to file with the SEC this afternoon. Please let me know by 1:30PM if you have a position on the motion.” Counsel for the Petitioners made no effort to discuss their concerns and raise the issue of witness order in relation to the DES’s commitment to provide a response by September 7.

14. DES is fully capable of determining the appropriate level of engagement with parties who may have some interest in a permit proceeding, and DES has done so here.⁴ The SEC authorized the Petitioners to participate in the SEC proceeding to provide data, views, or comments to the SEC. The Order does not confer upon the Petitioners a right to be involved in all permit discussions with constituent agencies, nor does the Order establish a special duty upon the Applicant to include the Petitioners in discussions with those agencies.⁵

15. Moreover, the Petitioners have had extensive time and opportunity to submit data and its views about the Project to DES. Indeed, the Petitioners have been highly involved in this matter since its inception, have filed pre-filed and supplemental pre-filed testimony in this docket, have submitted reports to the SEC, letters and reports to the Department, and even had conversations with the Department without the Applicant present.⁶

III. Conclusion

The Petitioners have failed to show how their motion would promote the orderly and efficient conduct of the proceedings. The Applicant has committed to ensuring that all parties have a full and fair opportunity to question the Applicant's witnesses. Lastly, the Petitioners are not conferred with any legal right or authorization to participate in the DES proceedings. Their request should be denied.

⁴ It appears that Counsel for the Petitioners is asking the Presiding Officer to issue an order to DES to respond to Counsel's email. See *Motion Requesting a Suspension of the Proceedings* at ¶ 3. RSA 162-H, however, does not contemplate or provide for such authority.

⁵ The Petitioners mistakenly assert that the Applicant's method of entering into discussions is contrary to standard practice, when in fact, it is customary for an Applicant to engage in discussions with underlying regulators one-on-one. It is also customary practice to supplement discovery, which the Applicant has done through this process by updating many facets of its Application materials, and will continue to do so prior to the start of hearings. Furthermore, the Petitioners cannot cite to a discovery request submitted by the Town/UNH that would have previously required the Applicant to provide such communications to the Petitioners. See *Order Denying The Society for Protection of New Hampshire Forests Motion to Compel*, Docket 2015-05 at 6 (Oct. 28, 2016) (a party has no standing to compel responses to data requests made by other parties).

⁶ Indeed, the Applicant learned during technical sessions that the Petitioners met with DES, without the Applicant present, to discuss the permit application and conditions. It is difficult to understand how the Petitioners could meet with DES, without notifying the Applicant, yet criticize the Applicant for precisely the same conduct.

WHEREFORE, the Applicant respectfully asks that the Subcommittee:

- A. Deny the Town of Durham's and UNH's Motion Requesting a Suspension of the Proceedings and that the Parties be Included in DES/Applicant Discussions; and
- B. Grant such other further relief as is deemed just and appropriate.

Respectfully Submitted,

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

By its attorneys,

McLANE MIDDLETON
PROFESSIONAL ASSOCIATION

Dated: August 27, 2018

By:  _____

Barry Needleman, Esq. Bar No. 9446
Adam Dumville, Esq. Bar No. 20715
11 South Main Street, Suite 500
Concord, NH 03301
(603) 226-0400
barry.needleman@mclane.com
adam.dumville@mclane.com

Certificate of Service

I hereby certify that on the 27th day of August, 2018, an electronic copy of this objection was filed with the Site Evaluation Committee and an electronic copy was sent to the Distribution List.



Adam Dumville