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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0468

Appeal of Northern Pass Transmission, LLC et al.

Rule 10 Appeal from the New Hampshire Site Evaluation Committee

**MUNICIPAL GROUP 1 NORTH
MEMORANDUM OF LAW IN LIEU OF BRIEF
PURSUANT TO SUPREME COURT RULE 16(4)(b)¹**

STATEMENT OF CASE

This Memorandum of Law is filed by the group “Municipal Group1 North” for the Towns of Pittsburg, Clarksville and Stewartstown and Coos County Commissioner, District Three, Richard Samson. Municipal 1 Group 1 North requests this Court to affirm the decision of the Site Evaluation Committee (“SEC”) denying the application of Eversource Energy and Northern Pass Transmission, LLC to site and construct their proposed transmission facility.

The Municipal Group 1 North intervenors opposed the Northern Pass application. This Memorandum of Law will emphasize certain points of our opposition. The Municipal Group 1 North intervenors also adopt and join: the brief filed by Municipal Groups 1 South, 2, 3 South and 3 North on behalf of the City of Concord and the Towns of Bethlehem, Bristol, Deerfield, Easton, Franconia, New Hampton, Littleton, Northumberland, Pembroke, Plymouth, Sugar Hill and Whitefield; and the brief filed by the Society for the Protection of New Hampshire Forests (“SPNHF”).

¹ This pleading was prepared, in part, with the assistance of a New Hampshire attorney.

STATEMENT OF FACTS

A. The Proposed Construction

The proposed project traverses 16 miles through Pittsburg, Clarksville and Stewartstown. Half that distance would be new overhead transmission lines in a new right-of-way. The other half would be constructed under roads. DK tab 1432 at 16-17; APP. Ex. 201 at Sheets 1-16.

1. The Overhead Route

For the overhead portion, the applicants proposed using three separate above-ground segments. These above-ground segments would involve construction of new access roads and clear cutting of corridors up to 120 feet wide through forests, farms and scenic areas. Moreover, excavation and pouring of concrete for massive foundations would be required for the erection of four transition stations and over 70 above ground industrial lattice transmission towers up to 130 feet high. APP. Ex. 201 at Sheets 1-16.

Although the transmission line from Canada would arrive from the Canadian border as an underground facility, the project would have emerged over the border in Pittsburg on lattice towers erected high over valuable local scenic resources such as Halls Stream valley, the Connecticut River Scenic Byways and the Connecticut River valley. CFP Ex. 646; APP Ex. 201 at Sheets 1-2. There are currently no high voltage transmission line towers in the Towns of Pittsburg, Clarksville and Stewartstown. The only electric line structures in this area are distribution lines. DK Tr. 03/07/2016 (Commissioner Samson) at 144.

The applicants planned to erect 20 towers through the southern reaches of the historic area of Pittsburg known as the Indian Stream Republic. CS Exs. 86 through 93; DK Tr. 10/20/2017 morning (Steve Ellis) at 122-129. The Indian Stream Republic is a unique historic site where local inhabitants declared themselves to be independent of Canada and the United States in response to a border dispute where their lands between Halls Stream and the Connecticut River were orphaned. MUNI-1-N Ex.1; Tr. 10/20/2017 morning (Steve Ellis) at 122-26. Luther Parker helped compose a separate Constitution for the Indian Stream Republic more than 175 years ago. Parker has been

recognized as one of the original Pioneers of the area by the Quebec Pioneer Trail. The Northern Pass project would devastate these valued community resources in the area. The applicants' experts failed to consider or assess this community resource in Pittsburg, which is well documented on the town's website and for which monuments in the town have been dedicated. CS Exs. 86 through 90; DK 10/20/17, Tr. Day 48 morning (Steve Ellis) at 120-129.

The above-ground towers and two transition stations of the project would also be highly visible along the Route 3 Connecticut River Scenic Byway on both sides of Pittsburg and Clarksville. App. Ex. 201 at Sheets 1-3. The same unreasonable conditions would exist looking west from the Moose Path Scenic and Cultural Highway on Route 145 in Clarksville where a string of up to 23 transmission towers and a transition station would be seen. App. Ex. 201 at Sheets 4-5. These highways are the gateway to Pittsburg from the south. The intervenors introduced testimony identifying their concerns about impacts on the entire area, including the Indian Stream Republic and the Connecticut River Headwaters Conservation area to the North. MUNI-1-N Ex.1; DK 10/20/2017, Tr. Day 49 morning (Steve Ellis) at 122-129; DK 12/14/2017, Tr. Day 67, afternoon (John Petrofsky) at 75-78.

The project also planned to erect transmission towers along the southern boundary of the Washburn Forest Conservation area in Clarksville, and along the southern boundary of Coleman State Park in Stewartstown. APP Ex. 201 at Sheets 2-4, 12-15. These transmission towers with insulators and conductors would have dramatically impacted those local conservation and recreational resources. APP Ex. Ex. 201 at Sheets 4-13; DK 12/14/2017, Tr. Day 67 afternoon (Rod Moore) at 104-106.

The project would also cross the Coos Trail with transmission towers and conductors as this iconic hiking trail exits out Dixville and winds its way west and north through Stewartstown. The adverse impact on the Coos Trail cannot be understated. The proposal was dramatically inconsistent and in conflict with the local uses and landscape given the total absence of transmission towers anywhere in the area. DK 12/14/2017, Tr. Day 67 afternoon (John Petrofsky) at 14-81; PC tab 80 (The Coos Trail).

1. The Underground Route

The transmission line was proposed to be constructed beneath paved and gravel surfaces of state and locally controlled roads. APP. Ex. 14 at 28; DK tab 1432 at 16. The proposal included approximately 5 miles of underground construction under town-maintained roads, *i.e.*, Old County Road, North Hill Road and a portion of Bear Rock Road. APP. Ex. 201 at Sheets 5-12. Old County Road and North Hill Roads are rural, gravel surface roads that are acknowledged by the applicants to be “narrow, winding and bucolic.” APP. Ex. 14 at 28. The applicants described Old County Road and North Hill Roads in their application as follows:

Significant stretches of Old County/North Hill Road have little or no defined ditch lines beyond the travelled way. Where ditch lines exist, they are within a few feet of the travelled surface. Dense, mature tree growth is similarly close to the travelled way which is generally less than 18’ wide. Fences, historic stone walls, landscaping and other property monuments, as well as existing overhead utility distribution lines run within ten feet of the travelled way. Several historic residences, barns and sheds, as well as two cemeteries line the length of the road. In several instances, historic properties are located on both sides of the road.

The extensive construction impacts necessary to install the proposed transmission line outside the disturbed roadway area *would irretrievably change the character of these roads*. Extensive mature tree clearing, disruption of old stone walls and fences would occur throughout the length of these roads dramatically altering the roads’ rural feel and charm.

APP. Ex. 14 at 29. For those reasons, the applicants asserted that it was imperative to construct the underground lines beneath the gravel of the roads to avoid environmental and social impacts, as well as impacts to the public. APP. Ex. 14 at 29.

Although the applicants argued that it was “imperative” to construct the project under the gravel road surface, the SEC found that the proposed underground construction along this route had many complications. For example, Old County Road would be closed during installation of splice pits. DK tab 1432 at 80. The applicants’ construction expert, Nathan Scott, also testified that there was a possibility that splice pits might be relocated away from the travelled portion of the road which would then require cutting

the trees. DK tab 1432 at 80; DK Tr. 05/01/17, Day 6 afternoon (Nathan Scott) at 80. This proposal was being considered despite the applicant's previous recognition that tree cutting along this route would "dramatically alter" and "irretrievably change" the rural character and charm of the roads. App. Ex. 14 at 29. Old County Road would be closed for three to five weeks for the HDD construction, and residents on the road would need to use a 2.7-mile detour. DK tab 1432 at 80.

Along North Hill Road, the road would be closed for five weeks for the "jack and bore" construction, as well as additional time for open trench construction and installation of splice pits. DK tab 1432 at 80. The proposed detour was 4.4 miles. DK tab 1432 at 80.

A portion of Bear Rock Road is also maintained by Stewartstown. APP. Ex. 14 at 29. There are many homes that are close to the roadway, and the municipal controlled portion of Bear Rock Road has steep embankments on the south and several driveways, mature trees, fences and stone walls on the north. APP. Ex. 14 at 29. There are historic buildings that line the roads, and the drainage ditches are only within a few feet of the travelled surface. APP. Ex. 14 at 29. The applicant asserted in its original application that construction outside of the disturbed area of the roadway was "highly problematic and unwise," and that such construction would "invariably wreak havoc on these abutting properties, several of which have historic significance." APP. Ex. 14 at 29.

The proposal to construct the line under Bear Rock Road meant that there would be a road closure in four locations for HDD construction, as well as the installation of nine splice splits. DK tab 1432 at 81. Approximately 30,000 cubic yards of ledge would need to be blasted and removed to accommodate a transition station. DK tab 1432 at 81. The applicant proposed a 16-mile detour for the residents of Bear Rock Road, which included a section that would be on a Class VI town road. DK tab 1432 at 81-82.

The applicants' construction plans for the project would have also disturbed at least one cemetery burial site under Old County Road in Clarksville. DK 08/31/2017, Tr. Day 30 afternoon (Victoria Bunker) at 13-22. As noted by Victoria Bunker, the archeological expert hired by the applicants, Clarksville declined to enter into any

agreements with the applicants. Clarksville's position on such a request was that the applicants have so far declined to apply for any permit to use Clarksville town roads to bury their project. DK tab 1368 at 14-15. Until such time as it was engaged by a permit application process for use of its roads, Clarksville was not willing to give what the applicants may claim is tacit approval to a project that can only be permitted in compliance with the utility road use statutes, RSA 231:160 and following. If the applicants had filed such an application, then Clarksville could have assessed the project plans and engage in setting conditions designed to affirmatively determine the status of that under-road section containing the suspected burial site. Whatever the outcome, however, Clarksville would have insisted that all parties involved respect the provisions of state law, including provisions restricting construction activities within 25 feet of any known burial site. RSA 289:3, III.

B. Concerns of Municipalities and Regional Planning Commissions

Representatives of Municipal Group 1 North appeared in this matter and gave testimony as intervenors before the SEC. MUNI-1-N Ex. 1; DK 10/20/17, Tr. Day 49 morning at 108-165. Commissioner Samson and former Pittsburg Selectman Ellis also gave statements in this matter at a public information session. APP Ex. 1, Vol. III, Tr. Coos County (09/09/15 – Public Comments) at 22-28, and at a combined hearing before the SEC and the United States Department of Energy (“US DOE”). DK tab 308, Tr. 03/07/16 at 82-85, 142-147.

The regional planning authority for Towns of Pittsburg, Clarksville and Stewartstown is the North Country Council (“NCC”). APP. Ex. 1 at Vol. XXXIII, Appx.41 at 13. It has consistently opposed the applicants proposed project, especially the applicants' plans for above-ground transmission line construction in the region. The NCC issued its original position on the Northern Pass in 2011 with its Board of Directors adopting the following resolution:

To express the opposition of the Board of North Country Council to the Northern Pass Project based on a survey of our member communities, the preponderance of negative impacts which may result from construction, and the lack of regional benefit.

CS Ex. 101.

The results of a survey conducted by NCC showed overwhelming opposition to the applicants' project from the NCC member towns. CS Exs. 102 and 103; The position of the NCC on Northern Pass has not changed. On March 14, 2016, Barbara Robinson, Executive Director of NCC, testified before the SEC and the US DOE in Holderness NH. Her testimony included the following:

Our current regional plan was adopted in 2014. The plan was developed after two years spent asking residents of the region what their highest priority need was, and what qualities of the region were most important to them. We asked in many different ways, in many different settings. Through this process, we were able to generate a consensus based regional plan....

The regional plan contains the following strategy statement: 'Protect the region's iconic and popular viewshed from undue adverse impacts associated with incompatible land use such as large transmission lines like Northern Pass through such means as legislative restriction and participation in EIS and permit reviews.'

DK tab 330, Tr. 03/14/2016 (Barbara Robinson, Executive Director of NCC) at 157-158 (emphasis added). NCC has taken a strong position against the damage that would be done to our iconic landscapes and natural environment by the applicants' project; and the SEC was required to take that view into consideration. The NCC has labeled this project "an incompatible land use." This same view was expressed in a letter from the NCC to the SEC and DOE. CS Ex. 102. The SEC was also presented with evidence about the votes of town citizens on warrant articles expressing the view that they disapprove the use of scenic resources for above ground high voltage transmission lines. MUNI-1-N Ex 2.

ARGUMENT

I. The SEC Correctly Determined That the Applicants Failed To Present Sufficient Evidence That Construction Would Not Unduly Interfere With Orderly Development of the Region

The SEC's concerns about the use of local roads was well supported and reasonable. DK tab 1432 at 115-120. The applicants contend that the SEC's decision was

“arbitrary and unreasonable” because it denied the application in part based on concerns about the proposal to bury underground utilities in the municipal controlled roads located the towns of Clarksville and Stewartstown. Applicants’ Brief at 54-56; DK tab 1432 at 15-16, 115. Under RSA 231:161, only municipalities have authority to authorize excavation and/or the installation of utility infrastructure within municipal controlled roadways. DK tab 1368 at 3-9. A license is required for work in municipal controlled roads to show that the applicant has permission from the municipality and the legal right to encumber, excavate and/or permanently install utilities within those roads. The applicant originally requested the DOT to oversee the underground construction in municipal controlled roads. DK tab 1432 at 47. The members of Municipal Group 1 North and other municipalities objected to that proposal because the DOT does not have any statutory authority over municipal controlled roads for which they are solely responsible under RSA chapter 231. DK tab 1368 at 3-9; DK tab 1385 at 137-39; DK tab 849.

The DOT rejected the applicant’s request for it to oversee construction on municipal controlled roads because it could not “usurp local authority with regards to usage for their roadways.” DK tab 1353 at 1. The DOT also explained that monitoring of construction over municipal controlled roads would be inappropriate because it would involve making construction related decisions that could impact long-term operation and maintenance of municipal roads. DK tab 1353 at 1. The DOT also did not have authority to approve detours and traffic management plans on municipal controlled roads. DK tab 1353 at 1. Although the applicants argue that the decision of the DOT was surprising because it was issued on the day the record closed, all parties were aware that the DOT had consistently explained that it would only be reviewing construction on state owned roads. In fact, DOT issued a letter dated April 3, 2017 stating that it was only reviewing construction on state-owned roads and the applicant would be required to acquire all applicable local permits. APP Ex.107 at 1-2, 3(¶5).

In an effort to salvage its project, the applicant then requested the SEC to oversee the construction, or alternatively, appoint a consultant. DK tab 1432 at 115-116. The

SEC appropriately denied that request explaining that the applicants failed to provide adequate testimony or evidence on how its proposal “could avoid the same concerns expressed by DOT.” DK tab 1432 at 116. As the SEC explained:

Long-term impact of the underground construction on locally-maintained roads substantially overlaps with the seasonal and routine maintenance of these roads and is not easily implemented or regulated. Locally-maintained roads do not exist in isolation. They are part of the road system that is used and maintained by municipalities in an integrated manner. Regulation of construction under these roads and the future maintenance of these roads requires a thorough understanding of each municipality’s plan for the use of these roads as a part of municipal infrastructure concerned with who has the ultimate authority over regulation, oversight, continuing maintenance and liability for work in these roads.

DK tab 1432 at 116. The SEC’s denial of that request did not “emerge from thin air.” Applicants’ Brief at 55. These concerns were raised throughout the proceedings, and there was sufficient competent evidence in the record to support the SEC’s findings. DK tab 1432 at 28-29; *see generally* Group 1 North Post Hearing Memorandum, DK tab 1368, and Ex. MUNI-1-N-1 & 2a. Moreover, the construction under and along Old County Road and North Hill Road, both of which were acknowledged by the applicants to have unique attributes and significant challenges for construction, further support the SEC’s concerns about these historic roads. APP. Ex. 14 at 28-29.

It was incumbent on the applicants to provide sufficient evidence to support a finding that the entire proposed route would not unduly interfere with orderly development. The SEC was well within its discretion to deny the application based on the applicants’ failure to provide a solution for the concerns raised by the municipalities about the use of their roads. *Amended Application of Portland Natural Gas Transmission System*, SEC Docket 1996-01 and 1996-03 Decision dated July 16, 1997 at 17 (holding that installation of a 100-mile underground pipeline would create undue interference with orderly development because a small portion of the route was in location being considered by municipality for a new public library). Moreover, the SEC based its decision on not only the 5 miles of construction under town-maintained roads, but also on

the sections of the overhead route that were proposed to be constructed over municipal controlled roads without local permits. DK tab 1432 at 115-117. That finding is also well supported by the record. *See e.g.* Tr.11/17/17, Day 61 (Edward Roberge) morning at 61-75.

II. The SEC Adequately Considered The Views and Concerns Raised By The Municipalities and Regional Planning Commissions

One of the mandatory findings the SEC must make for approval of any energy facility is that it “will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.” RSA 162-H:16 IV(b).

Both before and during the SEC proceedings, witnesses from the Pittsburg, Clarksville and Stewartstown communities presented testimony about the way the overhead and underground proposal would create unreasonable damage to their communities, tourism, and way of life. *See generally* DK tab 1368, and MUNI-1-N at Exs. 1 and 2a; CS 3; DK 10/20/17, Tr. Day 49 (Steve Ellis) morning at 102-165; APP Ex. 1, Vol. III, Tr. Coos County (09/09/15 – Public Comments) at 22-28; DK tab 308, Tr. 03/07/16 at 82-85, 142-147. The tourism industry is the largest industry in Pittsburg, and a large portion of the homes constructed are second homes built by people who visit the region to “escape to enjoy our abundant wildlife and beautiful vistas.” DK 10/20/17, Tr. Day 49 (Steve Ellis) morning at 118-119; APP Ex. 1, Vol. III, Tr. Coos County (09/09/15 – Public Comments) at 22. The fact that the project would increase property taxes has been to this date insufficient to change the towns’ opposition to the project. For example, when Steve Ellis from Pittsburg was asked whether “maintaining the existing conditions is more important to your town’s economies than the increased property taxes,” the response was “Absolutely. No Question.” DK 10/20/17, Tr. Day 48 morning (Steve Ellis) at 120. Moreover, although there may be some short-term job opportunities presented by the project, they were insufficient to overcome the long-term impacts that the construction would have on the landscape in the area. DK 10/20/17, Tr. Day 48 morning (Steve Ellis) at 149.

The towns also raised concerns about the impacts to community resources and aesthetics such as Indian Stream. As explained by Steve Ellis:

Well, right now we have a beautiful entrance into our town. You cross over the Connecticut River, and you come into our town and it's just great riding into our village, and the Connecticut River is on the right-hand side. Those towers are going to be seen miles away before you start coming into our town. So that's the first visual impact you're going to have concerning our town. So that clearly concerns us that that could adversely affect people coming in and enjoying our town.

DK 10/20/17, Tr. Day 48 morning (Steve Ellis) at 127. Municipal Group 1 North opposed both the overhead and underground routes in their represented towns because of the detrimental impacts that would occur to the community resources and the character of the region.

The Towns of Pittsburg, Clarksville and Stewartstown also raised concerns about the applicants' insistence on using older above ground transmission line technology in their communities to construct an entirely new energy transmission corridor. DK 1368 at 16-17. This was particularly concerning because, at the same time, the applicants modified their project to propose using underground construction technology for fifty miles in the more affluent and politically influential White Mountain Region to our south. The applicants defended this limited change in the White Mountain Region by asserting that they did so to recognize the value of preserving New Hampshire's scenic resources and landscapes. However, applying the same logic, the proposal to use overhead lines in our respective towns would create an undue interference with orderly development. The municipalities and regional planning commissions opposed the project to preserve the untouched landscapes and resources that have no existing transmission lines in the most northern region of the state. The rural character of the region and landscapes are the essence of this region. They define the communities and a sense of place. They drive the economy of the area through tourism and the building, maintenance and repair of second homes and vacation properties. The Site Evaluation Committee was well within its

discretion to recognize and respect these local community interests and concerns. The application was properly denied.

CONCLUSION

For the foregoing reasons, Towns of Pittsburg, Clarksville and Stewartstown and Coos County Commissioner, District Three, Richard Samson respectfully requests that this Court affirm the decision of the SEC.

The members of Municipal Group 1 North waive oral argument. *See Sup. Ct. R.* 16(4)(b).

Respectfully submitted,

**TOWNS OF PITTSBURG, CLARKSVILLE
AND STEWARTSTOWN AND COOS
COUNTY COMMISSIONER, DISTRICT
THREE, RICHARD SAMSON**

By their duly authorized representatives:



Steve Ellis

and

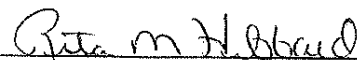


Richard J. Samson

Dated: March 21, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this day, March 21, 2019, a copy of the foregoing Memorandum of Law in Lieu of Brief was sent by electronic mail to persons named on the Service List of this docket.



Rita M. Hibbard

Town Clerk of Stewartstown
on behalf of Municipal Group 1 North