

**STATE OF NEW HAMPSHIRE  
PUBLIC UTILITIES COMMISSION**

Northern Pass Transmission, LLC

DE 15-460

**SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS’  
MEMORANDUM OF LAW**

The Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, submits this Memorandum of Law in support of the Public Utilities Commission’s (the “Commission”) application of the legal standards set forth in RSA 317:17, whether the Petitioner’s request to cross public waters meets the “reasonable requirements of service to the public,” and RSA 371:20, whether “the license petitioned for ... may be exercised without substantially affecting the public rights” in the affected waters or lands.

**I. BACKGROUND**

On or about October 19, 2015, Northern Pass Transmission, LLC (“Northern Pass”) filed a petition to construct and maintain electric lines across public waters, with crossings over lands bordering lands the Forest Society owns in fee and/or holds conservation easements over, and lands underneath the Connecticut River which the Forest Society owns. (Site Evaluation Committee Docket No. SEC 2015-06.) The proposed facility is projected to cross through/over a section of the Connecticut River, in which one-half of the riverbed is owned by and abuts lands owned by the Forest Society, including the Washburn Family Forest in the Town of Clarksville. This and other public water and land crossings related to the facility as set forth in Northern

Pass' petition trigger the Commission's review and application of the legal standards set forth in RSA 371.

The Forest Society did not receive notice of the Petition until Northern Pass sent notice in mid-April but nevertheless filed a Petition to Intervene immediately after being notified by Counsel for the City of Concord of a Commission prehearing conference on April 1. Subsequent to the prehearing conference, the Commission issued an Order, dated April 15, 2016, modifying certain dates to allow Northern Pass to fulfill its notification requirements and setting a deadline of May 2, 2016 for the Parties to file legal briefs regarding whether the proposed public crossings meet the requirement of: 1) providing service to the public as set forth in RSA 371:17; and 2) whether the license may be exercised "without substantially affecting the public rights" in the public waters and lands affected by the crossings pursuant to RSA 371:20.

## **II. ANALYSIS**

### **A. Issuance of a License to Cross Public Waters Must Meet the Reasonable Requirements of Service to the Public**

In its Petition, Northern Pass suggests that the Commission may effectively ignore its statutorily mandated obligation under RSA 371:17 in granting a license to first determine "whether it is necessary, in order to meet the reasonable requirements of service to the public ..." RSA 371:17. Northern Pass then assures the Commission that while not necessary to make such a finding, the requirement of service to the public will nevertheless be met when: 1) it is granted a Certificate of Site and Facility by the SEC in SEC Docket No. 2015-06; and 2) the Commission grants its petition to engage in New Hampshire as a public utility, DE 15-459.

Taking the second assertion first, neither of these outcomes are a foregone conclusion. There are many hearings to go and numerous considerations to be made before the SEC even gets to the point of deliberating the substance of the application. With respect to the Commission's consideration of Northern Pass' Petition for recognition as a public utility, that too has not yet been resolved. But, if these decisions are necessary for a determination of service to the public in this matter, perhaps the solution is a consolidation of the Commission's Northern Pass dockets and a delay until after the SEC has either dismissed or otherwise issued a final Certificate of Site and Facility in Docket No. 2015-06.

Northern Pass' first assertion that the Commission can simply ignore RSA 317:17 is equally meritless. Northern Pass relies on a Public Utilities Commission decision in *EnergyNorth Natural Gas, Inc.* DE 00-207, Order No. 23, in which the Commission actually made a finding concerning service to the public. Thus, even Northern Pass cannot cite to a decision by this Commission that stands for such an extraordinary abdication of the Commission's obligations under 371:17. Moreover, in numerous Commission decisions well-cited in the City of Concord's Memorandum of Law, this Commission has consistently made findings regarding public service.

Even if the *EnergyNorth* Order can be construed to reach such an extreme result, there is simply no basis in law that permits an agency to ignore a legislative mandate in a statute in which the plain and ordinary language leads to no ambiguity or unclear interpretation. Looking at the language of 371:17, the Commission must "apply [the] statute in light of the legislature's intent in enacting [it], and in light of the policy sought to be advanced by the entire statutory scheme." *United States v. Howe*, 167 N.H. 143, 145 (2104) (quotation omitted). The legislature

unambiguously intended the Commission to determine service to the public good *before* issuing a license.

As stated above, Northern Pass also seems to suggest that “when” it is recognized as a public utility and “when” it receives a Certificate of Site and Facility by the SEC, then in order to meet the reasonable requirements of providing transmission services to the public, it will be necessary to cross the public waters. This is circular reasoning and fails to apply the legal standard in the context of where it should be applied, *i.e.*, before this Commission in *this* Petition to Cross Public Waters and Lands. This Commission should therefore require Northern Pass to demonstrate that the public crossing is necessary to serve the public.

Based on Northern Pass’ filings in the SEC and with the Department of Energy, it is doubtful Northern Pass will satisfy the public service requirement. The Northern Pass project is not intended to serve *any* customer in New Hampshire—not one. Nor is the project intended to meet reliability needs. Any New Hampshire resident who arguably may ultimately receive some of that power that is transmitted from Hydro Quebec through New Hampshire over these new transmission lines, will receive it only *if* New Hampshire utility companies buy back power and have it transported back to New Hampshire to sell to its customers.

For all of the foregoing reasons, the Commission must first determine whether a license is necessary in order to meet the reasonable requirements of service to the public. Because Northern Pass will be unable to make such a showing, the license should therefore be denied.

**B. Issuance of a License to Cross Public Waters Will Substantially Impact the Rights of the Public in the Public Waters.**

The second, clear and distinct statutory standard that the Commission must consider is whether the license “may be exercised without substantially affecting the public rights in said

waters or lands ...” RSA 371:20. The public’s use of the Forest Society’s lands under and abutting the Connecticut River will be substantially affected by this crossing with respect to access, use, and enjoyment, as well as visually and aesthetically.

The Washburn Family Forest and the stretch of the Connecticut River it abuts are uniquely important recreational resources for the people of New Hampshire and visitors from away. The proposed crossing will substantially affect the public’s experience on many levels. At a minimum, based on Northern Pass’ application to the SEC, the crossing at this point over the Connecticut River enables the above ground structures for 130 miles to the south. However, as the City of Concord accurately stated in its Memorandum of Law, these segments of the Northern Pass transmission line are squarely before the SEC on the issue of visual and aesthetic impacts and will surely be well and carefully considered by the SEC. The Forest Society therefore requests that the Commission defer to findings on aesthetics and visual issues by the SEC relative to the public rights under 371:20 but nevertheless require Northern Pass to demonstrate the crossing will not substantially affect the public’s rights of use, access and enjoyment of the waters and lands affected by the crossing. Alternatively, the Forest Society respectfully requests the Commission suspend this proceeding pending the outcome before the SEC Docket No. 2015-06.

In sum, the Commission must apply both standards set forth in 371:17 and 371:20. In doing so, it will find that Northern Pass’ license request will not meet the reasonable requirements of service to the public and will substantially affect the public’s rights in the waters and lands affected by the crossing. The Forest Society also joins in and concurs with the City of Concord’s Memorandum of Law filed this same date.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF  
NEW HAMPSHIRE FORESTS**

By its Attorneys,

May 2, 2016

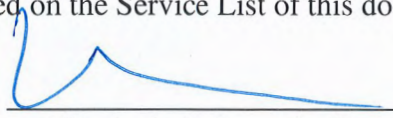
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**CERTIFICATE OF SERVICE**

I hereby certify that on this day, May 2, 2016, a copy of the foregoing Memorandum of Law was sent by electronic mail to persons named on the Service List of this docket.

By:   
Elizabeth A. Boepple, Esq.