

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

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE d/b/a  
EVERSOURCE ENERGY**

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

**DE 15-464**

**THE NEW ENGLAND POWER GENERATORS ASSOCIATION, INC.’s  
MOTION FOR A FINDING ON AFFILIATE TRANSACTION COMPLIANCE**

The New England Power Generators Association, Inc. (“NEPGA”)<sup>1</sup> respectfully moves to request that the New Hampshire Public Utilities Commission (“PUC” or “Commission”) make a finding, and grant appropriate relief, on whether the Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) has complied with New Hampshire law and the Commission’s regulations governing business transactions between affiliated utilities in New Hampshire.<sup>2</sup> NEPGA files this motion in response to the Settlement Agreement filed by PSNH on November 1, 2017, under which PSNH seeks Commission approval of a lease agreement. Under the lease agreement, PSNH seeks to convey to Northern Pass Transmission, LLC (“NPT”) certain rights PSNH asserts in rights of way in New Hampshire. Whether PSNH has complied with New Hampshire law and the Commission’s regulations governing utility affiliate transactions in executing the Lease Agreement is among the issues the Commission identified at the beginning of this proceeding.<sup>3</sup> NEPGA respectfully asks that the Commission find that

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<sup>1</sup> The comments expressed herein represent those of NEPGA as an organization, but not necessarily those of any particular member.

<sup>2</sup> NEPGA files this motion pursuant to Puc 203.07.

<sup>3</sup> Order of Notice at p. 3, Docket No. DE 15-464 (Jan. 29, 2016).

PNSH has not satisfied its legal and regulatory obligations in executing the Lease Agreement and order appropriate relief. In support of this Motion, NEPGA states as follows:

**I. BACKGROUND**

1. On November 1, 2017, PSNH filed with the Commission a Settlement Agreement between PSNH, NPT, the Office of Consumer Advocate, and PUC Staff.
2. Under the Settlement Agreement, PSNH proposes to lease to its affiliate NPT interests it asserts in certain easements and property for the purpose of constructing, operating and maintaining a 192-mile, high voltage electric transmission line from the international border between the United States and Canada at Pittsburg, New Hampshire to Deerfield, New Hampshire. PSNH seeks to lease approximately 781 acres of right-of-way for NPT's exclusive use, while approximately 472 acres will be for shared or common use by PSNH and NPT.
3. The Settlement Agreement follows PSNH's Petition for Approval of Lease Agreement between PSNH and NPT<sup>4</sup> ("Lease Agreement"), both of which are subject to approval in this docket.

**II. SUMMARY OF NEPGA'S OBJECTIONS**

4. Based on the discovery in this proceeding, it is apparent that PSNH has not filed with the Commission a code of conduct, compliance plan, or other written document governing its transactions with affiliates, including those with NPT, as required by the Commission's regulations and New Hampshire law. Indeed, PSNH has represented that no such document exists. It naturally follows that PNSH cannot be in compliance with a plan or code of conduct that does not exist.

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<sup>4</sup> *Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC*, Docket No. DE 15-464 (Oct. 19, 2015).

5. This apparent lack of regard for the Commission's regulations and New Hampshire law compels a finding that PSNH failed to comply with New Hampshire law and the Commission's regulations in executing the Lease Agreement.
6. Further, PSNH's and NPT's negotiation and attempted execution of the Lease Agreement is inconsistent with the basic intent and purpose of the Commission's updated affiliate regulations.

### **III. PSNH AND NPT ARE AFFILIATED ENTITIES UNDER NEW HAMPSHIRE LAW AND PUC REGULATIONS**

7. In 2015, the PUC adopted revised Affiliate Transactions Rules<sup>5</sup> which establish the standards of conduct "governing the relationship between a utility and its affiliates transacting business in New Hampshire" ("Affiliate Rules").<sup>6</sup> The Affiliate Rules build on New Hampshire law, including RSA 366, to provide important guidance and accountability for utilities and their affiliates.
8. The Affiliate Rules define a "competitive affiliate" as "any affiliate of a utility that is engaged in the sale or marketing of products or services on a competitive basis and includes any competitive energy affiliate."<sup>7</sup> A "competitive energy affiliate," in turn, is defined in part as "any competitive affiliate of a utility that is engaged in . . . the development of an energy related generation, transmission, or distribution project."<sup>8</sup>
9. Notably, prior to 2015 the Affiliate Rules defined Competitive Energy Affiliate more narrowly, only as "any competitive affiliate that is engaged in the sale or marketing of natural gas, electricity, or energy-related services on a competitive basis" whereas the

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<sup>5</sup> N.H. Admin. Rules, Puc 2100 *et seq.*

<sup>6</sup> Puc 2101.01.

<sup>7</sup> Puc 2102.03.

<sup>8</sup> Puc 2102.04.

2015 changes to the Affiliate Rules expressly include an affiliate engaged in the development of a transmission project.<sup>9</sup>

10. PSNH is a subsidiary of Eversource Energy,<sup>10</sup> and operates in New Hampshire as a public utility as defined by RSA 362:2. NPT is owned by Eversource Energy Transmission Ventures, LLC, which is a wholly-owned subsidiary of Eversource Energy.<sup>11</sup> Thus, PSNH and NPT are “affiliates” as that term is defined in RSA 366.1, and as that term is applied under the Rules.
11. PSNH has itself expressly affirmed that NPT is its affiliate. In responding to inquiries of the PUC in Docket IR-14-196, PSNH acknowledged that “Northern Pass and PSNH are affiliated entities under the definition of RSA 366:1 II and Rule Puc 2102.01,” and that “as a result, the following substantive portions of PUC Chapter 2100 appear to apply to the relationship, between PSNH and Northern Pass: 2103.01, 2103.02, 2105.01 and 2105.09.”<sup>12</sup>
12. In the PSNH Powerline Change Application, filed in 2013 with the United States Forest Service, PSNH stated that “[a]s described in this Application, Northern Pass

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<sup>9</sup> Puc 2102.04 (defining a competitive energy affiliate to include a utility that is engaged in the development of a transmission project).

<sup>10</sup> See Eversource Energy, Press Release (Feb. 2, 2015), (“All of the company’s subsidiaries, including . . . Public Service Company of New Hampshire (PSNH) . . . will immediately adopt and operate under the Eversource brand.”), available at <https://www.eversource.com/content/nh/about/news-room/new-hampshire/newspost?Group=new-hampshire&Post=northeast-utilities-announces-new-name>; Letter of Robert A. Bersak to Debra A. Howland, New Hampshire Public Utilities Commission, *Public Service Company of New Hampshire and Northern Pass Transmission Affiliate Issues*, Docket No. IR 14-196 (Mar. 3, 2015) (noting that Eversource Energy is a “d/b/a” and that “the legal names of the operating companies [including] Public Service Company of New Hampshire . . . will remain unchanged.”).

<sup>11</sup> The Northern Pass, Company Profile, at <http://www.northernpass.us/company-profile.htm> (last accessed November 28, 2017) (“All of the Northern Pass transmission lines and facilities in New Hampshire will be owned by Northern Pass Transmission LLC—a New Hampshire limited liability company owned by Eversource Energy Transmission Ventures, LLC, which is a wholly owned subsidiary of Eversource Energy.”).

<sup>12</sup> Report of Steven E. Mullen to Debra A. Howland, New Hampshire Public Utilities Commission, *Public Service Company of New Hampshire and Northern Pass Transmission Affiliate Issues*, Docket No. IR 14-196 (Nov. 5, 2013), at 8.

Transmission LLC, a PSNH affiliate, has proposed to construct the Northern Pass Transmission Line within the [current right of way].”<sup>13</sup>

13. Together, the Affiliate Rules and PSNH representations clearly establish that PSNH and NPT are affiliates under New Hampshire law and the Commission’s regulations. The affiliate relationship in turn calls into question whether PSNH has complied with the Affiliate Rules by allowing access to the easements and soliciting a lease agreement from only its affiliate NPT.

#### **IV. PSNH VIOLATED APPLICABLE AFFILIATE COMPLIANCE RULES**

14. The Affiliate Rules require each utility to file a “compliance plan that discloses its affiliates and demonstrates to the commission that there are adequate procedures and policies in place for complying with these [Affiliate Rules].”<sup>14</sup>
15. The compliance plan must identify “all affiliates with which the utility has a contract or arrangement” subject to the Affiliate Rules or RSA 366, as well as “copies of all written contracts and arrangements [and] detailed descriptions of all unwritten contracts and arrangements.”<sup>15</sup> The PUC retains the authority to investigate on its own motion, whether a “utility is in compliance with these [R]ules.”<sup>16</sup>
16. In 2009, PSNH sought a waiver of the annual compliance certification requirements under the Rules, specifically Puc 2106.03(a) related to affiliate transactions.<sup>17</sup>

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<sup>13</sup> PSNH Powerline Change Application, Special Use Permits WTM0759 and WTM0771(Nov. 4, 2013) at 7, available at <http://northernpass.us/assets/permits-and-approvals/PSNH-Powerline-‘SChange-Application-Final.PDF>.

<sup>14</sup> Puc 2106.01.

<sup>15</sup> Puc 2106.01(d).

<sup>16</sup> Puc 2106.05(a).

<sup>17</sup> *Public Service Company of New Hampshire, Request for Waiver of Annual Compliance Filing under Puc 2106.03* Docket No. DA 09-123.

According to PSNH, at that time PSNH no longer had any competitive energy supplier affiliates, negating the need for it to file an affiliate transaction compliance plan.<sup>18</sup>

17. The PUC Staff found that a waiver was not necessary, explaining that the Affiliate Rules require a distribution company to: (1) certify that its compliance plan continues to meet the Rules; and (2) if necessary due to a change in the compliance plan, file an updated compliance plan.<sup>19</sup> Because PSNH represented that there was no change to their compliance plan, and because PUC Staff opined that the annual certification requirement is not burdensome, PUC Staff found that PSNH did not require a waiver.<sup>20</sup>
18. The PUC Staff however noted that though PSNH may have no longer had any competitive energy supplier affiliates at that time, future or other types of affiliates may obligate PSNH to file a compliance plan given that “the definition of ‘affiliate’ contained in Puc 2102.0 ... expands beyond competitive energy suppliers.”<sup>21</sup> PSNH later withdrew its request for waiver<sup>22</sup> and the PUC closed the docket without prejudice.<sup>23</sup>
19. Despite its affiliate relationship with NPT, PSNH appears to have neither developed a compliance plan for transactions between NPT and PSNH nor filed a compliance plan (or change in compliance plan) with the PUC. In discovery in this proceeding, NEPGA asked Eversource to produce an “internal code of conduct or other internal document

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<sup>18</sup> See PUC Staff Memo to PUC Commissioners, at p. 1, Docket No. DA 09-123 (filed August 5, 2009) (“PUC Staff Memo”).

<sup>19</sup> PUC Staff Memo at pp. 1-2.

<sup>20</sup> PUC Staff Memo at p. 1.

<sup>21</sup> PUC Staff Memo at p. 2.

<sup>22</sup> *Public Service Company of New Hampshire, Withdrawal of Request for Waiver of Annual Compliance Filing under Puc 2106.03* Docket No. DA 09-123 (August 14, 2009).

<sup>23</sup> Letter of D. Howland to the Parties, *Public Service Company of New Hampshire, Request for Waiver of Annual Compliance Filing under Puc 2106.03* Docket No. DA 09-123 (September 3, 2009).

defining or otherwise governing contracts, conveyances and conduct between Eversource and its Affiliates.”<sup>24</sup>

20. In response, Eversource produced an undated “CEO Message” titled “Code of Business Conduct,” an apparent communication from Eversource’s CEO to its employees (enclosed as Attachment A). In a brief section of the written communication titled “Affiliate Businesses & Transactions,” the CEO Message explains in broad terms that Eversource and its employees are expected to comply with laws and regulations regarding affiliate transactions.<sup>25</sup>
21. NEPGA also asked in discovery for “every compliance plan either NPT or Eversource has filed with the Commission in accordance with Puc 2106.01(d) (providing for the filing of a compliance plan) in which the filing party has identified the Lease Agreement or the rights of way Eversource seeks to convey to NPT under the Lease Agreement as a ‘written contract,’ ‘arrangement’ or ‘unwritten contract as defined by Puc 2106.01(d).’”<sup>26</sup> In response, the Applicant stated that “[t]here are no such documents.”<sup>27</sup>
22. NEPGA independently contacted the PUC to determine whether Eversource or PSNH has any type of code of conduct or compliance plan governing transactions between Eversource, PSNH and NPT, and found none on file.
23. Together, the discovery in this proceeding and the PUC’s files establish that Eversource and PSNH do not have a compliance plan, much less one on file with the Commission, governing the Lease Agreement or any other transactions between NPT, Eversource, and PSNH.

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<sup>24</sup> Attachment A, Data Request NEPGA 1-001, Docket No. DE 15-464 (June 19, 2017).

<sup>25</sup> *Id.*

<sup>26</sup> Attachment A, Data Request NEPGA 1-002, Docket No. DE 15-464 (June 19, 2017).

<sup>27</sup> *Id.*

24. The failure of PSNH and Eversource to create, file, and receive Commission approval of a compliance plan violates New Hampshire law and the Affiliate Rules. This failure cannot and should not be abided by the Commission.
25. Other evidence in this proceeding calls into question the valuation of the Lease Agreement. PUC Staff rejected the initial appraisal of the Lease Agreement rights due to its expert's finding "the lease value to not be credible."<sup>28</sup> The PUC required an independent analysis, raising the question of why PSNH found it proper to value the transmission rights of way for an affiliate with which it was negotiating a lease agreement.
26. The Affiliate Rules are intended, in part, to ensure open and fair competition among all energy providers so that New Hampshire consumers may enjoy the economic benefits of competitively-procured energy-related services. In instances in which electricity supplies are procured to meet consumer demand, an open, competitive procurement process is used to ensure such fair and equal access. Competitive processes are open to any and all qualified entities and are intended to provide as low a price for consumers as possible as well as guarding against undue affiliate abuse.
27. A compliance plan approved and on file with the Commission is the means by which affiliate business transactions are evaluated for compliance with the Affiliate Rules, including the rules governing the Lease Agreement. For example, the compliance plan must explain how PSNH intends to comply with the requirement that all transfers of assets between affiliates prices the transfer at "the highest of the net book value, fully loaded costs, and its current market value."<sup>29</sup> Though PSNH may here assert that it has

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<sup>28</sup> Direct Testimony of John Schmick at p. 9, Docket No. DE 15-646 (Sept. 18, 2017).

<sup>29</sup> Puc 2105.09(a)(1).



complied with this requirement, the Affiliate Rules require that the Commission approve a compliance plan on file demonstrating such compliance.

28. The compliance plan would establish, in part, whether PSNH must competitively offer the rights it asserts in the rights of way in order to establish a “current market value of the asset.”<sup>30</sup> The compliance plan would also establish the procedures by which PSNH would guarantee its compliance with the Commission’s rules governing nondiscrimination between affiliates.<sup>31</sup> PSNH, through a compliance plan filing, should be required to demonstrate how its failure to solicit offers from entities other than their affiliate NPT has guaranteed New Hampshire ratepayers the economic benefit of the asserted conveyance of PSNH property rights.<sup>32</sup>
29. PSNH did not solicit offers from non-affiliated entities, entering into an exclusive negotiation with its affiliate NPT. Just two years ago, the Commission amended its regulations to address the very relationship at issue here, that between a utility and an affiliated transmission company. PSNH’s failure to seek a competitive, market-based rate for the rights it asserts in the rights of way violates the letter and intent of the Affiliate Rules. A competitive offering of the rights PSNH asserts to the highest bidder is the only means by which to assure that PSNH ratepayers realize the full value of the easements upon which NPT seeks to construct transmission assets. Anything less

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<sup>30</sup> *Id.*

<sup>31</sup> Puc 2013.01, *et seq.*

<sup>32</sup> See *Order Reviewing Legal Memoranda Petition for Approval of Lease Agreement Between Public Service Company of New Hampshire d/b/a Eversource Energy and Northern Pass Transmission LLC*, Docket No. DE 15-464 (April 6, 2017) (noting that the Order is limited in scope and should not be construed as making a decision as to whether the lease meets “applicable standards of approval” nor should it be “construed as determining any property rights among Eversource, NPT, and any of the owners of the properties that are subject to the easements. Only a court of competent jurisdiction may determine individual property owners’ rights.”)

perpetuates the structural flaws that electric restructuring<sup>33</sup> and the Affiliate Rules sought to protect against.

**V. CONCLUSION**

30. The Settlement Agreement does not address the fundamental question identified by the Commission in its Order of Notice of whether PSNH and its affiliates have complied with the Affiliate Rules.<sup>34</sup>
31. The Affiliate Rules require that the Commission approve a compliance plan governing the Lease Agreement and other business transactions between PSNH and its affiliates. Discovery in this proceeding demonstrates that PSNH has no such compliance plan, much less one approved by the Commission, and that the Commission therefore has no means by which to evaluate whether PSNH has complied with such plan in negotiating and executing the Lease Agreement.
32. Given these facts, the Commission should therefore not approve the Settlement Agreement.

**Wherefore, NEPGA respectfully requests that the Commission:**

33. Reject the Settlement Agreement, or suspend consideration thereof until such time as PSNH has on file a compliance plan approved by the Commission, and require that PSNH demonstrate compliance with the filed plan in negotiating and executing the Lease Agreement; and
34. Find that PSNH has not complied with all applicable affiliate transaction laws and regulations in seeking to execute the Lease Agreement and establish a process by which

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<sup>33</sup> See RSA 374-F.

<sup>34</sup> Order of Notice at p. 3, Docket No. DE 15-464 (Jan. 29, 2016)

PSNH must file and seek approval of a compliance plan from the Commission to competitively offer its asserted rights in rights of way to unaffiliated entities.

Respectfully Submitted,

**NEW ENGLAND POWER GENERATORS  
ASSOCIATION, INC.**

By its ~~Attorney~~,

Dated: December 4, 2017

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