

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-464

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

Petition for Approval of Lease Agreement with Northern Pass Transmission, LLC

Order Denying Motions for Rehearing

ORDER NO. 26,020

May 25, 2017

In this Order, the Commission denies the Motion for Rehearing of Order No. 26,001 by Deerfield Intervenors and the Joint Motion for Rehearing by the Society for the Protection of New Hampshire Forests and the City of Concord. The Commission finds that neither Motion cites facts not considered by the Commission in its initial decision or identifies an error of law. The Commission acknowledges that the parties have the right to file a petition in a court of competent jurisdiction for a conclusive opinion on alienability of easements.

I. PROCEDURAL HISTORY

In its petition, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) sought approval of a lease agreement between Eversource and Northern Pass Transmission, LLC (NPT). In the lease, Eversource proposes to lease rights-of-way principally comprised of electric utility easements over land owned by third parties. Eversource obtained most of the easements through negotiation with individual landowners. Eversource acquired three of the easements through eminent domain proceedings conducted by the Commission. In some instances, the lease contemplates an outright lease of the rights-of-way to NPT, and in others, Eversource proposes to share the easement rights with NPT.

In Order No. 26,001 (April 6, 2017), the Commission determined that Eversource had made a *prima facie* showing that it has legal authority to lease and divide the rights of certain easements it holds to NPT. In other words, the Commission could not find that Eversource is precluded from entering into the lease with NPT. The Commission made the ruling for the limited purpose of allowing the consideration of the merits of the lease agreement between Eversource and NPT pursuant to RSA 374:30. The Commission stated clearly that Order No. 26,001 should not be construed as determining any property rights among Eversource, NPT, and any of the owners of the properties that are subject to the easements. *See* Order No. 26,001 at 1. The Order stated that only a court of competent jurisdiction may determine the property rights of individual owners. *Id.*

Jo Anne Bradbury, Robert Cote, Bruce Adami, Jeanne Menard, and Erick Berglund (Deerfield Intervenors) filed a Motion for Rehearing of Order No. 26,001 on May 3, 2017. On May 5, 2017, the Society for the Protection of New Hampshire Forests and the City of Concord (Joint Movants) filed a Joint Motion for Rehearing. Eversource filed an objection to the Deerfield Intervenors' Motion and Joint Movants' Motion for Rehearing on May 12, 2017.

The procedural history in this matter is described in Order No. 26,001. The petition and subsequent docket filings, other than any information for which confidential treatment is requested of or granted by the Commission, are posted to the Commission's website at the following link: <http://puc.nh.gov/Regulatory/Docketbk/2015/15-464.html>.

II. POSITIONS OF THE PARTIES AND STAFF

A. Deerfield Intervenors

In their motion, the Deerfield Intervenors assert that it is settled case law in New Hampshire that an easement in gross is not transferable. The Deerfield Intervenors claim that the

Commission ignored established law and instead, speculated as to how the New Hampshire Supreme Court might decide the issue, primarily turning to various provisions of the Restatement of Property for guidance. Deerfield Intervenor Brief at 2 and 3. The Deerfield Intervenor argues that it was erroneous to reach the conclusion that nothing barred Eversource from transferring easement rights by relying on provisions of the Restatement that contradict established precedent in this state. *Id.* at 3.

The Motion points out that the Commission has the authority pursuant to RSA 365:20 to transfer a question of law to the Supreme Court. The Deerfield Intervenor says that “[b]y speculating how the New Hampshire Supreme Court may decide certain issues when it has the statutory ability to receive direct answers from the Supreme Court itself, the Commission exceeded its authority” and unlawfully created a presumption in favor of divisibility and alienability of the easements in question. *Id.* at 4. The Motion argues that this action by the Commission creates a “rebuttable presumption” that shifts the burden of proof to the landowners, and that Eversource has the burden of proof to demonstrate the alienability of the easements pursuant to New Hampshire law. *Id.* (citation omitted).

According to the Deerfield Intervenor, the creation of the rebuttable presumption shifts the burden of proof from Eversource to the landowners. The Deerfield Intervenor says that the New Hampshire Supreme Court has held that easement deeds should be interpreted using the rule of reason, and claims that the Commission should have required Eversource to explain how it met that burden. *Id.* at 5. The Deerfield Intervenor requests that the Commission reconsider its decision.

B. Joint Movants

The Joint Movants first argue that the Commission's decision to treat the easements acquired through eminent domain proceedings the same as those acquired through negotiation is unlawful and unreasonable. They assert that the Commission did not offer an analysis for this conclusion and that such an omission is contrary to RSA 363:17(b). Joint Movants Brief at 3.

The Joint Movants also criticize the Commission's finding that nothing in the easement deeds bars Eversource from leasing or apportioning easement rights to NPT. The Joint Motion points out that the easement deeds contain language stating that easement rights may be transferred to "successors or assigns." The Joint Movants argue that Eversource's easements are easements in gross and that the transfer of leasehold interest in these easements to NTP is neither an assignment nor transfer to a successor. *Id.* at 4.

The Joint Movants also claim that the Commission erred when it did not determine whether the apportionment of easements results in additional burdens to the servient landowners. They claim that the Commission has authority to determine if the apportionment creates a burden on the servient tenements but failed to do so. *Id.* at 5. According to the Joint Movants, the failure to examine whether the lease creates an additional burden on the easement created a presumption in favor of Eversource, and "[b]y effectively creating a presumption in favor of Eversource, and not exercising its jurisdiction to decide this issue or certifying a question..., the PUC unlawfully exceeded its authority." *Id.* at 6. Based on the foregoing, Joint Movants requested that the Commission grant the motion and expeditiously schedule rehearing.

C. Eversource

Eversource claims that there is nothing in the Commission's ruling that requires reconsideration, and that neither Deerfield Intervenors nor Joint Movants cited new law or fact in

support of their position. According to Eversource, these parties simply repeat their arguments from prior filings. Eversource Brief at 3-4.

Eversource notes that the Commission clearly stated that it is not ruling, and cannot rule, on the rights of the underlying landowners. Consequently, the Commission cannot determine whether some act may or may not result in a burden on an easement. Eversource also points out that while the Commission may transfer a question of law to the Supreme Court, it is not required to do so. *Id.* at 4-5.

Eversource disputes claims by the Movants that the Commission created a presumption in favor of transferability and apportionment of Eversource's easements. Eversource points out that the Commission has repeatedly stated that it does not have jurisdiction over the issue of property rights of parties and that its jurisdiction in this proceeding relates to the terms of the lease and whether Eversource customers are appropriately compensated for leased property. *Id.* at 5.

III. COMMISSION ANALYSIS

Pursuant to RSA 541:3, the Commission may grant rehearing or reconsideration when a party states good reason for such relief. Good reason may be shown by identifying new evidence that could not have been presented in the underlying proceeding, *see O'Loughlin v. N.H. Personnel Comm'n* 117 N.H. 999, 1004 (1977), or by identifying specific matters that were "overlooked or mistakenly conceived" by the deciding tribunal. *Dumais v. State*, 118 N.H. 309, 311 (1978). A successful motion for rehearing does not merely reassert prior arguments and request a different outcome. *Public Service Company of New Hampshire*, Order No. 25,239 (June 23, 2011) at 8.

We find that neither motion for rehearing meets the requisite standard. The Deerfield Intervenors and the Joint Movants essentially repeat the same arguments that they made in briefs

filed in this docket in October. We understand that they disagree with our conclusion that it is appropriate to proceed with those matters under our jurisdiction related to this filing; however, we are not persuaded to reconsider our decision. The moving parties did not offer any new evidence that was not available at the time of the initial decision, nor did they cite any misunderstanding or error in the Commission's decision. On that basis, we deny both motions for rehearing.

We also dispute that we created a presumption in favor of Eversource's request in this docket. The conclusion we reached was that no language in the easement deeds on their face barred Eversource from transferring or subdividing the easement deeds granting it a utility right-of-way over private land. As we have repeatedly said in orders in this proceeding, the Commission does not have authority to determine the property rights of Eversource and landowners. That matter must be addressed by a court of competent jurisdiction. Unless this proceeding is stayed by a court, we will proceed with review of Eversource's petition.

The Commission emphasizes that this proceeding is not about the merits of the Northern Pass Project. The Site Evaluation Committee is charged with reviewing that project and all of the associated issues. Our review here, as we have consistently stated, will be about whether the terms of the proposed lease between Eversource and NPT are reasonable and in the public interest, and whether Eversource's customers are appropriately compensated by NPT for the use of Eversource's rights-of-way. We remind intervenors that we have limited our review, and we will not adjudicate property rights in this proceeding. Any party is free to ask a court of competent jurisdiction to adjudicate the property rights of the parties.


Based upon the foregoing, it is hereby

ORDERED, that the motions for rehearing by Deerfield Intervenors and Joint Movants are hereby DENIED.

By order of the Public Utilities Commission of New Hampshire this twenty-fifth day of May, 2017.

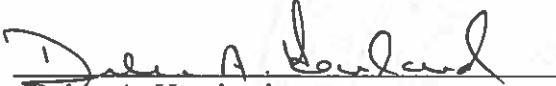


Martin P. Honigberg
Chairman



Kathryn M. Bailey
Commissioner

Attested by:



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