

STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

February 19, 2016 - 1:38 p.m.  
Concord, New Hampshire

NHPUC MAR08'16 PM 3:34

RE: DE 15-464  
PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE  
d/b/a EVERSOURCE ENERGY:  
Petition for Approval of Lease Agreement  
Between PSNH d/b/a Eversource Energy and  
Northern Pass Transmission, LLC.  
(Prehearing conference)

PRESENT: Chairman Martin P. Honigberg, Presiding  
Commissioner Kathryn M. Bailey

Adele Leighton, Clerk

APPEARANCES: Reptg. Public Service Co. of New Hampshire  
d/b/a Eversource Energy:  
Matthew J. Fossum, Esq.

Reptg. Northern Pass Transmission, LLC:  
Wilbur Glahn, Esq.

Reptg. McKenna's Purchase Unit Owners Assn.:  
Michelle Kleindienst

Reptg. Karen Spencer, Kevin Spencer and  
Mark Lagasse d/b/a Lagaspence Realty, LLC:  
Arthur B. Cunningham, Esq.

Court Reporter: Steven E. Patnaude, LCR No. 52

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**APPEARANCES: (c o n t i n u e d)**

**Reptg. Residential Ratepayers:**

Donald Kreis, Esq., Consumer Advocate  
James Brennan, Finance Director  
Office of Consumer Advocate

**Reptg. PUC Staff:**

Suzanne G. Amidon, Esq.  
Thomas C. Frantz, Director/Electric Division  
Jay Dudley, Electric Division

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**P R O C E E D I N G**

1  
2 CHAIRMAN HONIGBERG: We're here this  
3 afternoon in Docket DE 15-464, which is a filing by Public  
4 Service Company of New Hampshire d/b/a Eversource Energy.  
5 It's a Petition for Approval of a Lease Agreement with  
6 Northern Pass Transmission, LLC. This afternoon we're  
7 here for a prehearing conference. I know that you have a  
8 technical section following the prehearing conference. We  
9 have some interventions to discussed, some intervention  
10 petitions to discuss.

11 And, we will take those up, and talk  
12 about the scope of this proceeding, and what everybody  
13 expects to happen, after we take appearances. Mr. Fossum.

14 MR. FOSSUM: Thank you. Good afternoon,  
15 Commissioners. Matthew Fossum, for Public Service Company  
16 of New Hampshire doing business as Eversource Energy.

17 MR. GLAHN: Bill Glahn, for Northern  
18 Pass Transmission, LLC, an intervenor.

19 CHAIRMAN HONIGBERG: Who else is here  
20 and is seeking intervenor status?

21 MS. KLEINDIENST: Michelle Kleindienst,  
22 for McKenna's Purchase Unit Owners Association.

23 MR. CUNNINGHAM: Arthur B. Cunningham,  
24 representing the property owners of Karen and Kevin

1 Spencer and Mark Lagasse.

2 MS. HOLAHAN: Carol Holahan, on behalf  
3 of the New England Power Generators Association.

4 MR. KREIS: Good afternoon, Mr.  
5 Chairman. I'm Donald Kreis, the Consumer Advocate, here  
6 on behalf of residential utility customers.

7 MS. AMIDON: Good afternoon. Suzanne  
8 Amidon, for Commission Staff.

9 CHAIRMAN HONIGBERG: There's at least  
10 one intervention seeker that's not here, that would be the  
11 Palmers?

12 *[No verbal response]*

13 CHAIRMAN HONIGBERG: Are we aware of any  
14 others, besides the Palmers, that have filed, but aren't  
15 here? Mr. Fossum, you probably have this memorized.

16 MR. FOSSUM: No, that's the only one  
17 I'm -- based on the appearances we've just heard, that's  
18 the only one I'm aware of who's not here.

19 CHAIRMAN HONIGBERG: All right. Let's  
20 take them one at a time. You have -- I'm talking to you  
21 Mr. Fossum, you filed responses to all of them. With  
22 respect to the Kleindienst and the McKenna's Purchase  
23 filing, your position is that you understand that they may  
24 have an interest, because they own the property subject --

1 that may be the subject of this proceeding, but you're  
2 concerned about the scope of what it is they want to talk  
3 about, is that right?

4 MR. FOSSUM: That is correct.

5 CHAIRMAN HONIGBERG: Ms. Kleindienst,  
6 did you have an opportunity to read what Mr. Fossum filed  
7 in response to your petition?

8 MS. KLEINDIENST: Yes, I did.

9 CHAIRMAN HONIGBERG: Do you have any  
10 comments? You want to share anything with us?

11 MS. KLEINDIENST: The only thing I want  
12 to share is that the original easements that were filed  
13 back in the 1940s and 1950s don't say anything about the  
14 property being awarded the ability to lease the property  
15 to an outside entity.

16 CHAIRMAN HONIGBERG: Right. We will  
17 have to decide ourselves how to -- how to deal with your  
18 concerns. I think we're probably going to have a  
19 discussion at some point this afternoon about what issues  
20 we can or can't or shouldn't be considering in this  
21 proceeding.

22 Let's take next -- well, actually,  
23 before I leave the Kleindienst. Does anyone have any  
24 comments or thoughts on Kleindienst? Does Staff have a

1 position?

2 MS. AMIDON: No, we don't have a  
3 position. But, at some point, I'd like to present to you  
4 information about how Staff has determined it might be  
5 able to assist the Commission with reviewing the leases --  
6 I mean, the easements.

7 CHAIRMAN HONIGBERG: Okay. Just talking  
8 interventions right now, you have no position on it?

9 MS. AMIDON: No position.

10 CHAIRMAN HONIGBERG: All right. Let's  
11 deal next with Mr. Glahn, who is sitting right behind you.  
12 I assume, Mr. Fossum, you have no objection to NPT's  
13 intervention in this proceeding?

14 MR. FOSSUM: I do not.

15 CHAIRMAN HONIGBERG: Does anyone have  
16 any objection to -- Staff, do you have any comment on the  
17 NPT's petition?

18 MS. AMIDON: No. We take no position.

19 CHAIRMAN HONIGBERG: Mr. Kreis?

20 MR. KREIS: We support NPT's petition  
21 for intervention.

22 CHAIRMAN HONIGBERG: Did you have any  
23 position on Ms. Kleindienst and the McKenna's Purchase  
24 folks?

1                   MR. KREIS: Well, Mr. Chairman, it seems  
2 to me that, if the Commission is going to --

3                   CHAIRMAN HONIGBERG: You need to have  
4 your microphone on and uncomfortably close to your mouth.

5                   MR. KREIS: Sorry about that. I will  
6 learn how to do that by-and-by. It seems to me that, if  
7 the Commission is going to be making ruling about the  
8 extent to which the easements and their meaning and their  
9 scope are within the Commission's jurisdiction, then the  
10 intervenors, who are owners of those -- owners of the  
11 servient estates that relate to those easements ought to  
12 be considered for intervention, because, obviously, they  
13 have a material stake in the outcome of the proceeding.

14                   So, it's a bit of a chicken and an egg  
15 problem. Because, before the Commission decides whether  
16 it can consider those questions, it's difficult to  
17 determine the extent to which punitive intervenors have an  
18 interest.

19                   CHAIRMAN HONIGBERG: True. Let's deal  
20 with the facial issues as best we can, and move onto that  
21 slightly more meatier matter in just a moment.

22                   And, for all those interested, Mr. Kreis  
23 will be providing a seminar on servient and dominant  
24 estates later this afternoon.

1                   Mr. Cunningham, Mr. Cunningham  
2           represents Spencer and Lagasse, who filed initially as an  
3           individual and then combined. Mr. Fossum, can you refresh  
4           my memory on your position? I have read it, but I've  
5           forgotten.

6                   MR. FOSSUM: Well, the initial response  
7           from PSNH was to Mr. Spencer's individual request, and was  
8           filed at the same time and spoke to the same issues as  
9           related to the McKenna's Purchase Owners Association. It  
10          was an issue not with whether they had some interest in  
11          the proceeding, but the scope of their intervention.

12                   In the objection that I filed this  
13          morning, relative to their follow-up filing, I also noted  
14          in there that they had amended from Mr. Spencer's  
15          individual petition --

16                   CHAIRMAN HONIGBERG: Right.

17                   MR. FOSSUM: -- to now the one of the  
18          realty LLC, and that the arguments are nonetheless the  
19          same.

20                   CHAIRMAN HONIGBERG: Understood. Mr.  
21          Cunningham, you've had an opportunity to read Mr. Fossum's  
22          response. I don't want to get into the motion to dismiss  
23          right now, because it follows along with some of the other  
24          issues we're going to discuss. But do you have anything

1 to add with respect to the intervenors' rights to  
2 intervene in the proceeding?

3 MR. CUNNINGHAM: Only, Mr. Chairman,  
4 that the property is titled in the name of the LLC, and,  
5 as such, of course, they're entitled to intervene in this  
6 docket as property owners.

7 CHAIRMAN HONIGBERG: I would never say  
8 "of course" with anything with respect to this project or  
9 anything else, but I understand the position you're  
10 taking.

11 Ms. Holahan, NEPGA, you've had a chance  
12 to review Mr. Fossum's response to your motion. Anything  
13 you want to add?

14 MS. HOLAHAN: I have not had a chance to  
15 review it. Were they filed it electronically or simply  
16 hand-delivered to the Commission?

17 MR. FOSSUM: They were e-mailed out this  
18 morning, I think around approximately 10:00 a.m., and  
19 hand-delivered early this afternoon.

20 CHAIRMAN HONIGBERG: Off the record.

21 *[Off-the-record discussion ensued.]*

22 CHAIRMAN HONIGBERG: We're back on the  
23 record now. Ms. Holahan.

24 MS. HOLAHAN: This is not the first

1 proceeding that NEPGA has sought intervention, nor is it  
2 the first time that Eversource has objected to our  
3 intervention. I think, with respect to this docket, in  
4 particular, NEPGA has consistently been on the forefront  
5 of the affiliate rules recently adopted by this  
6 Commission. And, in the interest of maintaining a  
7 competitive market and even playing field, NEPGA, as a  
8 representative of the independent generating community  
9 here in New England, clearly has important interest in  
10 this.

11 I see that, you know, obviously, I've  
12 just had an opportunity to look at this for a couple  
13 minutes here. And, if necessary, I would like the  
14 opportunity to reply. I do think that NEPGA has a very  
15 strong interest in the issues in this proceeding. In  
16 fact, the Commission will recall that, in the divestiture  
17 docket, 14-238, NEPGA was denied at one point the  
18 opportunity to do some discovery on a proposed PPA with  
19 respect to the Northern Pass Project. And, the  
20 assurances -- or, at that point, it was our understanding  
21 that the Northern Pass dockets were not to be considered  
22 in the divestiture docket, that there would be a separate  
23 issue on affiliate issues in general. Now, we're in that  
24 docket, and I have a hard time understanding how

1 Eversource is maintaining that we do not have now an  
2 interest in enforcing that interest.

3 CHAIRMAN HONIGBERG: Well, I'm not sure  
4 that's this docket, Ms. Holahan. I think this docket is  
5 about the leases. And, I understand the general point  
6 you're making, and I understand the general interest that  
7 you represent -- the companies you represent as an  
8 organization are interested in the matters that we have  
9 before us. But does that mean you need intervenor status  
10 or does that mean you should follow this very closely and  
11 file comments, observations, even a legal memorandum, if  
12 you think it would be appropriate for us to consider  
13 issues in that way?

14 MS. HOLAHAN: I think that NEPGA  
15 deserves full intervenor status here. I think it is --  
16 the PPA issue is probably not the best to use as an  
17 example. But, clearly, the issues related to affiliate  
18 rules, and how they are enforced by this Commission, how  
19 they are enforced with respect to this project, how the  
20 lease is valuated, whether it is even proper for  
21 Eversource to conduct this transaction with its  
22 competitive electricity -- with its competitive affiliate.

23 All of these are issues that will arise  
24 in this docket, and are at the forefront of the affiliate

1 relationship rules, which are essential to protecting the  
2 competitive wholesale electricity market.

3 CHAIRMAN HONIGBERG: All right. We're  
4 not going to rule on the intervention motions, except for  
5 one, right now. We're going to deny the motion that was  
6 filed by the Palmers. As the Company pointed out in its  
7 response, the interests that they have articulated aren't  
8 really for this docket. They're in a town and an area  
9 where there is no lease -- the leases aren't in effect  
10 there. That's not how the Company has control or the  
11 ability to build or do whatever it needs to do there. So,  
12 they don't have the same kind of interests that the  
13 property owners who are here today do. There are other  
14 proceedings, Site Evaluation Committee being one, or there  
15 may be others, where they are -- might appropriately  
16 participate, but this is not that one. So, we'll be  
17 denying the Palmers.

18 For everybody else's, for everybody else  
19 at this point, I expect you'll all be participating in one  
20 way, shape or form. And, so, you should stay for the  
21 technical session that follows, and expect to be able to  
22 participate. It may not be in as big a way as you would  
23 like.

24 The next issue I want to hear from the

1 Parties on, maybe, Ms. Amidon, this is something you want  
2 to weigh in on, has to do with what exactly is it that we  
3 can consider here? Mr. Kreis alluded to it as well, with  
4 respect to the property rights of the owners of the  
5 underlying property.

6 Do you want to start, Ms. Amidon?

7 MS. AMIDON: Yes. Thank you. The Staff  
8 found one occasion where the Commission reviewed easements  
9 and made a *prima facie* determination regarding whether  
10 those easements were transferable, and that was in Docket  
11 DG 08-146, segTEL. That's a 2010 decision.

12 However, based on our understanding of  
13 what Eversource is trying to do in this docket, is to take  
14 easements and transfer the use to another entity. And, as  
15 I understand it, it's to transfer the use in the entirety  
16 to Northern Pass, in some instances, and, in other  
17 instances, to share the use of the easement.

18 On that basis, Staff has determined that  
19 we have to have some outside assistance in reviewing the  
20 leases -- I mean, strike that, the easements, to determine  
21 whether they can be transferred in the way that is claimed  
22 by Eversource. Whether the use of the right-of-way to  
23 locate an additional overhead or underground electric  
24 transmission line is within the scope of the easement, and

1 to make sure that Eversource holds the easement that it  
2 seeks to transfer.

3 What we're trying to do is what the  
4 Commission accomplished in the segTEL order, which is get  
5 a legal decision as to whether or not, on their face, the  
6 easements appear to be transferable. And, we've been  
7 pointed out -- it's been pointed out by many parties in  
8 written pleadings that the Commission cannot determine  
9 property rights, which is why the Staff is seeking this  
10 assistance.

11 The contract is in process, and,  
12 obviously, any legal opinion we receive from the  
13 contractor will be part of this record and will not be  
14 withheld from any party to the record.

15 CHAIRMAN HONIGBERG: So, the assistance  
16 you're referring to would be legal assistance?

17 MS. AMIDON: Yes.

18 CHAIRMAN HONIGBERG: Hiring a lawyer?

19 MS. AMIDON: Yes.

20 CHAIRMAN HONIGBERG: So I understand  
21 what you're saying, you're -- there's two slightly  
22 conflicting things, and I got to get -- I got to figure  
23 out where the line is. We can't adjudicate the property  
24 rights, but we need to look at the scope of the easements,

1 and whether they're transferable on their face?

2 MS. AMIDON: Yes. And, here's my  
3 concern. If the Commission did not look at the property  
4 rights at all, many of these petitioners would end up in a  
5 court, which would be a lot more expensive for them. If  
6 the Commission can do what it did in segTEL, with the help  
7 of a real estate lawyer that the Staff has retained, to  
8 determine whether these easements are transferable or  
9 whether the construction contemplated in those easements  
10 is permitted under the easement, then that would put the  
11 Commission in a better position to make a decision whether  
12 they can go forward with the rest of the proceeding.

13 CHAIRMAN HONIGBERG: In your view, are  
14 any of the owners of the underlying property, the  
15 "servient estates", Mr. Kreis's phrase, are those people  
16 precluded from going to court and seeking redress, if they  
17 feel that the Company is doing something it shouldn't be  
18 allowed to do?

19 MS. AMIDON: No. They're not precluded  
20 from going to court.

21 CHAIRMAN HONIGBERG: Could they seek an  
22 injunction to stop this proceeding?

23 MS. AMIDON: I think that's exceeded  
24 my --

1 CHAIRMAN HONIGBERG: It's above your pay  
2 grade today?

3 MS. AMIDON: Well, I don't want to say  
4 that. But I just want to say that it exceeded my, you  
5 know, my competency. I don't feel comfortable answering  
6 that question. There may be another attorney in the room  
7 who could.

8 CHAIRMAN HONIGBERG: I suspect there are  
9 attorneys in the room who have opinions about that.

10 Mr. Fossum, what is it we can and can't  
11 do here?

12 MR. FOSSUM: Well, I think, as we've  
13 tried to point out, and I will say that PSNH, back in the  
14 segTEL, made essentially the same arguments that it's made  
15 here, is that our understanding is that the Commission's  
16 authority on this comes from 374:30, and to look at the  
17 public good of the lease. And, under that standard, as we  
18 understand it, the Commission is to look at whether this  
19 is a proposed activity that's forbidden by law, and then  
20 otherwise whether it's reasonable.

21 And, we've already, I believe, by the  
22 filings that we made in this, in this docket, we've  
23 already demonstrated that there's no prohibition under the  
24 law on us doing this, on PSNH leasing its property.

1                   Now, to the extent that there may be an  
2 individual property owner who believes that a particular  
3 easement language does not permit it, that's something  
4 that this Commission can't decide, and shouldn't be  
5 deciding. That should be decided and must be decided in  
6 the courts.

7                   So, to get back to your question, I  
8 would say that the Commission would be reviewing is the  
9 general legal authority of PSNH to lease its property,  
10 which I believe we've demonstrated quite thoroughly that  
11 we have. And, then, having overcome that threshold, the  
12 remaining inquiry has to do with whether the lease itself  
13 is reasonable under the circumstances.

14                   So, and as a small aside, I guess I  
15 would -- I have a problem with the idea that the Staff  
16 would seek to retain some legal expert to render an  
17 opinion, if for no other reason than the fact that this  
18 docket has already sat for almost four months, with  
19 essentially no activity. This is the prehearing  
20 conference for a filing made in October. And, I don't  
21 know how long it would take to retain a lawyer, how long  
22 that lawyer would take to do his or her review. And, even  
23 when that review is finished, and perhaps submitted to the  
24 Commission, there's no guarantee that that review is

1 unassailable, that all Parties would agree that it's  
2 accurate and complete.

3 So, I'm very much concerned about an  
4 undue delay that would come from such a process.

5 CHAIRMAN HONIGBERG: I appreciate what  
6 you've just said. Thank you. You don't have a problem  
7 with the idea that we need to be satisfied that, on their  
8 face, the documents give you what you appear to be wanting  
9 to transfer. If you, for example, came here with a  
10 petition seeking to lease your rights to the Brooklyn  
11 Bridge, we would say "show us" -- "show us your right to  
12 the Brooklyn Bridge yourself, and then we'll talk about  
13 whether it's appropriate to lease it." And, that's about  
14 the standard, though, right?

15 MR. FOSSUM: I think that's -- I mean,  
16 obviously, it's an extreme example, but I think that's  
17 accurate, yes. Is the Commission had asked that we  
18 provide all the easements that are the subject of the  
19 underlying lease; we have done that. They show that PSNH  
20 has an ownership or possessor interest. We provided the  
21 legal analysis to explain that PSNH, like other commercial  
22 enterprises, has the right and ability to lease those  
23 easements. And, so, I think that, essentially, that's  
24 where the Commission's inquiry on that ends.

1 CHAIRMAN HONIGBERG: Mr. Kreis. I'll  
2 get back to you, Ms. Amidon, in just a minute. Mr. Kreis.

3 MR. KREIS: I apologize, Mr. Chairman,  
4 for sort of thinking out loud in real-time about this.  
5 But it seems to me that it -- I don't have any concerns  
6 about Staff seeking outside advice about whether PSNH is  
7 right in its assertion that it has the requisite property  
8 rights to be able to lease its easement to Northern Pass.  
9 I'm a little concerned about sort of -- kind of sort of  
10 litigating that here, at the same time that we tell  
11 Parties that they really need to be in Superior Court if  
12 they're concerned about this.

13 And, so, I'm not quite sure what the  
14 right answer is. I'm just concerned about proceedings  
15 that could become duplicative and ambiguous with respect  
16 to their effect.

17 CHAIRMAN HONIGBERG: All right,  
18 Ms. Amidon. You had something you wanted to add?

19 MS. AMIDON: Yes, I did want to add one  
20 thing.

21 Attorney Fossum referenced "RSA 374:30",  
22 I believe that is where the Commission may grant a lease  
23 of utility property, if it finds it's in the public good.

24 I disagree that, if it is merely

1 forbidden by law, that it's -- that's the line where you  
2 determine whether it's in the public good or not. I  
3 don't -- while that's one interpretation, how close to  
4 that line do you get?

5 My concern, in other words, is that  
6 there should be a more robust discussion about what the  
7 "public good" is that this Commission can consider. You  
8 know, is it providing power to the New England Power Pool  
9 or is it, you know, to the people of New Hampshire? So, I  
10 disagree with that, that analysis on the "public good".

11 Staff is mindful we have to look at the  
12 affiliate transaction law and the affiliate transaction  
13 rules. And, we certainly want to make sure that the  
14 valuation that is in the lease, that was negotiated,  
15 apparently, between two affiliates, is just and reasonable  
16 and represents an arm's length transaction.

17 CHAIRMAN HONIGBERG: I think you've got  
18 universal agreement in the room on that.

19 MS. AMIDON: Right.

20 CHAIRMAN HONIGBERG: I don't think  
21 anybody disagrees with that.

22 MS. AMIDON: Correct. So, I just want  
23 to --

24 CHAIRMAN HONIGBERG: I just want to

1 focus on the "property rights" aspect of things right now.

2 MS. AMIDON: On the property rights?

3 Well, again, Staff did not feel that it could make a  
4 finding to present to the Commission regarding the  
5 transferability of those easements.

6 CHAIRMAN HONIGBERG: All right. Do any  
7 of the prospective intervenors want to add anything at  
8 this point? I see Mr. Glahn reaching for the microphone.

9 MR. GLAHN: Hard to sit in a room and  
10 not say anything, your Honor.

11 CHAIRMAN HONIGBERG: As long as your  
12 face is uncomfortably close to the microphone,  
13 Mr. Patnaude will be happy.

14 MR. GLAHN: I think I -- well, I do  
15 agree with Mr. Fossum's analysis. And, I think the  
16 position you put forward, which is it is a Brooklyn Bridge  
17 standard, in my opinion. That is, you look to determine  
18 whether, on the face of the documents themselves, it  
19 appears that there is the ability to assign or transfer  
20 that interest. And, otherwise, you're getting into  
21 interpreting the legal documents and the property rights  
22 themselves.

23 And, my concern, with respect to  
24 Ms. Amidon's position on hiring the outside counsel, is

1 that, then you're getting into exactly that issue. In  
2 other words, if the Commission decides that it is going to  
3 determine the property rights, then it might be relevant  
4 to have the opinion of counsel. But that counsel can't  
5 give an opinion that can be binding on the Commission of  
6 that position, because that would be an interpretation of  
7 what the property rights are, and that's a matter for the  
8 Superior Court.

9 CHAIRMAN HONIGBERG: Mr. Cunningham, --  
10 just we'll come back to you in a second, Ms. Amidon. Mr.  
11 Cunningham, this is, in part, the subject of your motion.  
12 So, you want to speak to that and speak to the issue we're  
13 discussing right now?

14 MR. CUNNINGHAM: Yes, I do. Thank you,  
15 Mr. Chairman. I remember back, many years ago, in  
16 Property 101, and the property professor described a  
17 quitclaim deed. And, I suspect here, arguably anyway,  
18 that PSNH could sign a quitclaim deed of sorts over to  
19 Northern Pass Transmission. But I think we all know that  
20 quitclaim deeds only convey what the punitive owner owns.

21 The bottom-line threshold issue here is  
22 whether or not PSNH owns the right, not just the lease,  
23 the interest they have, but whether they have the right to  
24 allow the construction of the Northern Pass on the lease.

1 That legal issue is what Mr. Fossum and I agree on. That  
2 issue cannot be determined without a judicial  
3 interpretation. And, that's why I filed the motion to  
4 dismiss.

5 What's mostly troubling about this is  
6 that the SEC requires a demonstration that the owner of  
7 the property or the applicant in an SEC application has  
8 the right to construct the project. That right has been  
9 challenged by serious property owners.

10 CHAIRMAN HONIGBERG: You've got --  
11 you're wrong in your premise, Mr. Cunningham. So, it --  
12 that's not what the SEC rules require. So, let's assume  
13 for a minute, you may not agree with me, but assume for a  
14 minute that all the SEC rules require is that the  
15 applicant demonstrate that they have a way of acquiring  
16 the right. That they either own it, or they have an  
17 agreement, or that they have initiated all the proper  
18 proceedings to get the right to do it. Assume that's what  
19 the SEC requires.

20 And, continue with your argument.

21 MR. CUNNINGHAM: Well, with respect, Mr.  
22 Chairman, that begs the question, because they don't own  
23 the right, and that right cannot be determined unless  
24 there's a judicial interpretation of their rights.

1                   So, you know, it's a bit -- I think it's  
2 a bit frustrating to everybody that has participated in  
3 that SEC proceeding that it's going so far for so long  
4 without an examination of that question.

5                   So, if I'm repeating myself, I agree  
6 with Mr. Fossum. There needs to be an judicial  
7 interpretation of whether or not --

8                   CHAIRMAN HONIGBERG: What's stopping  
9 that from happening? What's stopping the judicial  
10 interpretation?

11                  MR. CUNNINGHAM: Nothing. Somebody has  
12 to file.

13                  CHAIRMAN HONIGBERG: That's right.

14                  MR. CUNNINGHAM: Somebody has to file.

15                  CHAIRMAN HONIGBERG: Somebody has to  
16 file. And, the statutes that govern the PUC, and I will  
17 add as an aside, the statutes that govern the SEC, don't  
18 have a provision that says "Stop, if there's some  
19 question". Someone -- there are ways to stop  
20 administrative proceedings.

21                  MR. CUNNINGHAM: But here's the thing,  
22 Mr. Chairman. The SEC could proceed down a long road,  
23 take all the expert testimony, hear all the objections to  
24 a setting, so on and so forth, and the challenge could lie

1 in six months, a year. You cannot extinguish property  
2 rights by regulatory action. So, this issue needs to be  
3 adjudicated. And, I agree, it needs to be adjudicated  
4 soon.

5 But it -- I think it would be a  
6 frustration for the SEC and for this agency to go down  
7 this road, with this case pending and that case pending,  
8 without that necessary adjudication of property rights  
9 issues.

10 CHAIRMAN HONIGBERG: One thing I can  
11 assure you is that neither the PUC, nor the SEC, is going  
12 to be going to court to get this litigated. We wouldn't  
13 have standing, nor would it be appropriate for the  
14 agencies to do that.

15 MR. CUNNINGHAM: No. And, I'm not  
16 suggesting that the agencies do that. It has to be  
17 property owners or it has to be the Petitioner in this  
18 case.

19 CHAIRMAN HONIGBERG: All right. Do any  
20 of the others have anything they want to add or offer  
21 regarding the property rights issue we're discussing?

22 I know Ms. Amidon wants to. Let's let  
23 her go first, and then you, Mr. Fossum.

24 MS. AMIDON: I just wanted to address

1 something that may have been misleading about the nature  
2 of these easements. These easements go back -- you know,  
3 there are, I think, approximately 700 easements in  
4 question. And, they go back in time, I think -- I'm  
5 trying to remember the earliest one, it was at least in the  
6 1930s. And, of course, the language of these easements  
7 have changed over time.

8           You cannot assume, in my opinion, that  
9 there is a blanket way to interpret the easements in the  
10 aggregate. There may be -- there may be categories, you  
11 say perhaps there are 20 categories, but they're going to  
12 be different. And, that is one reason Staff struggled  
13 with this. And, we sought to get assistance from the  
14 Attorney General, and, ultimately, with their guidance,  
15 determined the path that we've chosen.

16           And, I think the Commission has it  
17 within its jurisdiction, if it determines it wants to  
18 grant Mr. Cunningham's motion, that it can do that. But  
19 we think that this review will help the process, and  
20 perhaps help those individuals who have granted the  
21 easements or have the easements in their title to  
22 understand a little bit more clearly what their rights  
23 are. Thank you.

24           CHAIRMAN HONIGBERG: Mr. Fossum.

1 MR. FOSSUM: Thank you. Just very  
2 briefly on responding to one of the comments from Staff.  
3 Is I didn't mean to suggest, and, if I did, I apologize  
4 for misspeaking, that the "forbidden by law" standard is  
5 "the standard" for this case.

6 As far as I understand that that  
7 standard applies, it's really just a threshold inquiry.  
8 "Does the law forbid you to do this?" If it does not,  
9 then there is a test of reasonableness, looking at the  
10 circumstances of the case that you must march through.

11 So, my argument was meant to simply say  
12 that I understand that this is not forbidden by law. That  
13 doesn't mean that the inquiry ends there. There's  
14 certainly more things to discuss. And, you know, we  
15 understand the burden is on us, the Company, to  
16 demonstrate that this is a reasonable and appropriate  
17 lease, and that customers are not harmed, and that it  
18 meets all of the relevant standards.

19 CHAIRMAN HONIGBERG: All right. Anyone  
20 else want to weigh in on this issue?

21 Yes, Mr. Kreis.

22 MR. KREIS: Well, it seems to me that  
23 what could happen here is that Staff could do whatever it  
24 would like, seek outside advice from expert attorneys, or

1 something else, and come to its own informed judgment  
2 about whether what PSNH is doing is something that it  
3 enjoys the requisite property rights to do. And, if it  
4 comes to the opinion that there is an issue, then it could  
5 bring that to the attention of the Commission, and the  
6 Commission could then decide whether an appropriate course  
7 of action would be to suspend this proceeding or tell PSNH  
8 it needs to go into Superior Court to resolve it, or  
9 something like that.

10 It doesn't seem useful to put this case  
11 on ice further while that analysis goes forward though.

12 CHAIRMAN HONIGBERG: All right. Thank  
13 you, Mr. Kreis. Anyone else or is that the last word?

14 Mr. Glahn.

15 MR. GLAHN: I want to go back to a  
16 question you asked earlier --

17 *[Court reporter interruption.]*

18 MR. GLAHN: Yes. I want to go back to a  
19 question you asked earlier, Mr. Chairman, which is "could  
20 the Superior Court enjoin this proceeding?", because I  
21 think that really goes to the issue that we're dealing  
22 with here. That is, is there any reason for you to stay  
23 your proceedings or would the court enjoin them? I'm not  
24 sure a court would enjoin an administrative proceeding in

1 this situation, because there is no demonstration of  
2 irreparable harm.

3 And, the real question is, is there  
4 anything that can prevent this Commission from making the  
5 decision it needs to make? While, as you pointed out, on  
6 a parallel track, if parties sought to challenge it, and,  
7 indeed, if parties came forward, there would be a pending,  
8 let's say, declaratory judgment proceeding in Superior  
9 Court.

10 CHAIRMAN HONIGBERG: All right. I'm  
11 going to take that as the last word on this topic.

12 With respect further to interventions  
13 before we leave that, we don't have a lot happily. But  
14 I'm wondering about the presence of both Northern Pass and  
15 Eversource as separate entities in this proceeding, when  
16 their petition to the SEC is a joint petition, and, in  
17 large measure, they're going to be arguing the same  
18 things.

19 Mr. Fossum, Mr. Glahn, you want to say  
20 anything about that?

21 MR. FOSSUM: The reason for the  
22 separateness in this proceeding is that this is a  
23 permission that's sought by PSNH in its own name. The  
24 fact that Northern Pass Transmission is a counterparty to

1 the lease is, you know, it's a fact. That it is an  
2 affiliated company is also a fact. But, in the end, this  
3 is a decision that is sought by PSNH for purposes of its  
4 business.

5 And, I don't know that it has any direct  
6 bearing, obviously, it has some bearing, but no direct  
7 bearing on the decisions that the SEC would need to make.

8 CHAIRMAN HONIGBERG: Mr. Glahn.

9 MR. GLAHN: I haven't thought that  
10 through, your Honor.

11 *[Court reporter interruption.]*

12 CHAIRMAN HONIGBERG: Off the record.

13 *[Brief off-the-record discussion*  
14 *ensued.]*

15 CHAIRMAN HONIGBERG: All right. Go  
16 ahead.

17 MR. GLAHN: I don't think it needs to be  
18 a joint proceeding. But, obviously, this Commission has  
19 the authority to determine, in the conduct of the  
20 proceedings, how much of it might be treated as a joint  
21 proceeding. So, I guess that's the way I'd answer your  
22 question, if it's helpful.

23 I can't predict at the moment what  
24 examination of witnesses might need to be done by one side

1 or the other in a way that would be helpful to the  
2 Commission. And, I think that's something that may have  
3 to play itself out at the hearing itself.

4 CHAIRMAN HONIGBERG: Ms. Holahan.

5 MS. HOLAHAN: On behalf of NEPGA, I  
6 think it's important that they are separate entities, that  
7 they are separately in the docket. They are separate  
8 entities. And, for the purposes of enforcing, and even  
9 the appearances governed by the affiliate transaction  
10 rules, they should separately be in the proceeding. If  
11 it's an arm's length transaction, and they're two separate  
12 entities, then they should appear separately.

13 CHAIRMAN HONIGBERG: All right. Any  
14 other thoughts on this issue?

15 *[No verbal response]*

16 CHAIRMAN HONIGBERG: All right.  
17 Ms. Amidon, what else do we need to think about and talk  
18 about here? You started to go through some of the issues  
19 that are going to be litigated here. I think maybe it's  
20 appropriate to have the Parties state their position,  
21 their initial position, as we generally do at prehearing  
22 conferences, on how they expect this to play out.

23 Does that make sense to you, Ms. Amidon?

24 MS. AMIDON: That makes sense. Thank

1 you.

2 CHAIRMAN HONIGBERG: All right.

3 Mr. Fossum, you get to start.

4 MR. FOSSUM: Thank you, Commissioners.  
5 I'll begin by noting that I think what this docket is not.  
6 It is not a referendum on Northern Pass. It is also, as  
7 you've taken some argument on, in my opinion, it is not a  
8 proceeding intended to determine the underlying easement  
9 rights of all of the easements that are affected by the  
10 proposed lease.

11 What it is is an opportunity for the  
12 Commission to review a proposed lease transaction, of  
13 where PSNH would lease its property, under terms that are,  
14 in PSNH's opinion, commercially reasonable terms, based on  
15 a outside opinion of their value. It's an opportunity for  
16 the Commission to determine whether doing so under those  
17 terms is reasonable; whether the means for PSNH to flow  
18 the funds that it will be paid for that leased property  
19 back to customers is reasonable; and to determine whether,  
20 as PSNH has contended in its initial filing, leasing the  
21 property in this manner would have any potentially  
22 detrimental effect on PSNH's ability to provide safe and  
23 reliable service to its customers, which it would not.  
24 So, I believe that's what the scope of this docket is and

1 should be.

2 And, it's our position that we have  
3 demonstrated, through the filing that we made initially,  
4 and ultimately supplemented, that we have satisfied the  
5 requirements of the statute to demonstrate that this is a  
6 reasonable and appropriate lease of PSNH's utility  
7 property, that is being fairly compensated for that  
8 property, and that it's appropriately flowing the funds  
9 from that compensation back to customers, and that it will  
10 not have any detrimental effect on its ability to serve  
11 its customers. Thank you.

12 CHAIRMAN HONIGBERG: Mr. Glahn.

13 MR. GLAHN: I have nothing to add.

14 CHAIRMAN HONIGBERG: Ms. Kleindienst?

15 MR. GLAHN: Nothing to add to what Mr.  
16 Fossum said.

17 CHAIRMAN HONIGBERG: Ms. Kleindienst?

18 MS. KLEINDIENST: I'd need to speak to  
19 the directors before I could comment.

20 CHAIRMAN HONIGBERG: Mr. Cunningham?

21 MR. CUNNINGHAM: Repeating myself, Mr.  
22 Chairman. They, PSNH, has nothing to lease. They have no  
23 property rights in these easements. And, as I set forth  
24 in the motion to dismiss, this proceeding should not

1 proceed until that determination is made.

2 Without that happening, the valuable  
3 property rights of my clients, and many others up and down  
4 this proposed transaction, their property rights would be  
5 significantly injured.

6 So, just as a matter of regulatory  
7 efficiency, I believe this case should be dismissed until  
8 that issue is determined. And, I suspect that we will be  
9 filing a very similar motion to dismiss the application in  
10 the SEC.

11 Until these property rights are  
12 established, there is no case. And, it's a serious,  
13 serious issue for many, many people that are going to be  
14 impacted by this project. This has to be done.

15 CHAIRMAN HONIGBERG: Ms. Holahan.

16 MS. HOLAHAN: Mr. Chairman, Commissioner  
17 Bailey, at the risk of repeating myself also, since some  
18 of these issues came up during the intervention  
19 discussion.

20 For the record, NEPGA is the trade  
21 association representing the competitive electric  
22 generating companies in New England. Collectively, the  
23 companies generate approximately 25,000 megawatts of  
24 generating capacity, with more than 2,600 megawatts

1 generated here in New Hampshire alone.

2 As Mr. Fossum stated in his objection,  
3 and as we stated in our motion or our petition to  
4 intervene, NEPGA's mission is to promote sound energy  
5 policies to further economic development, jobs, and a  
6 balanced environmental policy. NEPGA believes that the  
7 sustainable competitive markets are the best means to  
8 provide long-term reliable and affordable supplies of  
9 electricity for consumers.

10 NEPGA's member companies have been  
11 involved in the design and the development of the  
12 competitive wholesale electricity markets and sell their  
13 energy and capacity into the New England wholesale markets  
14 administered by ISO-New England.

15 As participants in the region's  
16 wholesale power markets, NEPGA members have a substantial  
17 and specific interest in fully competitive generation  
18 markets and sustaining a level playing field within that  
19 market.

20 NEPGA has direct and substantial  
21 interests in ensuring that Eversource's competitive  
22 electric -- an electric affiliate, Northern Pass, is not  
23 unfairly advantaged to the detriment of other  
24 non-affiliated companies operating in the region.

1                   Specifically, NEPGA has a direct and  
2                   substantial interest in ensuring that the Commission's  
3                   newly adopted affiliate rules are complied with, that the  
4                   valuation of the lease between Eversource and Northern  
5                   Pass is based on fair market value, in accordance with the  
6                   valuation methods established in the Commission's  
7                   affiliate rules, and the effect of this and related issues  
8                   may have on the competitive wholesale electricity market.

9                   NEPGA has been granted intervention and  
10                  participated in other dockets. We believe that we have  
11                  important -- an important voice and can add additional  
12                  value to this proceeding. And, NEPGA's participation will  
13                  not impair the orderly conduct of the proceeding, and may,  
14                  in fact, be helpful, in that NEPGA member companies will  
15                  not intervene individually.

16                  As stated before, I think the transfer  
17                  of property rights between the affiliates is an issue, it  
18                  is one that affects other competing entities within this  
19                  region, many of whom are NEPGA members. And, the  
20                  valuation and the potentially unfair advantage between  
21                  affiliates and its effect on other entities operating in  
22                  the region is why NEPGA -- is why NEPGA seeks  
23                  intervention, and why it believes are among the issues  
24                  NEPGA believes should be determined during the course of

1 this proceeding. Thank you.

2 CHAIRMAN HONIGBERG: Mr. Kreis.

3 MR. KREIS: Thank you, Mr. Chairman. I  
4 was gratified to hear Mr. Fossum say that he does not  
5 regard the "not forbidden by law" as anything other than a  
6 threshold standard, because I think the inquiry here  
7 raises some very serious issues for PSNH's customers that  
8 deserve to be thoroughly explored here. They have to do  
9 with, assuming Mr. Cunningham is wrong, and that PSNH does  
10 have some property rights that it can transfer here, it  
11 has to do with whether these assets are being valued  
12 properly, and whether they're being transferred in a fair  
13 and reasonable manner, particularly in light of the  
14 affiliate transaction rules that we just heard alluded to.

15 I agree with PSNH that this is not a  
16 referendum on the Northern Pass Project in general, or a  
17 determination of the underlying property rights. But the  
18 question of whether PSNH's customers are being treated  
19 fairly here, in light of their century-long partnership  
20 with this company in developing the property that is now  
21 going to be transferred to a merchant transmission  
22 operator, that's an issue that deserves the most serious  
23 and exacting attention by the Commission, and we intend to  
24 be very actively involved in that.

1 CHAIRMAN HONIGBERG: Ms. Amidon.

2 MS. AMIDON: Thank you. I think you've  
3 heard everybody talk about the affiliate transaction  
4 rules. Those are very important. For example, a portion  
5 of the lease provides NPT exclusive use of about  
6 781 acres. And, it means we need to make sure that the  
7 Company, Eversource, is fairly compensated for forgoing  
8 the use of that property, as well as the value of the  
9 property. In other words, there may be some limitations  
10 there that have to be evaluated in light of the affiliate  
11 transaction rules.

12 We do believe that Eversource has the  
13 burden that it has the legal right to lease or to sublease  
14 the various easements that it obtained from private  
15 property owners. And, we consider that to be an important  
16 issue, because, while I may have a right-of-way through  
17 your property to get to my home, you don't expect me to  
18 set up a lumbering business, for example, and run lumber  
19 trucks back and forth.

20 So, there are some legal issues that  
21 have be explored. And, if we can reach a conclusion here,  
22 that would be preferable. But, if we can't, at least we  
23 know, you know, we properly supported the Commission in  
24 any determination that you make on that, and that is the

1 goal of Staff right now.

2 Finally, I think Mr. Kreis referred to  
3 this, the Consumer Advocate mentioned the "public good".  
4 And, I do think that is a big issue in this proceeding,  
5 the public good and the customers of PSNH, in evaluating  
6 whether this transaction is in the public good, consistent  
7 with the statutory requirement.

8 So, as such, we haven't taken a  
9 position. We've just identified issues going forward, and  
10 we intend to work with the Parties to examine these  
11 issues.

12 CHAIRMAN HONIGBERG: Mr. Fossum, and  
13 Mr. Glahn, this is a question for both of you, perhaps.

14 Can you outline for the record all of  
15 proceedings that are -- that are or were necessary for  
16 everything to happen for the Northern Pass Transmission to  
17 be built and be useful? Because people -- I'm not even  
18 sure I recognize all of the proceedings that are going on.  
19 I know a number of them are here. There's one at the SEC.  
20 And, I think there are others as well.

21 MR. FOSSUM: I can start, I suppose.  
22 But I guess, I, too, do not know all of them. There is,  
23 of course, the SEC proceeding to permit the siting of  
24 Northern Pass. There is the -- at the Commission, there

1 is the presently pending request of Northern Pass to  
2 commence business as a public utility. There are, I  
3 believe, four separate petitions, some by Northern Pass in  
4 its own right and some by PSNH, for this Commission to  
5 authorize crossings of public lands and waters. And,  
6 there is this petition relative to the lease of certain  
7 rights-of-way.

8 I believe that there is also a  
9 pending -- there's some pending activity at FERC, but what  
10 exactly that is, I do not know.

11 And, then, of course, submitted along  
12 with the SEC application, were applications for various  
13 permits from other state agencies, including the  
14 Department of Environmental Services and Department of  
15 Transportation.

16 So, that's, I guess, the extent of my  
17 knowledge. Whether there are additional proceedings that  
18 are open, I do not know.

19 CHAIRMAN HONIGBERG: Mr. Glahn.

20 MR. GLAHN: I can't add to that, your  
21 Honor. My involvement here has really been in this  
22 proceeding.

23 And, if Mr. Getz were here, rather than  
24 Cuba, perhaps he would be able to add to that. But I

1 think Mr. Fossum probably got most of them.

2 CHAIRMAN HONIGBERG: Off the record.

3 *[Brief off-the-record discussion*  
4 *ensued.]*

5 CHAIRMAN HONIGBERG: All right. Back on  
6 the record. All right. Is there anything else we can do  
7 for you?

8 Yes, Ms. Holahan.

9 MS. HOLAHAN: I think there are a number  
10 of other permits that haven't been discussed. You need  
11 the Presidential Permit to cross the International  
12 Boundary into Canada. You need a Special Use Permit from  
13 the Department of the Interior for the White Mountain  
14 National Forest. I believe you need a permit from the  
15 U.S. Army Corps of Engineers. I think there's a CORD  
16 permit in there also that you may need.

17 CHAIRMAN HONIGBERG: CORD is a state  
18 entity?

19 MS. HOLAHAN: Correct. Correct. And,  
20 there are also the hearings going on by DOE as well.

21 CHAIRMAN HONIGBERG: Anything else,  
22 before we leave you to your technical session?

23 *[No verbal response]*

24 CHAIRMAN HONIGBERG: All right. Thank

1       you all very much.

2                               *(Whereupon the prehearing conference was*  
3                               *adjourned at 2:35 p.m., and a technical*  
4                               *session was held thereafter.)*

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