

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

_____))
RE:))
Northern Pass Transmission, LLC and))
Public Service Company of New Hampshire))
d/b/a Eversource Energy:))
Joint Application for a Certificate of Site and)) SEC DOCKET No. 2015-06
Facility for Construction of a New High Voltage))
Electric Transmission Line in New Hampshire))
_____))

Business Intervenor Group’s Motion for Recusal

The International Brotherhood of Electrical Workers and the Coos County Business and Employers Group (hereinafter collectively referred to as the “Business Intervenor Group”) file this motion for recusal and say:

Introduction

1. As set forth more fully below, the Business Intervenor Group respectfully requests that Subcommittee Members Weathersby and Bailey recuse themselves from further proceedings involving this Application. Their continued participation in this proceeding would deprive the parties of their due process rights.

Background

2. Following 70 days of hearings on this Application, the Subcommittee engaged in deliberations. After two and a half days into the scheduled 12 days of deliberations, the Subcommittee decided that the Applicants had failed to meet their burden with respect to RSA 162-H:16, IV (b). Rather than continuing with the deliberations or contemplating other conditions that might address their concerns, the Subcommittee stopped deliberations upon issuing an oral decision. During those deliberations, Subcommittee Member Bailey moved to deny the Application for Certificate of Site and Facility. (NPT Deliberations, Day 3 PM Tr.

3:12–22.) In the context of stopping deliberations, she stated “And I think that **there are some - - some risks in continuing the deliberations**, and - - well, let me say it this way. I think, let’s keep it simple. . . . So, for a number of reasons, and **we know this is going to be appealed, it may be better for us just to stop now.**” (NPT Deliberations, Day 3 PM Tr. 4:14–23) (emphasis added). Subcommittee Member Bailey noted: “I’m worried that, if we continue with our deliberations, we will really need to figure out what conditions we would impose on a lot of things. **And that’s not - - that’s not going to be simple and it’s not going to be fast. And there’s going to be a lot more things to appeal. And I think we have a pretty good record right now. . . .**” (NPT Deliberations, Day 3 PM Tr. 8:12–19) (emphasis added).

3. Thereafter, the Applicants moved for rehearing. Citing specific procedural deficiencies related to the deliberation process, the Applicants requested that the Subcommittee vacate its oral decision and reopen its deliberations. The Business Intervenor Group joined in that request. In bringing their respective filings, the Applicants and the Business Intervenor Group reserved the right to set forth substantive bases why the Subcommittee erred in rendering its decision.

4. On March 12, 2018, the Subcommittee held a public meeting during which it addressed the Applicants’ motion for rehearing. During that public meeting, Subcommittee Member Weathersby stated: “I don’t think we should vacate our oral decision. I’m pretty confident that that decision was well-reasoned, lawful, made in accordance with the statute and the administrative rules. So I think that suspending the oral decision until such time there’s actually a final written decision does sort of add some clarity without just a dismissal.” (NPT Public Meeting Tr. 11:2–10, March 12, 2018.) Subcommittee Member Bailey agreed with Ms. Weathersby on this point. (Id. 19:2-4.)

5. With respect to reopening the deliberations on the Application, Subcommittee

Member Weathersby went on to state:

Just on that point, if we reopen deliberations, I don't think anyone's being precluded from going back and saying, Hey, I want to talk about tourism some more. We may not - - **I don't think we really should** but that's - - by reopening deliberations, I think you reopen the whole thing. I think reopening deliberations would be a good idea because **I think that understanding where the Committee sits on the other factors that we didn't address would be instructive. I don't think it would be dispositive at all.** And therefore, **I don't really have a preference as to whether we do it before our final decision is issued or after.** I don't think we need to do it. I just think that there's a few issues that would - - a lot of work's gone into a number of factors we didn't get to. I think that it would be helpful to all parties to have an analysis of those. There's some legal issues, you know, what's a historic site, the interplay of the 106 process and state process and - - you know, sort of some of those things that I think would just be helpful to review. But I don't think - - **my opinion still stands, that they did not meet their burden concerning orderly development of the region.** And, you know, I don't think we can grant a certificate. **Certainly not going to reopen the record and then get new conditions and all of that put on.**

So I would be in favor of going through the other factors, but, as I said, **I don't really have a preference whether it's done before or after a final decision is issued.**

(NPT Public Meeting Tr. 20:6–21:19) (emphasis added).

Legal Analysis

6. Part I, Article 35 of the New Hampshire Constitution provides, in pertinent part, that “it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.” This requirement applies to quasi-judicial officers. *See, e.g., Appeal of City of Keene*, 141 N.H. 797, 801 (1997). Here, there can be no dispute that the Subcommittee and, in turn, Subcommittee Members Weathersby and Bailey are acting in a judicial capacity. *See Petition of Boston & Maine Corp.*, 109 N.H. 324, 327 (1969) (“If private rights are affected by the board’s decision the decision is a judicial one.”). A party should raise issues associated with a tribunal member’s impartiality at the earliest possible time. *Cf. Appeal of Cheney*, 130 N.H. 589, 594

(1988) (“We require issues to be raised at the earliest possible time, because trial forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance. This is only fair to the trial forums and the appellate courts.”).

7. There is no specific statute governing the standard for recusal of members of the Site Evaluation Committee. However, in *Appeal of Seacoast Anti-Pollution League*, the New Hampshire Supreme Court reviewed disqualification of quasi-judicial administrative body members by looking to analogous federal statutes. *See* 125 N.H. 465 (1984) (analyzing disqualification of PUC commissioner). There, in evaluating a statute governing recusal of PUC commissioners and to assist in that evaluation, the Court noted that a pertinent and analogous federal statute requires disqualification of a judge “in any proceeding in which his impartiality might reasonably be questioned.” *Id.* (citing 28 U.S.C.A. 455(a)). It further noted that federal courts have interpreted this statute “as establishing an objective-reasonable person standard.” *Id.* (citations omitted). “Such a standard allows recusal when objective appearances provide a factual basis to doubt impartiality, even though the judge himself may subjectively be confident of his ability to be evenhanded.” *Id.* The impartiality of individuals who are acting in a quasi-judicial role is imperative in order to afford the Applicants due process guarantees. *See Appeal of Lathrop*, 122 N.H. 262, 265 (1984).

8. Here, Subcommittee Member Bailey’s comments demonstrate that she should recuse herself from further proceedings. Her comments demonstrate a focus on the number of issues that a party could take on appeal and the “risks” to the Subcommittee if they continued their deliberations, rather than focusing on the appropriate procedure for evaluating the Application. From an objectively reasonable person’s perspective, her comments demonstrate a

factual basis upon which to doubt her impartiality. It follows that she should recuse herself from further participation in this proceeding.

9. Likewise, Subcommittee Member Weathersby's comments during the March 12, 2018 public meeting demonstrate that she lacks the requisite impartiality required to continue participating in this proceeding. From an objectively reasonable person's perspective, her statements demonstrate that she has foreclosed any possibility that a motion for rehearing may shed light on substantive facts and argument that she and the Subcommittee may have overlooked or misapprehended. Her comments demonstrate that she remains firmly entrenched in her view that the Applicants failed to meet their burden. She makes these comments without giving the Applicants or any other party an opportunity to persuade her otherwise through substantive facts and argument. Moreover, her comments indicate that even if deliberations were reopened, she would not consider whether any mitigating conditions imposed by the Subcommittee could address concerns raised during the course of this proceeding, contrary to the SEC rules. Subcommittee Member Weathersby's comments, taken as a whole, set forth a basis upon which to doubt her impartiality moving forward in the evaluation of this Application. For this reason, she should recuse herself.

10. Ultimately, Subcommittee Member Weathersby's comments represent a predetermined purpose to reach a determined end. This is in direct conflict with existing law. As the New Hampshire Supreme Court has noted, "[i]t is well established that due process guarantees also apply to administrative agencies." *Appeal of Lathrop*, 122 N.H. at 265. In *Appeal of Lathrop*, the Court concluded, in the context of the parties' due process rights, that "[i]t is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies

which should be controlling and **prejudgment concerning issues of fact in a particular case. . . . There is no doubt that the latter would constitute a ground for disqualification.**” *Id.* at 265 (emphasis added) (citing *N.H. Milk Dealers’ Ass’n v. Milk Control Board*, 107 N.H. 335, 339 (1973)).

11. Through her comments during the March 12, 2018 public meeting, Subcommittee Member Weathersby has signaled that her decision and the factual basis upon which it hinges will not waiver, irrespective of what other information and argument may be put before her in a subsequent motion for rehearing or through subsequent deliberations on the Application. No matter how meritorious a subsequent motion for rehearing may be, her comments indicate that she is firmly rooted in her prior decision. Her comments demonstrate prejudgment of fact in this matter, which is contrary to New Hampshire law, and goes against the required impartiality that is expected of individuals acting in a quasi-judicial capacity while sitting on an administrative agency. *See Appeal of Lathrop*, 122 N.H. at 265. By maintaining a predetermined purpose to reach a specific outcome, Subcommittee Member Weathersby’s continued participation in this proceeding would further deny the Applicants and other intervenors due process. *See id.* Because the Applicants’ and other parties’ due process rights would be violated by her continued participation in this proceeding, Subcommittee Member Weathersby should recuse herself from further participation in this proceeding.

WHEREFORE, the Business Intervenor Group respectfully requests that Subcommittee Members Weathersby and Bailey recuse themselves from the remainder of the proceedings involving this Application.

Respectfully submitted,

IBEW
By Its Representative,

Dated: 04-20-2018

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COOS COUNTY BUSINESS AND EMPLOYERS
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By Its Attorney,

Dated: 4/24/18

By: [Signature]
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Certificate of Service

I hereby certify that on this day the foregoing was sent to the New Hampshire Site Evaluation Committee and a copy was sent by electronic mail or U.S. Mail, postage prepaid to persons named on the SEC distribution list.

Dated: 4/24/18

By: [Signature]