

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-464

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

Petition to Lease Rights-of-Way to Northern Pass Transmission, LLC

Order Reviewing Legal Memoranda

ORDER NO. 26,001

April 6, 2017

In this Order, the Commission determines that Eversource has made a *prima facie* showing that it has legal authority to lease and divide the rights of certain easements it holds to Northern Pass Transmission, LLC. The Commission makes this ruling for the limited purpose of allowing it to consider the merits of the lease agreement between Eversource and NPT under RSA 374:30. This Order should not be construed as containing any decision about whether the lease meets the applicable standards for 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.

I. PROCEDURAL HISTORY

On October 19, 2015, Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) filed a petition for approval of a lease agreement between Eversource and Northern Pass Transmission, LLC (NPT). The Commission reviews transfers and leases of utility franchises, works, and systems pursuant to a "public good" standard. RSA 374:30. Unless the Commission approves of an attempted transfer or lease pursuant to a public good standard, the transfer or lease is void as a matter of statutory law. RSA 374:31.

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.

On November 17, 2015, the Commission informed Eversource that its petition was deficient, and required the Company to file copies of all deeds subject to the lease and a legal opinion that supported Eversource's lease of the easements to NPT. *Public Service Co. of N.H.*, Secretarial Letter (November 17, 2015). Eversource filed the deeds and responded to the request for legal opinion by letter dated December 4, 2015.

The Commission granted intervention to the following parties, subject to limitations set forth in Order No. 25,882 (April 15, 2016): New England Power Generators Association (NEPGA), City of Concord (Concord), Society for the Protection of New Hampshire Forests (Forest Society), Lagaspence Reality, LLC (Lagaspence); McKenna's Purchase, Jeanne Menard, Jo Anne Bradbury and Erick and Kathleen Berglund (Deerfield Intervenors).

Robert Cote and Bruce Adami filed a motion to intervene on October 25, 2016, that is pending review by the Commission.

The Commission directed all parties to brief eight issues relating to the legality of Eversource's lease of easement rights to NPT. The Commission found that it might be necessary to resolve those issues in order to complete a facial review of the transferability of the easements. *Public Service Co. of N.H.*, Order No. 25,943, at 2-3 (September 15, 2016), as clarified by Order No. 25,946 (September 27, 2016). The parties were directed to brief the following issues:

1. Does the language "successors and assigns" in a utility easement deed, without any additional prohibition or express grant, allow the lease of the easement to a third party?

2. Does the holder of a utility easement have the right to lease less than all of the easement rights to a third party?
3. Does a grant of a utility easement “over and across” a parcel of land grant the right to install an underground electric transmission line?
4. Does the scope of the rights granted pursuant to the three [eminent domain] orders permit Eversource to construct more than one transmission line within the physical boundaries of the right-of-way?
5. May Eversource construct a transmission line that is not for the purposes stated during the conduct of the proceedings in D-E 3231, D-E 3232, and D-E 3314 and upon which the Commission based its findings of public necessity in the three orders?
6. Does the scope of the rights granted pursuant to the three [eminent domain] orders permit Eversource to construct a transmission line in any location within the physical boundaries of the right-of-way or only as depicted on plans submitted to the Commission to obtain a grant of eminent domain?
7. If the answers to questions 4, 5, or 6, are in the affirmative, does Eversource have the right to lease some or all of the rights it holds by virtue of eminent domain to a third party?
8. Does the term “successors and assigns” in a utility easement deed obtained by eminent domain differ in construction and effect from the term “successors and assigns” in a utility easement deed obtained through agreement of the parties?

Based on Eversource’s representation that underground lines are not planned within any easement subject to the lease, the Commission determined that Issue 3 is moot. Issues 4-8 refer to the three easements that Eversource obtained through eminent domain in proceedings conducted by the Commission.

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>.¹

¹ The easement deeds establishing Eversource’s rights-of-way can be found at Tab 7 in the link above. The case files for the relevant eminent domain proceedings are posted at Tabs 52-54.

II. POSITIONS OF THE PARTIES

A. Eversource

Eversource claims that it has the legal right to lease all or a portion of its rights-of-way, including both negotiated and condemned easements, to NPT pursuant to the express language of those easements and applicable law. Eversource contends that all of the easements it obtained are easements in gross that are freely transferable or alienable absent some indication in the easement grant restricting that transfer. Eversource brief at 1-2. Eversource asserts that, in New Hampshire and elsewhere, the touchstone for the interpretation of every easement deed, whether obtained by negotiation or condemnation, is the intent of the parties determined first by the language of the instrument. *Lussier v. New England Power Comp*, 133 N.H.753, 756 (1990). Only when the language of a conveyance document, such as a negotiated easement deed or condemnation order, is found to be ambiguous will a court resort to extrinsic evidence to evaluate its intent or purpose. The subject easement deeds indicate that the substantive purpose for the easement is for the transmission of electric energy, and the construction of the NPT line for the purpose of carrying energy from Canada to customers in New England is consistent with the purpose stated in the easement deeds. *Id.* at 2.

Eversource argues that commercial easements in gross are freely transferrable as a matter of law, even when the grants are silent and do not include the phrase “successors and assigns,” because a contrary interpretation would mean that all forms of transfer, including the right to mortgage easement rights or grant liens on such interests, would be forbidden. The inclusion in an easement deed of “successors and assigns” demonstrates the parties’ intent to permit a transfer of the rights in the easement, and a lease is simply another form of such transfer. *Id.* at 3-6. Construing easements that specify a right to assign as not including the right to lease would lead

to an absurd result; namely, that no method of transfer would be permitted unless specifically identified in the easement deed. *Id.* at 6. Eversource argues that such a construction would also be at odds with RSA 477:26 and RSA 374:30.²

Eversource compares its petition to that of the lease of New England Power Company and Eversource's electric utility rights-of-way to New England Hydro-Transmission Corporation as part of the Hydro-Quebec Phase II project. Eversource brief at 9. In the Hydro-Quebec Phase II docket, the Commission approved the lease of easements, one of which did contain "successors and assigns" language, most of which did not, and one of which was secured by Eversource through eminent domain. *See* Order No. 19,058 (April 11, 1988). Eversource argues that the approvals in Order No. 19,058 support Eversource's argument that it has the right to lease rights-of-way obtained by easement deed or condemnation equally. Eversource brief at 9-10.

With regard to leasing portions of its easement rights, Eversource asserts that its easements are "exclusive," meaning that none of the grantors reserved to themselves the right to engage in the same activities as Eversource. *Id.* at 11. Eversource maintains that because its easement rights are exclusive, sharing its rights with third parties who intend to use the easement for the conveyance of electric power via overhead lines does not overburden the easements. *Id.* at 11-12. Eversource claims that assignment of a portion of its easement rights for the same purpose for which the easements were granted is permitted and consistent with the

² RSA 477:26 provides that, "In a conveyance of real estate or any interest therein, all rights, easements, privileges and appurtenances belonging to the granted estate or interest shall be deemed to be included in the conveyance, unless the contrary shall be stated in the deed, and it shall be unnecessary in order for their inclusion to enumerate or mention them either generally or specifically." As indicated above, RSA 374:30 allows a utility to transfer or lease all or part of its franchise, works, or system when the Commission finds that it would be for the public good and assents to the transfer or lease.

Commission's approval of Eversource's lease of rights-of-way to New England Hydro-Transmission. *Id.* at 12-13.

The analysis of the transfer of easements taken by eminent domain does not differ from the analysis of the transfer of negotiated easements, according to Eversource. *Id.* at 14. In either case, Eversource says easements are interpreted by the plain language of their terms regarding the intent of the parties pursuant to *Lussier*, without looking at extrinsic evidence. *Id.*

With respect to the interpretation of condemnation easements themselves, Eversource points to the decisions of other states, primarily Vermont. Eversource argues that *Farrell v. Vermont Electric Power Company*, 193 Vt. 307, 313, 68 A.3d 1111, 1116 (2012) requires a court to limit itself to the plain language of an easement and not consider extrinsic evidence when interpreting an easement taken by condemnation, such as the order granting eminent domain. Eversource brief at 15. Eversource argues that the condemnation easements that are the subject of this docket unambiguously provide for the construction of more than one transmission line. *Id.* at 15-18. The Company adds that, even if the Commission finds that the grant language is ambiguous, the orders and petitions refer to "lines of poles" and construction of "one or more lines" while the reports filed by the Commissioners in the three condemnation dockets contain nothing "inconsistent with the right to construct one or more lines." *Id.* at 19.

Eversource argues that the proposed NPT line is fully consistent with the stated purpose of the takings in the condemnation proceedings; that is, for the conveyance of electricity. Eversource Memo at 20-21. Because the proposed use is for the same purpose as the condemnation, the proposed use is allowed. *Id.* at 21. The Company asserts that the petitions in the condemnation dockets were not limited to the construction of one line between two specified points, but were for the construction of "one or more lines for the transmission of electric

energy’ ‘in order to meet the reasonable requirements of service to the public.’” *Id.* at 21.

According to Eversource, the petitions requested the grant of the right-of-way to build a specific line or future lines for that purpose. *Id.* Eversource argues that this request was consistent with the eminent domain statute in effect in 1953 and 1954, which the Company characterizes as making clear that the purpose of the taking was “a broad public purpose served by public utilities.” *Id.* at 21-22.

Eversource asserts that interpreting the purpose of electric utility easements as being limited to the construction of one line for transmitting electricity between two points would create undesirable results, unless those specific limitations appear in the condemnation documents. Eversource argues that the rights granted it by eminent domain expressly allow for the construction of multiple lines within the specified areas and at any location within those areas. *Id.* at 23. Consequently, Eversource believes that it could construct lines anywhere within the easements, not just in the locations specified in its plans submitted to obtain the easements by eminent domain. *Id.* at 23-24.

Finally, Eversource reiterates that condemnation easements should be interpreted in the same manner as negotiated easements. Based on this similarity, Eversource relies on its arguments above to support its claim that the three condemnation easements are transferable in whole or in part by lease.

B. SPNHF, City of Concord, and NEPGA

SPNHF, Concord, and NEPGA filed a joint memorandum (Joint Memo). They argue that principles of property law and the State’s constitution and statutes prevent Eversource from transferring its rights within its existing right-of-way to NPT. Joint Memo at 1-2.

The Joint Memo argues that the language “successors and assigns” does not allow Eversource to apportion and lease an easement in gross to a third party; rather, the deed must specify that the grantee may sublease an interest in the easement by using terms such as “lessees” or “tenants.” Joint Memo at 4-5 (citing *Joliff v. Hardin Cable Television Co.*, 269 N.E. 2d 588 (Ohio 1971)). The Joint Memo states that the words “successors and assigns” indicate that an easement in gross can only be transferred to a successor or assign. *Id.* at 5. It argues that no transfer to a successor has occurred because no corporate successor has replaced Eversource as a company in good standing. *Id.* It also distinguishes between apportionment and assignment. The Joint Memo argues that no assignment of rights has occurred because an assignment requires that the “*complete and present right* in the subject matter” be conferred upon “the individual(s) to whom property is transferred.” *Id.* (citing 6 Am. Jur. 2d Assignments §1 (2d ed. 1999) (emphasis added in Joint Memo)). Because Eversource did not divest its control over its easements, the Joint Memo concludes that the lease represents an impermissible apportionment and not a permissible assignment specified in the language of Eversource’s easement deeds. *Id.* at 6.

The Joint Memo further claims that Eversource may not apportion its easement rights and lease less than all of them to a third party when doing so would result in an additional burden to the landowner.³ In this regard, the Joint Memo asserts that the lease violates an underlying property owner’s right to exclude third parties from his or her land. *Id.* It argues that the most factually analogous cases held that easements could not be apportioned and leased to third parties because doing so would create an additional servitude. *Id.* at 9-10 (citing *Postal Telegraph & Cable Co. v. Gulf & S.I.R. Co.*, 70 So 833, 834-35 (Miss. 1916) (telephone company could lease

³ SPNHF, Concord, and NEPGA argue that the laws governing apportionment apply equally to easements taken by eminent domain. *Joint Memo* at 19.

a wire to a telegraph company, but could not lease right to telegraph company to construct its own line in the right-of-way); *Ft. Worth & Rio Grande R.R. Co. v. Jennings*, 13 S.W. 2470 (Tex. 1890) (easement could not be apportioned to allow a railroad company to build a new track on unused portion of right-of-way)).

The Joint Memo distinguishes *Lussier v. New England Power*, 133 N.H. 753 (1990), stating that *Lussier* only decided whether the scope of the transmission easement allowed the easement holder to construct an additional transmission line through the right-of-way. According to the Joint Memo, there was no indication in *Lussier* that the easement was being apportioned by New England Power Company for lease to New England Hydro-Transmission Company. The Joint Memo also distinguishes cases from other jurisdictions because those cases arose in the context of whether communications cables could be installed on electricity poles, similar to the issue the Commission decided in *SegTEL, Inc., Request for Arbitration Regarding Failure to Provide Access to Utility Poles by Public Service Company of New Hampshire*, Order No. 25,090 at 21-24 (April 7, 2010) (*SegTEL*). The Joint Memo points out that courts are split on the issue of apportionment, with some not permitting apportionment even when the use is within the scope of the easement, and others allowing apportionment subject to a finding that the apportionment did not increase the burden on the servient tenement. Joint Memo at 8-9.

With regard to easements acquired by eminent domain, the Joint Memo argues that a utility's rights to use property, once condemned, are more limited than they were before electric restructuring and other recent statutory and constitutional changes. *Id.* at 12. In particular, the Joint Memo argues that the policies underlying restructuring require the Commission to monitor companies providing transmission services to ensure no supplier has an unfair advantage, to promote non-discriminatory open access to the electric system, to promote competition for the

benefit of consumers, and to be vigilant against the exercise of vertical market power. *Id.* at 13 (citing RSA 372-F:1, I and RSA 372-F:3, IV and V).

The Joint Memo also argues that Article 12-a of the N.H. Constitution was enacted to provide additional protection against the taking of private property for private development by making clear that any taking, direct or indirect, cannot be used to support private development. Joint Memo at 13-15. According to the Joint Memo, to remain consistent with the N.H. Constitution and case law interpreting the N.H. Constitution, “any subsequent use by Eversource of the properties condemned in the 1950s must be for a public purpose and consistent with the scope and purpose of the original taking.” *Id.* at 16-17. In addition, the Joint Memo asserts that a 2012 amendment to RSA 371:1 requires that any subsequent use of the easements taken by eminent domain must be for a transmission project that is required for the reliability of the system and therefore eligible for cost allocation by ISO-New England. *Id.* at 18. The Joint Memo argues that the changes to statute and the constitution create a new test for the subsequent use of properties that have been taken by eminent domain. According to the Joint Memo, the use of those properties must be (1) for a public purpose; (2) consistent with the original scope and terms of the condemned properties; and (3) deemed necessary for reliability and eligible for regional cost recovery. The Joint Memo concludes that using the easements for a project not based on system reliability would overburden the original taking and constitute an indirect taking for private purposes.

C. Lagaspence

Lagaspence begins its argument with the assertion that facial reviews are meaningless and that property rights must be adjudicated in the court system. Memoranda of Law of Intervenors Kevin Spencer and Mark Lagasse dba Lagaspence Realty, LLC (Lagaspence Memo)

at 1. Lagaspence ends its argument by stating that it has brought a declaratory action in the United States District Court for the District of New Hampshire to determine its property rights in connection with the proposed Lease between Eversource and NPT.

In between, Lagaspence argues that property rights are not determined by the phrase “successors and assigns” but by the language of the grant instrument and the intent of the parties at the time of the grant. According to Lagaspence, the interpretation of an easement deed is a question of law to be decided without reference to extrinsic evidence of intent if the language of the deed itself is clear and unambiguous. *Id.* at 2 (citing *Lussier; Ettinger v. Pomeroy Limited Partnership*, 166 N.H. 447, 449-450 (2014); *Flanagan v. Prudhomme*, 138 N.H. 561. 556 (1994)). Lagaspence claims that discovery must be permitted to determine the purpose of the easements when they were acquired. Lagaspence asserts that the purpose of the easements was to bring electricity to rural New Hampshire, and not to import electricity from Canada for sale into neighboring states on the wholesale market. Lagaspence Memo at 2-3. Lagaspence also asserts that, notwithstanding the language of an easement deed, an easement may not be used in an unreasonable manner that materially increases the burden on the servient estate or that imposes a new or additional burden outside the reasonable expectations of the parties at the time of the easement’s creation. *Id.* at 2. Lagaspence argues that these principles of interpretation apply equally regardless of whether easements are obtained by negotiation or by eminent domain.

Finally, Lagaspence asserts that Eversource is taking a position on the interpretation of easements in this docket that is contrary to the position that Eversource took in *SegTEL*.

D. McKenna's Purchase and the Deerfield Intervenors

McKenna's Purchase and the Deerfield Intervenors with Robert Cote and Bruce Adami (McKenna and Deerfield) share the same attorney and submitted substantially similar memoranda of law. They argue that easements in gross are not alienable and cannot be rendered alienable by including the term "successors and assigns" in the deed. Memorandum of Intervenor McKenna's Purchase (McKenna's Memo) at 1-2; Memorandum Bradbury, Menard, Berglund, Cote, and Adami (Deerfield Memo) at 1-2. They argue that *Cross v. Berlin Mills Co*, 79 N.H. 116 (1918), and *Arcidi v. Rye*, 150 N.H. 694 (2004), both cases relied upon by Eversource, are distinguishable from the issues in Eversource's filing, and do not stand for the proposition that easements in gross are alienable. Instead, they assert that the New Hampshire Supreme Court confirmed that easements in gross are not alienable in *Arcidi*, where the court stated that "[a]n easement in gross is also a nonpossessory right to the use of another's land, but it is a mere personal interest." McKenna and Deerfield also cited *Burcky v. Knowles*, 120 N.H. 224(1980), where the court stated that "[a]n easement in gross is also an incorporeal, nonpossessory right to the use of another's land, but it is a mere personal interest." McKenna's Memo at 2-3; Deerfield Memo at 2-3. According to McKenna's Purchase, there is no contrary New Hampshire law, and these statements by the Supreme Court are controlling in this case. *Id.* at 3.

With regard to divisibility of easement rights, McKenna and Deerfield point out that the only New Hampshire cases that allow dividing or apportioning easements relate to dominant estates and appurtenant easement rights. They state that there are no New Hampshire cases that hold that easements in gross may be divided or apportioned. McKenna's Memo at 3-4; Deerfield Memo at 3-4.

Last, these parties argue that the “rule of reason” test, which focuses on the specific facts and circumstances of a particular situation, must be applied to balance the rights of an easement holder against the rights of the servient estate. McKenna and Deerfield reserved their rights to contest the rights granted to NPT under the lease pursuant to the rule of reason. McKenna’s Memo at 4-5; Deerfield’s Memo at 4-5.

III. COMMISSION ANALYSIS

At the outset, we emphasize that our review here is limited. We need only determine (1) whether to apply different level of review to easements obtained by eminent domain, (2) whether Eversource has made a prima facie showing that it owns the easements it intends to lease to NPT, and (3) whether anything on the face of the easement deeds would prohibit their divisibility and lease to NPT as a matter of law. We conduct this review only as a predicate to our subsequent review of the merits of the lease under RSA 374:30. We cannot, and do not, attempt to determine such matters as whether Eversource’s easements are exclusive, and whether the uses proposed in the lease would overburden the easements. Such determinations of individual property interests are the province of the Courts.

The first question is whether to apply a different level of review to Eversource’s lease of easement rights obtained by eminent domain. We see no reason to treat the three easement deeds obtained by eminent domain differently from deeds obtained through negotiation. The owners of these servient estates, like the owners of all other servient estates, remain free to establish their individual property rights and challenge the transfers in court.

Next we address whether Eversource owns the easements that it intends to lease to NPT. To support its rights of ownership, Eversource provided, at the request of the Commission, copies of the easement deeds that are the subject of the lease. Those deeds evidence over five

hundred fifty easements from individual landowners, towns, and the State of New Hampshire. The easements, for the most part, contain the same language in the grant.⁴ The easement deeds all give Eversource the right, in perpetuity, to use the easement to transmit electricity and to construct the necessary towers, poles, wires, and other necessary appurtenances for that purpose. None of the easement deeds contains explicit language reserving to the grantor the right to use the right-of-way for a similar purpose (the transmission of electricity). Based on the foregoing, we conclude that Eversource has made the requisite prima facie showing that it owns the transmission easements that it intends to lease to NPT.

Regarding the division and transfer of Eversource's easement rights, despite briefing on these issues and our own review of case law, we find no case on point in New Hampshire governing the issue whether utility easements in gross are divisible and transferable. Likewise, the Commission's order in *SegTEL* does not address this issue. In that case, the Commission did not need to reach the issues of divisibility and transferability because it was able to determine from the face of the deed that Eversource did not own an easement to run lines for telecommunications and information services. *SegTEL*, Order No. 25,090 at 23-24.

We are aware of the published restatements of the law, which many courts, including the New Hampshire Supreme Court, sometimes turn to for guidance. The Restatement of Property evidences a trend away from any common law notion that easements in gross are not transferrable. Specifically, Section 489 of the Restatement of Property from 1944 provides that "Easements in gross, if of a commercial character are alienable property interests." Restatement (First) of Property §489 (1944). The third restatement now reads: "A benefit in gross is freely transferable." Restatement (Third): Servitudes §4.6(1)(c) (2000). While we are not in a position

⁴ One easement deed includes a "no towers" restriction. *See* Easement deed of George B. Dean of New Hampton, dated September 1, 1928.

to determine how the New Hampshire Supreme Court would rule, we find nothing on the face of the deeds that would render Eversource's easements inalienable.

The situation is similar with regard to divisibility and Eversource's lease of less than all of its rights in each easement. While we are not aware of any controlling law here in New Hampshire, the Restatement (Third) of Property provides that:

§5.9 Division of Benefits in Gross

Transferable benefits in gross may be divided unless contrary to the terms of the servitude, or unless the division unreasonably increases the burden on the servient estate.

Restatement (Third) of Property: Servitudes §5.9 (2000). If this is an accurate statement of how the New Hampshire Supreme Court would rule, we believe it creates a rebuttable presumption in favor of divisibility. The presumption can be overcome by a showing that divisibility is contrary to the terms of a deed, or by a showing that divisibility would overburden the servient estate. Regardless, we lack the jurisdiction to determine individual property rights, and are not empowered to determine the rights of the individual owners of the more than 500 servient estates. Consequently, we are not able to conclude that Eversource's easements are not transferable and divisible.

Based on the foregoing, we find that nothing in the easement deeds, on their face, bars Eversource from dividing and leasing a portion of its easement rights to NPT for the purpose of transmitting electricity. Therefore, we find no barrier to moving forward with our consideration of the terms of the proposed lease and the valuation of the easement rights granted thereby, to determine whether the lease is for the public good as required by RSA 374:30.

We direct Staff to work with the parties to develop a procedural schedule for this proceeding with the goal of having a final order by year's end, if possible. Finally, we grant the

intervention request of Mr. Cote and Mr. Adami, provided that their intervention be limited to the issues before the Commission and not the underlying property rights issue.

Based upon the foregoing, it is hereby

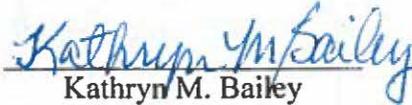
ORDERED, that the review of the proposed lease of easement rights by Eversource to NPT may proceed; and it is

FURTHER ORDERED, that Staff shall work with the parties to develop an appropriate procedural schedule for the proceeding.

By order of the Public Utilities Commission of New Hampshire this sixth day of April, 2017.

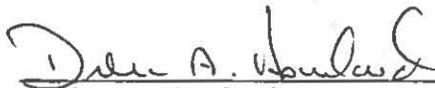


Martin P. Honigberg
Chairman



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director