SB361
Chaptered Law 220, Laws of 2012

An act establishing a commission to study the feasibility of establishing energy infrastructure corridors within existing transportation rights-of-way and repealing a commission.

In adopting SB361, the legislature found that the state would be well-served by determining whether it is feasible to use existing transportation rights-of-way to serve as locations for utility infrastructure, including underground installations.

SB361 established this commission (the "Commission") to conduct a feasibility study, and, if warranted, to recommend a process by which appropriate energy infrastructure corridors on existing state transportation rights-of-way should be identified for specific utility facilities and a process by which bidding for these corridors and revenue for the annual use of the corridors would be established.

SB361 established that the Commission has no regulatory or supervisory authority over the planning, siting, construction, or operation of any past, present, or future power transmission or energy infrastructure project.

This is the Final Report of the Commission. This report summarizes the Commission's process in discharging its duties under SB361. The report then sets forth the Commission's findings and recommendations.

FINAL REPORT

SB361 established a commission (the "Commission") pursuant to RSA 362:G as follows:

362-G:1 Definitions. –
In this chapter:
I. "Energy infrastructure" includes electric transmission and distribution facilities, natural gas transmission lines, carbon dioxide pipelines, petroleum pipelines, and other energy transport pipelines or conduits.
II. "Energy infrastructure corridor" means a transportation right of way on an existing state-owned transportation right of way within which energy infrastructure could potentially be sited underground or aboveground.
III. "Potential developer" means a person that can demonstrate to the state the financial and technical capability to engage in the development and construction of energy infrastructure.
IV. "Project" means the development or construction of energy infrastructure within an energy infrastructure corridor.
V. "State-owned" means owned by the state or by a state agency or state authority.

362-G:2 Commission to Study the Feasibility of Establishing Energy Infrastructure Corridors Within the Existing Transportation Rights-of-ways. –

I. There is established a commission to study the feasibility of establishing energy infrastructure corridors within the existing transportation rights-of-ways.

II. The members of the commission shall be as follows:

(a) One member of the senate, appointed by the president of the senate.

(b) Three members of the house of representatives, appointed by the speaker of the house of representatives.

(c) The director of the office of energy and planning, or designee.

(d) The commissioner of the department of administrative services, or designee.

(e) The commissioner of the department of transportation, or designee.

(f) The commissioner of the department of environmental services, or designee.

(g) The commissioner of the department of resources and economic development, or designee.

(h) The chairman of the public utilities commission, or designee.

(i) The commissioner of the department of revenue administration, or designee.

III. Legislative members of the commission shall receive mileage at the legislative rate when attending to the duties of the commission.

IV. The commission shall identify the feasibility of using state-owned transportation corridors for energy infrastructure and, if the commission finds the use of transportation corridors feasible for such use, shall specify which corridors are most appropriate for specific utility infrastructures. The commission's assessment of feasibility shall consider, but shall not be limited to the following issues:

(a) Whether such corridor or corridors materially enhance the delivery of electricity or other utilities, or both, to New Hampshire consumers and increase the reliability and security of the electricity distribution system in the state.

(b) The identification of the corridors.

(c) The identification of available technologies.

(d) The identification of the costs of available technologies.

(e) Whether there would be long-term economic benefits for the state, including, but not limited to, direct financial benefits from leasing rights-of-ways; employment opportunities; and private sector economic development.

(f) What the effects of such corridor or corridors are on the retail price of electricity or other utilities, or both, to businesses and residential ratepayers.

(g) A process design to assure the efficient development of such corridor or corridors by energy distribution companies serving the state.

(h) What actions need to be taken to assure that conflict with the public purposes for which such rights-of-way are already owned is minimized.

(i) Circumstances where eminent domain might be used to complete an otherwise incomplete energy infrastructure corridor.

V. Chairperson; Quorum. The members of the commission shall elect a chairperson from among the members. The first meeting of the commission shall be called by the first-named senate member. The first meeting of the commission shall be held within 45 days of the effective date of this section. Six members of the commission shall constitute a quorum.

VI. Report. The commission, after public hearings, shall report its findings and any recommendations for proposed legislation to the president of the senate, the speaker of the house of representatives, the senate clerk, the house clerk, the governor, and the state library on or before December 1, 2012.

THE COMMISSION'S PROCESS

The Commission met on August 2nd, 16th and 30th, September 6th, 20th, and 27th, October 4th, 11th and 25th and November 1st, 15th, and 26th. A summary of public session input is attached. The Commission invited a broad range of testimony from government, industry, engineering and policy perspectives. The parties providing formal testimony (in person and written) to the Commission included George McCluskey, NH PUC, Charles Schmidt., PE, Administrator, NH Department of Transportation, N. Roger Rosenqvist, VP Business Development of ABB (Power Systems Division, Raleigh NC), Michael S. Giaimo, Esq., External Affairs, ISO New England and Eric D. Johnson, Director, External Affairs, ISO New England, Joseph M. Rossignoli, Director, U.S. Business Development, National Grid; Nabil Hitti, Director, FERC, Network Strategy National Grid; Gil Paquette, C.W.B., P.W.S., Principal TRC; Donna Gamache, Director, Governmental Affairs at Public Service of New Hampshire/Northeast Utilities and Joseph Staszowski, Director, NEPOOL and ISO Relations, Northeast Utilities; Mark A. Lambert, Director, Government Affairs, Unitil Service Corp.; Randall S. Knepper, P.E., Director of Safety and Security Safety Division, Via Teleconference Kenneth C. Fletcher, Director of the Governor's Energy Office in Maine, Michael Iacopino of Brennan, Caron, Lenehan & Iacopino, outside counsel for Site Evaluation Committee, Michael Pillsbury, Deputy Commissioner, NH Dept of Transportation, Stephan Hamilton**,** Dir. of Property Appraisal Division, Benoit Lamontagne, NH DRED Industrial Agent, Karen Rantamaki, Energy Manager, NH Dept of Admin. Services, Timothy Drew, Administrator, Dept of Environmental Services, Dr. G.P. Campbell McLaren, MD, FACEP of Littleton Regional Hospital and Dennis Pinski, Health Risk Assessment Supervisor, Department of Environmental Services**,** Susan Schibanoff, Managing Partner, Responsible Energy Action, LLC, Ann Ross, General Counsel, Public Utilities Commission, Susan Thorne, Administrator, NH Office of Energy and Planning, Andrew Smith, CCIM, Broker/Owner, Peabody & Smith Realty, Inc., Carolyn O'Connor, Director of External Affairs and Communications, Hydro-Quebec, Christophe Courchesne, Staff Attorney, CLF New Hampshire, Donald J. Pfundstein, Esq. Gallagher, Callahan & Gartrell, P.C., Robin Comstock, President and CEO, Greater Manchester Chamber of Commerce, Joint letter from Appalachian Mountain Club, Conservation Law Foundation, Conservation New Hampshire, The Nature Conservancy (NH Chapter), and the Society for the Protection of New Hampshire Forests, letter

from Responsible Energy Action, LLC, letter from Paul Conboy, Chichester, email dated 11/26/12 from Rep. Cali-Pitts, 11/28/12 email from Michael Giaimo, ISO-NE. Approximately 27 members members of the public spoke at the Commission's two public sessions held on November 7 and 14, in Concord and Plymouth respectively. The minutes of the Commission meetings and other documents relating to the Commission's proceedings are available at the NH State Library after December 1, 2012.

The members of the Commission are sincerely appreciative for the testimony and public comments provided to the Commission.

FINDINGS

The Commission was able to gather a substantial body of information relative to feasibility of using existing state transportation rights-of-way for energy infrastructure corridors. However, important gaps remain in the Commission's fact-finding efforts.

The Commission's findings and observations are as follows:

1. It appears that a number of energy projects (transmission and generation) are proposed for New Hampshire. While the NH Public Utilities Commission (PUC) does participate in planning processes run by the Independent System Operator of New England (ISO NE) and at NEPOOL, ultimate decision-making on the siting of energy projects rests with the State. Studying the inter-related factors which shape our energy infrastructure and its potential corridors has highlighted the need for a comprehensive framework for evaluating, planning and regulating such projects, to ensure not only a complete understanding of projects' technical, economic and legal feasibility, but also the assurance that the project serves a larger public benefit.

   Some current transmission proposals would use New Hampshire essentially as a "through-path" to link generation capacity located outside New Hampshire with demand load centers also located outside New Hampshire. These projects raise substantial questions as to the relative benefits and burdens for the state. The Commission understands and appreciates the important regional elements of energy policy, planning and infrastructure. The Commission also heard testimony that it is incumbent upon the State of New Hampshire to take charge and formulate a state energy policy regarding new energy infrastructure that strikes the right balance between the benefits and burdens to New Hampshire, while recognizing that the Interstate Commerce Clause and other provisions of the US Constitution and Federal Law will also be important factors in addressing these issues.

2. The vast majority of state-maintained highways are constructed on easement rights-of-way. In such cases the State does not own the underlying land in fee. In fact, prior to 1992 land acquired via eminent domain (except for Limited Access Right of Way [i.e. interstate and divided highways]) were required to be taken as an easement for transportation purposes only. The use of these easement rights-of-way by the NH Department of Transportation (DOT) is restricted to construction, maintenance and operation of the roadway, which may impair their ability to identify these as potential locations of energy infrastructure corridors without further legislation.

   Limited access rights-of-way (interstate, turnpike and divided highways) are the only roadways where the state owns the underlying land in fee. In accordance with RSA 236:18, the state has the exclusive rights insofar as they do not conflict with any federal statute to build, lease, or utilize for any public purpose the air space directly above or below the toll highways and the interstate system highways within the state. These limited access rights-of-way could be available for use as energy infrastructure corridors.

   For the purposes of this report, the DOT has identified four highway corridors as possible energy infrastructure corridors. The DOT considered several factors in identifying these corridors, including but not limited to:

   - a continuous corridor of significant length that is owned in fee by the state
   - a corridor that provides connectivity with adjoining states
   - corridors that are wide and well-defined
   - corridors which are relatively free of existing energy infrastructure

   The corridors identified include I-89 (between the intersection of I-93 and the Vermont border); I-93 (between the Massachusetts border and the Vermont border); I-95 (between the Massachusetts border and the Maine border); and NH Route 101 (between the intersection of I-93 and the intersection of I-95). These State-owned transportation rights-of-way, and potentially others, could be used to locate underground energy transmission corridors.

   There are 516 miles of State-owned railroad corridors within the State. Active railroad operations occur on 202 miles of the 516 miles. Abandoned or inactive State-owned railroad rights-of-way may be potential candidates for siting energy infrastructure while recognizing the statutory requirement of RSA 228:60-a, paragraph I: “no railroad right-of-way in this State shall be used for any purpose that would unreasonably limit the ability to restore rail service over the right-of-way at minimum cost if such service were to be required in the future.” Additionally, notwithstanding RSA 228:60-a, paragraph V, additional title and legal research may be needed to clarify the ownership rights of the underlying property. Further research is needed to identify railroad rights-of-way which could be used as energy infrastructure corridors.

3. Underground transmission technology is being used extensively throughout the U.S. and internationally.

4. Testimony suggests that underground corridors may increase the reliability and security of the electric transmission system.

5. Questions of technical and financial feasibility of underground transmission technology are typically site and project-specific to a significant extent. However, testimony suggests that underground transmission facilities on appropriate State transportation rights-of-way may be technically and financially competitive with other transmission designs and locations.

6. At least two pending interstate electric transmission projects in the New England/New York region have been designed with underground transmission lines located on state-owned transportation rights-of-way, indicating this approach can be technically and financially viable.

7. At least one New England state (Maine) has developed a general framework for making state-owned transportation rights-of-way available to transmission developers, including provisions for the nature and amount of compensation to be paid to the state.

8. Through testimony received at the Commission meetings, it is clear that other states are considering and implementing proactive policies to make state-owned transportation rights-of-way available for transmission infrastructure development. NH is deficient in this area, and is without any process for considering such development.

   Commission members differed on their view of the Site Evaluation Committee's effectiveness. Recorded votes follow each version (9a. vs. 9b).

9. (a) The Site Evaluation Committee (SEC) was established by the Legislature for the purpose of providing a procedure "for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities." The Legislature in establishing the SEC recognized that the siting of energy facilities, including high voltage transmission lines and natural gas pipelines, would have a significant effect on the State, including impacts to the economy and the environment and the overall welfare of the people of New Hampshire and that it was in the public interest to maintain a balance between the need for new energy facilities and the environment.

   As specified in RSA 162-H, the SEC, before issuing its approval for a proposed energy facility, must consider available alternatives and fully review the environmental impact of the

site or route. It must also find that the site and facility "will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies" and that the site and facility "will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety." *Supporting version 9a): Steve Hamilton, DRA; Tim Drew, DES; Rep. Cali-Pitts; Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki.*

or

9.(b) New Hampshire's current Site Evaluation Committee (SEC) framework was designed before the relatively recent regulatory changes that provide the potential for multiple, competing and overlapping private transmission proposals subject to only limited regulatory review and essentially no regional planning. While the SEC framework appears to work for transmission projects subject to the full regional planning process and determined to be necessary by ISO-New England (ISO-NE) for system reliability, the SEC framework fails to serve the State as applied to optional, private transmission projects. The State needs a more robust review process for such "merchant" projects, to assure that the best interests of citizens and ratepayers are being served. *Supporting version 9b): Rep. Simard, Senator Forrester; Rep. Rappaport*

10. State agencies do not enact legislation and thus do not set legislative policy. As a result, the state agencies on the SB 361 Commission have expressed a reluctance to take advocacy positions on any public policy recommendations that the Commission might consider.

    An additional hurdle faced by those State agencies assigned roles on the SEC, RSA 162-H, was their need to remain neutral on specific energy infrastructure projects which might come before the SEC for site approval. RSA 162-H requires that the SEC hold adjudicative proceedings to consider applications for energy facilities, including electric and gas transmission facilities. RSA 162-H:10, II. When conducting adjudicatory proceedings, agencies must: 1) refrain from communications about the applications outside of the proceeding, 2) refrain from pre-judging issues coming before them for hearing, and 3) remain impartial in order to render a decision which is fair to the participants and affords all parties due process. RSA 541-A:36.

    S*enator Forrester asked state agencies, given Finding #10, if they would like to recuse themselves from voting on the Recommendations. All state agencies voted not to recuse themselves from voting on the Recommendations (Steve Hamilton, DRA; Tim Drew, DES Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki)*

11. There were two public hearings on the draft report, and a summary of public comments include:

    - NH's landscape is unique, has great social and economic value and must be protected from ill-considered development, including energy infrastructure. Current law, policy, and regulatory structures related to energy transmission have gaps which leave our landscape and the way of life it supports unacceptably vulnerable. The Commission is asked to address these gaps through its study and recommendations. The public expressed concerns about the impact of energy infrastructure development on property values.

    - NH needs a comprehensive energy plan.

    - Improved means to more comprehensively evaluate and control proposed energy transmission and generation projects are urgently needed. Many citizens requested a moratorium.

    - Undergrounding power transmission is seen as preferable to overhead power for several reasons—visual and electro-magnetic field protection. Exemplary projects in neighboring states were cited.

12. The Commission was unable to secure necessary testimony and information to provide a definitive answer to the following:

    - The identification of the costs of available technologies. (The Commission notes that testimony suggests that the use of State transportation rights-of-way for underground transmission infrastructure may be cost-competitive with other designs and locations in specific circumstances. However, more data needs to be gathered on this point.)

    - Whether there would be long-term economic benefits for the State, including, but not limited to, direct financial benefits from leasing rights-of-ways; employment opportunities; and private sector economic development. (The Commission notes that a grant by the State to a transmission developer for permission to use State transportation rights-of-way for transmission development could provide economic and financial benefits to the State and the construction of such transmission infrastructure could create employment opportunities and private sector economic development. However, more data needs to be gathered on this point.)

    - What the effects of such corridor or corridors are on the retail price of electricity or other utilities, or both, to businesses and residential ratepayers. (The Commission notes that the price effect of transmission projects are difficult to quantify and are

highly project specific. However, the Commission believes that more firm numbers on this point would be beneficial.)

- A process design to assure the efficient and fair development of such corridor or corridors by energy companies serving the State. (The Commission notes that it has obtained information regarding the design of the comparable process in Maine, but more work is needed to develop a New Hampshire-specific framework.)

- What actions need to be taken to assure that conflict with the public purposes for which such rights-of-way are already owned is minimized? (The Commission notes that the DOT has identified four State-owned transportation rights-of-way as viable for transmission infrastructure development, however a detailed level of design review is required to determine the suitability of co-location within each corridor.)

- Circumstances where eminent domain might be used to complete an otherwise incomplete energy infrastructure corridor. (The Commission notes that it has not yet addressed this topic pending completion of the basic feasibility analysis.)

CONCLUSION

The Commission has studied both the web of systems linked to energy infrastructure development, such as technical, regulatory, economic, aesthetic and environmental, as well as the details of system components such as underground transmission lines or permitted uses of rights-of-way. The knowledge and understanding gained affirms that evaluating feasibility is complex and will require more study before a comprehensive and thorough determination can be made on most aspects of the Commission's charge. The Commission is prepared to offer the following recommendations at this time. Each recommendation is followed by a recorded vote of the Commission members.

Prior to taking the vote, Senator Forrester made the following comments:

- *As an elected official, my priority, my responsibility, is to my constituents. I have heard loud and clear their concerns about what could potentially happen to New Hampshire's beautiful vistas and landscapes with uncontrolled predatory development. It is exactly why the 361 Commission was created—to look at the feasibility of creating underground energy corridors—we haven't finished that work and until we do, it is appropriate to ask for a moratorium on projects that are not needed for reliability that have the potential to ruin our landscape until this work has been completed. To ignore comments from the public is irresponsible.*

- *I think we can all agree that we want to protect NH's scenic and natural landscapes, which are an extremely valuable resource for our people and our economy. And a one-year moratorium on elective projects will give the time needed to complete the task of finding out if underground energy corridors are feasible.*

- *I agree with Governor-elect Maggie Hassan's observation that "we must protect the scenic views of the North Country, which are vital to our tourism industry." And I also agree with her that "any proposal that would damage scenic views must be subject to a rigorous review process."*

Senator Forrester asked the full Commission to vote on the recommendations. A recorded vote follows each recommendation.

RECOMMENDATIONS

1. The Commission recommends that legislation be proposed that gives the Governor the authority to create a task force on underground and above-ground energy corridors including, but not limited to, that defined under 362-G:1. The task force shall include membership representing utility ratepayers, the business community, the conservation community, legislators, State and municipal government, and the utility industry. This would ensure that the full range of perspectives is engaged in this process to obtain the needed knowledge and draft appropriate legislation. This task force should be charged with answering the following questions:

    - What are the costs of underground electric transmission technologies (like ABB's HVDC light technology) as the technology may be applied to use in New Hampshire?

    - Are there long-term economic benefits to the State for leasing rights-of-way for energy infrastructure, including, but not limited to, direct financial benefits from leasing rights-of-ways; employment opportunities; and private sector economic development?

    - If such corridors were leased by the State, what are the economic benefits and costs to electricity ratepayers in NH?

    - If New Hampshire were to develop a process to assure the efficient and fair development of such corridor or corridors by energy companies serving the state, how would it be designed to assure that the public interest is served and that the process is open to fair competition?

    - What actions need to be taken to assure that conflict with the public purposes for which such rights-of-way are already owned is minimized?

- Are there any circumstances where eminent domain might be used to complete an otherwise incomplete energy infrastructure corridor?

- If existing State-owned rail corridors could be included as potentially viable for underground energy corridors.

- Do existing statutes fully address impacts on valuable New Hampshire landscapes.

Voting "Yes": Steve Hamilton, DRA; Tim Drew, DES; Rep. Simard; Senator Forrester; Rep. Rappaport; Rep. Cali-Pitts; Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki.

2. Legislation should be introduced to require merchant or elective (non-reliability) electric transmission projects applying for a 162-H certificate from the SEC shall be required to provide a proposal for an underground alternative if it is proposing to build new overhead transmission lines. This would ensure that the SEC could fully consider requiring an underground alternative where detailed analysis indicates that such an alternative is available and serves the public interest.

   Voting "No": Steve Hamilton, DRA; Tim Drew, DES; Rep. Cali-Pitts; Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki. General comments: Not within the scope of the Commission.
   Voting "Yes": Rep. Simard, Senator Forrester, Rep. Rappaport
   General comments: Not outside the scope of the Commission. Support the finding 9b that says SEC needs a more robust review process to address elective projects.

3. The Legislature should enact a one-year moratorium on any new applications to the Site Evaluation Committee for electric transmission projects which have not been determined to be reliability projects by ISO-NE. This is to provide the Governor's task force recommended above one year to complete its charge.

   Voting "No": Steve Hamilton, DRA; Tim Drew, DES; Rep. Cali-Pitts; Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki.
   General comments: Not within the scope of the Commission.
   Voting "Yes": Rep. Simard, Senator Forrester, Rep. Rappaport
   General comments: Not outside the scope, findings acknowledge that work is not done and this will give task force time to complete its work first.

4. The State of New Hampshire should develop a comprehensive state energy policy, a policy which includes a more robust regulatory review process of energy projects. This

state energy policy should take into account projects' impacts, including but not limited to the State's economy and its landscapes.

Voting "No": Steve Hamilton, DRA; Tim Drew, DES; Rep. Cali-Pitts; Mike Pillsbury, DOT; Tom Frantz, PUC; Benoit Lamontagne, DRED; Susan Thorne, OEP; Karen Rantamaki.
General Comments: Not within the scope of the Commission.
Tom Frantz: If the language was more narrow, he could support, acknowledges we need some policy.
Susan Thorne: Recognizes we need to plan, not against the plan, but has to vote no.
Rep. Cali-Pitts: Need a comprehensive plan, but has to vote no.
Voting "Yes": Rep. Simard, Senator Forrester, Rep. Rappaport
General comments: Not outside the scope of the Commission.
Senator Forrester/Rep. Rappaport: Conversations with other legislators, regulators, public indicate a need for a comprehensive energy policy.
Rep. Simard: This matter is important to the Northern part of the state. Public is upset and frustrated and we need to listen to the taxpayers.