

July 9, 2014

Heather Hunt  
Executive Director, NESCOE  
655 Longmeadow Street  
Longmeadow, MA 01106

By email to: Heather Hunt, [HeatherHunt@nescoe.com](mailto:HeatherHunt@nescoe.com)

Re: Public Records Request Appeal

Dear Ms. Hunt:

On March 19, 2014, my colleague, Seth Kaplan, sent you a request for public documents pursuant to Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont laws permitting public access to governmental records. Mr. Kaplan requested copies of the following records related to electric system transmission, gas pipeline capacity, and electricity imports from Canada:

1. All documents<sup>1</sup> created and/or dated after June 30, 2012, concerning<sup>2</sup> communications<sup>3</sup> between New England States Committee on Electricity (“NESCOE”) employees or representatives and employees or representatives of any New England State, the Independent System Operator for New England (“ISO-NE”), the Federal Energy Regulatory Commission (“FERC”), any Electricity Market Participant,<sup>4</sup> or any natural gas transmission or distribution company regarding “New Electric Transmission Infrastructure” as set forth in the NESCOE Letter,<sup>5</sup> including without limitation:

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<sup>1</sup> The term “documents” includes any and all reports, statements, memoranda, analyses, designs, maps, photographs, videotape, microfilms, computer tapes or disks, rules, regulations, codes, handbooks, manuals, operations logs, work orders, notes, equipment purchase receipts, fuel purchase receipts, contracts, meeting minutes, engineering specifications, fuel shipment records, monitoring data, calendars, project schedules, emissions calculations, process modeling, emissions modeling, financial records and analyses, safety records, maintenance records, proposals, graphs, and other data representations.

<sup>2</sup> The term “concerning” means “referring to, describing, offering evidence of, or constituting.”

<sup>3</sup> The term “communications” means the giving, receiving, transmitting, or exchanging of information, including, but not limited to, any and all written correspondence (including facsimiles and e-mail), and any records of printed, facsimile, telephonic, electronic, or other forms of communications, including documents that memorialize or refer to any such communications.

<sup>4</sup> Any ‘Individual Participant’ recognized as such under the February 23, 2011 Restated Participants Agreement Among ISO-NE and NEPOOL and Individual Participants.

<sup>5</sup> The letter dated January 21, 2014, from NESCOE to ISO- NE captioned “Re: Request for ISO-NE technical support and assistance with tariff filings related to electric and natural gas infrastructure in New England.”

- a. All Documents relating to proposals for development of transmission infrastructure;
  - b. All Documents relating to the extent of, need for, reliability impacts of, and locations for development of new transmission infrastructure;
  - c. All Documents relating to the cost(s) of and cost allocation(s) for new transmission infrastructure;
  - d. All Documents relating to electrical system planning by ISO-NE for development of new transmission infrastructure;
  - e. All Documents relating to the development of, requests for and/or filing of tariff changes to facilitate development of new transmission infrastructure;
  - f. All Documents relating to analysis of non-transmission alternatives (NTAs) in lieu of new transmission infrastructure;
  - g. All Documents relating to analysis of greenhouse gas emissions impacts associated with the development of new transmission infrastructure.
2. All documents created and/or dated after June 30, 2012, concerning communications between NESCOE employees and employees or representatives of any New England state, ISO-NE, FERC, Electricity Market Participant, or natural gas transmission or distribution company regarding “Increased Natural Gas Capacity” as set forth in the NESCOE Letter, including but not limited to:
- a. All Documents relating to proposals for increased natural gas pipeline capacity into New England;
  - b. All Documents relating to the extent of, need for, reliability impacts of and locations for development of increased natural gas pipeline capacity into New England;
  - c. All Documents relating to the cost(s) and cost allocation(s) for the procurement of new pipeline capacity into New England;
  - d. All Documents relating to the development of, requests for, and/or filing of tariff changes for recovery of the cost of any such procurement of increased pipeline capacity through the electricity Regional Network Services rate, or by any other means;
  - e. All Documents relating to analysis of alternatives to new or increased pipeline capacity, including, without limitation, energy efficiency;
  - f. All Documents relating to analysis of greenhouse gas emission impacts associated with the development of increased pipeline capacity into New England, including any analysis or request for information regarding fugitive emissions.
3. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between NESCOE employees and employees or representatives of any New England State, ISO-NE, FERC, Electricity Market

Participant, or natural gas transmission or distribution company regarding electricity imports from Canada, including but not limited to:

- a. All Documents relating to any proposed project to import hydropower from Canada including but not limited to the Northern Pass project;
- b. All Documents constituting, memorializing, or otherwise relating to communications relating to hydropower purchases from Canada between Department employees and any officials, employees, or representatives of the Province of Quebec; Hydro Quebec; Hydro Renewable Energy, Inc.; HQ Energy Services (US), Inc.; Northeast Utilities; Northern Pass Transmission, LLC; and NU Transmission Ventures, Inc.
- c. All Documents relating to the costs to import and/or the financial terms applicable to importation of hydropower from Canada;
- d. All Documents relating to eligibility of hydropower from Canada under the Renewable Portfolio Standard or Renewable Energy Standard of any New England State.
- e. All Documents relating to the development of requests for, and/or filing of tariff changes for purposes of importing hydroelectricity from Canada.
- f. All Documents relating to analysis of greenhouse gas emissions impacts associated with the importation of hydroelectricity from Canada.

In response, on April 15, 2014, you wrote to Mr. Kaplan and informed him that “NESCOE is not subject to the statutes you reference.” You directed him to instead direct his records request to the various New England state agencies to whom we had also sent records requests.

State law requires NESCOE to permit public access to governmental records. This letter serves as our appeal of that determination. *See e.g.*, 1 V.S.A. § 318(c)(1)(any denial of access by the *custodian of a public record* may be appealed to the head of the agency)(emphasis added). CLF received some but not all NESCOE records through its document requests to the various states (as referenced in your April 15 letter) but seek a complete set of records responsive to the above categories from you. CLF also appealed to Chris Recchia and the Vermont Governor’s office the denial of access to records requested from the Vermont Public Service Department, the Vermont Governor’s office and NESCOE.

For any documents that NESCOE withholds under a claim of privilege, CLF requests an individual privilege log so that we may understand how any claim of privilege applies to the withheld document.

Because CLF is entitled to all of the above-requested documents under any one of the state freedom of public access laws, we will – for ease of consideration – concentrate our appeal on analysis of why we are entitled to the records under Vermont law.

NESCOE functions as arm of Vermont State Government

NESCOE functions as an arm of Vermont state government. *See e.g., Governors of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont*, FERC Dt. No. EL04-112-000 (July 7, 2005) (Governors petition FERC in 2004 to form NESCOE to in part investigate and report to New England Governors on policy questions related to siting of interstate transmission facilities); *New England Governors' Commitment to Regional Cooperation on Energy Infrastructure Issues* at p. 2 (directing state staff to work together with NESCOE to take all necessary steps to meet common needs and goals concerning energy infrastructure). Because NESCOE takes direction from the Governor of Vermont to perform governmental work with respect to energy infrastructure – a role inherently reserved to state authority – it is obligated to comply with Vermont's access to records laws. *See, e.g., Prison Legal News v. Corrections Corp. of America*, No. 332-5-13 Wncv (Vt. Sup. Ct., Jan. 10, 2014).

In the *Prison Legal News* (PLN) case, plaintiff had served a request for public records on defendant private corporation CCA, which housed Vermont prisoners in out-of-state facilities under contract with the Vermont Department of Corrections. *PLN*, No. 332-5-13 Wncv at p. 1. Like NESCOE, CCA refused to answer the request, asserting that it was not subject to the Access to Public Records Act. *Id.* at 3-4. PLN ultimately appealed that determination to the superior court (the same court that will hear any appeal in the instant case), which held that CCN performs a uniquely governmental function which it could not perform without governmental authority. It therefore functioned as the equivalent of a public agency subject to the Act. *Id.* at p. 11. Notably CCN performed this same function for other states at the same time that it performed the functions for Vermont.

Vermont law mandates that "custodian of public record" shall promptly produce records

Vermont's Access to Public Records law strongly reflects a policy of free and open examination of public records. 1 V.S.A. § 315. The Act must be liberally construed to affect this policy. *Id.* It defines a "public record" as "any written or recorded information ... produced or acquired in the course of agency business (1 V.S.A. § 317(b)), and 'public agency' or 'agency' as any "agency, board, department, commission, committee, branch, instrumentality or authority of the State of any agency, board, committee, department, branch, instrumentality, or authority of any political subdivision of the State." 1 V.S.A. § 317 (a)(2). Moreover, the law contemplates that requests may be directed to the "custodian of a public record" (see 1 V.S.A. § 318(a)), rather than to the head of an agency. *See also Prison Legal News*, Dt. No. 332-5-13 Wncv (request properly directed to private corporation that housed state prisoners rather than to Department of Corrections); 1 V.S.A. § 318(a)(5)(A)(extension of time to respond to a request permissible where need to search for and collect records from field facilities *or other establishments* separate from office where request processed)(emphasis added). Based on the language and intent of the



Act and the *PLN* case, there can be no doubt that NESCOE must comply with our request for records.

For the foregoing reasons, CLF requests that you reconsider your position and provide all documents responsive to CLF's March 19 letter.

Thank you for your attention to this appeal. Please let me know if there is anything I can do to facilitate your response.

Sincerely,

Sandra Levine  
[slevine@clf.org](mailto:slevine@clf.org)

Enclosures:

Public Record Request Appeal to Chris Recchia, Vermont Public Service Department (7/9/14)  
Public Record Request Appeal to Elizabeth Miller, Vermont Governor's Office (7/9/14)

cc: Chris Recchia (Vermont Public Service Department)  
Elizabeth Miller (Vermont Governor's Office)