



For a thriving New England

CLF Vermont 15 East State Street, Suite 4
Montpelier, VT 05602
P: 802.223.5992
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www.clf.org

July 9, 2014

Elizabeth Miller
Chief of Staff
Office of the Governor Peter Shumlin
109 State Street, Pavilion
Montpelier, VT 05609

By email to: Elizabeth Miller, elizabeth.miller@state.vt.us

Re: Public Record Request Appeal

Dear Ms. Miller:

Pursuant to 1 V.S.A. sec. 318(c)(1) Conservation Law Foundation (CLF) appeals the withholding of documents requested by CLF of:

1. the Vermont Governor's Office on March 19, 2014 (request attached); and
2. NESCOE on March 19, 2014 (request attached).

Request of Vermont Governor's office

In response to CLF's request, Ms. London stated in an email dated April 9, 2014:

"I have withheld certain potentially responsive records as exempt from disclosure pursuant to 1 VSA 317(c)(1) and (c)(4) because they are executive privileged communications containing policy advice for the Governor. These are emails: (a) between and among Elizabeth Miller, representing the Governor as his designated NESCOE manager, legal counsel for the Department of Public Service, DPS Regional Policy Director Ed McNamara, the governor-designated NESCOE managers from other states, and NESCOE staff, and (b) emails and weekly reports between and among Elizabeth Miller, in her capacity as Chief of Staff, Chris Recchia as Commissioner of Public Service, other members of the Governor's senior staff, and the Governor. Certain emails also contain attorney-client communications and are exempt pursuant to 1 VSA 317(c)(3) and (c)(4).

If you feel any records have been wrongfully withheld, you may appeal to Elizabeth Miller at Elizabeth.Miller@state.vt.us."

CLF appeals the determination to withhold documents and requests that the withheld documents be provided to CLF. CLF has also filed appeals with Chris Recchia and with Heather Hunt. A copy of those appeals is attached.

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

Policy favors disclosure

The policy of Vermont's Access to Public Records law is "to provide for free and open examination of records." 1 V.S.A. § 315. The access to records law "is to be construed liberally" in favor of the right to access documents. *Finberg v. Murnane*, 159 Vt. 431, 434 (1992); *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 106 (1993). Against this liberal policy, executive privilege only "protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." *Killington v. Lash*, 153 Vt. 628, 636 (1990). The privilege is qualified, not absolute, and requires balancing the interests of confidentiality against those of disclosure. *Id.* at 637-38.

Communications with NESCOE not protected

Documents exchanged between Vermont state employees and NESCOE do not fall within any privilege. Rather than constituting sensitive intragovernmental communications that require a mantle of secrecy, Vermont's communications with NESCOE are, in whole or in part, conducted by employees who are not high-level members of the Governor's office and concern communications with employees of other states that may not share the same decisional interests as Vermont. *See id.* (addressing intragovernmental communications at state level) and *Center for Intern. Env. Law v. Office of U.S. Trade Rep.*, 237 F.Supp.2d 17, 26 (D.C. 2002) (communication between U.S. and another member country of U.S. Trade Rep not privileged because each member promoting own interests despite goal of cooperation). Because each member state of NESCOE has its own interests as its paramount concern, documents shared through NESCOE are not privileged. *Id.*

Documents shared with other states and with VT Public Service Board not protected

Documents exchanged between Vermont state employees and employees of other states as well as documents shared with the Vermont Public Service Board do not fall within any privilege. As with communications with NESCOE, these are not intra or intergovernmental communications requiring secrecy. Other states provided documents in response to CLF record requests that the Department withheld, recognizing that the exchange of documents between states is not protected. *See id.* (no privilege where each member promotes own interest). The Vermont Public Service Board does not serve in a function as a high-level member of the Governor's staff but serves an independent adjudicatory function. 30 V.S.A. §§ 3, 9, 209. Documents shared with the Board are not protected.

Factual information not protected

Executive privilege does not protect documents that contain purely factual data prepared for intra- or inter-office use which would not compromise military or state secrets. *Armstrong Bros. Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (U.S. Cust. Ct. 1979). The withheld documents that contain purely factual information are not protected by executive privilege and should be disclosed.

Need for public access

The large-scale regional policies on transmission and gas pipeline infrastructure that have been and are being considered among the New England states and NESCOE have broad public policy implications extending beyond the executive purview of Vermont's Governor and his close staff. The broad reach of these policies emphasize the need for public access and weigh against any claim of privilege.

Privilege log

CLF requests that you provide all the withheld documents. To the extent the Governor's office continues to claim privilege with respect to certain documents, CLF requests that the withheld documents be specifically identified, including the date, the subject or title of the document, the persons in possession of the document or included in any communication, and the specific privilege claimed for each document.

Request of NESCOE

CLF also appeals to you as the office making the appointment for Vermont to NESCOE, the withholding of documents requested from NESCOE. (See attached request to and response from NESCOE). CLF has also filed an appeal with NESCOE. (Attached)

NESCOE serves a public function and 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). 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). As the office appointing Vermont's representative to NESCOE, CLF requests that you ensure NESCOE's compliance with Vermont's Access to Public Records law so that CLF is provided the records identified in the attached request to NESCOE.



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

Sincerely,

A handwritten signature in black ink that reads "Sandra Levine". The signature is written in a cursive, flowing style.

Sandra Levine
slevine@clf.org

Enclosures:

- CLF Public Record Request to Vermont Governor's Office (3/19/14)
- CLF Public Record Request to NESCOE (3/19/14)
- Response from NESCOE (4/15/14)
- Public Record Request Appeal to NESCOE (7/9/14)
- Public Record Request Appeal to VT PSD (7/9/14)

cc: Chris Recchia (Public Service Department)
Heather Hunt (NESCOE)
Sarah London (Governor's Counsel)



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March 19, 2014

Honorable Peter Shumlin
Office of the Governor
109 State Street, Pavilion
Montpelier, VT 05609

By email to: Elizabeth Miller, elizabeth.miller@state.vt.us
Jeb Spaulding, jeb.spaulding@state.vt.us
Chris Recchia, chris.recchia@state.vt.us
Lawrence Miller, lawrence.miller@state.vt.us
James Volz, james.volz@state.vt.us
Deborah Markowitz, deb.markowitz@state.vt.us

Re: Public Record Request

Dear Governor Shumlin:

This is a public records request pursuant to 1 V.S.A. sec. 315 et seq. The Conservation Law Foundation requests public records related to electric system transmission, gas pipeline capacity, and electricity imports from Canada.

Definitions

For purposes of this request, the following words and phrases are defined as follows:

“Communications” means communication in any form or medium including, without limitation, oral, telephonic, written, e-mail, and electronic communications.

“Document” means any “public record” or “public document” as defined in 1 V.S.A. sec. 317(b) and includes correspondence, letter, paper, record or file kept in any medium, including hard copies, paper copies, and all electronic media; the term “document” specifically includes all e-mail communications.

“Electricity Market Participant” means any ‘Individual Participant’ recognized as such under the February 23, 2011 Restated Participants Agreement Among ISO-NE and NEPOOL and Individual Participants.

“FERC” means the Federal Energy Regulatory Commission.



“ISO-NE” means “Independent System Operator-New England, the Regional Transmission Organization for New England designated and regulated by FERC.

“NESCOE” means the New England States Committee on Energy.

“NESCOE Letter” means the attached 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.”

“Vermont Governmental Representatives” means any person acting for or on behalf of the State of Vermont or any department or agency of the State of Vermont. It includes, without limitation, all elected officials; the staff members of all elected officials; and any employee of any state agency, department, or quasi-governmental entity, including, without limitation, the Vermont Public Service Department, the Vermont Agency of Administration, the Vermont Agency of Natural Resources, the Vermont Agency of Commerce and Community Development and the Vermont Public Service Board.

Documents Requested

1. TRANSMISSION BUILD-OUTS. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Vermont Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding “New Electric Transmission Infrastructure” as set forth in the NESCOE Letter; this includes, without limitation:

- (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. GAS PIPELINE CAPACITY. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Vermont Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding "Increased Natural Gas Capacity" as set forth in the NESCOE Letter; this includes, but is 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.

3. HYDROPOWER. All Documents created and/or dated after June 30, 2012, constituting, memorializing, or otherwise relating to communications between or among Vermont Governmental Representatives and representatives of any other New England state, NESCOE, ISO-NE, FERC, natural gas transmission or distribution companies, and/or Electricity Market Participant regarding hydropower imports from Canada; this includes, but is 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 Vermont Governmental Representatives 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.

Charges for Record Request and Format

CLF recognizes that there may be a charge for providing and compiling the requested records. If possible, please provide this information in electronic format. If you expect costs to exceed \$100.00, please provide an estimate of the charges and allow me to respond before proceeding with fulfilling the request.

Exemption and Privilege Log

To the extent that you claim that any document or communication is exempt from this request due to an exception within the public records law or due to any alleged privilege, kindly provide a log identifying which documents you claim are exempt, specify the exemption or privilege that you are asserting applies, and explain why you believe such exemption or privilege applies to such document or communication.

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

Sincerely,



Sandra Levine
slevine@clf.org

March 19, 2014

VIA ELECTRONIC MAIL AND FIRST CLASS MAIL

Heather Hunt
Executive Director
655 Longmeadow Street
Longmeadow, MA 01106
HeatherHunt@nescoe.com

Dear Ms. Hunt:

Pursuant to the Connecticut Freedom of Information Act, Conn. Gen. Stat. § 1-200 *et seq.*, the Maine Freedom of Access Law, 1 M.R.S.A. § 401, *et seq.*, the Massachusetts Public Records Law, M.G.L. Chapter 66, Section 10, the New Hampshire Right-to-Know Law, N.H. Rev. Stat. Ann. 91-A, the Rhode Island Access to Public Records Act, R.I. Gen. Laws § 38-2-1, *et seq.*, and the Vermont Public Records Law, 1 V.S.A. § 315, *et seq.*, please provide copies of the following records related to electric system transmission, gas pipeline capacity, and electricity imports from Canada:

1. All documents¹ created and/or dated after June 30, 2012, concerning² communications³ 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,⁴ or any natural

¹ 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.

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

³ 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.

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

gas transmission or distribution company regarding “New Electric Transmission Infrastructure” as set forth in the NESCOE Letter,⁵ including without limitation:

- 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.

⁵ 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.”

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.

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To the extent that you claim that any document or communication is exempt from this request due to an exception within a public records law or due to any alleged privilege, please identify which documents you claim are exempt, please specify the exemption or privilege that you are asserting applies, and explain why you believe such exemption or privilege applies to such document or communication.

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

Sincerely,

Seth Kaplan

Vice President for Policy & Climate Advocacy

skaplan@clf.org

(617) 850-1721

New England States
Committee on Electricity

April 15, 2014

Seth Kaplan
Vice President for Policy & Climate Advocacy
CLF Massachusetts
62 Summer Street
Boston, MA 02110

Dear Mr. Kaplan:

We are in receipt of your legal request for records. NESCOE is not subject to the statutes you reference. We understand from your press announcement that you have sent records requests to various New England state agencies, which are the appropriate entities to direct such requests.

As you know from discussions at the New England Power Pool (NEPOOL) Participants Committee earlier this year, New England stakeholders' ideas about the concepts that underlie the Governors' infrastructure initiative, and alternatives to it, are most welcome. The invitation to share your ideas at any time remains. Your constructive substantive inputs could help move preliminary concepts to concrete proposals for NEPOOL's further consideration and, when in final form, to the Federal Energy Regulatory Commission (FERC) for its review and deliberation.

Sincerely,

/s/ Heather Hunt

Heather Hunt
Executive Director
New England States Committee
on Electricity
655 Longmeadow Street
Longmeadow, MA 01106
heatherhunt@nescoe.com



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July 9, 2014

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

By email to: Heather Hunt, 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 documents¹ created and/or dated after June 30, 2012, concerning² communications³ 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,⁴ or any natural gas transmission or distribution company regarding "New Electric Transmission Infrastructure" as set forth in the NESCOE Letter,⁵ including without limitation:

¹ 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.

² The term "concerning" means "referring to, describing, offering evidence of, or constituting."

³ 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.

⁴ Any 'Individual Participant' recognized as such under the February 23, 2011 Restated Participants Agreement Among ISO-NE and NEPOOL and Individual Participants.

⁵ 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,

A handwritten signature in cursive script that reads "Sandra Levine".

Sandra Levine
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)



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July 9, 2014

Chris Recchia
Commissioner,
Vermont Public Service Department

By email to: Chris Recchia, chris.recchia@state.vt.us

Re: Public Record Request Appeal

Dear Commissioner Recchia:

Pursuant to 1 V.S.A. sec. 318(c)(1) Conservation Law Foundation (CLF) appeals the withholding of documents requested by CLF of:

1. the Public Service Department on March 19, 2014 and April 1, 2014 (request attached); and
2. NESCOE on March 19, 2014 (request attached)

Request of Public Service Department

As stated by Mr. Springer in his email response of April 9, 2014:

“The Department has also determined that certain documents in our possession are responsive, but exempt from disclosure under 1 VSA 317 (c)(1) and (4) Executive Privilege. These documents are communications between the Department and the Governor’s Office; communications between Chris Recchia (or his designee) in his role as the Governor’s designated manager for NESCOE, representing the Governor in discussions with other states and their designated gubernatorial-appointed managers; and weekly reports from the Department to the Governor.

The Department also has determined that we have additional documents in our possession that are responsive, but exempt from disclosure under several provisions including 1 VSA 317 (c)(1) and (4) Executive Privilege, 1 VSA 317 (c)(1) (confidential by law), (14) (litigation), and 15 (negotiation of contracts). These include communications regarding FERC and Public Service Board filings, NESCOE contracts, and some analyses regarding regional energy markets.”

CLF appeals the determination to withhold documents and requests that the withheld documents be provided to CLF. For any documents that continue to be withheld, CLF requests an individual privilege log so that we may understand how any claim of privilege applies to the withheld document.

Policy favors disclosure

The policy of Vermont's Access to Public Records law is "to provide for free and open examination of records." 1 V.S.A. § 315. The access to records law "is to be construed liberally" in favor of the right to access documents. *Finberg v. Murnane*, 159 Vt. 431, 434 (1992); *Trombley v. Bellows Falls Union High School Dist. No. 27*, 160 Vt. 101, 106 (1993). Against this liberal policy, executive privilege only "protects and insulates the sensitive decisional and consultative responsibilities of the Governor which can only be discharged freely and effectively under a mantle of privacy and security." *Killington v. Lash*, 153 Vt. 628, 636 (1990). The privilege is qualified, not absolute, and requires balancing the interests of confidentiality against those of disclosure. *Id.* at 637-38.

Communications with NESCOE not protected

Documents exchanged between Vermont state employees and NESCOE do not fall within any privilege. Rather than constituting sensitive intragovernmental communications that require a mantle of secrecy, Vermont's communications with NESCOE are, in whole or in part, conducted by employees who are not high-level members of the Governor's office and concern communications with employees of other states that may not share the same decisional interests as Vermont. *See id.* (addressing intragovernmental communications at state level) and *Center for Intern. Env. Law v. Office of U.S. Trade Rep.*, 237 F. Supp. 2d 17, 26 (D.C. 2002) (communication between U.S. and another member country of U.S. Trade Rep not privileged because each member promoting own interests despite goal of cooperation). Because each member state of NESCOE has its own interests as its paramount concern, documents shared through NESCOE are not privileged. *Id.*

Documents shared with other states and with VT Public Service Board not protected

Documents exchanged between Vermont state employees and employees of other states as well as documents shared with the Vermont Public Service Board do not fall within any privilege. As with communications with NESCOE, these are not intra or intergovernmental communications requiring secrecy. Other states provided documents in response to CLF record requests that the Department withheld, recognizing that the exchange of documents between states is not protected. *See id.* (no privilege where each member promotes own interest). The Vermont Public Service Board does not serve in a function as a high-level member of the Governor's staff, but serves an independent adjudicatory function. 30 V.S.A. §§ 3, 9, 209. Documents shared with the Board are not protected.

Factual information not protected

Executive privilege does not protect documents that contain purely factual data prepared for intra- or inter-office use which would not compromise military or state secrets. *Armstrong Bros. Tool Co. v. United States*, 463 F. Supp. 1316, 1320 (U.S. Cust. Ct. 1979). The withheld

documents that contain purely factual information are not protected by executive privilege and should be disclosed.

Need for public access

The large-scale regional policies on transmission and gas pipeline infrastructure that have been and are being considered among the New England states and NESCOE have broad public policy implications extending beyond the executive purview of Vermont's Governor and his close staff. The broad reach of these policies emphasize the need for public access and weigh against any claim of privilege.

Privilege log

CLF requests that you provide all the withheld documents. To the extent the Department continues to claim privilege with respect to certain documents, CLF requests that the withheld documents be specifically identified, including the date, the subject or title of the document, the persons in possession of the document or included in any communication, and the specific privilege claimed for each document. For any claim of privilege by law separate from executive privilege, kindly identify the litigation under which any document is withheld pursuant to 1 V.S.A. § 317(c)(14), and kindly identify any contract the negotiation of which is claimed to preclude disclosure of any document withheld pursuant to 1 V.S.A. § 317(c)(15).

Request of NESCOE

CLF also appeals to you as the appointed Vermont representative to NESCOE, the withholding of documents requested from NESCOE. (See attached request to and response from NESCOE). CLF has also filed an appeal with NESCOE, and with Governor Shumlin's office. (Attached)

NESCOE serves a public function and 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). 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). As Vermont's representative to NESCOE and the head of the Vermont department under which these functions fall, CLF requests that you ensure NESCOE's compliance with Vermont's Access to Public Records law so that CLF is provided the records identified in the attached request to NESCOE.



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

Sandra Levine
slevine@clf.org

Enclosures:

CLF Public Record Request to Public Service Department (4/1/14)
CLF Public Record Request to NESCOE (3/19/14)
Response from NESCOE (4/15/14)
Public Record Request Appeal to NESCOE (7/9/14)
Public Record Request Appeal to Governor Shumlin's office (7/9/14).

cc: Darren Springer (Public Service Department)
Heather Hunt (NESCOE)
Elizabeth Miller (VT Governor Shumlin's Office)