

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 15-460 and DE 15-461

NORTHERN PASS TRANSMISSION LLC

DE 15-462 and DE 15-463

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

**Petitions for Licenses to Cross Public Waters (DE 15-460 and DE 15-462) and
Public Lands (DE 15-461 and DE 15-463)**

O R D E R N O. 25,910

June 28, 2016

In this Order, the Commission determines the scope of its review of the petitions for licenses to cross public waters and public lands pursuant to RSA 371:17 and RSA 371:20 in connection with the construction of the Northern Pass Transmission Project. The Commission interprets RSA 371:17 and RSA 371:20 to direct the focus of its inquiry when considering a crossing license petition to be on the proposed crossing's effects on the public rights in the waters or lands in question. The provision of RSA 371:17 regarding the proposed crossing being "necessary, in order to meet the reasonable requirements of service to the public" is a threshold matter that a petitioner meets if the reason for the crossing is to provide a service that historically has been provided by a public utility. The Commission finds that Northern Pass Transmission LLC and Eversource have both met the threshold requirement of necessary for service to the public under RSA 371:17. The Commission will limit its review of the proposed crossings under RSA 371:20 to the functional use and safety of the proposed crossings, and all licenses shall be contingent upon Site Evaluation Committee approval of the project.

I. PROCEDURAL BACKGROUND

On October 19, 2015, Northern Pass Transmission LLC (NPT) filed an application with the New Hampshire Site Evaluation Committee (SEC) for a certificate of site and facility permitting construction and maintenance of a high voltage electric transmission line and related facilities in New Hampshire (the Northern Pass Project). NPT is a limited liability company organized under the laws of the State of New Hampshire engaged in the business of developing, designing, constructing, and owning the Northern Pass Project. NPT plans to construct the Northern Pass Project for the purpose of transmitting hydroelectric power produced in Canada to customers in the New England energy market. The proposed Northern Pass Project will run approximately 192 miles from the New Hampshire border with Canada to a Public Service Company of New Hampshire d/b/a Eversource Energy (Eversource) substation in Deerfield, New Hampshire

As part of its application with the SEC, NPT included a petition for licenses to cross public waters at twenty-five locations (DE 15-460) and public lands at fourteen locations (DE 15-461). Also included in the application were the petitions of Eversource for licenses to relocate existing crossings over public waters at fifteen locations (DE 15-462) and public lands at thirteen locations (DE 15-463). NPT states that it needs approval of all four petitions to construct the Northern Pass Project.

The Commission held prehearing conferences on all four petitions. Based on the presentation of initial positions at the prehearing conferences, the Commission required briefs concerning the application of RSA 371:17 and RSA 371:20 with respect to both the NPT and Eversource petitions. By secretarial letter dated April 15, 2016, the Commission set a deadline of May 2, 2016, for submission of briefs. Briefs were filed by NPT, the City of Concord (an

intervenor in DE 15-460 and DE 15-462), the Society for the Protection of New Hampshire Forests (SPNHF), (an intervenor in DE 15-460), and Commission Staff.

II. POSITIONS OF THE PARTIES

A. Northern Pass Transmission, LLC¹

NPT argues that RSA 371:17 is not a separate substantive test for granting a license. Instead, NPT points to RSA 371:20 as the operative test for when a license to cross public lands or waters can be granted. According to NPT, if the Commission finds the public's rights are not substantially affected by the crossings requested in the petitions, then the licenses should be granted. *Id.*

NPT claims that its interpretation of RSA 371:17 and 371:20 is supported by the statutes, the legislative history, New Hampshire Supreme Court decisions, and decades of Commission practice. NPT distinguishes the test for a taking by eminent domain under RSA 371:1 and RSA 371:4 from the test for granting a license to cross public lands and waters under RSA 371:17 and RSA 371:20. NPT argues that a broader application of public necessity under RSA 371:17 would change a mere licensing provision to a fully litigated siting proceeding, thus increasing the cost and complexity of service by public utilities, and nullifying the ability of non-utilities to obtain licenses. *Id.* at 10-11.

B. City of Concord

Concord argues that RSA 371:17 requires that Eversource and NPT prove the crossings are necessary to serve the public. Concord Memo at 4 and 6. According to Concord, the Northern Pass Project is not "intended to meet any identified need for additional power in New Hampshire, or to address system reliability issues in New England generally. There are no

¹ NPT requested licenses to cross public waters, DE 15-460, and public lands, DE 15-461, and Eversource requested licenses to relocate existing water crossings in DE 15-462, and public lands in DE 15-463.

specific customers that need the crossing in order to be ‘served.’” *Id.* at 6. Concord recommends that the licenses be denied, because NPT cannot show that the Northern Pass Project is necessary to serve the public. *Id.* at 7. Concord further asserts that the Northern Pass Project will not benefit New Hampshire power customers in any substantial way. *Id.*

Concord claims that RSA 371:20 is a second statutory test for granting licenses to cross public lands or waters. Although Concord argues that aesthetics and visual impacts could be considered by the Commission under RSA 371:20, Concord recognizes that the same issues are being taken up in the SEC docket and requests that the Commission defer to the SEC on those issues. Instead, Concord requests that if the Commission considers the merits of the petitions, that the Commission focus solely on the functional use of the public waters and lands, and whether such uses substantially impact public rights in those public resources. *Id.* at 8.

C. Society for the Protection of New Hampshire Forests

SPNHF concurs with the Memorandum filed by Concord and argues that pursuant to RSA 371:17, in order to grant a license to cross public lands or waters, the Commission must find that NPT’s crossings are necessary to meet the reasonable requirements of service to the public. SPNHF claims that the Northern Pass Project is not intended to serve any customer in New Hampshire nor is it intended to meet system reliability needs. SPNHF also argues that unless New Hampshire suppliers buy the power to sell to their customers, no New Hampshire customers will benefit from this project. SPNHF Memo at 4. With respect to RSA 371:17, SPNHF claims that NPT will not be able to meet the burden of proving the crossings are needed for service to the public, and requests that NPT’s application for licenses be denied. *Id.*

With respect to the application of RSA 371:20 to the proposed NPT crossings, SPNHF requests that the Commission suspend each of the crossing proceedings and any other matter related to the Northern Pass Project, pending the outcome before the SEC in SEC Docket No. 2015-06. SPNHF asserts that the public's use of SPNHF land will be substantially affected by the proposed crossings with respect to access, use and enjoyment, and also for aesthetics and visual impact. For those reasons, SPNHF requests that the Commission defer to the SEC's findings on aesthetics and visual issues as it relates to those crossings. SPNHF Memo at 5. SPNHF asserts that under RSA 371:20, the Commission should require NPT to demonstrate that the proposed crossings will not substantially affect the public's right of use, access and enjoyment of the waters and lands. SPNHF requests that NPT's applications for licenses be denied based on the foregoing as well as the arguments raised by the City of Concord in its legal memorandum. *Id.*

D. Staff

Staff asserts that the Commission, under RSA 371:17, must make a finding that the construction of the crossings is needed to meet reasonable requirements of service to the public. In addition, according to Staff, the Commission must determine whether the proposed crossings will substantially affect the public rights in public lands and waters. RSA 371:20. Staff finds no basis for the notion that the Commission has to use a different standard for review of these crossings because they are associated with the NPT docket at the SEC.

Staff concludes that RSA 371:17 and 371:20 also apply to the proposed relocation of Eversource's existing crossings. Finally, Staff recommends that all crossing licenses requested by both NPT and Eversource be conditioned on SEC approval of the Northern Pass Project.

III. COMMISSION ANALYSIS

In evaluating the merits of the requests by NPT and Eversource for licenses to cross public lands and waters, we apply the statutory standards set out in RSA 371:17 and 371:20. We have reviewed and considered the parties' legal arguments on both statutory provisions.

A. Necessary to Meet Reasonable Requirements of Service to the Public is a Threshold Requirement for a Crossing Petition

To interpret the requirements of RSA 371:17 and 371:20, we begin by looking at the specific language used and the processes directed by the General Court, and then see how those sections fit within RSA Chapter 371. The crossing petition statute states in relevant part as follows:

Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a pipeline, cable, or conduit, or a line of poles or towers and wires and fixtures thereon, over, under or across any of the public waters of this state, or over, under or across any of the land owned by this state, it shall petition the commission for a license to construct and maintain the same.

RSA 371:17. The eminent domain petition section within Chapter 371, uses the same phrase at the beginning before laying out the types of takings that may take place under its authority:

Whenever it is necessary, in order to meet the reasonable requirements of service to the public, that any public utility should construct a line, branch line, extension, pipeline, conduit, line of poles, towers, or wires across the land of another, or should acquire land, land for an electric substation, or flowage, drainage, or other rights for the necessary construction, extension, or improvement of any water power or other works owned or operated by such public utility, and it cannot agree with the owners of such land or rights as to the necessity or the price to be paid therefor, such public utility may petition the public utilities commission for such rights and easements or for permission to take such lands or rights as may be needed for said purposes.

RSA 371:1 (emphasis added).

Concord and SPNHF would have us end the analysis regarding "necessity" here, relying on the similarity of the language used by the legislature in authorizing both crossings and

takings. We agree with NPT, however, that RSA 371:17 and RSA 371:1 cannot be understood without looking at what else the legislature has said about the two processes. In particular, the crossing and eminent domain sections of RSA Chapter 371 have provisions that direct the Commission regarding petitions in the two areas. The relevant portion of the crossing process is as follows:

The commission shall hear all parties interested; and, in case it shall find that the license petitioned for, subject to such modifications and conditions, if any, and for such period as the commission may determine, may be exercised without substantially affecting the public rights in said waters or lands, it shall render judgment granting such license. Provided, however, that such license may be granted without hearing when all interested parties are in agreement.

RSA 371:20. The eminent domain hearing requirement is quite different. It states:

The commission shall, upon notice to all parties in interest, hear and determine the necessity for the right prayed for and the compensation to be paid for such right, and shall render judgment accordingly. In such proceedings the provisions relating to flowage rights contained in RSA 482 shall not apply, but when petitions to acquire flowage or drainage rights are filed the commission shall notify the department of environmental services.

RSA 371:4.

Paring the language down to its essence, RSA 371:20 requires that the Commission “hear all parties” only if there is a disagreement and, regardless of whether a hearing was necessary, grant the license if it finds “that the license petitioned for ... may be exercised without substantially affecting the public rights in said waters or lands.” *Id.*² In contrast, RSA 371:4 requires a hearing in every case, and requires that the Commission “*determine the necessity for the right prayed for* and the compensation to be paid for such right. *Id.* (emphasis added). The difference is stark. The inquiry for the taking of a private property right focuses on the necessity

² Under a separate section, the Commission is required to “determine the compensation, if any, to be paid” to bordering landowners for damage caused by water crossings, as well as appropriate compensation to the state for the use of public lands.

of the taking, while the inquiry for a crossing license focuses on the impact of the crossing on existing public rights in public waters or land.

There have been two amendments to disqualify certain merchant power projects from a public utility's use of eminent domain to take private property. *See* RSA 371:1. The first amendment followed certification by the Commission that retail competition for electric generation existed in 2001. Following electric restructuring, the amended language excluded takings by public utilities for the construction of electric generating plants. Laws of 1998, ch. 253:1. The second amendment, enacted in 2012, added language excluding merchant or elective transmission projects, such as the Northern Pass Project, from petitioning under RSA 371:1 to take private property. Laws of 2012, ch. 2:6.

Concord and SPNHF argue that the necessity language in RSA 371:17 precludes its use by transmission projects that are not needed for system reliability. We disagree. Here, the fact that the same necessity language is used in both RSA 371:1 and 371:17 works directly against Concord and SPNHF's argument.

Past Commission decisions have applied RSA 371:17 to merchant projects. *See EnergyNorth Natural Gas, Inc.* Order No. 23,657 (March 22, 2001) (order granting a crossing license to serve a merchant generation plant). When the legislature amended RSA 371:1 to exclude merchant or elective transmission projects, it did not amend RSA 371:17. If the language on public necessity in RSA 371:1 excluded projects developed for profit rather than for reliability, then it would not have been necessary to expressly exclude such projects from RSA 371:1 in 2001 and 2012. Further, if the legislature had intended to exclude such merchant or elective projects from licensing crossings over public lands and waters, it could have done so with similar amendments to RSA 371:17 excluding its use for merchant generation or

transmission projects. There have not been any such amendments to RSA 371:17. Thus, we find that the language requiring projects to be “necessary to serve the reasonable requirements of service to the public” in RSA 371:17 is a threshold eligibility requirement broad enough to include both merchant and reliability projects to provide utility service.

In the current case, NPT presents a unique set of facts not previously decided by this Commission. Although prior Commission decisions are instructive, the parties have not identified any cases decided on the facts presented. For the subject dockets, DE 15-460 and DE 15-461 (NPT request for licenses) and DE 15-462 and DE 15-463 (Eversource request for licenses), any decision we make concerning the request to license specific crossings will be contingent upon the Northern Pass Project receiving a Certificate of Site and Facility from the SEC. Because the Northern Pass Project cannot be built without such a certificate, any crossing licenses, if granted, must be contingent on SEC approval.

We find as a threshold matter that the service NPT proposes to provide is electric transmission service, a service that is clearly a type of public utility service. *See* RSA 362:2, I. The fact that the single customer, Hydro Quebec, and the ultimate end users, customers throughout the New England region, are not limited to New Hampshire electric consumers does not defeat NPT’s status as a provider of utility service, nor does it change the nature of the service offered. Because the electric transmission service proposed to be offered by NPT is a utility type service, we find that, under the specific facts of these four dockets, that the transmission service offered is necessary to meet the reasonable requirements of service to the public. The fact that the Northern Pass Project is a participant funded project and is not determined to be required for reliability purposes by its regulator, the federal energy regulatory

commission (FERC), does not prevent us from finding that NPT is eligible to request a crossing license. Therefore, subject to SEC approval, NPT meets the threshold requirement under RSA 371:17, and is eligible to request crossing licenses.

B. Substantial Impact on Public Waters or Lands

In order to grant a license to cross public water or lands, the Commission must find that the licensed use “may be exercised without substantially affecting the public rights in said waters or lands.” RSA 371:20. The balance of this docket shall explore the proposed uses of the licenses and the impact, if any, of those uses on the public’s rights. Both the City of Concord and SPNHF suggest a compromise on the scope of the issues to be considered by the Commission in determining the impacts to public rights. While the City of Concord and SPNHF argue that such balancing includes consideration of environmental and aesthetic impacts of the crossing, both acknowledge that such impacts will be considered by the SEC in its siting review. As a result, the City of Concord and SPNHF suggest that the Commission defer to the SEC on those issues.

Although we acknowledge that parties have identified in their briefs a few instances when the Commission has considered environmental and aesthetic aspects of crossings in license dockets, in the only cases cited by the City of Concord, the Commission approved a crossing notwithstanding opposition to the crossings on the basis of environmental or aesthetic concerns. *See Androscoggin Electric Corporation*, 70 NH PUC 160 (1985) (Order No. 17,548), and *New Hampshire Electric Cooperative*, 49 NH PUC 349 (1967) (Order No. 9017). Further, in cases cited where crossings have been requested in connection with concurrent SEC siting proceedings, the Commission has left environmental and aesthetic issues to the SEC for decision.

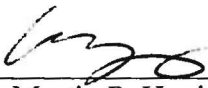
See *EnergyNorth Natural Gas, Inc.*, Order No. 23,601 (December 12, 2000); and *Portland Natural Gas Transmission System*, Order No. 22,657 (July 14, 1997).

Without definitively holding that environmental and aesthetic issues are beyond the scope of impacts to public use to be considered under RSA 371:20 in crossing licenses, we hold on the facts of these cases before us, that the Commission's review under RSA 371:20 will focus on the functional use and safety of the proposed crossings. We leave the environmental and aesthetic issues to the SEC. Thus, as stated earlier, any licenses we grant in these cases will be contingent on SEC approval of the Northern Pass Project. If, as a result of the SEC process, any of the proposed crossings are reconfigured, we will require resubmission of amended plans for our review.

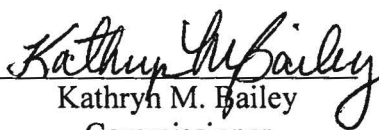
Based upon the foregoing, it is hereby

ORDERED, the scope of our consideration of the proposed crossings over public lands and waters pursuant to RSA 371:17 and RSA 371:20, shall be consistent with the above discussion.

By order of the Public Utilities Commission of New Hampshire this twenty-eighth day of June, 2016.

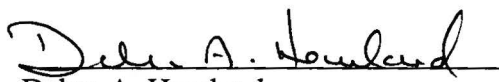


Martin P. Honigberg
Chairman



Kathryn M. Bailey
Commissioner

Attested by:



Debra A. Howland
Executive Director

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FILING INSTRUCTIONS:

- a) Pursuant to N.H. Admin Rule Puc 203.02 (a), with the exception of Discovery, file 7 copies, as well as an electronic copy, of all documents including cover letter with:**
- DEBRA A HOWLAND
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CONCORD NH 03301-2429
- b) Serve an electronic copy with each person identified on the Commission's service list and with the Office of Consumer Advocate.**
- c) Serve a written copy on each person on the service list not able to receive electronic mail.**