

DG 00-145  
DG 00-207

**ENERGYNORTH NATURAL GAS, INC.**

**Petition for Approval of Gas Transportation Agreement and  
Natural Gas Firm Peaking Agreement with AES Londonderry, LLC  
and Approval of Plans for Construction of  
Natural Gas Pipeline to Serve AES Londonderry, LLC**

**Petition for a License to Construct and Maintain a  
Natural Gas Pipeline Beneath Little Cohas Brook and to  
Cross State Property Located in the Town of Londonderry**

**Order Approving Settlement Agreement**

**O R D E R N O. 23,657**

**March 22, 2001**

**APPEARANCES:** McLane, Graf, Raulerson & Middleton,  
P.A. by Steven V. Camerino, Esq. and Thomas O'Neill, Esq.  
(Company Counsel) for EnergyNorth Natural Gas, Inc. d/b/a  
KeySpan Energy Delivery New England; Bernstein, Cushner &  
Kimmell, P.C. by Charles Harak, Esq. on behalf the Town of  
Londonderry; Office of Consumer Advocate by Kenneth E. Traum,  
Finance Director for residential utility consumers; and Larry  
S. Eckhaus, Esq. for the Staff of the New Hampshire Public  
Utilities Commission.

**I. PROCEDURAL HISTORY**

**1. DG 00-145 – Gas Transportation and Natural Gas Firm  
Peaking Agreements and Plans for Construction of  
Natural Gas Pipeline**

On July 3, 2000, EnergyNorth Natural Gas, Inc.  
(ENGI) d/b/a KeySpan Energy Delivery New England (KeySpan)  
filed with the New Hampshire Public Utilities Commission  
(Commission), pursuant to RSA 378:18, a Petition for Approval  
of Agreements with AES Londonderry, LLC (AES) (Petition),

along with the joint Pre-filed Direct Testimony of Messrs. Mark G. Savoie, ENGI Manager of Regulatory Affairs, and William R. Luthern, Vice President of Gas Resources for Boston Gas Company, Essex Gas Company and Colonial Gas Company, the three gas subsidiaries of Eastern Enterprises.<sup>1</sup> In the Petition, KeySpan seeks approval of a Gas Transportation Agreement (Transportation Agreement) (Special Contract No. 00-01) and Natural Gas Firm Peaking Agreement (Peaking Agreement) with AES in order to proceed with construction of an approximately 2.8 mile natural gas pipeline from a take station on the Tennessee Gas Pipeline Company Concord lateral in Londonderry, New Hampshire to AES' planned 720 megawatt gas-fired electric generating station (the Facility) on North Wentworth Road in Londonderry. KeySpan requested authority to utilize a 20-year depreciation rate with regard to its capital investment in the project in order to match the 20-year term of the Transportation Agreement.

On July 3, 2000, KeySpan also filed a set of plans and specifications for a natural gas pipeline to be constructed by KeySpan in order to provide service to the

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<sup>1</sup>On May 8, 2000, by Order No. 23,470, the Commission approved the acquisition of EnergyNorth Natural Gas, Inc. by Eastern Enterprises and KeySpan Corporation in Docket DG 99-193, *EnergyNorth Natural Gas, Inc.*

Facility. Under an order of the New Hampshire Site Evaluation Committee (NHSEC) dated May 25, 1999, in NHSEC Docket No. 98-02, the NHSEC, pursuant to RSA 162-H:4, III and III-a, delegated to the Commission authority "to monitor the construction safety aspects of the natural gas pipeline". In addition, the NHSEC Order provided that "The Application and Petitions are referred to... the Public Utilities Commission for the issuance of such permits and licenses as required by law to be included in the Certificate of Site and Facility" (at p. 29).

KeySpan also filed a Motion for Protective Order and Confidential Treatment for certain materials relating to the cost of construction of the pipeline necessary to serve AES, information concerning the terms on which AES has agreed to provide peaking services to KeySpan, and information concerning the financial and related business terms on which KeySpan will provide transportation service to AES and other customer-specific information concerning AES.

On July 28, 2000, the Commission issued an Order of Notice scheduling a Prehearing Conference and Technical Session for August 21, 2000 and setting deadlines for intervention requests and objections thereto. In the Order, the Commission noted:

The filing raises, inter alia, issues related to whether special circumstances exist which render departure from ENGI's schedules of general application just and consistent with the public interest in accordance with RSA 378:18; whether the terms and conditions of the Transportation Agreement and the Peaking Agreement are just and reasonable and in the public interest; how the Transportation Agreement and Peaking Agreement relate to the Company's ongoing Revenue Neutral Rate Redesign Proceeding, Docket DG 00-063; how the Transportation Agreement and Peaking Agreement relate to the Model Delivery Tariff now under consideration by the Commission in Docket DE 98-124, *Gas Restructuring, Unbundling and Competition in the Natural Gas Industry*; whether a 20-year depreciation schedule with regard to ENGI's capital investment related in the project is appropriate; whether the Commission should exempt the requested information from public disclosure; whether the Peaking Agreement triggers the need for ENGI to file a new integrated resource plan; whether the plans and specifications as submitted meet the appropriate construction safety standards; whether the proposed crossing of Little Cohas Brook requires ENGI to petition the Commission for a license, pursuant to RSA 371:17, to construct a pipeline under or across any of the public waters of the State defined to be all ponds of more than 10 acres, or such streams as are commonly used for navigation, See *Public Utilities and Others*, 35 NH PUC 94 (1953), and if so, whether such crossing will, pursuant to RSA 371:20, substantially affect the public safety or public functional use of said waters, See *Re Portland Natural Gas Transmission System*, 82 NH PUC 533, (1997); whether the proposed crossing of an existing or former railroad right-of-way requires ENGI to petition the Commission for a license to construct a pipeline under or across any land owned by the State pursuant to RSA 371:17, or property of a railroad pursuant to RSA 371:24; and, if such petitions pursuant to RSA 371:17 are required, whether owners of lands bordering on Little Cohas Brook shall be notified pursuant to RSA 371:19, and whether any payments or compensation is due to such owners and/or the State pursuant to RSA 371:21 and/or RSA 371:24. At p. 4

On July 31, 2000, the Office of Consumer Advocate (OCA) notified the Commission that, pursuant to the Inter-

Agency Memorandum of Understanding dated April 28, 2000, it would be participating in this docket on behalf of residential ratepayers consistent with RSA 363:28.

On August 1, 2000, KeySpan filed a Motion for Protective Order and Confidential Treatment concerning information provided in responses to Staff Data Requests 1-24, 1-25 and 1-26, which include information regarding existing gas supply arrangements.

On August 14, 2000, the Town of Londonderry (the Town) filed a Petition for Intervention.

On August 18, 2000, KeySpan filed a Motion for Protective Order and Confidential Treatment concerning information provided in responses to Staff Data Requests 2-5 and 1-20 regarding certain information contained in the License Agreement with Public Service Company of New Hampshire; i.e., the license fee in Sections 1(g) and 3 of the License Agreement.

On August 21, 2000, KeySpan filed a Form E-22 pursuant to N.H. Admin. Rule Puc 509.13 for the proposed 2.8 mile pipeline in Londonderry, New Hampshire.

The Prehearing Conference and Technical Session were held on August 21, 2000 in accordance with the Order of Notice. Other than the Town of Londonderry and the OCA, there

were no other petitions for intervention. There being no objection, the Commission granted the Petitions for Intervention pursuant to N.H. Admin. Rule Puc 203.02 and RSA 541-A:32, I(b).

Subsequently, KeySpan responded to three rounds of data requests propounded by Staff and one round of data requests propounded by OCA.

On September 14, 2000, KeySpan filed a Motion for Protective Order and Confidential Treatment concerning information provided in certain revised financial analyses contained in response to Data Request OCA 1-3.

On September 18, 2000, the Commission issued Order No. 23,556 adopting an interim procedural schedule for the proceeding consisting of discovery and technical sessions/settlement conferences proposed by the Parties<sup>2</sup> and Staff and also approving the intervention of the Town. The Order also discussed KeySpan's and Staff's opposing positions on whether KeySpan is required to petition the Commission, pursuant to RSA 371:17, for a license to cross Little Cohas Brook in the Town of Londonderry. Staff recommended that the Commission defer action until the Parties and Staff had an

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<sup>2</sup>The Parties include KeySpan, OCA and the Town of Londonderry.

opportunity to discuss the matter further. The Commission did not make a determination in Order No. 23,556 regarding whether the petition was necessary.

On September 19, 2000, KeySpan filed revised Plans and Specifications for Construction of Natural Gas Pipeline to Serve AES Londonderry, LLC with the Commission. The revisions were made in response to comments received from Richard G. Marini, P.E., of the Commission's Engineering Department, the staff member with primary responsibility for construction safety oversight.

On November 22, 2000, KeySpan filed an Amendment to Gas Transportation Agreement (First Transportation Agreement Amendment) with the Commission. The First Transportation Agreement Amendment provides for AES to make an additional payment to KeySpan, waives certain deadlines contained in the Transportation Agreement, and provides for a second additional payment by AES if KeySpan achieves completion of the pipeline project by September 30, 2001.

On December 12, 2000, the Commission issued Order No. 23,600 adopting a procedural schedule for the remainder of the proceeding and approving consolidated hearings with Docket DG 00-207, *EnergyNorth Natural Gas, Inc.*, pursuant to NH

Admin. Rule Puc 203.08. The Commission also determined the scope of this proceeding:

In our companion order in Docket DG 00-207 issued this day, we agreed with Staff and ENGI that the scope of Docket DG 00-207 relates to the issues of water and land use that may be affected by the crossing, not environmental impacts associated with the crossing, and whether the license "may be exercised without substantially affecting the public rights in said waters or lands". RSA 371:20. We will not address issues, in Docket DG 00-207 or in this proceeding, properly decided by the NHSEC or those which should be brought before other agencies. Therefore, construction safety aspects, as delegated by the NHSEC, and issues related to the agreements between ENGI and AES, will continue to be addressed in the context of Docket DG 00-145, and Docket DG 00-207 shall be limited to license issues of public safety and public functional use of said waters, See *Re Portland Natural Gas Transmission System*, 82 NH PUC 533, (1997), as well as the issue raised by Londonderry in its Petition to Intervene and at the Prehearing Conference with regard to the statutory requirement "in order to meet the reasonable requirements of service to the public". RSA 371:17.

Order 23,600 at 5

On January 10, 2001, Staff filed the direct testimony of Mr. Marini, Administrator of the Commission's Safety Division. Also on January 10, 2001, Staff filed with the Commission a concurred to request to revise the procedural schedule with which the parties concurred.

On January 12, 2001, KeySpan filed Supplemental Testimony of A. Leo Silvestrini, KeySpan Director of Rates and Regulatory Affairs, and Mr. Luthern updating earlier prefiled testimony in Docket DG 00-145. KeySpan also filed prefiled

Direct Testimony of Anthony J. DiGiovanni, Senior Operations Advisor on a contract basis for KeySpan, in both Docket DG 00-145 and Docket DG 00-207. In particular, the testimony filed by KeySpan on January 12, 2001 discussed KeySpan's expectation that the cost of constructing the proposed pipeline was anticipated to substantially exceed the estimate included in KeySpan's original filing, presented a revised financial analysis for the project that reflected both the updated cost estimate and the benefits anticipated under the Peaking Agreement, and discussed an anticipated minor change of the pipeline's location within land owned by the State of New Hampshire.

On January 12, 2001, KeySpan also filed with the Commission a document entitled "Design and Construction Specifications for Natural Gas Pipeline for AES Londonderry Cogeneration Facility" dated December 18, 2000 (Specifications) and a set of plans for the pipeline project dated December 29, 2000 (Construction Plans), which were the plans and specifications recommended for approval by Mr. Marini in his prefiled testimony.

On January 18, 2001, the Commission approved the revised procedural schedule.

On January 19, 2001, Staff filed the Joint Testimony of Michelle A. Caraway, Utility Analyst III, Commission Economics Staff, and Stephen P. Frink, Commission Staff Assistant Finance Director.

On January 31, 2001, KeySpan filed a Second Amendment to the Gas Transportation Agreement (the First Gas Transportation Agreement Amendment and the Second Gas Transportation Agreement Amendment are referred to below together as the "Transportation Agreement Amendments") and a First Amendment to the Natural Gas Firm Peaking Agreement (Amendment to Peaking Agreement). KeySpan stated that the amendments were entered in order to address certain concerns raised by Staff during the course of the settlement discussions in this proceeding.

**2. DG 00-207 - License Petition**

On September 27, 2000, KeySpan filed a Petition for a License to Construct and Maintain a Natural Gas Pipeline Beneath Little Cohas Brook and to Cross State Property Located in the Town of Londonderry (License Petition). The License Petition sought a license pursuant to RSA 371:17 to construct and maintain the gas pipeline for the AES project beneath Little Cohas Brook and within an easement granted by the State Department of Transportation within an abandoned railroad bed

(DOT Railroad Bed) owned by the State of New Hampshire. The Commission opened Docket DG 00-207 to address the issues raised in this proceeding and subsequently consolidated the docket with Docket DG 00-145. One set of data requests was propounded to KeySpan by the Town in Docket DG 00-207.

On October 10, 2000, the Commission issued an Order of Notice scheduling a Prehearing Conference and Technical Session for November 16, 2000 and setting deadlines for intervention requests and objections thereto. All the parties in Docket DG 00-145 were deemed to be parties in this proceeding as well. In the Order, the Commission noted:

The filing raises, inter alia, issues related to: whether the license petitioned for may be exercised without substantially affecting the public rights in said waters or lands See *Public Utilities and Others*, 35 NH PUC 94 (1953); whether such crossing will, pursuant to RSA 371:20, substantially affect the public safety or public functional use of said waters, See *Re Portland Natural Gas Transmission System*, 82 NH PUC 533, (1997); whether any payment or compensation is due to owners of lands bordering on Little Cohas Brook and/or the State pursuant to RSA 371:21; and whether this proceeding shall be consolidated and heard on a common record pursuant to N.H. Admin. Rules Puc 203.08.

The Prehearing Conference and Technical Session were held on October 16, 2000 in accordance with the Order of Notice. No additional petitions to intervene were filed.

On December 12, 2000, the Commission issued Order No. 23,601 adopting a procedural schedule for the remainder of the proceeding and approving consolidated hearings with Docket DG 00-145. The Commission also determined the scope of this proceeding. (See above re: Order No. 23,600 in Docket DG 00-145.) The Commission also provided for the submission of Memoranda of Law and replies regarding the statutory requirement "in order to meet the reasonable requirements of service to the public". RSA 371:17.

Also on December 12, 2000, KeySpan filed an Objection to First Set of Data Requests Propounded by Town of Londonderry (Objection). On December 13, 2000, Staff filed a response to KeySpan's Objection recommending that the Commission either deny the Objection without prejudice or defer any action with regard thereto. On December 15, 2000, the Town filed its response to KeySpan's Objection.

On December 27, 2000, the Town submitted a Memorandum of Law regarding the Commission's authority to grant the license requested by KeySpan.

On January 10, 2001, Staff filed with the Commission a request to revise the procedural schedule with which the parties concurred. Staff also filed the Testimony of Mr. Marini.

On January 12, 2001, KeySpan and Staff filed responses to the Town's Memorandum of Law. Also on January 12, 2001, KeySpan filed the Direct Testimony of Mr. DiGiovanni.

On January 12, 2001, KeySpan filed an Amended Petition for a License to Construct and Maintain a Natural Gas Pipeline Beneath Little Cohas Brook and to Cross State Property Located in the Town of Londonderry (Amended Petition). The Amended Petition requested that the Commission expand the license being requested by KeySpan pursuant to RSA 371:17 to include location of the proposed pipeline closer to the center of the DOT Railroad Bed. On January 18, 2001, the Commission approved the request to revise the procedural schedule.

The Parties and Staff held a number of technical sessions and/or settlement conferences in one or both of the dockets related to the AES project including those on August 29, 2000, November 16 & 27, 2000 and December 7, 2000. As a result of those discussions, a settlement was reached among KeySpan, OCA and Staff.

The consolidated hearing was held on February 6, 2001 at which time the Settlement Agreement was filed with and presented to the Commission. At the hearing, KeySpan withdrew

its Objection to First Set of Data Requests Propounded by the Town.

## **II. POSITIONS OF THE PARTIES AND STAFF**

### **A. EnergyNorth Natural Gas, Inc.**

KeySpan initially requested that the Commission approve the Transportation Agreement and Peaking Agreement as filed. KeySpan asserted that the Transportation Agreement constitutes a special contract under the provisions of RSA 378:18 because it proposes to provide service to AES Londonderry, LLC on terms and conditions that vary from those in its tariff. KeySpan also asserted that, because it would not be willing to provide service to AES on the terms set forth in the Transportation Agreement unless AES was willing to enter into the Peaking Agreement, the Commission should consider and approve the Peaking Agreement as well. KeySpan asserted that the Transportation Agreement and Peaking Agreement would provide substantial net benefits to customers. KeySpan also proposed that its capital investment in the project be depreciated over a 20-year period, consistent with the term of the Transportation Agreement.

In its filing in DG 00-207, KeySpan proposed that the Commission grant it a license to construct and maintain the pipeline beneath Little Cohas Brook and in a former

railroad right-of-way owned by the State of New Hampshire in Londonderry. KeySpan originally proposed to locate the pipeline in the toe of the slope of the railroad right-of-way because that was the location that was initially approved by the State Department of Transportation and the Governor and Executive Council. Subsequently, KeySpan indicated that the Department of Transportation appeared willing to permit KeySpan to locate the pipeline in the center of the right-of-way if it would agree to relocate the pipeline to the toe of the slope if the right-of-way was utilized in the future. KeySpan, therefore, amended its Petition in DG 00-207 to request a license for both locations within the railroad right-of-way. Its initial petition and its amended petition asserted that construction and maintenance of the proposed pipeline would not interfere with the public's use of the areas for which a license was sought and that it would not pose a threat to public safety, and, therefore, the requested licenses should be granted.

As a result of the settlement discussions with OCA and Staff, KeySpan negotiated certain amendments to the Transportation Agreement and Peaking Agreement intended to extend the term of the Peaking Agreement.

**B. Town of Londonderry**

The Town engaged in discovery and participated in technical sessions and settlement conferences. The Town did not file testimony in either proceeding and is not a signatory to the Settlement Agreement. The Town did, however, file a Memorandum of Law concerning the provision in RSA 371:17 that requires a public utility to file a petition with the Commission for a license to construct a pipeline under any public waters or across land owned by the State "in order to meet the reasonable requirements of service to the public."

**C. Office of Consumer Advocate**

The OCA engaged in discovery and participated in technical sessions and settlement conferences. Although the OCA did not file testimony in either proceeding, the OCA is a signatory to the Settlement Agreement.

**D. Staff**

Staff was generally supportive of KeySpan's petitions. Mr. Marini recommended that the Commission approve the revised plans and specifications submitted by KeySpan for the AES project and also that the Commission grant the licenses requested by KeySpan in Docket DG 00-207. Regarding the Transportation Agreement and Peaking Agreement, Staff proposed certain specific changes in KeySpan's proposal

including matters related to the depreciation rate proposed by KeySpan, the term of the Peaking Agreement, and the allocation of a portion of the revenues from AES as a credit to KeySpan's deferred account for environmental remediation. Further, Staff indicated its continued support of the discounted cash flow methodology to evaluate major system expansions and recommended several changes to KeySpan's revised benefit-cost analysis.

**III. MEMORANDA OF LAW RE: RSA 371:17 STANDARD FOR REVIEW**

In its Memorandum of Law (Memorandum) in Docket DG 00-207 regarding RSA 371:17, the Town maintains that while there are two other related proceedings, Docket DG 00-145, and NHSEC Docket No. 98-02, the Commission has a separate obligation under RSA 371:17 to determine whether KeySpan should be granted the licenses it requests to cross public waters and state land. In its Order of Notice (at p. 2) in Docket DG 00-145 and subsequent Orders in both Docket DG 00-145 and Docket DG 00-207, the Commission stated

Under an order of the New Hampshire Site Evaluation Committee (SEC) dated May 25, 1999, in SEC Docket No. 98-02, the SEC, pursuant to RSA 162-H:4 III, III-a, delegated to the Commission authority "to monitor the construction safety aspects of the natural gas pipeline." In addition, the SEC Order provided that "The Application and Petitions are referred to ... the Public Utilities Commission for the issuance of such permits and licenses as required by

law to be included in the Certificate of Site and Facility." (p. 29)

In its Order No. 23,601, the Commission indicated that the scope of this proceeding, as it relates to the issuance of the license referred to in RSA 371:17:

relates to the issues of water and land use that may be affected by the crossing, not environmental impacts associated with the crossing, and whether the license "may be exercised without substantially affecting the public rights in said waters or lands." RSA 371:20. We do not intend to replicate issues properly decided by the NHSEC or those which should be brought before other agencies....and this proceeding shall be limited to license issues of public safety and public functional use of said waters. See *Portland Natural Gas Transmission System*, 82 NH PUC 533, (1997), as well as the issue raised by Londonderry in its Petition to Intervene and at the Prehearing Conference with regard to the statutory requirement "in order to meet the reasonable requirements of service to the public." RSA 371:17. We note that the Parties and Staff have agreed to address the issue in Memoranda of Law, prior to the hearing, and we welcome those submissions. Order No. 23,601 at p. 11.

Neither Staff nor KeySpan, in their Reply Memoranda, dispute the Town's assertions that the Commission has jurisdiction under RSA 371:17 to review KeySpan's Petition in Docket DG 00-207, that this proceeding is related to Docket DG 00-145 and NHSEC Docket No. 98-02, and that the Commission has an obligation under RSA 371:17 to determine whether KeySpan should be granted the license it requests to cross public waters and state land. KeySpan and Staff, however, disagree with the Town's proposed standard for review.

The Town admits that the present case does not involve the exercise of eminent domain power because KeySpan has obtained all of the necessary easements and property rights. However, the Town takes the position that the Commission should deny ENGI's request for a license because the request does not meet the statutory requirement "in order to meet the reasonable requirements of service to the public." The Town apparently reaches this conclusion based upon the following assertions:

1. The Commission must make similar findings when licensing crossings under RSA 371:17 as it does when determining whether land should be taken under RSA 371:1 *et seq.*
2. The new line is not needed to meet the reasonable requirements of service to the public because:
  - a. It will serve only a single customer, and not "the public," unless serving a single customer can be deemed to be serving the public;
  - b. KeySpan is not carrying out its quasi public corporation role, but is seeking to take advantage of what it considers a good business opportunity;
  - c. KeySpan is under no obligation to supply gas to AES since KeySpan, under its Tariff, may reject any application for service which would involve excessive cost to supply;
  - d. KeySpan can adequately serve its customers without building the line;

- e. RSA 317:17 does not authorize utilities to cross public lands for the purpose of obtaining related economic benefits;
- f. AES has no need for KeySpan to construct the line and it can obtain adequate gas supply without resort to KeySpan's services, as AES may construct the line itself or have it constructed by Tennessee Gas Pipeline Company;
- g. There is no evidence that the power to be generated by the AES plant will benefit the New Hampshire public in terms of price or electric supply.

Both KeySpan and Staff disagree with the Town's analysis equating the standard for review under RSA 371:17 *et seq*, with the standard for review under RSA 371:1 *et seq*. As a result, Staff maintains that the remainder of the Town's factual analysis is irrelevant to the Commission's determination in this proceeding. Staff also maintains that a review of the information provided by KeySpan and other information would show the Town's conclusions on these factual matters are likely to be incorrect.

KeySpan maintains that the proposed pipeline meets the requirement of "providing service to the public" as set forth in RSA 371:17, and that the pipeline route was previously considered and approved by the NHSEC, a case in which the Town participated as a supporter of the proposed route and the proposed generating facility. KeySpan maintains

that, as a public utility, it has a duty to provide service to any customer within its service territory, which would constitute "service to the public" as contemplated by RSA 371:17. Moreover, KeySpan maintains that the crossings that are the subject of this case meet the standard set forth in RSA 371:20.

Staff maintains that the standard for review of petitions under RSA 371:17 is different from the standard for review of petitions under RSA 371:1, and that all of the cases cited by the Town in its Memorandum relate to petitions for condemnation under either RSA 371:1 or other statutes relating to eminent domain proceedings, not petitions to cross public waters or lands under RSA 371:17. Staff maintains that the standard for review of petitions to cross public waters or lands under RSA 371:17, however, is whether "...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...." RSA 371:20. Even though both RSA 371:1 and RSA 371:17 contain the same phrase, "in order to meet the reasonable requirements of service to the public," Staff maintains that the Legislature has carefully

stated the criteria under which these very different types of petitions should be reviewed. This view is supported by the fact that even private corporations and individuals may petition the Commission under RSA 371:17 for private purposes.

We agree with KeySpan and Staff that the proper standard for reviewing petitions for licenses pursuant to RSA 371:17 is set forth in RSA 371:20: whether the license petitioned for may be exercised without substantially affecting the public rights in said waters or lands. This is the same standard applied by this Commission in previous proceedings. See *Re: Portland Natural Gas Transmission System*, 82 NH PUC 533, 535 (1997). In addition, as KeySpan correctly noted, this Commission has previously determined that service by a public utility to even a single customer constitutes "service to the public." In *Re New Hampshire Electric Cooperative, Inc.*, 69 NH PUC 301 (1984), the Commission granted a license to construct a distribution line across a state-owned right-of-way to serve a single customer. In addition, in this proceeding there is sufficient evidence that, while AES will be the only customer initially served by this line, other customers may also be served in the future.

See *Exeter & Hampton Electric Co. v. Harding*, 105 NH 317 (1964).

#### IV. SETTLEMENT AGREEMENT

The Settlement Agreement was entered into among KeySpan, OCA (the Settling Parties) and Staff. A summary of the Settlement Agreement follows below:

1. **Gas Transportation Agreement.** The Settling Parties and Staff recommend that the Transportation Agreement, as amended by the Transportation Agreement Amendments, be approved by the Commission as filed.
2. **Natural Gas Firm Peaking Agreement.** The Settling Parties and Staff recommend that the Peaking Agreement, as amended by Amendment to Peaking Agreement, be approved by the Commission as filed. The Parties and Staff agree that the benefits of the Peaking Agreement to KeySpan and its customers are an essential element of the recommendation to approve the Transportation Agreement.
3. **Construction Plans and Specifications.** The Settling Parties and Staff recommend that the Construction Plans and Specifications, as approved by Mr. Marini and discussed in his testimony, be approved by the Commission. The Settling Parties and Staff recommend that further changes in the Construction Plans and Specifications shall be subject to the continuing review and approval by the Commission's Engineering Department and the continuing jurisdiction of the Commission to resolve disputes regarding any such proposed modifications.
4. **Environmental Surcharge.** The Settling Parties and Staff recommend that the Commission order that KeySpan allocate 1.75% of the annual revenues from the Transportation Agreement as a credit to KeySpan's deferred account for expenses relating to remediation of manufactured gas contamination during any year in which KeySpan receives revenues under the Transportation Agreement and there remains an unrecovered balance in such account. The revenues thus allocated will be applied to reduce, dollar

for dollar, the amount that would otherwise be recovered from KeySpan's other firm customers.

5. **Depreciation.** The Staff and OCA acknowledge that KeySpan has proposed to depreciate the capital investment in the transmission main to be constructed to provide service to AES over the same period as the term of the Transportation Agreement, namely twenty (20) years. The Staff has recommended that KeySpan depreciate the investment in the main over a period consistent with its other distribution plant, despite the shorter term of the Transportation Agreement. KeySpan has indicated its willingness to depreciate its investment over a period of more than twenty (20) years if such extended depreciation period does not affect the rate recovery of any undepreciated portion of the investment because the plant ceases to provide service to AES prior to the end of such extended depreciation period. In view of the foregoing, the Settling Parties and Staff recommend that the Commission order that KeySpan depreciate its capital investment in the transmission main to be constructed to provide service to AES in a manner that is consistent with KeySpan's other distribution plant; provided, however, that the recovery through rates for any portion of such investment shall not be disallowed because such portion of the investment remains undepreciated if the plant is no longer in service.
6. **Inclusion in Rate Base.** KeySpan agrees with Staff and OCA that KeySpan's capital investment shall not be included in rate base for purposes of determining its revenue requirement unless and until such investment becomes used and useful. Thereafter, KeySpan may petition the Commission to include in rate base the amount of such investment, subject to the Commission's authority to consider the prudence of the final amount of such investment. Given that KeySpan has not yet begun construction of the pipeline that is the subject of this proceeding, the Settling Parties and Staff agree that the purpose of this Settlement Agreement is not to take a position regarding the prudence of the actual amount that may ultimately be spent by KeySpan in constructing the project.
7. **Arbitration of Disputes under Agreements with AES.** KeySpan understands and agrees that, while the arbitration provisions in the Transportation Agreement and Peaking

Agreement are intended to be binding with regard to disputes between the parties to such agreements, i.e. KeySpan and AES, they do not require that issues that may be raised by other parties or the Commission concerning regulatory matters relating to such agreements are thereby required to be submitted to arbitration, rather than to the New Hampshire Public Utilities Commission or other appropriate forums for resolution.

8. **Educational Meeting.** The Settling Parties and Staff recommend that the Commission consider the usefulness of an educational session or other similar meeting at which interested parties could discuss and exchange information regarding the impact, if any, that the construction of gas-fired electric generators in New England would have on energy prices and natural gas availability in New Hampshire.
9. **License to Cross Public Waters and State Property.** The Settling Parties and Staff recommend that the Commission issue a license to KeySpan to cross public waters and State property as requested in KeySpan's Amended Petition in Docket DG 00-207, providing KeySpan locate the main in the easement already approved by the Governor and Council or receive the approval of, and easement from, the New Hampshire Department of Transportation for the revised location in the middle of the railroad right-of-way.
10. **Data Requests.** Certain responses by KeySpan to data requests from the Staff, OCA and the Town will be provided to the Commission when this Agreement is filed with the Commission in order to make the Commission aware, in advance of the hearing on this Agreement, of information provided by KeySpan during the course of discovery. The responses to data requests do not constitute part of this Agreement and are provided for informational purposes only.
11. **Impact on Other Proceedings.** The Settling Parties and Staff agree that the Commission's approval of the Transportation and Peaking Agreements is not intended to affect the Settlement Agreement filed with the Commission in either Docket DE 98-124, *Gas Restructuring, Unbundling and Competition in the Natural Gas Industry* and Docket DG 00-063, *EnergyNorth Natural Gas, Inc. Revenue Neutral Rate Redesign* currently pending before the Commission.

12. **Motions for Confidentiality.** The OCA and Staff agree that the Commission should grant KeySpan's Motions for Confidentiality. However, the Settling Parties and Staff further agree that information regarding the estimated cost and actual cost of the pipeline shall remain confidential only until the pipeline is completed and in service.

## V. COMMISSION ANALYSIS

We have reviewed the Transportation Agreement (Special Contract No. 00-01), Peaking Agreement and License Petition, as amended, and the supporting testimony and exhibits presented at the February 6, 2001 hearing in addition to the filed Settlement Agreement. We have conducted our review pursuant to the language of RSA 378:18, which gives the Commission the authority to approve special contracts if "special circumstances exist which render such departure from the general schedules just and consistent with the public interest..." and RSA 371:17, which requires:

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.

We find that KeySpan's amended Transportation Agreement and Peaking Agreement with AES and the terms of the Settlement Agreement are reasonable and in the public good. We find the terms and conditions of the amended Transportation Agreement to be just and

consistent with the public interest, pursuant to RSA 378:18, and find that the methodology employed by KeySpan in its financial analysis in support of the proposed main extension to be a method acceptable to the Commission to evaluate the cost-effectiveness of major capital investments.

In approving the Transportation Agreement, we note that AES has a viable by-pass option. AES is under no obligation to take service from KeySpan. AES obtained the easements necessary to construct the pipeline and performed some of the initial engineering and design work. Further, AES was the entity which filed and received NHSEC approval to construct the 2.8 mile main to the Facility. For AES, the project would be uneconomical at tariffed rates, thus, forcing AES to by-pass KeySpan's delivery system and depriving current customers of the financial benefits of having AES as a KeySpan customer (such as those derived from the Peaking Agreement). Thus, there are special circumstances that qualify it for departure from standard tariff rates pursuant to RSA 378:18.

The most important benefit that KeySpan's customers will receive from the AES relationship is the additional gas supply that will become available under the Peaking Agreement. The Peaking Agreement is expected to provide significant gas cost savings because

it will provide KeySpan with considerable flexibility in managing its peaking resources. Although the Commission does not ordinarily approve gas supply contracts, we find, in this instance, that the terms and conditions of the Transportation Agreement and Peaking Agreement are not mutually exclusive, thus requiring us to consider both agreements indiscerptibly.

To fully analyze the benefits KeySpan and its customers will realize by our approval of the amended Transportation Agreement and the Peaking Agreement, we will require KeySpan to file with the Commission the capitalized costs of the main extension. Such filing shall include a comparison of actual costs to the estimated costs submitted by KeySpan in this proceeding.

Further, we note that our approval of the amended Transportation Agreement and Settlement Agreement does not authorize KeySpan to recover from ratepayers any revenue loss resulting from the Transportation Agreement. We reserve the right to address this issue at an appropriate time in the future. See Order No. 20,633, Re Generic Discounted Rates, 77 NHPUC 650, 655 (1992).

The Settlement Agreement requires 1.75% of the revenues derived from the Transportation Agreement be applied to the deferred account for environmental remediation, an

immediate financial benefit for existing firm ratepayers. As stated in the Settlement Agreement, this will serve to reduce, dollar for dollar, the amount of remediation costs recovered from KeySpan's remaining firm ratepayers.

Lastly, in order to provide service to AES, KeySpan must install its main under public waters and public land. The definition of public waters pursuant to RSA 371:17 includes "all ponds of more than ten acres, tidewater bodies, and such streams or portions thereof as the Commission may prescribe." The definition of public lands pursuant to RSA 371:17 includes "any of the land owned by this state." The Commission finds that Little Cohas Brook falls within the definition of "public waters." Therefore, KeySpan's crossing under Little Cohas Brook involves crossing public waters. Accordingly, construction in a former railroad right-of-way owned by the State of New Hampshire also requires our approval.

Based on the evidence presented, the Commission finds, pursuant to RSA 371:17, that the requested crossings are necessary for KeySpan to meet its reasonable requirements of service to the public within its authorized franchise area, and, pursuant to 371:20, that the licenses to cross may be exercised without substantially affecting the public rights in the designated waters and lands. The crossing of Little Cohas Brook by directional drilling as required by

the NHSEC will not hinder the use of the Brook. Similarly, the crossing of the former railroad right-of-way pursuant to conditions approved by the New Hampshire Department of Transportation, will not substantially affect the public rights in said land.

**Based upon the foregoing, it is hereby**

**ORDERED,** that the Settlement Agreement entered into among KeySpan, OCA and Staff is APPROVED; and it is

**FURTHER ORDERED,** that KeySpan's Petition for Approval of Gas Transportation Agreement and Natural Gas Firm Peaking Agreement with AES Londonderry, LLC and Approval of Plans for Construction of Natural Gas Pipeline to Serve AES Londonderry, LLC, as modified by the Amendments and the Settlement Agreement, are APPROVED; and it is

**FURTHER ORDERED,** that KeySpan's Petition for a License to Construct and Maintain a Natural Gas Pipeline Beneath Little Cohas Brook and to Cross State Property Located in the Town of Londonderry, as amended, is APPROVED; and it is

**FURTHER ORDERED,** that KeySpan shall submit a report to the Commission providing the capitalized costs of the main extension as discussed above. Such report shall be submitted to the Commission within sixty days upon the in-service date of the main.

DG 00-145  
DG 00-207

-31-

By order of the Public Utilities Commission of New  
Hampshire this twenty-second day of March, 2001.

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Douglas L. Patch  
Chairman

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Susan S. Geiger  
Commissioner

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Nancy Brockway  
Commissioner

Attested by:

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Thomas B. Getz  
Executive Director and Secretary