

DG 00-207

**ENERGYNORTH NATURAL GAS, INC.**

**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 Addressing Scope, Approving Consolidation of Hearings  
and Approving Procedural Schedule**

**O R D E R    N O.    23,601**

**December 12, 2000**

**APPEARANCES:** McLane, Graf, Raulerson & Middleton by Steven V. Camerino, Esq. on behalf of EnergyNorth Natural Gas, Inc. d/b/a KeySpan Energy Delivery; Bernstein, Cushner & Kimmell, P.C. by Jeffrey M. Bernstein, Esq. on behalf of the Town of Londonderry; and Larry S. Eckhaus, Esq. for the Staff of the New Hampshire Public Utilities Commission.

**I.    PROCEDURAL HISTORY**

On September 27, 2000, EnergyNorth Natural Gas, Inc. (ENGI) filed with the New Hampshire Public Utilities Commission (Commission), pursuant to RSA 371:17, a verified 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 (Petition). The Petition relates to the construction of a 2.8 mile natural gas pipeline to provide natural gas service to a proposed cogeneration facility to be constructed by AES Londonderry (AES). The pipeline to be constructed by ENGI will be located along a route previously approved by the New Hampshire Site

Evaluation Committee (NHSEC) in its Docket No. 98-02. The terms and conditions on which ENGI plans to provide service to AES are the subject of another related proceeding, Docket DG 00-145, *EnergyNorth Natural Gas, Inc.*<sup>1</sup> See Order No. 23,556 (September 18, 2000).

The route of the pipeline will cross, by means of directional drilling as ordered by the NHSEC, beneath a body of water known as Little Cohas Brook in the Town of Londonderry within an existing causeway that is part of an abandoned trolley line. ENGI avers that the location of the pipeline will not interfere with public use, if any, of Little Cohas Brook.

The route of the pipeline, approved by the NHSEC, also includes a section within an abandoned railroad right-of-way now owned by the State of New Hampshire. ENGI avers that the pipeline will be located beneath the base of the slope of the right-of-way, and therefore will not interfere with the public's use, if any, of the right-of-way. AES has obtained an easement from the State, approved by the Governor and Executive Council, giving AES, and its successors and assigns,

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<sup>1</sup>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.

the rights necessary to construct and maintain the proposed pipeline. These rights, conveyed by the State to AES, will be transferred to ENGI as and when necessary for purposes of constructing, owning and maintaining the pipeline.

The Petition states that the rights granted by the license sought by ENGI can be exercised without affecting the rights of the public to use the waters of Little Cohas Brook or the property of the State, and the use and enjoyment by the public of Little Cohas Brook and the property of the State will not be diminished as a result of ENGI's plan to construct and maintain the pipeline as proposed. All of the property rights necessary to construct and maintain the pipeline beneath Little Cohas Brook and the State's property have been obtained, so that no taking of private property or other acquisition of property rights is required for this purpose.

By an Order of Notice issued October 10, 2000, the Commission scheduled a Prehearing Conference and Technical Session for November 16, 2000, and set deadlines for intervention requests and objections thereto. The Office of the Consumer Advocate (OCA) and the Town of Londonderry (Londonderry), as Parties to Docket DG 00-145, were deemed by the Order of Notice to be Parties to this proceeding. The OCA did not participate in the prehearing conference. On October

23, 2000, Londonderry filed a Petition to Intervene "to make its position on the issues involved in this proceeding part of the official record of this case." No other interventions were filed.

The Order of Notice indicated that 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.

At the Prehearing Conference, the Commission requested that the Parties and Commission Staff (Staff), pursuant to NH Admin. Rule Puc 203.05, state their preliminary positions for the record and address the issues contained in the Order of Notice.

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

**1. ENGI**

ENGI stated that it has no objection to Londonderry's intervention, but, as in Docket DG 00-145, ENGI states that Londonderry's intervention seems to indicate that the route of the pipeline and environmental concerns are at issue in this proceeding and ENGI does not believe that they are. ENGI stated that those issues were addressed by the NHSEC and have been previously determined. ENGI believes that the only issues in this proceeding relate to the level of interference, if any, with use of public waters and the public's use of the public lands that the pipeline will be crossing. ENGI stated that the scope of this proceeding should not be broadened to address issues that were decided by the NHSEC. ENGI pointed out that in Docket DG 00-145, Londonderry indicated that it did not intend to litigate environmental issues already addressed by the NHSEC. See Order No. 23,556 at p. 8.

ENGI stated that, while it still disagrees with Staff as to whether this filing needed to be made, given the limited nature of the proceeding, ENGI felt it was easier to submit the filing and make its case on the merits to the Commission rather than argue jurisdiction. ENGI maintains that the NHSEC considered all of these issues previously,

however, it is prepared to address all of the issues that would normally be within the scope of the Commission's jurisdiction. ENGI believes the ambiguity stems from a statute that specifically says that the Commission must grant a license for these purposes and that the license issue was not expressly addressed by the NHSEC.

ENGI believes that neither the crossing of Little Cohas Brook nor the use of the Department of Transportation's (DOT) right-of-way create any undue interference with public use. In the case of the crossing of Little Cohas Brook, the crossing will be accomplished by going beneath the riverbed, another reason why ENGI believes the Commission may not have jurisdiction over this matter. ENGI avers that there will be no undue interference with the waters themselves.

With regard to the crossing of public lands, ENGI stated that it has negotiated an easement with the DOT which the DOT has determined is reasonable and will not duly interfere with the use of public lands. The easement has been approved by the Governor and Executive Council. ENGI notes that there is some possibility that within the railroad right-of-way, and the route previously approved by the NHSEC, the exact location of the pipeline may vary somewhat and that

would necessitate a modification of the easement granted by the DOT.

ENGI requests that if there is a hearing in this proceeding, that the hearing be held at the same time, or sooner, than the hearing in Docket DG 00-145.

## **2. Town of Londonderry**

Londonderry stated, as it did in Docket DG 00-145, that it does not intend to replicate issues that were already addressed in the NHSEC proceeding. Londonderry stated, however, that it is unclear whether ENGI is entitled to avail itself of the provisions of the statute, RSA 371:17. Londonderry questioned whether the pipeline to AES amounts to service to the public, and therefore ENGI may not be able to demonstrate that it meets the statutory requirement of public service. Londonderry avers that this statute is general eminent domain authority and, recognizing a principle that one cannot take property that is already appropriated to public use, there is a test that needs to be met. Londonderry states that if ENGI can surmount that test, the inquiry here is whether the crossing of Little Cohas Brook and the use of the State easement is consistent with the public use. Londonderry states that this necessarily involves the consideration of environmental and land use issues with respect to those two

relatively narrow crossings of the entire pipeline.

Londonderry stated that there is a legal issue that needs to be determined as a threshold matter which may require a hearing or filings, which would be up to the Commission.

Londonderry agreed with ENGI with regard to coordinating the hearings in this case with those in Docket DG 00-145.

### **3. Commission Staff**

Staff indicated that its position in this proceeding is similar to the one it took in Docket DG 00-145, and that it agrees with ENGI as to the scope of the proceeding, at least generally. Staff believes that the route of the pipeline and environmental impact issues were appropriately addressed by the NHSEC, and in any case, issues involving environmental impacts would not properly be brought before this Commission.

The issues that Staff believes are properly before the Commission are whether the license petitioned for may be exercised without substantially affecting the public rights in said waters or lands and whether such crossing will substantially affect the public safety or public functional use of said waters. Regarding the issue as to whether any payment or compensation is due to owners of land bordering on Little Cohas Brook and/or the State, Staff has no information as to whether there should be any compensation.



Staff believes, as it stated in Docket DG 00-145, that the Commission does have jurisdiction to determine whether this license should be granted and that whether the crossing is under the riverbed or on the bottom is insignificant. Staff further stated that it and other parties have promulgated numerous data requests on ENGI in Docket DG 00-145 and that Staff does not foresee further additional discovery except for the construction of the pipeline which the Commission's Gas Safety Engineer is continuing to review. Staff recommended that the hearings in Docket DG 00-145 be consolidated with this docket and heard on a common record pursuant to NH Admin. Rule Puc Rule 203.08.

With regard to Londonderry's questions about whether the pipeline involves service to the public, Staff believes that this line does provide service to the public. Although the pipeline primarily provides natural gas transportation service to the AES cogeneration facility, the agreement between ENGI and AES contains provisions for service to other customers under certain circumstances. In addition, this pipeline will provide service to AES for 20 years, after that time it is uncertain what the disposition of the pipeline would be. Further, the AES plant itself will be providing service to the public, and AES would become a customer of ENGI

and as such, whether this line is considered to be a distribution line or a large service line, it is still providing service to the public.

On December 7, 2000, Staff notified the Commission that the Parties and Staff agreed to the following procedural schedule:

Discovery by Town of Londonderry of ENGI	December 7, 2000
Responses by ENGI to Discovery	December 18, 2000
Filing by the Town of Londonderry of a Memorandum of Law regarding RSA 371:17, "service to the public". (Not to exceed 20 double-spaced pages in length)	
E-mail to all Parties and Staff	December 26, 2000
Hard copy	December 27, 2000
Direct Testimony by Intervenors and Staff (E-mail same day to all Parties and Staff)	January 10, 2001
Staff and Intervenor Replies to the Memorandum of Law (Not to exceed 20 double-spaced pages in length) (E-mail same day to all Parties and Staff)	January 12, 2001
Settlement and/or stipulations (if any)  Filed with the Commission	January 16, 2001

Hearings Consolidated with	
Docket DG 00-145	
(Commencing 2:00 pm)	January 24, 2001
(Commencing 9:00 am)	January 25, 2001

In addition, Londonderry and ENGI agreed that any additional discovery requests would be discussed informally. If no agreement is reached regarding additional discovery, Londonderry reserved the right to request additional discovery pursuant to Puc 203.04, and ENGI reserved the right to object to such a request.

### **III. COMMISSION ANALYSIS**

This proceeding is the result of a Petition filed by ENGI in connection with its petition in Docket DG 00-145 for approval of certain agreements with AES and for approval of plans for construction of a natural gas pipeline to serve AES. The Petition requests only that the Commission issue a license, pursuant to RSA 371:17, to construct and maintain a natural gas pipeline beneath Little Cohas Brook and certain property of the State of New Hampshire in the Town of Londonderry.

As we noted in the Order of Notice in Docket DG 00-145 (July 28, 2000), at p. 2, and in Order No. 23,556, at p. 2, in that proceeding,

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).

Consequently, the authority delegated to this Commission by the NHSEC and granted by RSA 371:17, as far as this proceeding is concerned, relates to the issuance of the license referred to in RSA 371:17. We agree with Staff and ENGI that the scope of this proceeding 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. 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 this proceeding 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. 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.

Further, as none of the Parties object to the recommendation by Staff, we will consolidate the hearings in Docket DG 00-145 and Docket DG 00-207 pursuant to NH Admin. Rule Puc 203.08. Our order in Docket DG 00-145 will issue accordingly.

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

**ORDERED,** that the scope of this proceeding shall be limited to those issues indicated above; and it is

**FURTHER ORDERED,** that the hearings in Docket DG 00-145 and Docket DG 00-207 shall be consolidated pursuant to NH Admin. Rule Puc 203.08; and it is

**FURTHER ORDERED,** that the procedural schedule proposed by the Parties and Staff shall be adopted.

By order of the Public Utilities Commission of New  
Hampshire this twelfth day of December, 2000.

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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