

**STATE OF NEW HAMPSHIRE
BEFORE THE
PUBLIC UTILITIES COMMISSION**

Docket No. DE 15-460

NORTHERN PASS TRANSMISSION LLC

Petition to Cross Public Waters

**LEGAL MEMORANDUM
INTERPRETATION OF RSA 371:17 AND 371:20**

I. PROCEDURAL BACKGROUND

On October 19, 2015, pursuant to RSA 162-H:7, Northern Pass Transmission LLC (“NPT”) filed jointly with Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) an Application for Certificate of Site and Facility (“Application”) with the New Hampshire Site Evaluation Committee (“SEC”) to construct a 192-mile high-voltage electric transmission line and associated facilities, which includes the relocation of certain PSNH electric lines to accommodate installation of the NPT line. With the Application, NPT and PSNH included four petitions to the New Hampshire Public Utilities Commission (“Commission” or “PUC”) for licenses pursuant to RSA 371:17 *et seq.* to cross public waters and lands owned by the state.

The PUC opened Dockets No. DE 15-460, 461, 462, and 463, which, respectively, concern NPT’s petition to cross public waters, NPT’s petition to cross state land, PSNH’s petition to cross public waters, and PSNH’s petition to cross state land. Orders of Notice were issued for each docket on March 10, 2016. Prehearing conferences were held for the NPT proceedings on April 1, 2016, and for the PSNH proceedings on April 4, 2016. Subsequently, on April 15, 2016, the Commission approved a procedural schedule that, among other things,

provided for the filing of legal memoranda regarding the interpretation of RSA 371:17 and 371:20, and the scope of these proceedings. Both statutes are set forth below.

371:17 Licenses for New Poles. – 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. For the purposes of this section, "public waters" are defined to be all ponds of more than 10 acres, tidewater bodies, and such streams or portions thereof as the commission may prescribe. Every corporation and individual desiring to cross any public water or land for any purpose herein defined shall petition the commission for a license in the same manner prescribed for a public utility.

371:20 Hearing; Order. – 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 and in cases involving filings made under RSA 371:17-a and RSA 371:17-b. The executive director of the commission may issue licenses under RSA 371:17-a and RSA 371:17-b.

By a Secretarial Letter dated April 27, 2016, the Commission granted petitions to intervene filed by the City of Concord (“Concord”), the Town of Franconia (“Franconia”), and the Society for the Preservation of New Hampshire Forests (“SPNHF”) in DE 15-460, and denied a petition to intervene filed by Kris Pastoriza in the same proceeding. Decisions on petitions to intervene in DE 15-460 by the Franconia Community Church of Christ and Campbell McLaren are pending. Concord was also granted intervention in DE 15-462. The various petitions to intervene raise a host of questions about the effect of the proposed crossings on the natural environment, aesthetics, historic sites, property values, tourism, and public health and safety; essentially the issues that the SEC is required to consider under RSA 162-H:16, IV when

determining whether to issue a Certificate of Site and Facility. In addition, they raise questions about the necessity of the proposed crossings. As recounted below, the questions raised by the petitioners, which prompted the filing of legal memoranda, have all been asked before and answered in no uncertain terms by the Commission, and are not relevant to the Commission's determinations with respect to the proposed crossings.

II. COMMISSION PRECEDENT

In its petition in DE 15-460, NPT set forth the legal background for the Commission's exercise of its authority under RSA 371:17 *et seq.* regarding Rights in Public Waters and Lands. Among other things, it described the standard that the Commission routinely applies when determining whether to grant a petition for a license under RSA 371:17 and 371:20, which was thoroughly developed in the analysis undertaken by the Commission in EnergyNorth Natural Gas, Inc., Docket No. DG 00-207. See Order No. 23,657 (March 22, 2001) Dockets DG 00-145 and 00-207.

Docket No. DG 00-207 involved the construction of a natural gas pipeline by EnergyNorth Natural Gas, Inc. ("ENGI") under the Little Cohas Brook, and within an easement granted by the New Hampshire Department of Transportation ("DOT") across an abandoned railroad bed, stemming from the SEC's approval of the AES Londonderry, LLC ("AES") natural gas-fired cogeneration plant. In Order No. 23,657, the Commission, at p. 22, held 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." The Commission thus rejected the notion that the prefatory language in RSA 371:17 regarding the reasonable requirements of service to the public constituted a separate test. It expressly pointed to "the fact that private corporations and

individuals may petition the Commission under RSA 371:17 for private purposes” as support for its position. *Id.*

In that proceeding, legal memoranda were filed by the Town of Londonderry, Commission Staff, and ENGI. The Town of Franconia and the City of Concord apparently intend to reprise here the arguments raised by the Town of Londonderry and rejected by the Commission fifteen years ago. They would effectively turn this crossing proceeding, and all prospective crossing proceedings, into siting proceedings, focusing on issues that are subject to SEC jurisdiction, while injecting a needs requirement similar to what the Commission was previously required to consider under RSA 162-H:16, V for siting of an energy facility (a requirement that was repealed by the Legislature in the wake of restructuring of the electric industry).

In DG 00-207, the Town of Londonderry (“Town”) argued in its Memorandum of Law, dated December 26, 2000, that a license under RSA 371:17 *et seq.* should be treated in the same manner as a taking under RSA 371:1 *et seq.*, in that the Commission must determine in each case that the proposed action “is needed ‘in order to meet the reasonable requirements of service to the public.’” It argued that serving a single customer, AES, did not constitute the public, and that the single customer did not reasonably require service from ENGI, but could procure it otherwise. The Town essentially created a two-part test under which, first, the utility must intend to serve more than a single customer, and, second, there must be no other way for such customer to receive service, i.e., a test of absolute necessity.

Commission Staff replied to the Town on January 12, 2001, and explained why the Town was wrong to equate the standard for a taking with the standard for a crossing. Commission Staff pointed out at p. 5 of its reply that, while the introductory language in RSA 371:17 mimics

the language in 371:1, the Legislature “carefully stated the criteria under which these very different types of petitions should be reviewed.” In the case of a taking, the Commission, pursuant to RSA 371:4, must “determine the necessity of the right prayed for,” which can only be sought by a public utility. In the case of a crossing, pursuant to RSA 371:20, the Commission shall render judgment granting a license “in case it shall find that the license petitioned for...may be exercised without substantially affecting the public rights in said waters or land,” which can be sought by any corporation or individual. Therefore, Commission Staff concluded at p. 6 of its reply that the only substantive determination the Commission need make is whether a crossing “will affect public safety and the public rights in said waters or lands.”

ENGI focused more on what constituted service to the public and identified a number of PUC orders in which a license was granted not only to a public utility on behalf of a single customer, but to an individual directly. Of particular note, in Re Lakes Region Construction Company, Inc., 71 N.H.P.U.C. 533 (1986), the Commission granted a license to an individual who sought to construct a sewer line under state-owned railroad tracks to interconnect to the municipal sewer line in Laconia. On a similar note, in Re Darrell A. Wagner, 70 N.H.P.U.C. 954 (1985), Mr. Wagner sought a license to install a submarine cable under Highland Lake to interconnect to a PSNH service drop. PSNH was reluctant to extend service under the lake, but the Commission granted Mr. Wagner a license directly.

In Order No. 23,657, the Commission, after deciding that the proper standard for reviewing a petition for a license was whether it may be exercised without substantially affecting the public rights, noted additionally that the Commission had previously determined that serving even a single customer constitutes service to the public. Ultimately, it found that the crossing was consistent with the statutory language of RSA 371:17 and 371:20.

While, based on its own analysis, the Commission need not have made the first finding, the second finding is especially pertinent in limning the extent of what it means to exercise a license without substantially affecting the public rights in water or lands. With respect to the crossing under Cohas Brook, the Commission concluded that crossing by directional drilling would not hinder use of the Brook, nor would crossing of the state-owned former railroad right-of-way subject to DOT conditions substantially affect public rights. Accordingly, the focus is restricted within the confines of the crossing itself, and centers on the functional use and enjoyment of the public water or land.¹

Similarly, in Re Portland Natural Gas Transmission System, Docket No. DSF 96-152, in Order No. 22,657 (July 14, 1997) the Commission addressed crossings over public waters and lands for a natural gas pipeline. In its order, the Commission observed, in the context of the SEC investigation of the pipeline, that the PUC's focus was on "the potential impact of the construction and operation of the pipeline facilities on public safety and functional use of the land and water bodies traversed." See 82 NHPUC 533, 535. It also observed that environmental, archeological, fish and wildlife, or transportation issues would be addressed by the SEC. The Commission granted the licenses, concluding that the crossings would "not unreasonably impact public safety or public functional use of any ponds, tidewater bodies, streams, or state owned land." *Id.* The Commission's approach in this case is consistent with its approach in a more recent case, NH-Big Island Co., Docket No. DE 15-066, Order No. 25,766 (April 8, 2015), another application of the functional use approach, in which the Commission found, at p. 5., that burying certain facilities under Lake Winnepesaukee would "likely prevent any interference with the public's right to use and enjoy the lake."

¹ It is important to note here that NPT and PSNH will be crossing state lands overhead along existing PSNH rights-of-way or across rail beds in which facilities are currently located. Similarly, NPT and PSNH will be crossing public waters overhead, except in one instance, i.e., Halls Stream, where facilities are currently located.

III. LEGISLATIVE HISTORY

The statutory provisions governing rights in public waters and lands have evolved gradually over time since the concept was adopted initially in 1921. At that time, the elements of what are now RSA 371:17, 19, 20 and 21 were part of a single provision. Only public utilities could petition for a license, and only over or across public waters. In addition, licenses were for twenty years, though they could be extended.

In 1951, the Legislature undertook a major recodification of the statutes governing public utilities. At that time, the single provision governing the crossing of public waters was broken into the subparts substantially as they exist currently, and RSA 371:18 was added, providing an exception to the petition and hearing requirement when the license was requested “for the exclusive purpose of furnishing facilities to the state.” The recodification also included crossings of land owned by the state, and crossings under, as well as over, both public waters and lands. Furthermore, the twenty-year time limit on licenses was removed.

Subsequently, in 1953, the Legislature expanded the reach of RSA 371:17 *et seq.* beyond public utilities to include “[e]very corporation and individual desiring to cross any public water or land for any purpose herein defined.” In 1967, the Legislature also added on to RSA 371:21 a provision for granting a license without hearing when all interested parties are in agreement.

The evolution of crossing licenses has been toward greater expansiveness, from only public utilities over or across public waters, to public utilities over and under public waters and lands, to every corporation, over, under, or across public waters and lands. While the class of entities that could petition for a license has expanded, as has the types of property that can be crossed, the standard for rendering judgment has not changed. In 1921, and now, the test is

whether the license “may be exercised without substantially affecting the public rights” in public waters or lands.

IV. SUPREME COURT

In *Dunbeck v. Exeter & Hampton Electric Company*, 119 N.H. 4, 7 (1979) the New Hampshire Supreme Court reviewed RSA 371:17 in the context of a tort claim to recover damages for personal injuries. In that case, a helicopter flying at an unauthorized level in an unauthorized location flew into two utility lines that cross Long Pond in Kingston, New Hampshire. One of the lines had been licensed by the PUC and the other had not. The plaintiff argued that the defendant public utility’s failure to license the second line constituted negligence. The Court rejected the plaintiff’s claim, concluding that RSA 371:17 “is merely a licensing provision to permit utilities to cross public waters or lands which are not subject to the power of condemnation.” The Court’s view of RSA 371:17 reinforces a narrow approach to interpreting the statute, not the expansive approach promoted by the Town of Franconia and the City of Concord, who would transform this proceeding into a full scale siting review extending beyond the boundaries of the crossing itself.

V. REASONABLENESS

Much is sought to be made of the introductory phrase to RSA 371:17, which states: “Whenever it is necessary, in order to meet the reasonable requirements of service to the public.” It has been argued that the phrase requires a showing of the necessity for a crossing in the sense that term is used in RSA 371:4, and it has been argued that the phrase requires a showing that some greater public would be served. The Commission has rejected these arguments in case after case over the years. To the extent the phrase has any substantive meaning, it may, at most, be seen as setting a general standard of reasonableness.

Examples of a general reasonableness approach include Re Lakes Region Construction and Re Darnell Wagner, cited above, as well as NH-Big Island Company, also cited above, in which the Commission granted a license to a non-profit corporation to construct an electric cable, an internet and television cable, a water pipeline, and a sewer pipeline beneath a state-owned railroad and Lake Winnepesaukee. In such cases, the Commission can be seen to be looking at the facts as they applied to the particular petition, concluding that the request was generally reasonable under the circumstances, and determining that the specific license could be exercised without substantially affecting the public's rights.

In the context of such a reasonableness review, NPT notes that, incidental to its Application to the SEC, it has requested approval from the Commission, pursuant to RSA 374:22 and 26 to commence business as a public utility in New Hampshire. NPT has requested such approval because it seeks to construct, operate, and maintain an electric transmission line and associated facilities that would be involved in the "transmission or sale of electricity ultimately sold to the public," which falls under the definition of public utility in RSA 363:2, I.

NPT has also sought and received authority from the Federal Energy Regulatory Commission ("FERC") to engage in a cost-based participant funded transmission project that would include a long-term bilateral transmission service agreement ("TSA"). FERC issued its Order Granting Petition for Declaratory Order on May 22, 2009, and it issued its Order Accepting Transmission Service Agreement on February 1, 2011. As a result, NPT will provide transmission service to its customer, viz., Hydro Renewable Energy, Inc. ("HRE"), a subsidiary of Hydro-Quebec. Moreover, the electricity transmitted over the NPT Project will ultimately be sold to the public, both in New Hampshire and throughout New England.

Consequently, although NPT does not concede that it is required to make such a showing, looking at the foregoing through the lens of a general standard of reasonableness, NPT satisfies such a requirement when considering the context of the restructured electric industry in New Hampshire, as a result of the enactment of RSA Chapter 374-F in 1996, and FERC's open access and non-discriminatory transmission requirements. Thus, it is the case, within the competitive market for the transmission of electricity established under State and Federal law, that it is necessary to meet the reasonable requirements of service to the public for NPT to construct its line over, under, or across various public waters and lands owned by the state. In this instance, public pertains to both a single customer, HRE, to which NPT provides transmission service, thus satisfying, to the extent it applies, the requirement under RSA 371:17, and the public more generally under RSA 363:2, to which the electricity will ultimately be sold.

VI. CONCLUSION

RSA 371:17 is not a substantive provision of law in the sense of requiring a specific finding by the Commission. Rather, it is more a purpose statement insofar as it establishes the requirement that a corporation, including a public utility, or an individual, must petition the PUC for a license if it wants to construct certain facilities across, over, or under public waters or lands. RSA 371:20 then sets forth the operative test for when a license shall be granted, that is, when the Commission can find that the public's rights in the waters or lands are not substantially affected.

This interpretation is consistent with the language of the statutes individually, and when read in concert, as well as with the structure of RSA Chapter 371 when considering the two very different types of petitions covered by the Chapter. This interpretation is also consistent with the legislative history of the provision, and the Supreme Court's description of the purpose of the

statute. Furthermore, this interpretation is consistent with decades of Commission practice, and to decide otherwise would transform a mere licensing provision into a fully litigated proceeding, increasing the cost and complexity of service by public utilities going forward, while potentially nullifying the ability of non-utilities to obtain licenses in the bargain.

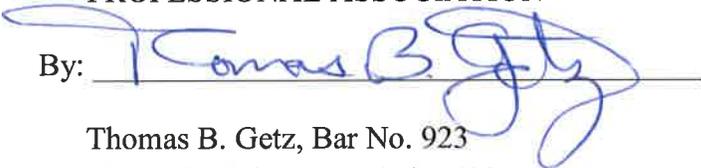
Respectfully submitted,

NORTHERN PASS TRANSMISSION LLC

By Its Attorneys,

MCLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

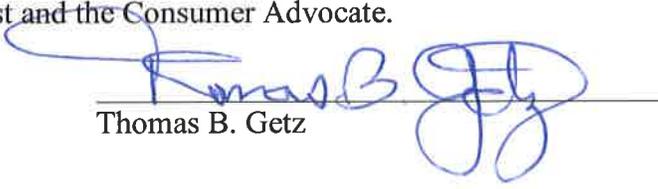
Dated: May 2, 2016

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Certificate of Service

I hereby certify that on the 2nd of May, 2016, an original and one copy of the foregoing Motion was hand-delivered to the New Hampshire Public Utilities Commission and an electronic copy was served upon the Service List and the Consumer Advocate.


Thomas B. Getz