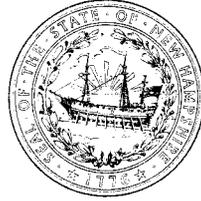


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December 11, 2008

Thomas S. Burack, Chairman
New Hampshire Site Evaluation Committee
Department of Environmental Services
29 Hazen Drive, P.O. Box 95
Concord, New Hampshire 03301

Re: Tennessee Gas Pipeline Company – Concord Lateral
Expansion Project
Site Evaluation Committee Docket No. 2008-02

Dear Chairman Burack:

Enclosed for filing with the New Hampshire Site Evaluation Committee with reference to the above-captioned matter please find *Counsel for the Public's Memorandum of Law*.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Manuela Perry".

Manuela Perry
Paralegal I
Environmental Protection Bureau
(603) 271-3679

/MP
Enclosures
cc: Service List

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2008-02

**Application of Tennessee Gas Pipeline Co.
Concord Lateral Expansion Project**

COUNSEL FOR THE PUBLIC'S MEMORANDUM OF LAW

Counsel for the Public in this proceeding Peter C.L. Roth, by his attorneys, the Office of the Attorney General, submits this Memorandum of Law. The purpose of this memorandum is to set forth the conditions that Counsel For the Public believes should be imposed on any certificate of site and facility that may be granted to the Applicant, Tennessee Gas Pipeline Co.

In support hereof, Counsel for the Public respectfully represents as follows:

I. The Conditions

Counsel for the Public represents that public safety and welfare and the human environment would be protected by requiring the following as conditions to the certificate of site and facility that may be granted to the Applicant pursuant to RSA 169-H:16:

A. The facility shall be constructed and continuously maintained, in accordance with the specifications provided by the Applicant in the letter by David Jones, HFP, and filed with the Committee as Public Counsel Ex. 7-16, and which incorporates certain provisions in the letters of David Jones, HFP dated June 9, 2008 and October 22, 2008, Public Counsel Ex. 5 and 6 respectively, and including such additional acoustical lagging and walls or barriers that may be necessary to achieve 46-48 dB(A) L_{dn} . The Applicant shall make all reasonable efforts to ensure that its predicted noise levels from the facility are not exceeded at the NSAs (as such NSAs are described in the Resource Report No. 9, Public Counsel Ex. 1), and file noise surveys with the Committee no later than 60 days after placing the facility in service.

B. If the noise attributable to the operation of the facility at full loads exceeds 50 dB(A) L_{dn} at any nearby NSAs, the Applicant shall file a report on what changes are

needed and shall install additional noise controls to meet the level within no more than 1 year of the in-service date. The Applicant shall confirm compliance with these requirements by filing a second noise survey with the Committee no later than 60 days after it installs the additional noise controls.

C. The Applicant shall supply copies of any submissions to FERC required by its Order Issuing Certificate (Aug. 28, 2008), or any subsequently issued FERC order, to the Committee and Counsel for the Public, within no more than 30 days of filing or submitting such to FERC.

D. The Committee shall retain jurisdiction and Counsel for the Public shall remain appointed for the purpose of enforcing any conditions to the Certificate of Site and Facility.

II. Factual Background

The Applicant seeks a certificate of site and facility pursuant to RSA ch. 169-H for a natural gas compressor station in Pelham, New Hampshire. The facility will employ a 6,130 horsepower turbine fired by natural gas to provide an incremental 30,000 Dth/day to customers in New Hampshire. Application at 1.1.

The Applicant applied for and received a FERC "Order Issuing Certificate" on August 28, 2008. PC Ex 4. As part of its FERC application, Applicant submitted its Resource Report No. 9 — Air and Noise Quality, in January 2008. PC Ex 1; *see* 18 C.F.R. § 380.12. As part of the Resource Report, the Applicant submitted the same Baseline Sound Survey and Noise Impact Assessment that it included as Appendix M to its Application to the Committee. The Noise Impact Assessment, dated December 20, 2007, and completed by Tetra Tech, identified four "noise sensitive areas" or NSAs near the facility. Those NSAs include the Whispering Winds retirement community, located approximately 210 meters north of the turbine building, 2 houses located 208 meters northeast, two other houses located 197 meters east of the turbine building and two other homes 181 meters southeast. *See* PC Ex 1, pp. 5-6 and figure A-2. According to the Applicant's Resource Report, there are 181

houses within one half mile of the facility, including the 92 residences at Whispering Winds.

PC Ex 1 at 9-5. The Applicant's Resource Report to FERC also stated:

Effective and proven noise mitigation measures have been included in the design of the Project to ensure that noise attributable to the operation of the new compressor station will not exceed applicable federal, state, county and township noise regulations.

PC Ex 1 at 9-7.

At the same time, the Tetra Tech Noise Assessment reported baseline noise levels at the NSAs of between 43-46 dBA L_{dn} . PC Ex 1 at 6, table 1. The background sound levels at Whispering Winds, NSA 1, were the lowest recorded: 43 dB(A) L_{dn} , with nighttime levels at 33 dB(A). *Id.* The source of noise at the NSAs was described by Tetra Tech as "typical of a rural/suburban residential area" caused by birds, insects, leaf rustle, traffic, activity at the industrial park, and construction noise in the expansion of Whispering Winds. PC Ex 1 at 6.

Tetra Tech estimated that noise from the facility combined with background would produce as much as 55 dB(A) L_{dn} at one of the NSAs, and 54.2 dB(A) L_{dn} at Whispering Winds. PC Ex 1 at 10, table 2. The sources of the noise at the facility included the 6,130 hp turbine, including its air intake and exhaust systems, mechanical noises, and exhaust line and stack, the auxiliary generator, the building ventilation system, the oil cooler, the gas cooler and aboveground piping. PC Ex 1 at 8. Tetra Tech based its noise predictions upon the assumption that a number of noise control measures would be applied to the various sources at the facility. *See* PC Ex 1 at 11-15. These measures included insulated building walls and doors, metal boots, silencers and insulated weather hoods for ventilation fans, silencers for air intake and a "critical grade exhaust stack silencer" for the turbine exhaust, which was to be constructed half into the building. PC Ex 1 at 12-13. Tetra Tech specified "ultra low

noise” fans for the gas aftercooler. PC Ex 1 at 14. Tetra Tech also required specified dimensions of acoustical lagging and insulation on any aboveground piping, and isolation of piping from metal structure components, which would be limited to a specified area. *Id.* at 14-15.

Subsequent to the Resource Report, FERC staff issued an Environmental Assessment for the facility. PC Ex 2. In the EA, FERC staff noted that it had received three letters from the public expressing concern over the noise impacts. PC Ex 2 at 28. FERC staff characterized nighttime background sound levels as “very, very low” and noted that the facility would cause “*a large increase in ambient noise up to almost a mile*” from the facility. *Id.* Importantly, the EA observed that the significant increases of noise levels caused by the facility were “of concern due to the number of residents impacted, *as well as elderly residents who may have health concerns.*” *Id.* As a result of these concerns, FERC staff recommended the conditions ultimately provided in the certificate. PC Ex 2 at 29 and 43; PC Ex 4 at 15 (¶ 12 & 13).

The Applicant, however, was not content with the results of the EA and its counsel commented on it on June 9, 2008. PC Ex 3. Some of the Applicant’s comments corrected factual problems repeated by FERC in the EA based on information provided by the Applicant in its Resource Report no. 9. PC Ex 3 at 1. But the Applicant also urged FERC not to include conditions 12 and 13 as specified in the EA. PC Ex 3 at 2. These requests were rejected by FERC in issuing its Order. PC Ex 4 at 8, ¶ 30. FERC said,

We disagree with these proposed wording modifications. These environmental conditions are *intended to ensure that Tennessee complies with the mitigation measure it has committed to in its filings.* ... Conditions 12 and 13 would ensure that operating noise levels are close to what was predicted by Tennessee. Further, we have revised Environmental Condition 12 to ensure

Tennessee provides information demonstrating that station blowdown noise is minimized at the nearby retirement community.

PC Ex 4 at 8, ¶ 30 (emphasis added).

FERC indicated that the construction and mitigation measures were necessary to “ensure that the public is adequately protected from station noise.” PC Ex 4 at 7-8.

Without amending its Application, the Applicant received two additional noise models and noise control designs for the facility. *See* PC Ex 5 and 6. These new reports re-modeled the Tetra Tech assumptions about the noise levels to be produced by the facility and the various equipment components. The HFP reports made further specific determinations about mitigation measures. HFP modeled three scenarios or cases for its analysis. The first being 55 dB FERC compliance, the second showing 3 dB below FERC levels and the third, 6 dB below FERC compliance. *See* PC Ex 5 at 4-5. Each scenario included specified mitigation measures and predicted noise levels at the NSAs. *Id.* HFP further refined its analysis with manufacturers’ information on October 22, 2008. PC Ex 6.

In its last report, on November 6, 2008, HFP made a number of specific recommendations for measures, identified equipment that the Applicant has already purchased, and predicted a noise level at the nearest NSAs of no more than 46-48 dB(A) L_{dn} . PC Ex 7-16. Thus, after two firms of experts and four analyses, with very specific measures identified and committed, the Applicant predicts that its noise emissions combined with background, will not exceed 48 dB at the NSAs. PC Ex 7 at 7, § 5.2 (46-48 dB); PC Ex 6 at 3, § 4.3 (44 to 46 dB); PC Ex 5 at B2, Table 5-1 (47-48 dB).

At the hearing before the Committee on December 1, 2008, Michael Stokdyk, the Applicant’s Manager of Business Development testified at length about the project and in

particular the noise mitigation elements. *See* Transcript of December 1, 2008 Hearing (“Tr”), at 25-41. Mr. Stokdyk testified that the Applicant would construct the facility in accordance with section 4 of the November 6, 2008 HFP report. Tr at 27 (describing the measures taken as “significant” to “minimize” noise levels). He identified some of the particular elements of the noise proofing measures to be undertaken by the Applicant. Tr at 28. Finally, Mr. Stokdyk testified that the measures undertaken would mean that noise levels produced by the operation of the facility at the nearest NSA would not exceed 46-48 dB(A) L_{dn} . Tr 29-30.

When questioned about the impacts of a 50 dB condition imposed upon the Applicant, Mr. Stokdyk said that a 50 dB limit would not delay the project other than through the Applicant’s own legal maneuvers and not because of any additional requirements. *See* Tr at 40-41. He also stated that the 50 dB limit would not cause the Applicant to incur any additional costs at the facility beyond what had already been budgeted. Tr at 41. Finally, Mr. Stokdyk also agreed that the 50 dB limit proposed by Counsel for the Public would not make it impossible for the Applicant to comply with its responsibilities under federal law or its FERC license. Tr at 41.

III. Argument

A. Counsel For The Public’s Proposed Conditions Should Be Accepted By the Committee

Counsel for the Public proposes several conditions concerning noise mitigation. One of those conditions, Condition A, is substantially similar to the condition already proposed by the Applicant and very similar in wording with the condition under which the Applicant will operate imposed by FERC. Counsel for the Public’s condition B is also substantially

similar to condition 13 imposed under the Applicant's FERC certificate with the exception that it includes a 50 dB limit rather than a 55 dB limit. FERC could not, of course, require the Applicant to comply with a lower limit consistent with its regulations. *See* 18 C.F.R. § 380.12(k)(4)(v)(A) (FERC limit is 55 dB). Instead, what FERC did was require the Applicant to build the facility towards the levels the Applicant predicted were possible in deference to Whispering Winds and the concerns of the many elderly people who live there. PC Ex 1 at 9-5; PC Ex 2 at 28-29.

Because of their similarity to the FERC conditions, the Applicant should have no serious objection to the wording of the conditions proposed.

1. The Fifty dB Limit Is A Good Idea

The Applicant's officer, Mr. Stokdyk, testified that the Applicant wants to be a "good neighbor" to the residential community in which it proposes to install its 6,130 hp turbine. Tr at 32. That neighborhood has "very, very low" background noise levels. *See* PC Ex 2 at 28. The many people who live within 1,000 feet of the facility are accustomed to hearing typical suburban noises such as leaf rustle, insects, birds, distant traffic and occasional sounds from the industrial park. PC Ex 1 at 9-6, & App. 9A at 6. They are most likely not accustomed to daily constant levels of noise that the Applicant's facility will bring. According to evidence submitted by Counsel for the Public without objection from the Applicant, background sound levels in a neighborhood like the facility's location can be characterized as somewhere between "library" and "quiet." PC Ex 18; PC Ex 19 at 15, fig. 1, and Table B-3 (on page 57) (showing quiet suburban residential area having sound levels of 48-52 dB L_{dn}). In addition, as pointed out during questioning by the Committee, the Applicant's proposal of 55 dB at the residence does not necessarily protect those who may

find themselves still on their own property but closer to the facility from “somewhat louder” noises emanating from the facility. *See* Tr at 45-46. It is also noteworthy that the Applicant’s levels represent a day/night average which “is equivalent to a continuous noise level of 48.6 dB(A).” PC Ex 2 at 27. Due to the fact that included in the averages are necessarily periods where the noise from the facility may be quite low, there are also almost certainly noise levels that could exceed 55 dB, including loud phases from the blowdown silencer, the noises from which are not included in the project’s projected noise levels. *See* Tr at 67-69; PC Ex 3 at page 2 (blowdown silencer noises not modeled); PC Ex 2 at 29 (“Noise from both maintenance and emergency types of unsilenced blowdown events can be upwards of 100 dB(A) L_{eq} at 50 feet.”); PC Ex 4 at 7 (FERC finding that unsilenced “blowdown events at the station ...are intermittent but can be quite loud and annoying”).

Consequently, for the Applicant truly to be a good neighbor and to preserve the quiet nature of the neighborhood, it makes sense that its noise limitation should be with reference to what is unlikely to be noticed in the neighborhood. Fifty-five dB is beyond what the Applicant has demonstrated it is capable of doing to be a good neighbor. A fifty dB limit will assure that the facility does not interfere with the quiet enjoyment of the many people living in the “nearest sensitive areas” and still not trap or unduly burden the Applicant.

2. The Fifty dB Limit Is Achievable

The Applicant’s own filings of its consultant’s carefully done and redone work show that the fifty dB limit is fully attainable by the Applicant under normal operation of its facility with equipment and mitigation measures it has already committed to install. PC Ex 7 at 7, § 5.2 (46-48 dB); PC Ex 6 at 3, § 4.3 (44 to 46 dB); PC Ex 5 at B2, Table 5-1 (47-48 dB). While it is true, as Mr. Stokdyk said, that sound measurement is part art, part science, it

is equally true that within the mitigation possibilities that remain for the Applicant, there is flexibility. There is no evidence on the record that any *operational* changes would be required of this facility to enable the Applicant to attain the 50 dB limit consistently. *See* Tr at 40-41. Moreover, Applicant's consultants reported that additional lagging and sound barriers could be employed to further mitigate noise levels on the facility. *See* PC Ex 5 at p. 5 (¶ 5.3 discussing options to mitigate noise on various components including lagging and noise barriers).¹ Finally, much of the sound level information used by the Applicant's consultants was provided by equipment manufacturers of the components, presumably covered by warranties. *See* PC Ex 7-16. Aside from unspecified uncertainties about the reliability of the Applicants' consultants' modeling mentioned by Mr. Stokdyk, the record has no evidence that shows anything other than that the 50 dB limit is achievable.

3. A 50 dB Limit Is Not Preempted By FERC Rules.

The Applicant's project is under FERC jurisdiction and has a FERC certificate. PC Ex 4. In the Applicant's certificate, however, FERC noted that it "encourages cooperation between interstate pipelines and local authorities." PC Ex 4 at 9. FERC cautioned, however, that application of state laws cannot "prohibit or unreasonably delay" the construction of the facility. *Id.*² FERC has interpreted its authority in other cases in similar ways. *See* PC Ex 17. In the PacifiCorp matter FERC was asked to declare how much a local government could exercise its authority over a FERC licensed facility. FERC ruled that the Federal

¹ This point was also emphasized by the Applicant and its consultants during the technical session held on October 28, 2008.

² "Of course, every state statute that has some indirect effect on rates and facilities of natural gas companies is not preempted." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

Power Act preempted all state and local law concerning hydroelectric facilities. *Id.* at 4.

FERC went on to hold, however, that

Federal preemption does not necessarily mean that FERC will not elect to require [the Applicant] to comply with those of the county's requirements that FERC concludes will not interfere with the company's ability to carry out FERC's orders. ... We prefer for our licensees to be good citizens of the communities in which projects are located, and thus to comply with state and local requirements, where possible. However, to the extent that state or local regulations make compliance with our orders impossible or unduly difficult, we will conclude that such regulations are pre-empted.

Id.

There is nothing about the 50 dB limitation sought by Counsel for the Public, which will prohibit or unreasonably delay the construction or operation of the Applicant's facility. The Applicant's proposals are all consistent and show that it has the ability to meet 50 dB without any delay or prohibition. Moreover, there is nothing about the 50 dB limit that will make compliance with the Applicant's FERC orders impossible or unreasonably difficult. The evidence, provided by the Applicant is undisputed on this point. PC Ex 5, 6, 7-16; Tr at 40-41.

The mere fact that FERC regulations set a maximum noise level of 55 dB at the nearest NSA does not indicate that Congress intended for FERC regulation to prohibit a lower locally mandated limit, where such limit neither interferes with nor prohibits this project, and does not complicate the Natural Gas Act's goal of national uniformity. As the Applicant stated on the record, different noise levels at different locations require different types of mitigation efforts — there is nothing uniform about it. *See* Transcript of July 17, 2008 Public Meeting (Pelham) ("Public Mtg. Tr") at 63-64. The Committee would thus not intrude on FERC's jurisdiction by requiring this facility, under these conditions, to provide a modicum of additional protection

from the noise generated by the facility to the particularly sensitive receptors at Whispering Winds.³

As shown above, while FERC can preempt local laws where there is an actual conflict, it clearly wants the Applicant to be a good citizen of New Hampshire and of Pelham, and a good neighbor to Whispering Winds, and it will not interfere with the Committee's imposition of a 50 dB limit on this facility in this case.

B. The Applicant's Claim That It Will Be Disadvantaged In Other States Is Unsubstantiated And Not A Valid Concern For The Committee

At the hearing, Mr. Stokdyk suggested to the Committee that the 50 dB limit proposed by Counsel for the Public should not be accepted because it would make the Applicant's projects in other locations more costly and difficult. Tr at 31-32. Aside from this claim being pure speculation, more importantly, it is not a valid concern for the Committee to take into account.

The extent to which the Applicant faces similar situations is not known. The Applicant was asked to indicate what noise levels it had met in other jurisdictions. *See* Public Mtg. Tr at 61-64. The Applicant's answers were fairly opaque. But one thing that became very clear from the testimony: the Applicant approaches noise mitigation on a case-by-case, location-by-location, basis. Public Mtg. Tr at 24-25 (describing the variety of conditions at different locations that can affect noise levels). From 'none' in cases where no residences are nearby, to 'extra' where residences are close. Public Mtg. Tr at 63-64. Regardless of the actual limit, the Applicant

³ Even assuming that FERC rules are in fact preemptive for what is arguably a local distribution facility. *See* 15 U.S.C. § 717(b) (act does not apply to local distribution facilities).

professes to endeavor to be a good neighbor elsewhere and not produce annoying noises and will spend what is necessary on mitigation to achieve that. Public Mtg. Tr at 62 (“we’re employing a lot of mitigation measures” in order to meet “target to be a good neighbor”). Moreover, the Applicant provided no evidence of any specific instance where it would be required to spend more money or time developing a project elsewhere because of a more stringent condition imposed in New Hampshire. Consequently, the Applicant’s apocryphal and unsupported assertions about how a 50 dB limit might cost it more in other places are exaggerated and should be given little, if any, weight.

More importantly, however, the Committee cannot disregard the environmental consequences of a facility here, in order to protect the *Applicant’s* interests elsewhere. See RSA 162-H:1, I (focus of purpose is on energy and environmental consequences “of the state”); RSA 162-H:16, IV (findings to be based on “relevant factors bearing on whether the objectives of this chapter would be best served by the issuance of the certificate...[for] the site and facility”). The Committee’s job is to protect the interests of the people of New Hampshire with respect to facilities at sites in *this* State. It is indisputably not within the Committee’s jurisdiction to consider the energy and environmental impacts of facilities in other states. And the Applicant has produced no evidence showing that a 50 dB limit in New Hampshire, would be harmful to any of the interests of New Hampshire’s residents.

IV. Conclusion

Counsel for the Public has presented conditions to be placed on the certificate of site and facility that the Applicant seeks. Those conditions in most respects mirror the conditions imposed by FERC in granting the Applicant its certificate. The additional measure of protection sought by Counsel for the Public is a modest tightening of the noise level that is designed to protect the Whispering Winds community from noise disruption from the operation of 6,130 horsepower turbine in the quiet residential neighborhood proposed. The Applicant's own evidence is that the additional requirement will have no effect on the cost, timing or operability of its facility in New Hampshire. Federal preemption of this particular condition would not occur based on the Applicant's FERC certificate, prior FERC ruling and under applicable federal law. As such, Counsel for the Public's proposed conditions should be approved, and the Applicant's proposed conditions should be denied.

Respectfully submitted,

PETER C.L. ROTH
COUNSEL TO THE PUBLIC

By his attorneys

KELLY A. AYOTTE
ATTORNEY GENERAL



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Dated: December 11, 2008

Certificate of Service

I, Peter C.L. Roth, do hereby certify that I caused the foregoing to be served by first class mail postage prepaid upon each of the parties on the attached Service List.

Dated: December 11, 2008

Peter C.L. Roth
Peter C.L. Roth

SERVICE LIST
As of October 9, 2008
Docket No. 2008- 02

Application of Tennessee Gas Pipeline Co.

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