



NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXONPEABODY.COM
@NIXONPEABODYLLP

W. Scott O'Connell
Partner
T 603-628-4087
F 866-947-1393
soconnell@nixonpeabody.com

900 Elm Street
Manchester, NH 03101-2031
603-628-4000

September 18, 2015

VIA EMAIL AND FEDERAL EXPRESS

New Hampshire Site Evaluation Committee
c/o David K. Wiesner, Staff Attorney
New Hampshire Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

**RE: New Hampshire Site Evaluation Committee Rulemaking
(Docket No. 2014-04)**

Dear Attorney Wiesner:

Nixon Peabody (“NP”) represents Tennessee Gas Pipeline, LLC (“TGP”), the developer of the FERC-regulated interstate Northeast Energy Direct natural gas pipeline project. On behalf of TGP, we respectfully submit the following additional comments on the proposed rules for the New Hampshire Site Evaluation Committee (“SEC”).

Recognizing the complex task before you, and the timing constraints under which you are operating, we thank you for the continued opportunity to participate in your rulemaking process. Your work over the past nineteen months has contributed to significant improvements in the consistent and unambiguous application of rules for the siting of energy facilities in New Hampshire. Despite the progress made, we urge the SEC to consider further refinements to the proposed rules in order to be consistent with existing law and to provide for cost-efficient parallel analysis and review by state and federal regulators in their respective processes. We offer the following comments on specific aspects of the Annotated Draft Final Proposed Rules dated September 1, 2015:

1. Site 301.03(c)(6): Contents of Application – Site Control

Section 301.03(c)(6), has been improved as it now provides that each application shall contain evidence that (a) the applicant has a legal right to control the site for construction of the facility, or (b) the taking of other simultaneous “action” that could provide the applicant with legal rights to control the site via eminent domain (the “Parallel Filing Option”). As there are great economies and benefits that would result from parallel state and federal processes, NP has

advocated for the positive change addressed in subsection (b) above. At the work session on August 26, 2015, the SEC agreed to further broaden the Parallel Filing Option by deleting the limiting reference to “federal and state” action in favor of “any” other action.

Although the revised language has been significantly improved, our concern is that, as currently written and without including additional clarifying language, this provision still might be read to require an “action” that directly involves a court of law. This incorrect interpretation might unintentionally rule out the filing for a Federal Energy Regulatory Commission Certificate of Public Convenience and Necessity (a “FERC Certificate”) as the means through which an applicant will acquire the right of eminent domain. As it was clearly not the intention of the SEC to limit the Parallel Filing Option in this manner, we believe this language should be further clarified to expressly authorize a FERC Certificate Filing as sufficient “action” to meet the Parallel Filing Option. We suggest revising Section 301.03(c)(6) as set forth below:

Evidence that the applicant (a) has a current right, or an option or other legal right to acquire the right to construct the facility on, over, or under the site, in the form of ownership, ground lease, easement, other contractual right or interests, written license or other permission from a federal, state or local government agency, or (b) through the simultaneous filing of a federal regulatory proceeding or the taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing the facility thereon;

2. Site 301.03(c)(7): Contents of Application – Pre-Certificate Access

Section 301.03(c)(7) is a new provision which first appeared in the version of the Draft Rules dated August 26, 2015. It appears the intent behind the rule is to offer the SEC some means to perform site visits and to allow “pre-construction monitoring or studies” on particular sites where the proposed facility is above-ground and located on a single site. This new provision is not a workable standard for linear projects that cross state land, bodies of water, and private land, (e.g., natural gas pipelines). It is simply not possible to obtain a right or conditional right of access to all of these types of land and bodies of water prior to filing an SEC application. Any requirement to do so is (i) unduly burdensome, (ii) exceeds the enabling authority of the SEC, as set forth in RSA 162-H:10, which is limited to “reasonable investigation,” and (iii) with regard to interstate natural gas pipelines, preempted by the National Gas Act.

Moreover, Section 301.03(c)(7) is in internal conflict with the Parallel Filing Option discussed above. Site 301.03(c)(6) implicitly recognizes that (i) because a FERC Certificate provides the power of eminent domain for the development of an interstate resource, and (ii) as a result, such an applicant will ultimately be able to secure legal site control, (iii) the SEC will accept as complete an application if it is simultaneous filed along with a FERC Certificate application.

Thus, in addition to being an impossible standard, which constitutes a barrier to the orderly development of an interstate project, requiring that such interstate linear projects evidence pre-certificate access to all of the land which it will encumber at the time of filing a SEC application effectively prohibits the Parallel Filing Option in numerous unintended applications.

Section 301.03(c)(7) will also significantly limit state and local input into many energy projects. The Parallel Filing Option ensures that issues of local significance will be addressed through cooperation and good faith efforts to find common ground—a better outcome for all interested parties. However, as written, Section 301.03(c)(7) would unintentionally place virtually all of the permitting emphasis of an interstate linear project applicant on the FERC Certificate regulatory process. Ultimately, the consequence of such a requirement could be a FERC Certification approval with very little state involvement and the issuance of a FERC Certificate that could preempt further consideration and modification to account for state and local interests.

For interstate linear projects, Section 301.03(c)(7) needs to appropriately reflect the federal regulatory overlay and its power of preemption. To ensure that the state can be a meaningful participant in the consideration of such a project, the access issues should be more narrowly drawn. Instead of requiring access to every single mile of a linear project, the applicant should rather ensure the SEC that it can provide, at minimum, access to (i) any property that will have above-ground facilities, such as compressor facilities and metering stations, and (ii) some areas of the linear line that are representative of the project. Further, inspections can be completed from abutting lots (over which access is available) or through the use of aerial high definition photography, or flyovers. In sum, there are many ways to accommodate the reasonable needs that the SEC may have for access to certain portions of a proposed linear project site without adopting the “all or nothing” framework now included within Section 301.03(c)(7).

In order to address these important considerations, we suggest revising Section 301.03(c)(7) as set forth below:

- (a) Evidence that the applicant has a current or conditional right of access sufficient to accommodate a site visit by the committee and the performance of any required pre-construction monitoring or studies; or (b) for linear projects under the regulatory authority of Federal Energy Regulatory Commission, evidence of a simultaneous filing of a federal regulatory proceeding or the taking of other action that would, if successful, provide the applicant with a right of eminent domain to acquire control of the site for the purpose of constructing the facility thereon, and evidence that the applicant has a current or conditional right of access for all proposed above ground structures to accommodate a site visit by the committee and the performance of any required pre-construction monitoring or studies; and

September 18, 2015
New Hampshire Site Evaluation Committee
Page 4

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We appreciate the SEC's consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "W. Scott O'Connell", written over the printed name.

W. Scott O'Connell, Esq.
Partner

GJM/meb

cc: Gordon J. MacDonald, Esq.