

May 11, 2000

D.T.E. 00-34

Petition of Maritimes & Northeast Pipeline, L.L.C., for approval by the Department of Telecommunications and Energy to grant it the authority to enter upon land owned by various persons, entities, or corporations in the Towns of Methuen, Boxford, North Andover, Middleton and Danvers, and the Cities of Haverhill, Peabody, and Salem in Essex County, as well as in the Town of North Reading in Middlesex County, Massachusetts, for the purpose of making a survey preliminary to an application to the Federal Energy Regulatory Commission for the construction and operation of a natural gas pipeline and appurtenant facilities and eminent domain proceedings, pursuant to M. G. L. c. 164, §§ 72A and 75D.

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APPEARANCES: James T. Finnigan, Esquire

Rich, May, Bilodeau & Flaherty, P.C.

176 Federal Street

Boston, MA 02110-2223

FOR: MARITIMES & NORTHEAST PIPELINE, L.L.C.

Petitioner

- INTRODUCTION

On March 29, 2000, Maritimes & Northeast Pipeline, L.L.C. ("Petitioner") filed a petition with the Department of Telecommunications and Energy ("Department") seeking authority under G. L. c. 164, §§ 72A and 75D to enter upon land in the towns of Methuen, Boxford, North Andover, Middleton, Danvers, and North Reading, and the Cities of Haverhill, Peabody, and Salem for the purpose of making a survey of a proposed natural gas pipeline route preliminary to: (1) an application to the Federal Energy Regulatory Commission ("FERC") to obtain a Certificate of Public Convenience and Necessity ("Certificate") with respect to the proposed pipeline (15 U.S.C. § 717f(c)) and (2) eminent domain proceedings.

Petitioner intends to file an application with FERC to obtain a Certificate for authority to construct and operate a 24.7 mile, 30-inch high pressure interstate natural gas pipeline and other appurtenant facilities in Massachusetts ("Maritimes Phase III Project") (Petition at 1). The Maritimes Phase III Project, as currently proposed, would run from a point in Methuen, through the above-referenced municipalities, to an interconnection with Algonquin Gas Transmission Company's proposed pipeline in Salem (id. at 2; Exh. B to Affidavit of Patrick J. Hester).

Petitioner states the Maritimes Phase III Project would provide transportation service to various markets and to new and existing power generators in Massachusetts and the northeast (id. at 1-2). Petitioner has identified a proposed route for the Maritimes Phase III Project and states that "in order to prepare and file a complete application for the Certificate on or about June 1, 2000 and to complete applications for federal and state environmental permits, the Petitioner must physically enter all property along the route of the proposed project and conduct civil, wetlands delineation, archeological and endangered species surveys as soon as possible" and to survey preliminary to eminent domain proceedings (id. at 2-3, 9).

General Laws c. 164, §§ 72A and 75D authorize the Department to grant a Petitioner authority to enter private lands for the purpose of making a survey preliminary to eminent domain proceedings.<sup>(1)</sup> The Department may grant such permission without notice and hearing. Carlisle v. Department of Public Utilities, 353 Mass. 722 (1968). In acting on this petition, the Department exercised its discretion on the question of notice and hearing by ordering Petitioner to mail notice of this proceeding to all landowners upon whose land the Petitioner has petitioned for authority to enter (see Appendix A). This notice provided that property owners could submit comments on the petition to the Department by April 21, 2000. On April 4, 2000, the Petitioner mailed notice to the landowners referenced in its Petition (see Appendix A) (Certification of Compliance with Order of Notice at 1). On April 6, 2000, three additional landowners, G.I.O. Properties, Wilfried Welsch, and Northland at 128 Realty Trust were notified by mail

(see Appendix B)(id. at 1-2). On April 7, 2000, Petitioner sent notice, by express mail, to a fourth additional landowner, Mayflower Liberty Tree, L.L.C. (see Appendix A)(id.). Petitioner arranged to have the Order of Notice published in The Boston Globe on April 6 and 13, 2000 (id. at 2).

The Department received comments from the following: Jack R. Pearl; Donald Kelley, principal of Wayside Transcorp. ("Wayside"); Harold S. Otto and Elizabeth C. Otto ("the Ottos"); Paul D. Reddick and Sherri L. Reddick ("the Reddicks"); Nancy A. Pearl; Steven D. Feinstein; Joseph R. Petringa; John S. Merriam, Jr. and Lynn R. L. Merriam ("the Merriams"); Gayle M. Gallagher and Lawrence D. Gallagher ("the Gallaghers"); Keith Mitchell, Chairman, Board of Selectmen of the Town of North Andover, and Mayflower Liberty Tree, L.L.C. ("Mayflower").<sup>(2)</sup>

Many of these comments raise issues relating to the Maritimes Phase III Project, including the need for the pipeline, the need for alternative routes, and concerns about perceived negative impacts of the Maritimes Phase III Project, as well as concerns about the survey petition. Mr. Pearl, Wayside, the Ottos, and the Reddicks also comment specifically on the survey petition. Steven D. Feinstein asserts the mileage calculations of the Petition may become inaccurate if alternative routes are to be considered and surveyed.

Mr. Pearl states "the subject petition is not a public necessity" and, consequently, should be denied (Pearl Letter). Counsel for Wayside expresses concerns that surveying may create legal obligations for Wayside and states that if the Department compels entry, "[Wayside] expects to receive from [Petitioner] a complete indemnification and hold harmless agreement, protecting [Wayside] from any and all claims, costs, liens or liabilities of every nature which might arise against them or the land as the result of the [Petitioner's] agents presence on, investigation or, or discovery of a condition concerning [Wayside] property" (Wayside Letter). Moreover, Wayside argues it operates a business involving large trucks and to allow the Petitioner to survey Wayside's property raises safety concerns and would unnecessarily impede business operations (*id.*).

The Ottos state surveying their land would create a burden, invade their privacy, and subject their children to prowling strangers (Otto Letter). Further, Mr. Otto states he possesses a family history of heart disease and wishes to avoid the stress associated with the surveying as he will have to take time out of work to be present during the surveying (*id.*). Finally, the Ottos state "conservation restrictions or covenants for the wetlands areas and storage ponds " are imposed upon their property in a recorded order of conditions (*id.*).

In addition to concerns about the route of the proposed pipeline, the Reddicks assert the Petitioner is not requesting survey permission for a "feasibility study," but rather has already determined that the route being surveyed is the proposed route (Reddick Letter).<sup>(3)</sup>

On April 28, 2000, the Petitioner submitted a response to the comments submitted by the above-listed individuals ("Response"). Petitioner states two commenters, Stephen D. Feinstein of Peabody and Keith Mitchell, Chairman of the Board of Selectmen of North Andover, lack standing to comment in this proceeding because the Petitioner is not requesting authorization from the Department to enter upon any property owned by Mr. Feinstein or the Town of North Andover.<sup>(4)</sup> The Petitioner also asserts that comments

submitted by Jack Pearl, Nancy Pearl, Joseph Petringa, the Merriams, and the Gallaghers raise general project related concerns which are not specific concerns pertaining to the Petitioner's proposed survey activities (Response at 2).

Petitioner states it will supply the Ottos and Wayside with 48 hour notice prior to entering their properties. Further, Petitioner acknowledges it is liable for damages incurred during the course of its survey activities as set forth in G. L. c. 164, §§ 72A and 75D.

## II. ANALYSIS AND FINDINGS

Before the Department makes a determination on the Petitioner's petition filed under

G. L. c. 164, §§ 72A and 75D, the Department considers the comments submitted by the affected landowners. The Department notes that the majority of comments address the need for, alternatives to, and impacts of the Maritimes Phase III Project and are not specific to the survey petition. Further, this is not an eminent domain proceeding. Therefore, comments addressing concerns associated with an eminent domain proceeding are not within the statutory scope of this proceeding.

The Department has reviewed the comments that related directly to the survey petition and finds that although the commenters raise specific concerns regarding the surveying of their property, these concerns are not sufficient reason to deny the Petitioner the survey authority it has requested and are adequately addressed by the conditions placed on Petitioner in this Order. To allow Mr. Otto and Wayside to be present for the survey and to alleviate Wayside's concerns regarding interference with its business operations, the Department directs Petitioner to arrange with the Ottos and Wayside, if possible, for a mutually convenient surveying time, and to provide the Ottos with at least forty-eight hours advance notice prior to entering their property to survey. Wayside's further concern that the survey might uncover pre-existing conditions on its property which it could then be required to mitigate is understandable, but does not constitute good reason to prevent the survey. While the Department will not transfer any legal obligations resulting from the discovery of such hypothetical pre-existing conditions to the Petitioner, we note that the Petitioner is liable under G. L. c. 164, §§ 72A and 75D for any damage caused to Wayside's property, and to the owners of all property surveyed, by the surveying.

Accordingly, the Department finds the Petitioner's petition to be appropriate as a necessary preliminary activity incident to the proposed Maritimes Phase III Project. The Petitioner is granted authority to enter those lands listed in Appendix A, subject to the conditions enumerated in Section III of this Order.

The Department's approval under G. L. c. 164, §§ 72A and 75D does not constitute a judgment regarding the Maritimes Phase III Project or the need for or location of any

potential eminent domain takings. Considerations of and findings regarding the underlying project are reserved for the federal and state permitting process and for any eminent domain proceeding which may be filed with the Department at some future date. The Department will keep this docket open for a reasonable period of time to allow the Petitioner to supplement its petition should the Petitioner identify additional land for which it is unable to obtain permission to survey.

### III. ORDER

Accordingly, after due notice and consideration, it is

ORDERED: That for the purpose of making surveys and field studies in connection with the proposed Maritimes Phase III Project, as described in the Petitioner's petition and attachments, Maritimes & Northeast Pipeline, L.L.C., acting through its employees, agents, and representatives, is authorized to enter upon the lands of those persons listed in the attached Appendix A; and it is

FURTHER ORDERED: That Maritimes & Northeast Pipeline, L.L.C. comply with the following conditions: (1) no trees or timber shall be cut down or removed on the affected properties; (2) small brush may be cut down and removed on the affected properties, but only in areas where surveyors need to make a line of sight; (3) areas excavated for purposes of conducting archaeological surveys on the affected properties must be restored to a condition reasonably consistent with their condition before construction; (4) no blasting shall be conducted on any of the affected properties; (5) no man-made structures, including buildings, fences, and stone walls shall be disturbed; (6) Maritimes & Northeast Pipeline, L.L.C. shall make a reasonable effort to arrange with each landowner a convenient date and time that their property will be surveyed so that the landowner may observe the surveying; (7) Maritimes & Northeast Pipeline, L.L.C. shall contact the Ottos and Wayside and arrange for a mutually convenient time to conduct the survey; and (8) Maritimes & Northeast Pipeline, L.L.C. shall provide a copy of its petition and plans to any of the landowners listed in Appendix A who request a copy; and it is

FURTHER ORDERED: The Department shall transmit a copy of this Order, by certified mail, to the landowners listed in the attached Appendix A at least five days prior to any entry upon the affected properties; and it is

FURTHER ORDERED: That within three days of the date of this Order, Maritimes & Northeast Pipeline, L.L.C. shall serve a copy of this Order on the selectmen of the towns of Methuen, Boxford, North Andover, Middleton, Danvers, and North Reading, and the cities of Haverhill, Peabody, and Salem, and place a copy of this Order in the libraries of those towns and cities for public inspection; and it is

FURTHER ORDERED: That this docket shall remain open for a reasonable period of time to allow Maritimes & Northeast Pipeline, L.L.C. to supplement its petition should it determine the need to obtain Department approval to survey the lands of other property owners along the primary route.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr., Commissioner

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Deirdre Manning, Commissioner

A true copy

Attest;

MARY L. COTTRELL

Secretary

1. Petitioner is a natural gas pipeline company to which the statutes apply.
2. On April 28, 2000, the Petitioner informed the Department that it has further defined the Maritimes Phase III Project and as a result will not cross the property of Mayflower (Response at 2). Because Mayflower's property will not be surveyed, Mayflower's property is no longer subject to this Order and its comments are not addressed.
3. The Department's jurisdiction in this proceeding is limited to rendering a decision on a petition to survey for the proposed route(s) contained in the petition. FERC possesses jurisdiction over the designation of primary and alternative pipeline routes.
4. Mr. Feinstein suggests that if Petitioner ultimately constructs the Maritimes Phase III Project along an alternate route, the pipeline mileage listed in the notice may become inaccurate and argues that if this occurs, Petitioner should be required to issue a new notice (Feinstein Letter at 2). The Department notes that the sole purpose of this proceeding is to determine whether the Petitioner should be allowed to enter upon 57 specific properties in order to conduct survey work, and that each of the 49 property owners in question received mailed notice of this proceeding. We conclude that this proceeding has been properly noticed and emphasize that the proposed route for the Maritimes Phase III Project is not a subject for adjudication in this proceeding. If the Petitioner is required to survey any alternative to the proposed route or an alternative route, and it is unable to obtain permission to conduct the required surveys from the landowner(s), the Petitioner must seek permission from this Department to survey the additional properties; in such a case, additional property owners would be noticed.