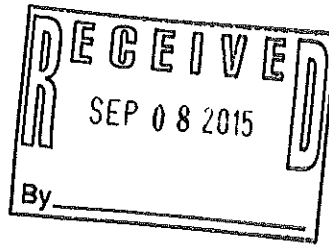


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September 2, 2015

VIA FIRST CLASS AND CERTIFIED MAIL

Mr. John G. Spanbauer
Chairman
Town of Northfield Board of Selectmen
69 Main Street
Northfield, MA 01360-1017

Joel B. Bard, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 11th Floor
Boston, MA 02110

Re: Northfield's Purported Moratorium on Survey Activity for Proposed Pipeline

Dear Messrs. Spanbauer and Bard:

This firm represents Tennessee Gas Pipeline Co., L.L.C. ("Tennessee") in connection with the Northeast Energy Direct Project (the "Project") located in Massachusetts.

We are writing to respond to your letter dated March 9, 2015, in which you communicated the Town of Northfield (the "Town") Board of Selectmen's (the "Board") purported moratorium on survey activity on town owned or controlled property (hereinafter, the "Order"). The Order is invalid and a nullity for each of the reasons outlined below.¹ After reviewing this letter, we would appreciate the opportunity to meet with you or your counsel.

A. Background

Tennessee must perform some or all of the following surveys on all public lands the Project may cross in order to commence construction and obtain certain permits: (1) civil surveys, designed to locate the potential centerline for the pipeline, *see* 18 C.F.R. § 380.12(c)(3) (describing technical requirements of survey); (2) archaeological surveys or cultural resources investigations, to identify the location of cultural and historic resources, *see* 18 C.F.R. §§

¹ This letter is not intended to comprehensively address the grounds set forth herein, or to identify all of the reasons Tennessee contends that the Order is invalid. Tennessee reserves all rights to set forth additional grounds and reasons in support of its contention that the Order is invalid.

380.12(f)(1)(ii), 380.12(f)(2); (3) wetlands and waterbody delineations, to identify locations of wetlands, *see* 18 C.F.R. § 380.12(d)(1)-(9) (requiring disclosure of identification and description of all wetlands areas proposed pipeline will cross); (4) endangered or rare species surveys, to identify the locations of endangered or rare species and their habitats, *see* 18 C.F.R. § 380.12(e)(1)-(8) (identifying surveys to determine specific impacts of proposed project on endangered or threatened species); and (5) geotechnical or HDD surveys, to analyze properties that cross roads or rivers to confirm proposed construction techniques, *see* 18 C.F.R. § 380.12(h)(1)-(2) (applicant must identify location of all mineral resources and geologic hazards to proposed facilities).

The surveys are limited in scope. All surveys will be conducted in accordance with the procedures and protocols set forth in various federal and state regulations and guidelines and as may be required by applicable regulatory agencies.

B. Northfield and its Citizens May Express Concerns about the Project Directly to FERC and Survey Consent Does Not Limit Northfield's Opportunity to Oppose the Pipeline During the FERC Process

Tennessee is using the surveys for informational purposes. The survey results will enhance the record upon which decisions will be made and provide information potentially relevant to siting and mitigation. As set forth in the paragraph below, survey consent does not in any way indicate the Town's consent to the proposed pipeline, or limit the rights of the Town's or its citizens to oppose the pipeline during the FERC process.

Tennessee is currently in the pre-filing process and anticipates filing its application with FERC in October 2016. FERC's pre-filing process provides multiple opportunities for landowners in Northfield, regulatory agencies, governmental officials, the Town of Northfield, non-governmental agencies and others interested in a project (referred to as "stakeholders") to comment on the proposed project. The process allows stakeholders to identify potential environmental and other impacts from the proposed project and allows FERC and a project sponsor to develop methods to avoid, minimize, and mitigate those impacts during permitting.

For the pre-filing process, FERC requires a project sponsor to prepare and file a significant amount of documentation in the form of draft Resource Reports that are filed with FERC in conjunction with the application for the certificate of public convenience and necessity. The Resource Reports, collectively referred to as the Environmental Report, describe the project and identify and evaluate the environmental, social, and cultural impacts of the proposed project. For the Project, the draft Resource Reports are available on the FERC website (www.ferc.gov) and Kinder Morgan's Project website

(www.kindermorgan.com/business/gas_pipelines/east/neenergydirect/) for all interested stakeholders to review. Stakeholders may comment to FERC at any time.

In addition, during the pre-filing process for the project, Tennessee has held 20 informational open houses throughout the project area for landowners and other interested stakeholders to gather information about the project and ask questions about the proposed project. Open houses were held in Berlin, Massachusetts on February 25, 2015, Fitchburg, Massachusetts on February 26, 2015 and Rindge, New Hampshire on February 23, 2015. FERC staff attended these open houses to provide information about the FERC's pre-filing and certificate processes and to respond to questions of interested stakeholders. During the scoping period, FERC staff is conducting scoping meetings throughout the project area. At the scoping meetings, interested stakeholders may provide verbal comments, which are recorded and transcribed for inclusion in FERC's public record for the project. Stakeholders may also file written comments with FERC as well. Tennessee will be asked to respond to these scoping comments, as well as comments of FERC and other regulatory agencies, in the final versions of the Resource Reports.

Once Tennessee files an application for a certificate of public convenience and necessity, interested stakeholders will have several more opportunities to submit comments, including during an initial notice period and after the issuance of the draft Environmental Impact Statement. In addition, interested stakeholders have the opportunity to become parties to the proceeding by filing motions to intervene during the initial notice period after the certificate application is filed.

C. The Order is Not Authorized Under the Town's By-laws

The Town's March 9, 2015 letter fails to identify the Town's purported authority to issue a blanket moratorium on surveying activity on Town owned or controlled property. Under G.L. c. 43B, § 13:

Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter.

G.L. c. 43B, § 13. The Town's by-laws contain no authority pursuant to which the Board may deny access to public ways or other public property in connection with surveying activities on

Town owned or controlled property. Accordingly, it is Tennessee's position that the Town's actions are unauthorized.

D. The Order is Preempted by the Natural Gas Act

The Order is preempted by federal law. Pursuant to the Natural Gas Act, the Federal Energy Regulatory Commission ("FERC") will be the government agency responsible for reviewing Tennessee's application for a Certificate of Public Convenience and Necessity (the "Certificate") to construct the Project in Massachusetts. As part of the review process, FERC will, *inter alia*, evaluate the proposed siting of the Project and the proposed construction methodology. Under the authority the Natural Gas Act vests in FERC, 15 U.S.C. § 717 *et seq.*, the federal government, through FERC, maintains "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). The NGA delegates to FERC the exclusive authority to regulate the transportation and sale of natural gas in interstate commerce, including the siting and construction of natural gas facilities and interstate pipelines, *see* 15 U.S.C. § 717f(c)(1)(A), and FERC does so through its extensive regulations on this area. *See generally* 18 C.F.R. Part 157, Subpart A.

To the extent states and their associated entities have enacted statutes, regulations and other legal orders that deprive FERC of the exclusive authority to govern the siting and construction of interstate natural gas pipelines, courts have repeatedly struck down these actions on the basis that these laws conflict with FERC's exclusive authority in this area and are therefore preempted. *See, e.g., Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 894 F.2d 571, 574 (2d Cir. 1990) (state statute requiring pipeline company to obtain state "certificate of environmental compatibility and public need" preempted); *Islander E. Pipeline Co. v. Blumenthal*, 478 F. Supp. 2d 289 (D. Conn. 2007) (state permit to construct interstate natural gas pipeline preempted); *N. Nat. Gas Co. v. Munns*, 254 F. Supp. 2d 1103, 1111-12 (S.D. Iowa 2003) (state regulations governing environmental requirements for natural gas pipelines conflicted with explicit FERC regulations and therefore preempted); *Tennessee Gas Pipeline Co. v. Massachusetts Bay Trans. Auth.*, 2 F. Supp. 2d 106, 111 (D. Mass. 1998) (state statute restricting types of property available for condemnation as easements preempted due to conflict with NGA).

The Order purports to wrest from FERC the ability to control the construction and siting of an interstate natural gas pipeline, which puts the Order in direct and explicit conflict with FERC's authority under the NGA. Accordingly, the NGA preempts the Order.

E. The Order is Preempted by G.L. c. 164 and the Massachusetts Constitution

To the extent the Order is not preempted by federal law, the Order is preempted by the Massachusetts Constitution and G.L. c. 164, §§ 72A, 75B and 75D. Chapter 164 expressly delegates the regulation of natural gas pipeline companies, including regulation of preconstruction survey work, to the Department of Public Utilities (the “DPU”). *See* G.L. c. 164, § 1 *et seq.* The Massachusetts Supreme Judicial Court has held that the comprehensive delegation of regulation of natural gas pipelines to DPU preempts any local ordinance that is the subject matter of Chapter 164. *See Boston Edison Co. v. Town of Bedford*, 444 Mass. 775, 781 (2005) (“We have stated that the purpose of G.L. c. 164, . . . is to ensure uniform and efficient utility services to the public. We have also concluded that, given the comprehensive nature of G.L. c. 164, the Legislature intended to preempt local entities from enacting legislation in this area.”) (internal citations and quotations omitted). Chapter 164 expressly delegates to DPU authority to regulate preconstruction surveys; accordingly, the Order is preempted by Chapter 164, to the extent the Order is not preempted by federal law.

For the same reason, the Order is invalid under the Massachusetts Constitution’s Home Rule Amendment—it is inconsistent with the Commonwealth’s regulatory scheme for public utilities. *See* G.L. c. 164, § 1 *et seq.* Municipalities such as the Town may only adopt local ordinances to exercise “any power or function which the [Legislature] has the power to confer upon it, which is not inconsistent with the constitution or the laws enacted by the [Legislature] in conformity with the powers reserved to the [Legislature] by [Section 8 of the Home Rule Amendment].” *Town of Wendell v. Attorney Gen.*, 394 Mass. 518, 523 (1985) (internal notations omitted). *See also* G.L. c. 43B, § 13 (“Nothing in this section shall be construed to permit any city or town to exercise any power or function which is inconsistent with any general law enacted by [the Legislature]...”).

A town bylaw or ordinance is inconsistent with a state statute if the bylaw enables the town to nullify or second guess a determination by a state agency. *See Town of Wendell*, 394 Mass. at 529. The Legislature has delegated to DPU the authority and responsibility to regulate and oversee preconstruction surveys for natural gas pipeline companies. G.L. c. 164 §§ 72A, 75D. To the extent the Order prohibits any preconstruction surveys it permits the Town to nullify the DPU’s determination and clearly prevents achievement of this identifiable statutory purpose of having centralized power to oversee natural gas pipeline operations in the Department.

Moreover, the Order is impermissible under the Home Rule Amendment because it interferes with a proposed interconnected infrastructure project that crosses municipal boundaries. *See Beard v. Town of Salisbury*, 378 Mass. 435, 441 (1979) (the Home Rule

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Amendment is not “so expansive as to permit local ordinances or by-laws that, as here, regulate areas outside a municipality’s geographical limits”).

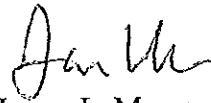
F. The Order Violates the Equal Protection Clause of the Constitution

Lastly, the Order violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Massachusetts Declaration of Rights because it treats natural gas pipeline companies different—both procedurally and substantively—than other public utility companies or private companies who seek access to public lands for express, limited purposes. The Order wholly forecloses Tennessee from accessing public ways and other public property otherwise allowed to any other private company under the law. This targeted action aimed directly at Tennessee enjoys no rational relation to a legitimate public purpose under the laws of the United States or Massachusetts. *See Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528 (1959) (classification violative of Equal Protection Clause when it rests upon some ground of difference not having a fair and substantial relation to the object of the legislation). Therefore, the Order is invalid.

Tennessee wants input from Northfield and its citizens and encourages you to participate in the FERC process. Additionally, representatives of Tennessee would appreciate the opportunity to meet with you and/or your counsel to discuss the contents of this letter and to attempt to resolve the dispute over use of town roads to conduct surveys.

Tennessee reserves all rights and remedies, including, without limitation, the right to challenge the Order in an appropriate forum, at an appropriate time.

Sincerely,



James L. Messenger
Attorney at Law