

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2004-01**

**Decision and Order**

**Joint Application of AES Londonderry, L.L.C. and ABN AMRO Bank N.V. as  
Agent, for Approval to Transfer Equity Interests in AES Londonderry, L.L.C.  
Under R.S.A. 162-H (Joint Application)**

In this Joint Application, AES Londonderry, L.L.C. and ABN AMRO Bank N.V., (Co-Applicants) seek approval from the Site Evaluation Committee (Committee) to transfer the equity in AES Londonderry, LLC, from AES Holdings Londonderry, LLC, a subsidiary of the AES Corporation, to a new entity owned by a consortium represented by ABN AMRO Bank N.V., as agent. AES Londonderry LLC owns and operates: 1.) a 720 MW combined cycle natural gas fired power plant in the Ecological Industrial Park located in Londonderry, Rockingham County, New Hampshire; 2.) a 2.9-mile electrical transmission interconnection from the power plant to the North Litchfield substation in Litchfield, Hillsborough County; 3.) a 1.3-mile electrical transmission interconnection from the power plant to the Watts Brook substation; 4.) a cooling water supply pipeline connecting the power plant to the Manchester Wastewater Treatment Plant (including a pumping station and chlorine injection system located at the Manchester Wastewater Treatment Plant). This application also implicates a 2.7-mile lateral gas pipeline connection, owned by Keyspan, to a natural gas pipeline operated by the Tennessee Gas Pipeline Company. The Committee's authority to consider the issue raised in this docket is set forth at N.H.R.S.A. 162-H: 5 *et. seq.*

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## Decision and Order

### Joint Application of AES Londonderry, L.L.C. and ABN AMRO Bank N.V. as Agent, for Approval to Transfer Equity Interests in AES Londonderry, L.L.C. Under R.S.A. 162-H (Joint Application)

#### Introduction

In this Joint Application, AES Londonderry, L.L.C. (AESL) and ABN AMRO Bank N.V., (ABN) (jointly referred to as Co-Applicants) seek approval from the Site Evaluation Committee (Committee) to transfer the ownership of all equity in AESL, from AES Holdings Londonderry, LLC, a subsidiary of the AES Corporation, to a new entity owned by an international consortium of banks and financial institutions<sup>1</sup> represented by ABN, as agent. AESL owns and operates a certificated power plant in Londonderry known as AES Granite Ridge. The power plant includes the following facilities: 1.) a 720 MW combined cycle natural gas fired power plant in the Ecological Industrial Park located in Londonderry, Rockingham County, New Hampshire; 2.) a 2.9-mile electrical transmission interconnection from the power plant to the North Litchfield substation in Litchfield, Hillsborough County; 3.) a 1.3-mile electrical transmission interconnection from the power plant to the Watts Brook substation; 4.) a cooling water supply pipeline connecting the power plant to the Manchester Wastewater Treatment Plant (hereafter together referred to as the Project.) The Project is supplied with natural gas by a 2.7-mile lateral gas pipeline connection, owned by Keyspan, to a natural gas pipeline operated by the Tennessee Gas Pipeline Company.

The Project is subject to the terms and conditions of a Certificate of Site and Facility issued by the Committee in SEC Docket No. 98-02 (Certificate). The conditions to the Certificate require Committee approval prior to a change in ownership. *See* Certificate, General Condition 6. Similarly, R.S.A. 162-H: 5, I, requires Committee approval before a transfer or assignment of a certificate.

#### History of the Project

On July 6, 1998, AESL submitted an application to construct and operate the Project. After complying with the procedural requirements of R.S.A. 162-H, including

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<sup>1</sup> At the time of the filing of the Joint Application the consortium consisted of ABN and the following financial institutions: Abbey National Treasury services, PLC (UK); Bank of Scotland (UK); Bayerische Hypo-Und Vereinsbank AG (New York Branch)(Germany); Cargill Financial Services International, Inc. (US); CoBank ACB (US); Deutsche Bank Trust Co. Americas (Germany); Kreditanstalt Fur Wiederaufbau (Germany); Merrill Lynch Credit Products, LLC (US); NIB Capital Bank N.V (Netherlands).; Rabobank Ireland PLC (Ireland); The Bank of Nova Scotia (Canada); The Royal Bank of Scotland (UK). However, the membership and relative shares in the consortium have changed since the filing of the Joint Application. CoBank ACB (US) and Abbey National Treasury Services PLC (UK) have since left the consortium transferring their interests to the remaining consortium members. Transcript, August 31,2004, p. 23.

public informational and adversarial hearings, the Committee issued the Certificate on May 25, 1999. The integrated permitting process produced a comprehensive set of approximately 500 permit requirements and conditions applicable to the construction and operation of the Project. *See*, Joint Application, Appendix B. These conditions included but were not limited to items such as the conditions contained in the Environmental Protection Agency's Prevention of Significant Deterioration (PSD) and Non-Attainment Permit, construction noise conditions, and wetlands and site-specific construction conditions. The proceedings included the input of AESL, the Town of Londonderry, Public Counsel appointed by the Attorney General, and various local citizens groups.

Construction of the Project commenced on or about September 17, 2000. The Project commenced commercial operation and began selling power into the New England NEPOOL wholesale market administered by ISO-New England, Inc. on April 1, 2003. Although provisional acceptance under its engineering, procurement and construction ("EPC") contract was achieved on March 17, 2003, the Joint Applicants report that final acceptance of the Project has yet to occur. *See*, Joint Application, p. 6.

### **Nature of and Reasons for the Relief Sought**

The Joint Application proposes a transfer of the controlling ownership interest in AESL from AES Holdings, LLC (a wholly owned subsidiary of AES Corporation) to Granite Ridge I, SPE, LLC (Granite Ridge I.) Granite Ridge I is a newly formed "special purpose entity" organized as a limited liability company under the laws of the State of Delaware.<sup>2</sup> Granite Ridge I was formed by the consortium that is represented by ABN. Granite Ridge I, at present, has no assets and is formed solely as a vehicle to take ownership of the equity interests of AESL. AESL will continue to be the owner of and Certificate holder for the Project. The consortium represented by ABN specifically disavows any ownership interest in AESL (except through Granite Ridge I) and has clearly indicated that it "will not own or manage the project and will not be putting their balance sheets behind the project." Pre-Filed Testimony of Steven L. Bissonnette, p. 4.

AESL represents that current market conditions, including depressed merchant power profit margins and significant overcapacity in some areas of the restructured New England power market, have resulted in AESL being unable to meet its obligations to its Lenders. AESL is currently in default. Joint Application p. 2; Transcript, August 31, 2004, p. 11. As a result the Joint Applicants seek to transfer all of AESL's equity interests and holdings to Granite Ridge I, a new special purpose limited liability company formed by the lenders or their affiliates. It is further represented that Granite Ridge I will hold the equity interest in AESL only until it receives a satisfactory offer to purchase the Project and, if required, approval of the transaction by the Committee. AESL will continue to own the Project assets (including the Certificate). However, AESL will have a new owner. After approval of the application to transfer the equity interest of AES Londonderry, LLC to Granite Ridge I, Granite Ridge I will engage North American Energy Services (NAES) to complete and operate the Project.

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<sup>2</sup> See, Transcript, June 30, 2004, p. 31.



The primary purpose of the transfer, as represented by the Joint Applicants, is to avoid an adversarial foreclosure process whereby the ABN consortium would foreclose on the Project under the terms of the credit financing agreement and Article 9 of the Uniform Commercial Code (UCC). *See generally*, RSA 382-A:9 . The transfer would satisfy the consensual transfer provisions of the UCC. *See*, RSA 382-A:9-620. The Joint Applicants suggest that avoidance of an adversarial foreclosure proceeding is beneficial to all parties and to the people of the State of New Hampshire as it will eliminate the uncertainty of an adversarial foreclosure proceeding and the possibility of concomitant proceedings in bankruptcy court. *See*, Transcript, August 31, 2004, p. 36 – 39.

### **Procedural History**

The procedural history of this docket is as follows:

On June 11, 2004, the Committee issued an Order and Notice that a public hearing be held on June 30, 2004.

On June 30, 2004, at a duly noticed public meeting, the Committee reviewed the Joint Application and voted to issue a Procedural Order and Notice which provided deadlines for intervention and a date for a pre-hearing conference.

On July 26, 2004, Sustainable Design and Development, LLC (SDD) and the Town of Londonderry each filed a motion to intervene in the proceedings.

On July 27, 2004, a Pre-Hearing conference was held and a procedural schedule was consented to by the parties and reported to the Committee. On August 11, 2004, Chairman Michael P. Nolin issued an order granting the motions to intervene. Public Hearing on the Joint Application was set for August 31, 2004, and duly noticed by publication. *See*, Transcript, August 31, 2004, p. 67; Committee Exhibit 1.

The Joint Applicants pre-filed the written testimony of Steven L. Bissonnette, Senior Vice-President, Financial Recovery and Restructuring Department, ABN AMRO Bank, Oscar D. Scarborough, Vice President, Power Plant Operations, North American Energy Services and Terry D. Ramborger, Senior Soils and Wetlands Scientist, Earth Tech Inc. SDD pre-filed the written testimony of Justin Bielagus. The Town of Londonderry did not pre-file testimony.

A public hearing was held on August 31, 2004. The Joint Applicants and SDD appeared. The Town of Londonderry did not appear at the hearing. At the commencement of the hearing SDD withdrew from the proceeding and withdrew its pre-filed testimony.<sup>3</sup> At the hearing Mr. Bissonnette and Mr. Scarborough were presented for

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<sup>3</sup> SDD's withdrawal was apparently based upon certain representations by AESL. *See*, Transcript, August 31, 2004, p. 7 – 10. However, those representations are not within the jurisdiction of the Committee and the parties were specifically advised that any decision of the Committee would be based upon the record and no further hearing would be held. Transcript, August 31, 2004, p. 9.

examination by the Committee. Additionally, Attorney Gregory A. Bray, of Millbank Tweed Hadley & McCoy, representing ABN, made an offer of proof outlining the likely issues to arise if an adversarial foreclosure should occur. Transcript, August 31, p. 34 – 39.

### **Criteria For Approval of the Joint Application**

In issuing a certificate pursuant to RSA 162-H the Committee considers, among other things, whether the applicant “has adequate financial, technical and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.” RSA 162-H:16, IV (a).

In 1999 the Committee was persuaded that AESL possessed adequate financial, technical and managerial capability as required by RSA 162-H: 16 IV (a). However, anticipating the possibility of changes in ownership, the Committee conditioned the Certificate upon Committee approval of any change in ownership of AESL: “Any change in ownership of the applicant, AES Londonderry LLC without the approval of this committee, shall render the Certificate subject to revocation. The Certificate itself shall not be transferred or assigned to any other person or entity without the approval of the Committee. RSA 162-H: 5.1.” Certificate, Attachment A, General Condition 6.

In this case, where the Project has been substantially completed, many of the siting issues implicated by the original application for a certificate are moot.<sup>4</sup> However, when a change in ownership is proposed, it is important for the Committee to investigate the financial, technical and managerial capability of the proposed new owner. This information is vital for the Committee and other state agencies to be able to ensure that the conditions of the certificate are continuously met. Ongoing environmental compliance and the safe operation of the facility are of the utmost concern to the Committee and the State of New Hampshire. Thus, the Committee’s focus in this Docket is on the financial, technical and managerial capability of the proposed new owner of AESL.

### **Findings and Analysis**

The Project was developed and financed through a debt-finance, limited recourse structure that is typical in the industry. Under this structure, AESL holds the equity interest in the Project, as well as the debt finance obligation. AESL must service debt borrowed to build the plant through project cash flows, generated primarily through power sales. The lenders represented by ABN loaned AESL approximately \$288 million of which approximately \$285 million (plus accrued and unpaid interest) is still owed. *See*, Pre-Filed Testimony of Steven L. Bissonnette, p. 2 – 3. Market factors, including

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<sup>4</sup> In issuing a certificate of site and facility the Committee is required to review available alternatives and the environmental impact and determine that: a) the applicant has adequate financial, technical and managerial capability to ensure construction and operation in continuing compliance with the terms and conditions of the certificate; b) whether the project will unduly interfere with the orderly development of the region; c) whether the project will have unreasonable adverse effects on aesthetics, historic sites, air and water quality, the natural environment or public health and safety; and d) whether operation of the project is consistent with the state’s energy policy. *See generally*, RSA 162-H: 16, IV.

depressed profit margins and overcapacity in the New England power market have rendered the Project unable to generate sufficient revenue to sustain its debt service and have led to a default under the terms of AESL's financing agreement with the ABN consortium. *See*, Pre-Filed Testimony of Steven L. Bissonnette, p. 2 – 3; Transcript August 31, p. 11; Joint Application, p. 1-2.

The Committee must determine whether the proposed transferee of AESL equity, Granite Ridge I, has adequate financial, technical and managerial capability to operate the Project in accordance with the terms and conditions of the Certificate. Neither Granite Ridge I nor ABN has the technical and managerial capability to operate the project. Granite Ridge I is for all intents and purposes an entity of convenience that will own the Project and operate it through a contractor while ABN seeks a purchaser for the Project. ABN and the lenders it represents will provide a working capital credit facility of up to \$40 million to AESL. *See*, Transcript, August 31, 2004, p. 16; Pre-Filed Testimony of Steven L. Bissonnette, p. 4. This additional financing will be available for the day-to-day operations of the Project with the hope that an operational Project will be more attractive to potential purchasers. Transcript, August 31, p. 27 – 29.

The Joint Applicants represent that AESL will contract with NAES to complete, operate and maintain the Project.<sup>5</sup> NAES is an independent power plant operation and maintenance company that was formed in 1980 by four power companies in the Northwest United States. Itochu International Inc., the United States subsidiary of Itochu Corporation, now owns NAES. Pre-Filed Testimony of Oscar D. Scarborough, p. 2; Joint Application, Appendix F. NAES has operated and managed more than 60 power plants ranging in size from 10 to 1070 MW. NAES has been involved in at least 34 plant transfers and takeovers. As of the date of the hearing in this Docket, NAES had managed 36 combined cycle combustion turbines in both North and South America. Pre-Filed Testimony of Oscar D. Scarborough, p. 4. NAES's power plant operations experience includes the completion, operation and maintenance of plants that are similar in technology to the Project. These plants include four "G" turbine technology plants and a number of "F" turbine technology plants which are manufactured by Mitsubishi, General Electric, or Siemens -Westinghouse. Transcript, August 31, 2004, p. 54; Pre-Filed Testimony of Oscar D. Scarborough, p. 6. NAES has experience in dealing with the operational challenges that accompany the management of such plants. Transcript, August 31, 2004, p. 51.

The record reflects that NAES has educated itself with respect to existing permitting and regulatory issues at the Project. Mr. Scarborough testified that he is familiar with the administrative consent order pertaining to emissions issued by New Hampshire Department of Environmental Services on June 9, 2004. He indicates that NAES has the expertise to understand and strive for compliance with that order and any modifications that may occur. Transcript, August 31, 2004, p. 48 – 49. Mr. Scarborough also testified that NAES has expertise and experience in dealing with plume abatement

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<sup>5</sup> A copy of the proposed Operation and Maintenance Agreement between AESL and NAES was provided to Committee counsel. The copy was redacted to maintain the confidentiality of proprietary information and the document itself was not included in the record.



operational protocols and has the ability to address such issues with the Manchester Airport Authority. Transcript, August 31, 2004, p. 49. Finally, Mr. Scarborough testified that NAES has the experience and expertise to comply with the provisions of the effluent supply agreement between AESL and the City of Manchester. Transcript, August 31, 2004, p. 50.

The Committee is aware and recognizes that the financing of electric power generation facilities can be complex and difficult. Large electric generation projects are expensive and implicate numerous permitting, regulatory and safety concerns all of which are extremely important to the State of New Hampshire, lenders in this industry and to the public at large. These concerns are precisely the reason why the Legislature delegated the consolidated permitting authority set forth throughout RSA 162-H to this Committee. See, RSA 162-H:1. These concerns also underlie the Committee's authority to monitor the construction and operation of energy facilities. RSA 162-H: 4, I, (c).

The default by AESL in its financial obligations to its lenders creates a distinct prospect that the Project will not be continuously operated. Furthermore, it is the Committee's conclusion that a voluntary foreclosure is preferable to adversarial proceedings between AESL and the consortium represented by ABN. Such proceedings would very likely be lengthy, complicated and might involve the initiation of either voluntary or involuntary bankruptcy court proceedings. The continued availability of the plant for operation during such proceedings would be at risk. Thus, the proposal to transfer the equity of AESL to Granite Ridge I is a reasonable effort to avoid the uncertainties and expense of a complex and expensive adversarial process. The proposal also provides an appropriate way to find an owner who will operate and maintain the Project in accordance with the conditions of the Certificate for the remaining life of the Project.

The lenders represented by ABN have expressed a willingness to extend up to an additional \$ 40 Million towards the completion, maintenance and operation of the Project. Although the Committee recognizes that these operating funds are not guaranteed, it is also apparent that the lenders have an interest in marketing a Project that is available for operation in accordance with the terms and conditions of its Certificate. The availability of this working credit facility makes it more likely that AESL will continue to have the financial capability of operating the Project in accordance with the terms and conditions of its Certificate.

The Joint Applicants also propose that they will employ NAES to manage and operate the Project. The record clearly demonstrates that NAES has the technical and managerial capability to manage and operate the Project. NAES has over twenty years experience in the industry and has successfully managed and operated dozens of power plants, many of which share similar technologies with this Project. Additionally, NAES is familiar with operating plants that are in a distressed financial condition and subject to the same constraints that apply in this case.



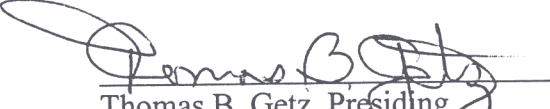
## Conclusion

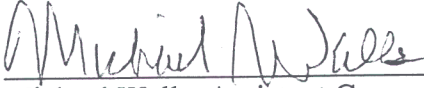
In summary, the Committee continues to believe that the clean and efficient power produced at the Project, as well as the commerce created by the Project, is a benefit to the surrounding community, the State of New Hampshire and the entire New England region. Moreover, the Joint Applicants' proposal to transfer the equity in AESL to Granite Ridge I presents the most economical and convenient method to ensure that AESL maintains adequate financial, managerial and technical capabilities to complete, maintain and operate the Project in accordance with the terms and conditions of the Certificate issued in Docket No. 98-02, Application of AES Londonderry, LLC. It should be noted that this Order does not change or modify any of the terms and conditions of the Certificate. The Committee maintains the authority to monitor and enforce the terms and conditions of the Certificate. RSA 162-H:4, I. Finally, any future changes in ownership or attempts to transfer the Certificate itself are subject to the approval of the Committee.


## Order

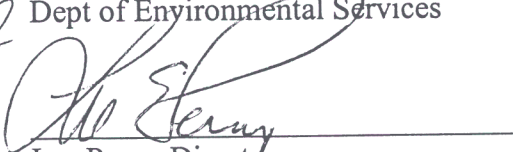
The Joint Application is GRANTED and the Applicants are hereby authorized to transfer all of the equity interest in AESL to Granite Ridge-I. All other terms and conditions of the Certificate of Site and Facility in Docket No. 98-02, Application of AES Londonderry, LLC, remain in full force and effect.

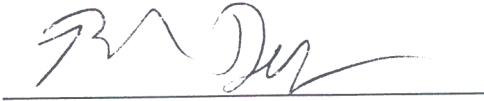
By Order of the Energy Facilities Site Evaluation Committee of New Hampshire  
this 14<sup>th</sup> day of October 2004, at Concord, New Hampshire.

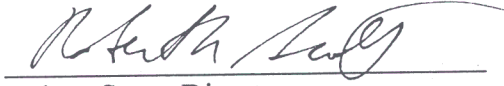
  
Thomas B. Getz, Presiding  
Chairman, Public Utilities Commission

  
Michael Walls, Assistant Commissioner  
Dept of Environmental Services

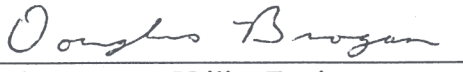
  
Harry Stewart, Director  
Water Division  
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