161 FERC ¶ 61,250
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Robert F. Powelson.

Transcontinental Gas Pipe Line Company, LLC Docket Nos. CP15-138-001
CP15-138-004

ORDER ON REHEARING

(Issued December 6, 2017)

1. On February 3, 2017, the Commission issued an order under section 7(c) of the Natural Gas Act (NGA)[1] authorizing Transcontinental Gas Pipe Line Company, LLC (Transco) to construct, lease, and operate its proposed Atlantic Sunrise Project in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina.[2] The project will include approximately 200 miles of new interstate pipeline and related facilities, the bulk of which will be constructed in Columbia, Susquehanna, Luzerne, Lancaster, Clinton, Lycoming, and Wyoming Counties, Pennsylvania. The project will connect to Transco's existing interstate natural gas pipeline to transport 1.7 million dekatherms (Dth) per day of natural gas from Appalachian supply areas in northeast Pennsylvania to its Station 85 in Alabama, including to markets in Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida. On May 18, 2017, the Commission approved a certificate amendment to modify the route location.[3]

2. On February 10, 2017, Allegheny Defense Project, Clean Air Council, Concerned Citizens of Lebanon County (Concerned Citizens of Lebanon), Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, and Sierra Club (collectively, Allegheny) sought rehearing of the February 3 Order. On February 24, 2017, the Accokeek, Mattawoman, and Piscataway Creeks Communities Council Inc. (Accokeek)

[1] 15 U.S.C. § 717f(c) (2012).

[2] *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) (February 3 Order).

[3] *Transcontinental Gas Pipe Line Co., LLC*, 159 FERC ¶ 62,181 (2017).

sought rehearing.

3. On March 6, 2017, the North Carolina Utilities Commission (NCUC) and the New York Public Service Commission (NYPSC) (collectively, State Commissions); the Narragansett Indian Tribe and the Wampanoag Tribe of Gay Head (Aquinnah) (collectively, the Tribes); and several landowners, including: Susan and Justin Cappiello (collectively, the Cappiellos); Stephen and Dorothea Hoffman and Gary and Michelle Erb (collectively, the Hoffman and Erb Landowners); Lynda Like; Blair and Megan Mohn (collectively, the Mohns); Geraldine Nesbitt; and Follin Smith sought rehearing. Also on March 6, Appalachian Mountain Advocates and Sierra Club (collectively, Mountain Advocates) submitted comments on the project.[4] On March 7, 2017, Walter and Robyn Kochan (collectively, the Kochans) and John Timothy Gross separately filed untimely requests for rehearing.[5]

4. Many of the requests for rehearing also sought a stay of the February 3 Order. The Commission denied those stay requests in an order issued on August 31, 2017.[6] On October 2, 2017, Allegheny and Accokeek (together, Intervenors) sought rehearing of the Stay Order.

5. For the reasons discussed below, the requests for rehearing of the February 3 Order and of the Stay Order are dismissed or denied.

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[4] Rule 713(c)(2) of the Commission's Rules of Practice and Procedure requires that a rehearing request include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph. Any issue not so listed will be deemed waived. 18 C.F.R. § 385.713(c)(2) (2017). Mountain Advocates' comments do not satisfy these requirements and thus we will not treat them as a request for rehearing. Accordingly, we dismiss Mountain Advocates' Filing.

[5] On April 7, 2017, MFS, Inc. d/b/a Eastern Land and Resources Company (EL&RC) filed a request for an order to show cause on Transco's alleged non-compliance with the February 3 Order. EL&RC subsequently withdrew this request on April 11, 2017. *See* Letter from Thomas J. Zagami, Counsel to EL&RC, to Alisa Lykens, Chief, Gas Branch 2, Office of Energy Projects, Federal Energy Regulatory Commission (Apr. 11, 2017).

[6] *Transcontinental Gas Pipe Line Co.*, 160 FERC ¶ 61,042 (2017) (Stay Order).

I. Procedural Matters

A. Party Status

6. Under section 19(a) of the NGA and Rule 713(b) of our regulations, only a party to a proceeding has standing to request rehearing of a final Commission decision.[7] Any person seeking to intervene to become a party must file a motion to intervene pursuant to Rule 214 of the Commission's rules of Practice and Procedure.[8] The Concerned Citizens of Lebanon never sought to intervene in this proceeding and thus we must deny their attempt to join in the rehearing request filed by Allegheny.

7. On rehearing, the Mohns contend that their earlier comments submitted during the environmental review process should be construed as requests to intervene and that, as affected landowners, they should be permitted to intervene at this stage to protect their property rights. The Tribes contend that their consultation request under the National Historic Preservation Act is the functional equivalent of a motion to intervene.

8. The earlier filings by the Mohns and the Tribes do not meet the requirements of a motion to intervene. Nowhere in those earlier filings did either the Mohns or the Tribes seek to intervene in this proceeding.[9] And they may not avoid this requirement by joining other intervenors' requests for rehearing.[10]

9. With regard to the Mohns' motion to intervene out-of-time, the Commission has explained that "when late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial."[11] In such circumstances, movants bear a higher burden

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[7] 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713(b) (2017).

[8] 18 C.F.R. § 385.214(a)(3) (2017).

[9] Motions to intervene must also state, to the extent known, the position taken by the movant and the basis in fact and law for that position, as well as the movant's interest in sufficient factual detail to demonstrate that the movant has a right to participate conferred by statute or rule, an interest that may be directly affected by the outcome of the proceeding, or that the movant's participation is in the public interest. 18 C.F.R. § 385.214(b)(1) and (2) (2017).

[10] The Mohns joined Follin Smith's rehearing request, and the Tribes joined the rehearing request filed by Geraldine Nesbitt.

[11] *PJM Interconnection, L.L.C.*, 157 FERC ¶ 61,193, P 10 (2016).

to demonstrate good cause for the granting of late intervention.[12] The Mohns did not explain why they waited to intervene in this proceeding and have not met their burden. Because the Mohns and the Tribes are not parties to this proceeding, they have no standing to seek rehearing of the February 3 Order, and we therefore dismiss the pertinent rehearing requests as to them. We nonetheless note that by answering other intervenors' concerns below, we also address the issues raised by the Concerned Citizens of Lebanon and the Mohns.

B. Untimely Requests for Rehearing

10. Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order.[13] In this case, the deadline to seek rehearing was 5:00 pm U.S. Eastern Time, March 6, 2017.[14] The Kochans and John Timothy Gross filed requests for rehearing after the 5:00 pm deadline on March 6, 2017; therefore, they effectively sought rehearing on March 7, 2017.[15] Because the Kochans and Mr. Gross failed to meet the deadline, their requests must be dismissed as untimely.[16]

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[12] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

[13] 15 U.S.C. §717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order"). The Commission has no discretion to extend this deadline. *See, e.g., North Amer. Elec. Reliability Corp.*, 147 FERC ¶ 61,140 (2014) (rejecting untimely request for rehearing); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the analogous provision in the Federal Power Act] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing section 19(a) of the NGA as "a tightly structured and formal provision. Neither the Commission or the courts are given any form of jurisdictional discretion.").

[14] The Commission's regular business hours end at 5:00 PM, U.S. Eastern Time. 18 C.F.R. § 375.101(c) (2017).

[15] Documents received after regular business hours are deemed filed on the next regular business day. 18 C.F.R. § 385.2001(a)(2) (2017).

[16] On July 31, 2017, Mr. Gross filed a motion for leave to answer and answer to Transco's answer to his request for rehearing and motion for stay. In that filing,

(continued ...)

C. Certificate Amendment and Nesbitt Request

11. On March 6, 2017, Ms. Nesbitt and the Tribes filed a joint request for rehearing. The request urged the Commission to grant an alternative route to avoid Ms. Nesbitt's land based on alleged Commission violations of the National Historic Preservation Act, the National Environmental Policy Act (NEPA), the Clean Water Act, and Commission regulations.

12. On May 18, 2017, the Commission approved a request by Transco to amend its certificate to modify a 6.48 mile segment of the originally certificated route in Luzerne and Wyoming Counties, Pennsylvania, to address landowner and US Army Corps of Engineers (Army Corps) concerns. The new route, known as Central Penn Line North Alternative 13, avoids Ms. Nesbitt's property. Ms. Nesbitt supported the route amendment.[17]

13. Under section 19(a) of the NGA, only a party that has been aggrieved by a Commission order may file a request for rehearing. To establish aggrievement, a party must demonstrate, among other things, a concrete injury fairly traceable to the Commission's action.[18] Here, because the Commission has already granted the remedy supported by Ms. Nesbitt, we find that she has failed to demonstrate that she remains aggrieved by the February 3 Order. Accordingly, we dismiss Ms. Nesbitt's rehearing request.

Mr. Gross attempted to explain why his rehearing request was filed late. The Commission's regulations do not generally permit answers to answers and we reject Mr. Gross's filing. 18 C.F.R. § 385.213(a)(2). Moreover, as noted above, the Commission has no discretion to waive the rehearing time limit. *See, e.g.*, *Tennessee Gas Pipeline Company*, 95 FERC 61,169 (2001) ("Both the Commission and the courts have consistently held that the thirty-day requirement in section 19(a) is a jurisdictional requirement that the Commission does not have the discretion of waiving, even for good cause.").

[17] *See* Motion to Intervene of Geraldine Turner Nesbitt in Support of Amendment to Application, filed in Docket No. CP17-212-000 (May 12, 2017).

[18] *See Green Island Power Authority v. FERC*, 577 F.3d 148, 159 (2d Cir. 2009) (construing substantially similar provision of the FPA, 16 U.S.C. § 825*l* (2012)).

II. Discussion

A. Initial Recourse Rates

1. Rehearing Request

14. In granting Transco's requested certificate in the February 3 Order, the Commission accepted, over protest from the State Commissions, Transco's use of a pre-tax return of 15.34 percent in calculating its proposed incremental recourse rates for the Atlantic Sunrise Project.[19] The Commission also rejected concerns raised by State Commissions regarding Transco's calculation of annual lease payments under its project lease, finding that using costs from the first year of the lease to calculate rates for the | 20-year term was consistent with Commission regulations and precedent, and that the lease arrangement provided benefits to shippers.[20]

15. In their request for rehearing, State Commissions renew their concerns regarding the rate of return used to calculate Transco's incremental recourse rates. They contend that the Commission erred by failing to take into account the significant changes in the financial markets which have occurred since the Commission's approval of a 15.34 percent pre-tax return for Transco, which was the last specified rate of return from Transco's general rate case approved by the Commission under section 4 of the NGA in 2002 and the rate of return used to calculate Transco's incremental recourse rates. State Commissions also seek rehearing of the Commission's decision to accept Transco's lease of capacity based on a single year of cost and revenue. State Commissions contend that such an analysis fails to take into account the depreciation of the leased facilities and cannot support a finding that the lease payments will be less than the equivalent cost of service had Transco constructed the facilities itself. State Commissions advocate for a life-of-the-lease analysis of the pertinent costs.

16. For the reasons discussed below, we deny the request for rehearing.

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[19] February 3 Order, 158 FERC ¶ 61,125 at PP 34-41. Transco proposed to use the same rate of return in calculating proposed recourse rates for its Dalton Expansion Project in Docket No. CP15-117-000 and Virginia Southside Expansion II Project in Docket No. CP15-118-000.

[20] February 3 Order, 158 FERC ¶ 61,125 at P 60.

2. Commission Determination

a. Rate of Return

17. State Commissions acknowledge that, in the February 3 Order, the Commission applied its established policy in section 7 proceedings of requiring incremental recourse rates to be designed using the rate of return specified in the pipeline's most recent general rate case approved under section 4 of the NGA.[21] If the most recent section 4 rate case involved a settlement that did not specify a rate of return or pre-tax return, we look to the most recent prior rate case that did so specify.[22] State Commissions nevertheless assert that the Commission was arbitrary and capricious and failed to engage in reasoned decision-making because it: (1) failed to protect consumers from excessive rates by permitting Transco to calculate its recourse rates using an excessive pre-tax return,[23] and (2) did not require that the return be calculated based on current market conditions.[24] These arguments were advanced by State Commissions in their initial pleadings,[25] and fully addressed in the February 3 Order.[26] State Commissions present no new evidence or arguments that warrant reversing the Commission's application of its consistent policy in the February 3 Order, nor have they demonstrated that circumstances have changed such that the policy should no longer apply.

18. In addition to reiterating arguments addressed in the February 3 Order, State Commissions contend on rehearing that the Commission erred in referring to *Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y.* (*CATCO*),[27] a case regarding the Commission's discretion in section 7 proceedings to approve initial rates that will "hold the line" until just and reasonable rates are adjudicated under sections 4 or 5 of the NGA.[28] According to State Commissions, the cited case is inapplicable because it

[21] State Commissions Rehearing Request at 14. *See also* February 3 Order, 158 FERC ¶ 61,125 at P 38 (explaining Commission's policy).

[22] *See* February 3 Order, 158 FERC ¶ 61,125 at P 38 n.60 (citing cases).

[23] State Commissions Rehearing Request at 13-18.

[24] *Id*. at 19-21.

[25] *See* State Commissions April 22, 2015 Protest at 9-13; State Commissions May 27, 2015 Answer at 2-5.

[26] February 3 Order, 158 FERC ¶ 61,125 at PP 34-41.

[27] 360 U.S. 378 (1959).

[28] State Commissions Rehearing Request at 20-21.

pre-dates the existence of negotiated rates, and the fact that Transco will need to file an NGA general section 4 rate case by August 31, 2018, fails to protect customers from excessive rates charged before that time. We disagree.

19. Initially, State Commissions fail to explain how the advent of negotiated rates constitutes a "change in circumstance" negating the Commission's discretion to approve initial rates in this section 7 certificate proceeding under the public convenience and necessity standard pending the adjudication of just and reasonable rates in Transco's next NGA general section 4 rate case.[29] In the February 3 Order, the Commission cited *CATCO* to contrast the less rigorous public convenience and necessity standard of review employed under section 7 to assess initial rates for new service or facilities with the just and reasonable standard of review for rate changes under sections 4 and 5.[30] The less exacting standard of review used in a section 7 certificate proceeding is intended to mitigate the delay associated with a full evidentiary rate proceeding, and the Commission has discretion to approve initial rates that will "hold the line" while awaiting the adjudication of just and reasonable rates.[31] State Commissions' observation that *CATCO* was decided before the development of negotiated and recourse rates does not detract from these basic tenets or their applicability in this proceeding. Whether the initial rates in question are recourse rates, serving as a check against the exercise of market power by pipelines with negotiated rate authority, or the rates actually charged to shippers, the Commission retains the discretion to protect the public interest while preventing the delays that can accompany full evidentiary proceedings.

20. The fact that the rates in Transco's next NGA general section 4 rate case will go into effect prospectively does not change this analysis. Indeed, this is always the case.[32] Here, the Commission appropriately examined Transco's proposal under the public convenience and necessity standard, applied its consistent policy to accept recourse rates designed using the last Commission-approved rate of return from a NGA general section 4 rate case in which a rate of return was specified in order to calculate the rates,

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[29] *Id*. at 20 ("To begin, negotiated rates did not exist in 1959 at the time of this decision. This change in circumstance renders this decision inapposite.").

[30] February 3 Order, 158 FERC ¶ 61,125 at P 39 and n.64 (citing *CATCO*, 360 U.S. at 390).

[31] *Id*. (citing *CATCO*, 360 U.S. at 391-92).

[32] *See CATCO*, 360 U.S. at 389 (noting that new rate changes filed under section 4 become effective upon filing, subject to suspension and the posting of a bond, where required, and that just and reasonable rates fixed in a section 5 proceeding become effective prospectively only).

but pointed out that, in any event, parties would have the opportunity to raise concerns regarding Transco's pre-tax return and other cost of service components in the next NGA general section 4 rate case, to be filed by August 31, 2018.[33] State Commissions have not persuaded us on rehearing to revisit this determination.

b. Lease Payments

21. In the February 3 Order, the Commission accepted a proposed lease arrangement under which the Central Penn line facilities constructed for the Atlantic Sunrise Project would be jointly owned by Transco and Meade Pipeline Co LLC (Meade), with Meade leasing its ownership interest in the facilities to Transco for a primary term of 20 years.[34] As relevant here, the Commission found that the annual amount Transco would pay Meade under the lease (based on fixed lease payments of $7,964,908 per month) was $66,430,118 per year less than the equivalent cost of service that would result if Transco constructed and owned the facilities itself. The Commission thus concluded that the lease arrangement benefited shippers.[35] In so finding, the Commission rejected State Commissions' contention that Transco's analysis of the cost of the lease versus equivalent service on pipeline-owned facilities was deficient because Transco only analyzed cost data for the first year of the lease and did not account for depreciation of the facilities over the 25-year term.[36]

22. On rehearing, State Commissions again argue that the Commission's finding that approval of the lease agreement will reduce the amount shippers will pay under the recourse rate by an estimated $66,430,118 per year is unfounded because the Commission did not take into account depreciation of the facilities that should decrease the cost of service over the life of the lease.[37] State Commissions thus claim that the Commission "ignor[ed] 95% of the life of the lease in its economic analysis" and

therefore failed to evaluate all factors bearing on the public interest determination

[33] February 3 Order, 158 FERC ¶ 61,125 at P 40.

[34] *Id*. P 50.

[35] *Id*. P 57.

[36] *Id*. PP 58-60. *See* State Commissions April 22, 2015 Protest at 14-15; State Commissions May 27, 2015 Answer at 6-8.

[37] State Commissions Rehearing Request at 21-25.

regarding the lease.[38]

23. We deny rehearing. In the February 3 Order, the Commission analyzed the three factors of its lease-approval analysis, and found that the lease arrangement provides a lower rate than if Transco constructed the facilities itself and, as such, benefits shippers.[39] As the Commission explained, rates are based on a first year cost of service and pipelines are under no obligation to revise their cost of service and associated recourse rates over time to account for depreciation.[40] Moreover, other cost factors could increase, or billing determinants could decrease, that would have the effect of offsetting the impact of depreciation on the cost of service in the future. There is simply no way to predict what the future cost of service or rates for the project would be over the lease term to the extent that Transco constructed and owned all of the project facilities. For these reasons, we reject the State Commissions' assertion that the Commission ignored all factors bearing on the public interest and reaffirm that the lease arrangement provides lower rates and benefits shippers and is consistent with Commission precedent.

B. Public Purpose

1. Rehearing Requests

24. In the February 3 Order, the Commission rejected the Clean Air Council's assertion that Transco must demonstrate that the project is for "public use" in order to exercise eminent domain.[41] The Commission explained that, while the taking must serve

[38] *Id.* at 25. State Commissions also claim that the Commission's reliance on section 157.14(a)(18)(c)(ii)(a) of the Commission's regulations to approve the lease is misplaced. To clarify, that regulation addresses the support needed for initial rates and we agree that it does not directly address our lease policy. However, as explained in the February 3 Order and herein, the Commission's approval of the lease is consistent with our precedent.

[39] *See* February 3 Order, 158 FERC ¶ 61,125 at P 56 (explaining that "[t]he Commission's practice has been to approve a lease if it finds that: (1) there are benefits from using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the term of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers").

[40] *Id.* P 60.

[41] February 3 Order, 158 FERC ¶ 61,125 at PP 66-67.

a public purpose to satisfy the Takings Clause of the U.S. Constitution,[42] the United States Supreme Court has defined this concept broadly, "reflecting [the court's] longstanding policy of deference to the legislative judgments in this field."[43] With respect to natural gas pipelines, the Commission explained, Congress has determined the business of transporting and selling natural gas for ultimate distribution to the public to be in the public interest,[44] and has provided that a company that has obtained a certificate of public convenience and necessity may exercise the right of eminent domain.[45]

25. On rehearing, the Hoffman and Erb Landowners, the Cappiellos, Follin Smith, and Lynda Like argue that the Commission erred in finding that the Project serves a "public purpose" for purposes of exercising the right of eminent domain.[46] The Hoffman and Erb Landowners further allege that the application of sections 717f(h) and 717r(a) of the NGA and the Commission's Rules of Practice and Procedure, combined with the Commission's practice of issuing tolling orders in response to rehearing requests,

[42] U.S. CONST. amend. V.

[43] February 3 Order, 158 FERC ¶ 61,125 at P 67 (quoting *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479-80 (2005) (*Kelo*) (citing *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158-64 (1896)).

[44] 15 U.S.C. § 717(a) (2012).

[45] February 3 Order, 158 FERC ¶ 61,125 at P 67. *See* 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts.").

[46] Hoffman and Erb Landowners Rehearing Request at 2-3, 10-13; Cappiello Rehearing Request at 4-5, 9-12; Smith Rehearing Request at 5, 11-3; Like Rehearing Request at 3, 7-9. Geraldine Nesbitt also included this argument in her joint request for rehearing, which has been dismissed as moot as discussed above. *See* Nesbitt Rehearing Request at 81-84.

deprives landowners of their due process rights under the Fifth and Fourteenth Amendments.[47] Finally, the Cappiellos and Lynda Like assert that the February 3 Order violates the Uniform Relocation Act[48] because the Commission failed to instruct Transco's parent company, Williams Partners Operating LLC (Williams), to provide financial assistance to tenant farmers on their properties who could be displaced by the project.[49]

26. We deny rehearing for the reasons discussed below.

2. Commission Determination

a. Project Need

27. Allegheny and the Hoffman and Erb landowners assert that the Commission placed too much weight on the fact that Transco had secured long-term commitments from shippers as evidence of public need for the project, citing to former Commissioner Bay's statement in *National Fuel Gas Supply Corp*.[50] It is well-established, however, that long-term commitments serve as "significant evidence of demand for the project."[51] And the Commission typically does not look behind such agreements to assess shippers' business decisions.[52] The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has confirmed that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market

[47] Hoffman and Erb Landowners Rehearing Request at 3-4, 13-16. Other parties advance similar arguments in connection with their motions for stay of the certificate. *See* Allegheny Rehearing Request at 38-39 (asserting that issuance of a tolling order would constitute an effective denial the rehearing requests).

[48] 42 U.S.C. § 4601 (2012).

[49] Cappiello Rehearing Request at 3-4, 7-8; Like Rehearing Request at 3, 6-7.

[50] 158 FERC ¶ 61,145 (2017) (Commissioner Bay, Separate Statement). *See* Allegheny Rehearing Request at 36-38; Hoffman and Erb Landowners Rehearing Request at 11-12.

[51] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

[52] *See, e.g., Transcontinental Gas Pipe Line Co., LLC*, 157 FERC ¶ 61,095, at P 5 (2016); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 39 (2016); *Paiute Pipeline Co.*, 151 FERC ¶ 61,132, at P 33 (2015).

need reflected by the applicant's contracts with shippers.[53] Here, all of the project's proposed capacity has been subscribed under long-term precedent agreements with nine shippers.[54]

28. To the extent these parties argue that the Commission should have independently evaluated the need for the project, we note that, in the February 3 Order, the Commission looked to the comments by three project shippers affirming their need for project service.[55] While the parties assert that the Commission should not accept these "self-serving statements from a prime beneficiary of the project,"[56] it would seem that as a pipeline project is intended to serve need for transportation services, statements from those entities actually experiencing the need for such services would be precisely the kind of evidence the Commission should look to. And where, as here, the shippers have backed their words with subscriptions for all of the proposed project's capacity, we generally decline to look beyond the evidence of need demonstrated by those contracts to make an independent determination of the quality of the subscribing shippers' business judgment. Nonetheless, the Commission also analyzed a study by the Institute for Energy Economics and Financial Analysis (IEEFA) submitted by Clean Air Council.[57] The Commission found that while the IEEFA study was general and not directly applicable to the project's proposed market, it did suggest that pipelines like the Atlantic Sunrise Project may serve to aid in the delivery of lower-priced natural gas to higher-

[53] *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

[54] *See* February 3 Order, 158 FERC ¶ 61,125 at P 23.

[55] *See* February 3 Order, 158 FERC ¶ 61,125 at P 30 (citing evidence of demand provided by Southern Company Services, Inc., Seneca Resources Corporation, and Washington Gas Light Company).

[56] *See* Cappiello Rehearing Request at 11-12; Smith Rehearing Request at 13; Like Rehearing Request at 9 (citing *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C. Cir. 1956); Hoffman and Erb Landowners Rehearing Request at 2, 11 (arguing that FERC failed to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project") (citing *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

[57] February 3 Order, 158 FERC ¶ 61,125 at PP 26, 28.

priced markets.[58] The Commission further noted that, to the extent that the study showed underutilization of existing capacity in Virginia and North Carolina, Transco proposes to make use of underutilized capacity instead of constructing new pipeline facilities in these states.[59]

29. With respect to arguments premised on the potential export of project gas, our policy does not require shippers to be end-use consumers of natural gas to establish demand for the project, and a project is not deemed speculative simply because it is driven primarily by marketers and producers.[60] The Commission determined that Transco designed its project to meet the growing demand for natural gas in the Mid-Atlantic and southeastern markets and executed precedent agreements for 100 percent of the project's capacity.[61]

b. Constitutional Takings

30. Several landowners assert that the "public interest" referenced in the NGA is distinguishable from finding that the project serves a "public use" sufficient to justify a taking,[62] but that, in any event, the project meets neither standard because most of the

[58] *Id*. P 28.

[59] *Id*. P 30.

[60] *Id.* P 29 (citing *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061, at 61,241 (1999)).

[61] *Id*.

[62] Hoffman and Erb Landowners Rehearing Request at 2-3, 12-13 (noting that Cabot Oil & Gas Corporation, one the project's major subscribers, has stated that its anticipated pricing for gas transported on the pipeline will be based on the D.C. market area and the Gulf Coast market area and stating that "[t]he fact that 87% of the Project's capacity is subscribed to by four gas production companies that, upon completion of the Project, will have direct access to export facilities, raises serious concerns that the main driver behind the Project is to provide these companies with access to higher priced markets overseas"); Cappiello Rehearing Request at 11-12 ("[T]he record shows that a 350,000 Dth/day of gas carried along the CPL Line will be exported to Japan, while the remainder will be sold [at] WGL Midstream potentially for export or spot market sales."); Smith Rehearing Request at 12-13; Like Rehearing Request at 8-9. Similarly, Allegheny argues that the precedent agreements fail to establish demand for the project because most of the natural gas to be transported is destined for export. *See* Allegheny Rehearing Request at 37-38.

natural gas to be transported by the project will be exported and not ultimately distributed to the public.[63]

31. As we recently have explained,[64] the Commission itself does not confer eminent domain powers. Under NGA section 7, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination and issues a natural gas company a certificate of public convenience and necessity, it is NGA section 7(h) that authorizes that certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.[65]

32. As noted above, Congress provided in NGA section 7(h) that a certificate holder was entitled to use eminent domain. Congress did not suggest that there was a further test, beyond the Commission's determination under NGA section 7(c)(e),[66] that a proposed pipeline was required by the public convenience and necessity, such that certain certificated pipelines furthered a public use, and thus were entitled to use eminent domain, while others did not. The Commission has interpreted the section 7(c)(e) public convenience and necessity determination as requiring the Commission to weigh the public benefit of the proposed project against the project's adverse effects.[67] We undertake this balancing through our application of the Certificate Policy Statement

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[63] Cappiello Rehearing Request at 10-11; Smith Rehearing Request at 12-13; Like Rehearing Request at 8.

[64] *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 77 (2017); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 61 (2017).

[65] 15 U.S.C. § 717f(h) (2012).

[66] 15 U.S.C. § 717f(e) (2012).

[67] As the agency that administers the NGA, and in particular as the agency with expertise in addressing the public convenience and necessity standard in the Act, the Commission's interpretation and implementation of that standard is accorded deference. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 392 (D.C. Cir. 2017); *Office of Consumers Counsel v. FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980); *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865, at *21 (S.D. Tex. July 15, 2016), *aff'd*, 859 F.3d 325 (5th Cir. 2017); *see also MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011) (under Chevron, the Court "giv[es] effect to clear statutory text and defer[s] to an agency's reasonable interpretation of any ambiguity").

criteria, under which we balance the public benefits of a project against the residual adverse effects.[68] Thus, through this balancing process we make findings that support our ultimate conclusion that the public interest is served by the construction of the proposed project.[69] Accordingly, once a natural gas company obtains a certificate of public convenience and necessity, it may exercise the right of eminent domain in a U.S. District Court or a state court.

33. The Commission, having determined that the Atlantic Sunrise Project is in the public convenience and necessity, was not required to make separate finding that the project serves a "public use" to allow the certificate holder to exercise eminent domain.[70] In short, the Commission's public convenience and necessity finding is equivalent to a "public use" determination.[71] In enacting the NGA, Congress clearly articulated that the transportation and sales of natural gas in interstate commerce for ultimate distribution to the public is in the public interest.[72] This congressional recognition that natural gas

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[68] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,747-61,749.

[69] *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (because the Commission declared that the subject pipeline would serve the public convenience and necessity, the takings complained of did serve a public purpose); *see also Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002) (no evidence of public necessity other than the Commission's determination is required).

[70] *See Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at P 79; *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 61.

[71] *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000); *see also, e.g., Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3rd Cir. 1984) ("authoriz[ing] an occupation of private property by a common carrier . . . engaged in a classic public utility function" is an "exemplar of a public use"); *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) ("Congress may, as it did in the NGA, grant condemnation power to 'private corporations . . . execut[ing] works in which the public is interested.'") (quoting *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)).

[72] 15 U.S.C. § 717(a) (2012) (declaring that the "business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest"). *See also Thatcher v. Tenn. Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1950) (explaining that Congress, in enacting the NGA, recognized that "vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product;

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transportation furthers the public interest is consistent with the Supreme Court's emphasis on legislative declarations of public purpose in upholding the power of eminent domain.[73]

34. Through the transportation of natural gas from the project, the public at large will benefit from increased reliability of natural gas supplies. To the extent that natural gas transported by the project is exported, we note that the Department of Energy (DOE) first would need to find that such exportation is not inconsistent with the public interest.[74] Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product. Therefore, we continue to find that the proposed project is required by the public convenience and necessity.

35. Finally, we dismiss as beyond the scope of this proceeding the Cappiellos' argument that, even if the use of eminent domain is not found to be unconstitutional for the project in general, it should be disallowed for their property because the current route may not be built.[75] The Cappiellos note that approval of a site-specific plan for minimizing construction impacts on the Cappiellos' barn, and amending a restrictive covenant to permit construction must be met before the pipeline can go forward.[76] In the February 3 Order, the Commission found under section 7(c) of the NGA that the public convenience and necessity requires approval of Transco's proposal. Once the Commission has authorized pipeline construction, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property

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and that the only way this natural can be feasibly transported from one State to another is by means of a pipe line.").

[73] *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479-80 (2005) (upholding a state statute that authorized the use of eminent domain to promote economic development); *see also id.* at 480 (noting that without exception the Court has defined the concept of "public purpose" broadly, reflecting the Court's longstanding policy of deference to the legislative judgments in this field).

[74] *See* 15 U.S.C. § 717b(a) (2012); 10 C.F.R. § 590.201 (2017).

[75] Cappiello Rehearing Request at 8-9, 12.

[76] *Id*. at 8, 12. The Cappiellos further represent that they do not intend to sign a letter authorizing Williams to apply for a permit from the Pennsylvania Department of Transportation to use an access road on their property. *Id*. at 8-9.

rights by a pipeline under the eminent domain provisions of section 7(h) of the NGA are matters for the applicable state or federal court.[77]

c. Due Process

36. On March 13, 2017, consistent with its standard practice, the Commission issued an order in this proceeding granting rehearing for further consideration. Absent this tolling order, the timely rehearing requests in this proceeding would have been deemed denied by operation of law after 30 days.[78] Nevertheless, the Hoffman and Erb Landowners argue that issuance of a tolling order in this proceeding, absent a concurrent stay of the effectiveness of the February 3 Order, deprives landowners of a meaningful opportunity for judicial review of the Commission's decision regarding public use and taking of their property.[79]

37. We disagree. The Commission's use of tolling orders has been found to be valid by the courts,[80] and it is well settled that, "[i]n the absence of a stay, the [Commission's]

[77] *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at PP 68, 70 (2017) (explaining that "[t]he Commission does not oversee the acquisition of property rights through eminent domain proceedings").

[78] 18 C.F.R. § 385.713(f) (2017) ("Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.").

[79] Hoffman and Erb Landowners Rehearing Request at 3, 14. Specifically, the Hoffman and Erb Landowners state that the pipeline company may exercise the power of eminent domain once it has obtained a certificate of public convenient and necessity, while landowners cannot seek judicial review of the Commission's determination that the project serves a public purpose until they have filed for rehearing with the Commission, which does not stay the effectiveness of the grant of certificate. *Id*. at 14.

[80] *Del. Riverkeeper Network v. FERC*, 243 F.Supp.3d 141, 146 (D.D.C. 2017) ("Tolling orders have no explicit statutory basis, but have been upheld by the First and Fifth Circuits, as well as by the D.C. Circuit in several unpublished orders."); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *California Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969). *See also*, *City of Glendale v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) ("Nor is there merit to petitioner's contention that this court should treat FERC's orders tolling the period for resolving petitioner's requests for agency rehearing as effectively denying rehearing; the tolling orders do not resolve the rehearing requests but simply extend the time to consider them.").

orders are entitled to have administrative operation and effect during the disposition of the proceedings."[81]

38. The Hoffman and Erb Landowners fail to establish that issuance of a tolling order followed by a substantive rehearing order will deprive them of the chance to be heard "at a meaningful time and in a meaningful manner."[82] The Hoffman and Erb Landowners had notice of, and participated in, the certificate proceeding before the Commission. Thus, their reliance on *Brody v. Vill. Of Port Chester*[83] is misplaced, as that case focused on whether the landowner had received sufficient notice of the commencement of the 30-day period to challenge the public use determination.[84] The Hoffman and Erb Landowners do not argue that they have been deprived of the opportunity to seek review of the February 3 Order. Rather, they assert that the potential *delay* in receiving a substantive order on rehearing will deprive them of their right to judicial review of the public use determination.[85]

39. As the Supreme Court has recognized, "due process is flexible and calls for such procedural protections as the particular situation demands."[86] The courts have recognized the importance of permitting the Commission "to give complete and deliberate consideration" to matters before it, and have rejected arguments that delays in rendering final decisions, within reason, raise due process concerns.[87] Here, the Hoffman and Erb

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[81] *Ecee, Inc. v. FPC*, 526 F.2d 1270, 1274 (5th Cir. 1974), *cert. denied*, 429 U.S. 867 (1976) (citing *Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 937 (1970)).

[82] *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

[83] 434 F.3d 121 (2d Cir. 2005).

[84] *See id*. at 126-27.

[85] *See* Hoffman and Erb Landowners Rehearing Request at 16 (asserting that "the due process rights that the Landowners are guaranteed by the Constitution here require that FERC timely decide the request for rehearing, without issuing a tolling order, or they require FERC to issue a stay while any such tolling order is pending").

[86] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

[87] *See Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988) (rejecting claim that due process was violated when a final rehearing order had not been issued by the Commission five years after the filing of a complaint).

Landowners do not argue that they will not be able to seek review of the February 3 Order, but only that such review must await the Commission's consideration of their requests for rehearing. But "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate."[88] In sum, the Hoffman and Erb Landowners fail to show that they have been substantially prejudiced by the Commission following its longstanding procedure of issuing a tolling order while affording the multiple rehearing requests in this proceeding the careful consideration they are due.[89]

d. Uniform Relocation Act

40. The Cappiellos and Lynda Like argue, for the first time on rehearing, that the February 3 Order violates the Uniform Relocation Assistance and Real Property Acquisitions Policies for Federal and Federally Assisted Programs Act (Uniform Relocation Act)[90] because the Commission did not direct Transco's parent company, Williams, to provide for payments to tenants on the Cappiello and Like properties who may be displaced by construction of the pipeline.[91] As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented.[92]

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[88] *Phillips v. Internal Revenue Comm'r*, 283 U.S. 589, 596-97 (1931). *See also Council of & for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) ("In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.") (emphasis in original); *see also Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983) (plaintiff's property right, while delayed, was not extinguished, and that no deprivation of property interest occurred).

[89] *Arthur Murray Studio of Washington, Inc. v. F.T.C.*, 458 F.2d 622 (5th Cir. 1972) (showing of substantial prejudice is required to make a case of denial of procedural due process in administrative proceedings).

[90] 42 U.S.C. §§ 4601 *et seq*. (2012).

[91] Cappiello Rehearing Request at 7-8; Like Rehearing Request at 6-7.

[92] *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016) (explaining that novel issues raised on rehearing are rejected "because our regulations preclude other parties from responding to a request for rehearing and such behavior is disruptive to the administrative process because it has the effect of moving the target for

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41. Even if we were to consider the merits of this argument, we would reject it. Section 4622(a) of the Uniform Relocation Act provides for the payment to "displaced persons" of reasonable expenses for moving and reestablishing a business or farm.[93] There is no directive relating to the Uniform Relocation Act in the February 3 Order because the Act does not apply at this point in NGA section 7(c) proceedings. To the extent the use of eminent domain proves necessary, it would be the natural gas company, not the Commission, that would be the "displacing agency" for the purposes of the Uniform Relocation Act.[94] And, the compensation requirements generally do not apply

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parties seeking a final administrative decision") (internal quotations omitted); *Baltimore Gas & Electric Co*., 91 FERC ¶ 61,270, at 61,922 (2000) ("we look with disfavor on parties raising issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of a moving target for parties seeking a final administrative decision.").

[93] "Whenever a program or project to be undertaken by a displacing agency will result in the displacement of any person, the head of the displacing agency shall provide for the payment to the displaced person of--

(1) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the head of the agency;

(3) actual reasonable expenses in searching for a replacement business or farm; and

(4) actual reasonable expenses necessary to reestablish a displaced farm, nonprofit organization, or small business at its new site, but not to exceed $25,000, as adjusted by regulation, in accordance with section 4633(d) of this title."

42 U.S.C. § 4622(a) (2012).

[94] Section 4601(11) defines "displacing agency" as "any Federal agency carrying out a program or project … which causes a person to be a displaced person." As defined in section 4601(1), "Federal agency" includes "any person who has the authority to acquire property by eminent domain under Federal law." *See Tenn. Gas Pipeline Co. v. New England Power, C.T.L., Inc*., 6 F.Supp.2d 102, 105 (D. Mass. 1998) (noting that

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until the party has been "displaced," i.e., moved from the property and filed a claim for reimbursement.[95] Accordingly, the Cappiellos and Ms. Like fail to establish that the Commission should have included any directives regarding the Uniform Relocation Act in the February 3 Order.

C. Environmental Analysis

1. Certificate Environmental Conditions

a. Rehearing Requests

42. Allegheny, Accokeek, the Hoffman and Erb Landowners, and Follin Smith assert that the February 3 Order granting a conditional certificate violates NEPA and Commission regulations. Citing Commission regulations requiring all federal agencies to issue final permits within 90 days after issuing a final Environmental Impact Statement (EIS), Follin Smith claims that the Commission acted too "hasty" in issuing a certificate conditioned on the Army Corps' Clean Water Act section 404 permit before that period elapsed.[96] Accokeek and the Hoffman and Erb Landowners join Allegheny's request by arguing that the February 3 Order's environmental conditions violated the Council on Environmental Quality's (CEQ) regulations requiring that environmental information be publicly available before decisions are made and actions taken.[97] Allegheny contends that the Commission should have supplemented the EIS because the mitigation plans required by these conditions constitute substantial changes from the original environmental analysis.

b. Commission Determination

i. Coordination of Federal Authorizations

43. We reject the claim that the Commission violated its own regulations by issuing a certificate conditioned on the Army Corps' section 404 permit. The regulation cited by Follin Smith establishes a 90-day time limit, not a 90-day waiting period, for federal

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pipeline in possession of a certificate of public convenience and necessity under the NGA would be the "federal agency" for purposes of the Uniform Relocation Assistance Act.).

[95] *Tenn. Gas Pipeline Co.*, 6 F.Supp.2d at 105 (finding that a party who had not yet left the premises was not entitled to prepayment of relocation expenses).

[96] Smith Rehearing Request at 10 (citing 18 C.F.R. § 157.22) (2017).

[97] Allegheny Rehearing Request at 7 (citing 40 C.F.R. § 1500.1(b), 18 C.F.R. 380.11(a) (2017)).

approvals.[98] Nor is there any requirement that the Commission not act until that time period has lapsed. The courts have consistently affirmed the Commission's practice of issuing conditional certificates.[99]

ii. Conditional Authorization

44. The Commission also complied with NEPA when it conditioned its approval on compliance with environmental conditions. Of the 56 environmental conditions included in the certificate order, Allegheny alleges that 35 conditions will require additional information and therefore additional NEPA analysis. In particular, Allegheny focuses on environmental conditions 21 and 23, which together direct Transco to submit a final *Abandoned Mine Investigation and Mitigation Plan* (Mine Fire Plan) to protect the pipeline from potential underground mine fire migration during operations. According to Allegheny, this alleged new information should have been subjected to additional NEPA analysis.

45. When a federal agency determines that a licensee must mitigate potential impacts, NEPA does not require a "complete mitigation plan" that is "actually formulated and adopted" when the EIS is issued.[100]

46. The Commission properly analyzed in the final EIS the potential environmental impacts associated with environmental conditions and then went beyond NEPA's mandate by conditioning the certificate on this additional mitigation. For example, the final EIS analyzed Transco's submitted Mine Fire Plan, which showed that the project would not cross an active mine fire, but would be within three miles of three active

[98] 18 C.F.R. § 157.22 ("a final decision on a request for a Federal authorization is due no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law").

[99] *See Del. Riverkeeper Network v. FERC*, 857 F.3d at 399 (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the Clean Water Act); *see also Myersville*, 783 F.3d at 1320-21 (upholding FERC's conditional approval of a natural gas facility construction project where FERC conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 578-79 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from FERC's conditional approval of a natural gas terminal construction despite statutes requiring states' prior approval because FERC conditioned its approval of construction on the states' prior approval).

[100] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989).

fires.[101] Although nothing suggested that these fires would migrate, the final EIS recommended that Transco update its Mine Fire Plan to include mitigation measures to guard against any migration in the future.[102] We disagree that a supplemental EIS is necessary to review the plan. Such supplemental analysis is only required if "there remains 'major Federal actio[n]' to occur, and if the new information will affect the quality of the human environment in a significant manner or to a significant extent not already considered."[103] That is not the case here.

47. The other environmental conditions of concern to Allegheny were also proper. These conditions – environmental mitigation, ensuring other federal approvals have been met, and finalizing workspace plans once property has been acquired – must be completed before the Commission will authorize construction.[104] All environmental impacts associated with these conditions were analyzed in the final EIS. We see no evidence suggesting that these environmental conditions, once fulfilled, demanded additional analysis pursuant to NEPA.

2. Project Scope and Alternatives

a. Rehearing Requests

48. Accokeek and the Hoffman and Erb Landowners join Allegheny's claim that the Commission failed to properly identify or evaluate the project's purpose and need, and therefore, failed to evaluate a reasonable range of alternatives. Allegheny claims the final EIS failed to even identify the project's purpose and need, pointing to a statement in the EIS that the Commission "will not determine whether the need for the Project exists" as part of the NEPA process, noting that "this will later be determined by the Commission [under section 7 of the NGA]."[105] Allegheny also claims that the Commission

[101] December 2016 Final Environmental Impact Statement for the Atlantic Sunrise Project (Final EIS) at 4-25.

[102] *Id.* at 4-30.

[103] *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 361 (1989).

[104] For example, these conditions include requirements that Transco: perform post-construction noise surveys to ensure that operation noise levels at the compressor stations meet the Commission's noise criterion (condition numbers 53 - 56); finalize and file alignment and workspace requirements (conditions 4, 5); finalize and file an implementation plan for workspace monitoring; and show that all other necessary federal authorizations have been obtained (condition 6). February 3 Order, 158 FERC ¶ 61,125.

[105] Allegheny Rehearing at 9 (citing Final EIS at 1-2).

unreasonably narrowed its alternatives analysis by excluding generation of electricity from renewable energy sources and conservation. Allegheny alleges that the Commission excluded these alternatives because other agencies and states regulate these resources. We disagree.

b. Commission Determination

i. Purpose and Need

49. Contrary to Allegheny's claim, the final EIS explains that the purpose of the project was to provide enhanced access to Marcellus Shale gas supplies and incremental, firm natural gas transportation capacity between Marcellus Shale producing areas and Transco's existing markets.[106] The statement relied upon by Allegheny was intended to advise that the determination of a project's purpose under NEPA differs from the Commission's determination of need under the public convenience and necessity standard of section 7(c) of the NGA. As discussed above, when determining whether a project is in the public convenience and necessity, the Commission examines several different factors when analyzing a project's market need before balancing public benefits against project impacts.

ii. Alternatives

50. Under NEPA, alternatives are reasonable if they can feasibly achieve the project's aims.[107] The final EIS properly considered and rejected commenters' requests for renewable energy and energy conservation alternatives because neither would meet project objectives.[108] Although the EIS noted that renewable energy and energy

[106] To the extent Allegheny argues that the project purpose and need statement should be broader, we note that when an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal to adopting it to varying degrees or with modification. *See Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72-74 (D.C. Cir. 2011).

[107] *See, e.g., Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.). *See also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2017) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

[108] Final EIS at 3-2.

conservation could potentially provide equivalent amounts of energy, neither were transportation alternatives and thus would not meet the project's objectives. Moreover, renewable energy and energy conservation measures could not provide additional natural gas supplies for residential and commercial uses, including heating and cooking, without extensive conversion of existing systems to electric-based systems. As the final EIS explained, "because the purpose of the Project is to transport natural gas, and the generation of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation are not transportation alternatives, they are not considered or evaluated further in this analysis."[109]

51. Allegheny cites the final EIS for the Constitution Pipeline Project as an example of where the Commission did consider these renewable energy and energy conservation alternatives. But, as is the case here, those alternatives were rejected in the Constitution proceeding because they would not meet project objectives.[110]

3. Segmentation

a. Rehearing Requests

52. Allegheny, the Hoffman and Erb Landowners, and Accokeek claim that the Commission impermissibly segmented the environmental analysis for the Atlantic Sunrise Project from four other purportedly interdependent pipeline projects: Transco's Hillabee Expansion Project (CP15-16-000); American Midstream's Magnolia Extension Project; Transco's Rock Springs Expansion Project (CP14-504-000); and Transco's Northeast Supply Enhancement Project (CP17-101-000).

b. Commission Determination

53. Segmentation refers to the requirement that an agency must consider other connected and cumulative actions, and may consider similar actions, in a single environmental document to "prevent agencies from dividing one project into multiple

[109] *Id.*

[110] Final EIS for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000, CP13-502-000 (Oct. 2014) (Constitution EIS), at 3-4 to 3-5, 3-7 to 3-13. The Constitution EIS explained that gains in energy efficiency would only occur on a much longer time-line than the shippers' contracted service and would not be expected to eliminate the increasing demand for energy or natural gas in New England. The Constitution EIS also concluded that renewable resources would not meet overall anticipated consumer needs and would not be completely interchangeable with natural gas.

individual actions" with less significant environmental effects.[111] Connected actions include actions that: (1) automatically trigger other actions, which may require an EIS; (2) cannot or will not proceed without previous or simultaneous actions; (3) are interdependent parts of a larger action and depend on the larger action for their justification.[112] Such actions must be proposed or pending at the same time.[113] The Commission is not required to consider in its NEPA analysis other potential projects for which the project proponent has not yet filed an application, or where construction of a project is not underway.[114]

54. In evaluating whether connected actions are improperly segmented, courts apply a "substantial independent utility" test. The test asks "whether one project will serve a significant purpose even if a second related project is not built."[115] For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful and those that are not. Similar to a highway network, "it is inherent in the very concept of" the interstate pipeline grid "that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility."[116]

55. Allegheny's concerns about the Hillabee Expansion Project and the Magnolia Extension Project were raised well outside the EIS scoping and comment periods.[117]

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[111] *Myersville*, 783 F.3d at 1326 (Court approved FERC's determination that, although a Dominion-owned pipeline project's excess capacity may be used to move gas to the Cove Point terminal for export, the projects are "unrelated" for purposes of NEPA).

[112] 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2017).

[113] 40 C.F.R. §1508.25 (a)(1) - (2) (2017) (defining connected and cumulative actions).

[114] *See Minisink*, 762 F.3d at 113, n.11.

[115] *Coal. on Sensible Transp., Inc. v Dole*, 826 F.2d 60, 69 (D.C. Cir., 1987); *see also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project "can stand alone without requiring construction of the other [projects] either in terms of the facilities required or profitability").

[116] *Coal. on Sensible Transp., Inc. v Dole*, 826 F.2d at 69.

[117] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that

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Commenters should raise concerns about the scope of the project during these periods. In any event, as discussed below, the Commission did not segment from its environmental analysis either project.

56. Allegheny claims that the Hillabee Expansion, which is a component of the Southeast Market Expansion Project, relies on the Atlantic Sunrise Project to deliver Marcellus shale gas because both projects use Transco's Station 85 hub in Alabama. Although Atlantic Sunrise Project delivers to, and the Hillabee Expansion can receive natural gas from, the Station 85 hub, the projects are not interdependent. Transco's Station 85 hub consists of the zone 4a and zone 4 pooling points connecting several interstate pipelines—including Transco's mainline, Sabal Trail's leased Hillabee Expansion, Midcontinent Express Pipeline, LLC, and Gulf South Pipeline Co., LP—as well as intrastate pipelines. The existing Station 85 hub already has capacity to deliver more gas than the Hillabee Expansion could accept. This is unlike the circumstances in *Delaware Riverkeeper Network v. FERC*, where the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in "a single pipeline" that was "linear and physically interdependent" and where those projects were financially interdependent.[118] Such factors are absent here when the Hillabee Expansion will be able to receive natural gas from a number of sources and does not rely on the Atlantic Sunrise Project to move forward.

57. Because no pipeline has filed an application with the Commission for the Magnolia Extension Project, the Commission had no basis to evaluate the Magnolia Extension in the context of this proceeding.

58. We also dismiss Allegheny's claims relating to the Rock Springs Expansion Project, as they were raised for the first time on rehearing. The Commission looks with disfavor on parties raising issues for the first time on rehearing that should have been raised earlier, particularly during NEPA scoping[119] in part, because other parties are not

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it ... alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration.").

[118] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1316 (D.C. Cir. 2014).

[119] *Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("We look with disfavor on parties raising issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of a moving target for parties seeking a final administrative decision.").

permitted to respond to requests for rehearing.[120]

59. But, again, even if we were to consider the merits of Allegheny's request, we would reject it. The Rock Springs Expansion Project was placed into service on August 1, 2016, and provides service from Transco's system in Lancaster County, Pennsylvania, to Old Dominion Electric Cooperative's generating facility in Cecil County, Maryland. Because both projects have facilities in Lancaster County, the Commission considered the Rock Springs Expansion Project throughout its analysis of cumulative impacts in the final EIS. But there was no indication that either project relied on the other and no project facilities overlapped.

60. As for Transco's Northeast Supply Enhancement Project, the project is not "connected" for purposes of NEPA to the Atlantic Sunrise Project The Northeast Supply Enhancement Project was proposed on March 27, 2017, well after the Atlantic Sunrise Project was approved.[121] As discussed, if a project is not yet proposed, it is not subject to NEPA review.

61. Moreover, the Atlantic Sunrise Project in no way depends on the Northeast Supply Enhancement Project, a much smaller, regional project that will transport natural gas north to New York City, in the opposite direction as the Atlantic Sunrise Project. And although the natural gas made available by the Atlantic Sunrise Project could, theoretically, serve Northeast Supply Enhancement Project customers, this service does not depend on the Atlantic Sunrise Project. Without the Atlantic Sunrise Project, natural gas could be sourced from other areas on Transco's system for the Northeast Supply Enhancement Project customers.[122]

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[120] *See, e.g., Nw. Pipeline, LLC, 157 FERC* ¶ 61,093, at P 27 (2016) (dismissing argument raised for the first time on rehearing and noting that the "Commission looks with disfavor on parties raising issues for the first time on rehearing that should have been raised earlier, particularly during NEPA scoping, in part, because other parties are not permitted to respond to requests for rehearing"); *PJM Interconnection, L.L.C.*, 126 FERC ¶ 61,030, at P 15 and n.10 (2009) ("The Commission has held that raising issues for the first time on rehearing is disruptive to the administrative process and denies parties the opportunity to respond."); *Allegheny Energy Supply Co., L.L.C.*, 122 FERC ¶ 61,104, at P 6 (2008) (same); 18 C.F.R. § 385.713(d) ("The Commission will not permit answers to requests for rehearing.").

[121] Transco Application for Certificate of Public Convenience and Necessity for the Northeast Supply Enhancement Project, filed in Docket No. CP17-101-000 (Mar. 26, 2017) (Northeast Supply Enhancement Project Application).

[122] Based on an engineering review by Commission staff, the Northeast Supply *(continued ...)*

4. Local Siting Concerns

a. Rehearing Requests

62. The Cappiellos and Follin Smith claim the Commission failed to consider and avoid project impacts to their properties. The Cappiellos argue that Commission erred by failing to recognize that, in the short term, pipeline construction will cause noise and disrupt the use of their farm and, in the long term, future building and farm equipment operations will not be permitted on the pipeline right of way. Follin Smith claims that a portion of the project known as the Central Penn Line will impact her neighbor's organic farm, preclude future organic farming on her land, and adversely impact cultural and archaeological resources. Ms. Smith argues that the Commission failed to consider alternatives to prevent such impacts. We disagree.

b. Commission Determination

63. The Cappiellos had previously expressed concern that pipeline construction noise would adversely impact an Amish family residing on their property. The February 3 Order explained that the project is not expected to exceed target noise levels. Nonetheless, the Commission required Environmental Condition 53, directing Transco to file in its weekly construction status reports the noise measurements and any necessary mitigation near the Cappiellos' property.

64. With respect to cultural and archeological resources on Follin Smith's land, the EIS explained that Transco would complete a cultural resource report once it gained access to the project area. The project area on Ms. Smith's property was subsequently reviewed for cultural resources and although historic period artifacts were recovered, no archaeological sites or historic properties were identified. Regarding Ms. Smith's land, the Pennsylvania State Historic Preservation Officer and Commission staff agreed that there would be no effects to historic properties.

65. We dismiss the Cappiellos' and Follin Smith's remaining concerns relating to post-construction impacts because these arguments are raised for the first time on rehearing, without any explanation for their delay.[123]

Enhancement project could receive gas from the Gulf or north from its Leidy Line. *See id.* at Exhibit G, Transco Application for Certificate of Public Convenience and Necessity for the Atlantic Sunrise Project, at Exhibit G (Mar. 15, 2015).

[123] *See supra* at n.119 & 120.

66. Nonetheless, the Commission fully considered post-construction surface impacts from the project easement. The EIS explained that most preconstruction land use, such as farming, would resume on the surface of the project easement following construction.[124] We also note that, although the existence of the easements would prevent landowners from altering the easement land by constructing structures or improvements on the land, property owners can request specific routing adjustments and mitigation, including compensation for lost development potential, during the right-of-way acquisition process. Minor route modifications may be made after surveys are conducted to resolve landowner concerns. Finally, with regard to organic farming, the Commission also required an organic certification mitigation plan as Environmental Condition 40. This includes measures to maintain organic certification of agricultural land by limiting the use of materials, such as fertilizer or composted matter that contains a prohibited synthetic substance, which would mitigate the effect of the project on the certification of organic farms.[125]

67. In any event, we note that the Commission nonetheless fully considered several alternatives to the route crossing her property.[126] But none of these routes offered overall environmental advantages. Ultimately, crossing Ms. Smith's property was necessary to minimize impacts on natural resources and proximity to nearby homes.

5. Direct and Indirect Impacts on Water Resources

a. Rehearing Requests

68. Allegheny, the Hoffman and Erb Landowners, and Accokeek claim that the Commission violated NEPA by failing to take a hard look at the direct and indirect effects of the Atlantic Sunrise Project on water resources, including high-quality and exceptional value streams and wetlands. Allegheny argues that required mitigation was not supported by substantial evidence and will be insufficient to ensure adequate mitigation of project impacts on waterbodies. Allegheny cites to violations by Tennessee Gas Pipeline Corporation (Tennessee Gas) of Pennsylvania's Clean Streams Law[127] during construction of the 300 Line Project as evidence that mitigation is not sufficient to

[124] Final EIS at 4-311.

[125] *Id.* at 3-42.

[126] *Id.* at 3-8 to 3-55.

[127] Pennsylvania's Clean Streams Law was enacted on June 22, 1937, and subsequently amended to align its requirements with the Clean Water Act. 35 PA. Cons. Stat. § 691.1, *et seq*.

ensure that pipeline projects' impacts on water resources will be adequately mitigated.[128]

b. Commission Determination

69. That Tennessee Gas was found to have violated Pennsylvania's Clean Streams Law during construction of a different pipeline project provides no support for Allegheny's allegation that Commission requirements are inadequate to prevent or sufficiently minimize the environmental impact of the Atlantic Sunrise Project. The issue raised is one of compliance, rather than adequacy of the required mitigation. One instance of non-compliance does not support a conclusion that there are pervasive flaws in the required mitigation measures. To that point, in the course of this proceeding Allegheny has not identified any parts of the required plans that it believes to have been deficient. Neither has Allegheny identified any project impacts that may not be adequately mitigated by Transco's compliance with its required plans.

70. We note that the Commission required that Transco implement several mitigation plans to protect water resources, including: a Horizontal Directional Drilling Contingency Plan; an Abandoned Mine Investigation and Mitigation Plan; a Karst Investigation and Mitigation Plan; Spill Plan for Oil and Hazardous Materials; and mitigation based on the Commission's Upland Erosion Control, Revegetation, and Maintenance Plan (Erosion Control Plan or Plan) and Wetland and Waterbody Construction and Mitigation Procedures (Wetland and Waterbody Mitigation Procedures or Procedures).[129]

71. The Commission also required on-site monitoring of these plans' requirements. Project-specific environmental inspectors, along with pipeline reporting must be in place before, during, and after facility construction. Prior to construction, Transco must have in place a construction Implementation Plan to ensure that construction activities will fully comply with all required mitigation measures and have an onsite Environmental

[128] Allegheny Rehearing Request at 15-16. Tennessee Gas's 300 Line Project included, *inter alia*, the construction of 127.4 miles of pipeline loop. *Tenn. Gas Pipeline Co., L.L.C.*, 131 FERC ¶ 61,140 (2010).

[129] Final EIS at ES-4. The Erosion Control Plan and Wetland and Waterbody Mitigation Procedures identify mitigation measures that are required, as applicable, to minimize erosion, enhance revegetation, and minimize the extent and duration of disturbance on wetlands and waterbodies during and following project construction. *Notice of Availability of Final Revisions to the Plan and Procedures*, 78 Fed. Reg. 34,374 (June 7, 2013). The current versions of the Plan and Procedures are available on the Commission's website at http://www.ferc.gov/industries/gas/enviro/guidelines.asp.

Inspector.[130] During construction, Transco must file weekly status reports, which would notify staff of any problem areas, noncompliance events, and any corrective actions taken.[131] After construction, the February 3 Order conditioned receipt of authorization to begin service on a showing that Transco was satisfactorily restoring areas affected by the project.[132] The February 3 Order required an additional affirmation statement confirming compliance with all conditions within thirty days of placing the authorized facilities into service.[133] The EIS thus properly relied on these mitigation measures to reduce any minor adverse impacts on water quality to well below a level of significance.

6. Indirect Effects on Gas Production

a. Rehearing Requests

72. In the February 3 Order, the Commission declined commenters' requests to consider the greenhouse gas (GHG) emissions associated with the upstream production of the natural gas to be transported by the project in the final EIS.[134] Consistent with prior natural gas infrastructure proceedings, the Commission found that the record in this proceeding did not demonstrate a reasonably close causal relationship between the project and the impacts of future natural gas production warranting their review under NEPA.[135] The Commission further held that, even if a causal relationship were presumed to exist between approval of the project and additional natural gas production, the scope of impacts from any such induced production was not reasonably foreseeable.[136]

Nevertheless, Commission staff provided upperbound estimates of upstream and downstream effects based on DOE and Environmental Protection Agency (EPA) methodologies.[137]

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[130] February 3 Order, 158 FERC ¶ 61,125, Condition Nos. 3, 6, and 7.

[131] *Id.* at Condition No. 8.

[132] *Id.* at Condition No. 11.

[133] *Id.* at Condition No. 12.

[134] February 3 Order, 158 FERC ¶ 61,125 at PP 124-146.

[135] *Id*. PP 133-136.

[136] *Id*. PP 137-139.

[137] *Id*. PP 139-143.

73. On rehearing, Allegheny argues that the Commission violated NEPA by failing to consider the indirect effects of induced gas production, and should therefore rescind the February 3 Order to prepare a revised EIS.[138] According to Allegheny, the Commission should have taken a "hard look" at the indirect effects of induced shale gas development in the Marcellus and Utica shale formations, which Allegheny alleges are both causally related to,[139] and reasonably foreseeable as a result of,[140] the project.

74. We deny rehearing for the reasons discussed below.

b. Commission Determination

75. CEQ regulations direct federal agencies to examine the "indirect impacts" of their proposed actions, i.e. effects that are later in time or farther removed in distance, but are still (1) caused by the proposed action and (2) reasonably foreseeable.[141] The Commission has previously found that the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project.[142]

76. With respect to causation, "NEPA requires a 'reasonably close causal relationship'

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[138] Allegheny Rehearing Request at 3, 16-26. Accokeek and the Hoffman and Erb Landowners support this argument. *See* Accokeek Rehearing Request at 2, 4 (incorporating by reference the arguments in Allegheny's request for rehearing); Hoffman and Erb Landowners Rehearing Request at 7-8, 10 (same).

[139] Allegheny Rehearing Request at 17-23.

[140] *Id*. at 23-26.

[141] 40 C.F.R. § 1508.25(c) (2017); 40 C.F.R. § 1508.8(b) (2017).

[142] *See, e.g.*, *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion); *Columbia Gas Transmission, LLC*, 153 FERC ¶ 61,064, at PP 26-29 (2015) (finding that Commission approval of a pipeline project will not induce further gas production, nor is the scope of any increased production reasonably foreseeable); *Texas Gas Transmission, LLC*, 153 FERC ¶ 61,323, at P 62 (2015); *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015); *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,253, at P 21 (2015).

between the environmental effect and the alleged cause"[143] in order "to make an agency responsible for a particular effect under NEPA."[144] In the February 3 Order, the Commission explained that such a relationship could exist if the project would transport new production from a specified production area and such production would not occur absent the project (i.e., there would be no other way to move the gas).[145] In this case, the Commission did not find any evidence that the proposed project was predicated on future gas development; the Commission concluded that the project was not creating the need for transportation, but responding to it.[146] Despite its determination that study of the impacts of natural gas production is not mandated as part of the Commission's NEPA review, Commission staff nonetheless prepared an analysis regarding the potential impacts associated with natural gas production.[147] Allegheny is thus mistaken in asserting that the public has been left to make these assessments.[148]

77. Allegheny attempts to distinguish the precedent cited in the February 3 Order, but ultimately fails to show that the Commission erred in finding no reasonably close causal relationship between the Atlantic Sunrise Project and further shale gas extraction in the Marcellus and Utica shale formations. For example, Allegheny does not dispute the applicability of *Central N.Y. Oil and Gas Co.*,[149] but instead points out that the order by the Second Circuit Court of Appeals (Second Circuit) affirming the Commission's finding, *Coalition for Responsible Growth v. FERC*, was a summary order that does not

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[143] *Pub. Citizen*, 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (*Metropolitan Edison*)).

[144] *Id.*

[145] February 3 Order, 158 FERC ¶ 61,125 at P 130 (citing *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998); *City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997)).

[146] *Id.* PP 133-135.

[147] February 3 Order, 158 FERC ¶ 61,125 at PP 139-143.

[148] Allegheny Rehearing Request at 25.

[149] *Id.* P 134 (citing *Central N.Y. Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at P 91; *order on reh'g*, 138 FERC ¶ 61,104; *pet. for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. App'x 472, 474 (2d Cir. 2012) (finding that Marcellus shale development activities were not sufficiently causally-related to a pipeline project to warrant in-depth consideration of the gas production impacts)).

have precedential effect under the Second Circuit's rules of civil procedure.[150] Allegheny further alleges that, despite expressly affirming that the Commission reasonably concluded that the impacts of shale gas development were not sufficiently causally-related to the project to warrant a more in-depth analysis, the Second Circuit offered no "independent analysis, but merely accepted FERC's rationale for the specific case at issue."[151] Allegheny fails to explain why the fact that the Second Circuit affirmed the Commission via a summary order calls the Commission's reasoning in that proceeding into question, or why the Commission could not draw the same conclusion in this proceeding.

78. Allegheny distinguishes the details of several other cases, without showing that the precedent established in these cases is not sound or cannot be applied in this proceeding.[152] According to Allegheny, *Metropolitan Edison* is not on point because, unlike the psychological effects alleged in that proceeding, environmental effects are within the zone of interests NEPA was intended to address. Allegheny's reasoning seems to read out the requirement for a "reasonably close causal relationship" in *Metropolitan Edison*, suggesting that, because the impacts alleged are environmental in nature, they are automatically reasonably foreseeable.[153]

79. Allegheny then attempts to distinguish *Public Citizen* based on the fact that, in that case, the Federal Motor Carrier and Safety Administration had no discretion to deny registration of motor carriers meeting certain requirements and the Court therefore found no causal relationship between increased emissions and its lifting a presidential moratorium on cross-border operation of Mexican motor carriers.[154] Allegheny claims that *Public Citizen*'s limitation on NEPA[155] does not apply in this case, because the

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[150] Allegheny Rehearing Request at 17 (citing 2nd Cir. L.R. 32.1.1). The rules note that summary orders may be cited, as long as they are so designated.

[151] Allegheny Rehearing Request at 17.

[152] *Id*. at 17-19; February 3 Order, 158 FERC ¶ 61,125 at P 127 (citing *Pub. Citizen*, 541 U.S. at 767; *Metropolitan Edison*, 460 U.S. at 774).

[153] *See* Allegheny Rehearing Request at 18 ("Unlike the psychological harm resulting from the risk of a nuclear accident in *Metropolitan Edison*, the impacts related to reasonably foreseeable Marcellus and Utica shale gas drilling involve harms to the environment.").

[154] *Id*. at 18-19.

[155] *See Pub. Citizen*, 541 U.S. at 770 (stating that "where an agency has no ability to prevent a certain effect to its limited statutory authority over the relevant actions, the

(continued ...)

Commission has the discretion to attach conditions to a certificate, and to deny a certificate that is not required by the public convenience and necessity.[156] Similarly, Allegheny attempts to distinguish two cases in which the D.C. Circuit found that the Commission need not consider the environmental consequences of the export of natural gas in authorizing the construction of natural gas export facilities[157] on the grounds that DOE has statutory authority over the export of natural gas, whereas the Commission has sole discretion to approve construction of the Atlantic Sunrise Project.[158]

80. First, although the Commission explained in the February 3 Order that it has no jurisdiction over natural gas production,[159] the Commission did not rely solely on its lack of statutory authority, but instead reviewed the record in this proceeding and found no evidence that approval of the project would cause or induce additional shale gas production.[160] Moreover, the D.C. Circuit recently has clarified that DOE, which has statutory authority over gas exports, acted reasonably in declining to consider the indirect effects of the proposed Freeport export facility on natural gas production. The court found that DOE "was not required to 'foresee the unforeseeable,'" and acted reasonably in concluding that any attempts to estimate the location and magnitude of any resulting gas production would be too speculative to be useful.[161]

81. The Commission does not have jurisdiction over natural gas production.[162] This

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agency cannot be considered a legally relevant 'cause' of the effect").

[156] Allegheny Rehearing Request at 19 (citing *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 n.20 (9th Cir. 2007)).

[157] *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (*Freeport LNG*), and *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016).

[158] Allegheny Rehearing Request at 22-23.

[159] February 3 Order, 158 FERC ¶ 61,125 at P 129.

[160] *See id*. PP 133-136.

[161] *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (*Sierra Club v. DOE*).

[162] February 3 Order, 158 FERC ¶ 61,125 at P 129 (explaining that natural gas production is regulated at the local and regional level and, as to GHG emissions and deep underground injection and disposal of wastewaters and liquids, the EPA); *id.* P 136 (noting that any potential new production would be driven by a number of factors and "would take place pursuant to the regulatory authority of state and local governments").

does not mean, however, that the environmental impacts of any future production will remain unevaluated.[163] The potential impacts of natural gas production, with the exception of GHG emissions and climate change, would be localized. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level.[164] In addition, deep underground injection and disposal of wastewaters and liquids are subject to regulation by the EPA under the Safe Drinking Water Act, as well as air emissions under the Clean Air Act. On public lands, federal agencies are responsible for the enforcement of regulations that apply to natural gas wells.

82. Contrary to Allegheny's assertions, the Atlantic Sunrise Project and gas extraction in the Marcellus and Utica shale formations are not "two links of a single chain."[165] Allegheny focuses on the fact that, once produced, natural gas is transported to consumers via pipeline.[166] But, as the Supreme Court has explained, "a 'but for' causal relationship is insufficient" to trigger a hard look under NEPA.[167] Additional production might not be possible without additional transportation capacity– whether provided by the current project or alternate pipelines – to convey the product to consumers. However, the Commission reviewed the record in this proceeding and found that the project was not being constructed to induce future gas development, but rather to respond to the current

[163] *See* Allegheny Rehearing Request at 23.

[164] *See* February 3 Order, 158 FERC ¶ 61,125 at P 129.

[165] *Id*. at 19-23 (citing *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 400 (9th Cir. 1989)).

[166] *Id*. at 19-20.

[167] *Pub. Citizen*, 541 U.S. at 767. Allegheny asserts that *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998) is not on point because the Atlantic Sunrise Project is not simple "rearranging" existing gas production, but represents "a direct stepping stone to further gas development." Allegheny Rehearing Request at 21-22. The Commission cited *Morongo* in one footnote in the section of the February 3 Order explaining the type of sufficiently close causal relationship the Commission looks for in determination whether indirect effects should be considered under NEPA. February 3 Order, 158 FERC ¶ 61,125 at P 130 n.188. In any event, as explained later in the February 3 Order, the Commission found that a number of factors drive new natural gas production and that it would be reasonable to assume that any new production spurred by such factors would reach the market through alternate routes were the project not approved. *Id*. P 136.

need for transportation.[168] That the Surface Transportation Board considered induced coal production in reviewing a railroad proposal has no bearing on this determination.[169] Neither does the fact that four of the subscribed shippers are production companies.[170] The Commission does not require that shippers be end-use consumers of natural gas,[171] and the fact that production companies have subscribed to the project does not, in itself, imply that those companies will produce additional gas that would not reach intended markets through other means if the project were not approved.[172] While Allegheny maintains that "[t]he fact that other factors may influence drilling does not mean that additional pipeline capacity does not drive additional shale gas development,"[173] Allegheny fails to point to record evidence demonstrating the requisite close causal between the proposed project and the environmental effects from natural gas production area have a close causal relation to the proposed project. We continue to find no evidence that the project will transport new production from a specified production area that would not occur in the absence of this project.[174]

83. We further affirm that, even if a causal relationship between our action in the February 3 Order and additional production were presumed, the scope of impacts from any such induced production in this case is not reasonably foreseeable.[175] Allegheny insists that "a person of ordinary prudence would take Marcellus and Utica shale gas drilling into account before reaching a decision about whether to approve the Atlantic Sunrise Project," and asserts that the Commission must consider these impacts

[168] February 3 Order, 158 FERC ¶ 61,125 at PP 133-136.

[169] Allegheny Rehearing Request at 20-21.

[170] *Id*. at 21.

[171] February 3 Order, 158 FERC ¶ 61,125 at P 29.

[172] *See id*. P 136 ("If the proposed project were not constructed, it is reasonable to assume that any new production spurred by such factors [i.e., domestic natural gas prices and production costs] would reach intended markets through alternate pipelines or other modes of transportation.") (citing *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015)).

[173] Allegheny Rehearing Request at 23 (citing Energy Information Administration data showing a connection between pipeline capacity and natural gas prices).

[174] February 3 Order, 158 FERC ¶ 61,125 at PP 130, 133-136.

[175] *Id*. PP 137-138.

even if it does not know the precise location and timing of future development.[176] However, while NEPA requires "reasonable forecasting," agencies are not required "to engage in speculative analysis" or "to the do the impractical, if not enough information is available to permit meaningful consideration."[177] Given the immense size of the Marcellus and Utica shale formations, the inability to determine the number and precise locations of any additional wells, the highly localized nature of any impacts from future production, and the myriad factors that drive new drilling, the Commission concluded that the impacts of natural gas production were not reasonably foreseeable.[178] We find that this conclusion was reasonable. Finally, while Allegheny cites to former Commissioner Bay's separate statement from *National Fuel Gas Supply Corp.* in support of its argument that the Commission should have considered the impacts of potential additional gas production, as Commissioner Bay acknowledged in his statement "there is no legal requirement for the Commission to do such a review of gas production from shale formations."[179]

[176] Allegheny Rehearing Request at 23-25.

[177] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (citing *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv*., 451 F.3d 1005, 1014 (9th Cir. 2006)).

[178] February 3 Order, 158 FERC ¶ 61,125 at P 137. *See also Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 120; *see also Sierra Club v. DOE*, 867 F.3d at 198-200 (increased gas production not reasonably foreseeable when agency cannot predict the incremental quantity of natural gas that might be produced in response to an incremental increase in LNG exports).

[179] *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (Commissioner Norman C. Bay, Separate Statement). *See also Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of future Marcellus Shale wells and the associated development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd*, *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012). *See also Sierra Club v. DOE*, 867 F.3d at 202 (holding that DOE's generalized discussion of the impacts associated with non-conventional natural gas production fulfill its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

7. Cumulative Impacts

a. Rehearing Request

84. On rehearing, Allegheny argues that the Commission's public interest analysis was insufficient in that it: (1) failed to address cumulative impacts on water resources, vegetation and wildlife, fisheries, land use, or air quality; (2) improperly limited the analysis to areas directly affected by the project and surrounding areas; (3) understated the cumulative impacts on wildlife and interior forests; (4) failed to consider the impacts associated with shale gas development in the Marcellus and Utica shale formations; and (5) failed to adequately address the project's downstream impacts on GHG emissions and climate change.[180]

85. We affirm the February 3 Order, and find that the Commission appropriately analyzed the project's cumulative impacts under NEPA, consistent with CEQ guidance.

b. Commission Determination

86. NEPA requires federal agencies to take a "hard look" at "their proposed actions' environmental consequences" –including the cumulative effects in light of other past, present and future actions – before deciding whether and how to proceed.[181] Allegheny alleges that the Commission failed to take a hard look at the cumulative impacts of the Atlantic Sunrise Project because it did not address the potential cumulative impacts of the project on water resources, vegetation and wildlife, fisheries, land use, or air quality in the February 3 Order.[182] In fact, these issues were discussed at length in the final EIS.[183]

[180] Allegheny Rehearing Request at 3, 26-34. *See also* Accokeek Rehearing Request at 3, 4 (incorporating by reference the arguments in Allegheny's request for rehearing); Hoffman and Erb Landowners Rehearing Request at 8, 10 (same). Geraldine Nesbitt also raised similar issues in her joint request for rehearing, which has been dismissed as discussed above. *See* Nesbitt Rehearing Request at 8-10, 43-48.

[181] *See Sierra Club v. DOE*, 867 F.3d at 196 (citing *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015); 40 C.F.R. § 1508.7 (2017).

[182] Allegheny Rehearing Request at 26-27.

[183] Final EIS at 4-292 – 4-299 (water resources); *id*. at 4-299 – 4-302 (vegetation and wildlife); *id*. at 4-302 (fisheries and other aquatic resources); *id*. at 4-303 – 4-308 *(continued ...)*

Allegheny suggests that the Commission should have reiterated the analysis in the final EIS in the certificate order itself.[184] We fail to see why doing so would be necessary to render a "fully informed and well-considered" decision.[185]

87. Neither has Allegheny shown that the Commission improperly limited the cumulative impacts analysis area to the area directly affected by the project and surrounding areas.[186] Allegheny hinges its argument on 1997 guidance from CEQ and 1999 guidance from EPA suggesting that the geographic boundaries for cumulative impacts analyses usually should be expanded beyond the immediate project area.[187] However, the "determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies."[188] CEQ has explained

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(land use, recreation, special interest areas, and visual resources); *id*. at 4-311 – 4-316 (air quality at noise).

[184] Allegheny Rehearing Request at 27 ("In the Certificate Order, FERC addressed cumulative impacts in just two paragraphs about climate change and safety.").

[185] *Sierra Club v. DOE*, 867 F.3d at 196 (citing *Del. Riverkeeper Network v. FERC*, 753 F.3d at 1309-10 (D.C. Cir. 2014) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978)) (the purpose of NEPA "is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency")).

[186] Allegheny Rehearing Request at 27-30.

[187] *Id*. at 28-29 (citing CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act*, at 12 (January 1997) (1997 CEQ Guidance), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf; EPA, *Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, at 8 (May 1999), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-EPA-cumulative_impacts.pdf).

[188] *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976). *See also Freeport LNG*, 827 F.3d at 49-50 (rejecting argument that the Commission should have undertaken a nationwide cumulative impacts analysis for a proposed liquefied natural gas terminal); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 312 (D.C. Cir. 2013) (because the NEPA process "involves an almost endless series of judgment calls … [t]he line-drawing decisions … are vested in the agencies, not the courts") (quoting *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008)).

that "it is not practical to analyze the cumulative effects of an action on the universe;"[189] rather, the analysis should be proportional to the magnitude of the environmental impacts of a proposed action. CEQ has explained that actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.[190] Consistent with this guidance, the final EIS determined that the impacts of most actions would affect only the project and surrounding areas. The final EIS nevertheless considered cumulative impacts for certain resources on a "broader, more regional basis," explaining that "[t]he potential cumulative impact area for certain resources, such as air quality, watersheds, and visual impacts encompasses a larger geographic area."[191]

88. The Commission did not narrow the geographic scope of its cumulative impacts analysis of natural gas well permitting and development projects following the issuance of the draft EIS, as Allegheny contends.[192] As was the case in the draft EIS, the final EIS analyzed projects within 10 miles of the Atlantic Sunrise Project, as reflected in Appendix Q.[193] Allegheny's argument is largely based upon Appendix I to the final EIS, which provides more detailed information regarding a subset of these projects, mineral resources within 0.25 mile of the project. Allegheny also points to a map set forth in the final EIS (Figure 4.13.1-1), which was intended to provide perspective on the location of the planned developments discussed in Commission staff's geographic analysis of cumulative impacts. The fact that this map does not identify gas wells or all associated access roads does not, as Allegheny implies,[194] mean that the potential cumulative impacts of these items were not considered.[195]

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[189] 1997 CEQ Guidance at 8.

[190] *See* CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis*, at 2-3 (June 24, 2005), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

[191] Final EIS at 4-274.

[192] Allegheny Rehearing Request at 29, 33.

[193] *See* Final EIS at 4-276; Appendix Q at Q-33 (noting that the table shows "the projects that have the most potential to contribute to the cumulative impacts within the vicinity of the proposed Atlantic Sunrise Project," but may not reflect all projects in the region).

[194] Allegheny Rehearing Request at 30.

[195] *See, e.g.*, Final EIS at 4-276 (noting that the area to the west of the Atlantic

(continued ...)

89. Allegheny asserts that the Commission understated the cumulative impacts of the project and gas development on wildlife and interior forests.[196] While Commission staff was not aware of other major recently constructed or future projects within the geographic scope of the cumulative impact assessment that would affect the same interior forest habitats as the project, the final EIS explained that Transco had reduced the potential for cumulative impacts associated with the project by collocating the pipeline and aboveground facilities where possible with existing rights-of-way and aboveground facilities.[197] We continue to agree with the conclusion in the final EIS that cumulative impacts on vegetation and general wildlife resulting from the project, Marcellus Shale development, and other Commission-regulated and non-jurisdictional actions would be moderate. With respect to migratory birds, while Allegheny asserts that issuance of the certificate was premature because Transco had not yet obtained a Migratory Bird Treaty Act permit from the U.S. Fish & Wildlife Service (USFWS),[198] we note that USFWS filed a letter in this proceeding on February 16, 2017, and does not indicate that such a permit is required.[199]

Sunrise Project in Susquehanna County has been affected by past and ongoing development of natural gas wells and associated facilities); *id*. at Appendix Q, Q-3 (line item noting production well permits issued in Susquehanna and other counties).

[196] Allegheny Rehearing Request at 31.

[197] Final EIS at 4-301.

[198] Allegheny Rehearing Request at 31.

[199] Letter from Lora Z. Lattanzi, Field Office Supervisor, USFWS, to Alisa M. Lykens, Chief, Division of Gas-Environment and Engineering, FERC, at 2, filed in Docket No. CP15-138-000 (Feb. 16, 2017) ("The Migratory Bird Treaty Act prohibits the taking, killing, possession, transportation, and importation of migratory birds, their eggs, parts, and nests, except when specifically authorized by the Department of the Interior. While the MBTA has no provision for allowing unauthorized take, the FWS recognizes that some birds may be taken during activities such as pipeline construction even if all reasonable measures to avoid take are implemented.").

90. We confirm that the level of detail in the final EIS was appropriate to ensure that the Commission was able to make a fully-informed decision regarding the cumulative environmental impacts of the Atlantic Sunrise Project. Allegheny does not identify any particular information that was overlooked in the Commission's analysis of cumulative impacts on land use, recreation, special interest areas, and visual resources. Instead, Allegheny contends that the final EIS was faulty because it discusses these impacts "in just four paragraphs."[200] First, Allegheny is factually incorrect.[201] Second, NEPA does not prescribe a certain level of detail, and certainly does not dictate a minimum number of paragraphs. While "[i]t is of course always possible to explore a subject more deeply and to discuss it more thoroughly," agencies must make "[t]he line-drawing decisions necessitated by this fact of life."[202]

91. According to Allegheny, the Commission relied on "outdated and incomplete data" because the final EIS refers to a 2013 U.S. Forest Service report regarding the condition of interior forests that uses data from 2004 to 2009.[203] Allegheny does not point to other sources with relevant information that Commission could have used in its analysis. And the 2013 Forest Service report was the most recent inventory at the time Commission staff prepared the final EIS. We note, however, that the Forest Service recently published a new inventory of Pennsylvania forests, using data from 2009 to 2014.[204] These updated findings remain consistent with the final EIS, which acknowledged that the project, combined with the effects of nearby projects, would contribute to the cumulative long-term permanent loss of forest, including interior forest habitat, and noted the trend that some parts of the state are gaining forest cover, while others are losing it, with the amount of forested acreage generally remaining stable at around 16.7 million acres.[205] Indeed, while noting loss of forest land converted to

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[200] Allegheny Rehearing Request at 33.

[201] Allegheny points to the discussion on pages 4-303 and 4-304 of the Final EIS. However, consideration of recreation, special interest areas, and visual resources continues on pages 4-305 through 4-309.

[202] *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 66. *See also*, *Sierra Club v. DOE*, 867 F.3d at 196; *Freeport LNG*, 827 F.3d at 46 (explaining that "our task is not to 'flyspeck' the Commission's environmental analysis for 'any deficiency no matter how minor'") (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011)).

[203] Allegheny Rehearing Request at 32-33 (citing Final EIS at 4-85).

[204] U.S. Dep't of Agriculture, Forest Service, *Pennsylvania Forests 2014* (May 2017) (2014 Inventory), https://www.nrs.fs.fed.us/pubs/54420.

developed uses, including activities associated with Marcellus shale gas development, the 2014 Inventory determines that "[o]verall, there was a small net gain in forest land in Pennsylvania from 2009 to 2014."[206]

92. Finally, we find that the Commission adequately considered the project's downstream impacts on GHG emissions and climate change.[207] While determining that downstream combustion impacts did not meet the definition of indirect impacts, the Commission nevertheless considered and quantified an upperbound estimate of downstream GHG emissions in the February 3 Order. We note that, subsequently, the D.C. Circuit has held that the Commission should have provided a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the Southeast Market Pipelines Project will transport.[208] In this case, the Commission estimated the GHG emissions associated with burning the gas to be transported by the project, consistent with the quantification that the *Sabal Trail* court required.[209] In the final EIS and February 3 Order we estimated that, if all 1.7 million Dth per day of natural gas were transported to combustion end uses, this would result in about 32.9 million

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[205] *See id.* at 12 ("Forest land area in Pennsylvania remained relatively stable between 2009 and 2014; however, some areas of the State experienced forest loss, while others saw increased in forest land."); *id.* (estimating forest land at 16.9 million acres and 58 percent of the total area of the State); Final EIS at 4-300 – 4-301.

[206] 2014 Inventory at 16-17.

[207] Final EIS at 4-316 – 4-319; February 3 Order, 158 FERC ¶ 61,125 at PP 143-147.

[208] *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.").

[209] Further, *Sabal Trail* and this case are factually distinct, in that the record in *Sabal Trail* showed that the natural gas to be transported on the new project would be delivered to specific destinations – power plants in Florida – such that the court concluded that the burning of the gas in those plants was reasonably foreseeable and the impacts of that activity warranted environmental examination. In contrast, the gas to be transported by the Atlantic Sunrise Project will be delivered to markets along Transco's pipeline system in seven states, as well as to interconnects with existing pipelines serving Florida markets, and its end use is not predictable.

metric tpy of CO_{2e}.[210] Commission staff used an EPA-developed methodology to arrive at this estimate.[211]

93. This estimate represents an upper bound of GHG emissions because it assumes the total maximum capacity is transported 365 days per year. As such, it is unlikely that this total amount of GHG emissions would occur. Additionally, were the demand for natural gas instead met by coal or oil, the GHG emissions would be greater. Obviously, if any portion of that demand could be met by renewables (solar, wind), the GHG emissions would be substantially less.

94. To give this estimate context, we suggested that the best way to provide perspective on the magnitude of a project's GHG emissions is by comparison to regional GHG emissions (313 million metric tons of CO_{2e} in Pennsylvania per a 2005 inventory in the final EIS).[212] Transco has indicated that the project has not been designed to provide natural gas service to any particular end user or market.[213] Rather, the gas supplies provided by the Atlantic Sunrise Project would be delivered into the Transco and Dominion pipeline systems that can deliver gas to 16 states.[214] Therefore, we reevaluated the GHG emissions in context of the *Sabal Trail* decision, looked at the inventory of those 16 states, and compared the potential increase in GHG emissions from the Atlantic Sunrise Project to the total 2015 GHG fossil fuel combustion inventory from the states, as well as the National GHG Inventory. The estimated 32.9 million metric tons of GHG

[210] Final EIS at 4-318; February 3 Order, 158 FERC ¶ 61,125 at P 143.

[211] February 3 Order, 158 FERC ¶ 61,125 at P 143. The D.C. Circuit outlined a similar strategy (i.e., estimating the amount of gas carried by a pipeline daily and using DOE emissions estimates per unit of energy generated for various plants) in explaining that it should be feasible for the Commission to provide such an estimate for the Southeast Market Pipelines Project. *Sabal Trail*, 867 F.3d at 1374.

[212] Final EIS at 4-317. *See* Allegheny Rehearing Request at 34 (asserting that the Commission failed to explain how it arrived at this number or analyze how potential emissions would impact climate change).

[213] Final EIS at 1-2.

[214] The 16 states are: Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, North Carolina, South Carolina, Virginia, West Virginia, Ohio, Maryland, Delaware, Pennsylvania, New Jersey, and New York.

emissions would result in no more than a 1.4 percent increase in GHG emissions from fossil fuel combustion to the states in which the gas would be delivered,[215] and a 0.6 percent increase in national emissions.[216]

95. Allegheny is correct that the final EIS did not quantify the amount by which this upper limit of the project's potential emissions might be reduced by the project displacing some use of higher carbon-emitting fuels;[217] indeed, any estimate provided for this offset would be too uncertain, given the many variables involved (i.e., which fuels would be displaced, to what extent, for how long, etc.). While it is possible that gas transported on the project could offset renewable energy production, as Allegheny suggests, this effect likewise cannot be quantified.[218] In considering the downstream effects of a liquefied natural gas export facility, the D.C. Circuit recently rejected as "flyspecking" the argument that DOE should have considered the potential for natural gas to compete with renewables in import markets.[219] As we noted in the February 3 Order, natural gas transported by the project may also displace gas that otherwise be transported via different means, resulting in no change in emissions, and the project likely will not transport maximum capacity every day of the year, reducing the estimated emissions.[220]

D. Intervenors' Request For Rehearing Of The Stay Order

1. Rehearing Request

96. In the Stay Order, the Commission determined that justice did not require a stay of the Atlantic Sunrise project. The Commission found, among other things, that

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[215] Based upon Texas, Louisiana, Mississippi, Alabama, Georgia, Florida, North Carolina, South Carolina, Virginia, West Virginia, Ohio, Maryland, Delaware, Pennsylvania, New Jersey, and New York GHG emissions of 2,590 million metric tons for 2015, per year according to U.S. Energy Information Administration (October, 2017), https://www.eia.gov/environment/emissions/state/.

[216] Based on 5,411 million metric tons of CO2 in 2015 as presented by the EPA at https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf.

[217] Allegheny Rehearing Request at 34.

[218] *Id.*

[219] *Sierra Club v. DOE*, 867 F.3d at 202.

[220] February 3 Order, 158 FERC ¶ 61,125 at P 143.

Allegheny and Accokeek had failed to establish that they would suffer irreparable harm in the absence of a stay of the project.[221] On rehearing, Intervenors argue that the Commission erred in concluding that they would not likely suffer irreparable harm. Intervenors further assert that, because of the Commission's determination regarding the lack of irreparable injury, the "FERC consequently failed to examine the other relevant factors" pertinent to the question of whether justice requires a stay.[222] For the reasons discussed below, we deny rehearing.

2. Commission Determination

97. In the Stay Order, the Commission found that Allegheny and Accokeek had failed to "provide[] specific information regarding the alleged injury inflicted upon their members by the Atlantic Sunrise Project."[223] On rehearing, Intervenors attempt to remedy this shortcoming by citing declarations submitted to the Commission in September 2017 – nearly seven months after Intervenors moved for a stay – in connection with Intervenors' challenge to the Commission's issuance of a notice to proceed with construction.[224] The purpose of the rehearing requirement, however, is identify alleged errors in the Commission's initial decision,[225] not to raise new issues or introduce new evidence.

98. The Commission has a long-standing policy of rejecting arguments raised, and evidence introduced, for the first time on rehearing, absent a compelling showing of good cause.[226] Because Rule 713(d)(1) of the Commission's Rules of Practice and Procedure[227] prohibit answers to requests for rehearing, "allowing parties to introduce new evidence at the rehearing stage would raise concerns of fairness and due process for

[221] Stay Order, 160 FERC ¶ 61,042 at PP 7-19.

[222] Intervenors' Request for Rehearing of Stay Order at 3-8.

[223] Stay Order, 160 FERC ¶ 61,042 at P 7.

[224] Intervenors' Request for Rehearing of Stay Order at 3.

[225] *See Ecee, Inc. v. FERC*, 611 F2d 554, 565 (5th Cir. 1980) ("The purpose of a rehearing requirement is not give the administrative agency an initial opportunity to correct its errors").

[226] *See, e.g.*, *Kinetica Deepwater Express, LLC*, 155 FERC ¶ 61,183, at P 20 (2016); *Aguirre Offshore GasPort, LLC*, 155 FERC ¶ 61,139, at P 14 (2016).

[227] 18 C.F.R. § 385.713(d) (2017).

other parties to the proceeding."[228] Intervenors offer no explanation for why these declarations could not have been submitted with their motions for stay. Accordingly, we reject Intervenors' efforts to introduce supplemental evidence and new issues at the rehearing stage of the proceeding.

99. Intervenors' request for rehearing also reiterates their previous contention that the project would have adverse land use and air quality impacts, but makes no effort address the Commission's analysis of these issues in the Stay Order.[229] Accordingly, we deny rehearing on this issue.

100. Where, as here, a party requesting a stay is unable to establish that it will suffer irreparable harm absent a stay, the Commission need not examine other factors.[230] Intervenors contend that, in light of our decision regarding the lack of irreparable harm, the Commission failed to examine whether a stay would harm other parties or serve the public interest.[231] But that is incorrect. The Commission found that a stay could jeopardize compliance with the limited tree clearing window recommended by the Fish and Wildlife Service in order to mitigate impacts on threatened and endangered species in the project area.[232] The Commission also found that "any delay in construction could delay completion of a project that the Commission has found to be required by the public interest."[233] Intervenors fail to address these findings. Instead, Intervenors suggest that permitting construction to continue pending a final decision could foreclose alternatives.[234] But as we explained in the Stay Order, "[t]o the extent that Transco elects to proceed with construction, it bears the risk that … our orders will be overturned on appeal. If this were to occur, Transco might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation."[235]

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[228] *Kinetica Deepwater Express*, 155 FERC ¶ 61,183 at P 20.

[229] Intervenors' Request for Rehearing of Stay Order at 3.

[230] *Tennessee Gas Pipeline, L.L.C.*, 160 FERC ¶ 61,062, at P 4 (2017).

[231] Intervenors' Request for Rehearing of Stay Order at 4-6.

[232] Stay Order, 160 FERC ¶ 61,042 at P 17.

[233] *Id.*

[234] Intervenors' Request for Rehearing of Stay Order at 5.

[235] Stay Order, 160 FERC ¶ 61,042 at P 18.

101. Intervenors also argue that justice requires a stay because they are likely to succeed on the merits. In this regard, Intervenors contend that the EIS fails to comply with the D.C. Circuit's directives in *Sabal Trail*.[236] But "the factors we examine when considering whether to grant a stay … do not include the likelihood of success on the merits."[237] In any event, we have addressed Intervenors contention in this regard above and do not believe it to be meritorious.

102. Finally, Intervenors contend that a stay is appropriate because there are questions regarding the finality of the February 3 Order in light of ongoing appellate litigation regarding the validity of the tolling order issued in this case.[238] With the issuance of this order on rehearing, we believe that any such dispute is now moot and does not support rehearing of the Stay Order.

The Commission orders:

The requests for rehearing are denied, rejected, or dismissed as discussed above.

By the Commission. Commissioner Glick is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[236] Intervenors' Request for Rehearing of Stay Order at 6-7.

[237] *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,264, at P 4 (2017).

[238] Intervenors' Request for Rehearing of Stay Order at 7-8.

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