ORAL ARGUMENT HAS NOT BEEN SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Docket No. 20-1132

FOOD & WATER WATCH and BERKSHIRE ENVIRONMENTAL ACTION TEAM,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF ORDERS ISSUED BY FEDERAL ENERGY REGULATORY COMMISSION

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Initial Brief: July 27, 2020

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), petitioners submit the following:

A. Parties

This case is a Petition for Review. The parties, amici and entities moving to intervene and participate in this proceeding are as follows:

Petitioners are Food & Water Watch and Berkshire Environmental Action Team

Respondent is the Federal Energy Regulatory Commission

Tennessee Gas Pipeline Company is an intervenor in support of the Federal Energy Regulatory Commission

B. Rulings Under Review

The rulings under review are the Federal Energy Regulatory Commission's Issuing Certificate to Tennessee Gas Pipeline Company dated December 19, 2020 in *Tennessee Gas Pipeline*, referenced as Docket CP17-9-000 and as 169 FERC ¶ 61,230, and the Commission's Order Denying Rehearing dated February 21, 2020 in *Tennessee Gas Pipeline Company*, referenced at CP17-9-001 and as 170 FERC ¶ 61,142.

C. Related Cases

This matter has not previously been before this Court or any other court, as defined in D.C. Circuit Rule 28(a)(1)(c). Nor is there any other case known to Petitioners which raise issues related to the issuance of this Certificate.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 15 of the D.C. Circuit Rules and Federal Rule of Appellate Procedure 26.1, Food & Water Watch and Berkshire Environmental Action Team, petitioners in the above captioned case submit this Corporate Disclosure Statement.

Food & Water Watch is a 501(c)(3) not-for-profit organization founded in 2005 to ensure access to clean drinking water, safe and sustainable food, and a habitable climate system. Food & Water Watch has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Food & Water Watch.

Berkshire Environmental Action Team is a 501(c)(3) not-for-profit organization founded in 2003 to protect the environment for wildlife in support of the natural world that sustains us all. Berkshire Environmental Action Team has no parent companies, and there are no publicly held corporations that have a ten-percent or greater ownership interest in Berkshire Environmental Action Team.

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GLOSSARY

APA	Administrative Procedure Act
Berkshire	Berkshire Environmental Action Team
CO2e	Carbon dioxide equivalent
Certificate	Certificate of public convenience and necessity
CEQ	Center on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
Commission	Federal Energy Regulatory Commission
FWW	Food & Water Watch
GHG	Greenhouse Gas
NGA	Natural Gas Act
NEPA	National Environmental Policy Act
Project	261 Upgrade Project
Petitioners	Food & Water Watch; Berkshire Environmental Action Team

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BRIEF OF PETITIONERS FOOD & WATER WATCH and BERKSHIRE ENVIRONMENTAL ACTION TEAM

JURISDICTIONAL STATEMENT

The Natural Gas Act, 15 U.S.C. §§ 717, *et seq*. ("NGA"), requires a Certificate of Public Convenience and Necessity ("Certificate") from the Federal Energy Regulatory Commission ("Commission") for the construction of facilities used in the transportation of natural gas. 15 U.S.C. § 717f(c)(1)(A). This Court has jurisdiction under Section 717r of the Natural Gas Act, 15 U.S.C. §717r, over this Petition for Review. On November 8, 2018 and November 21, 2018, Petitioners Food and Water Watch and Berkshire Environmental Action Team

respectively each filed motions to intervene (JA___, JA___) which were granted by operation of law. *See* 18 C.F.R. §385.214(c) (providing for grant of party status if no opposition is filed within 15 days of timely motion to intervene). Within thirty days of the Commission's order granting a certificate for the Project, Petitioners filed timely petitions for rehearing on January 19, 2020. JA___, JA____. On February 21, 2020, the Commission in a 2-1 ruling denied all rehearing requests, thus rendering the orders final for judicial review under 15 U.S.C. §717r(a). This Petition for Review was timely filed on April 21, 2020 within sixty days of the Commission's order on rehearing. *See* 15 U.S.C. §717r(b).

STATEMENT OF THE ISSUES

1. Did the Commission act arbitrarily, capriciously, and in violation of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*., the Council on Environmental Quality regulations, 40 C.F.R. Parts 1500-1508, the Natural Gas Act, 15 U.S.C. § 717f, and this Court's ruling in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017), by failing to evaluate the indirect and cumulative upstream and downstream impacts associated with the project?

2. Did the Commission err in its refusal to treat the modifications to the Longmeadow Metering Station as a related project and its refusal to consider historical, concurrent, and cumulative impacts from gas infrastructure development in the area, thereby causing improper segmentation and failure to perform an indirect and cumulative impact review as required under the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*., the Council on Environmental Quality regulations, 40 C.F.R. Parts 1500-1508?

3. Was the Commission's Finding of No Significant Impacts with respect to health risks to the community, including adverse air quality impacts, unsupported by substantial evidence in the record and, therefore, arbitrary and capricious?

4. Did the Commission act in a manner that was arbitrary, capricious, and in violation of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*., the Council on Environmental Quality regulations, 40 C.F.R. Parts 1500-1508, the

Natural Gas Act, 15 U.S.C. § 717f, by issuing its December 19, 2019 Certificate Order and March 4, 2020 Notice to Proceed with Construction despite knowledge of, and failure to consider, that the sole remaining precedent agreement holder upon which the project was conditioned, Columbia Gas of Massachusetts, had been banned from operating in the Commonwealth of Massachusetts and pled guilty to criminal negligence in the maintenance of its distribution network during an investigation by the U.S. Department of Justice?

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

INTRODUCTION

In the fourteen months since this Court's ruling in *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019), which chastised the Commission for its "less than dogged efforts" to assess a project's indirect upstream and downstream greenhouse gas emissions, the Commission continues to drag its feet. Over the vigorous dissent of Commissioner Glick, the Commission has, in at least seven separate cases,[1] stubbornly refused to consider the consequences its actions have for climate change as required by the Natural Gas Act, the National Environmental Policy Act, and this Court's precedent *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

Petitioners, Food and Water Watch ("FWW") and Berkshire Environmental Action Team ("Berkshire") challenge one of these Commission decisions, approving Tennessee Gas Pipeline Company's ("Tennessee") 261 Upgrade Project ("Project"), which would construct and expand a fossil gas pipeline and gas-powered compressor station in Agawam, Massachusetts. Because here, the

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[1] *Rio Grande LNG, LLC, Rio Bravo Pipeline Company, LLC*, CP16-454 and SP16-455, 169 FERC ¶ 61,131 (Nov. 22, 2019); *Annova LNG Common Infrastructure*, CP16-480, 170 FERC ¶ 61,140 (Nov. 22, 2019); *Jordan Cove Energy Project, L.P.*, CP17-495, 170 FERC ¶ 61,202 (March 19, 2020); *Adelphia Gateway, LLC*, CP18-46, 169 FERC ¶ 61,220 (Dec. 19, 2019); *Columbia Gas Transmission, LLC*, CP18-137, 170 FERC ¶ 61,045 (Jan. 23, 2020); *Natural Gas Pipeline Company of America, LLC*, CP19-52, 169 FERC ¶ 61,050 (Oct. 17, 2019); *Gulfstream Natural Gas System, L.L.C.*, CP19-475, 170 FERC ¶ 61,199 (March 19, 2020).

Commission again, refused to evaluate the Project's upstream and downstream greenhouse gas emissions and their significance, and the cumulative environmental impacts associated with related infrastructure development, as required by the National Environmental Policy Act ("NEPA"), the Commission's approval of the project is a product of arbitrary and capricious decision-making. Accordingly, the Petitioners ask this Court to vacate the Commission orders below and remand the matter to the agency for required environmental review.

STATEMENT OF THE CASE

On October 19, 2018, Tennessee filed an application with the Commission under Section 7 of the Natural Gas Act ("NGA") for a certificate to construct and operate the 261 Upgrade Project, a 2.1-mile pipeline and compressor station expansion project designed to provide up to 72,400 Dekatherms per day of additional gas transportation into the local distribution system of Columbia Gas of Massachusetts. On November 8, 2018 and November 21, 2018, Petitioners each filed motions to intervene opposition to the 261 Project. JA ___, JA ___. The Final Environmental Assessment was released on May 17, 2019. JA___. On December 19, 2019, the Commission granted a Certificate of Public Convenience and Necessity to Tennessee. *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (Dec. 19, 2019), JA___ ("Certificate Order'). Petitioners filed individual rehearing requests addressing the issues raised in this petition on January 17, 2020. JA___.

On February 21, 2020, the Commission denied Food & Water Watch's request and dismissed Petitioner Berkshire's as improper. *Tennessee Gas Pipeline Co., L.L.C.*, 170 FERC ¶ 61,142 (Feb. 21, 2020) ("Rehearing Order"), JA___. The Rehearing Order rendered the Commission's action final for purposes of review under Section 717r(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

On February 26, 2020, the 261 Upgrade Project's sole remaining purchaser of gas, Columbia Gas of Massachusetts ("Columbia"), pled guilty before the U.S. Department of Justice to criminal negligence in the maintenance of their gas distribution network receiving this Project's transportation and was barred from operating in the Commonwealth of Massachusetts. Food & Water Watch submitted a Protest letter alerting the Commission to this development and requesting a stay of the Certificate Order on February 27, 2020, JA___. The Commission granted Tennessee's request to begin construction on March 4, 2020, without any response to the Protest Letter. JA____. This petition ensued.

STATEMENT OF FACTS

A. Description go the 261 Upgrade Project

Tennessee's "261 Upgrade Project" ("Project") will provide an additional 72,400 Dekatherms ("Dth") per day of firm transportation service on Tennessee's existing system. To accomplish this expansion, Tennessee would construct a 2.1-mile segment of pipeline and replace two existing compressor unit units with a new 11,107 horsepower gas-fired turbine compressor station (representing a 66 percent increase in capacity) in the vicinity of Agawam, Massachusetts, a city in Hampden County, within the Springfield metropolitan area. Certificate Order at P. 1.

Following the filing of the application, on December 19, 2018, the Commission asked Tennessee to "provide the end point of the natural gas delivery points and gas volumes (*i.e*, local distribution company or interconnection)." Request for Information No. 44, JA___. Tennessee responded that Bay State Gas Company d/b/a Columbia Gas of Massachusetts ("Columbia Gas") would receive an incremental 40,400 Dth/day at Agawam and Holyoke Gas and Electric Department would receive 5,000 Dth/day at that same Agawam meter. Tennessee Response (January 8, 2018), JA___. In the aftermath of oral argument in *Birckhead v. FERC*, the Commission again requested this information, Commission Information Request (May 16, 2019), JA___, and Tennessee added that "the additional transportation capacity to which each shipper has subscribed will be

used to provide gas service to support [Columbia Gas]'s and Holyoke's residential and commercial connections in the Greater Springfield service territory." Tennessee Response (May 20, 2019), JA___.

B. Commission Proceedings

Meanwhile, alarmed by the anticipated impact of an unnecessary project on the local community and broader region, Food & Water Watch, Berkshire, and other intervenors urged the Commission to require a thorough analysis of indirect and cumulative impacts associated with the Project, as well as their significance. *See*, Motion to Intervene of FWW (Nov. 21, 2018), JA___; Berkshire Motion to Intervene (Nov. 8, 2018), JA___; *see also*, Berkshire Comments to Commission dated Jan. 7, 2019, Feb. 8, 2019, April 10, 2019, July 24 and 26, 2019. JA___, JA___, JA___. Petitioners argued that the Commission's narrow review of individual gas infrastructure projects in isolation does not adequately assess the cumulative impacts of the historical, concurrent, and continued development of numerous other fossil fuel infrastructure projects.

Other participants in the Commission proceeding criticized different aspects of the project. Both the Attorney General's Office of Massachusetts and U.S. Senators Markey and Warren and Agawam U.S. Congressional Representative Neal argued that the Commission's decision to segment the review of the Springfield area's expansion of gas infrastructure into smaller projects, choosing to

exclude the nearby Longmeadow Metering Station and the historical and cumulative development of gas infrastructure in the Springfield metropolitan area. JA___.

The Petitioners and other commenters also raised concerns about project safety in light of the troubled operational history of Columbia Gas, the sole-remaining precedent agreement holder. Petitioners highlighted Columbia Gas's record of pipeline explosions due to criminally negligent pressure regulation, its guilty plea for criminal negligence in the maintenance of its gas distribution network, and its permanent ban from operating in the Commonwealth of Massachusetts. FWW Protest Letter (Feb. 27, 2020), JA____.

C. The Environmental Assessment

The Commission prepared an Environmental Assessment ("EA") which projected the direct impacts of the upgrades: emissions of up to 4,531 tons of carbon dioxide equivalent ("CO2e") over the duration of construction, and a release of 113,131 tons of CO2e per year during project operation. EA at 53-55, JA ___. But the EA made no attempt to find the significance of the direct impacts on climate change. *Id*. JA___. The EA's treatment of indirect emissions was even less adequate because the EA did not even consider let alone quantify the significance of the project's indirect emissions from upstream induced production

or downstream combustion which it deemed unforeseeable and outside the scope of NEPA review. EA at 53-55, JA___.

D. Certificate Order and Rehearing Requests

On December 19, 2019, a 2-1 Commission majority granted a Certificate Order for the Project, largely ignoring Petitioners' objections. *Tennessee Gas Pipeline Co., L.L.C.,* 169 FERC ¶ 61,230 ("Certificate Order"). The Commission majority ruled that it need not substantively analyze the indirect and cumulative impacts of the Project, asserting that the Commission was not required to study indirect greenhouse gas ("GHG") emissions and their impacts either because its approval would not be the immediate cause of such impacts or that impacts were not foreseeable. Certificate Order at PP. 57-64, JA___. Commissioner Glick disagreed, criticizing the Commission for

> "refus[ing] to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction and operation. That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project 'would not constitute a major federal action significantly affecting the quality of the human environment' and, as a result, conclude that the Project is in the public interest and required by the public convenience and necessity."

Certificate Order, Comm'r Glick dissenting in part at P. 2, JA__.

The Commission majority also found its EA had sufficiently addressed the Project's impacts to surrounding air quality, safety of the precedent agreement

holder's distribution pipeline system, segmentation, and cumulative impacts of historical, concurrent, and future gas infrastructure expansion. *See* Certificate Order at P. 50, 76-83, JA___.

Petitioners disagreed, and sought rehearing. JA___, JA___. There, they pointed out the Commission's failure to meaningfully consider (1) the indirect greenhouse gas emissions and their significance resulting from upstream and downstream emissions as legally required by NEPA and this Court; (2) broader development of the fossil gas network within the Springfield area; (3) regional air quality and Springfield, Massachusetts' remarkably high asthma rates; and (4) the necessity of the project in light of a withdrawn precedent agreement and safety issues surrounding the sole remaining precedent agreement holder. *See*, Rehearing Order at PP. 14, 22, 24, JA___ (Recognizing arguments petitioners advanced in seeking rehearing).

Commissioner Glick, however, did not abide the Commission's attempt to sweep greenhouse gas emissions under the rug and called out his colleagues' ongoing failure to consider the project's climate change impacts, stating that:

> "[t]he refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project 'would not constitute a major federal action significantly affecting the quality of the human environment' and as a result conclude that the Project is in the public interest… Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking."

Certificate Order, JA___, Comm'r Glick dissenting in part at P. 2.

As Glick observed, the majority continued to reject Petitioners' claim that the Commission has failed, and continues to fail, to sufficiently evaluate indirect and cumulative impacts of upstream and downstream activities, and their significance, resulting from approval of the Project. Certificate Order at PP. 57-68; Rehearing Order at PP. 14-20. The majority also improperly limited the Project's geographic scope, improperly considered the status of precedent agreements, and erroneously concluded that indirect emissions impacts were not "reasonably foreseeable." Certificate Order at PP. 10, 64, 76-83, JA___; Rehearing Order at PP. 18-20, 26-27, JA___.

The Commission majority acknowledged that NEPA's implementing regulations at 40 C.F.R. Parts 1500-1508, established under 42 U.S.C. § 4321 *et. seq*., mandate that a reviewing agency must identify the cumulative effects associated with a particular proposed action. *See* Certificate Order at P. 20, JA___; Rehearing Order at P. 25. Further, the Commission recognized that NEPA requires agencies to consider indirect impacts that are "caused by the action and are later in time or farther removed in distance, but still are reasonably foreseeable." Certificate Order at P. 58, JA___, *citing* 40 C.F.R. § 1508.8. The Commission further admits that the reviewing agency must establish the geographic scope for analysis, establish a time frame for analysis, and identify other actions with the

potential to impact the same resources, ecosystem, and human communities as the action under review. EA at 62, JA___.

Petitioners filed rehearing requests of the Certificate Order on January 17, 2020. FWW Rehearing Request, JA__, Berkshire Rehearing Request, JA__. The Commission ignored or dismissed all of the issues raised by Petitioners throughout the proceedings in the Certificate Order, Rehearing Order, and Notice to Proceed with Construction.

Relating to climate change and greenhouse gas accounting, Petitioner FWW wrote that the Commission

> "failed to look at how this Project would facilitate downstream emissions increases and how it would fuel additional fracking throughout the Marcellus and Utica shales. … [the Commission] cannot ignore the fact that adding firm transportation capacity is likely to 'spur demand' for natural gas and, for that reason, the Commission must at least examine the effects that an expansion of pipeline capacity might have on consumption and production."

FWW Rehearing Request at 12-13, JA__. This sentiment has been expressed by numerous parties within Commission's natural gas dockets since issuance of this Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (Hereinafter "*Sierra Club*"), but has been continually disregarded.

Excusing its refusal to perform the analysis it recognized as called for by NEPA and its implementing regulations, the Commission majority claimed that the record does not include sufficient information to determine the origin of the gas

which will be transported by the Project and determined that the matter was beyond the scope of Commission's review. Certificate Order at PP. 61-21, JA___; Rehearing Order at P. 18, JA___. In so holding, the Commission never requested that Tennessee provide this information or further identify the origin of the gas being transported within its gas infrastructure, the number of wells expected to supply the Project's additional gas capacity, or to determine whether obtaining such information was impossible or even merely difficult – such information is glaringly absent within the Project EA. *See* Certificate Order at PP. 61-62, JA___.

The Commission did not collect such information though this Court has held that failure to request such information from the applicant may violate NEPA's review requirements. This Court stated in *Lori Birckhead v. FERC*, decided two months before this Certificate Order was issued, that

> "[a]lthough it is true that an agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information, in the pipeline certification context the Commission does have statutory authority to act. Because the Commission may therefore deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline. Accordingly, the Commission is not excuse[d] . . . from considering these indirect effects' in its NEPA analysis. … It should go without saying that NEPA also requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities."

925 F.3d 510, 520 (D.C. Cir. 2019) (internal citations omitted) (Hereinafter "*Birckhead*").

The Commission majority also concluded that because the Project relates in part to the construction and modification of compressor stations, it is appropriate to confine the evaluation of impacts to a discrete project area – neglecting any and all indirect effects of permitting gas transportation infrastructure. Rehearing Order at P. 26. By declaring that upstream production of hydraulically-fractured fossil gas is categorically unforeseeable, the Commission majority summarily determined that "the environmental impacts of upstream natural gas production are not an indirect effect of the project." Certificate Order at P. 62, JA___.

Further, despite supplying additional capacity for known end-use, citing nothing, the Commission held that approval of this project would not "spur additional identifiable gas consumption." Certificate Order at P. 62, JA___. The Commission majority then claimed that the record did not include meaningful information about potential downstream emissions potential, despite knowing the volume contracted for by precedent agreement holders, the capacity of the infrastructure, and identified end-use. Certificate Order at P. 64, JA___. The Commission majority wrote that despite identifying the end-use of this gas as serving "residential and commercial connections in the Greater Springfield service territory" that because there may be some variability in demand over the life of the project, that "*any* potential greenhouse gas emissions associated with the ultimate

combustion of the transported gas are not reasonably foreseeable, and therefore not an indirect impact" of the 261 Upgrade Project. *Ibid*. (emphasis added).

However, the Commission majority did not explain why the inability to *fully* analyze indirect effects should preclude a reasonable estimate of potential impacts to the extent possible. The Commission does not explain why it cannot reasonably estimate the downstream indirect greenhouse gas emissions associated with a known *contracted quantity*, *known capacity*, and *known end-use* of fossil gas – an issue expressly raised by Commissioner Glick in his dissents. *See* Certificate Order, Comm'r Glick dissenting at PP. 3, 8, JA___; Rehearing Order, Comm'r Glick dissenting at P. 7-8, JA___.

With respect to climate change, the Commission majority also rejected Petitioners' contention that a comprehensive analysis of lifecycle greenhouse emissions, including emissions relating to the production, processing, distribution and consumption of gas associated with Tennessee's Project, should be performed. Rehearing Order at P. 11. The Commission dismissed models widely used by the scientific community to assess the significance of GHG emissions, claiming that none had been accepted as predictive of climate impacts resulting from a given rate or volume of greenhouse gas emissions, while refusing to analyze or research different models used by comparative state and global governments or to formulate its own. Certificate Order, McNamee concurring at PP. 79-80, JA___; Rehearing

Order at P. 21, JA___. The Commission offered no other alternative means of analyzing indirect GHG emissions impacts necessary for fulfillment of its statutory requirements under NEPA nor did it indicate that it has ever attempted to do so.

Recognizing the deficient reasoning of the Commission majority, Commissioner Glick stated in his dissent that:

> "Using the approach in today's order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project's actual GHG emissions or those emissions' impact on climate change. So long as that is the case, a project's impact on climate change cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking."

Certificate Order, Comm'r Glick dissenting at P. 6, JA___.

This is not an isolated exclusion of indirect impact analysis required under NEPA by the Commission. The Commission has perpetuated a policy of refusing to analyze indirect and cumulative impacts of gas infrastructure permitting since it established its ad hoc agency "policy" in the rehearing denial of a single project, without the notice and comment required to make such authoritative findings. *Dominion Transmission, Inc*., CP14-497, 155 FERC ¶ 61,106 (Apr. 28, 2016) and Order Denying Rehearing, 163 FERC ¶ 61,128 (May 18, 2018). The Commission practice of not considering the significance of indirect effects of the gas projects it permits has been ongoing and pervasive.

SUMMARY OF ARGUMENTS

First, through a series of decisions, this Court has clearly stated that, under NEPA, the Commission must review indirect effects of the projects it permits or provide legitimate reasons as to why they cannot. Despite this, the Commission issued a deficient Certificate when it chose not to review the upstream and downstream indirect and cumulative impacts of the 261 Upgrade Project, as well as the significance of climate change impacts such infrastructure may present. This approach violated binding legal precedent concerning NEPA and the NGA. In rejecting an analysis of such impacts and their significance, the Commission engaged in circular reasoning, ignored clear scientific evidence of potential harm, and disregarded NEPA review requirements mandated by this Court.

Second, the Commission disregarded the interconnected nature of gas infrastructure under development in the Springfield, Mass. area, despite commentary by Petitioners, the Attorney General's Office of Massachusetts, and the U.S. Congressional delegation of Agawam, Massachusetts. Instead Tennessee and the Commission chose to segment review of the 261 Upgrade Project from related infrastructure development in order to make the project small enough so as not to have a "significant impact" requiring a more in-depth Environmental Impact Statement. The Commission also failed to meaningfully consider cumulative

impacts associated with historical, concurrent, and future gas infrastructure in the Project area.

Third, the Commission did not meaningfully consider community health and safety risks associated with the expansion of transmission infrastructure capacity. Springfield, Massachusetts has one of the worst airsheds in the nation for vulnerable populations; the Commission failed to meaningfully consider this Project's direct and indirect impacts on the respiratory health of the area, instead only basing its finding of no significant impact on an overly narrowed scope of relevant emissions.

Fourth, the sole purchaser of gas from this Project was under criminal investigation by the U.S. Department of Justice and the National Transportation Safety Board for negligence in the maintenance of their distribution grid during the Commission's review of Tennessee's Certificate application. This investigation resulted in a guilty plea by Columbia Gas and their banishment from operating the distribution grid that is set to purchase the increased capacity of this project. The Commission failed to meaningfully consider these issues of distribution network safety, criminal negligence, and changed purchaser circumstances when issuing its Certificate Order, Rehearing Order, and Notice to Proceed with Construction.

STANDING

A. Petitioners Have Standing to Sue

Petitioner Food & Water Watch ("FWW") is a non-profit organization with members who live, work, and recreate in areas that will be affected by the construction and operation of the 261 Upgrade Project. *See* Declarations of Linda Grimaldi, Wendy Hollis, and Susan Grossberg. Petitioner Berkshire Environmental Action Team ("Berkshire") is a non-profit organization led, guided, and funded by persons who live, work, and recreate in areas that will be affected by the Project. *See* Standing Declaration of Jane Winn; *Flyers Rights Educ. Fund, Inc. v. United States Dep't of Transportation*, 957 F.3d 1359, 1361-62 (D.C. Cir. 2020). This Court can redress the harm to these members by vacating the Certificate Order and remanding to the Commission. *See Sierra Club*, 867 F.3d at 355 (D.C. Cir. 2017).

B. The Commission Improperly Dismissed Petitioner Berkshire's Rehearing Request

The Commission dismissed Petitioner Berkshire's Rehearing Request due to a minor formatting discrepancy. The Commission found that Berkshire forfeited its substantive arguments by "fail[ing] to include a Statement of Issues section separate from its arguments" on its seven-page request for rehearing as required by Commission Rule 713. Rehearing Order at P. 5, JA___. Other than its own rule, the Commission cited no authority that would empower it to deny Berkshire of its

statutory right under the Natural Gas Act to seek rehearing of a Commission order. Indeed, it cannot.

The Commission cites no statutory or case law that would authorize it to strip Berkshire of its judicial review rights for formatting errors - because it cannot. Berkshire's use of subheadings in its rehearing request satisfies Section 717a of the Natural Gas Act which merely requires that an "application for rehearing shall set forth specifically the grounds" to preserve any issues for review. *See NRG Power Marketing, LLC v. FERC*, 718 F.3d 947, 958 (D.C. Cir. 2013) (finding that petitioner preserved argument on rehearing despite failure to include it under an explicit subheading). To the extent that the Commission's regulation imposes prerequisites for rehearing that exceed what Congress dictated by statute, it is invalid. *See Allegheny Defense Project v. FERC*, __ F.3d. __ (D.C. Cir. 2020) (*en banc*) (finding Commission's tolling orders unauthorized by Section717a and unduly delay parties' due process rights to review)

Moreover, for a Commission that regularly publishes Orders and reviews comments and filings that are hundreds, if not thousands, of pages long, it is preposterous that the omission of a separate paragraph directly stating the issues raised in a seven-page rehearing request should be considered such a heinous act deserving of dismissal. The Commission's bizarre form of strict adherence to procedural rules while regularly sidestepping substantive requirements, as raised in

the merits of this case, is the definition of arbitrary and capricious agency action. *Union Texas Products Corp. v. FERC*, 899 F.2d 432, 437 (5th Cir. 1990) ("[T]he Commission's punctilious insistence that the failure to follow its directions in the minor respect … should result in such a disproportionately heavy penalty works a manifest injustice and constitutes an abuse of discretion.").

STANDARD OF REVIEW

This Court's review is governed by the Administrative Procedure Act ("APA") which allows a reviewing court to set aside an agency action when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(a); *see also Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999) ("We review FERC orders under the Administrative Procedure Act's ("APA") arbitrary and capricious standard.").

Under the applicable arbitrary and capricious standard of review for an agency decision under both NEPA and the NGA, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Del. Riverkeeper Network v. Fed. Energy Regulatory Comm'n*, 753 F.3d 1304, 1313 (D.C. Cir. 2014). A reviewing court must find an agency action arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its

decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*.

The Commission must support determinations under the Natural Gas Act with "substantial evidence." 15 U.S.C. § 717r(b). Findings of fact unsupported by substantial evidence are not entitled to deference. 15 U.S.C. §717r(b) ("findings by the Commission as to the facts, if supported by substantial evidence, shall be conclusive"). Moreover, "[s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). Where the agency has neglected pertinent facts or "refus[ed] to come to grips" with evidence in the record, the Commission order cannot withstand judicial review. *Tenneco Gas v. FERC*, 969 F. 2d 1187, 1214 (D.C. Cir. 1992).

NEPA also prohibits an agency from relying upon conclusory statements by the applicant that are unsupported by data, authorities, or explanatory information. *Seattle Audubon Soc. v. Moseley*, 798 F. Supp. 1473, 1482 (W.D. Wash. 1992), *supplemented*, 798 F. Supp. 1484 (W.D. Wash. 1992), *aff'd sub nom. Seattle Audubon Soc. v. Espy*, 998 F.2d 699, (9th Cir. 1993), and *aff'd in part, appeal dismissed in part sub nom. Seattle Audubon Soc. v. Espy*, 998 F.3d 699 (9th Cir. 1993).

ARGUMENT

I. IN FAILING TO CONSIDER UPSTREAM AND DOWNSTREAM GHG EMISSIONS AND THEIR SIGNIFICANCE, THE COMMISSION'S CERTIFICATE IS A PRODUCT OF ARBITRARY AND CAPRICIOUS AGENCY ACTION.

In approving the Station 261 Upgrade Project ("Project"), the Commission, in the words of Commissioner Glick, once again "refused to consider the consequences that its actions have for climate change." The Commission committed two errors. First, the Commission did not consider upstream indirect effects and in direct violation of *Sierra Club v. FERC* and its progeny and found that the indirect downstream effects of the project are categorically unforeseeable absent knowledge of the specific volume and end-use of the gas. Second, even though the Commission at least quantified the direct emissions associated with the Project, it failed to analyze whether the impacts are significant.

The Commission's tone-deafness to climate change – both here and in the seven cases since *Birckhead* where the Commission has disregarded this Court's precedent – is not merely arbitrary and capricious but has broader policy implications. Given that the Commission is the primary federal regulatory body for the gas industry of the largest gas producing nation on earth in 2019, the Commission's decisions to severely limit climate review when permitting fossil gas infrastructure with multidecadal lifespans have broad health, environmental,

and economic impacts across both the U.S. and the globe. As such, this Court must closely scrutinize the Commission's action.

A. The Commission's Continued Refusal to Consider Downstream Greenhouse Gas Emissions as Indirect Effects Violates This Circuit's Precedent

Like Commissioner Glick, Petitioners "remain baffled by the Commission's continued refusal to take any step towards considering indirect downstream emissions and their impact on climate, particularly when mandated by this Circuit. Rehearing Order, Comm'r Glick dissenting at P.8, JA___. The Commission itself acknowledges that in fulfilling its statutory duty under NEPA, it must consider the indirect effects of the projects it permits and that indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." Certificate Order at P.58, JA___; *see also* 42 U.S.C. § 4332(2)(C)(ii); CEQ Regulations 40 C.F.R. § 1508.8(b) ("[i]ndirect effects may include growth inducing effects … and related effects on air and water and other natural systems, including ecosystems. …).

i. Court Precedent Requires the Commission to Make Educated Assumptions of Downstream Impacts to Comply with NEPA

In *Sierra Club, supra,* this Court reversed and remanded a Commission order which failed to assess downstream emissions from gas pipelines, namely the emissions resulting from the combustion of gas by end-users. The Court held that NEPA required the Commission to consider these indirect effects *and their*

significance when permitting gas pipelines as these emissions are a reasonably foreseeable product of permitting transmission infrastructure.

Moreover, *Sierra Club* recognized that the reasonable foreseeability of downstream emissions is not the same as absolute certainty, but that "some educated assumptions are inevitable in the NEPA process," *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Indeed, even in *Sierra Club* where both the amount and the destination of the gas – to two identified power plants downstream – were known, the court acknowledged that the resulting emissions "depend on several uncertain variables, including the operating decisions of individual plants and the demand for electricity in the region." *Id*., 867 F.3d 1357, 1374 (D.C. Cir. 2017). As *Sierra Club* and other cases recognize, uncertainty over how gas might ultimately be used does not excuse the Commission from its duty under NEPA to make educated assumptions to estimate downstream emissions. *See Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 816-817 (9th Cir. 1987), *rev'd on other grounds, Robertson v. Methow Valley* ("Reasonable forecasting and speculation is implicit in NEPA" and courts "must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'.")

In the wake of *Sierra Club*, the Commission attempted to narrow the scope of this Court's holding. In *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019), the

Commission took the position that *Sierra Club* was limited to its facts, and that the Commission was only required to evaluate downstream impacts where the use of the gas was bound for specifically-identified power plants as it had been in *Sierra Club*. The *Birckhead* court pushed back, stating that:

> "[c]ontrary to the Commission's position, *Sierra Club* hardly suggests that downstream emissions are an indirect effect of a project only when the project's 'entire purpose' is to transport gas to be burned at 'specifically-identified' destinations. … Indeed, the Commission itself backed away from this extreme position during oral argument in *Otsego 2000*, a companion case heard the same day as this one. *See Oral Arg. Rec. 25:48–26:27, Otsego 2000 v. FERC*, No. 18-1188 (D.C. Cir. Apr. 11, 2019) (acknowledging that whether downstream greenhouse-gas emissions qualify as an indirect effect 'has to be [decided] on a case-by-case basis because every one of these projects is different' and declining 'to draw a line that ... is not mandated by the Court')."

Id., 925 F.3d at 519 (D.C. Cir. 2019).

In addition to attempting to limit *Sierra Club* to its facts, the Commission also tried to skirt its obligation to review downstream impacts by claiming that it lacked adequate information to do so. But this excuse fared no better with the *Birckhead* court, which expressed that:

> "[w]e are troubled, as we were in the upstream-effects context, by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question. … ('The Commission does not know where the gas will ultimately be consumed or what fuels it will displace, and likely neither does the entity over which the Commission has jurisdiction ....')."

Id. 925 F.3d at 519-520 (D.C. Cir. 2019).

Again, as in *Sierra Club*, the *Birckhead* court reiterated that "NEPA analysis necessarily involves some 'reasonable forecasting,' and ... agencies may sometimes need to make educated assumptions about an uncertain future." *Sierra Club*, 867 F.3d at 1374 (*quoting Delaware Riverkeeper Network v. FERC*, 753 F.3d at 1310 (D.C. Cir. 2014)).

ii. The Commission's Refusal to Consider Downstream Emissions for the 261 Upgrade Project Perpetuates the Rationale Already Rejected in *Sierra Club* and *Birckhead*

Here, the Commission refused to consider downstream impacts of the project based on arguments soundly put to rest in *Sierra Club* and *Birckhead*. In the Certificate Order, the Commission found that "because the specific volume and end-use of gas [is] transported under [Tennessee's] contracts with two local distribution companies," potential greenhouse gas emissions associated with combustion of the transported gas are not reasonably foreseeable. Certificate Order, P. 64, JA___. On rehearing, the Commission found that Tennessee's statement that it would deliver gas to Columbia and Holyoke's residential and commercial customers were "too generalized" because they did not describe exactly how the gas would be used - and therefore did not provide the level of detail in *Sierra Club* where the gas was bound for combustion by two identified power plants. Rehearing Order at PP. 19, 20, JA___. By using the two-power plant scenario in *Sierra Club* as the litmus test for the foreseeability of

downstream impacts, the Commission essentially limits the scope of *Sierra Club* to its facts which is precisely the outcome that the *Birckhead* court would not abide. This is not the Commission's first rodeo either; in at least three previous instances, the Commission likewise attempted to skirt its NEPA obligations by similarly claiming that impacts on downstream use fell short of the two-power plant standard. *See also El Paso Natural Gas., Co., L.L.C.*, 169 FERC ¶ 61,133 (Nov. 21, 2019) (Comm'r Glick dissenting in part at PP. 10-11) (criticizing the Commission for failing to follow D.C. Circuit direction in *Birckhead* to consider greenhouse emissions associated with increased gas transportation capacity); *Transcontinental Gas Pipe Line Co., LLC*, 165 FERC ¶ 61,221 (Dec. 12, 2018) (Comm'r Glick dissenting in part at PP. 1-2) (Criticizing the Commission's continued policy of disregarding indirect emissions of the projects it permits); *Nexus Gas Transmission, LLC*, 164 FERC ¶ 61,054 (July 25, 2018) at PP. 94-95 (The Commission states that downstream greenhouse gas emissions are not significant based on the conclusion that "the Commission lacks meaningful information about downstream use of the gas").

Moreover, in refusing to consider downstream impacts, the Commission turned its back on evidence in the record that would have enabled it to make educated assumptions. In response to the Commission's requests for information about gas use, Tennessee reported that:

> "Columbia Gas Company d/b/a Columbia Gas of Massachusetts ("CMA") will receive an incremental 40,400 Dth/day at Agawam (meter 400484) which is an existing interconnect between Tennessee and CMA. Holyoke Gas and Electric Department will receive 5,000 Dth/day at that same Agawam meter." (Jan 2019 Response to Request 44, JA___), and

> "As stated in the Executive Summary section of the certificate application (and as recently reconfirmed to Tennessee by the Projects' shippers, CMA and Holyoke Gas and Electric Department ("Holyoke")), the additional transportation capacity to which each shipper has subscribed will be used to provide gas service to support CMA's and Holyoke's residential and commercial connections in the Greater Springfield service territory." (May 20, 2019 Response, JA___)

Given that the Commission had information on the volume of gas to be transported and that it would serve residential and commercial customers in the Springfield service area, it is difficult to figure what more information the Commission required to assess downstream impacts. Indeed, reviewing the same evidence and observing that 97 percent of gas in the United States is combusted, (Rehearing Order, Comm'r Glick dissenting at P. 20, JA___), Commissioner Glick found that the record "makes this a relatively easy case":

> "In comments in support of the project application, Columbia states that it needs the additional transportation capacity to provide natural gas to approximately 321,000 residential, commercial and industrial customers in Massachusetts. that would seem to be more than sufficient to confirm that the gas is highly likely to be combusted, making the resulting [downstream] emissions reasonably foreseeable."

Rehearing Order, Comm'r Glick dissenting at P. 8, JA_____.

The Commission majority never explained why the facts that Commissioner Glick found sufficient to make downstream emissions foreseeable were inadequate for the Commission to conduct an analysis. In fact, the Commission did not respond to Commissioner Glick's concerns at all, which in itself renders the decision arbitrary and capricious. *American Gas Ass'n v. F.E.R.C*, 593 F.3d 14, 16 (D.C. Cir. 2010) ("Because the Commission failed to respond to the reasonable concerns of a dissenting Commissioner, we grant the petition for review.").

Moreover, the Commission's claim that even specific information on the volume and destination of gas to local distribution companies and the number of customers to be served is still inadequate to predict downstream emissions makes it unlikely that any information short of an identified power plant would pass muster. Yet if downstream emissions are only foreseeable where a downstream power plant will combust the gas, then the Commission effectively confines this Court's ruling in *Sierra Club* to its facts – the approach that this Court rebuffed in *Birckhead*. Because the Commission has again strayed from this Circuit's precedent in *Sierra Club* and *Birckhead*, this Court must correct the Commission's course by vacating its decision and instructing it to evaluate downstream indirect effects of the Project to comply with this Court's ruling and NEPA.

B. The Commission Did Not Review Upstream Emissions

Whereas downstream impacts arise from how gas is consumed, upstream impacts refer to effects associated the increased production in anticipation and as a result of new transportation capacity. In *Birckhead*, the Commission conceded that there may be instances where upstream gas production is both reasonably foreseeable and sufficiently causally connected to a pipeline project to qualify as an indirect effect. *Birckhead*, 925 at 516-17 (D.C. Cir. 2019). The Commission's recognition that gas projects may have upstream impacts is consistent with rulings of other federal courts which have likewise required other agencies to consider these impacts. *Barnes v. U.S. Dep't of Transp*., holds that it "is completely inadequate" for an agency to ignore a project's "growth inducing effects" where the project has a unique potential to spur demand. 655 F.3d 1124, 1138-39 (9th Cir. 2011) ("[O]ur cases have consistently noted that a new runway has a unique potential to spur demand, which sets it apart from other airport improvements, like changing flight patterns, improving a terminal, or adding a taxiway, which increase demand only marginally, if at all."); *id*. at 1139 ("[E]ven if the stated purpose of [a new airport runway project] is to increase safety and efficiency, the agencies must analyze the impacts of the increased demand attributable to the additional runway as growth-inducing effects."); *see also Indigenous Envtl. Network v. U.S. Dep't of State*, 347 F. Supp. 3d 561 (D. Mont. Nov. 8, 2018) (Agency conclusions made

without the calculation and consideration of reasonably foreseeable upstream impacts of the Keystone XL pipeline were arbitrary and capricious agency action).

Here, the Commission refused to consider upstream impacts which are foreseeable with respect to the Project. While the Commission has noted that this Project will receive gas from "other interstate pipelines", it refuses to expand that inquiry or require further information from the project's applicant. Certificate Order at P. 62, JA___; Rehearing Order at P. 18, JA___. The Commission fails to acknowledge that maintenance of existing gas supply capacity, nonetheless increased capacity, fundamentally requires additional drilling due to the nature of gas well depletion. *See* Petitioner FWW, Rehearing Request at 5-8, JA__. In so doing, the Commission leans on the interconnected nature of regional transmission networks to allow pipeline developers to obscure the sources of their gas supply, permitting developers to evade the consideration of such upstream impacts though they may be significant yet determinable with adequate inquiry.

In contrast to its treatment of downstream impacts where the Commission requested additional information, the Commission failed to press for vital information pinpointing the production area of the gas supplying this Project. *See, Birckhead* at 520, *citing Del. Riverkeeper Network*, 753 F.3d at 1310 ("NEPA also requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities."). The Commission has employed this tactic in

the past to evade its obligation to review upstream impacts. *See, e.g.*, *Dominion Transmission, Inc.*, CP14-497, 163 FERC ¶ 61,128 (May 18, 2018) at PP. 62-66; *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190 (June 12, 2018) at PP. 60-61 (rejecting the need for additional analysis of upstream and downstream analysis as part of an EA because the Commission stated that upstream and downstream emissions were not reasonably foreseeable given the information before it – even though the Commission itself dictates what information goes before it); *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (Aug. 3, 2018) at PP. 252-53 (relying on the uncertainty of upstream and downstream emissions to support a Finding of No Significant Impact).

Moreover, the Commission asserts, citing nothing but itself, that "environmental effects from natural gas production are neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of an infrastructure approval," Certificate Order at P. 61, JA__, yet the Commission contradicts its previous acknowledgment in *Birckhead* that upstream impacts may in fact result from pipeline permitting. 925 F.3d 510, 517 ("[T]he Commission conceded that there may well be instances in which upstream gas production is both reasonably foreseeable and sufficiently causally connected to a pipeline project to qualify as an indirect effect."). Such a statement is conclusory in nature,

is unsupported by substantial evidence, and directly contravenes the holdings of this Court.

As NEPA requires consideration of upstream impacts and their resulting emissions, the Commission's failure to meaningfully assess and consider "all factors bearing on the public interest" renders its Certificate a product of arbitrary and capricious agency action.

C. The Commission Did Not Calculate the Significance of Indirect Effects as Required by Law.

In addition to calculating the estimated volume of upstream and downstream greenhouse gas emissions resulting from a project, the Commission is required "to include a discussion of *the significance of*" those emissions and their resultant impact on climate change. *Sierra Club*, 867 F.3d at 1374. NEPA was expressly enacted to ensure that "environmental information is available to public officials and citizens *before decisions are made and before actions are taken*." 40 C.F.R. §§ 1500.1-2 (emphasis added). Identifying and evaluating the consequences that the Project's greenhouse gas emissions may have for climate change is essential if NEPA is to provide for the full disclosure and informed decision-making for which it was drafted. *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purposes is to ensure that "relevant information will be made available to the larger audience that may also

play a role in both the decision-making process and the implementation of that decision").

Despite this explicit requirement, the Commission decided that it need not assess the significance of the Project's greenhouse gas emissions, and indeed *all* greenhouse gas emissions from Commission permitted projects, because it lacks a "universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs." EA at 68. This does not excuse the Commission's refusal to evaluate these emissions. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (Agencies cannot overlook a single environmental consequence if it is even "arguably significant."); *Michigan v. EPA*, 135 S. Ct. 2699, 2706, 576 U.S. 743, (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.") (internal quotation marks omitted); *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

Courts review agencies' NEPA compliance by "mak[ing] a pragmatic judgment whether the [environmental review's] form, content and preparation

foster both informed decision-making and informed public participation." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 368 (1989). Thus, the inquiries that an agency makes, *or fails to make*, are relevant to compliance with NEPA. Moreover, this Court and others nationwide have consistently held that the judiciary must "reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'", just as the Commission has done here as it relates to the significance of indirect effects. *Scientists' Inst. for Pub. Info., Inc. v. U.S. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973); *see also Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent speculation on potential ... effects."); *Mont. Envtl. Info. Ctr. v. United States Office of Surface Mining*, 274 F. Supp. 3d 1074, 1091 (D. Mont. Aug. 14, 2017) (vacating the Office of Surface Mining and Enforcement's mining plan EA on several grounds and stating, "an agency should not attempt to travel the easy path and hastily label the impact of the [action] as too speculative and not worthy of agency review.") (internal citations omitted); *WildEarth Guardians v. U.S. Office of Surface Mining, Reclamation & Enf't*, 104 F. Supp. 3d 1208, 1230–31 (D. Colo. 2015), *order vacated, appeal dismissed*, 652 F. App'x 717 (10th Cir. 2016) (The agency failed to take a hard

look at environmental impacts when issuing its Finding of No Significant Impact, including downstream greenhouse gas emissions).

While this Court's case law makes clear that agencies are not required to use any one specific modeling system to assess the significance of greenhouse gas emissions if it adequately explains why it should not use such a model, *see, e.g.*, *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016), the Commission has failed to show that it has even attempted to determine any *acceptable* system of analyzing the significance of this Project's indirect effects, or explain why such methodologies must be "universally accepted" – a tall task for *any* scientific modeling. Instead, the Commission has completely ignored the significance of this Project's greenhouse gas emissions in its EA, though a concurring Commissioner dismissed the utility of the Social Cost of Carbon in its Certificate Order while proffering no evidence of efforts made to identify an adequate alternative methodology. *See* Certificate Order, Comm'r McNamee concurring at PP. 77-80, JA___. The Commission has not even attempted to find or employ a modeling system that met their unclear criteria for utility, nor did it explain why it could not, despite numerous agencies, states, and global governments employing a variety of greenhouse gas accounting metrics to provide them with useful information for more reasoned decision-making. While the Commission need not foresee the unforeseeable, it must "at least attempt to obtain the information necessary to

fulfill its statutory responsibilities" – namely determine a means of calculating greenhouse gas significance – something it has failed to even try. *Birckhead*, 925 F.3d at 520.

Instead the Commission has thrown its hands up in exasperation, said all indirect greenhouse gas emissions and their resulting impacts are innately ineffable, and thus capable of being completely disregarded when completing environmental review of the gas infrastructure projects it permits and when determining whether said project will result in significant impacts on the environment. Such an argument does not pass the laugh test when it comes from the principle federal regulator of the largest gas producing nation on the planet. An effort must at least be made – the Commission knows this, but refuses to comply. Commissioner Glick clearly illustrates this point in his dissent to the Rehearing Order, stating that despite legal requirements, under the Commission majority's current policy

> "the volume of emissions caused by the Project does not play a meaningful role in the Commission's public interest determination … The Commission is saying out of one side of its mouth that it need not assess the significance of the Project's impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the 'hard look' that the law demands."

Rehearing Order, Comm'r Glick dissenting at P. 5. This intentional blinding and refusal to comply with NEPA's requirements is clearly arbitrary and capricious and in violation of the APA.

The Commission is not even making a bare minimum effort here and, in fact, is actively trying to avoid ever considering the true significance of its continued project-by-project permitting of tremendous volumes of greenhouse gas emitting fossil fuel infrastructure in an era where a near unanimous scientific community clearly understands that humanity must cease fossil fuel use in the near future to ensure climatological stability. Instead of meaningfully considering the significance of the direct and indirect greenhouse gas emissions of its gas transmission infrastructure permitting, the Commission - *the principle gas regulator of the largest gas producing nation on Planet Earth* - has spent Order after Order refuting the utility of calculating methods repeatedly suggested by scholars and governmental commenters, all while refusing to seek out answers on its own as statutorily mandated. In doing so, the Commission has chosen to categorically *ignore and exclude* – regardless of aggregate significance – consideration of any and all greenhouse gas emissions facilitated by transmission infrastructure and the impacts that its continued fossil fuel infrastructure permitting has on global climate change.

Not only is the Commission legally required to consider the potential significance of direct and indirect greenhouse gas emissions under NEPA, the Executive Branch's own Government Accountability Office has called on government agencies, including the Commission, to use "[i]nformation about the potential economic effects of climate change [to] inform decision makers about significant potential damages in different U.S. sectors or regions." U.S. Gov't Accountability Off., "*Information on Potential Economic Effects Could Help Guide Federal Efforts to Reduce Fiscal Exposure*," GAO-17-720, Sept. 28, 2017. https://www.gao.gov/products/gao-17-720#summary. Consideration of this sort of information concerning climate change and its impacts is vital to NEPA's mission of requiring agency decision-makers to look before they leap – especially when permitting fossil fuel infrastructure that will have useful life for decades to come.

By refusing to consider the full extent of the impacts that permitting gas transmission projects has on the largest looming environmental crisis of the modern era, the Commission is arbitrarily placing its weighty finger on the balancing scale in favor of fossil fuel infrastructure expansion. The Commission is locking society and rate payers into decades of continued reliance upon fossil fuels as global atmospheric carbon concentrations continue to rise. It does so contrary to direct court orders and at the expense of those most impacted by these projects.

Thus, the significance of greenhouse gas emissions resulting from this Project is reasonably foreseeable, readily calculable, and its consideration required by NEPA. In refusing to acknowledge its legal responsibility to review the significance of the emissions enabled by the projects it permits, the Commission is "attempt[ing] … to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'". *Methow Valley*, 833 F.2d at 816-817 (9th Cir. 1987).

II. THE COMMISSION IMPROPERLY SEGMENTED REVIEW OF THE PROJECT AND FAILED TO MEANINGFULLY CONSIDER CUMULATIVE IMPACTS AS REQUIRED BY NEPA

An agency impermissibly "segments" its NEPA review when it divides connected, cumulative, or similar federal actions into separate actions under consideration. *Del. Riverkeeper Network v. FERC*, 753 F.3d at 1313 (finding the Commission unlawfully segmented environmental review of four separate proposals by the same pipeline companies to upgrade different sections of the same line). Actions are "connected" if they: "automatically trigger other actions which may require environmental impact statements;" "cannot or will not proceed unless other actions are taken previously or simultaneously;" or "are interdependent parts of a larger action and depend on the larger action for their justification" or lack independent functional utility. 40 C.F.R. § 1508.25(a)(1); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894-95 (9th Cir. 2002).

Here, the Commission segmented its review by treating approval of the Longmeadow Metering Station and the 261 Upgrade as two separate projects, finding that the facilities are independent of each other and subject to two separate construction schedules. Rehearing Order, P. 82-83, JA___. In so doing, the Commission ignored key facts showing that the facilities are part and parcel of a larger development.

For starters, the capacity for the Longmeadow Metering Station and the 261 Upgrade are both part of a single firm transportation contract. Sole purchaser Columbia has publicly represented the 261 Upgrade and the Longmeadow Metering Station, together with other proposed pipeline construction in the Springfield service area, as a singular "Reliability Project" consisting of "integrated supporting infrastructure projects" designed to address "interrelated reliability challenges". *See* Columbia Gas, "Reliability Project" handout, JA___. This broader Greater Springfield Service Area Reliability Project consists of additional pipeline construction throughout the Springfield area, which Columbia represented as "system enhancements [that] are required to ensure our ability to continue providing a reliable and uninterrupted supply of gas to our residential and business customers in this region." *Id*. In short, the project developers understood Longmeadow Metering Station and Upgrade 261 to be but one "interdependent part[] of a larger action and depend[s] on the larger action for their justification."

Further, the Longmeadow Metering Station was once planned as part of a previously submitted Certificate application for a broader single project planned by Tennessee and Columbia – the Northeast Energy Direct project – which included significant pipeline construction across five states. See FERC Docket No. CP16-21-0000 and PF14-22-00, *Application for a Certificate of Public Convenience and Necessity (Northeast Energy Direct Project) of Tennessee Gas Pipeline Company, L.L.C. under CP16-21, et al*, "*Environmental Report",* Nov. 2015, at 1-50. This project was withdrawn from consideration after significant public commentary was entered into the Project's docket. FERC Docket No. CP16-21-000, *Notice of Withdrawal of Certificate Application of Tennessee Gas Pipeline Company, L.L.C. under CP16-21*, May 23, 2016, http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14253626. The Commission docket shows that Tennessee had considered the Longmeadow Metering Station as part of a larger project meant to address regional reliability, sought approval from the Commission to construct it as part of that larger project, then withdrew the entire project. Following withdrawal of its Certificate application, Tennessee continued work with Columbia on ways to address "reliability issues" in the Springfield area, and decided to proceed with construction of the Longmeadow Metering Station in a segmented fashion under the guise of pre-existing certificate authority.

Tennessee claims that the Longmeadow Metering Station is subject to automatic approval under its blanket certificate authority and is therefore, an independent unit rather than part and parcel of a planned development. But the blanket certificate regulations state: "The certificate holder shall not segment projects in order to meet the cost limitations ..." 18 C.F.R. § 157.208(a). Tennessee cannot avail itself of the blanket certificate regulations because the Longmeadow Metering Station is part of a larger reliability project developed jointly by Columbia Gas and Tennessee that was segmented to expedite construction.

The Commission also reasoned that the 261 Upgrade Project is solely to improve capacity while the Longmeadow Metering Station is solely to provide reliability enhancement east of the Connecticut River, allowing that eastern line to connect with the 261 Project and provide "reliability and redundancy". Certificate Order at PP. 80, 82, JA___. The Commission overlooks that while Tennessee is capable of supplying that capacity with existing lines, the Longmeadow Metering Station is intended to handle additional capacity anticipated and provided for by the 261 Upgrade – this is not coincidence. The Commission also overlooks this by stating that the planned service dates differed between the Longmeadow and the 261 Upgrade infrastructure, even though many infrastructure expansion projects are completed in non-overlapping phases.

The Commission's decision to restrict its scope of review for this Project despite substantial evidence of interdependence constitutes arbitrary and capricious agency decision-making.

III. THE COMMISSION'S FAILURE TO CONSIDER COMMUNITY HEALTH AND SAFETY RISKS CONSTITUTES ARBITRARY AND CAPRICIOUS AGENCY ACTION

The site of this Project, Agawam, Massachusetts, sits within Hampden County – a county listed as the "Most Challenging Place to Live with Asthma" by the Allergy and Asthma Foundation of America in 2018. Asthma and Allergy Foundation of America, "*Asthma Capitals 2019: The Most Challenging Places to Live with Asthma*," 2010, at 33. https://www.aafa.org/asthma-capitals/. Pediatric asthma rates are preposterously high in Hampden County, with 27% of children in neighboring Holyoke and 19% in Springfield being diagnosed with asthma – the national average is 8.9%. Mass. Dep't of Pub. Health, "*The Facts About Pediatric Asthma in Holyoke*," https://www.mass.gov/files/documents/2017/05/bab/factsheet-holyoke.pdf. However, the Commission, when confronted with this information and more concerning the air quality of the region through commenters' submissions, baselessly concluded in both their EA and Certificate Order that, despite Hampden County's non-attainment with the Clean Air Act's National Ambient Air Quality Standards, this Project would have no significant impact on the human

environment. Rehearing Order at PP. 22-23, *citing* EA at 53, 66, JA___. The EA provided no meaningful support for such a conclusion.

Furthermore, the Commission makes this assumption based upon deficient and incomplete emissions calculations – only making its determination on the *operational emissions* of the Project, *i.e.*, the highly localized emissions from running the gas-powered compressor unit alone, not the emissions resulting from transporting tens of thousands of Dekatherms a day of additional gas into the Springfield region's end-use gas distribution system through that very compressor unit, largely for combustion by residential and commercial customers. *Ibid*. This is intentionally myopic by the Commission to the point of being insulting to the people of Hampden County.

Transmission infrastructure is purpose-built to move gas from wellhead to end-user – it is the sole reason that gas can and will be used by those end-users. What the Commission is effectively stating (despite D.C. Circuit precedent to the contrary as discussed *supra*) is that, despite being the gatekeeper for *all* interstate gas transmission development, it need not – at any point whatsoever – review how its gatekeeping affects air quality degradation due to the combustion of the fossil fuel that fills the infrastructure they permit. The Commission maintains that it need not review the indirect effects of downstream emissions on air quality even if its permitting further degrades the air quality of vulnerable communities in the same

county and airshed as the Project, even if that airshed is significantly out of compliance with existing Clean Air Act requirements. This behavior is preposterous and an abdication of the Commission's responsibility to consider "all factors bearing on the public interest" and in doing so has resulted in a final decision that does not meet the public interest requirements of the NGA, thus rendering this Certificate Order a product of arbitrary and capricious agency decision-making.

IV. THE COMMISSION ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER WHEN IT APPROVED CONSTRUCTION COMMENCEMENT BEFORE ADDRESSING SAFETY CONCERNS AND SIGNIFICANT CHANGED CIRCUMSTANCES

The Commission is tasked with considering "all factors bearing on the public interest" when determining whether a gas infrastructure project will serve the public interest, this includes public safety and the purported need of a project. *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959); 15 U.S.C. § 717f(e); *see also Fla. Southeast Connection*, 162 FERC ¶ 61,233 (2018). That is why their lack of critical oversight on the precedent agreement undergirding this Project and the safety issues involved in it is so galling. In its Project EA, the Commission acknowledges a series of explosions within the low-pressure gas distribution system of now-sole precedent agreement holder, Columbia Gas. *See* EA at 61, JA___. However, it refuses to discuss its role in approving infrastructure that increases compression capacity, *i.e*. *pressure,* into that same distribution

network despite said explosions resulting from criminally negligent grid maintenance and pressure regulation.

This Court has recognized that the Commission's duties under NEPA require it to not only "look hard at the environmental effects of [its] decision," but also "a project's impact on public safety." *City of Oberlin v. FERC*, 937 F.3d 599, 602 (D.C. Cir. 2019) (internal citations omitted). As such, the Commission must meaningfully consider the public safety issues associated with permitting gas infrastructure as it must be a component of a public interest consideration. *See Wash. Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008) (finding project not consistent with public convenience where Commission failed to ensure that project could operate safely). Moreover, a minor mention does not meet the "hard look" standard; it requires the Commission "assess the reasonably foreseeable impacts of a proposed action before an irretrievable commitment of resources is made that would trigger those impacts." *WildEarth Guardians v. Zinke,* 368 F. Supp. 3d 41, 64 (D.D.C. March 19, 2020), *citing* 42 U.S.C. § 4332(2)(C)(v).

When reviewing this Project, the Commission was aware that Columbia Gas was under investigation for distribution pipeline explosions in Columbia's network related to violations of Pipeline Safety Act, 49 U.S.C.S. §§ 60101 *et seq*., yet refused to meaningfully consider the safety implications of permitting increased volume and pressures into those same networks. EA at 61, JA___. Berkshire

challenged the Commission's failure to consider the impact of Columbia Gas's operating record on the safety of the overall project and future operation of their distribution network. Berkshire Rehearing Request at 3, JA___. The Commission did not even respond - a shortcoming that in itself, renders the action arbitrary and capricious. *See PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (An agency's "failure to respond meaningfully" to objections raised by a party renders its decision arbitrary and capricious).

Subsequently, just days after the Commission denied rehearing, the U.S. Department of Justice announced that the 261 Upgrade Project's sole remaining precedent agreement holder, Columbia Gas, had pled guilty to *criminal* negligence in the maintenance of their distribution system. U.S. Attorney's Office, Dist. Of Mass, "*Columbia Gas Agrees to Plead Guilty in Connection with September 2018 Gas Explosions in Merrimack Valley*," Feb. 26, 2020, https://www.justice.gov/usao-ma/pr/columbia-gas-agrees-plead-guilty-connection-september-2018-gas-explosions-merrimack. Under the plea agreement, Columbia Gas's parent company NiSource must sell all its Massachusetts assets, pay a record $53 million criminal fine for violating the Pipeline Safety Act, and may no longer operate in the Commonwealth of Massachusetts. *Ibid.* Petitioners immediately alerted the Commission to this issue, filing a protest letter on February 27, 2020. Without addressing the ramifications that this unprecedented guilty plea may have

on the precedent agreement conditions or public safety, the Commission approved Tennessee's request to proceed with construction on March 4, 2020.

Given that the Commission must take a "hard look" at public safety issues and meaningfully factor them into determinations of project necessity and public interest, the fact that the Commission completely ignored such a tremendous violation of pipeline safety law by the project's sole precedent agreement holder demonstrates that the Commission did not meaningfully fulfill its duties under the NGA and NEPA. This renders the Certificate Order and its Order allowing construction to begin as arbitrary and capricious agency decision-making.

V. THE PROPER REMEDY IS VACATUR OF THE CERTIFICATE ORDER AND REMAND WITH INSTRUCTIONS

"The ordinary practice is to vacate unlawful agency action." *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019) (*citing* 5 U.S.C. § 706(2)); *accord FCC v. NextWave Personal Comms. Inc.*, 537 U.S. 293, 300 (2003) ("In all cases agency action must be set aside if the action … failed to meet statutory, procedural, or constitutional requirements.") (*quoting Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971)). Vacatur is also the "standard remedy" in this Circuit for an "action promulgated in violation of NEPA." *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (*citing Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001));

see also Reed v. Salazar, 744 F. Supp. 2d 98, 118–20 (D.D.C. 2010) (finding NEPA violation and ordering vacatur); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78–80 (D.D.C. 2010) (finding NEPA violation and ordering remand with partial vacatur); *Greater Yellowstone Coal. v. Kempthorne*, 577 F. Supp. 2d 183, 204–05, 210 (D.D.C. 2008) (finding NEPA violation and ordering vacatur); *see also Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) (surveying "cases in this district" and noting "the primacy of vacatur to remedy NEPA violations").

This Court ordered a certificate vacated for NEPA violations in *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017), a nearly identical case. This result governs here. Remand without vacatur would allow the company to continue constructing the pipeline while the Commission addresses the remand, making it impossible for the petitioners to obtain the remedy they seek.

CONCLUSION AND REFLIEF REQUESTED

WHEREFORE, for the foregoing reasons, Petitioners Food & Water Watch and Berkshire respectfully request that this Court vacate the Commission orders issuing certificate and approving construction for the 261 Upgrade Project.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32, I certify that this motion complies with (1) the type-volume limitations of Rule 32(a)(7) because it contains 11,559 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface (14-point) using Microsoft Word (the same program used to calculate the word count).

/s/ *Adam S. Carlesco*

Adam S. Carlesco

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2020, I electronically filed the foregoing Petitioners' Initial Brief with the Clerk of the Court using the CM/EF system, which will send notice of such filing to all registered CM/ECF users.

/s/ *Adam S. Carlesco*

Adam S. Carlesco

Counsel for Petitioners

ADDENDUM OF STATUTES AND REGULATIONS

5 USCS § 706, Part 1 of 3

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES (§§ 101 — 11001) > Part I. The Agencies Generally (Chs. 1 — 9) > CHAPTER 7. Judicial Review (§§ 701 — 706)

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

History

HISTORY:

Act Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

15 USCS § 717

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS §§ 717 et seq. applicable. The provisions of this Act [15 USCS §§ 717 et seq.] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of 15 USCS §§ 717 et seq.; certification from state commission as conclusive evidence. The provisions of this Act [15 USCS §§ 717 et seq.] shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act [15 USCS §§ 717 et seq.] by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

(d) Vehicular natural gas jurisdiction. The provisions of this Act [15 USCS §§ 717 et seq.] shall not apply to any person solely by reason of, or with respect to, any sale or transportation of vehicular natural gas if such person is—

(1) not otherwise a natural-gas company; or

(2)subject primarily to regulation by a State commission, whether or not such State commission has, or is exercising, jurisdiction over the sale, sale for resale, or transportation of vehicular natural gas.

History

HISTORY:

Act June 21, 1938, ch 556, § 1, 52 Stat. 821; March 27, 1954, ch 115, 68 Stat. 36; Oct. 24, 1992, P. L. 102-486, Title IV, § 404(a)(1), 106 Stat. 2879; Aug. 8, 2005, P. L. 109-58, Title III, Subtitle B, § 311(a), 119 Stat. 685.

End of Document

15 USCS § 717f

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing. Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission. No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity.

(1)

(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission

within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A)natural gas sold by the producer to such person; and

(B)natural gas produced by such person.

(d) Application for certificate of public convenience and necessity. Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity. Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act [15 USCS §§ 717 et seq.] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the isssuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate customers.

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission

in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served. Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc. 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. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

History

HISTORY:

Act June 21, 1938, ch 556, § 7, 52 Stat. 824; Feb. 7, 1942, ch 49, 56 Stat. 83; July 25, 1947, ch 333, 61 Stat. 459; Nov. 9, 1978, P. L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, P. L. 100-474, § 2, 102 Stat. 2302.

End of Document

15 USCS § 717r

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 — 116) > CHAPTER 15B. NATURAL GAS (§§ 717 — 717z)

§ 717r. Rehearing and review

(a) Application for rehearing; time. Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [15 USCS §§ 717 et seq.] 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 application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act [15 USCS §§ 717 et seq.].

(b) Review of Commission order. Any party to a proceeding under this Act [15 USCS §§ 717 et seq.] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the [circuit] court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court

such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [28 USCS § 1254].

(c) Stay of Commission order. The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(d) Judicial review.

(1) In general. The United States Court of Appeals for the circuit in which a facility subject to section 3 or section 7 [15 USCS § 717b or 717f] is proposed to be constructed, expanded, or operated shall have original and exclusive jurisdiction over any civil action for the review of an order or action of a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit, license, concurrence, or approval (hereinafter collectively referred to as "permit") required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.).

(2) Agency delay. The United States Court of Appeals for the District of Columbia shall have original and exclusive jurisdiction over any civil action for the review of an alleged failure to act by a Federal agency (other than the Commission) or State administrative agency acting pursuant to Federal law to issue, condition, or deny any permit required under Federal law, other than the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.), for a facility subject to section 3 or section 7 [15 USCS § 717b or 717f]. The failure of an agency to take action on a permit required under Federal law, other than the Coastal Zone Management Act of 1972, in accordance with the Commission schedule established pursuant to section 15(c) [16 USCS § 717n(c)] shall be considered inconsistent with Federal law for the purposes of paragraph (3).

(3) Court action. If the Court finds that such order or action is inconsistent with the Federal law governing such permit and would prevent the construction, expansion, or operation of the facility subject to section 3 or section 7 [15 USCS § 717b or 717f], the Court shall remand the proceeding to the agency to take appropriate action consistent with the order of the Court. If the Court remands the order or action to the Federal or State agency, the Court shall set a reasonable schedule and deadline for the agency to act on remand.

(4) Commission action. For any action described in this subsection, the Commission shall file with the Court the consolidated record of such order or action to which the appeal hereunder relates.

(5) Expedited review. The Court shall set any action brought under this subsection for expedited consideration.

History

42 USCS § 4321

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 — 4370m-12)

§ 4321. Congressional declaration of purpose

The purposes of this Act [42 USCS §§ 4321 et seq.] are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

History

HISTORY:

Act Jan. 1, 1970, P. L. 91-190, § 2, 83 Stat. 852.

End of Document

42 USCS § 4332, Part 1 of 2

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY (§§ 4321 — 4370m-12) > POLICIES AND GOALS (§§ 4331 — 4335)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act [42 USCS §§ 4321 et seq.], and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.], which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552

of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i)the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii)the responsible Federal official furnishes guidance and participates in such preparation,

(iii)the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv)after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act [42 USCS §§ 4321 et seq.]; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [;]

(E)study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F)recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G)make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H)initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I)assist the Council on Environmental Quality established by title II of this Act [42 USCS §§ 4341 et seq.].

History

HISTORY:

Act Jan. 1, 1970, P. L. 91-190, Title I, § 102, 83 Stat. 853; Aug. 9, 1975, P. L. 94-83, 89 Stat. 424.

49 USCS § 60101

Current through Public Law 116-149, approved July 14, 2020.

United States Code Service > TITLE 49. TRANSPORTATION (§§ 101 — 80504) > Subtitle VIII. Pipelines (Chs. 601 — 605) > CHAPTER 601. Safety (§§ 60101 — 60141)

§ 60101. Definitions

(a) General. In this chapter [49 USCS §§ 60101 et seq.]—

(1)"existing liquefied natural gas facility"—

(A)means a liquefied natural gas facility for which an application to approve the site, construction, or operation of the facility was filed before March 1, 1978, with—

(i)the Federal Energy Regulatory Commission (or any predecessor); or

(ii)the appropriate State or local authority, if the facility is not subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.); but

(B)does not include a facility on which construction is begun after November 29, 1979, without the approval;

(2)"gas" means natural gas, flammable gas, or toxic or corrosive gas;

(3)"gas pipeline facility" includes a pipeline, a right of way, a facility, a building, or equipment used in transporting gas or treating gas during its transportation;

(4)"hazardous liquid" means—

(A)petroleum or a petroleum product;

(B)nonpetroleum fuel, including biofuel, that is flammable, toxic, or corrosive or would be harmful to the environment if released in significant quantities; and

(C)a substance the Secretary of Transportation decides may pose an unreasonable risk to life or property when transported by a hazardous liquid pipeline facility in a liquid state (except for liquefied natural gas);

(5)"hazardous liquid pipeline facility" includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid;

(6)"interstate gas pipeline facility" means a gas pipeline facility—

(A)used to transport gas; and

(B)subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.);

(7)"interstate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility used to transport hazardous liquid in interstate or foreign commerce;

(8)"interstate or foreign commerce"—

(A)related to gas, means commerce—

(i)between a place in a State and a place outside that State; or

(ii)that affects any commerce described in subclause (A)(i) of this clause; and

(B)related to hazardous liquid, means commerce between—

(i)a place in a State and a place outside that State; or

(ii)places in the same State through a place outside the State;

(9)"intrastate gas pipeline facility" means a gas pipeline facility and transportation of gas within a State not subject to the jurisdiction of the Commission under the Natural Gas Act (15 U.S.C. 717 et seq.);

(10)"intrastate hazardous liquid pipeline facility" means a hazardous liquid pipeline facility that is not an interstate hazardous liquid pipeline facility;

(11)"liquefied natural gas" means natural gas in a liquid or semisolid state;

(12)"liquefied natural gas accident" means a release, burning, or explosion of liquefied natural gas from any cause, except a release, burning, or explosion that, under regulations prescribed by the Secretary, does not pose a threat to public health or safety, property, or the environment;

(13)"liquefied natural gas conversion" means conversion of natural gas into liquefied natural gas or conversion of liquefied natural gas into natural gas;

(14)"liquefied natural gas pipeline facility"—

(A)means a gas pipeline facility used for transporting or storing liquefied natural gas, or for liquefied natural gas conversion, in interstate or foreign commerce; but

(B)does not include any part of a structure or equipment located in navigable waters (as defined in section 3 of the Federal Power Act (16 U.S.C. 796));

(15)"municipality" means a political subdivision of a State;

(16)"new liquefied natural gas pipeline facility" means a liquefied natural gas pipeline facility except an existing liquefied natural gas pipeline facility;

(17)"person", in addition to its meaning under section 1 of title 1 (except as to societies), includes a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person;

(18)"pipeline facility" means a gas pipeline facility and a hazardous liquid pipeline facility;

(19)"pipeline transportation" means transporting gas and transporting hazardous liquid;

(20)"State" means a State of the United States, the District of Columbia, and Puerto Rico;

(21)"transporting gas"—

(A)means—

(i)the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in interstate or foreign commerce; and

(ii)the movement of gas through regulated gathering lines; but

(B)does not include the gathering of gas, other than gathering through regulated gathering lines, in those rural locations that are located outside the limits of any incorporated or unincorporated city, town, or village, or any other designated residential or commercial area (including a subdivision, business, shopping center, or community development) or any similar populated area that the Secretary of Transportation determines to be a nonrural area, except that the term "transporting gas" includes the movement of gas through regulated gathering lines;

(22)"transporting hazardous liquid"—

(A)means—

(i)the movement of hazardous liquid by pipeline, or the storage of hazardous liquid incidental to the movement of hazardous liquid by pipeline, in or affecting interstate or foreign commerce; and

(ii)the movement of hazardous liquid through regulated gathering lines; but

(B)does not include moving hazardous liquid through—

(i)gathering lines (except regulated gathering lines) in a rural area;

(ii)onshore production, refining, or manufacturing facilities; or

(iii)storage or in-plant piping systems associated with onshore production, refining, or manufacturing facilities;

(23)"risk management" means the systematic application, by the owner or operator of a pipeline facility, of management policies, procedures, finite resources, and practices to the tasks of identifying, analyzing, assessing, reducing, and controlling risk in order to protect employees, the general public, the environment, and pipeline facilities;

(24)"risk management plan" means a management plan utilized by a gas or hazardous liquid pipeline facility owner or operator that encompasses risk management;

(25)"Secretary" means the Secretary of Transportation; and

(26)"underground natural gas storage facility" means a gas pipeline facility that stores natural gas in an underground facility, including—

(A)a depleted hydrocarbon reservoir;

(B)an aquifer reservoir; or

(C)a solution-mined salt cavern reservoir.

(b) Gathering lines.

(1)

(A) Not later than October 24, 1994, the Secretary shall prescribe standards defining the term "gathering line".

(B) In defining "gathering line" for gas, the Secretary—

(i)shall consider functional and operational characteristics of the lines to be included in the definition; and

(ii)is not bound by a classification the Commission establishes under the Natural Gas Act (15 U.S.C. 717 et seq.).

(2)

(A) Not later than October 24, 1995, the Secretary, if appropriate, shall prescribe standards defining the term "regulated gathering line". In defining the term, the Secretary shall consider factors such as location, length of line from the well site, operating pressure, throughput, and the composition of the transported gas or hazardous liquid, as appropriate, in deciding on the types of lines that functionally are gathering but should be regulated under this chapter [49 USCS §§ 60101 et seq.] because of specific physical characteristics.

(B)

(i) The Secretary also shall consider diameter when defining "regulated gathering line" for hazardous liquid.

(ii) The definition of "regulated gathering line" for hazardous liquid may not include a crude oil gathering line that has a nominal diameter of not more than 6 inches, is operated at low pressure, and is located in a rural area that is not unusually sensitive to environmental damage.

History

HISTORY:

Act July 5, 1994, P. L. 103-272, §§ 1(e), 4(s), 108 Stat. 1301, 1371; Oct. 11, 1996, P. L. 104-287, § 5(90), 110 Stat. 3398; Oct. 12, 1996, P. L. 104-304, §§ 3, 20(f), 110 Stat. 3793, 3805; Dec. 29, 2006, P. L. 109-468, § 7, 120 Stat. 3491; Jan. 3, 2012, P. L. 112-90, § 14, 125 Stat. 1914; June 22, 2016, P. L. 114-183, § 12(a), 130 Stat. 522.

End of Document

18 CFR 157.208

This document is current through the July 22, 2020 issue of the Federal Register. Title 3 is current through July 2, 2020.

Code of Federal Regulations > TITLE 18 -- CONSERVATION OF POWER AND WATER RESOURCES > CHAPTER I -- FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY > SUBCHAPTER E -- REGULATIONS UNDER NATURAL GAS ACT > PART 157 -- APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT > SUBPART F -- INTERSTATE PIPELINE BLANKET CERTIFICATES AND AUTHORIZATION UNDER SECTION 7 OF THE NATURAL GAS ACT FOR CERTAIN TRANSACTIONS AND ABANDONMENT

§ 157.208 Construction, acquisition, operation, replacement, and miscellaneous rearrangement of facilities.

(a) Automatic authorization. If the project cost does not exceed the cost limitations set forth in column 1 of Table I, under paragraph (d) of this section, or if the project is required to restore service in an emergency, the certificate holder is authorized to make miscellaneous rearrangements of any facility, or acquire, construct, replace, or operate any eligible facility. The certificate holder shall not segment projects in order to meet the cost limitations set forth in column 1 of Table I.

(b) Prior notice. If the project cost is greater than the amount specified in column 1 of Table I, but less than the amount specified in column 2 of Table I, the certificate holder is authorized to make miscellaneous rearrangements of any facility, or acquire, construct, replace, or operate any eligible facility. The certificate holder shall not segment projects in order to meet the cost limitations set forth in column 2 of Table I.

(c) Contents of request. In addition to the requirements of § 157.205(b), requests filed for activities described under paragraph (b) of this section shall contain:

(1) A description of the purpose of the proposed facilities including their relationship to other existing or planned facilities;

(2) A detailed description of the proposed facilities specifying length, diameter, wall thickness and maximum operating pressure for pipeline; and for compressors, the size, type, and number of compressor units, horsepower required, horsepower existing and proposed, volume of fuel gas, suction and discharge pressure and compression ratio;

(3) A USGS 7 1/2 minute series (scale 1:24000) topographic map (or map of equivalent or greater detail, as appropriate) showing the location of the proposed facilities, and indicating the location of any sensitive environmental areas within one-quarter mile of project-related construction activities;

(4) A map showing the relationship of the proposed facilities to the applicant's existing facilities;

18 CFR 385.214

This document is current through the July 22, 2020 issue of the Federal Register. Title 3 is current through July 2, 2020.

Code of Federal Regulations > TITLE 18 -- CONSERVATION OF POWER AND WATER RESOURCES > CHAPTER I -- FEDERAL ENERGY REGULATORY COMMISSION, DEPARTMENT OF ENERGY > PART 385--RULES OF PRACTICE AND PROCEDURE PART 385 -- > SUBPART B -- PLEADINGS, TARIFF AND RATE FILINGS, NOTICES OF TARIFF OR RATE EXAMINATION, ORDERS TO SHOW CAUSE, INTERVENTION, AND SUMMARY DISPOSITION

§ 385.214 Intervention (Rule 214).

(a) Filing.

(1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the issues in the proceeding.

(2) Any State Commission, the Advisory Council on Historic Preservation, the U.S. Departments of Agriculture, Commerce, and the Interior, any state fish and wildlife, water quality certification, or water rights agency; or Indian tribe with authority to issue a water quality certification is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, each entity identified in this paragraph must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person seeking to intervene to become a party, other than the entities specified in paragraphs (a)(1) and (a)(2) of this section, must file a motion to intervene.

(4) No person, including entities listed in paragraphs (a)(1) and (a)(2) of this section, may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of this chapter.

(b) Contents of motion.

(1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2)A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) Grant of party status.

(1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) Grant of late intervention. (1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)

(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

5 U.S.C. 551-557; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 791a-825r, 2601-2645; 28 U.S.C. 2461; 31 U.S.C. 3701, 9701; 42 U.S.C. 7101-7352; 49 U.S.C. 60502; 49 App. U.S.C. 1-85.

40 CFR § 1500.1 - Purpose.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains “action-forcing” provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 CFR § 1500.2 - Policy.

§ 1500.2 Policy.
Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

40 CFR § 1508.8 - Effects.
§ 1508.8 Effects.
Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

40 CFR § 1508.25 - Scope.

§ 1508.25 Scope.
Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be: (1) Direct; (2) indirect; (3) cumulative.