

174 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Algonquin Gas Transmission, LLC
Maritimes & Northeast Pipeline, LLC

Docket No. CP16-9-012

ORDER ESTABLISHING BRIEFING

(Issued February 18, 2021)

1. On September 24, 2020, Commission staff issued an order authorizing Algonquin Gas Transmission, LLC (Algonquin) and Maritimes & Northeast Pipeline, LLC (Maritimes) (together, Applicants) to place facilities associated with the Atlantic Bridge Project into service (Authorization Order).¹ On October 23, 2020, the Fore River Residents Against the Compressor Station (Fore River Residents), the City of Quincy, Massachusetts, Weymouth Councilor Rebecca Haugh, Michael Hayden, and Food and Water Watch (collectively Petitioners) filed a timely joint request for rehearing of the Authorization Order. Since issuance of the Authorization Order the Commission has also received numerous other pleadings expressing safety concerns regarding the operation of the project.

2. We believe that the concerns raised regarding the operation of the project warrant further consideration by the Commission and set the matter for paper briefing to address the questions listed below. Initial briefs will be due 45 days from the date of this order. Reply briefs will be due 30 days thereafter. The facilities placed in service pursuant to the Authorization Order may remain in service while the Commission considers the issues raised here. The Commission asks for briefing on the following matters:

- In light of the concerns expressed regarding public safety, is it consistent with the Commission's responsibilities under the Natural Gas Act (NGA) to allow the Weymouth Compressor Station to enter and remain in service?

¹ *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-000, at 1 (Sept. 24, 2020) (delegated order) (Authorization Order).

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- Should the Commission reconsider the current operation of the Weymouth Compressor Station in light of any changed circumstances since the project was authorized? For example, are there changes in the Weymouth Compressor Station's projected air emissions impacts or public safety impacts the Commission should consider? We encourage parties to address how any such changes affect the surrounding communities, including environmental justice communities.
- Are there any additional mitigation measures the Commission should impose in response to air emissions or public safety concerns?
- What would the consequences be if the Commission were to stay or reverse the Authorization Order?

The Commission orders:

Briefing procedures are hereby established, as discussed in the body of this order. Initial briefs are due 45 days from the date of this order and reply briefs are due 30 days thereafter.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

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Maritimes & Northeast Pipeline, LLC

Docket No. CP16-9-012

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DANLY, Commissioner, *dissenting*:

1. I dissent in full from the majority's "Order Establishing Briefing" in *Algonquin Gas Transmission, LLC* Docket No. CP16-9-012. This order is both contrary to law and bad policy. Before I explain my reasoning, a complete recitation of the background facts is necessary.

I. Background

2. Over four years ago, on January 25, 2017, the Commission issued Algonquin Gas Transmission, LLC (Algonquin) a certificate authorizing the construction and operation of the Weymouth Compressor Station as part of the Atlantic Bridge Project.¹ The Commission found the project to be in the public convenience and necessity after considering the project need and the environmental effects of the project, including the effects that constructing and operating the Weymouth Compressor Station would have on safety, air quality, and environmental justice communities.² The Certificate Order found that the Weymouth Compressor Station would not result in a significant increase in risk to the nearby public "[b]ased on Algonquin's commitment to comply with [Pipeline and Hazardous Materials Safety Administration (PHMSA)] requirements."³ In addition, the Commission's Environmental Assessment (EA) estimated the fugitive emissions (including blowdowns) at the Weymouth Compressor Station, compared the emissions to

¹ *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017) (Certificate Order). Chairman Bay, Commissioner LaFleur, and Commissioner Honorable unanimously approved the certificate.

² *See id.* PP 225-238 (safety), *id.* PP 194-216 (air quality), *id.* PP 185-189 (environmental justice). The Certificate Order also addressed specific air quality and health effects from blowdowns. *See id.* PP 198, 223

³ *Id.* P 226.

a past health risk assessment performed on a similar facility, and found that the health risks from operating the compressor station would not be significant.⁴

3. In December 2018, the U.S. Court of Appeals for the D.C. Circuit upheld the Certificate Order, including the Commission's assessment of impacts on public safety and environmental justice.⁵

4. On November 27, 2019, Commission staff authorized Algonquin to commence construction of the Weymouth Compressor Station after confirming that Algonquin had received all federal authorizations relevant to the approved activities. Those federal authorizations included its Air Quality Plan approved by the Massachusetts Department of Environmental Protection (Massachusetts DEP).

5. Late summer last year, Algonquin began testing its compressor station facilities as required by PHMSA.⁶ Section 192.503 of PHMSA's regulations prohibits any person from operating a new segment of pipeline until "(1) [i]t has been tested in accordance with this subpart and § 192.619 to substantiate the maximum allowable operating pressure; and (2) [e]ach potentially hazardous leak has been located and eliminated."⁷ Further, section 192.503 requires the test medium to be "liquid, air, natural gas, or inert gas."⁸

6. On September 11, 2020, during Algonquin's testing of equipment, a gasket failed, triggering the manual activation of its emergency shutdown system. Section 192.167 of the PHMSA's regulations requires compressor stations to have emergency shutdown systems that blow down the station piping.⁹ Consequently, Algonquin's emergency shutdown system blew down natural gas, releasing 169,000 standard cubic feet (scf) of natural gas and 35 pounds (lbs) (or 0.0175 tons¹⁰) of Volatile Organic Compounds (VOCs), which is approximately 0.19 percent of the estimated 9.0 tons of annual fugitive

⁴ EA at 2-95, 2-98.

⁵ *Town of Weymouth v. FERC*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (unpublished opinion).

⁶ Algonquin September 29, 2020 Weekly Status Report for No. 176 for Reporting Period Ending September 4, 2020 at 2.

⁷ 49 C.F.R. § 192.503(a) (2020).

⁸ *Id.* § 192.503(b).

⁹ *Id.* § 192.167(a)(1).

¹⁰ One ton equals 2,000 lbs.

VOCs evaluated by the EA.¹¹ Thereafter, Algonquin continued testing and calibrating activities.¹² The record does not show Massachusetts DEP initiating a compliance action.

7. On September 16, 2020, Algonquin requested authorization to place the Weymouth Compressor Station into service pursuant to Environmental Condition 10 of the Certificate Order. Environmental Condition 10 requires Algonquin to “receive written authorization from the Director of OEP before commencing service on each discrete facility of the Project” and provided that “[s]uch authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.”¹³

8. On September 24, 2020, Commission staff authorized Algonquin to place its Weymouth Compressor Station into service, finding that “Algonquin and Maritimes [had] adequately stabilized areas disturbed by construction and that restoration is proceeding satisfactorily.”¹⁴

9. On September 30, 2020, the Weymouth Compressor Station experienced an unplanned emergency shutdown, releasing approximately 195,000 scf of natural gas, including 27 lbs (or 0.0135 tons) of VOCs, which is approximately 0.15 percent of the estimated 9.0 tons of annual fugitive VOCs evaluated by the EA. The cause of the unplanned shutdown was unknown. That same day, Algonquin voluntarily shut in its system.¹⁵ The record does not show Massachusetts DEP initiating a compliance action.

10. On October 1, 2020, as amended on October 30, 2020, PHMSA issued a Corrective Action Order directing Algonquin to not operate the compressor station until authorized to do so, develop a Restart Plan for approval, and complete a root cause failure analysis.¹⁶

¹¹ EA at 2-95, tbl. 2.7.4-3.

¹² Algonquin October 7, 2020 Weekly Status Report No. 177 for the Reporting Period Ending September 11, 2020 at 3.

¹³ Certificate Order, 158 FERC ¶ 61,061 at Appendix B, Environmental Condition 10.

¹⁴ Commission Staff September 24, 2020 Letter Order Authorizing Commencement of Service at 1 (Authorization Order).

¹⁵ Algonquin October 7, 2020 Weekly Status Report No. 180 for the Reporting Period Ending October 2, 2020 at 2.

¹⁶ PHMSA, Corrective Action Order (Oct. 1, 2020),

11. On October 23, 2020, Petitioners¹⁷ filed a timely request for rehearing of Commission staff's September 24, 2020 Letter. First, they argued that the Commission "failed to complete a situational assessment and strategic responses for public safety and environmental impacts associated with incidents involving natural gas infrastructure."¹⁸ Second, they argued "[t]he unplanned emergency shutdowns and COVID-19 pandemic . . . rise to the level of a change in core circumstances" requiring the Commission to reopen the record under Rule 716 of the Commission's Rules of Practice and Procedure.¹⁹ Petitioners did not challenge Commission staff's finding that restoration and rehabilitation was proceeding satisfactorily.

12. On November 23, 2020, the Commission issued a notice denying Petitioners' rehearing request by operation of law.

13. On November 25, 2020, PHMSA approved Algonquin's Restart Plan and authorized Algonquin to return the compressor station facilities to a pressure not exceeding 80 percent of full operating pressure.²⁰

14. On January 22, 2021, PHMSA approved the temporary operation of the Weymouth Compressor Station at full pressure, stating "PHMSA has reviewed the [root cause failure analysis] and the data submitted on [Algonquin's] preventative and mitigative measures performed and based on our technical review, it is our determination to allow the temporary removal of the pressure restriction."²¹

https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-10/12020014CAO_Corrective%20Action%20Order_10012020-Algonquin%20Gas%20Transmission.pdf.

¹⁷ Petitioners include the Fore River Residents Against Compressor Station; City of Quincy, Massachusetts; Weymouth Councilor Rebecca Haugh; Michael Hayden; and Food & Water Watch.

¹⁸ Petitioners Oct. 23, 2020 Rehearing at 2.

¹⁹ *Id.* at 3. Although not explicitly stated, it is apparent that the Petitioners sought to reopen the Certificate Order. *Id.* at 5 ("The issuance of the Certificate Order on January 25, 2017 could not possibly have foreseen the impact of COVID-19, nor could the Certificate Order have anticipated the disparate impact the pandemic would have upon environmental justice communities in the Commonwealth of Massachusetts.")

²⁰ PHMSA, Letter Approving Restart Plan (Nov. 25, 2020), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-11/12020014CAO_PHMSA%20Approval%20of%20Weymouth%20Restart%20Plan_11252020.pdf.

²¹ PHMSA, Letter Approving Enbridge Allowing Temporary Removal of Pressure

15. On January 25, 2021, Algonquin placed the Weymouth Compressor Station into service.²²

16. Now on February 18, 2021—over four years after the Commission issued the Certificate Order authorizing the operation of the Weymouth Compressor Station, nearly four months after Petitioners’ timely rehearing request, after PHMSA has authorized Algonquin to resume operating the Weymouth Compressor Station at full pressure, and without any indication that Algonquin is out of compliance with its air permit—the Commission is issuing this “Order Establishing Briefing.”

II. The Order is an Attempt to Revisit the Certificate Proceeding and is Contrary to Law

A. This Order is an Attempt to Revisit the Certificate Order

17. It is somewhat difficult to make sense of this order. On its face, it bears the benign-sounding title “Order Establishing Briefing.” Those sorts of orders are issued now and again; they are procedural and, one would think, warrant little scrutiny. But briefing for what? The Certificate Order and the Authorization Order are both final—the Certificate Order was issued more than four years ago, and as for the Authorization Order, rehearing was denied by operation of law and the opportunity to appeal lapsed without a petition for review. Both of those proceedings appear to be irretrievably final. And, in fact, this order is *neither* of those proceedings. The Commission has assigned a new sub-docket number, -012, to distinguish it from the rehearing proceeding.²³ Confusion is justified as to what exactly is at issue since the Order Establishing Briefing cites to pleadings filed in the rehearing sub-docket.

18. Procedural oddities aside, this order does not look like other orders, by which I mean that those few people who spend a large amount of their time reading Commission orders will enjoy the familiarity of the caption and paragraph format but will be left with vague unease as they notice that the order is missing some fairly standard contents. It has no background section. It offers no basis in law for the Commission’s action. It provides no explanation as to what it is trying to achieve other than a vague promise of the “further

Restriction at Weymouth Compressor Station at 1 (Jan. 22, 2021), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-01/12020014CAO_Region%20Response%20to%20Corrective%20Action%20Item%205_01222021.pdf.

²² Algonquin January 25, 2021 Notice of Commencement of Service.

²³ With a new docket number may come a new intervention period. Every pipeline company, shipper, and pipeline investor should consider intervening in this “new” proceeding.

consideration” of something.²⁴ In fact, in the last 10 years, the Commission has never issued an order captioned “Order Establishing Briefing” and to the extent that free-standing briefing orders have issued during that time, they have issued following remand from appellate courts, or to address issues not resolved in settlement, motions for interlocutory appeal, and investigations into the justness and reasonableness of rates.²⁵

19. So what exactly does this order purport to do? It states that staff authorized Algonquin to place the Weymouth Compressor Station into service and it mentions that a timely rehearing request and other pleadings were filed. Then it states that the Commission “believe[s] that the concerns raised regarding the operation of the project warrant further consideration by the Commission and set[s] the matter for paper briefing to address” a series of appended questions.²⁶ By its plain language, the order requests

²⁴ This formulation, “further consideration,” is particularly unfortunate and perhaps even provocative in an order issued in a closed docket following the D.C. Circuit’s issuance of *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

²⁵ See, e.g., *Am. Elec. Power Serv. Corp. v. Midcontinent Indep. Sys. Operator, Inc.*, 168 FERC ¶ 61,178 (2019) (order establishing briefing procedures to investigate potentially unjust and unreasonable rates); *Duke Energy Corp.*, 163 FERC ¶ 61,102 (2018) (order establishing briefing schedule following remand); *Black Oak Energy, L.L.C.*, 146 FERC ¶ 61,099 (2014) (same); *Duquesne Light Co.*, 135 FERC ¶ 61,237 (2011) (order establishing briefing procedures to develop a record to enable the Commission to respond to a district court’s questions); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,248 (2004) (order establishing briefing schedule to consider rehearing requested 13 days before order issuance); *Nat. Gas Pipeline Co. of Am.*, 82 FERC ¶ 61,061 (1998) (order establishing briefing schedule to consider pipeline’s request to flow through refunds); *El Paso Nat. Gas Co.*, 82 FERC ¶ 61,060 (1998) (same); *Union Pac. Fuels, Inc.*, 75 FERC ¶ 61,071 (1996) (order establishing briefing schedule on complaint regarding violation of NGA); *Williston Basin Interstate Pipeline Co.*, 66 FERC ¶ 61,169 (1994) (order establishing briefing schedule to address issues not resolved in settlement); *Tenn. Gas Pipeline Corp.*, 63 FERC ¶ 61,204 (1993) (same); *Northwest Pipeline Corp.*, 63 FERC ¶ 61,028 (1993) (same); *Trunkline Gas Co.*, 57 FERC ¶ 61,314 (1991) (same); *Panhandle Eastern Pipe Line Co.*, 57 FERC ¶ 61,313 (1991) (same); *Transcontinental Gas Pipe Line Corp.*, 38 FERC ¶ 61,142 (1987) (order establishing briefing on interlocutory appeal from rulings of the presiding judge); *Am. Elec. Power Serv. Corp.*, 30 FERC ¶ 61,011 (1985) (order establishing briefing schedule following remand); *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 56 F.P.C. 2673 (same).

²⁶ *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126, at P 2 (2021) (Order

information on a set of discrete topics for the Commission's "further consideration." To what end? Among other things, the questions ask, rather ominously, (1) whether the Commission "should allow the Weymouth Compressor Station to enter and remain in service"; (2) whether the Commission should "reconsider" the current operation of the compression station; (3) whether the Commission "should consider" changes in air emissions or public safety impacts; (4) whether there are any "additional mitigation measures" the Commission should "impose" (presumably by means of revising Environmental Condition 10 of the Certificate Order); and (5) what would happen if the Commission were to "stay or reverse" the Authorization Order.

20. It would appear that the Commission is collecting comments in order to determine whether it should re-litigate the Certificate Order absent a breach or violation of the certificate terms and conditions. Though the majority may be laboring under the impression that this Order Establishing Briefing is no more than a late attempt to grant a (now denied and final, non-appealable) rehearing request sought following the Authorization Order, the Order asks questions that go directly the Certificate Order only. Only by re-litigating the Certificate Order and modifying Environmental Condition 10 of the Certificate Order can the Commission "reconsider the current operation of the Weymouth Compressor Station," consider "changes in . . . projected air emissions or public safety impacts," "impose" "additional mitigation measures," or "stay or reverse the Authorization Order." Moreover, none of the questions address the basis for the Authorization Order—whether the rehabilitation and restoration of lands affected by project construction were proceeding satisfactorily.

B. The Order Establishing Briefing is Contrary to Law

21. This Order is legally infirm because the action is simply beyond the Commission's authority. Even if it were not *ultra vires*, the Commission has fallen short of its Administrative Procedure Act (APA) obligations by failing to explain why it departs from the Commission's rules and policies.

22. There is a good reason for why the Commission fails to cite legal authority for today's order—"[t]he Commission has already approved the [c]ertificate, and there is nothing in the law that allows us to revisit that decision."²⁷ Just so. The current Commission may believe that the Commission, voting unanimously, acted improvidently in early 2017. They may believe that circumstances have changed.²⁸ They may believe

Establishing Briefing).

²⁷ Commissioner (now Chairman) Glick, Comments at Open Meeting at 29 (Jan. 19, 2021).

²⁸ Circumstances, however, have not changed and additional briefing on this matter is not needed to make this finding. The Certificate Order found that there were no

that the parties seeking rehearing were completely correct and that rehearing should have been granted. They may be right.²⁹ Regardless, there is no basis in law to re-examine final orders.

23. The Commission, as a mere creature of statute, can only act pursuant to law by which Congress had delegated its authority.³⁰ Although courts afford agencies great discretion to establish the procedures by which they conduct their business, that business, however fashioned, must be conducted within the bounds of that delegation.³¹

24. Nowhere does NGA section 7 authorize the Commission to unilaterally revisit final certificate orders or establish briefing schedules to inform such actions. Quite the contrary. NGA section 7(e) states: “a certificate shall be issued . . . if it is found that the applicant is able and willing properly to do the acts . . .”³² and “[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions . . .”³³ So conditioned, the

significant impacts on safety because Algonquin would comply with PHMSA regulations. Certificate Order, 158 FERC ¶ 61,061 at P 226. Algonquin has done so. *See supra* PP 5-6, 9-10, 13-14. Further, the Commission considered blowdown events, such as those that occurred in September, and found they would not have significant effects on air quality and health. EA at 2-98. And moreover, the amount of VOCs released by the events amounted to only 0.34 percent of the estimated blowdown emissions from the Weymouth Compressor Station in the EA. *See supra* PP 6, 9.

²⁹ This is unlikely. Every subject raised in the rehearing requests was fully litigated at various stages of the underlying proceedings. *See Appendix.*

³⁰ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”); *accord, e.g., Atl. City Elec Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.”) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in original).

³¹ For example, the Commission established a tolling procedure for rehearing requests in which the D.C. Circuit found was contrary to the Natural Gas Act (NGA). *See Allegheny Def. Project v. FERC*, 964 F.3d 1.

³² 15 U.S.C. § 717f(e).

³³ *Id.* *See also Trunkline LNG Co.*, 22 FERC ¶ 63,028, at 65,135-39 (1983) (Chief Administrative Law Judge Recommended Decision).

Commission's regulations require the pipeline to then accept the certificate order.³⁴ In sum, the Commission's power is to grant, with conditions, a certificate of public convenience and necessity and to enforce the certificate. Absent a violation of those conditions, once the certificate issues and becomes final, the Commission has never revisited a certificate order and has in fact always doubted its ability to do so.³⁵

25. Many are quick to turn to NGA section 16 when all else has failed, but it is often freighted with more weight than it can bear. Section 16 does not represent an independent grant of authority: "[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."³⁶ This does not create new powers under the NGA or obviate NGA section 7(e), which limits the Commission's authority over a certificate to the certificate's conditions.³⁷ Moreover, like its counterpart in FPA section 309, the use of NGA

³⁴ 18 C.F.R. § 157.20(a) (2020) ("The certificate shall be void and without force or effect unless accepted in writing by applicant within 30 days from the issue date of the order issuing such certificate."). *Cf.* 16 U.S.C. § 799 ("Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions of this chapter and such further conditions, if any, as the Commission shall prescribe in conformity with this chapter, which said terms and conditions and the acceptance thereof shall be expressed in said license."); *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1261 (D.C. Cir. 1996) (concluding that the Commission erred in finding the license required the licensee to operate the project in a run-of-river mode because the license order did not contain an explicit condition requiring the licensee to operate run-of-river).

³⁵ *Trunkline LNG Co.*, 22 FERC ¶ 61,245, at 61,442 (1983). In *Trunkline*, the Commission declined to address whether it had the authority to revisit a certificate. However, to the extent the Commission has the authority, the Commission stated that action, "would be an extraordinary step and would, in our judgment, require a compelling showing of a fundamental shift of a long-term nature in the basic premises on which the certificate was issued." *Id.* at 61,442. The Commission also stated "because the project had previously been approved by the Commission and funds committed based on that approval, the Commission would be obligated to revoke or modify the certificate in a manner that would leave investors in the project in substantially the same position they would have been had the Commission not revoked or modified the certificate." *Id.* at 61,442 n.5. The record shows no fundamental shift, and the Order Establishing Briefing asks no questions on how to leave investors in substantially the same position they would have been.

³⁶ 15 U.S.C. § 717o.

³⁷ *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 647 (D.C. Cir. 2010)

section 16 must be “consistent with the authority delegated to it by Congress.”³⁸ But the order here does not do so because it flies in the face of the statutory process for rendering final orders subject to judicial review.

26. No other law, regulation, or policy can be relied upon to revisit a certificate. Rule 716, which allows the Commission to reopen the record in certain proceedings,³⁹ explicitly applies only to initial or revised initial decisions and, moreover, *does not apply* to final, unappealable orders.⁴⁰ And even if there were another source of authority, the Commission has failed to explain how the exercise of that authority in this proceeding can be squared with the Commission’s longstanding practice of leaving final,

(“[W]hile section 16 gives the Commission ancillary jurisdiction to carry out the statute’s other provisions, it does not confer additional jurisdiction . . . otherwise outside the Commission’s jurisdiction.”) (citing *Pub. Serv. Comm’n of N.Y. v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989)).

³⁸ *Verso Corp. v. FERC*, 898 F.3d 1, 7 (D.C. Cir. 2018) (citing *Xcel Energy Servs. Inc. v. FERC*, 815 F.3d 947, 952 (D.C. Cir. 2016)); *accord id.* at 10 (“Section 309 accordingly permits FERC to advance remedies not expressly provided by the FPA, *as long as they are consistent with the Act.*”) (emphasis added) (citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 359 (D.C. Cir. 2017) (citing *Niagara Mohawk Power Corp. v. Fed. Power Comm’n*, 379 F.2d 153, 158 (D.C. Cir. 1967))).

³⁹ 18 C.F.R. § 385.716 (2020). “Initial decision” is “any decision rendered by a presiding officer in accordance with Rule 208”—meaning a decision rendered by the Administrative Law Judges, not the Commission. *Id.* § 385.702. The Commission has previously applied Rule 716 to Commission orders despite the Commission’s regulations to the contrary. *See Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“[W]e do not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations.”). To my knowledge, the Commission has never reopened a record of a final order that was affirmed on appeal. Nor can the majority square reopening the record of the Authorization Order with its long-standing policy to reopen only where there is “a change in the core circumstance that goes to the very of the case,” *CSM Midland, Inc.*, 56 FERC ¶ 61,177, at 61,624 (1991), as the safety and air emissions are entirely unrelated to the issuance of the Authorization Order. Similarly, the majority has not explained its departure from its long-standing policy.

⁴⁰ *See N. Nat. Gas Co.*, 113 FERC ¶ 61,060, at 61,170 (2005); *Old Dominion Elec. Coop.*, 105 FERC ¶ 61,094, at 61,485 (2003).

unappealable orders undisturbed. Failure to set forth that explanation, in the face of so long a practice, is necessarily a violation of the APA.⁴¹

III. The Order is Bad Policy

27. On top of being unlawful, the Order is bad policy. Issuing an order that appears to revisit final, unappealable certificate orders impairs regulatory certainty and arrogates to the Commission authority it does not have.

28. Regulatory certainty, of which finality is a large part, is absolutely critical to achieving the goals of the NGA. “[W]ithout the sanctity of certificates granted under Sections 3 and 7 of the Natural Gas Act, there would be no private financing, and without private financing, there would be no projects.”⁴² Further, “the revocation or adverse modification of a certificate or authorization . . . when the certificate or authorization forms the basis of project financing would be a clear violation of the basic constitutional principles of due process.”⁴³

29. Worse still, the Order Establishing Briefing impairs the finality normally enjoyed by certificate holders, based on issues well outside our jurisdiction. The Order asks: whether the Commission should revisit the Certificate Order on the basis of pipeline operational safety and air emissions. Reading this, one would presume that Algonquin is not in compliance with pipeline safety and air emission requirements and the Commission has the authority and expertise to address the non-compliance. Neither of those presumptions, however, is correct.

30. First, as I note above, PHMSA and Massachusetts DEP appear satisfied that Algonquin is complying with their regulations and requirements. Nearly one month ago, PHMSA authorized Algonquin to resume operating the Weymouth Compressor Station at

⁴¹ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original); *id.* (“[A]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”); *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding “that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*”) (emphasis added).

⁴² *Trunkline LNG Co.*, 22 FERC ¶ 63,028 at 65,139.

⁴³ *Id.*

full pressure.⁴⁴ Massachusetts DEP approved the Air Quality Plan for the Weymouth Compressor Station, finding it is in compliance with the Air Pollution Control regulations and current air pollution control engineering practice.⁴⁵ The record does not show Massachusetts DEP initiating a compliance action.

31. Second, Congress expressly delegated to the Secretary of the Department of Transportation the authority to regulate pipeline safety⁴⁶ and to the U.S. Environmental Protection Agency (EPA) the authority to regulate air emissions.⁴⁷ The Commission's long-standing practice is to rely on PHMSA to regulate pipeline safety and the EPA, or its state delegated agency, to regulate air emissions.⁴⁸ It is baffling on what factual basis the Commission could modify the Certificate Order and what additional measures the Commission could impose that PHMSA and Massachusetts DEP have not considered and would not interfere with their approvals.

⁴⁴ See *supra* P 14.

⁴⁵ Massachusetts DEP, Air Quality Plan Approval at 2 (Aug. 26, 2019), <https://www.mass.gov/doc/air-quality-plan-approval-august-2019/download>. Massachusetts affirmed the plan on September 29, 2020. Massachusetts DEP, Final BACT Determination for Weymouth Compressor Station at 1, <https://www.mass.gov/doc/final-bact-determination-september-29-2020/download>.

⁴⁶ See 49 U.S.C. § 60102(a)(2) (2018) (“The Secretary shall prescribe minimum safety standards for pipeline transportation and for pipeline facilities.”); see also FERC, Natural Gas Safety and Inspections, <https://www.ferc.gov/industries-data/natural-gas/safety-and-inspections> (“[o]nce Natural Gas pipeline projects become operational, safety is regulated, monitored, and enforced by the Department of Transportation”); FERC, Strategic Plan FY2018-2021 at vii, <https://www.ferc.gov/sites/default/files/2020-04/FY-2018-FY-2022-strat-plan.pdf> (lists “[r]esponsibility for pipeline safety” under the heading “What FERC does not do”).

⁴⁷ See *Wyoming v. U.S. Dep’t of Interior*, 2020 WL 7641067 *9 (Oct. 8, 2020) (“The rub here, however, is whether the Rule, or at least certain provisions of the Rule, was promulgated *for the prevention of waste* or instead for the *protection of air quality*, which is expressly within the ‘substantive field’ of the EPA and States pursuant to the Clean Air Act.”) (emphasis in original).

⁴⁸ See *Town of Weymouth*, No. 17-1135, 2018 WL 6921213 at *1 (“although the challengers argue that FERC impermissibly relied on the pipeline companies’ assertions that they would comply with certain federal safety regulations, FERC was entitled, ‘[a]bsent evidence to the contrary,’ to ‘assume . . . that [the companies] will exercise good faith.’ *Murray Energy Corp. v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011).”).

32. Intended or not, the message from this order is clear: even if a pipeline has its certificate, a court upholds that certificate, and that pipeline is in compliance, the Commission can now find a way to modify, or even possibly revoke, the certificate. This order requires Algonquin to relitigate the Certificate Order affirmed over three years ago. Algonquin has now been aggrieved.⁴⁹ This order threatens the certainty of the certificate upon which the pipeline's business is founded, disregards the principles of final judgement upon which all litigants rely, and violates the specific statutory procedures devised by Congress to render and challenge final orders. The order manufactures what is essentially an end-run around the statutory process for rehearing and judicial review that is far more dangerous and disruptive than the Commission's past abuse of tolling orders,⁵⁰ because tolling orders only delayed the final resolution of cases, but did not constitute surprise attacks on long-final orders. Algonquin should appeal immediately.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

⁴⁹ *Cf. Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 245 (D.C. Cir. 1980) (explaining that Mobile-Sierra claims are immediately reviewable in the courts).

⁵⁰ *See Allegheny Def. Project v. FERC*, 964 F.3d 1.

Appendix

FERC Process

- On January 25, 2017, the Commission issued a Certificate Order to Algonquin, considering the safety risk of the compressor station, the air quality and health impacts of blowdowns, and impacts on environmental justice communities near the compressor station. *See Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017).
- On December 13, 2017, the Commission denied rehearing after considering the safety risks of the Weymouth Compressor Station (PP 27-28, 32, 134-139), the effects of blowdowns (P 132), and environmental justice (PP 91-99). *See Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255 (2017).
- On December 27, 2018, the U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's Certificate Order, including its consideration of impacts on safety and environmental justice. *Town of Weymouth, Massachusetts*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (unpublished opinion).

Massachusetts DEP Air Quality Plan Approval

- In March 2017, Massachusetts DEP issued a proposed Air Quality Plan Approval, determining that the Massachusetts Environmental Justice Policy does not apply because the anticipated emissions would not exceed emission thresholds. *See Massachusetts DEP, Air Quality Proposed Plan Approval* (Mar. 30, 2017), <https://www.mass.gov/doc/proposed-air-quality-plan-approval-march-2017/download>.
- In the spring of 2017, Massachusetts DEP held a public comment period on the proposed Air Quality Plan Approval. *See Massachusetts DEP Algonquin Natural Gas Compressor Station, Weymouth*, <https://www.mass.gov/service-details/algonquin-natural-gas-compressor-station-weymouth>.
- In July 2017, Governor Baker directed Massachusetts DEP and the Massachusetts Department of Public Health to perform a comprehensive health impact assessment. *See id.*
- In January 2019, Massachusetts DEP and the Massachusetts Department of Health issued the *Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth*. The assessment considered health and environmental justice

impacts of the Weymouth Compressor Station. *See* Massachusetts Department of Health et al., *Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth*, MA (January 2019), http://foreriverhia.wpengine.com/wp-content/uploads/2019/01/Final-Report_20190104.pdf.

- On January 11, 2019, Massachusetts DEP issued a Non-Major Comprehensive Air Quality Plan Approval to Algonquin for its construction and operation of the Weymouth Compressor Station. *See* Massachusetts DEP, Air Quality Plan Approval (January 11, 2019).
- In May and June 2019, an adjudicatory hearing was held on six appeals of Massachusetts DEP's approval. *See* Massachusetts DEP Algonquin Natural Gas Compressor Station, Weymouth, <https://www.mass.gov/service-details/algonquin-natural-gas-compressor-station-weymouth>.
- On August 26, 2019, Massachusetts DEP issued a Non-Major Comprehensive Air Quality Plan Approval, which incorporated conditions required by the final decisions resulting from the adjudicatory hearing and found that Massachusetts Environmental Justice Policy does not apply because the anticipated emissions would not exceed emission thresholds. Massachusetts DEP, Air Quality Plan Approval (Aug. 26, 2019), <https://www.mass.gov/doc/air-quality-plan-approval-august-2019/download>.
- On June 3, 2020, the U.S. Court of Appeals for the First Circuit affirmed in part Massachusetts DEP's Air Quality Plan Approval, including its assessment of environmental justice. *See Town of Weymouth, Massachusetts v. Mass. Dep't of Environmental Protection*, 961 F.3d 34, 54-55 (1st Cir. 2020), *amended*, 973 F.3d 143 (1st Cir. 2020).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC
Maritimes & Northeast Pipeline, LLC

Docket No. CP16-9-012

(Issued February 18, 2021)

CHRISTIE, Commissioner, *dissenting*:

1. What the majority does in this order is inconsistent with the purpose and principle behind a future-looking review of certification applications. Today, the Commission makes a foray into retroactively changing the rules long after the fact: long after construction was begun and long after investors committed significant funds, as described below, to a project. Today's capricious action violates the most basic standards of regulatory due process and regulatory finality, both of which are absolutely necessary to balance appropriate regulatory protections for people who live in geographic proximity to infrastructure projects with regulatory certainty for those who are building and financing needed infrastructure to provide vital services to consumers and create jobs for Americans.

2. On January 25, 2017 – more than four years ago – this Commission authorized Applicants to construct and operate certain pipeline and compression facilities in New York, Connecticut, and Massachusetts (Atlantic Bridge Project), and, in so doing, found that the “*public convenience and necessity require approval and certification of the Atlantic Bridge Project under section 7 of the NGA,*” subject to certain conditions.¹ In reliance on the issuance of that certificate of public convenience and necessity (CPCN), investors committed hundreds of millions of dollars to construct the project.² Construction took place and on September 24, 2020, Commission staff issued a delegated letter order authorizing the remaining facilities associated with the Atlantic Bridge

¹ *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 at P 31 (Certificate Order) (emphasis added), *order on reh'g*, 161 FERC ¶ 61,255 (2017) (Certificate Rehearing Order), *aff'd sub nom.*, *Town of Weymouth v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018) (unpublished opinion).

² The Certificate Order states that, at the time of the applications, Applicants estimated the cost of the Atlantic Bridge Project to be \$451,791,440. Certificate Order at P 10 (footnote omitted).

Project be placed into service, including the Weymouth Compressor Station in Norfolk, Massachusetts, and the Maritimes Westbrook Metering and Regulator Station in Cumberland, Maine, and finding that “Algonquin and Maritimes have adequately stabilized areas disturbed by construction and that restoration is proceeding satisfactorily.”³

3. Now, four years after finding *public convenience and necessity require approval and certification of the Atlantic Bridge Project* and inviting investors to commit substantial funds to build it, and without recognizing the request for rehearing was denied by operation of law, the majority literally invites opponents of the project to re-litigate the core question of whether the project should even have been built. The majority’s order unquestionably raises the specter of shutting down this completed and functioning project even permanently, although it offers no discussion as to how it would do so under the law.

4. The majority’s decision is apparently – it is unclear – based on an alleged safety issue with a compressor station that is no longer under this Commission’s jurisdiction, but is rather under that of another federal agency.⁴ The Certificate Rehearing Order states that the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (PHMSA) is the agency charged with developing safety regulations for the design and operation of natural gas pipeline facilities and enforces compliance with these regulations. To compound the Kafkaesque quality of the Commission’s action, PHMSA has already investigated and given the compressor facility a temporary green light to operate.⁵

³ *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-000, at 1 (Sep. 24, 2020) (delegated order) (Authorization Order). Subsequent to the Authorization Order, on October 23, 2020, the Fore River Residents Against the Compressor Station (Fore River Residents), the City of Quincy, Massachusetts, Weymouth Councilor Rebecca Haugh, Michael Hayden, and Food and Water Watch filed what was styled as request for rehearing of the Authorization Order.

⁴ The Commission’s action *may* also be based on an argument in the request for rehearing that has already been denied by operation of law, that the Weymouth Compressor Station poses a threat to neighboring communities during the COVID-19 pandemic and represents a change in core circumstances that requires the Commission to re-open the record in this proceeding. Such an argument appears to be another attempt to re-open and re-litigate the original certificate proceeding with a goal of overturning that decision and shutting the project down permanently.

⁵ See *In the Matter of Algonquin Gas Transmission, LLC*, Corrective Action Order, CPF No. 1-2020-014-CAO, Dep’t of Transp. (Oct. 2020) (prohibiting Algonquin from operating the Weymouth Compressor station following two unplanned emergency

5. Fairness and due process in the regulatory consideration of project certification applications means litigating all relevant issues during the original proceeding, providing for robust public participation, and then issuing a decision well-grounded in law and fact. Then out of fairness to all concerned, the regulatory body should stand behind its decision. Today's decision violates this basic standard.

6. Instead, today's order creates more questions than it answers and leaves uncertainty only in its wake. Nothing in today's order suggests that the Commission has not left open the possibility that it will shut down this project. As a result, today's order may, regrettably, impact investment in *all* infrastructure projects making them less appealing to engage in by those who normally seek to build the projects and harder to finance or, at the very least, more expensive to finance due to the increased risk created by this specter of uncertainty.

7. Mark Twain said the art of prophecy is very difficult, especially with respect to the future; however, I suspect that the use of the legal weapons of unending litigation and collateral attacks against infrastructure projects long after they have been approved, as is enabled by today's order, will not be limited to natural gas projects, even though they are today's primary target. Campaigns of unending legal warfare may well be used one day against other types of infrastructure projects, including those the majority may well want to promote.

For these reasons, I respectfully dissent.

Mark C. Christie
Commissioner

shutdowns on September 11 and 30, 2020); *see also In the Matter of Algonquin Gas Transmission, LLC*, Region Approves Restart Plan, CPF No. 1-2020-014-CAO, Dep't of Transp. (Nov. 2020) (approving Algonquin's restart plan for the Weymouth Compressor Station at 80 percent capacity), January 22, 2021 Letter from PHMSA to Enbridge, CPF 1-2020-014-CAO (permits the temporary removal of the pressure restriction and approves the temporary operation of the compressor units in the station). As a result of the January 22, 2021 PHMSA Letter, Applicants filed a Notice of Commencement of Service with the Commission in this docket on January 25, 2021. Even if additional measures are ordered by PHMSA, that would be under PHMSA's authority not the Commission's.

Document Content(s)

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