UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC	**)**	**Docket No. CP16-9-012**
Maritimes & Northeast Pipeline, LLC	**)**	
	)	

REQUEST FOR REHEARING AND SUPPORT FOR MOTIONS FOR LATE INTERVENTION OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AND THE ENERGY INFRASTRUCTURE COUNCIL

Pursuant to Rules 212, 214, and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"),[1] the Interstate Natural Gas Association of America ("INGAA") and the Energy Infrastructure Council ("EIC") file this motion in support of their document-less motions to intervene, and request rehearing of the "Order Establishing Briefing" issued in the above-captioned proceeding.[2]

I. EXECUTIVE SUMMARY

By questioning the finality of a certificate order, the Commission has shaken the core principles of finality and regulatory certainty upon which all Commission-regulated infrastructure is built. Pipeline companies have invested approximately $97.8 billion developing new interstate natural gas transmission facilities in the past decade, in reliance on the stability of the Commission's certificate orders. Without confidence in this stability, investors cannot make the financial commitments required to fund the infrastructure that forms a cornerstone of our economy and way of life. The Briefing Order will make it more difficult to develop projects not only for natural gas, but in all sectors regulated by the

[1] 18 C.F.R. §§ 385.212, 385.214, and 385.713 (2020).
[2] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) ("Briefing Order").

Commission, because it undermines the regulatory certainty that historically has been a pillar of Commission regulation.

The Briefing Order also may have cascading effects upon pipeline shippers and other segments of the economy. Pipeline facilities are essential parts of integrated pipeline systems and the larger interstate pipeline grid, which in turn supports customers that use natural gas to generate electricity, heat homes, and fuel manufacturing. Removal of operating facilities from service would reduce the reliability of these operations and harm the people and businesses that rely on them. The Commission must also consider the impact of its actions on firm transportation contracts, marketers' obligations to their customers, and on financial markets.

Uncertainty is the bane of the financial markets; undercutting the finality of certificate orders will make it more difficult and costly for operators to finance new projects and refinance debt on existing pipelines. By questioning whether a facility constructed in accord with a final Commission certificate should "remain in service," the Commission has breached its fundamental responsibilities, which include encouraging the orderly development of reasonably priced supplies of natural gas[3] and supporting the reliability of the electric grid, which depends on natural gas.

The Briefing Order cites no authority that allows it to reconsider or revoke a final certificate. That is because there is none. Courts have made it clear that the NGA[4] does not permit the Commission to revoke a certificate of public convenience and necessity that has become final. INGAA and EIC are not aware of any case in which the Commission

[3] *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)) (a "principal aim" of the Natural Gas Act ("NGA") is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices").
[4] 15 U.S.C. §§ 717, *et seq.*

revoked the certificate of an existing pipeline in the 80 years since the NGA was passed. Indeed, the Commission itself has questioned whether it has the authority to take such a drastic action. Also, now that the Station has entered service, the only means to remove the Station from service is for the Commission to authorize abandonment under NGA Section 7(b) and the regulations governing abandonment.[5] The Briefing Order ignores these issues, failing even to acknowledge the unprecedented nature of the Commission's action. This failure to recognize or explain a dramatic departure from precedent is arbitrary and capricious, in violation of the Administrative Procedure Act ("APA").[6]

The Briefing Order also oversteps the Commission's jurisdiction. Once a natural gas pipeline project is constructed in compliance with conditions provided in a certificate order, jurisdiction over those facilities' safety and air emissions passes to other agencies. In particular, safety is regulated by the U.S. Department of Transportation's Pipeline and Hazardous Materials and Safety Administration ("PHMSA"), an agency with a robust enforcement program. In this case, PHMSA has regulated the Weymouth Compressor Station (sometimes referred to herein as the "Station") for safety reasons, having issued a Corrective Action Order that paused the facility's operation. Likewise, the Station's air emissions are regulated by the Massachusetts Department of Environmental Protection ("Massachusetts DEP"), which issued the air quality plan approval for the Station and closely monitors the Station's emissions of volatile organic compounds ("VOC").[7] There

[5] *See* 18 C.F.R. § 157.18.
[6] 5 U.S.C. § 706(2)(A).
[7] Mass. DEP, Algonquin Natural Gas Compressor Station, Weymouth, https://www.mass.gov/service-details/algonquin-natural-gas-compressor-station-weymouth (providing air quality plan applications, supporting documents, and permits, and listing of emissions of all VOCs on a weekly basis) (last visited Mar. 22, 2021). Although the Station experienced two unplanned shutdowns that resulted in emissions of VOCs, the Massachusetts DEP did not initiate a compliance action.

is no need or authority for the Commission to encroach into these agencies' areas of expertise and jurisdiction.

The Commission should grant rehearing and void the Briefing Order. Further, to provide industry assurance in the stability of the Commission's certificate orders, the Commission should clarify that it will not—and cannot—reconsider or revoke *any* certificate order once it has become final.

II. MOTION FOR LEAVE TO INTERVENE OUT-OF-TIME

A. INGAA

INGAA represents the vast majority of interstate natural gas pipelines in America. Its 26 members operate approximately 200,000 miles of interstate natural gas pipelines, serving as an indispensable link between natural gas producers and consumers. INGAA and its members have a substantial interest in pipeline development, continued investment in energy infrastructure, maintenance of an efficient and timely process for approval and construction of new interstate natural gas pipeline infrastructure, and ensuring predictable, consistent, and rational law and policy affecting natural gas transportation.

B. EIC

The EIC is a non-profit trade association representing over 60 energy companies, and is dedicated to advancing the interests of companies that develop and operate energy infrastructure. EIC's membership includes numerous Commission-regulated transporters and gatherers of natural gas, crude oil, natural gas liquids, and refined products. EIC addresses core public policy issues critical to investment in U.S. energy infrastructure that directly impact its member companies. Consideration of the practical impact of the Commission's policies on the regulated community is of utmost importance to EIC.

C. Motions to Intervene Out-of-Time

On February 25, 2021, INGAA filed a doc-less motion to intervene in the captioned proceeding, which was issued in a new sub-docket. EIC filed a doc-less motion to intervene on March 17, 2021. Because INGAA's doc-less motion was filed one week after issuance of the Briefing Order, and EIC's shortly thereafter, Commission precedent makes INGAA and EIC parties to all subdockets previously established in this proceeding.[8] Should the Commission deem INGAA's and EIC's doc-less motions to intervene as out-of-time because they were filed after the intervention deadline in the underlying certificate proceeding in Docket No. CP16-9-000, INGAA and EIC provide the following information supporting the late intervention.

The Commission should grant INGAA's and EIC's motions for leave to intervene out-of-time. Commission Rule 214 provides that, in acting on any late-filed motion to intervene, the Commission may consider, in addition to the standard intervention requirements,[9] 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; and (iv) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention.[10]

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[8] *See PJM Interconnection, L.L.C*, 111 FERC ¶ 61,201, at P 4 (2005) (clarifying that a party's timely intervention into a new subdocket made that party "a party to all earlier-filed subdockets in this proceeding, subject to the requirement that [the party], as a late intervenor, is required to accept the record in these proceedings as the record was developed prior to [the party's] late intervention").
[9] 18 C.F.R. § 385.214(b).
[10] *Id.* § 385.214(d)(1).

First, good cause exists for INGAA and EIC's late-filed interventions. This proceeding has significant implications for the entire natural gas industry, indeed for all industries regulated by the Commission.[11] INGAA and EIC had no need to intervene in the underlying certificate proceeding for the Atlantic Bridge Project ("Project"), which related only to the certification of an individual pipeline project and did not raise any issues of first impression, precedential concerns, or industry-wide changes of Commission policy. Now, however, for the first time since the NGA was passed over 80 years ago, the Commission has begun a process of revisiting a final certificate order, with no prior indication that it would undertake this unprecedented inquiry. As Commissioner Mark C. Christie stated in his dissent, the Briefing Order jeopardizes the finality of all pipeline certificates and may establish precedent that harms all interstate natural gas pipelines, most of which are INGAA and EIC members.[12] The Briefing Order also may disrupt pipeline projects currently under development and future projects because it introduces substantial uncertainty that could affect the ability of interstate natural gas pipelines to access capital markets for financing. When the original intervention deadline was set in 2017, INGAA and EIC had no way of knowing that the Commission would take an action that could result in the revocation of a final certificate; or that could undercut the reliability of FERC decisions and impact other FERC-regulated assets owned by EIC members. INGAA and EIC have a clear interest in this proceeding that arose only when the Briefing Order was issued in 2021.

[11] *See, e.g.*, *S. Nat. Gas Co.*, 130 FERC ¶ 61,193, at PP 5-7 (2010) (granting INGAA's late-filed motion to intervene for the purpose of seeking rehearing of an issue with broad industry implications); *Tenn. Gas Pipeline Co.*, 101 FERC ¶ 61,311, at PP 19-20 (2002) (granting motion for late intervention to industry group in a proceeding with industry-wide implications).

[12] *See* Briefing Order, Comm'r Christie Dissent at P 6.

Second, there will be no disruption or additional burden placed on other parties as a result of granting INGAA and EIC's motions. INGAA and EIC accept the record as it currently exists, and this motion for leave to intervene out-of-time will not serve as a basis for delaying or deferring the briefing schedule established in the Briefing Order.

Third, INGAA and EIC have a direct and substantial interest in this proceeding that cannot be adequately represented by another party. As the trade association representing the vast majority of the interstate pipeline industry, INGAA has a unique responsibility to protect its members' interests in the finality of certificate orders, and an overarching perspective that is not shared by any individual pipeline company. No other party can adequately represent INGAA's interests in this proceeding. EIC represents a broader segment of the energy industry that depends on the finality and reliability of Commission orders, and is not represented by other parties.

Therefore, INGAA and EIC request that the Commission grant this motion for leave to intervene out-of-time, for good cause shown, and allow INGAA and EIC to participate in this proceeding with full rights as a party.

D. Communications

All correspondence, communications, pleadings, and other documents related to this proceeding should be addressed to the following representatives:

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III. STATEMENT OF ISSUES AND SPECIFICATIONS OF ERROR

Pursuant to Rule 713, 18 C.F.R. § 385.713(c), INGAA submits the following statement of issues and specifications of error:

1. The Commission erred by commencing a new proceeding to reconsider a final certificate order without identifying any statutory authority for its action.

2. The NGA does not authorize the Commission to reconsider final certificate orders. 15 U.S.C. §§ 717f; 717o; 717r.

3. The Commission violated the Administrative Procedure Act by arbitrarily and capriciously questioning the finality of certificate orders for the first time in over 80 years, causing harm to the regulated community, without acknowledging that it was changing course or explaining why it was appropriate to do so. 5 U.S.C. § 706(2)(A).

4. The Weymouth Compressor Station's safety and air emissions are outside the Commission's jurisdiction, since the pipeline has commenced service.

5. The Commission is undermining electric reliability, as the Briefing Order makes it more difficult for all pipeline companies to construct new infrastructure needed to serve gas-fired electric generation plants.

6. The Commission erred by taking an action that will chill investment in natural gas infrastructure, contrary to the Natural Gas Act's "principal aim" of "encouraging the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (quoting *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976)).

IV. BACKGROUND

A. Abbreviated History

Commissioner James P. Danly provided a thorough history of the proceeding in his dissent to the Briefing Order.[13] For context, INGAA and EIC provide only a brief background:

In January 2017, the Commission approved Algonquin Gas Transmission, LLC's ("Algonquin") and Maritimes & Northeast Pipeline, LLC's ("Maritimes") Atlantic Bridge Project, which included construction and operation of the Weymouth Compressor Station, in the Town of Weymouth, Norfolk County, Massachusetts.[14] The Commission subsequently denied requests for rehearing and the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld the Commission's orders.[15] The Commission authorized Algonquin and Maritimes to place the Weymouth Compressor Station into service in September 2020.[16] Several parties requested rehearing of the Authorization Order, and the Commission issued a notice denying those rehearing requests by operation of law in November 2020.[17] No party sought judicial review of the Authorization Order and the time for seeking judicial review has passed.[18]

Four years after issuing the Certificate Order, and two years after the Commission's order was affirmed, on February 18, 2021, the Commission issued the Briefing Order to address "concerns raised regarding the operation of the project" and asking whether the

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[13] Briefing Order, Comm'r Danly Dissent at PP 2-16.
[14] *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 ("Certificate Order"), *reh'g denied*, 161 FERC ¶ 61,255 (2017) ("Rehearing Order"), *pet. for review denied sub. nom.*, *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018).
[15] *See id*.
[16] *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-000 (Sept. 24, 2020) (delegated order) ("Authorization Order").
[17] *Algonquin Gas Transmission, LLC*, 173 FERC ¶ 62,097 (2020).
[18] 15 U.S.C. § 717r(b).

project should remain in service.[19] Two Commissioners dissented, stating that the Briefing Order is contrary to law and will adversely impact investment in pipeline infrastructure.

B. INGAA's and EIC's Members Are Aggrieved by the Briefing Order.

INGAA's and EIC's members are aggrieved by the Briefing Order and have standing to seek rehearing. Section 19(a) of the NGA allows persons who are "aggrieved by" a Commission order to seek rehearing. INGAA and EIC are entitled to seek rehearing because the Briefing Order has an immediate impact on its members' abilities to secure financing for natural gas pipeline projects.

The NGA confers standing upon persons "aggrieved by" a Commission order. The D.C. Circuit recognizes that "in construing 'party aggrieved' or similar language in court review sections of other regulatory statutes[,] [courts] have relaxed the established requirements for 'standing to sue' to permit a party who has suffered only financial (or economic) injury to obtain judicial review."[20] The D.C. Circuit has stated that aggrievement "is a status conferred by Congress upon a party who, though he may have no interests that must be considered in the [agency's] determination, is likely to suffer injury by that determination."[21]

Although the Briefing Order refers to the "Authorization Order," it questions the merits of the Certificate Order, which the Commission issued after completing the administrative process established under NGA Section 7, and has been final for years. As Commissioner Danly explained in his dissent, the Briefing Order "asks questions that go

[19] Briefing Order at P 2.
[20] *Nat'l Coal Ass'n v. FPC*, 191 F.2d 462, 464 (D.C. Cir. 1951) (citation omitted).
[21] *City of Pittsburgh v. FPC*, 237 F.2d 741, 746 (D.C. Cir. 1956).

directly [to] the Certificate Order only," including whether the Commission should impose new conditions related to the Station's safety and air emissions.[22]

Merely by *questioning* the finality of the four-year old Certificate Order, the Briefing Order causes grave damage. It is immaterial that the Commission has not yet modified or revoked the Certificate Order because by casting doubt over its stability, the Briefing Order impairs regulatory certainty. Indeed, the Commission has already received comments calling for "cancellation of the station's authorization."[23] As then-Chief Judge Curtis L. Wagner, Jr. previously explained in support of a Commission decision not to revoke a certificate, without confidence in the sanctity of certificate orders, "businessmen and investment institutions would not enter into such projects nor lend the necessary funds to make the projects possible."[24] Judge Wagner stated that there is "absolutely no doubt that investment funds will *not* be available if certificates, in the absence of violations, can be revoked by the granting agency at will for political or other reasons."[25]

In his dissent, Commissioner Christie explained that the Briefing Order may "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."[26] Commissioner Danly similarly noted that the Briefing Order sends the industry a clear message that final certificates can be revoked.[27] Thus, the Briefing Order has the impact

[22] Briefing Order, Comm'r Danly Dissent at P 20.
[23] *See, e.g.*, Comments of Nes Correnti, Docket No. CP16-9-012, Accession No. 20210311-5128 (Mar. 11. 2021); Sierra Club Motion to Intervene, Docket No. CP16-9-012, Accession No. 20210311-5168 (Mar. 11, 2021).
[24] *Trunkline LNG Co.*, 22 FERC ¶ 63,028, at p. 65,138 (1983).
[25] *Id*.
[26] Briefing Order, Christie Dissent at P 6.
[27] *See id.*, Danly Dissent at P 32.

of a "final" order, because it immediately affects concrete interests of INGAA's and EIC's members.

Several INGAA and EIC members have current projects planned and pending before the Commission,[28] as well as projects not yet made public. The Briefing Order makes it more difficult and more expensive for INGAA's and EIC's members to finance these projects because investors no longer can be confident in the stability of certificate orders. The Briefing Order creates a new, material risk that undermines the very foundation of the natural gas pipeline business. Clearly, INGAA's and EIC's members are aggrieved and qualified to seek rehearing.

V. REQUEST FOR REHEARING

A. The Commission Lacks Authority to Reconsider the Certificate Order.

The Briefing Order identifies no statutory authority for the Commission to revisit the Certificate Order, or to revoke authorizations granted thereunder. The omission is a telling admission that the Commission has no such authority. As a regulatory agency, the Commission is a "creature of statute," such that "if there is no statute conferring authority, FERC has none."[29] To take any action, including reopening a certificate proceeding or rescinding a certificate order, it is "incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise."[30] The Commission failed to cite any statute granting it power to reconsider the Certificate Order after it has been fully adjudicated, let alone to "demonstrate that" it has any such authority.

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[28] *See* Energy Information Admin., Natural Gas Pipeline Projects (Detailed information on the size and location of pipeline projects announced or under construction). https://www.eia.gov/naturalgas/pipelines/EIA-NaturalGasPipelineProjects.xlsx (last visited Mar. 22, 2021).
[29] *Atl. City Elec Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002).
[30] *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

Congress vested several administrative agencies with authority to grant certificates of public convenience and necessity, and only in specific instances did it permit agencies to reconsider final certificate orders. In *United States v. Seatrain Lines, Inc.*, the U.S. Supreme Court held that the Interstate Commerce Commission ("ICC") violated the Interstate Commerce Act even by ***reopening*** a certificate proceeding, and modifying the certificate order granted thereunder.[31] In that case, less than two years after issuing a certificate authorizing Seatrain Lines, Inc. ("Seatrain") to be a common carrier of goods by water, the ICC, on its own motion, reopened the proceedings to determine whether the certificate should be modified.[32] The ICC subsequently revoked the original certificate and proposed a new one that limited Seatrain's rights as a common carrier.

The Supreme Court found that the ICC "exceeded its statutory authority in reopening the proceeding and altering the certificate."[33] The Court explained that the Interstate Commerce Act authorized the ICC to regulate different types of common carriers, including motor carriers and water carriers. The statutory provision addressing motor carriers empowered the ICC to revoke certificates; the provision addressing water carriers did not. Absent express statutory authority to revoke water carriers' certificate orders, the ICC had none. The Court held:

> The certificate, when finally granted, and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress.[34]

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[31] 329 U.S. 424 (1947).
[32] *Id*. at 426-27. The ICC rejected Seatrain's challenge to the reopening of the proceeding. *Id*.
[33] *Id*. at 427-28.
[34] *Id*. at 432-33.

Courts and the Commission have cited and applied *Seatrain* in considering the Commission's authority to revoke final authorization orders.[35] Under *Seatrain*, if a statute does not expressly grant an agency power to revoke a certificate order, it has none.[36]

Here, the governing statute is the NGA, which grants the Commission authority to approve construction and operation of interstate natural gas pipeline facilities. Because the Commission declined to identify any source of authority for its action, INGAA and EIC must guess at what authority the Commission relies on in questioning whether the Weymouth Compressor Station should remain in service. For purposes of this pleading, INGAA and EIC will address the Commission authority—or lack thereof—under NGA Sections 19, 7, and 16, as well as the conditions the Commission imposed in the Certificate Order. As shown below, the NGA does not allow the Commission to reopen final certificate proceedings, to reconsider findings made therein, or to revoke certificate orders. The Commission must grant rehearing.

1. Section 19 of the NGA Does Not Permit the Commission to Reconsider Final Certificate Orders.

Section 19 of the NGA does not permit the Commission to revisit the Certificate Order. If a petition for review of a Commission order has been filed in court, Section 19(a) permits the Commission to "modify or set aside, in whole or in part, any finding or order made or issued by it" until the record is filed with the court.[37] This section does not permit the Commission to rescind orders after the time for seeking judicial review expires, or long

[35] *See Hirschey v. FERC*, 701 F.2d 215, 218 (D.C. Cir. 1983) and *Trunkline LNG*, 22 FERC ¶ 61,245 (1983), *reh'g denied*, 40 FERC ¶ 61,048 (1987), discussed *infra*, and referring to provisions of the Federal Power Act ("FPA") and NGA that are "analogous" to the Interstate Commerce Act.
[36] *Seatrain*, 329 U.S. at 430. *See also Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322, 325 (1961) (the power to revoke a certificate must be specifically granted by Congress).
[37] 15 U.S.C. § 717r(a).

after judicial review is complete. Courts have explained that Section 19(a) only allows the Commission to modify orders "until such time as the record on appeal has been filed with a court of appeals *or the time for filing a petition for judicial review has expired*."[38] Section 19 does not permit the Commission to revoke final orders.

The Certificate Order and the Authorization Order are both final orders, so the Commission has no ability to revisit them. The Commission denied rehearing of the Certificate Order and the D.C. Circuit denied petitions for review of that order.[39] That was the end of the matter.[40] Indeed, that is the position taken by the Commission in the Supreme Court earlier this month.[41]

The Authorization Order is also final. It was issued in September 2020, and the Commission issued a notice denying requests for rehearing of that order on November 23, 2020.[42] The Authorization Order became final when no parties filed petitions for review by the statutory deadline of January 22, 2021.

Even if the Authorization Order was not final, it would not allow the Commission to reconsider a final Certificate Order. As the Commission (including then-Commissioner Richard Glick and then-Chairman Neil Chatterjee) explained in this very Docket, an order

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[38] *Hirschey*, 701 F.2d at 218 (emphasis in original) (quoting *Pan Am. Petroleum Corp. v. FPC*, 322 F.2d 999, 1004 (D.C. Cir.), *cert. denied*, 375 U.S. 941 (1963)). *See also Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1108 (D.C. Cir. 1989) (same).

[39] *See* Rehearing Order, 161 FERC ¶ 61,255, *pet. for review denied sub. nom.*, *Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213

[40] *See City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958) (construing the materially identical review provision of the FPA and stating, "upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all").

[41] Br. for the United States as *Amicus Curiae* at 11, PennEast Pipeline Co. LLC. v. New Jersey, No. 19-1039 (Mar. 8, 2021) (stating that a federal appellate court's judgment upholding a Commission order is "final," subject only to review by the Supreme Court).

[42] *Algonquin Gas Transmission*, 173 FERC ¶ 62,097.

the Director of the Office of Energy Projects ("OEP") issued via delegated authority is not intended:

> to reexamine the Commission's conclusions; rather it is to ensure that the Commission's conditions have been met before authorizing construction activities. This has been the Commission's longstanding practice of having the Director of OEP (or his designees), not the Commission itself, verify that certificate conditions have been met before issuing notices to proceed with construction or granting other authorizations related to the construction and operation of a Commission-certificated natural gas project.

Algonquin Gas Transmission, LLC, 161 FERC ¶ 61,287, at P 18 (2017). The Authorization Order is not a hook to allow reopening the underlying certificate proceeding.

In *Valero Interstate Transmission Co. v. FERC*, the U.S. Court of Appeals for the Fifth Circuit stated that under Section 19, once a FERC order becomes final, "FERC can no longer modify the order."[43] Under the provision of the FPA that parallels NGA Section 19, the D.C. Circuit has twice rejected Commission attempts to revoke final orders exempting hydroelectric generators from licensing requirements.[44] In *Hirschey*, the court refused to allow FERC to vacate a hydroelectric licensing exemption just two weeks after the date when the order became final, explaining that [Section 19] "provides no authority for the FERC's action."[45] In both *Hirschey* and a subsequent case, *International Paper v. FERC*, the court refused "[t]o sustain the sudden reversal of a final and nonreviewable FERC decision."[46]

Here, both the Certificate Order and Authorization Order are indisputably final orders. NGA Section 19 grants the Commission a limited window of time to modify its

[43] 903 F.2d 364, 368 (5th Cir. 1990).
[44] *Int'l Paper Co. v. FERC*, 737 F.2d 1159 (D.C. Cir. 1984); *Hirschey*, 701 F.2d 215.
[45] *Hirschey*, 701 F.2d at 218. In that case, the exemption became final on July 7, 1982, when no rehearing request was filed. The Commission vacated the licensing exemption two weeks later, on July 20, 1982. *Id.* at 217.
[46] *Hirschey,* 701 F.2d at 220; *Int'l Paper*, 737 F.2d at 1162 (citation omitted).

orders for purposes of judicial review; it does not grant the Commission an indeterminate period of time to continue reexamining final certificates.

2. Section 7 of the NGA Does Not Permit the Commission to Reconsider Final Certificate Orders.

Section 7 of the NGA allows FERC to "issue" certificates and to attach "terms and conditions" to them, but not to "revoke," "rescind," "suspend," or anything of that nature. In *Trunkline LNG*, the Commission considered whether Section 7 permitted it to revoke a final certificate order.[47] In an initial decision, Chief Judge Wagner opined that "there is absolutely no authority in . . . this Commission . . . to revoke, suspend, or adversely modify a Section 7(c) certificate."[48] The Commission deemed Judge Wagner's analysis "scholarly and well-reasoned," but avoided the question by ruling on narrower grounds.[49]

In a concurrence, however, two Commissioners stated that the Commission should have expressly ruled that it cannot "unilaterally modify or revoke a Section 7 certificate."[50] The concurring Commissioners stated it plainly: "[t]here simply is no provision in the NGA which gives the Commission authority to unilaterally revoke or amend certificates."[51] The concurring Commissioners also cited to the legislative history of NGA Section 7, which demonstrates that "Congress intended to restrict the Commission's authority to even modify certificates after they are finally issued."[52] Under Section 7 of the NGA, once a certificate order is issued and withstands judicial review, the order is final.

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[47] 22 FERC ¶ 61,245.
[48] *Trunkline LNG*, 22 FERC ¶ 63,028 at p. 65,135(Judge Wagner).
[49] 22 FERC ¶ 61,245 at p. 61,442.
[50] *Id.* at p. 64,445 (Commr's Sousa and Butler, concurring).
[51] *Id*.
[52] *Id*. (citing *A Bill to Amend Section 7 of the Natural Gas Act: Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 5249,* 77th Cong., 1st Sess.).

Under Section 7(b) of the NGA, the Commission can only order the removal of natural gas facilities from service by approving their abandonment. This requires the Commission to determine that "the present or future public convenience or necessity permit such abandonment."[53] The Commission has implemented regulations and a substantial line of precedent to implement this statutory requirement.[54] Here, the certificate holder has not sought abandonment, nor has the Commission made any of the findings required to authorize abandonment. NGA Section 7(b) does not permit the Commission to *sua sponte* order that a facility be removed from service.

3. Section 16 of the NGA Does Not Permit the Commission to Reconsider Final Certificate Orders.

Nor does NGA Section 16 allow the Commission to reconsider final certificate orders. Section 16 is administrative; it does not give the Commission authority it does not have elsewhere in the NGA.[55] As the Commission has explained:

> NGA section 16 does not give us authority beyond that given under the substantive provisions of the act[;] hence, if we could not impose . . . a condition under our section 3 or section 7 authority, we could not fall back on our authority under section 16, which allows us to issue such orders as are necessary and appropriate in administrating our jurisdictional responsibilities under the NGA.[56]

In *Hirschey* and *International Paper*, the D.C. Circuit found the provision of the FPA that parallels NGA Section 16 provides FERC no authority to revoke orders

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[53] 15 U.S.C. §§ 717f(b).
[54] 18 C.F.R. § 157.18. *See generally N. Natural Gas Co.*, 168 FERC ¶ 61,148, at P 12 (2019) (summarizing Commission abandonment requirements, and noting that "the continuity and stability of existing services are the primary considerations in assessing whether the public convenience or necessity permit the abandonment").
[55] *See FPC v. Texaco Inc*., 417 U.S. 380 (1974); *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83 (1966); *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989).
[56] *Dominion Cove Point LNG, LP*, 126 FERC ¶ 61,238, at P 22 (2009) (citing *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973)) (internal citation omitted).

exempting hydroelectric generators from licensing requirements.[57] In *Seatrain*, the Supreme Court found that under the provision of the Interstate Commerce Act that parallels NGA Section 16, issuance of a certificate "marks the end of that proceeding."[58] NGA Section 16 does not permit the Commission to reconsider or revoke final certificate orders.

4. Nothing in the Certificate Order, Including Environmental Conditions, Can Allow the Commission to Revisit the Certificate.

To the extent the Commission views conditions imposed in the Certificate Order as authority for the Briefing Order, that is an error. The Commission cannot use its authority to place conditions upon certificate orders as a source of power that it lacks in the first place. This is a fundamental principle of law.[59] The D.C. Circuit has held that "the Commission may not use its § 7 conditioning power to do indirectly . . . things that it cannot do at all."[60] The Commission has recognized this principle as well.[61]

Environmental Condition 10 of the Certificate Order required authorization from the Director of OEP before any project component could commence service, and required the Director of OEP to determine whether "rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily."[62] In the Authorization Order, the Director of OEP determined that these conditions were satisfied. No other conditions were required for the Station to commence service. The Commission

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[57] *Int'l Paper v. FERC*, 737 F.2d 1159; *Hirschey*, 701 F.2d 215.
[58] 329 U.S. at 432.
[59] *See, e.g.*, *Gelpcke v. City of Dubuque*, 68 U.S. 175, 192 (1863) ("It is almost unnecessary to say, that what the legislature cannot do directly, it cannot do indirectly. The stream can mount no higher than its source.").
[60] *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510-11 (D.C. Cir. 1990). *See also Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) ("The Commission may not, however, when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in unconditional form, already in the public convenience and necessity."); *cf. Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (the Commission may not achieve indirectly through conditioning power of the FPA what it is otherwise prohibited from achieving directly).
[61] *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, at P 50 (2018) ("The Commission cannot do indirectly what it cannot do directly").
[62] Certificate Order, App. B at Envtl. Condition No. 10.

cannot retroactively revise Environmental Condition 10 to impose additional conditions in the Certificate Order long after that order has become final.

Likewise, Environmental Condition 2 does not provide for the Commission to determine that a certificated project cannot remain in service. That condition delegates to the Director of OEP the ability to take steps necessary to protect the environment during construction and operation of the Project. Environmental Condition 2 is a standard condition included in certificate orders. The Commission has clarified that this condition "is intended to give the Director authority to enforce the environmental terms and conditions of the certificate order. It is not intended to give the Director of [OEP] authority to take unrelated actions throughout the life of the project."[63] The Commission has stated that this condition allows the Director of OEP to modify environmental conditions if needed to ensure National Environmental Policy Act ("NEPA") compliance, but made it clear that this authority is "limited to environmental matters within the scope" of the certificate order.[64]

Here, there have not been any events that were not foreseen as a part of the environmental review process, nor has there been any suggestion that Algonquin has violated any of the Certificate Order's conditions.[65] Moreover, while the condition allows the Director of OEP to issue a stop-work order during construction, it does not allow the Director of OEP to determine that a certificated facility cannot remain in service.

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[63] *Tex. E. Transmission Corp.*, 73 FERC ¶ 61,136, at p. 61,387 (1995).
[64] *Id*.
[65] In the Project's Environmental Assessment ("EA"), the Commission considered that unplanned blowdowns might occur, and that these would result in air emissions. The Commission determined that these events would not have significant impacts on public health. Atlantic Bridge Environmental Assessment, Docket No. CP16-9-000, at 2-98 and n.22 (May 2016).

If the Commission determines that any of the Certificate Order's environmental conditions have been violated (which has not been alleged or even suggested here), the Commission can exercise its enforcement authority. The Commission routinely uses its enforcement authority to ensure compliance with conditions of certificate orders.[66] The Commission's conditioning power does not permit it to revise certificate orders after they have become final. The Briefing Order confuses the Commission's enforcement duties with the Commission's right to upend and overturn the Certificate Order itself. These are not the same duties, and by conflating them, the Briefing Order extends the Commission's jurisdiction beyond the intent of the NGA.

5. The Briefing Order Violates Rules Against *Res Judicata* and Collateral Estoppel.

The Briefing Order also violates the rules against *res judicata* and collateral estoppel because it raises issues that have already been litigated.[67] The Commission has long recognized that collateral attacks on its orders are inappropriate, explaining that "[c]ollateral attacks on final orders and relitigation of applicable precedent, especially by parties that were active in the earlier case, impede the finality and repose in agency decisions that are essential to administrative efficiency, and are therefore strongly discouraged."[68] The Commission should not engage in the type of attack on its own final order that it would never tolerate from a litigant.

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[66] *See, e.g.*, *Tres Palacios LLC*, 174 FERC ¶ 61,060 (2021) (civil penalty agreement following Staff inquiry into whether storage operator failed to timely conduct sonar surveys required under its certificate order).
[67] *See generally McCulloch Interstate Gas Corp.*, 9 FERC ¶ 61,152, at p. 61,305 (1979) (quoting *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 602 (3d Cir. 1977) (summarizing Commission's application of these doctrines).
[68] *S. Co. Servs., Inc.*, 129 FERC ¶ 61,253, at P 37 (2009).

B. The Commission Acted Arbitrarily and Capriciously by Reconsidering a Final Certificate Order for the First Time in Over 80 Years, Without Acknowledging Its Change in Practice or Explaining Why the Change Is Warranted.

The Briefing Order is arbitrary and capricious because it ignores and violates longstanding Commission policy and precedent without explanation.[69] When an agency changes its policies, it must "display awareness that it is changing position," and provide a "reasoned explanation" for that change.[70] The D.C. Circuit has vacated Commission actions for failure to provide "reasoned explanation for how [the Commission's] decision comports with statutory direction [or] prior agency practice."[71] This explanation also must account for reliance interests that past policies and orders may have engendered.[72]

In over 80 years of certificate practice, the Commission has never unilaterally revoked a final certificate order.[73] The Commission has expressed doubts whether it even has this power under the NGA. Moreover, in *Trunkline LNG*, the Commission stated that even assuming *arguendo* that it *could* revoke a certificate order, this would be "an extraordinary step" that would "require a compelling showing of a fundamental shift of a long-term nature in the basic premises on which the certificate was issued."[74] The

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[69] APA, 5 U.S.C. § 706(2)(A).
[70] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[71] *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014). *See also PG&E Gas Transmission v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003) (vacating Commission action based on a finding that "FERC's failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking process").
[72] *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) ("[A]n agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." (citation omitted)).
[73] Briefing Order at P 26, n.39 (Comm'r Danly, dissenting) ("To my knowledge, the Commission has never reopened a record of a final order that was affirmed on appeal."); *Trunkline LNG*, 22 FERC ¶ 63,028, at p. 65,137 ("Neither this Commission nor the Economic Regulatory Administration has ever revoked a certificate or authorization in an ongoing project under Section 3 or Section 7 of the Natural Gas Act where the holder remained in compliance with the terms and conditions of the authorization. There has never even been a claim during these nearly 50 years since the Natural Gas Act became law that such power existed.").
[74] *Trunkline LNG*, 22 FERC ¶ 61,245, at p. 61,442.

Commission further stated that if it were to revoke a certificate order, it would be obligated to do so "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."[75]

The Briefing Order never acknowledges that reconsideration of the Certificate Order is unprecedented, ignores the analysis required by *Trunkline LNG* and does not explain why this action is appropriate. This is arbitrary and capricious. Furthermore, the Briefing Order makes no attempt to explain how the Commission could possibly undo the harm investors would incur should the Commission determine that this certificated and operating facility cannot remain in service. The Commission could never undo this harm, as construction of the Station alone was estimated to cost over $100 million, and the overall Atlantic Bridge Project cost approximately half a billion dollars.

The Commission also fails to explain why the Briefing Order is appropriate in light of the natural gas industry's longstanding reliance on the finality of certificate orders. As the D.C. Circuit explained in *Hirschey*:

> There is a strong interest in repose under any regime of legal rules. And particularly in this context—given the expense of developing hydroelectric projects—applicants, other potential investors and lending institutions must be able confidently to rely on the predictability of the FERC's procedural rules.[76]

Investors in natural gas pipelines are entitled to the same protection.

The Briefing Order may have cascading effects across the natural gas industry, none of which were considered in the Briefing Order's two paragraphs. By introducing doubt as to the finality of certificate orders, the Briefing Order will make it more difficult for

[75] *Id.* at p. 61,442 n.5.
[76] *Hirschey*, 701 F.2d at 220.

pipeline companies to develop new infrastructure. The Briefing Order adds significant risk to the investment community's ongoing ability to finance infrastructure at this level.

Revocation of a certificate also would upset customers' abilities to rely on pipelines to supply fuel for electric generation, heating of buildings including homes and hospitals, and manufacturing. The sudden removal from service of pipeline facilities will harm the shippers that rely on *firm* pipeline capacity, and by—for the first time—making it possible that this could occur, the Briefing Order has made it more difficult for natural gas customers to rely on pipelines going forward. Also, any removal of the Station from service could have rippling effects upon the customers who rely on the facility. Shippers may have executed financial instruments designed to mitigate their gas supply risk. Removal of the Station from service could make it more difficult for downstream local distribution companies and electric generators to meet their own service obligations. A reasoned decision requires that the Commission consider and address all of these factors.

In the past ten years, pipelines have invested approximately $97.8 billion developing new interstate transmission infrastructure. The mere possibility of a facility's removal from service adds risk to these investments, causing immediate harm to the industry. Removal of a facility from service could leave the operator unable to pay its debts; the specter of this event is enough to drive up present costs. For instance, when pipeline companies seek to refinance debt, they may find that financial institutions view their operations as having greater risk than ever before.

The Briefing Order does not consider these reliance interests or explain why its sudden change in policy is appropriate in light of them. This is arbitrary and capricious, and the Commission must grant rehearing.

C. The Briefing Order Is Impermissible Because the Commission Seeks Comment on Issues Outside Its Jurisdiction.

Rehearing also must be granted because the Briefing Order considers revoking the Certificate Order on the basis of issues that are outside the Commission's jurisdiction. The APA prohibits any agency action "in excess of statutory jurisdiction, authority, or limitations,"[77] and courts have vacated Commission actions for jurisdictional overreach.[78] The Briefing Order asks whether the Weymouth Compressor Station should be permitted to remain in service "[i]n light of the concerns expressed regarding public safety" and due to changes in its "projected air emissions."[79] It further asks whether "there [are] any additional mitigation measures the Commission should impose in response to air emissions or public safety concerns."[80]

The Commission lacks authority to suspend the Station's operation on the basis of safety or air emissions, absent a violation of the conditions of the Certificate Order. The Commission lacks jurisdiction over the safety and local air emissions of a facility constructed and operating in compliance with all applicable certificate conditions. Pipeline safety is within the exclusive jurisdiction of PHMSA.[81] The Commission has stated repeatedly that PHMSA, not FERC, has jurisdiction over pipeline safety.[82] Indeed, Chairman Glick has recognized that PHMSA has exclusive jurisdiction over pipeline safety

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[77] 5 U.S.C. § 706(2)(C).
[78] *See, e.g.*, *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258 (5th Cir. 2011) (vacating Commission rulemaking that addressed intrastate natural gas transportation).
[79] Briefing Order at P 2.
[80] *Id*.
[81] Pipeline Safety Act, 49 U.S.C. § 60102(a)(2) (providing that pipeline safety enforcement is within the authority of the U.S. Department of Transportation ("DOT")).
[82] *Tenn. Gas Pipeline Co.*, 139 FERC ¶ 61,008, at P 16 (2012); *Millennium Pipeline Co.*, 145 FERC ¶ 61,007, at P 88 (2013); *Williams Gas Pipelines Cent., Inc.*, 96 FERC ¶ 61,084, at p. 61,361 (2001) (stating that the DOT "has exclusive jurisdiction over the safety of gas pipelines").

in letters to members of Congress regarding the Weymouth Compressor Station at issue here.[83] Indeed, the Commission does not have its own safety regulations.

In reviewing certificate applications, the Commission conducts a comprehensive environmental review pursuant to NEPA.[84] The Commission considers safety as part of this review,[85] and requires pipelines to certify that they will comply with PHMSA's safety standards.[86] In the Certificate Order, the Commission found that "Algonquin has committed to complying with PHMSA regulations, and PHMSA is responsible for ensuring compliance with its regulations."[87] The D.C. Circuit determined that the Commission adequately addressed safety issues in the Certificate Order.[88]

PHMSA is fully capable of overseeing the safety of the Weymouth Compressor Station's operations, and in fact, issued a corrective action order concerning the facility.[89] PHMSA has an active enforcement division that examines compliance with the gas transmission pipeline regulations pursuant to 49 U.S.C. § 60101, *et seq.* and 49 C.F.R. Part 190. Over the past ten years, PHMSA has initiated 709 enforcement proceedings addressing natural gas transmission operators, including 23 corrective action orders.[90] In

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[83] Letter from Richard Glick, Chairman, FERC to Rep. Stephen F. Lynch, Docket No. CP16-9-000, at 1 (filed date Feb. 24, 2021) (PHMSA has "has exclusive jurisdiction to enforce compliance with pipeline safety standards and regulations.").
[84] *See generally Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999); *order on clarification*, 90 FERC ¶ 61,128 (2000); *order on clarification*, 92 FERC ¶ 61,094 (2000).
[85] 18 C.F.R. § 380.12(m) (Reliability and Safety).
[86] *Id.* § 157.14(a)(10)(vi).
[87] Certificate Order at P 228. The Commission also considered safety issues on rehearing. Rehearing Order at PP 27-28, 32, 134-139.
[88] *Town of Weymouth*, 2018 WL 6921213 at *1.
[89] PHMSA, Corrective Action Order, CPF No. 1-2020-014-CAO (Oct. 1, 2020), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-10/12020014CAO_Corrective%20Action%20Order_10012020-Algonquin%20Gas%20Transmission.pdf.
[90] *See* PHMSA, Summary of Enforcement Actions, https://primis.phmsa.dot.gov/comm/reports/enforce/Actions_opid_0.html?nocache=6476 (last visited Mar. 22, 2021).

21 of the 23 corrective action orders, operations of the affected pipeline segment were suspended until PHMSA permitted the pipeline to resume service.[91] Given PHMSA's robust enforcement record, including enforcement addressing the Weymouth Compressor Station, there is no need for the Commission to usurp PHMSA's jurisdiction.

Likewise, as the Commission has recognized, it lacks jurisdiction to enforce state air quality permits.[92] The Massachusetts DEP has sole jurisdiction over the facility's air emissions.[93] After considering comments from the public and conducting an adjudicatory hearing, the Massachusetts DEP granted Algonquin a Non-Major Comprehensive Air Quality Plan Approval for construction and operation of the Weymouth Compressor Station.[94]

Although two unplanned blowdowns occurred during the initial testing and operation of the Station, the Project's EA contemplated that unplanned blowdowns could occur. The Commission considered possible air emissions associated with blowdown events and found that they would not have significant impacts on air quality and health.[95] On September 11, 2020, during testing of the Station, there was an unplanned emergency shutdown, and a second unplanned emergency shutdown occurred on September 30, 2020. Collectively, these shutdowns emitted 0.34 percent of the annual emissions the

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[91] *See id*.
[92] *See, e.g.*, *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, at P 198 (2019) ("The review and enforcement of air quality permits and controls for [a] project is not under the Commission's jurisdiction."), *reh'g denied*, 171 FERC ¶ 61,049 (2020); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 190 (2016) ("The EPA, not the Commission, is responsible for identifying applicable facilities and enforcing any existing or future air quality regulations.").
[93] *Wyoming v. U.S. Dep't of Interior*, No. 2:16-CV-0285-SWS, 2020 WL 7641067, at *9 (D. Wyo. Oct. 8, 2020) (providing that the "*protection of air quality*. . . is expressly within the 'substantive field' of the EPA and States").
[94] Mass. DEP, Air Quality Plan Approval (Aug. 26, 2019), https://www.mass.gov/doc/air-quality-plan-approval-august-2019/download.
[95] EA at 2-98.

Commission evaluated in the Project. Both of these events were reported to the Commission in Weekly Status Reports at the time those events occurred.[96] As noted above, the Commission found in the EA that events of this nature did not pose significant health risks, and upheld this determination when it was challenged on rehearing.[97] The issue was also raised in the requests for rehearing of the Authorization Order, and those petitions were denied. Thus, even if the Commission had jurisdiction to address air emissions associated with unplanned shutdowns, it should have acted before denying the rehearing petitions on November 23, 2020.

The Commission cannot impose new conditions related to pipeline safety or local air emissions, or halt operation of the Station on these grounds. By seeking comment on safety and air emissions to "reconsider the current operation of the Weymouth Compressor Station," the Commission has overstepped its authority.

D. The Commission Should Grant Rehearing Because the Briefing Order Will Harm Reliability of the Nation's Energy Supply.

Just weeks after electric outages and a significant run-up in natural gas commodity prices following a devastating storm in Texas, the Commission should not take actions that will undermine the reliability of the Nation's energy supply. The Commission must carefully consider the adverse impact the Briefing Order will have on electric reliability.

Roughly 40 percent of the Nation's electricity is generated with natural gas, and the U.S. Energy Information Administration expects demand for natural gas-fired generation

[96] Algonquin Gas Transmission, LLC, Weekly Status Report No. 177 for the Reporting Period Ending September 11, 2020, Docket No. CP16-19-000, at 3 (Oct. 7, 2020); Algonquin Gas Transmission, LLC, Weekly Status Report No. 180 for the Reporting Period Ending October 2, 2020, at 2 (Oct. 7, 2020).
[97] EA at 2-98; Rehearing Order at P 132.

to continue growing through 2050.[98] Sufficient pipeline capacity is critical to maintaining the reliability of the electric grid. In its recent Long-Term Reliability Assessment, the North American Electric Reliability Corporation ("NERC") stated, "additional pipeline infrastructure is needed to reliably serve load."[99] NERC includes pipeline expansions as one of its six "mechanisms promoting fuel assurance," and explains that "[p]ipeline expansion into constrained areas significantly promotes [bulk power system] fuel assurance."[100] NERC's Reliability Assessment also notes that as more renewable generation comes online, additional natural gas-fired generation is "key" to offsetting these resources' variability and securing the bulk power system's reliability.[101]

The Commission recently stated that "resilience and reliability of the bulk power system must—and will—remain one of the Commission's paramount responsibilities and concerns."[102] The Commission recently announced that it will convene a technical conference to discuss issues surrounding the threat to electric system reliability posed by climate change and extreme weather events.[103] INGAA and EIC support the Commission's efforts. However, the Commission should not simultaneously undertake separate actions that undermine those goals. Rather, the Commission must consider resilience in a

[98] U.S. EIA, *Annual Energy Outlook 2021 with Projections to 2050*, at 16-18 (Feb. 2021), https://www.eia.gov/outlooks/aeo/pdf/AEO_Narrative_2021.pdf.
[99] NERC, *2020 Long-Term Reliability Assessment*, at 38 (Dec. 2020) ("Long-Term Reliability Assessment"), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf.
[100] *Id*. at 34.
[101] *Id*. at 7.
[102] *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 174 FERC ¶ 61,111, at P 4 (2021).
[103] *Climate Change, Extreme Weather, and Electric System Reliability*, Notice of Technical Conference, Docket No. AD21-13-000 (Mar. 5, 2021).

"comprehensive way."[104] Questioning whether an existing facility can remain in service completely undermines the Commission's credibility on reliability.

The Briefing Order will harm the reliability of the electric grid by making it more difficult to construct the additional pipeline infrastructure that NERC states "is needed to reliably serve load."[105] If the Commission were to revoke certificate authority for even a single natural gas facility, it would chill future natural gas investment nationwide. This also would have a significant economic impact on local distribution companies, gas-fired generators and industrial end-users that rely on natural gas. Further, it could cause disruption of the underlying marketplace in which natural gas users obtain their gas. Taking transportation capacity off the pipeline grid could not only upset the functioning of the natural gas market, but the power markets as well.

The Weymouth Compressor Station provides transportation capacity that benefits electric generators in New England, including Footprint Power's Salem Harbor station in Massachusetts, a new, high-efficiency natural gas power plant that replaced a higher-emitting coal-fired plant.[106] Revocation of the Certificate would immediately harm the electric generators connected to Algonquin's system and send a chilling message that pipeline capacity serving gas-fired generation is no longer reliable. At a time when the resilience of our electric grid is being scrutinized, FERC should not initiate a proceeding that could undermine reliability or the marketplace.

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[104] *Grid Resilience*, 174 FERC ¶ 61,111 (Comm'r Chatterjee Dissent at P 6).
[105] Long-Term Reliability Assessment at 38.
[106] *See* Algonquin Gas Transmission LLC's Petition for Panel Rehearing, Ex. M, Declaration of Eric Miller ¶ 7, Town of Weymouth, Massachusetts v. Massachusetts Department of Environmental Protection, No. 19-1794 (1st Cir. July 1, 2020).

E. FERC's Action Is Inconsistent With the Purpose of the NGA.

Finally, the Briefing Order contravenes the NGA's very purpose. A "principal aim" of the NGA is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[107] The Briefing Order does just the opposite—it is anything but "orderly" to reconsider a final Certificate Order, let alone one that has been affirmed on judicial review. The Commission has already conducted a years-long review of the Weymouth Compressor Station, which addressed the safety and air quality concerns mentioned in the Briefing Order. The Commission issued the Certificate Order unanimously, and then-Commissioner Glick and then-Chairman Chatterjee joined in denying rehearing.[108] On this basis, the Project's developers spent over $100 million building the Weymouth Compressor Station.

Investors expect certainty and consistency from regulatory agencies.[109] The Commission's action in this case implies that any final certificate, no matter how old, can be reopened and rescinded. As Commissioners Danly and Christie both pointed out in their dissents, the Briefing Order reduces regulatory certainty and makes it more difficult for pipeline operators to develop natural gas infrastructure. Commissioner Christie suggested that the Briefing Order may "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

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[107] *City of Clarksville*, 888 F.3d at 479 (quoting *NAACP*, 425 U.S. at 669-70).
[108] Rehearing Order, 161 FERC ¶ 61,255.
[109] *See FPC v. Hope Nat. Gas Co*., 320 U.S. 591, 603 (1944) ("the investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated . . . That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.").

this specter of uncertainty."[110] Commissioner Danly similarly expressed concern that the Briefing Order "threatens the certainty of the certificate upon which the pipeline's business is founded."[111]

The Briefing Order could have consequences beyond just the natural gas industry. The Commission's action may chill investment in other critical infrastructure, as participants in other Commission-regulated industries are watching this proceeding closely. The Briefing Order sends a message that the Commission is willing to ignore the statutory deadlines that make orders final. If the Commission can remove the Weymouth Compressor Station from service at this juncture, without so much as an assertion that a Commission order was violated, are other final Commission orders, no matter how old, equally susceptible to reversal?

The time for review of the Weymouth Compressor Station has passed. Having approved the Project, and permitted Algonquin to spend half a billion dollars developing it and placing it in service, the Commission cannot now turn back on its word.

The Commission should grant rehearing and void the Briefing Order. To undo the damage the Briefing Order has already caused, the Commission also should make clear that it will not—and cannot—reconsider or revoke any certificate order once it has become final.

[110] Briefing Order, Christie Dissent at P 6.

[111] *Id.*, Danly Dissent at P 32. *See also Trunkline LNG*, 22 FERC ¶ 61,245 at p. 61,445 (Commissioners Sousa and Butler, dissenting, and stating that the Commission's failure to clearly state that it will not unilaterally modify or revoke certificate orders would create "an element of regulatory uncertainty which will ultimately result in higher costs to natural gas consumers, and may inhibit natural gas companies undertaking future supplemental gas supply projects.").

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA and EIC respectfully request the Commission grant their motion to intervene out-of-time and grant rehearing of the Briefing Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2020), I hereby certify that I have this 22nd day of March 2021, served the forgoing documents on each person designated on the official service list compiled by the Secretary in this proceeding.

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