

Testimony of

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Subcommittee on Civil Rights and Civil Liberties
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Chairman Raskin, Ranking Member Roy, and Members of the Subcommittee:

We appreciate the opportunity to appear before you today as members of the staff of the Federal Energy Regulatory Commission (Commission).

My name is David Morenoff, and I am the Commission's Acting General Counsel. The Office of the General Counsel provides counsel and legal services to the Commission and to the Commission's staff. I joined the Commission's staff in 2006, and I am honored to have served in senior roles in the Office of the General Counsel since 2010.

My name is Terry Turpin, and I am Director of the Office of Energy Projects at the Commission. The Office of Energy Projects is responsible for taking a lead role in carrying out the Commission's responsibilities in siting infrastructure projects including: (1) licensing, administration, and safety of non-federal hydropower projects; (2) authorization of interstate natural gas pipelines and storage facilities; and (3) authorization of liquefied natural gas terminals. I am an engineer by training, and I have been a member of the Commission's staff for 22 years, including the past five years as Deputy Director and Director of the Office of Energy Projects.

As members of the Commission's staff, the views we express today are our own and are not necessarily those of the Commission or of any individual Commissioner.

Our testimony discusses the Commission's consideration of proposals to develop infrastructure for the transportation of natural gas in interstate commerce, including the opportunity for potentially affected landowners to participate in that process, and the ways

in which those proposals may affect those landowners. The Commission takes seriously the responsibility assigned to it by Congress under the Natural Gas Act (NGA) for determining whether a proposed natural gas pipeline or storage facility is in the public interest. In fulfilling those responsibilities, the Commission accounts for and balances many factors, including the potential impact of that infrastructure on landowners. The Commission also has taken recent steps to make its processes more easily accessible to potentially affected landowners, as well as to ensure that affected landowners who wish to do so may seek relief in court in a timely manner.

I. The Commission's Process for Determining Whether a Proposed Natural Gas Pipeline or Storage Facility is in Public Interest

Under the NGA, the Commission evaluates applications to construct interstate natural gas pipeline and storage facilities. Section 1 of the NGA states “that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”¹ Section 7 of the NGA requires that any person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce must obtain a certificate of public convenience and necessity from the Commission. It further provides that the Commission shall issue such a certificate to any qualified applicant upon finding

¹ 15 U.S.C. 717(a).

that the construction and operation of the proposed project “is or will be required by the present or future public convenience and necessity.”²

In approaching this evaluation in the context of any particular proceeding, the Commission considers the interests of all stakeholders and renders detailed decisions that address technical, economic, and environmental matters, as well as legal issues. The Commission bases its decisions on an extensive written record that reflects information from the prospective developer, other parties to the proceeding, commenters, and a thorough environmental analysis prepared by the Commission’s staff pursuant to the National Environmental Policy Act. The Commission’s regulations provide for public notice and the opportunity to intervene in certificate proceedings, for commenting on or protesting an application, and for participation in the environmental review process.

For approximately 20 years, the Commission’s Certificate Policy Statement has provided the analytical framework that the Commission uses in evaluating proposals for new natural gas transportation facilities.³ In developing the Certificate Policy Statement, the Commission sought “to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas.”⁴ The Certificate Policy Statement explains that, in deciding

² 15 U.S.C. 717f.

³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

⁴ Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,743.

whether a proposed natural gas project is required by public convenience and necessity, the Commission first will consider whether a proposed project's anticipated public benefits outweigh its residual adverse effects on the economic interests of the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new pipeline. If so, then the Commission in its order analyzes the project's environmental impacts and considers those findings in reaching a conclusion on whether a project is required by the public convenience and necessity. In considering an applicant's efforts to minimize the adverse economic impacts to landowners and communities, the Commission looks at actions such as the measures an applicant has taken throughout the application process to make route adjustments in response to concerns raised by landowners, government officials, or other stakeholders.

The Certificate Policy Statement identifies various public benefits that an applicant may seek to demonstrate, including meeting unserved demand, eliminating bottlenecks, providing access to new supplies, lowering costs to consumers, providing new interconnects that improve the interstate pipeline network, and increasing electric reliability. The Certificate Policy Statement further states that the amount of evidence necessary to establish the need for a proposed project depends on its potential adverse economic effects. Relevant factors demonstrating the need for the project may include, but are not limited to, precedent agreements, demand projections, evidence of potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The Commission considers precedent agreements as

significant evidence of demand for a project, and most project proponents include such agreements in their applications.

II. Eminent Domain.

As noted above, in NGA section 7, Congress assigned to the Commission the responsibility to determine whether the construction and operation of proposed natural gas pipeline and storage facilities are in the public convenience and necessity. After the Commission has issued a certificate of public convenience and necessity with respect to a particular project, NGA section 7(h) allows the certificate holder to initiate eminent domain proceedings to acquire the land necessary to construct the approved facilities, if it is unable to agree with the owner of the property to the compensation to be paid for access and use.⁵

Thus, although the Commission's granting of a certificate of public convenience and necessity is a necessary prerequisite for pipeline companies initiating eminent domain proceedings, NGA section 7(h) assigns eminent domain authority solely to certificate holders and confers no such authority upon the Commission. The Commission does not grant, exercise, or oversee the implementation of NGA eminent domain authority: that is a matter assigned exclusively to the courts. Nor does the Commission have a role in the acquisition of property rights through private contracts resulting from easement negotiations between a pipeline developer and a landowner. Whether property rights are established by negotiated contract or an eminent domain proceeding, any legal disputes

⁵ 15 U.S.C. § 717f(h).

involving the timing and nature of those rights, as well as compensation that the landowner may receive, must be resolved by an appropriate federal or state court.

III. Oversight of Project Construction

Section 7 of the NGA also provides that the Commission may approve a proposed project subject to “such reasonable terms and conditions as the public convenience and necessity may require.”⁶ When the Commission grants a certificate of public convenience and necessity, its order typically includes conditions that the prospective developer must meet before construction or operation of the project may begin, and typically provides that a company must receive written authorization from the Commission (often referred to as a Notice to Proceed) before commencing construction of any project facilities, to ensure that the Commission’s pre-construction requirements have been met. These requirements include demonstration that the developer has met statutory requirements for federally listed threatened and endangered species, cultural resources, and waters of the United States, and that the developer has received applicable authorizations required under federal law. The Commission’s order also includes a standard condition that requires each project developer to establish a program, reviewed and approved by the Commission, for its own compliance oversight during construction, including the employment of Environmental Inspectors.

During construction, the project developer must meet the conditions of the Commission’s order, which include compliance with the requirements of FERC’s *Upland Erosion Control, Revegetation, and Maintenance Plan (Plan)* and *Wetland and Waterbody*

⁶ 15 U.S.C. 717f(e).

Construction and Mitigation Procedures (Procedures). These Environmental Inspectors monitor construction activity within all project areas to ensure it meets the Commission's Plan and Procedures, as well as the environmental conditions of the Commission's order. The Commission also requires the project developer to file construction status reports, weekly or monthly depending on the complexity of the project, until construction is complete. These reports must include: a listing of all problems and non-compliances reported by the Environmental Inspectors and corrective actions implemented; a description of any landowner/resident complaints related to compliance with the requirements of the Commission's order, and the measures taken to satisfy their concerns; and copies of any correspondence received by the developer from other federal, state, or local permitting agencies concerning instances of non-compliance.

Throughout project construction, FERC staff monitor the developer's progress and compliance through review of construction status reports and staff inspection. FERC staff also perform routine inspections during construction to ensure that the project developer and its Environmental Inspectors are appropriately complying with the Commission's Plan and Procedures. During these inspections, FERC staff concentrate on areas along the project right-of-way where landowners raised concerns and on sensitive environmental areas such as wetlands. On larger, more complex projects, the Commission typically has used a third-party environmental compliance monitoring program to augment Commission staff's oversight. In such a program, environmental compliance monitors, who report solely to Commission staff, conduct daily field inspections of the construction rights-of-way to ensure that the developer remains in compliance with mitigation measures, the

environmental conditions of the Commission's order, and the FERC Plan and Procedures. Commission staff reviews all work by the environmental compliance monitors, including field inspection findings, issuances of non-compliance notices, and inspection findings regarding corrective measures that the developer has taken. Where non-compliances have been identified, staff verify that the developer has completed corrective actions or, if necessary, directs further actions to be done by the developer.

Commission oversight continues after project construction, throughout the entire period required for the developer to complete restoration. Restoration activities include final grading, topsoil replacement, decompaction, installation of permanent erosion control structures, and seeding to ensure successful revegetation of the right-of-way. The Commission through its orders typically requires project developers to demonstrate substantial progress in these activities before Commission staff allows the project to go into service. Although the bulk of the work typically is completed soon after a project goes into service, restoration can be a multi-year effort. The Commission oversees follow-up inspections of all disturbed areas for a minimum of two years to determine the revegetation status and to address landowner concerns. During this period, the project developer must document these efforts in quarterly reports filed with the Commission. This documentation must include the corrective actions taken for any compliance deficiencies and landowner concerns, as well as the restoration status of the project. The restoration requirement has no specified end date and continues until Commission staff determines that complete restoration is successful.

At any time throughout the construction and restoration process, landowners can notify the Commission if they believe their property was not properly restored, by contacting the Commission's Landowner Helpline or by making a filing in the relevant Commission docket. Staff from either the Office of Energy Projects or the Commission's Dispute Resolution Service will then follow up with the landowner. If there are additional restoration activities that the landowner believes are needed, staff will contact the landowner and the pipeline company for information necessary to assess the issue. This information may include additional clarification and/or photographic documentation. Staff also perform independent inspections of the project areas during restoration, including inspection of the landowner's property where restoration concerns are raised. Based on this information, staff determines if any further remediation by the company is required and directs the company to undertake it.

IV. Opportunity and Requirements for Appellate Review

Individuals, including potentially affected landowners, have the option to intervene and thereby become a party in the Commission's proceeding on a proposed project. Parties have the right to request rehearing of Commission orders and, if the Commission denies that request, to seek relief in an appropriate U.S. Courts of Appeals. The NGA requires parties to seek rehearing before petitioning a court for review of Commission orders and provides that if the Commission does not act on the rehearing request within 30 days, the request may be deemed denied.

Prior to July of this year, and consistent with 50 years of court precedent, the Commission routinely initially acted on rehearing requests by issuing what was known as a

tolling order. Tolling orders granted rehearing for the limited purpose of extending the time for the Commission to consider the merits of rehearing requests. This practice allowed the Commission time to prepare comprehensive orders addressing the concerns raised on rehearing by parties, but also had the unintended effect of delaying the ability of parties to seek judicial review of the Commission's order.

On June 30, 2020, in *Allegheny Defense Project v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision addressing the timeliness of Commission action on requests for rehearing under the NGA. The court recognized that the Commission's responsibilities on rehearing are complex, and also that the tolling order practice had been affirmed by the courts for decades. But the court held that, under the plain language of the NGA, tolling orders do not amount to action on rehearing requests, and do not prevent rehearing requests from being deemed denied after 30 days. The court also highlighted the Commission's authority, even where rehearing has been deemed denied by operation of this statutory deadline, to "modify or set aside, in whole or in part" the underlying order until the record on appeal is filed with a reviewing court.

Beginning the day after the court's decision, the Commission began implementing changes to its rehearing practices both to expedite consideration of rehearing requests and to keep the public apprised of the status of Commission proceedings. Most importantly, the Commission no longer issues tolling orders. Instead, where the Commission is not acting on the merits of a rehearing request by the 30-day deadline, the Commission's Office of the Secretary generally will issue one of two types of notices no earlier than the 31st day after a rehearing request is received: a Notice of Denial of Rehearing by Operation of Law, or,

where the Commission intends to make further statements about matters raised on rehearing, a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration. Both these types of Notices differ from a tolling order in that they acknowledge that, because the 30-day deadline in the NGA has passed, rehearing may be deemed denied by operation of law and, therefore, a party may proceed to seek judicial review of the underlying Commission order.

These and other changes in the Commission's rehearing practices are intended to allow appeals of Commission orders to proceed on a complete administrative record in a timely manner. The Commission made other changes over the preceding year specifically to expedite consideration of landowner requests for rehearing in the Commission's natural gas infrastructure proceedings. In September 2019, Chairman Chatterjee pledged that the Commission would strive to act on landowner-related rehearing requests in natural gas infrastructure proceedings within 30 days, to reduce the use of tolling orders in those cases. In February 2020, Chairman Chatterjee further announced the creation of a new Rehearings section within the Commission's Office of the General Counsel, as well as a group within that section focused on landowner-related rehearing requests, to help ensure that rehearing requests are considered as quickly as possible.

Moreover, reflecting both its commitment to respond expeditiously to parties' concerns raised on rehearing and concerns associated with the possibility of construction starting before a party could seek judicial review, the Commission in June 2020 issued Order No. 871. In that final rule, the Commission amended its regulations to state that no authorization to proceed with construction activities would be issued until the time for the

filing of a request for rehearing has expired with no such request, or until the Commission acted upon the merits of that timely requests for rehearing.⁷

Thank you again for the opportunity to join the Committee today to discuss these topics. We look forward to any questions you may have.

⁷ Order No. 871, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201 (2020), *reh'g pending*.