

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC

Docket No. CP16-9-009

(Issued February 20, 2020)

GLICK, Commissioner, *dissenting*:

1. On December 26, 2018, the Commission's staff extended by two years the deadline to complete construction of the Atlantic Bridge pipeline just hours after the project's developer—Algonquin Gas Transmission, LLC (Algonquin)—asked for the additional time.¹ I dissent from today's order denying rehearing of Commission staff's action because, in my opinion, such a significant modification of a condition in a natural gas pipeline certificate requires consideration and action by the Commission as a whole, not Commission staff on its own. This proceeding presents important issues and the parties deserve better than a cursory response from Commission Staff.

2. The relevant facts are straightforward. On January 25, 2017, the Commission issued a certificate of public convenience and necessity under Natural Gas Act (NGA) section 7² for the Atlantic Bridge pipeline.³ The certificate required that the project be completed and put into service within two years—*i.e.*, by January 25, 2019.⁴ In addition, the certificate required the developers to secure the necessary federal approvals prior to beginning any construction. Before long, it became clear that those approvals would not be immediately forthcoming and that the project would not be finished as originally anticipated. Although the parties disagree vehemently over who bears responsibility for that delay, the fact of the delay is all that matters for these purposes. On the day after Christmas—December 26, 2018—a month before the deadline to complete construction,

¹ According to the eLibrary entries, the extension request was received by the Commission at 8:00:17 AM on December 26, 2018, and was published to the docket at 10:51:53 AM. Commission staff's letter order granting the extension request appeared on the docket less than an hour later at 11:40:41 AM.

² 15 U.S.C. § 717f (2018).

³ *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061, *reh'g denied*, 161 FERC ¶ 61,255 (2017).

⁴ *Id.* Order Para. B(1).

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Algonquin submitted a request for a two-year extension of that deadline.⁵ As noted above, Commission staff granted the request a few hours later, just minutes after it appeared on the docket.⁶

3. Whether to modify a significant deadline imposed by a section 7 certificate is an important issue that should be resolved by the Commission acting as a whole, not Commission staff acting through its delegated authority.⁷ For one thing, a deadline to complete construction helps to limit the disruption caused by constructing a new pipeline by ensuring that any disruption occurs within a discrete timeframe and that construction is not prolonged for years into the future. In addition, a deadline to complete construction helps to ensure that the Commission does not award certificates to speculative projects or projects that cannot or will not be timely completed. Finally, as today's order explains, a deadline for completing construction "diminish[es] the potential that the public interest might be compromised by significant changes occurring between issuance of the certificate and commencement of the project."⁸ In short, deadlines to complete construction are an important tool for the Commission to use in ensuring that an interstate natural gas pipeline is developed in a manner that is consistent with the public interest.⁹

4. In some cases, there may be a good reason for a delay in a new pipeline's construction schedule and, in those instances, it may be consistent with the public interest to extend the relevant deadline. But whether good cause exists and whether an extension is consistent with the public interest is an important question that each Commissioner should decide for themselves. After all, it is the Commissioners that are nominated by

⁵ See *supra* n.1.

⁶ *Id.*

⁷ In any case, the Commission's delegation of authority to its staff is permissive. Nothing requires Commission staff to exercise delegated authority in every instance in which it is conceivably authorized to do so. Commission staff, acting on its own or at the direction of the Chairman or the Commission, could choose not use its delegated authority, allowing the Commission to issue an order on the merits. Such forbearance is not uncommon in other areas where the Commission has delegated its authority.

⁸ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 15 (2020) (internal quotation marks and alterations omitted) (Order).

⁹ Indeed, the Commission's regulations provide that a deadline to complete construction is one of the standard conditions that it attaches to section 7 certificates. See 18 CFR § 157.20(b) (2019).

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the President and confirmed by the Senate to make the decisions entrusted to the Commission pursuant to our various statutory authorities.

5. That is especially true here, where the Commission was on notice that any extension in this proceeding was likely to be disputed.¹⁰ A proceeding in which the relevant law and facts are subject to significant disagreement is likely to raise important questions that deserve the Commissioners' attention and demand a reasoned response from the Commission as a whole. Under those circumstances, Commission staff's exercise of delegated authority will rarely, if ever, constitute an adequate response.

6. Although my concerns would apply to any exercise of delegated authority under these circumstances, I am particularly troubled by the facts before us here. As explained above, the extension request was approved the same morning it came in and only minutes after it was published on the docket.¹¹ That means that the parties who opposed the extension had no opportunity whatsoever to be heard before it was granted. Moreover, I do not see how, on the record before us, a few hours was anywhere near enough time to meaningfully evaluate whether good cause existed to extend the deadline, much less to render the type of reasoned decision that the Administrative Procedure Act requires.¹²

7. Actions like these only lend further credence to those who view the Commission as a rubber stamp in pipeline proceedings. We can and must do better. The process of producing an order that is voted on by the full Commission may not be perfect—and the Commissioners may not always agree—but that process will almost certainly deliver more reasoned and considered decisionmaking than the parties received here.

8. The Commission responds to my concerns by asserting that it “generally acts” on contested requests for an extension of time and proposing a new policy for noticing and

¹⁰ In January 2018, a member of Congress representing one of the towns affected by the project sent a letter to the Commission urging that it deny any request to extend the deadline to commence construction. *See* February 22, 2018 Letter from Congressman Stephen F. Lynch. The Chairman responded to this letter by noting that no request for an extension had been filed, *see* March 21, 2018 Letter from Chairman McIntyre, which was true at the time. The request was filed several months later and only a couple of hours before the delegated order was issued, likely without time to notify the Chairman that such a request had been subsequently filed. I certainly received no such notification.

¹¹ *See supra* n.1.

¹² *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (requiring that agency action be the product of reasoned decisionmaking).

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responding to extension requests.¹³ That assertion is more than a little sanctimonious coming in a proceeding where the requested extension was granted less than an hour after it appeared on the docket, well before any party had an opportunity to object.

9. Nevertheless, I recognize that the new policy is a step in the right direction and, insofar as it represents progress, I support it. But it cannot cure the error that already took place in this proceeding. In any case, because I believe that these extension requests represent important questions, I would prefer not to truncate parties' opportunity to be heard by prohibiting reply comments and answers.¹⁴ In addition, although I agree that extension requests should not be a forum to re-litigate the underlying certificate,¹⁵ parties must have the right to argue that developments since the issuance of the certificate have called into question the Commission's finding of public convenience and necessity. That said, I will keep an open mind in evaluating how this policy plays out and whether it provides parties with adequate process for addressing extension requests.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

¹³ Order, 170 FERC ¶ 61,144 at P 39.

¹⁴ *Id.*

¹⁵ *Cf. Eagle Crest Energy Co.*, 167 FERC ¶ 61,117 (2019) (Glick, Comm'r, dissenting in part at P 3).