

169 FERC ¶ 61,102
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Constitution Pipeline Company, LLC
Iroquois Gas Transmission System, L.P.

Docket Nos. CP13-499-005
CP13-502-002

ORDER ON REHEARING

(Issued November 8, 2019)

1. On November 5, 2018, the Commission issued an order granting Constitution Pipeline Company, LLC (Constitution) and Iroquois Gas Transmission System, L.P. (Iroquois) two-year extensions of time to construct the Constitution Pipeline Project and the Wright Interconnect Project, respectively, in Susquehanna County, Pennsylvania; and Broome, Chenango, Delaware, and Scholarie Counties, New York (Extension Order).¹ The Extension Order required that Constitution and Iroquois construct their projects and make them available for service by December 2, 2020.² Stop the Pipeline; Catskill Mountainkeeper, Clean Air Council, Delaware-Otsego Audubon Society, Delaware Riverkeeper Network, Riverkeeper, Inc., and Sierra Club (collectively, Catskill Mountainkeeper); and Catherine Holleran, Michael and Maryann Zeffer, Patricia Glover, and Dustin Webster (collectively, Holleran Landowners) filed timely requests for rehearing of the Extension Order. For the reasons discussed below, we dismiss or deny the requests for rehearing.

I. Background

2. The Commission issued certificates authorizing the Constitution Pipeline Project and Wright Interconnect Project on December 2, 2014.³ The Constitution Pipeline Project will be a new pipeline system designed to provide 650,000 dekatherms (Dth) per

¹ *Constitution Pipeline, Co., LLC*, 165 FERC ¶ 61,081 (2018) (Extension Order).

² *Id.* PP 24 & 26.

³ *Constitution Pipeline, Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order), *reh'g denied*, 154 FERC ¶ 61,046 (2016).

day of firm transportation service from northern Pennsylvania to markets in New York and New England.⁴ The Wright Interconnect Project will add new compression facilities and modify existing compression facilities at the Wright Compressor Station and is designed to provide 650,000 Dth per day of firm transportation service from the Constitution Pipeline Project to Iroquois' existing mainline and Tennessee Gas Pipeline Company, L.L.C.'s pipeline system.⁵

3. The Certificate Order required Constitution and Iroquois to construct and place the Constitution Pipeline System and the Wright Interconnection Project into service by December 2, 2016.⁶ The Certificate Order explained that Constitution and Iroquois could only begin construction once they obtained "all applicable authorizations required under federal law (or evidence of waiver thereof)."⁷

4. On July 22, 2016, Constitution requested a two-year extension of the Certificate Order's time limit, to December 2, 2018.⁸ Constitution explained that it needed an extension because its application for a Clean Water Act section 401 water quality certification had been denied by the New York State Department of Environmental Conservation (New York DEC) and Constitution had filed an appeal of that decision with the U.S. Court of Appeals for the Second Circuit (Second Circuit).⁹ The Director of the Commission's Division of Pipeline Certificates granted Constitution's request for a two-year extension.¹⁰ On rehearing, the Commission affirmed the decision to grant the requested extension for good cause.¹¹

5. On July 29, 2016, Iroquois also requested a two-year extension of the Certificate Order's time limit, to December 2, 2018. Iroquois explained that it had initiated a review

⁴ *Id.* PP 8, 25.

⁵ *Id.* PP 2, 12.

⁶ *Id.* at ordering para. (E)(1).

⁷ *Id.* at appendix, envtl. condition 8.

⁸ Constitution July 22, 2016 Request for Extension of Time.

⁹ *Id.*

¹⁰ *Constitution Pipeline Co., LLC*, Docket No. CP13-499-000 (July 26, 2016) (delegated order).

¹¹ *Constitution Pipeline Co., LLC*, 157 FERC ¶ 61,145, at P 13 (2016).

proceeding in the U.S. Court of Appeals for the District of Columbia (D.C. Circuit) to compel the New York DEC to act on Iroquois's application for a State Facility & Title V air permit under the Clean Air Act.¹² The Director of the Commission's Division of Pipeline Certificates granted Iroquois' request for a two-year extension for good cause.¹³

6. On August 18, 2017, the Second Circuit upheld the New York DEC's decision to deny Constitution's application for a water quality certification¹⁴ and concluded that the court lacked jurisdiction to decide whether the New York DEC waived its authority under Clean Water Act section 401 through delay.¹⁵ On October 11, 2017, Constitution filed with the Commission a petition for a declaratory order, which sought a finding that the New York DEC had waived its authority under section 401 of the Clean Water Act.¹⁶ On January 11, 2018, the Commission denied the petition, and subsequently denied rehearing.¹⁷ On September 14, 2018, Constitution filed a petition for review of the Declaratory Order in the D.C. Circuit.¹⁸

7. On June 25, 2018, Constitution requested a second two-year extension of the Certificate Order's time limit from December 2, 2018, to December 2, 2020.¹⁹ On August 1, 2018, Iroquois also requested a second two-year extension to the same date.²⁰ The Commission received filings in opposition to Constitution's request for an extension

¹² Iroquois July 29, 2016 Request for Extension of Time.

¹³ *Iroquois Gas Transmission System, L.P.*, Docket No. CP13-502-000 (Aug. 2, 2016) (delegated order).

¹⁴ *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Env'tl. Conservation*, 868 F.3d 87, 102-103 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 1697 (2018).

¹⁵ *Id.* at 99-100.

¹⁶ Constitution, Petition for Declaratory Order, Docket No. CP18-5-000 (filed Oct. 11, 2017).

¹⁷ *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014, at P 23 (2018) (Declaratory Order), *reh'g denied*, 164 FERC ¶ 61,029 (2018) (September 2018 Waiver Rehearing Order).

¹⁸ *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. No. 18-1251.

¹⁹ Constitution June 25, 2018 Request for Extension of Time.

²⁰ Iroquois August 1, 2018 Request for Extension of Time.

of time, including from Catskill Mountainkeeper, Holleran Landowners, and Stop the Pipeline. On November 5, 2018, the Commission granted the requested extensions of time to December 2, 2020.²¹

8. Stop the Pipeline, Catskill Mountainkeeper, and the Holleran Landowners filed timely requests for rehearing of the Extension Order.

9. On February 25, 2019, the Commission filed with the D.C. Circuit an unopposed motion for voluntary remand of the Declaratory Order.²² Specifically, the Commission sought the remand so that it could evaluate the implications of the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC (Hoopa Valley)*²³ on the New York DEC's denial of Constitution's Clean Water Act section 401 application. In *Hoopa Valley*, the court determined that "a state waives its Section 401 authority when, pursuant to an agreement between the state and applicant, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."²⁴ On August 28, 2019, the Commission issued an order reversing its opinion in the Declaratory Order and determining that under *Hoopa Valley*, the New York DEC waived its authority under Clean Water Act section 401 to issue or deny a water quality certification for the proposed Constitution Pipeline Project.²⁵

II. Procedural Matters

A. Party Status

10. Under NGA section 19(a) and Rule 713(b) of the Commission's Rules and Practice and Procedure, only a party to a proceeding has standing to request rehearing of a final Commission decision.²⁶ Any person seeking to become a party must file a motion

²¹ Extension Order, 165 FERC ¶ 61,081.

²² *Constitution Pipeline Co., LLC v. FERC*, Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, No. 18-1251 (D.C. Cir. Feb. 25, 2019).

²³ 913 F.3d 1099 (D.C. Cir. 2019).

²⁴ *Id.* at 1103.

²⁵ *Constitution Pipeline, Co., LLC*, 168 FERC ¶ 61,129 (2019) (Remand Order) (rehearing pending).

²⁶ 15 U.S.C. § 717f(a) (2018); 18 C.F.R. § 385.713(b) (2019).

to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.²⁷ Michael and Maryann Zeffer, Patricia Glover, and Dustin Webster are not parties to this proceeding; accordingly, they may not join in the rehearing request filed by Holleran Landowners.²⁸

B. Answers

11. On December 21, 2018, Constitution filed a motion for leave to answer and answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure prohibits answers to a request for rehearing.²⁹ Accordingly, we reject Constitution's filing.

III. Discussion

A. The Commission Had Jurisdiction To Act on the Extension of Time Request

12. Stop the Pipeline contends that the Commission violated NGA section 19(b) because it issued the Extension Order after the Commission filed, with the Second

²⁷ 18 C.F.R. § 385.214(a)(3).

²⁸ We note that Holleran Landowner's Petition in Opposition sought party status for Michael and Maryann Zeffer, Patricia Glover, and Dustin Webster. Holleran Landowners Petition In Opposition at n.2. When intervention is sought after the issuance of a dispositive order, as is the case here, movants bear a higher burden to show good cause for filing late because the prejudice to other parties and the burdens on the Commission of granting late intervention are substantial. *See, e.g., Natural Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037 (2012); *Flor. Gas Transmission Co.*, 133 FERC ¶ 61,156 (2010). Holleran Landowners did not provide any justification for filing late intervention for Michael and Maryann Zeffer, Patricia Glover, and Dustin Webster. The petition in opposition merely stated that for certain landowners it sought intervention now and satisfied the requirements of Rule 214. Holleran Landowners Petition In Opposition at n.2. Therefore, not having met the higher burden to show good cause to intervene after the issuance of the dispositive Certificate Order, we deny Michael and Maryann Zeffer's, Patricia Glover's, and Dustin Webster's requests for late intervention. However, Catherine Holleran, an intervenor in this proceeding, appears to be part of the Holleran Landowners, and accordingly, we will address Holleran Landowners' request for rehearing.

²⁹ 18 C.F.R. § 385.713(d)(1).

Circuit, its record on appeal of the Certificate Order.³⁰ Thus, Stop the Pipeline argues that the Commission lacked jurisdiction to act on Constitution's and Iroquois' extension of time requests.³¹

13. Under NGA section 19(b), the Commission may modify or set aside an order until the record in a proceeding is filed in a court of appeals. Once the record is filed, the court of appeals "shall have jurisdiction, which ... shall be exclusive, to affirm, modify, or set aside" the order.³² However, an aggrieved party cannot petition for review at the court without first requesting rehearing at the Commission.³³ Section 19(b) puts "teeth into that requirement"³⁴ by providing that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing, unless there is reasonable ground for failure to do so."³⁵ Thus, a reviewing court has exclusive jurisdiction over matters first raised before the Commission on rehearing and subsequently raised before the court. But, the Commission may issue further orders that address other matters not raised on rehearing, and therefore not before the reviewing court.³⁶ The petitions for review in front of the Second Circuit do not address when Constitution and Iroquois must complete construction and place their projects into service. The Commission's action in the Extension Order did not affirm, modify, or set aside the Certificate Order or otherwise

³⁰ Stop the Pipeline Request for Rehearing at 3.

³¹ *Id.*

³² 15 U.S.C. § 717r(b).

³³ *Id.* § 717r(a).

³⁴ *S. Natural Gas Co. v. FERC*, 877 F.2d 1066, 1072 (D.C. Cir. 1989).

³⁵ 15 U.S.C. § 717r(b).

³⁶ See *San Diego Gas & Elec. Co.*, 105 FERC ¶ 61,066, at P 118 (2003) (finding the Commission did not violate Federal Power Act section 313 by issuing a refund order that used a new methodology to calculate prices because this methodology was never addressed in earlier rehearing orders); *Amoco Production Co.*, 49 FPC 777, 778 (1973) (denying petitioner's request to defer a consolidated proceeding on a contractual issue under review by the court of appeals until the court issues a decision on the matter). Although some of these cases were decided under the Federal Power Act, the rehearing provisions in the Federal Power Act and the NGA are identical and read *in pari materia*. See *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line v. Mobil Gas Service Corp.*, 350 U.S. 332 (1956).

encroach upon the exclusive jurisdiction of the Second Circuit’s review of the Certificate Order, because the Extension Order addressed a matter not raised in the Certificate Order. Thus, the Commission acted within the scope of its statutory authority in granting the requested extensions of time.

14. Our approach here is in keeping with that taken by appellate courts on review of decisions from a district court, where matters remain before the district court. As described by the D.C. Circuit in *Chamber of Commerce v. Securities and Exchange Commission (Chamber of Commerce)*, “the jurisdictional authority of district courts and courts of appeal are *mutually exclusive regarding issues raised in the appeal . . .*”³⁷ As noted above, the pending petitions for review do not address when Constitution and Iroquois must complete construction and place their projects into service. Further, some of the reasons underlying the court’s principle, “such as avoiding confusion or a waste of time by having the same matter considered in more than one forum at the same time, apply to administrative proceedings”³⁸ but are not implicated by the Commission’s grant of an extension of time. We find that granting an extension of time allows the Commission to carry out its mission³⁹ with little risk of wasting the court’s time during review of the appeal, primarily because Constitution’s and Iroquois’ request to extend the deadline to complete construction and place the projects into service is not under the court’s review.

15. Stop the Pipeline claims that the Commission must follow *Ryan v. U.S. Line Co. (Ryan)*,⁴⁰ and, asserts that under that case, “the Commission was only allowed to consider

³⁷ 443 F.3d 890, 898 (D.C. Cir. 2006).

³⁸ *Chamber of Commerce*, 443 F.3d at 897 (emphasis added) (citing *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”); *U.S. v. DeFries*, 129 F.3d 1293, 1303 (D.C. Cir. 1997); *U.S. v. Salerno*, 868 F.2d 524, 540 (2d Cir. 1989)).

³⁹ See *infra* P 18 (discussing the Commission’s continuing responsibilities during the pendency of an appeal).

⁴⁰ 303 F.2d 430, 434 (2d Cir. 1992) (holding that because the case was filed for appeal with the Second Circuit, the district court had lost jurisdiction over the case and, in order to grant a motion, the district court would have to seek remand from the court of appeals).

and deny the Company's motion for an extension."⁴¹ Stop the Pipeline misunderstands *Ryan*, which simply reflects the practice later formalized in Federal Rule of Appellate Procedure 12.1, which provides that a district court may offer an indicative ruling on a motion that is, in light of a pending appeal, beyond the jurisdiction of the district court to grant.⁴² Thus, Stop the Pipeline errs by incorrectly assuming that the Commission lacks authority to grant the extensions of time requested here. As explained above, the Commission has interpreted its statutory authority in a reasonable manner to allow it to continue to carry out its statutory responsibilities in a manner that does not infringe upon the court's review.

16. Stop the Pipeline states that the Commission incorrectly relied on *Alabama Power Company v. FPC (Alabama Power)*⁴³ and *Chamber of Commerce*⁴⁴ to support the Commission's finding that it could issue the Extension Order.⁴⁵ Specifically, Stop the Pipeline states that neither case addresses the issue of whether the Commission can modify a certificate order while an appeals court is reviewing an appeal of that order; rather, it explains that each case refers only to an agency's power to amend or modify a rulemaking proceeding.⁴⁶

17. We disagree with Stop the Pipeline's assertion that because these cases involved rulemakings, they do not support the Commission's determination in this proceeding.⁴⁷ Stop the Pipeline fails to explain how differences between rulemakings and adjudications are relevant to the Commission's authority under NGA section 19(b). In any event, neither *Alabama Power* nor *Chamber of Commerce* spoke to an agency's ability to, as here, consider matters that are outside of the scope of the court's review.

⁴¹ Stop the Pipeline Request for Rehearing at 5-6 (citing *Ryan*, 303 F.2d at 434).

⁴² See *Ryan*, 303 F.2d at 434 ("Under this procedure, the district court is first to determine whether it would grant the motion; if it decides in favor of it, then and then only is the necessary remand by the court of appeals to be sought.").

⁴³ 511 F.2d 383, 388-89 (D.C. Cir. 1974).

⁴⁴ 443 F.3d 890, 898 (D.C. Cir. 2006).

⁴⁵ Stop the Pipeline Request for Rehearing at 3 (citing Extension Order, 165 FERC ¶ 61,081 at P 21 n.58).

⁴⁶ *Id.*

⁴⁷ *Id.* at 5.

18. Stop the Pipeline would have the Commission follow a course that would prevent our functioning effectively, because we would have to either stay the proceedings for an indefinite period of time,⁴⁸ not only for the completion of review by the court of appeals, but until all rights to further judicial review are exhausted, or vacate our authorizations and halt any judicial review of our determinations. Such an approach would conflict with the design of the NGA, which contemplates both that the Commission has the authority to condition a certificate authorizing facility construction and operation,⁴⁹ and to enforce those conditions,⁵⁰ and equally provides that the commencement of proceedings on judicial review of the Commission's orders does not, absent court order, operate as a stay of the Commission's order.⁵¹ Thus, either course advocated by Stop the Pipeline would undermine our statutory mandate and obstruct our authorization of facilities the Commission otherwise has found to be in the public convenience and necessity.

B. The Commission Found Good Cause to Grant Constitution an Extension of Time

19. The Commission's certificate orders include completion deadlines, in part, because the information supporting our public convenience and necessity determinations can become stale with the passage of time.⁵² However, construction deadlines may be extended for good cause.⁵³ The completion date specified in a certificate order provides what the Commission believes—based on its assessment of circumstances relevant to the

⁴⁸ *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at n.12 (2001) (finding the statutory language of NGA section 19(b) can reasonably be read not to cover a request for stay); *Pyramid Lake Paiute Tribe of Indians v. Sierra Pacific Power Company*, 15 FERC ¶ 61,098, at 61,213 (1981) (finding the Commission decision to defer an applicant's filing of a license application does not violate FPA section 313); *City of Seattle, Washington, Department of Lighting*, 12 FERC ¶ 61,010, at 61,023 (1980) (granting licensee's request for stay of the license pending judicial review of the license).

⁴⁹ See 15 U.S.C. § 717f(e).

⁵⁰ See *id.* § 717s.

⁵¹ See *id.* § 717r(c)

⁵² *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165, at P 8 (2016) (*Arlington*) (citing *Iroquois Gas Transmission System, L.P.*, 104 FERC ¶ 61,307, at P 14 (2003) (*Iroquois*)).

⁵³ *Id.* at P 8 n.6 (quoting *Iroquois*, 104 FERC ¶ 61,307 at P 14); see also 18 C.F.R. § 385.2008(a).

specific project—to be a reasonable period of time for the project sponsor to develop its implementation plan to address the conditions of the Commission’s authorization, complete construction, and make the project available for service.⁵⁴ But, if a certificate holder files for an extension of time within the timeframe during which the environmental and other public interest findings underlying the Commission’s authorization can be expected to remain valid, the Commission, or staff with delegated authority, generally will grant an extension of time if the movant demonstrates good cause for failing to meet the initial deadline.⁵⁵ As the Commission has explained, “good cause” can be shown by a project sponsor demonstrating that it made good faith efforts to meet its deadline but encountered unforeseeable circumstances.⁵⁶ The Commission has previously found that providing more time for a project applicant to obtain necessary federal permits can be an appropriate basis for granting an extension of time.⁵⁷

20. Catskill Mountainkeeper argues that Constitution failed to make a good faith effort to meet its construction deadline and any difficulties that Constitution encountered to

⁵⁴ *Arlington*, 155 FERC ¶ 61,165 at P 8 (citing *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 11 (2012) (*Chestnut Ridge*)).

⁵⁵ *Id.*; see also 18 C.F.R. § 385.2008(a) (providing for extensions of construction and other deadlines for good cause). Section 375.308(w)(4) of the Commission’s regulations authorizes the Director of the Office of Energy Projects or her designee to take appropriate action on “applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order of the Commission.” 18 C.F.R. § 375.308(w)(4) (2019).

⁵⁶ See, e.g., *Chestnut Ridge*, 139 FERC ¶ 61,149 at P 11 (denying request for extension of time).

⁵⁷ *Arlington Storage*, 155 FERC ¶ 61,165 (granting two year extension of time to accommodate the project applicant’s ongoing efforts to obtain a permit from the New York State DEC). See also October 12, 2016 letter order in Docket Nos. CP09-418-000, *et al.* (granting two-year extension of time to complete construction to accommodate delays in obtaining a permit from the Louisiana Department of Natural Resources); August 2, 2016 letter order in Docket No. CP13-502-000 (granting two-year extension of time where applicant has diligently pursued a required air permit and has initiated court review in the U.S. Court of Appeals of the state agency’s inaction); September 30, 2015 letter order in Docket No. CP13-8-000 (granting pipeline project two-year extension of time to complete construction due to delays in obtaining waterbody crossing permits); March 25, 2015 letter order in Docket No. CP09-19-000 (granting a two-year extension of time because applicant had not yet obtained required permit from a state agency).

meet that deadline are a result of Constitution's own actions.⁵⁸ Catskill Mountainkeeper explains that Constitution has failed to provide the information necessary to obtain a section 401 water quality certification from the New York DEC and rather than work with the New York DEC, Constitution chose to sue the agency in two separate federal court proceedings.⁵⁹

21. We affirm the Extension Order's determination that Constitution is free to decide how to satisfy the Certificate Order's prerequisites for construction.⁶⁰ Constitution had a right to appeal the New York DEC's denial of the water quality certification⁶¹ and to seek a declaratory order from the Commission to determine whether the New York DEC waived its authority to issue a section 401 certification.⁶² Constitution's choice to seek judicial review and remedy with the Commission, rather than file a new application with the New York DEC, does not show a lack of good faith by Constitution. Rather, Constitution's actions show that it is diligently pursuing completion of the project. Thus, we affirm the Extension Order's determination that Constitution's chosen strategy does not show bad faith and the Commission was justified in granting an extension of time.⁶³

22. Additionally, we disagree with Catskill Mountainkeeper's argument that this proceeding differs markedly from other cases where the Commission has found good cause to extend a project sponsor's deadline to construct its project.⁶⁴ Specifically, Catskill Mountainkeeper relies on: *Arlington Storage Company, LLC (Arlington Storage)*,⁶⁵ a case where the Commission granted the applicant a two-year extension of time to accommodate the applicant's ongoing efforts to obtain an underground storage permit from the New York

⁵⁸ Catskill Mountainkeeper Request for Rehearing at 4.

⁵⁹ *Id.*

⁶⁰ Extension Order, 165 FERC ¶ 61,081 at P 14.

⁶¹ See 15 U.S.C. § 717r(d)(1) (giving U.S. Court of Appeals jurisdiction over a state agency's denial of a permit required under Federal law).

⁶² Constitution, Petition for Declaratory Order, Docket No. CP18-5-000 (filed Oct. 11, 2017).

⁶³ Extension Order, 165 FERC ¶ 61, 081 at P 14.

⁶⁴ Catskill Mountainkeeper Request for Rehearing at 5.

⁶⁵ 155 FERC ¶ 61,165 (2016).

DEC;⁶⁶ and *Iroquois Gas Transmission System, L.P. (Iroquois)*,⁶⁷ a case where the Commission found that good cause existed to extend the applicant's timeline for construction of a compressor station, because the applicant had a contractual dispute with its sole customer.⁶⁸ In *Arlington* and *Iroquois*, the Commission found that it may extend construction deadlines in order to respond to the factual circumstances of each case,⁶⁹ particularly where an applicant made good faith efforts to meet its deadline but encountered unforeseeable circumstances.⁷⁰ We find the circumstances faced in *Arlington* and *Iroquois* are substantially similar to the circumstances faced by Constitution, where Constitution, as noted above and in the Extension Order, diligently pursued satisfaction of the Certificate Order's prerequisites for construction. Accordingly, we find that Constitution showed good cause to extend its construction deadline while the New York DEC's denial of Constitution's application for a water quality certification remained in effect and while Constitution pursued all available legal remedies.⁷¹

23. Catskill Mountainkeeper argues that an extension of time is not warranted here because Constitution cannot reasonably complete construction of the project by the new December 2, 2020 deadline.⁷² Holleran Landowners asserts that the Commission must rescind the certificate and deny any extensions of time.⁷³ We disagree. Catskill Mountainkeeper's and Holleran Landowners' arguments rest on Constitution's failure to obtain a section 401 water quality certification from the New York DEC and Catskill Mountainkeeper's assessment of Constitution's likelihood of success on appeal of that

⁶⁶ *Arlington Storage*, 155 FERC ¶ 61,165 at P 13.

⁶⁷ 104 FERC ¶ 61,307 (2003).

⁶⁸ Catskill Mountainkeeper Request for Rehearing at 5 (citing *Iroquois*, 104 FERC ¶ 61,307 at P 14).

⁶⁹ *Arlington Storage*, 155 FERC ¶ 61,165 at n.6; *Iroquois*, 104 FERC ¶ 61,307 at P 14.

⁷⁰ *Id.* P 8 (citing *Chestnut Ridge*, 139 FERC ¶ 61,149 at P 11 (denying request for extension of time)).

⁷¹ Extension Order, 165 FERC ¶ 61,081 at P 10 (citing Constitution June 25, 2018 Request for Extension of Time at 1-2).

⁷² Catskill Mountainkeeper Request for Rehearing at 5-7.

⁷³ Holleran Landowners Rehearing Request at 2-4.

denial in the Second Circuit.⁷⁴ We note that the Commission subsequently determined that the New York DEC waived its authority to issue a certification under Clean Water Act section 401.⁷⁵ Although we will not speculate on the result of any litigation surrounding this project, we find that Constitution is diligently pursuing efforts to secure all of its necessary authorizations to complete construction by the new December 2, 2020 deadline.

C. Court Review of Constitution's CWA Section 401 Water Quality Certification Does Not Invalidate the Certificate Order

24. Contrary to Holleran Landowners' assertion, the New York DEC's denial of Constitution's section 401 water quality certification does not render Constitution's project non-jurisdictional.⁷⁶ We find Holleran Landowners attempt to compare this case to others where the Commission has rescinded certificates because the Commission found that the facilities were exempt gathering pipelines or non-jurisdictional facilities not subject to the Commission's NGA authority nonsensical.⁷⁷ The Commission's finding that the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission⁷⁸ is not affected by the New York DEC's denial of Constitution's water quality certification. The Commission required Constitution to obtain a water quality certification, or provide evidence of waiver thereof, as a condition of the Certificate Order.⁷⁹ This condition is not a basis for determining or undermining the Commission's jurisdiction. As stated above, Constitution is continuing to pursue satisfaction of the requirements of its certificate. We find no cause to rescind or fail to grant Constitution an extension of time.

⁷⁴ Catskill Mountainkeeper Request for Rehearing at 5-7; Holleran Landowners Rehearing Request at 2-4.

⁷⁵ Remand Order, 168 FERC ¶ 61,129 at P 40.

⁷⁶ Holleran Landowners Request for Rehearing at 3-4.

⁷⁷ *Id.* at 2-3.

⁷⁸ Certificate Order 149 FERC ¶ 61,199 at P 21.

⁷⁹ *Id.* at appendix, envtl. condition 8.

D. Granting the Extension of Time Does Not Affect the Commission's Public Convenience and Necessity and Environmental Review

25. Catskill Mountainkeeper asserts that the findings that the Commission made in the Certificate Order to determine whether the project is required by the public convenience and necessity and whether the pipeline could mitigate against any significant environmental effects are stale.⁸⁰ Catskill Mountainkeeper contends that the Commission must account for changing market conditions and economic impacts to landowners and communities before extending Constitution's construction deadline to 2020.⁸¹ Additionally, Catskill Mountainkeeper argues that the Commission cannot rely on a September 2014 environmental analysis to adequately mitigate against any environmental impacts caused by the project.⁸² We find that the Extension Order sufficiently discussed the impacts of an extension of time on our public convenience and necessity review⁸³ and on our environmental analyses.⁸⁴ No further discussion is warranted. Accordingly, we summarily dismiss these arguments.

26. We note that, for the first time on rehearing, Catskill Mountainkeeper contends that the Commission must update our analysis of the project's effects on climate change in light of the D.C. Circuit's decision in *Sierra Club v. FERC*;⁸⁵ however, Catskill Mountainkeeper does not explain how or why the Final Environmental Impact Statement's analysis of greenhouse gases and climate change is inadequate.⁸⁶ The Commission looks with disfavor on parties raising issues for the first time on rehearing that could have been raised earlier, particularly in Catskill Mountainkeeper's protest in opposition to Constitution's

⁸⁰ Catskill Mountainkeeper Request for Rehearing at 7.

⁸¹ *Id.*

⁸² *Id.* at 8.

⁸³ Extension Order, 165 FERC ¶ 61,081 at P 13.

⁸⁴ *Id.*

⁸⁵ 867 F.3d 1357 (D.C. Cir. 2017).

⁸⁶ See Final Environmental Impact Statement at 4-175 to 4-187 (analyzing the project's impacts on greenhouse gases and air quality from construction and operation of the project); 4-255 to 4-257 (discussing the project's impacts on climate change).

extension of time request.⁸⁷ Due to Catskill Mountainkeeper's failure to present this information in a timely fashion, we dismiss its request for rehearing on this issue.

The Commission orders:

(A) Stop the Pipeline's, Catskill Mountainkeeper's, and Holleran Landowner's requests for rehearing are dismissed or denied.

(B) Constitution's December 21, 2018 answer is rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁸⁷ See 18 C.F.R. § 385.713(c)(3) (new matters may be raised in a rehearing request only when "based on matters not available for consideration by the Commission at the time of the final decision or final order). See also *Baltimore Gas & Electric Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("We look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.").