May 28, 2021

The Honorable John Barrasso, M.D.
United States Senate
Washington, D.C. 20510

Dear Senator Barrasso:

Thank you for your letter dated March 30, 2021, regarding your concerns about the Commission's recent issuance of the Order Establishing Briefing in Docket No. CP16-9-012, *Algonquin Gas Transmission, LLC*.[1] I appreciate the opportunity to share my thoughts.

As mentioned in your letter, on February 18, 2021, the Commission established briefing procedures on matters related to the operation of the Weymouth Compressor Station owned and operated by Algonquin Gas Transmission, L.L.C. (Algonquin).[2] I dissented in full from that order, and have attached my dissent as Attachment A for your convenience.

The Briefing Order has generated significant interest. I have been given to understand that the Commission has received 87 motions to intervene (filings necessary to secure party status in order to preserve the right to petition for judicial review), 3 requests for rehearing filed by Algonquin and multiple trade associations,[3] over 80 initial comments (including one comment filed jointly by seven former FERC Commissioners), and 13 reply comments.

On April 19, 2021, the Commission issued a notice denying the requests for rehearing by operation of law, stating that the Commission would issue a future order addressing the merits of the request. This notice was issued in order to enable the parties to petition for review and Algonquin has petitioned for review in the U.S. Court of Appeals for the

[1] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Briefing Order).

[2] *See id.*

[3] In addition to Algonquin, rehearing requests were filed jointly by Interstate Natural Gas Association and Energy Infrastructure Council (collectively, INGAA *et al*.), and jointly by the Natural Gas Supply Association and Center for LNG (collectively, NGSA *et al*.).

District of Columbia Circuit (D.C. Circuit). On May 19, 2021, the Commission issued the order on the merits dismissing the requests for rehearing as premature.[4] I dissented from that order as well and have attached that dissent as Attachment B for your convenience.

In your letter, you ask that my colleagues and I address a series of general policy questions in the most expeditious and appropriate manner that we determine the Commission's rules will permit. As you imply, some of the questions you asked are directly at issue in the contested and pending Briefing Order and in the requests for rehearing. Although the Commission has since issued an order dismissing the rehearing requests, the proceeding remains pending before the Commission which enjoys concurrent jurisdiction with the appellate court following petition for review until the time at which the Commission files the record with the court.[5] To my knowledge, that has not yet occurred. On April 12, 2021, Chairman Glick responded to your letter offering "general responses to the questions posed."[6]

To avoid any appearance that I might be prejudging the Briefing Order and the pending rehearing requests, for those questions directly at issue in the proceeding, my answers will be confined to the text of the Natural Gas Act (NGA), provide information regarding historical issuances of the Commission, and recite the contents of my separate statements. Additionally, I will offer comments on the Chairman's letter to provide additional context in response to statements which, in my view, misconstrue Commission precedent and processes.

There is one claim that the Commission recently made in its Rehearing Dismissal Order and that Chairman Glick repeats in his letter that warrants discussion before I address your questions. The Commission states that the Briefing Order "is not a reopening of the Commission's order from January 25, 2017, issuing Algonquin a certificate of public convenience and necessity to construct and operate the Atlantic Bridge Project."[7] The Commission instead states that "the Briefing Order merely initiates a fact-finding

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[4] *Algonquin Gas Transmission, LLC*, 175 FERC ¶ 61,150 (2021) (Rehearing Dismissal Order).

[5] *See* 15 U.S.C. § 717r(a).

[6] Chairman Glick April 12, 2021 Letter at 2.

[7] Rehearing Dismissal Order, 175 FERC ¶ 61,150 at P 1 n.1.

proceeding as an exercise of the Commission's continuing oversight of the Project."[8] Similarly, Chairman Glick says that, "the Briefing Order does not revisit or otherwise reopen the certificate for the Atlantic Bridge Project."[9] Rather, he states "the Commission is fulfilling its ongoing responsibility to the public interest, which continues throughout the construction and operation of certificated facilities, and even after the certificate becomes final."[10]

As I stated in my dissent to the Rehearing Dismissal Order, the Briefing Order reopens the certificate.[11] The Briefing Order

> asks questions (for which the Commission had no authority to ask) that directly affect determinations made in a final, non-appealable certificate order. Those questions mean that the determinations are not in fact settled and the final, non-appealable certificate order is in fact no longer final.[12]

My insistence that the legal effect of the Briefing Order was to re-open the certificate is not an idiosyncratic reading of the order. In fact, it is shared by a bipartisan group of seven former Commissioners appointed by every president since President Reagan, who filed a letter to "express [their] concern about the Commission's February 18, 2021, Order Establishing Briefing."[13] In their letter, they state:

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[8] *Id.* P 8.

[9] Chairman Glick April 12, 2021 Reply Letter at 2.

[10] *Id.*

[11] *See* Rehearing Dismissal Order, 175 FERC ¶ 61,150 (Danly, Comm'r, dissenting at PP 5-11).

[12] *Id.* (Danly, Comm'r, dissenting at P 2).

[13] Former Commissioners Mike Naeve, Elizabeth A. Moler, Donald F. Santa, Jr., Pat Wood, III, Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly April 12, 2021 Letter to the Commission at 1 (Bipartisan Group of Former Commissioners April 12, 2021 Letter). *Compare id.*, *with* Chairman Glick April 12, 2021 Letter at 1 ("The February 18 Briefing Order, which was supported by a bipartisan group of Commissioners, addresses a different matter.").

> In this proceeding, the Commission has effectively reopened the record many years after it authorized construction of facilities and denied rehearing requests, and after a federal court upheld the Commission's actions in all respects. We are troubled by the novel assertion of authority to reconsider a long-since-final certificate order, without any suggestion that the terms of that order were violated, and long after a private company built and placed into service the facilities in question, at a cost of approximately a half billion dollars. We are unaware of any other instance, in the eight-decade history of the Natural Gas Act, where the Commission has taken such a step. Certainly, we cannot recall any such cases during our tenures on the Commission, which collectively span 20 years.[14]

I have previously explained that the only obligations to which a pipeline can be made subject and that the Commission can then enforce are those that flow directly from the terms of a certificate.[15] More specifically, as I have stated, "[t]he Commission cannot order [a pipeline] to take actions beyond the requirements established in the conditions attached to its certificate."[16]

To understand what the Commission can and cannot require, a general overview of the standard contents of Commission orders on certificate applications may be helpful. First, certificate orders begin with an introduction that provides the date of the application, the name of the applicant, the authorization sought and the relevant statutory provision and regulations, the name of the project, and whether the order grants or denies the authorization. Next, the "Background" describes the applicant (where the applicant is incorporated and operates) and the applicant's proposal. Then, in the "Discussion," the Commission generally evaluates at least three aspects of the proposed project: (1) the project's economic impact—in light of the balancing test set forth in the Certificate

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[14] Bipartisan Group of Former Commissioners April 12, 2021 Letter at 2. The former Commissioners' letter is included in Appendix A of my dissent in the Rehearing Dismissal Order.

[15] *See Spire STL Pipeline LLC*, 174 FERC ¶ 61,219 (2021) (Danly, Comm'r, dissenting at P 2).

[16] *Id.*

Policy Statement,[17] (2) the applicant's proposed initial rates for firm and interruptible service; and (3) the project's impact on environmental and socioeconomic resources as required by the National Environmental Policy Act. On occasion, the Commission may also discuss Commission staff's evaluation of the project's engineering and the applicant's proposed accounting treatment if an issue is identified by stakeholders or Commission staff.

Next, in the conclusion, the Commission makes two findings: (1) whether the project will have a significant effect on the environment or, if significant, whether the environmental effects are "acceptable" and (2) whether the project is required by the public convenience and necessity. The conclusion also includes boilerplate language reminding the applicant that the Commission expects compliance with the environmental conditions included in the appendix of the order and that state and local permits must be consistent with the conditions of the certificate.

Finally, certificate orders end with ordering paragraphs that include (1) the authorization to construct and operate the project and (2) the terms and conditions of the certificate. The terms and conditions can be specifically enumerated in the ordering paragraphs themselves or can be incorporated by reference to the Commission's regulations or to the standard and project-specific environmental conditions listed in the appendix to the order.

My dissent to the Rehearing Dismissal Order explains that no condition in the certificate authorizing Algonquin to construct and operate the Atlantic Bridge Project permits the Commission to consider or impose additional measures to mitigate air emissions or threats to public safety.[18] In addition, my dissent states "[t]he only way to consider establishing new requirements is to reopen the certificate proceeding to add additional conditions, and such conditions can only be created by amending the certificate."[19]

With that background in mind, I will turn to the questions from your letter.

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[17] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

[18] *See* Rehearing Dismissal Order, 175 FERC ¶ 61,150 (Danly, Comm'r, dissenting at PP 8-11).

[19] *Id.* (Danly, Comm'r, dissenting at P 7).

1. ***Does FERC have statutory authority to revisit final certificate orders? If so, please cite the specific statute and thoroughly explain your reasoning.***

Your question directly addresses arguments raised in the pending Briefing Order proceeding.

On rehearing, Algonquin argues:

> The Commission erred in the February 18 Order because it has no authority to amend (or consider whether to amend) the Certificate Order to impose additional conditions because the Certificate Order is final and no longer subject to rehearing or appeal. Nothing in the NGA authorizes the Commission to reconsider a final certificate order to impose additional conditions or to revoke a final certificate order in these circumstances.[20]

Likewise, the NGSA and CLNG state in their joint reply brief comments:

> [s]ection 7 of the NGA does not allow the Commission to reopen, reconsider, or revoke a final and unappealable Commission order[] like the Certificate Order and the Authorization Order. Similarly, the general language of NGA Section 16, which describes the administrative powers of the Commission, does not grant the Commission independent authority it does not have under the substantive sections of the NGA. Nothing in the Certificate Order itself allows the Commission to reopen that order after a pipeline is in service.[21]

[20] Algonquin March 19, 2021 Rehearing Request at 10.

[21] NGSA and CLNG May 5, 2021 Reply Brief at 6.

The New England Local Distribution Companies,[22] Electric Power Supply Association,[23] Energy Infrastructure Council,[24] INGAA,[25] and BHE Pipeline Group,[26] make similar arguments. Noting again that these comments were submitted in a proceeding still pending before the Commission, I will respond by referring to my dissents and by providing information on the relevant statutory text and the Commission's historical issuances.

As I stated in paragraphs 24 to 26 of my dissent to the Briefing Order, I am not aware of any provision in the NGA, or any other statute, that authorizes the Commission to add new terms and conditions to a certificate after it is final.[27]

There are three provisions of the NGA that generally apply to the Commission's issuance and enforcement of certificate orders: NGA section 7(e) (15 U.S.C. § 717f(e)), NGA section 16 (15 U.S.C. § 717o), and NGA section 19(a)-(b) (15 U.S.C. §§ 717r(a), (b)).

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[22] New England Local Distribution Companies April 5, 2021 Initial Brief at 6 ("The Commission does not have legal authority to reopen this proceeding for the purpose of reconsidering or modifying the Certificate Order or the Authorization Order.").

[23] Electric Power Supply Association April 5, 2021 Initial Brief at 7 ("The Commission has no statutory authority to reopen that issue, because the Certificate Order is final and not subject to further rehearing or judicial review.").

[24] Energy Infrastructure Council April 5, 2021 Initial Brief at 16 ("The order not only exceeds FERC's authority under the NGA and violates the Administrative Procedure Act, but is contrary to Congressional intent, court precedent, and decades of Commission precedent under the NGA . . . .").

[25] INGAA May 5, 2021 Reply Brief at Attachment A ("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.").

[26] BHE Pipeline Group April 6, 2021 Initial Brief at 7 ("Absent a clear statutory grant, the Commission does not have authority to reopen a final certificate, certainly not where the applicant has complied with all conditions.").

[27] *See* Briefing Order, 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting at PP 24-26).

Below, I provide information on each provision and relevant Commission practice and policy.

NGA section 7

NGA section 7(e) obligates the Commission to issue certificates to construct and operate natural gas facilities required by the present or future public convenience and necessity.[28] Once the Commission issues a certificate, NGA section 7(e) authorizes the Commission to enforce the terms and conditions attached to the certificate.[29]

The terms and conditions of a certificate appear in the ordering paragraphs, either specifically set forth in the ordering paragraph, or incorporated by reference to the Commission's regulations or to the environmental conditions in an attached appendix. Most certificate terms and conditions are standard. For example, every certificate includes an ordering paragraph that states some variance of the following:

> A certificate of public convenience and necessity is issued authorizing [applicant] to construct and operate the [proposed project], as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.[30]

The Commission has recently exercised its authority under this ordering paragraph to require mitigation to bring a pipeline into compliance with its certificate order.[31] Every certificate order also includes, in an attached appendix, Environmental Condition No. 2 (delegation of authority to the Director of the Office of Energy Projects (OEP)),

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[28] *See* 15 U.S.C. § 717f(e) ("a certificate *shall* be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . and that the proposed service . . . is or will be required by the present or future public convenience and necessity . . . .") (emphasis added).

[29] *See id.* ("attach to the issuance of the certificate and *to the exercise of the rights granted thereunder* such reasonable terms and conditions as the public convenience and necessity may require.") (emphasis added). Chairman Glick's letter also references NGA section 7(e) but oddly omits the word "thereunder" in his answer to your first question. *See* Chairman Glick April 12, 2021 Letter at 2.

[30] *See, e.g.*, *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at Ordering Paragraph A (2021).

[31] *See Spire STL Pipeline LLC*, 174 FERC ¶ 61,219.

Environmental Condition No. 9 (requiring authorization to proceed with construction), and Environmental Condition No. 10 (requiring authorization to place facilities into service).[32]

Environmental Condition No. 2 delegates to the OEP Director, or his designee, the authority to "to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project."[33] The delegated authority allows "the modification of conditions of the Order," "stop-work authority," and "imposition of any additional measures deemed necessary to ensure continued compliance . . . as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction, operation, and abandonment activities."[34]

Environmental Condition No. 2 has been incorporated into certificate orders since the mid-1990s.[35] Following requests for clarification regarding the breadth of Environmental Condition No. 2, in a 1995 case, the Commission stated:

> Condition 2 is intended to give the Director authority to enforce the 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. . . . It is also intended to provide expeditious resolution of unanticipated environmental situations the applicant may

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[32] The Chairman's letter references the authorizations issued under Environmental Conditions Nos. 9 and 10 as "major authorizations." Chairman Glick April 12, 2021 Letter at 2-3. I am not aware of any Commission issuance identifying those authorizations as "major." In fact, the Commission has previously identified notices to proceed as "ministerial." *See Tenn. Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013, at P 37 (2018) (unanimous order stating that "the notice to proceed[] is a mere 'ministerial action.'") (citation omitted).

[33] *See, e.g.*, *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 at Appendix.

[34] *Id.*

[35] The earliest certificate that I identified with the delegation authority was *Panhandle Eastern Pipe Line Co.*, 70 FERC ¶ 61,043 (1995), issued in January 1995. The delegation may have been issued earlier.

encounter during the construction and restoration of the project.[36]

I am not aware of any subsequent Commission precedent that departs from this clarification.[37]

Environmental Condition No. 9 sets forth the requirements for commencing construction. It states that the certificate holder must file with the Secretary of the Commission "documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)."[38] To my knowledge, the Commission has never added any additional requirements to this condition after a certificate order has become final.

Environmental Condition No. 10 sets forth the requirements for placing facilities into service. It requires the certificate holder to request authorization from the OEP Director, or his designee, and that "[s]uch authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily."[39] The Commission has stated that "[t]he condition requires only that the Commission have sufficient evidence to satisfy itself that [the pipeline] is proceeding with the measures necessary to ensure that the right-of-way is eventually rehabilitated and restored."[40] The Commission has declined to

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[36] *Tex. E. Transmission Corp.*, 73 FERC ¶ 61,012, at 61,019 (1995); *see also Columbia Gas Transmission Corp.*, 71 FERC ¶ 61,038, at 61,158 (1995) ("the Director's authority discussed in the second environmental condition is unambiguous and is limited to environmental matters within the scope of the January 30 order.").

[37] The Chairman cites to several letter orders where the OEP Director acted under his delegated authority as authorized by the certificate order. *See* Chairman Glick April 12, 2021 Letter at 3 n.8 (citing May 10, 2017 delegated letter order to Rover Pipeline, LLC to stop work on certain horizontal directional drilling paths following inadvertent release in wetland); *id.* at 5 n.12 (citing October 15, 2019 delegated letter order to Mountain Valley Pipeline, LLC to stop work following vacation of permits).

[38] *See, e.g.*, *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 at Appendix.

[39] *Id.*

[40] *Tenn. Gas Pipeline Co.*, 81 FERC ¶ 61,386, at 62,796 (1997).

establish a general test for determining when authorization will be granted.[41] On at least one occasion, however, the Director defined the criteria by which staff would determine whether rehabilitation and restoration activities were proceeding satisfactorily.[42] To my knowledge, the Commission has never added any additional measures to this condition once a certificate order has become final.

The Commission has also stated that certificates carry with them "the basic obligation to restore the land affected to its original condition" throughout the life of the project.[43] In support of this, the Commission has cited to NGA section 7(h), which "gives the certificate holder the right to 'construct, operate, and *maintain* a pipe line.'"[44] The Commission also has cited section 380.15(b) of the Commission's regulations, which requires pipelines to take "[t]he desires of landowners . . . into account in the planning, locating, clearing, and maintenance of rights-of-way,"[45] and the Commission's *Upland Erosion Control Plan* and *Waterbody Construction and Mitigation Procedures*.[46] I am not aware of any Commission precedent stating it has the authority to impose new conditions on project operations throughout the life of the project.

NGA section 16

NGA section 16 provides that "[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."[47] The D.C. Circuit has held that NGA section 16 gives the Commission "ancillary jurisdiction

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[41] *See id.*

[42] *See Rover Pipeline, LLC*, Docket No. CP15-93-000, at 1-2 (July 12, 2017) (delegated letter order).

[43] *Brian Hamilton v. El Paso Nat. Gas Co.*, 141 FERC ¶ 61,229, at P 29 (2012).

[44] *Id.* P 24 (emphasis in original).

[45] *Id*. P 25 (quoting 18 C.F.R. § 380.15(b)).

[46] *See id.* PP 27-28.

[47] 15 U.S.C. § 717o. It could be argued that the Commission's issuance in *Midship Pipeline Company, LLC*, 174 FERC ¶ 61,220 (2021), was authorized under NGA section 16.

to carry out the statute's other provisions, it does not confer additional jurisdiction . . . otherwise outside the Commission's jurisdiction."[48] Similarly, the court found that the Commission's exercise of powers under section 309 of the Federal Power Act, a counterpart provision read *in pari materia* with NGA section 16, must be "consistent with the authority delegated to it by Congress."[49]

In paragraph 25 of my dissent to the Briefing Order, I explained that NGA section 16 cannot be read as a freestanding source of authority to issue the Briefing Order because the order is inconsistent with the substantive authorities delegated by Congress and because "it flies in the face of the statutory process for rendering final orders subject to judicial review."[50]

NGA section 19

NGA section 19 provides for rehearing and judicial review of Commission orders. NGA section 19(a) states, "[u]ntil the record in a proceeding shall have been filed in a court of appeals . . . the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter."[51]

NGA section 19(b) states, "[t]he judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final . . . ."[52]

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[48] *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 647 (D.C. Cir. 2010) (citing *Pub. Serv. Comm'n of N.Y. v. FERC*, 866 F.2d 487, 491-92 (D.C. Cir. 1989)).

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

[50] Briefing Order, 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting at P 25).

[51] 15 U.S.C. § 717r(a).

[52] *Id.* § 717r(b).

2. ***Does FERC have statutory authority to consider "additional mitigation measures" regarding air emissions or public safety concerns after it has issued a Certificate Public Convenience and Necessity for a pipeline project? If so, please cite the specific statute and thoroughly explain your reasoning.***

Your question directly implicates arguments raised on rehearing and in the initial and reply briefs of the pending Briefing Order. On rehearing, Algonquin argues:

> The February 18 Order unlawfully places its legal authority to reopen the record on matters regulated by other federal agencies. The February 18 Order is concerned with "projected air emissions impacts" and "public safety impacts"; however, in addressing such concerns by establishing briefing, the Commission arrogates authority to itself that Congress provided to the EPA and the Department of Transportation ("DOT").[53]

The New England Local Distribution Companies,[54] INGAA,[55] the American Gas Association,[56] and Northeast Gas Association,[57] among others, make similar arguments.

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[53] Algonquin March 19, 2021 Rehearing Request at 11.

[54] New England Local Distribution Companies April 5, 2021 Initial Brief at 14 ("Moreover, the Commission has not provided any basis for departing from its policy and precedent of relying on PHMSA and the EPA or its state delegated agency to ensure such continued safe operation of pipeline facilities. Any revisiting of the safety of the Weymouth Compressor station should remain with PHMSA, not FERC through the Certificate Order.").

[55] INGAA May 5, 2021 Reply Brief at 23 ("PHMSA, Not FERC, Is the Safety Regulator."); *Id.* at 27 ("Issues regarding the Station's emissions are subject to the jurisdiction of the Massachusetts DEP, not the Commission.").

[56] American Gas Association May 5, 2021 Reply Brief at 7 ("AGA is concerned that the Commission, if it takes action in this proceeding, would override PHMSA's authority or the authority of other agencies.").

[57] Northeast Gas Association April 5, 2021 Initial Brief at 9 ("Moreover, the Commission has not provided any basis for departing from its policy and precedent of

As I explain above, I am not aware of any provision in the NGA that confers upon the Commission the authority to unilaterally amend a final certificate to impose additional mitigation measures. As to whether the Commission has the authority to unilaterally add conditions to a final certificate order requiring additional mitigation for air quality and public safety, you may also find paragraph 31 of my dissent to the Briefing Order informative. There I state, "Congress expressly delegated to the Secretary of the Department of Transportation the authority to regulate pipeline safety and to the U.S. Environmental Protection Agency (EPA) the authority to regulate air emissions."[58] I also state that, "the Commission's long-standing practice is to rely on [the Pipeline and Hazardous Materials Safety Administration (PHMSA)] to regulate pipeline safety and the EPA, or its state delegated agency, to regulate air emissions."[59]

In addition, I would like to address Chairman Glick's answer to this question. Chairman Glick writes, "the Commission has required certificate holders to perform additional mitigation . . . to address new safety concerns, such as cracks in tanks containing liquified natural gas," citing a Joint Corrective Action Order issued by PHMSA and the Commission.[60] That Joint Corrective Action Order applied to an LNG facility authorized under NGA section 3, not a certificated pipeline authorized under NGA section 7 and is thus an inapposite comparison. The Commission's NGA section 3 permits for LNG facilities typically include conditions subjecting the facility to regular Commission staff technical reviews and site inspections,[61] and delegates to the OEP Director the authority

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relying on PHMSA and EPA or its state delegated agency to ensure such continued safe operation of pipeline facilities. Any revisit of the safety of the Weymouth Compressor Station should remain with PHMSA, not FERC through the Certificate Order.").

[58] Briefing Order, 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting at P 31) (citations omitted).

[59] *Id*. *See also Brian Hamilton v. El Paso Nat. Gas Co.*, 141 FERC ¶ 61,229 at P 18 ("While the Commission seeks assurances that pipelines will comply with PHMSA's guidelines, the primary responsibility for pipeline safety resides with PHMSA.") (citation omitted).

[60] Chairman Glick April 12, 2021 Letter at 4, n.11.

[61] *See, e.g.*, *Sabine Pass Liquefaction, LLC*, 139 FERC ¶ 61,039, at Environmental Condition No. 55 (2012).

to take whatever steps necessary "[i]n the event of an incident."[62] To my knowledge, the Commission's NGA section 7 certificate orders have never included this condition or any condition like it.

3. ***What are examples of "changed circumstances" that would prompt the opening of a new proceeding for the purpose of addressing new issues bearing on the issuance of a Certificate of Public Convenience and Necessity years after the issuance of the same certificate?***

I appreciate that you have asked for general examples of "changed circumstances" and not whether there are changed circumstances in the *Algonquin* proceeding, which is directly at issue in the Briefing Order. To avoid the appearance of prejudging the outcome of the Briefing Order, however, I will not speculate on what may constitute a "changed circumstance" but will discuss the Commission's past issuances.

To my knowledge, the Commission has never identified any "changed circumstances" that would prompt opening a new proceeding to address new issues bearing on a final certificate order years after it was issued and upheld on appeal.

I would also like to respond to Chairman Glick's answer to this question. Chairman Glick defines changed circumstances as "situations in which significant new information has come to light that was not or could not reasonably have been presented to the Commission prior to its certificate orders."[63] Chairman Glick offers no precedent to support this definition. Nor have I identified any. Instead, as support, Chairman Glick provides the hypothetical that if "a major geological fault is discovered near the certificated facilities," "the Commission has no choice but to consider whether additional mitigation measures are necessary."[64] Since 1993, the Commission's Memorandum of Understanding (MOU) with the Department of Transportation has provided a process to address exactly the sort of hypothetical scenario that the Chairman raises. Under the terms of the MOU, if the Commission "becomes aware of an existing or potential safety problem" like Chairman Glick's example, the Commission shall promptly alert DOT, which has "exclusive authority to promulgate Federal safety standards for facilities used

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[62] *Id.*

[63] Chairman Glick April 12, 2021 Letter at 4.

[64] *Id.*

in the transportation of natural gas."[65] PHMSA has a regulation which directly addresses the Chairman's concern:

> If an operator determines that outside force (e.g., earth movement, loading, longitudinal, or lateral forces, *seismicity* of the area, floods, unstable suspension bridge) is a threat to the integrity of a covered segment, the operator must take measures to minimize the consequences to the covered segment from outside force damage. These measures include increasing the frequency of aerial, foot or other methods of patrols; adding external protection; reducing external stress; relocating the line; or inline inspections with geospatial and deformation tools.[66]

4. ***Has FERC undertaken an analysis on the impacts to reliability and affordability of natural gas and electric service or the impacts to jobs if pipeline projects that the Commission has found be to necessary can be collaterally attacked after the Commission has issued a certificate for such projects? If not, does the Commission have plans to conduct such analysis?***

To my knowledge, the Commission has neither conducted an analysis of the impacts that a collateral attack on a final certificate will have on reliability, affordability, or jobs, nor announced any plans to do so. In my view, such analysis would not be inconsistent with the purpose of the NGA to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[67]

In its Rehearing Dismissal Order, the Commission recently referred to concerns regarding the Briefing Order's effect on investment as "unsupported" and "generalized."[68] The

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[65] Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Natural Gas Transportation Facilities, 2 (Jan. 15, 1993), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/1993_DOT_FERC.pdf.

[66] 49 C.F.R. § 192.935(b)(2) (emphasis added).

[67] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70).

[68] Rehearing Dismissal Order, 175 FERC ¶ 61,150 at P 6.

Commission expressed doubts that the Briefing Order has affected project investment, observing that four certificate applications to construct natural gas pipeline facilities have been filed since the Briefing Order's issuance.[69] The Commission's observation proves less than one might think. Applications for pipeline facilities take years to develop and project applicants secure the necessary financing well in advance of filing their application. As I stated in my dissent to the Rehearing Dismissal Order, without the certainty that a final certificate order is in fact final, "pipeline investment will chill and risk premiums will increase, making it more difficult and costly to finance projects (including projects to modernize existing lines) to reliably transport gas at reasonable prices."[70] Several parties in the proceeding share my view that investment will chill not only for pipelines but also "within and proximate to the oil and natural gas industry."[71] If this issue remains a concern, I would respectfully suggest that it may be helpful to inquire directly with the pipeline industry and its shippers as to whether the Briefing Order has chilled investment for pipeline projects.

If I can be of any further assistance with this or any other Commission matter, please do not hesitate to contact me. Thank you again for the opportunity to share my thoughts.

Sincerely,

James Danly

James P. Danly
Commissioner

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[69] *See id.*

[70] *Id.* (Danly, Comm'r, dissenting at P 12).

[71] American Petroleum Institute April 5, 2021 Initial Brief at 3; *see also* Electric Power Supply Association April 5, 2021 Initial Brief at 16 ("such investment will be chilled just as surely as that in the pipelines themselves if certificate orders are subject to perpetual reopening"); DT Midstream Inc. April 5, 2021 Initial Brief at 10 ("Reconsideration, modification, or revocation of certificate authority for a single natural gas facility will chill future natural gas investment nationwide."); BHE Pipeline Group April 5, 2021 Initial Brief at 10 ("This re-opening of a concluded proceeding would result in a significant chilling effect on essential infrastructure investments."); Energy Infrastructure Council April 5, 2021 Initial Brief at 17 ("Further, it could have a chilling effect on the availability of capital to invest in such projects.").

ATTACHMENT A

The following document is Commissioner Danly's dissent to the Commission's February 18, 2021 Order Establishing Briefing in Docket No. CP16-9-012, *Algonquin Gas Transmission, LLC*.[1]

[1] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

(Issued February 18, 2021)

DANLY, Commissioner, *dissenting*:

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

I. Background

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

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

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

[3] *Id.* P 226.

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

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

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

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

6. On September 11, 2020, during Algonquin's testing of equipment, a gasket failed, triggering the manual activation of its emergency shutdown system. Section 192.167 of the PHMSA's regulations requires compressor stations to have emergency shutdown systems that blow down the station piping.[9] Consequently, Algonquin's emergency shutdown system blew down natural gas, releasing 169,000 standard cubic feet (scf) of natural gas and 35 pounds (lbs) (or 0.0175 tons[10]) of Volatile Organic Compounds (VOCs), which is approximately 0.19 percent of the estimated 9.0 tons of annual fugitive

[4] EA at 2-95, 2-98.

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

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

[7] 49 C.F.R. § 192.503(a) (2020).

[8] *Id.* § 192.503(b).

[9] *Id.* § 192.167(a)(1).

[10] One ton equals 2,000 lbs.

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

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

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

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

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

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[11] EA at 2-95, tbl. 2.7.4-3.

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

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

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

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

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

11. On October 23, 2020, Petitioners[17] filed a timely request for rehearing of Commission staff's September 24, 2020 Letter. First, they argued that the Commission "failed to complete a situational assessment and strategic responses for public safety and environmental impacts associated with incidents involving natural gas infrastructure."[18] Second, they argued "[t]he unplanned emergency shutdowns and COVID-19 pandemic . . . rise to the level of a change in core circumstances" requiring the Commission to reopen the record under Rule 716 of the Commission's Rules of Practice and Procedure.[19] Petitioners did not challenge Commission staff's finding that restoration and rehabilitation was proceeding satisfactorily.

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

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

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

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

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

[18] Petitioners Oct. 23, 2020 Rehearing at 2.

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

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

[21] PHMSA, Letter Approving Enbridge Allowing Temporary Removal of Pressure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The Order Establishing Briefing is Contrary to Law

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

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

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Establishing Briefing).

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

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

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

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

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

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

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

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

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

[32] 15 U.S.C. § 717f(e).

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

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

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

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

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

[36] 15 U.S.C. § 717o.

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

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

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

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

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

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

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

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

III. The Order is Bad Policy

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

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

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

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

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

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

[43] *Id.*

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

31. Second, Congress expressly delegated to the Secretary of the Department of Transportation the authority to regulate pipeline safety[46] and to the U.S. Environmental Protection Agency (EPA) the authority to regulate air emissions.[47] The Commission's long-standing practice is to rely on PHMSA to regulate pipeline safety and the EPA, or its state delegated agency, to regulate air emissions.[48] It is baffling on what factual basis the Commission could modify the Certificate Order and what additional measures the Commission could impose that PHMSA and Massachusetts DEP have not considered and would not interfere with their approvals.

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[44] *See supra* P 14.

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

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

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

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

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

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

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

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

Appendix

FERC Process

- On January 25, 2017, the Commission issued a Certificate Order to Algonquin, considering the safety risk of the compressor station, the air quality and health impacts of blowdowns, and impacts on environmental justice communities near the compressor station. *See Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017).

- On December 13, 2017, the Commission denied rehearing after considering the safety risks of the Weymouth Compressor Station (PP 27-28, 32, 134-139), the effects of blowdowns (P 132), and environmental justice (PP 91-99). *See Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255 (2017).

- On December 27, 2018, the U.S. Court of Appeals for the D.C. Circuit affirmed the Commission's Certificate Order, including its consideration of impacts on safety and environmental justice. *Town of Weymouth, Massachusetts*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (unpublished opinion).

Massachusetts DEP Air Quality Plan Approval

- In March 2017, Massachusetts DEP issued a proposed Air Quality Plan Approval, determining that the Massachusetts Environmental Justice Policy does not apply because the anticipated emissions would not exceed emission thresholds. *See* Massachusetts DEP, Air Quality Proposed Plan Approval (Mar. 30, 2017), https://www.mass.gov/doc/proposed-air-quality-plan-approval-march-2017/download.

- In the spring of 2017, Massachusetts DEP held a public comment period on the proposed Air Quality Plan Approval. *See* Massachusetts DEP Algonquin Natural Gas Compressor Station, Weymouth, https://www.mass.gov/service-details/algonquin-natural-gas-compressor-station-weymouth.

- In July 2017, Governor Baker directed Massachusetts DEP and the Massachusetts Department of Public Health to perform a comprehensive health impact assessment. *See id.*

- In January 2019, Massachusetts DEP and the Massachusetts Department of Health issued the *Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth*. The assessment considered health and environmental justice

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

- On January 11, 2019, Massachusetts DEP issued a Non-Major Comprehensive Air Quality Plan Approval to Algonquin for its construction and operation of the Weymouth Compressor Station. *See* Massachusetts DEP, Air Quality Plan Approval (January 11, 2019).

- In May and June 2019, an adjudicatory hearing was held on six appeals of Massachusetts DEP's approval. *See* Massachusetts DEP Algonquin Natural Gas Compressor Station, Weymouth, https://www.mass.gov/service-details/algonquin-natural-gas-compressor-station-weymouth.

- On August 26, 2019, Massachusetts DEP issued a Non-Major Comprehensive Air Quality Plan Approval, which incorporated conditions required by the final decisions resulting from the adjudicatory hearing and found that Massachusetts Environmental Justice Policy does not apply because the anticipated emissions would not exceed emission thresholds. Massachusetts DEP, Air Quality Plan Approval (Aug. 26, 2019), https://www.mass.gov/doc/air-quality-plan-approval-august-2019/download.

- On June 3, 2020, the U.S. Court of Appeals for the First Circuit affirmed in part Massachusetts DEP's Air Quality Plan Approval, including its assessment of environmental justice. *See Town of Weymouth, Massachusetts v. Mass. Dep't of Environmental Protection*, 961 F.3d 34, 54-55 (1st Cir. 2020), *amended*, 973 F.3d 143 (1st Cir. 2020).

ATTACHMENT B

The following document is Commissioner Danly's dissent to the Commission's May 19, 2021 Order Dismissing Requests for Rehearing in Docket No. CP16-9-014, *Algonquin Gas Transmission, LLC*.[1]

[1] *Algonquin Gas Transmission, LLC*, 175 FERC ¶ 61,150 (2021).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC Docket No. CP16-9-014
Maritimes & Northeast Pipeline, L.L.C.

(Issued May 19, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent from today's order dismissing the parties' requests for rehearing of the Commission's Order Establishing Briefing (Briefing Order)[1] as premature.[2]

2. Section 19(a) of the Natural Gas Act (NGA) permits any person "aggrieved by an order issued by the Commission" to which it is party to apply for rehearing.[3] The majority argues that the parties are not aggrieved by characterizing the Briefing Order as "interlocutory" and as initiating a "fact-finding process[] to develop a record to inform future final action."[4] The Briefing Order is not at all an interlocutory order in its ordinary sense. It is not a preliminary step in a proceeding that the Commission is authorized to initiate. It asks questions (for which the Commission had no authority to ask) that directly affect determinations made in a final, non-appealable certificate order. Those questions mean that the determinations are not in fact settled and the final, non-appealable certificate order is in fact no longer final.

3. As I explain in more detail below, whether the Commission later modifies the certificate order, or finds it has no authority to do so, is irrelevant. The parties have been aggrieved. Moreover, good governance demands that the Commission respond to the jurisdictional arguments raised now before continuing with its proceeding.

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[1] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Briefing Order).

[2] The timely rehearing requests were filed by Algonquin Gas Transmission, LLC (Algonquin), jointly by the Interstate Natural Gas Association of America (INGAA) and the Energy Infrastructure Council (EIC), and jointly by the Natural Gas Supply Association (NGSA) and Center for LNG (CLNG).

[3] 15 U.S.C. § 717r(a).

[4] *Algonquin Gas Transmission, LLC*, 175 FERC ¶ 61,150, at P 7 (2021) (Rehearing Dismissal Order).

I. Parties are Aggrieved

4. The parties are aggrieved as they suffered the present and immediate injury of the reopening of a final, non-appealable certificate order.

A. The Briefing Order Reopened the Certificate

5. The Briefing Order reopened the certificate proceeding for the Atlantic Bridge Project to consider the emissions and operational safety at the Weymouth Compressor Station. Only by reopening the certificate proceeding can the Commission "reconsider the current operation of the Weymouth Compressor Station," consider "changes in . . . projected air emissions impacts or public safety impacts," ask whether "additional mitigation measures" should be imposed, or consider "stay[ing] or revers[ing] the Authorization Order."[5] My belief that the Briefing Order re-opens the certificate is not an idiosyncratic reading.[6] I will explain in more detail why that *must* be the case, but to reassure my audience that I am not alone in this view, it is worth pointing out that a bipartisan group of seven former commissioners appointed by every president since President Reagan agree with me, stating in a letter to the Commission that: "[i]n this proceeding, the Commission has effectively reopened the record many years after it authorized construction of facilities and denied rehearing requests . . . ."[7]

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[5] Briefing Order, 174 FERC ¶ 61,126 at P 2. For those new to this proceeding, the "Authorization Order" refers to the September 24, 2020 Commission staff order authorizing Algonquin to place the Weymouth Compressor Station into service.

[6] *See, e.g.*, New England Local Distribution Companies April 5, 2021 Initial Brief at 6 ("The Commission does not have legal authority to reopen this proceeding for the purpose of reconsidering or modifying the Certificate Order or the Authorization Order."); Summit Natural Gas April 2, 2021 Comments at 2 ("Summit is concerned that re-opening the Commission's final orders on Atlantic Bridge and the Compressor Station would send an unfortunate message to the developers of natural gas pipelines, electric transmission facilities, and other energy infrastructure who rely upon the stability of FERC orders when making investment decisions."); Fore River Residents Against Compressor Station et al. April 2, 2021 Initial Brief at 2 ("Therefore, reopening the record and considering revocation of FERC's authorization to operate the Station cannot establish worrisome precedent as no other facility would, presumably, ever face the same combination of unique and critical changed circumstances.").

[7] Former Commissioners Mike Naeve, Elizabeth A. Moler, Donald F. Santa, Jr., Pat Wood, III, Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly April 12, 2021 Letter to the Commission at 1 (Bipartisan Group of Former Commissioners). This letter is attached in Appendix A.

6. The majority denies that it is the case, clarifying that the Briefing Order "is not a reopening of the Commission's order"[8] but "merely initiates a fact-finding proceeding as an exercise of the Commission's continuing oversight of the Project."[9] The majority does not elaborate on what "exercis[ing] . . . the Commission's continuing oversight of the Project" means or its origins.[10] And for good reason. It has no basis in the NGA or Commission precedent.[11]

7. NGA section 7(e) authorizes the Commission "to attach to the issuance of the certificate and to the *exercise of the rights granted thereunder* such reasonable terms and conditions as the public convenience and necessity may require."[12] The legal consequence of this provision of the NGA is clear: the legal obligation to mitigate anything can originate *only* from the terms of a certificate. It is with the issuance of a certificate that the conditions are established. Put another way, the Commission is powerless to order a pipeline to take any action outside the scope of the requirements established in the conditions attached to its certificate. The only way to consider establishing new requirements is to reopen the certificate proceeding to add additional conditions, and such conditions can only be created by amending the certificate.

8. None of the conditions attached to the certificate allow for the establishment of "additional mitigation measures."[13] To the extent the majority's clarification attempts to argue that the issuance of the Briefing Order falls under Environmental Condition No. 2 of the Certificate Order, such argument is unavailing. Environmental Condition No. 2 is a standard term that delegates to the Director of the Office of Energy Projects (OEP) the authority to "take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the Project."[14] Reliance on

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[8] Rehearing Dismissal Order, 175 FERC ¶ 61,150 at P 1 n.1.

[9] *Id.* P 8.

[10] *Id*.

[11] *See* Bipartisan Group of Former Commissioners April 12, 2021 Comments at 2 ("We are unaware of any other instance, in the eight-decade history of the Natural Gas Act, where the Commission has taken such a step. Certainly, we cannot recall any such cases during our tenures on the Commission, which collectively span 20 years.").

[12] 15 U.S.C. § 717f(e) (emphasis added).

[13] Briefing Order, 174 FERC ¶ 61,126 at P 2.

[14] *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061, at Environmental Condition No. 2 (2017) (Certificate Order); *see* Chairman Glick April 12, 2021 Letter to

Environmental Condition No. 2 to impose "additional mitigation" would contravene its unambiguous purpose. In 1995, shortly after the Commission began adding this condition to its certificate orders, the Commission clarified that

> Condition 2 is intended to give the Director authority to enforce the 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. Rather, it is intended to give the Director authority to ensure that [the pipeline] complies with the environmental conditions and, if necessary, to modify these conditions in order to ensure National Environmental Policy Act (NEPA) compliance. It is also intended to provide expeditious resolution of unanticipated environmental situations the applicant may encounter during the construction and restoration of the project.[15]

The Commission has not departed from this interpretation.[16] The only applicability of Environmental Condition No. 2 in this case, would be if Algonquin's operation of the Weymouth Compressor Station were inconsistent with the terms of the Certificate Order.

Senator Barrasso at 3-4.

[15] *Tex. E. Transmission Corp.*, 73 FERC ¶ 61,012, at 61,019 (1995); *see Columbia Gas Transmission Corp.*, 71 FERC ¶ 61,038, at 61,158 (1995) ("the Director's authority discussed in the second environmental condition is unambiguous and is limited to environmental matters within the scope of the January 30 order.").

[16] *See Emergency Reconstruction of Interstate Nat. Gas Facilities Under the Nat. Gas Act*, Order No. 633, 103 FERC ¶ 61,197, at P 42 (2003) ("[W]e expect the presence of Commission Staff with authority to ensure compliance with environmental mitigation measures, including the authority to grant on-site variances to enable a company to adopt alternative means to meet environmental requirements, will speed reconstruction efforts. Accordingly, we will amend our § 375.308 regulations to specify that a staff member designated by the OEP Director, present on the emergency construction site as necessary or appropriate, shall have delegated authority sufficient to ensure environmental protection."); *Emergency Reconstruction of Interstate Nat. Gas Facilities Under the Nat. Gas Act*, Notice of Proposed Rulemaking, 102 FERC ¶ 61,053, at P 39 (2003) ("A staff member designated by the Director of OEP shall be present on the construction site as necessary or appropriate based on the nature of the project and shall have delegated authority to take whatever steps are necessary to insure the protection of all environmental resources during activities associated with construction of the project. This authority shall allow the design and implementation of any additional measures

9. That is not the case. The most relevant term and condition is Ordering Paragraph (A), which provides that "[a] certificate of public convenience and necessity is issued authorizing Algonquin and Maritimes to construct and operate the Atlantic Bridge Project, *as described in this order and in their application*."[17] For air emissions, the Certificate Order states:

> Air impacts from blowdowns are addressed throughout the EA, providing an estimate of emissions, explaining that methane is non-toxic and buoyant (dispersing rapidly in air), and summarizing a past health risk assessment performed on a similar facility. We find that air impacts from operation of the compressor station and blowdown events have been adequately addressed.[18]

10. The blowdown events totaled 0.34 percent of the annual total fugitive volatile organic compounds estimated by the Commission.[19] For safety, the Certificate Order states, "Algonquin has committed to design, install, inspect, test, construct, operate, replace, and maintain the [Weymouth Compressor Station] in accordance with [Pipeline and Hazardous Materials Safety Administration (PHMSA)] safety standards."[20] The blowdown events occurred in compliance with PHMSA safety standards.[21] Given that Algonquin's operations comply with the Certificate Order, there is no term or condition for the Director of OEP to enforce.

11. To the extent that the majority believes it is part of its "continuing oversight" to find that it is in the public interest for the project to be placed in service and may also consider whether additional conditions or mitigation measures are necessary and

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deemed necessary (including stop work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction.").

[17] Certificate Order, 158 FERC ¶ 61,061 at Ordering Paragraph A (emphasis added).

[18] *Id.* P 198.

[19] Briefing Order, 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting at PP 6, 9).

[20] Certificate Order, 158 FERC ¶ 61,061 at P 230.

[21] Briefing Order, 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting at PP 5-6, 10, & 13-14).

appropriate pursuant to that authorization,[22] no provision in the NGA supports this claim. The Certificate Order found the operation of the Weymouth Compressor Station to be in the public convenience and necessity.[23] Any reconsideration of that finding constitutes a re-opening of the certificate proceeding. Moreover, Environmental Condition No. 10 of the Certificate Order sets forth the requirements for placing the compressor station into service: that Algonquin "receive written authorization from the Director of OEP" in which would "only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily."[24] The sole predicate for issuance of an authorization is a determination that restoration has occurred. Environmental Condition No. 10 includes no language authorizing the Commission to add new conditions or mitigation measures as further requirements for Algonquin to receive its in-service authorization. And only by reopening the certificate proceeding can the Commission consider establishing additional conditions.

B. Injury is Present and Immediate

12. The parties are "aggrieved" as their injury is "present and immediate."[25] Because the Commission reopened the Certificate Order, Algonquin must now re-litigate issues evaluated and conclusively resolved in the certificate proceeding completed over four years ago and upheld on appeal. Moreover, the reopening of the certificate eviscerated

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[22] *See* Chairman Glick, Comments at Open Meeting at 14 (Feb. 18, 2021), https://www.ferc.gov/media/transcript0218201 ("But the Commission must still find that it is in the public interest for the project to be placed in service."); Chairman Glick April 12, 2021 Letter to Senator Barrasso at 3 ("The Commission may also consider whether additional conditions or mitigation measures are necessary and appropriate pursuant to that authorization."). It appears that the Commission and my colleague may believe the Commission is acting on the request for rehearing of the Authorization Order. *See* Rehearing Dismissal Order, 175 FERC ¶ 61,150 at P 1 n.2 ("The request for rehearing, which is pending . . . ."); Chairman Glick, Comments at Open Meeting at 31 (Mar. 18, 2021), https://www.ferc.gov/media/transcript-3 ("Algonquin I don't understand the particular point you're making there, we absolutely acted upon, or asked for more comments essentially, on an issue that was pending before us . . . ."). That belief would be incorrect. The Authorization Order is now final. The rehearing request was denied by operation of law on October 23, 2020, and the time for filing an appeal for judicial review expired on December 22, 2020.

[23] Certificate Order, 158 FERC ¶ 61,061 at P 31.

[24] *Id.* Environmental Condition No. 10.

[25] *Tenneco, Inc. v. FERC*, 688 F.2d 1018, 1022 (5th Cir. 1982).

the finality and regulatory certainty of all existing and future Commission certificates, destabilizing the entire natural gas supply chain from the wellhead to the burner tip. No longer does a final certificate mean it is in fact "final." Without such certainty, pipeline investment will chill and risk premiums will increase, making it more difficult and costly to finance projects (including projects to modernize existing lines) to reliably transport gas at reasonable prices. Surely this is not the intended purpose. Regardless of intention, that will be the effect: to make the financing so onerous that capital cannot be secured and pipelines will no longer file applications for certificates for new facilities but for authorizations to abandon existing ones.

13. These harms are felt universally. Shippers now face unknowable project risks affecting their ability to commit to precedent agreements and subscribe for service. And with the chill in pipeline investment and inability to build infrastructure, shippers will inevitably face pipeline constraints and rising prices all of which will be born, ultimately, by consumers, including the nearly half of American households that depend on gas.[26] These are present and immediate harms.[27]

C. Commission's Arguments are Unpersuasive or False

14. The Commission makes three main points to argue that the parties are not aggrieved, each of which is unpersuasive or false. First, the Commission argues that the parties' claims are "unsupported" or "generalized."[28] It is obvious that the Commission's act of reopening a final certificate has destabilized project fundamentals, will cause risk premium for pipelines to increase, and will make it more difficult and expensive to finance projects. The courts have recognized the importance of finality for investment.[29]

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[26] Energy Information Administration, Natural gas explained: Use of natural gas, https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php#:~:text=In%202019%2C%20the%20residential%20sector,residential%20sector's%20total%20energy%20consumption.&text=Some%20consumers%20in%20the%20commercial,combined%20heat%20and%20power%20systems ("The residential sector uses natural gas to heat buildings and water, to cook, and to dry clothes. About half of the homes in the United States use natural gas for these purposes.").

[27] These consequences will also affect electric reliability and prices.

[28] Rehearing Dismissal Order, 175 FERC ¶ 61,150 at P 6.

[29] *See Hirschey v. FERC*, 701 F.2d 215, 220 (D.C. Cir. 1983) ("projects-applicants, other potential investors and lending institutions must be able confidently to rely on the predictability of the FERC's procedural rules"); *see also CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994) (finding affecting the company's bottom line, reducing earnings available for dividends and investment, and damage to a company's standing in the financial markets by reducing company value and making it

And a review of the initial comments filed shows that these effects are real.[30] There is no need for substantiation or affidavits for something that is apparent. Such facts are amenable to judicial and administrative notice.

15. Second, the Commission appears to argue that the courts have found being subject to an adjudicatory process does not constitute irreparable injury. The Briefing Order, however, is not an adjudicatory process akin to the proceedings at issue in the cases that the Commission cites. It is unlike NGA section 4 orders accepting and setting rates for hearings that do not decide *Mobile-Sierra* claims.[31] It is unlike NGA section 5 show cause orders. It is unlike NGA section 10 orders initiating investigations.[32] All of those proceedings are within the Commission's authority to undertake and are "part of the social burden of living under government."[33] Whereas the Briefing Order is not. The Briefing Order, contrary to over 80 years of precedent, reopened the record of a judicially final certificate order without *any* demonstration that a statute conferred on the Commission that power.[34]

16. Finally, the Commission argues that the parties' "claimed harms are based on speculation regarding potential action that the Commission could take, rather than any action the Commission has actually taken."[35] This is plainly false. The parties each allege they are harmed based on the Commission's reopening of the final order, making the final order no longer final, an action that the Commission *has actually taken*.

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more difficult to raise capital to be a sufficiently concrete and non-speculative injury).

[30] *See* Appendix B.

[31] *See Trailblazer Pipeline Co. LLC*, 168 FERC ¶ 61,005 (2019) (exercising statutory discretion to set issue for NGA section 4 hearing).

[32] *See Tenneco, Inc. v. FERC*, 688 F.2d 1018 (5th Cir. 1982) (transferring case from an adjudicatory hearing to an enforcement investigation).

[33] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Petroleum Expl., Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938)).

[34] *See U.S. v. Seatrain Lines, Inc.*, 329 U.S. 424 (1947) (reaffirming district court's holding that the Interstate Commerce Commission had exceeded its statutory authority in reopening the proceeding and altering the certificate).

[35] Rehearing Dismissal Order*, LLC*, 175 FERC ¶ 61,150 at P 8.

II. Reviewability of Rehearing Requests

17. By analogy, the Briefing Order is immediately appealable like the orders deciding *Mobile-Sierra* claims.[36] Courts consider whether the agency decision is conclusive, causes irreparable injury, and interferes with agency discretion.[37]

18. The Briefing Order is final to the extent that it definitively resolves the issue whether the majority has the authority to reopen a final certificate proceeding to consider modifying its terms. The majority never reserved for later disposition the issue of whether it has the authority to reopen a final order.[38] The majority asks no questions or expresses doubt regarding its authority. And the majority is not budging from its position.

19. The Briefing Order has irremediable consequences. With having a final certificate order, no longer subject to appeal, comes the entitlement that the pipeline no longer has to re-litigate whether its project is in the public convenience and necessity. That entitlement is effectively lost if the Commission were allowed to continue reopening the final certificate orders and subjecting the pipeline to post-adjudication review of an adjudication that has already taken place. Such unprecedented and surprise post-adjudications are not the type of litigation that "is 'part of the social burden of living under government.'"[39] Nor can the consequence of reopening a certificate be remedied upon review of the final order that comes out of the Briefing Order.

20. Finally, there is no reason for the Commission to wait until the proceeding established by the Briefing Order is complete. Again, the majority asked no questions regarding the Commission's authority. The question of whether the Commission has the

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[36] *See Harris v. FERC*, 809 F.3d 491 (9th Cir. 2015) (finding court had jurisdiction to review FERC's decision to employ the *Mobile-Sierra* presumption); *Ala. Power Co. v. FERC*, 993 F.2d 1557, 1567 (D.C. Cir. 1993); *Miss. Valley Gas Co. v. FERC*, 659 F.2d 488, 499 (5th Cir. 1981); *Atlanta Gas Light Co. v. FPC*, 476 F.2d 142 (5th Cir. 1973). Cases applying the collateral order doctrine to administrative actions are also instructive. *See Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 137 (3d Cir. 2012) (applying collateral order doctrine to agency reopening proceedings).

[37] *See Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 244 (D.C. Cir. 1980).

[38] *Cf. ASARCO, Inc. v. FERC*, 777 F.2d 767, 771-72 (D.C. Cir. 1985) (finding that the Commission reserved the *Mobile-Sierra* issue).

[39] *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (quoting *Petroleum Exploration, Inc. v. Pub. Serv. Comm'n of Ky.*, 304 U.S. 209, 222 (1938)).

authority to reopen a certificate order is separate from the majority's questions on whether and how should the Commission modify the terms of a certificate order.

III. Good Governance Demands Responding to Rehearing Requests

21. It also would be wise of the Commission to respond to the arguments that the Commission lacks the authority to reopen a final certificate order. In fact, it is incumbent upon the Commission to do so at some point.[40] Why wait until tomorrow when you have an opportunity to do so today?

22. Especially when this explanation would benefit all parties.[41] What party wants the Commission to state that their safety and environmental concerns "warrant further consideration," encourage them to labor over initial and reply comments, and then to be later told the Commission lacked the authority to reopen the record and cannot modify the certificate to address their concerns? Those parties will undoubtedly criticize the Commission for its mismanagement, waste, and deception. There will be no applause for giving those parties an additional opportunity to participate. The majority will simply have harassed a pipeline without any benefit.

23. The seven former commissioners have advised the Commission to terminate the proceeding.[42] I agree.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

[40] *See Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

[41] As of April 14, 2021, over 70 motions to intervene and over 25 initial comments were filed.

[42] Bipartisan Group of Former Commissioners April 12, 2021 Letter at 3.

Appendix A

April 9, 2021

Chairman Richard Glick
Commissioner Neil Chatterjee
Commissioner James Danly
Commissioner Allison Clements
Commissioner Mark C. Christie

Re: *Algonquin Gas Transmission, LLC*
Maritimes & Northeast Pipeline, LLC
Docket Nos. CP16-9, *et al.*
Comments of the Bipartisan Former FERC Commissioners on the Commission's February 18, 2021, Order Establishing Briefing

Dear Chairman Glick and Commissioners Chatterjee, Danly, Clements, and Christie:

The undersigned are a bipartisan group of former Commissioners appointed by every President since Ronald Reagan. We write to express our concern about the Commission's February 18, 2021, Order Establishing Briefing ("February 18 Order") in this proceeding.

The February 18 Order threatens to impede the development of all infrastructure projects subject to the Commission's jurisdiction. The Commission—and the Nation as a whole—relies on private companies and investors to commit the massive resources needed to develop infrastructure to support the Nation's energy needs. Those companies and investors are willing to make the necessary investments based on the expectation that rates will allow for reasonable returns over the course of the projects' long lives. They also rely on the expectation of a fair and predictable regulatory process characterized by reasoned decisionmaking.

The finality of Commission authorizations is a cornerstone of this regulatory scheme. If shifts in the composition or policy priorities of the Commission result in retroactive reconsideration of existing, already-final Commission authorizations after substantial investments have been made, investors will either demand higher returns or stop funding projects altogether. In either case, the ultimate victims will be the Nation's energy consumers, including manufacturers, businesses, schools, hospitals, and residential consumers who rely on natural gas for heating, cooking, and electricity. Put simply, increasing uncertainty for investors translates into higher energy bills and less reliable energy supply for consumers.

We are concerned that the February 18 Order deviates from the Commission's traditional respect for the finality of existing authorizations. That departure jeopardizes the private investment required to develop major energy infrastructure projects. In this proceeding, the Commission has effectively reopened the record many years after it authorized construction of facilities and denied rehearing requests, and after a federal court upheld the Commission's actions in all respects. We are troubled by the novel assertion of authority to reconsider a long-since-final certificate order, without any suggestion that the terms of

that order were violated, and long after a private company built and placed into service the facilities in question, at a cost of approximately a half billion dollars. We are unaware of any other instance, in the eight-decade history of the Natural Gas Act, where the Commission has taken such a step. Certainly, we cannot recall any such cases during our tenures on the Commission, which collectively span 20 years.

The investment community has already taken notice. In the words of one commentator, the idea that the Commission "can revoke a completed project's certificate without any enforcement action or even a determination that the certificate was violated" creates "an entirely new risk" for project developers.[1] At minimum, this departure from a settled practice of "respect[ing] the finality" of Commission orders imperils the billions of dollars that private companies have invested in natural-gas infrastructure projects approved by the Commission.[2] By one estimate, private enterprise invested approximately $97.8 billion developing new interstate natural gas transmission facilities in the past decade alone.[3] The February 18 order threatens all of that investment. That threat will likely deter companies from proposing new infrastructure projects to address public needs. Even if these detrimental effects were confined to the natural-gas sector alone, they would affect countless homes and businesses nationwide given the widespread reliance on natural gas.[4]

Furthermore, we fear the negative effects will not be limited to natural gas projects. Instead, the resulting uncertainty will "impact investment in *all* infrastructure projects" over which the Commission has jurisdiction.[5] A policy allowing re-opening of final authorizations when the Commission's composition or policy priorities change makes all projects subject to the Commission's jurisdiction—including potential projects involving renewable power sources[6]—less appealing for project developers and harder to finance. That, in turn, undermines the Commission's congressionally assigned mission of encouraging "the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[7] The Commission's mission cannot be accomplished without a robust energy infrastructure.

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[1] Gary Kruse, LawIQ, *FERC Inquiry Puts at Least $27 Billion in Pipeline Projects at Risk* (Feb. 26, 2021).
[2] *Id.* (noting that the estimated cost just for "projects that received their certificate after Atlantic Bridge and have a compressor station of at least [the Weymouth Compressor Station's] horsepower" is approximately $27 billion).
[3] Request for Rehearing of Interstate Natural Gas Association of America and Energy Infrastructure Council at 1, CP16-9-012 (Mar. 22, 2021).
[4] *See, e.g.*, U.S. Energy Information Administration, *Annual Energy Outlook 2021*, at 16, 25-26 (Feb. 2021), https://bit.ly/3qQOtnh (explaining that approximately 40% of the Nation's electricity was generated with natural gas in 2020, and that natural-gas consumption is expected to increase between 2020 and 2050).
[5] February 18 Order, C. Christie dissent, P 6.
[6] *See, e.g.*, Avi Zevin et al., *Building a New Grid Without New Legislation: A Path to Revitalizing Federal Transmission Authorities* (Dec. 2020), http://bit.ly/3vBQuHw (discussing how Commission might use its backstop-siting authority under 16 U.S.C. § 824p to authorize electric transmission lines needed to connect consumers to renewable power sources).
[7] *National Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976).

Finally, the Commission's long tradition of respecting the finality of its orders accords with Congress's intent to insulate the Commission, an independent, bipartisan agency, from arbitrary changes in policy that would upset settled reliance interests.[8] At a time when there is broad support for strengthening the Nation's infrastructure, it is disappointing that the Commission would adopt a course that can only weaken the United States' energy infrastructure.

For all of these reasons, the Commission should terminate the briefing process in Docket No. CP16-9-012.

Respectfully submitted,

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[8] *See* 42 U.S.C. § 7171(a), (b)(1) (establishing Commission as an "independent" agency in which no more than three of the five Commissioners may be members of the same political party, and in which the Commissioners serve fixed, five-year terms and "may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office").

Appendix B

- Bipartisan Group of Former Commissioners April 12, 2021 Comments at 1:

> The finality of Commission authorizations is a cornerstone of this regulatory scheme. If shifts in the composition or policy priorities of the Commission result in retroactive reconsideration of existing, already-final Commission authorizations after substantial investments have been made, investors will either demand higher returns or stop funding projects altogether. In either case, the ultimate victims will be the Nation's energy consumers, including manufacturers, businesses, schools, hospitals, and residential consumers who rely on natural gas for heating, cooking, and electricity. Put simply, increasing uncertainty for investors translates into higher energy bills and less reliable energy supply for consumers.

- Industrial Energy Consumer Group April 5, 2021 Initial Brief at 5:

> Until the uncertainty created by the February 18 Order is resolved in favor of the continued operation of the Weymouth compressor station, all Northern New England consumers of electricity and natural gas, including IECG members, are imperiled by continued economic, environmental, and justice-based harms.

- Summit Natural Gas April 2, 2021 Comments at 2:

> Summit is concerned that re-opening the Commission's final orders on Atlantic Bridge and the Compressor Station would send an unfortunate message to the developers of natural gas pipelines, electric transmission facilities, and other energy infrastructure who rely upon the stability of FERC orders when making investment decisions. Sensing instability in the finality of regulatory approval orders, project developers may be unwilling to invest in new projects because the regulatory risk is intolerable for investors. Even if projects are pursued, the risk that a seemingly final regulatory approval will be re-opened and nullified years later will be taken into account and allocated away from the project. Ultimately, that risk will be borne by consumers through higher cost and less reliable service due to the potential disruption of a once-final regulatory approval. Stated simply, consumers benefit from

> the stability and finality of the Commission's regulatory decisions.

- Heritage Gas Limited April 1, 2021 Comments at 2:

> Our Company relies on the finality for the Commissions' proceedings and regulatory certainty when contracting major supply options. The Commission's action to reopen the record and revisit a final certificate order will have consequences on our ability to satisfy our distribution service obligations. Reopening the record at the notice to commence service stage is particularly problematic for local distribution companies who have spent years planning for that service to be available in time to meet their system demand. . . . The action to reopen the matter has cast doubt on Heritage Gas' ability to receive natural gas supply and provide natural gas service to our distribution customers such as major hospitals, universities, and production companies who are the backbone of the rural economy and communities in Nova Scotia, Canada.

- Footprint Power Salem Harbor Development LP March 30, 2021 Comments at 1-2:

> In addition to threatening to undermine any contracts that Salem Harbor may pursue with Algonquin, Salem Harbor now must also consider whether the Commission will reopen any number of previously certificated natural gas projects. FERC's order contained no limitations to when and why it can reopen proceedings for projects that it has approved, that are already operational, and where no breach of the certificate exists (and where rehearing of the certificate decision has already been considered and denied). The Commission's Order may jeopardize unrelated transportation service contracts if it ultimately decides that a final certificate decision is not final, threatening Salem Harbor's ability to procure reliable gas service, and thus provide reliable electric service to New England residents and businesses. And Salem Harbor agrees with comments of many intervenors that even a suggestion that FERC may reconsider a supposedly final order will deter investment in energy infrastructure. All of these harms will eventually fall on the public.

- Electric Power Supply Association (EPSA) April 5, 2021 Initial Brief at 16:

> Where certificate orders are concerned, generation developers, including EPSA's members, invest billions of dollars in reliance on the finality of Commission orders certificating natural gas pipeline facilities needed to deliver fuel for their facilities, and such investment will be chilled just as surely as that in the pipelines themselves if certificate orders are subject to perpetual reopening.

- American Petroleum Institute (API) April 5, 2021 Initial Brief at 1-2:

> API and its members are deeply concerned by FERC's Order, not only because of its implications for these specific fully authorized, in-service natural gas facilities, but because of the problematic precedent it could set for a host of other final FERC and other agency orders related to infrastructure projects that support thousands of well-paying jobs, including union jobs, and transport essential fuels that help power economies both domestically and globally.

- TC Energy Parties April 5, 2021 Initial Brief at 5-6:

> Questioning the finality of Commission orders will erode the regulated community's confidence in the Commission's ability to come to final decisions on which all stakeholders rely, whether investors, operators, consumers, or other interested persons.

- Kinder Morgan, Inc. Natural Gas Entities April 5, 2021 Initial Brief at 4:

> The Commission's undermining of finality will cause market uncertainty and instability, which will in turn exacerbate investment risk in the industry, which will in turn yield fewer infrastructure projects and higher costs for consumers. This result is predictable.

- Cheniere Energy, Inc. March 23, 2021 Comments at 2:

> The introduction of regulatory uncertainty caused by issuance of the Briefing Order may create substantial barriers to the development of energy infrastructure necessary to ensure grid stability and reliable access to energy resources throughout the U.S., which would appear to be inconsistent with the Commission's basic duties to eliminate barriers to competition and ensure reliability of the nation's energy

infrastructure.

- DT Midstream Inc. April 5, 2021 Initial Brief at 10:

> Reconsideration, modification, or revocation of certificate authority for a single natural gas facility will chill future natural gas investment nationwide. The consequences of such actions could upset the underlying natural gas market place by removing vital natural gas capacity from the market—and ultimately from consumers who rely on natural gas for home heating and electricity. The Commission must avoid such an adverse result by terminating the proceeding and signaling to all stakeholders that they can have confidence in the Commission's final orders.
>
> DTM further believes that the uncertainty and risk created by the Order will have ramifications beyond the natural gas industry, causing all stakeholders interested in Commission orders to call into question whether any order issued by the Commission can be deemed final and not subject to revocation or modification simply because the Commission decided to do so. The harm associated with calling into question the reliability of Commission orders will be broad and the consequences difficult to limit or even predict.

- National Fuel Gas Supply Corporation and Empire Pipeline, Inc. April 5, 2021 Initial Brief at 12:

> The Commission's action may also lead to greater difficulties in funding modernization and replacement projects, which serve to ensure safe and secure pipelines, reinforce current systems by updating aging infrastructure, enhance system reliability, upgrade facilities, incorporate new technologies, and result in fewer emissions. By undermining the finality of certificate orders, the Commission has set in motion a potential chain reaction with unintended consequences, resulting in a ripple effect that may reach far beyond the current circumstances.