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RANKING MEMBER

ONE HUNDRED SEVENTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

September 27, 2021

The Honorable James Danly
Commissioner
Federal Energy Regulatory Comission
888 First Street NE
Washington, DC 20426

Dear Commissioner Danly:

Thank you for appearing before the Subcommittee on Energy on Tuesday, July 27, at the hearing entitled "The Changing Energy Landscape: Oversight of FERC." I appreciate the time and effort you gave as a witness before the Committee on Energy and Commerce.

Pursuant to Rule 3 of the Committee on Energy and Commerce, members are permitted to submit additional questions to the witnesses for their responses, which will be included in the hearing record. Attached are questions directed to you from certain members of the Committee. In preparing your answers to these questions, please address your responses to the member who has submitted the questions in the space provided.

To facilitate the printing of the hearing record, please submit your responses to these questions no later than the close of business on Tuesday, October, 12 2021. As previously noted, this transmittal letter and your responses, as well as the responses from the other witnesses appearing at the hearing, will all be included in the hearing record. Your written responses should be transmitted by e-mail in the Word document provided to Lino Peña-Martinez, Policy Analyst, at Lino.Pena-Martinez@mail.house.gov. To help in maintaining the proper format for hearing records, please use the document provided to complete your responses.

Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Lino Peña-Martinez with the Committee staff at (202) 225-2927.

Sincerely,

Frank Pallone, Jr.
Chairman

Attachment

cc: The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce

The Honorable Bobby L. Rush
Chairman
Subcommittee on Energy

The Honorable Fred Upton
Ranking Member
Subcommittee on Energy

Attachment—Additional Questions for the Record

Subcommittee on Energy
Hearing on
"The Changing Energy Landscape: Oversight of FERC"
Tuesday, July 27, 2021

The Honorable James Danly, Commissioner, Federal Energy Regulatory Commission

The Honorable Robert Latta (R-OH)

1. In your view, why is it important for FERC to examine grid resilience?

RESPONSE:

The Commission has jurisdiction over the reliability of the bulk electric system through our oversight of the mandatory reliability standards promulgated by the North American Electric Reliability Council (NERC). The reliability standards are requirements approved by FERC to provide for the reliable operation of the bulk-power system. Reliable operation means the bulk power system is operated in such a way "that instability, uncontrolled separation, or cascading failures of such system will not occur as a result of a sudden disturbance, including a cybersecurity incident, or unanticipated failure of system elements."[1] To date, the Commission has not yet issued an order defining "resilience." However, the Commission proposed a preliminary definition in a recent generic proceeding to examine the matter: resilience is the "ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event."[2] !

Resilience is not a matter over which Congress has conferred clear jurisdiction as it has in the case of reliability. Nevertheless, to the extent to which the Commission's exercise of its ratemaking or reliability powers implicate the resilience of the electric system, supporting the stability of operations and recovery from disruptions should inform our decisions because stable and affordable electricity is fundamental to the prosperity and well-being of the American people.

[1] 16 U.S.C. § 824*o*(a)(4).

[2] *Grid Reliability & Resilience Pricing Grid Resilience in Reg'l Transmission Orgs. & Indep. Sys. Operators*, 162 FERC ¶ 61,012 (2018).

2. What are the greatest threats to grid resilience?

RESPONSE:

The single greatest threat to the resilience of the electric system comes from the failure of FERC's jurisdictional markets (the Regional Transmission Organizations and Independent System Operators) to produce accurate price signals. When the markets fail to produce accurate price signals they do not create the correct incentives to attract the entry of new generation resources or to retain needed, existing generation. When the incentives are not properly established by market mechanisms, the market fails to ensure that there is adequate generation to meet the system's peak demand requirements and the resilience of the system is thereby imperiled. We have seen such market failures most starkly in the recent reliability events in California. We will see more of them in different regions of the country as market prices are skewed by the entry of state-subsidized intermittent resources that can offer their capacity into the market at suppressed prices, driving the market clearing prices down and depriving more expensive dispatchable generation of the revenue needed to remain solvent.

A second challenge to electric system resilience comes from the widespread integration of intermittent resources like wind and solar. While so far, these non-dispatchable resources have been accommodated in most regions of the country in relatively large quantities, they have been integrated alongside large quantities of reliable baseload and dispatchable natural-gas fired generation.[3] As the penetration of intermittent resources continues, and the percentage of total capacity delivered by intermittent resources increases, the stability of the system will become increasingly difficult to maintain. I am concerned that the inaccurate price signals in our markets, combined with state renewable portfolio standards, along with rising natural gas prices and the chilling effects of recent commission action on the natural gas industry, will drive ever more natural gas generators into premature retirement. When this happens, the markets will no longer be able to secure generating capacity of the right quantity (enough to meet peak load) and of the right type (dispatchable) to ensure system stability.

Lastly, physical and cyber-security vulnerabilities present significant concerns to system resilience because the electric system (and the gas system upon which it relies) are complex and interdependent. A physical or cyber attack, as we saw in the case of Colonial Pipeline, can have profound, wide-spread consequences for the entire system.

[3] As recently explained at a FERC technical conference the "electric power sector . . . is increasingly dependent upon reliable natural gas service . . . ." 2021 Annual Commissioner-Led Reliability Technical Conference, Statement of the N. Am. Electric Reliability Corp., Docket No. AD21-11-000, at 11 (Sept. 30, 2021).

3. More generally, what criteria does the commission use to determine resilience?

RESPONSE:

The Commission has no standard by which it evaluates resilience in any of the statutory regimes it administers.

4. What role can NERC (North American Electric Reliability Corporation) play in devising certain criteria or standards for utilities to rely on to help in efforts to harden the grid against external threats?

RESPONSE:

NERC can develop reliability standards to support the resilience of the electric system and use its considerable convening authority to share information and lessons learned among utilities. I remain concerned, however, that neither the Commission nor NERC are the ideal instrumentalities to bear primary responsibility for emergent resilience challenges. The Commission's primary role is that of an economic regulator and it is constituted to be a deliberative body. NERC is a standards organization that employs a deliberate, stakeholder-driven standards-setting process that typically permits ample time for industry compliance. Neither is organized to take fast, decisive action in the face of emergencies.

5. Finally, on a different topic, I believe that nuclear energy is the best and most reliable source of clean baseload power, and that it cannot be left out of any discussions or strategies to address carbon emissions.

    a. What is FERC doing to ensure the viability of nuclear energy in the United States?

RESPONSE:

The Commission's role under the Federal Power Act is to ensure that rates for the sale of wholesale power in interstate commerce are just and reasonable. The Federal Power Act reserves to the states the power to choose the type of generation assets within their borders. Other than the power to approve or reject utility tariffs that set wholesale power rates, including the tariffs that set the rates in the RTOs and ISOs, the Commission has no authority over nuclear power per se. I am gravely concerned, however, that the long-term economic prospects of reliable, dispatchable generation resources (like nuclear power plants), are being seriously jeopardized by the Commission's failure to police its jurisdictional markets to ensure that correct

price signals are being sent to properly compensate existing baseload generation.[4] As long as market prices can be suppressed and price signals thereby skewed, more reliable generators will fail to clear the capacity markets, be deprived of necessary revenue, and ultimately retire. This will subject the electric system to even greater instability as the percentage of intermittent generation further increases.

The Honorable David B. McKinley [R-WV]

1. Where customers have signed up for capacity on a proposed pipeline, indicating that there is demand for that pipeline, do you believe that FERC should approve the project?

RESPONSE:

Section 7(e) of the Natural Gas Act (NGA) mandates that the Commission issue a certificate authorizing the construction and operation of proposed pipeline facilities that are in the public convenience and necessity.[5] Where a proposed pipeline's public benefits (including demand for the project) outweigh adverse effects, the Commission's Certificate Policy Statement explains that the Commission must approve an application for a certificate.[6]

2. I'm concerned that FERC has recently been second-guessing the Commission's prior final decisions. For example, FERC ordered briefing on whether a facility operating in full compliance with a final certificate should "remain in service," calling 80 years of precedent regarding final certificate orders into question.

    a. Going forward, can the public and regulated industry rely on FERC to make final decisions and then stick by them?

RESPONSE:

I share your concern regarding the finality of Commission orders and the importance of regulatory certainty. In my dissent to the briefing order to which you refer, and which is

[4] A recent example came in the form of the acceptance by operation of law of a PJM proposal that will undermine price formation in the PJM capacity market and which thereby threatens grave consequences for resource adequacy in the PJM region. PJM Interconnection, L.L.C., Notice of Filing Taking Effect by Operation of Law, Docket No. ER21-2582-000 (filed Sept. 29, 2021); PJM Interconnection, L.L.C., Statement of Comm'r James P. Danly, Docket No. ER21-2582-000, at PP 61-68 (2021).

[5] 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 to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission . . . and that the proposed . . . construction . . . is or will be required by the present or future public convenience and necessity . . . .") (emphasis added).

[6] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,750 (1999) ("In sum, the Commission will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects."), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

attached for your convenience, I stated, "[r]egulatory certainty, of which finality is a large part, is absolutely critical to achieving the goals of the NGA."[7]

I am troubled by the Commission reopening a certificate order—a final, non-appealable certificate order—to consider imposing additional requirements and whether to allow a facility to remain in service. I am further troubled by the Chairman's and the Commission's insistence that the Commission did not reopen the certificate order,[8] and that the Commission "merely initiate[d] a fact-finding proceeding as an exercise of the Commission's continuing oversight over the Project."[9] The proceeding established by the briefing order is still pending at the Commission, and the briefing order itself is on appeal in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Because of the Commission's actions in this matter, I am not confident that, going forward, either the public or natural gas companies will be able to rely on the finality of Commission orders and the entire industry will suffer because this uncertainty will drive up the cost of capital necessary to undertake such large infrastructure projects.

3. FERC's Order No. 871 significantly restricts what companies may do while requests for rehearing of FERC certificate orders are pending, which can delay surveys for environmental and cultural resource permits, land acquisition, and construction. FERC applied these new delays to projects that it has already determined to be in the public convenience and necessity.

    a. What steps are you taking to expedite review of rehearing requests to ensure projects that the Commission has determined are needed can promptly proceed following certificate issuance?

RESPONSE:

The Chairman alone has been responsible for staffing and the timing of orders on rehearing. I share your concerns regarding unnecessary delays, particularly now that landowner due process concerns have been resolved by the D.C. Circuit in *Allegheny Defense Project v. FERC*.[10] In fact, in my dissents to the most recent decisions in Order No. 871, I stated that I would repeal the initial rule to withhold authorization to proceed with construction until rehearing was complete

[7] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly, Comm'r, dissenting at P 28).

[8] Letter from Richard Glick, Chairman, FERC, to Sen. John Barrasso, U.S. Senate, at 2 (Apr. 12, 2021), https://www.ferc.gov/media/letter-chairman-richard-glick-senator-john-barrasso-md (Chairman Glick April 12, 2021 Reply Letter) ("[T]he Briefing Order does not revisit or otherwise reopen the certificate for the Atlantic Bridge Project."); *Algonquin Gas Transmission, LLC*, 175 FERC ¶ 61,150, at P 1 n.1 (2021) ("To clarify, this proceeding 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.").

[9] *Algonquin Gas Transmission,* LLC, 175 FERC ¶ 61,150 at P 8; *see also* Chairman Glick April 12, 2021 Reply Letter at 2 ("[T]he 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] 964 F.3d 1 (D.C. Cir. 2020) (en banc).

as it is no longer required by law or prudence.[11] I also stated that the policy announced to presumptively stay certificate orders for up to 150 days is beyond the Commission's authority and contrary to the plain text of the NGA.[12] For your convenience, I have attached these two dissents.

4. The E&C majority's CLEAN Future Act would require a pipeline to secure all applicable federal and state permits before the pipeline can acquire access to the project route through eminent domain.

    a. Is it correct that pipelines often need physical access to the route to collect survey data that is required before the company can obtain environmental and cultural resource permits?

RESPONSE:

I do not have direct knowledge of state requirements regarding survey data and state-issued environmental and cultural resource permits. My understanding is that such requirements vary greatly by state, and in some states, pipelines do require physical access to the proposed route to collect the survey data required for the company's environmental and cultural resource permits. I believe this was the case for the PennEast Project, for example.[13]

    b. Would this CLEAN Future Act proposal then block projects from proceeding because they cannot gain access to the FERC-approved route to complete the permitting process?

RESPONSE:

If a pipeline company is required to conduct field surveys to obtain a permit, and the pipeline company is unable to do so because of inadequate access to a proposed route, then it would be nearly impossible for a pipeline company to proceed with its proposed project.

5. I'm concerned that FERC will attempt to act as a climate czar by using its pipeline review process to regulate greenhouse gas emissions from upstream natural gas producers and downstream natural gas end users.

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[11] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), *order on reh'g*, Order No. 871-A, 86 Fed. Reg. 7643 (Feb. 1, 2021), 174 FERC ¶ 61,050, *order on reh'g*, Order No. 871-B, 86 Fed. Reg. 26,150 (May 13, 2021), 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at P 2), *order on reh'g*, Order No. 871-C, 86 Fed. Reg. 43,077 (Aug. 6, 2021), 176 FERC ¶ 61,062 (2021) (Danly, Comm'r, dissenting at P 1).

[12] Order No. 871-C, 176 FERC ¶ 61,062 (Danly, Comm'r, dissenting at PP 2-6); Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at PP 7-12).

[13] *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at PP 98-99 (2018) (noting incomplete surveys due to lack of access to landowner property and where access was denied).

a. Do you believe that FERC has the authority to deny a Natural Gas Act certificate based on FERC's analysis of GHG emissions from upstream and downstream sources?

RESPONSE:

No. The Commission does not have the authority to deny an NGA certificate based on GHG emissions from upstream and downstream sources. The Supreme Court has explained that the principal purpose of the NGA is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[14] The Commission is an economic regulator, not an environmental regulator.

Further, the National Environmental Policy Act (NEPA) does not expand the Commission's jurisdiction to allow it to deny a certificate on such a basis.[15] Considering GHG emissions from upstream and downstream sources is not consistent with NEPA. It also runs afoul of the Supreme Court's decision in *Department of Transportation v. Public Citizen* which constrained federal agencies' consideration of the effects of government action to only those effects for which the federal agency is the legally proximate cause and which the agency has the legal discretion to prevent.[16] The Commission has no jurisdiction over either natural gas production or its end uses.

b. Do you think FERC has the authority to force pipelines to "offset" the GHG emissions from upstream and downstream sources?

RESPONSE:

No. The Commission does not have the authority to require pipelines to mitigate GHG emissions from upstream or downstream sources. NGA section 7(e) authorizes the Commission to attach to certificate orders "*reasonable* terms and conditions."[17] Requiring a pipeline to mitigate the effects of actions over which it has no control cannot be "reasonable." Moreover, the Clean Air Act designated the U.S. Environmental Protection Agency (EPA) and the states—not the Commission—with exclusive authority to regulate air quality.

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[14] *Nat'l Ass'n for Advancement of Colored People v. FPC*, 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).

[15] *Nat. Res. Def. Council, Inc. v. Env't Prot. Agency*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.") (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute."); *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) ("NEPA does not mandate action which goes beyond the agency's organic jurisdiction."); *see also FlintRidge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way").

[16] 541 U.S. 752, 770 (2004).

[17] 15 U.S.C. § 717f(e) (emphasis added).

The Commission has announced it will be conducting a technical conference on November 19, 2021, to discuss GHG mitigation for pipelines (both related to the pipeline facilities themselves and upstream and downstream emissions), but none of the proposed questions for the technical conference ask the threshold question of whether the Commission, in fact, has authority to impose a GHG mitigation regime or require pipelines to mitigate effects over which they have no control.

c. Wouldn't these actions be inconsistent with the NGA's fundamentally economic concerns and the fact that NEPA does not change an agency's underlying decision-making responsibilities or mandate particular results?

RESPONSE:

Yes. The direct or indirect regulation of GHG emissions from upstream natural gas producers and downstream natural gas end users is inconsistent with the NGA. The Commission's role under the NGA is to ensure the orderly development of plentiful supplies of natural gas at reasonable prices. The Commission fulfills this role by issuing certificates for the construction and operation of natural gas pipelines, when the proposals are found to be in the public convenience and necessity, and by ensuring that rates for transportation service are just and reasonable and not unduly discriminatory or preferential. Only the states and the EPA have authority to regulate emissions from natural gas producers and downstream consumers. The Commission should not do indirectly what it cannot do directly.

As you note, NEPA does not change an agency's underlying decision-making responsibilities or mandate particular results. The Commission is statutorily barred from regulating natural gas production, local distribution, and generation decisions. NEPA is a procedural statute and, as such, cannot overcome this statutory bar or serve to expand the Commission's jurisdiction.

6. Please describe FERC's role in ensuring transmission costs and projects are reasonable while also ensuring customer affordability. If not FERC's role, who's responsibility is it?

RESPONSE:

The Commission's role under the FPA is to ensure that both the rates for wholesale sales of electric power and the rates for transmission service are just and reasonable. The Commission does not directly regulate the planning, citing or permitting of transmission facilities. The State public utility commissions bear responsibility for scrutinizing transmission projects while the Commission approves or rejects transmission service rate filings. Transmission rates are only just and reasonable if they follow the cost-causations principles articulated by the courts in which ratepayers can only be charged transmission rates that are "roughly commensurate" with the benefits they receive from that transmission.[18]

7. Transmission rate base/investment has grown considerably over the past few years.

[18] *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 477 (7th. Cir. 2009).

a. Given the fact that we keep hearing that more transmission is needed to connect all the new renewables that are being built, what process does FERC have in place to monitor and control transmission cost increases for our customers?

RESPONSE:

This question is under active consideration in an Advanced Notice of Proposed Rulemaking (ANOPR), "Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection."[19] I am concerned that in the current zeal to encourage the widespread build-out of transmission infrastructure, ratepayers will be required to pay too much for transmission service and that the cost of the infrastructure will be socialized too broadly. Ratepayers must pay for both the electric power they consume and for the transmission service that delivers that power. I believe there is a great likelihood that, if too much transmission is built, ratepayers all-in bills will rise steeply and the promise of cost savings driven by inexpensive renewable energy will prove illusory when transmitted over long distances. I will review the comments submitted in the ANOPR proceeding and will be on guard for any policies that encourage overbuilding the transmission system or that will impose unnecessary or unlawful costs on ratepayers. Ultimately, the Commission may only approve rates that that are just and reasonable and, in the case of transmission rates, that requires that the benefits received be roughly commensurate with the rates imposed.[20]

8. As more renewables are being connected to the grid and more transmission is needed to connect them, what is FERC doing to ensure customer affordability while balancing reliability?

RESPONSE:

Please see my answer to the above question.

9. Does FERC require transmission planners to study and consider alternatives to transmission investment as being part of the solution? If no, why not?

RESPONSE:

As a general matter, the Commission's jurisdiction over transmission extends only to accepting or rejecting proposed rate filings under the Federal Power Act's just and reasonable standard. Different regions and different states employ varied methods of conducting transmission planning. The Commission's role is restricted to ensuring that the rates imposed satisfy the requirements of the Federal Power Act.

[19] 176 FERC ¶ 61,024 (2021).

[20] *Ill.Commerce Comm'n*, 576 F.3d at 477.

10. According to the EPA, the carbon intensity of gas in the Marcellus Basin is nearly four times lower than the average of all other basins. Moreover, replacing older pipeline infrastructure with new helps to address potential failures and leaks in existing infrastructure, increasing efficiency, and improves environmental security.

    a. How can the FERC help to ensure new and improved pipelines can be constructed in the near term to help ensure for the continued construction of reliable energy infrastructure while also ensuring sufficient oversight and consumer protections?

RESPONSE:

The Commission must approve proposed natural gas projects that are in the public convenience and necessity. Natural gas facilities are expensive; some cost billions of dollars. For companies to undertake this type of investment, developers and their investors require a clear understanding of the rules and must have confidence that those rules will be consistently followed. When the rules are not followed, are incomprehensible, or unexpectedly change without explanation (as has been the case at the Commission in the past year), no developer or investor can appropriately weigh the risks associated with undertaking such projects. Absent regulatory certainty, investment has chilled and risk premiums have risen. In turn, shippers, including producers and local distribution companies, will see transportation costs rise and suffer reduced access to reliable supplies.

Over the last nine months, the Commission has created a great deal of regulatory uncertainty. I will highlight a few examples. First, as you allude to earlier in your questions, in February the Commission reopened a final, non-appealable certificate order to consider imposing air quality and pipeline safety measures.[21]

Second, in March, the Commission established an "eye-ball test" to determine the significance of greenhouse gas emissions from the proposed project facilities.[22] I dissented in this proceeding and equated the majority's "eye-ball test" to posting a speed limit with a question mark instead of a number, leaving it to the police officer to decide whether you were speeding.[23]

Third, in May and June, Commission staff, under the supervision of the Chairman, announced it would issue supplemental Environmental Impact Statements for seven project proposals for which it had issued Environmental Assessments, four of which were published *last year*. Among the projects that have been delayed, four have had their Final Environmental Impact Statements issued—and they reach the same conclusion that the Environmental Assessments did: that Commission staff is unable to assess the project's impact on climate change. The Commission should have done what it had done (and successfully defended in court) for years—issue the

[21] Algonquin Gas Transmission, LLC, 174 FERC ¶ 61,126.

[22] *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021).

[23] *Id.* (Danly, Comm'r, dissenting at P 16).

Environmental Assessment and respond to comments in our orders. Instead, these projects have been significantly delayed in order to prepare Environmental Impact Statements that amount to little more than a paperwork exercise.

The uncertainty caused by the Commission over the last nine months has had a profound impact on the business decisions that pipeline companies must make. Within the last month, two pipelines have withdrawn their applications. On September 20, 2021, Eastern Gas Transmission and Storage, Inc. withdrew an application for a section 7 certificate which it filed nearly six months ago, requesting permission to build minor upgrades to three compressor stations in Pennsylvania and Virginia. It did so because, in their words, "[d]espite [the project's] limited scope, the Commission has not taken action to prepare an Environmental Assessment."[24]

More recently, on October 12, 2021, Adelphia Gateway, LLC (Adelphia) withdrew its request to install and operate an additional *electric-motor driven* compressor unit at its already authorized Marcus Hook Compressor Unit. It did so because "as a result of the extension of the environmental review through the supplemental EIS process and a prolonged Commission review process, the Project has been delayed well beyond Adelphia's expectations and, more specifically, there is significant uncertainty regarding when a order will issue in this docket. In light of this, Adelphia has decided not to continue the development of the Project."[25] It should be recognized that the supplemental Environmental Impact Statement process was conducted to inform the Commission on the significance of the emissions related to the downstream use of natural gas—as the proposed electric-motor driven compressor unit would only have had minimal operational emissions itself.

[24] Eastern Gas Transmission and Storage, Inc., Withdrawal of Application, Docket No. CP21-97-000 (filed Sept. 20, 2021) (Accession No. 20210920-5156).

[25] Adelphia Gateway, LLC, Withdrawal of Prior Notice, Docket No. CP21-14-000, at 2 (filed Oct. 12, 2021) (Accession No. 20211012-5713).

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,

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("[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).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing — Docket No. RM20-15-001

(Issued May 4, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent in full from today's order modifying and expanding Order No. 871.[1] As an initial matter, I write to state that I would grant rehearing on all matters and repeal the rule.

2. The Commission promulgated Order No. 871 on June 9, 2020, in advance of the decision in *Allegheny Defense Project v. FERC*,[2] the en banc proceeding before the U.S Court of Appeals for the District of Columbia Circuit (D.C. Circuit) that addressed longstanding objections to the Commission's practice of relying upon tolling orders to delay answering requests for rehearing.[3] In recognition of the injustice of the Commission's practice of tolling rehearing requests indefinitely, and that practice's consequent denial of an opportunity for litigants to perfect their appeals, the Commission issued Order No. 871 in an attempt to balance the interests of potential appellants with those of pipelines by delaying the issuance of notices to proceed with construction.[4] On June 30, 2020, the D.C. Circuit issued its en banc opinion in *Allegheny* in which it found that the Commission was prohibited from indefinitely tolling requests for rehearing and finding that parties were entitled to petition for review once a rehearing request had been denied by operation of law.[5] The D.C. Circuit, having rightly imposed the discipline the

[1] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 Fed. Reg. 40,113 (July 6, 2020), 171 FERC ¶ 61,201 (2020) (Order No. 871).

[2] 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

[3] *See* Order No. 871, 171 FERC ¶ 61,201 (Glick, Comm'r, concurring in part and dissenting in part at P 1) ("It is readily apparent that today's final rule attempts to address *some* of the concerns raised in the *Allegheny Defense Project v. FERC* proceeding before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit).").

[4] *See id.* P 11.

[5] *See Allegheny*, 964 F.3d at 18-19.

Commission was unwilling or unable to impose upon itself, obviated the pressing need animating the Commission's decision to delay the issuance of notices to proceed. In light of the D.C. Circuit's re-enforcement of the statutory scheme governing rehearing and appeal, the Commission today need not go any further than has the court. Nor do I see any real risk that a pipeline will commence construction before a party has the opportunity to petition for review. As the Commission itself states, "on average, natural gas companies should not have expected to receive authorization to proceed with construction sooner than three months after order issuance."[6] Accordingly, I see no reason why this rule—promulgated in the face of litigation and in light of legitimate, unresolved concerns for the competing rights of the parties before the Commission—is still required by law or prudence. I would repeal it in full and instead rely wholly upon the rehearing and appeal provisions ordained by Congress to balance our litigants' various interests.

3. I also write separately in order to highlight a handful of self-evident legal infirmities that might form the basis of an aggrieved party's appeal. With this order, the Commission has, for the third time in as many months, dramatically increased the uncertainty faced by the natural gas industry by changing its policies so as to make it harder to rationally deploy capital, accurately assess risk, or predict Commission action.[7] Worse yet, the Commission fails in this order to satisfy its obligations under the Administrative Procedure Act (APA) and implements policies that conflict with the plain text of the Natural Gas Act (NGA), the most obvious of which is our new, unnecessary, and unjustifiable presumption to stay certificate orders.

I. The Commission fails to respond to arguments raised in briefing

4. Turning first to the most basic of APA violations, the Commission declines to even acknowledge, let alone respond to, the arguments raised by the Interstate Natural Gas Association of America (INGAA) that the issuance of Order No. 871-A was improper.[8] INGAA argues:

> (1) Order No. 871 was promulgated in violation of the notice-and-comment requirements of the Administrative Procedure Act, and that procedural deficiency cannot be cured by Order

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[6] *Limiting Authorization to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098, at P 37 (2021) (Order No. 871-B).

[7] *See N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021) (Danly, Comm'r, dissenting at P 2) (*Northern*); *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly, Comm'r, dissenting at P 32) (*Algonquin*).

[8] *See, e.g.*, INGAA February 16, 2021 Initial Brief at 7-8.

> No. 871-A or other after-the-fact processes; (2) Order No. 871-A appears to invite comments on issues that were not raised in Order No. 871 or in the requests for rehearing of that Order, while ignoring other issues that were raised in requests for rehearing of that Order; (3) Order No. 871-A does not address the merits of the requests for rehearing of Order No. 871 or modify Order No. 871 in any respect, and likewise fails to explain why the Commission views the existing record as insufficient to rule on the prior requests for rehearing; and (4) Order No. 871-A contemplates a schedule that effectively delays a Commission ruling on the merits of the requests for rehearing of Order No. 871 until *ten months* after they were submitted, which violates the text and spirit of the D.C. Circuit's recent en banc decision in *Allegheny Defense*."[9]

5. I for one would be interested to hear the Commission's response.[10] Whether the Commission's refusal was intentional or a consequence of hasty action, the Commission's decision to ignore arguments properly raised runs contrary to the APA and stands as an obvious failure to engage in reasoned decision making.[11] In addition to the APA violation I describe above, there are a number of other legal infirmities that require attention.

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[9] *Id.* (emphasis in original).

[10] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-A, 86 Fed. Reg. 7643 (Feb. 1, 2021), 174 FERC ¶ 61,050 (2021) (Danly, Comm'r, dissenting) (Order No. 871-A).

[11] *See 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"); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("Unless the Commission answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.") (citations omitted); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1294 (D.C. Cir. 2000) ("The Commission's failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious.").

II. The Commission's new policy presumptively staying NGA section 7(c) certificate orders is contrary to law

6. The Commission's new policy establishing a presumptive stay in section 7(c) certificate proceedings is simply beyond the Commission's authority. The power of eminent domain is surely profound and formidable. I cannot fault my colleagues for the anxiety they have expressed over its wise and just exercise. However, the Commission, as a mere "creature of statute," can only act pursuant to law by which Congress had delegated its authority.[12] Congress conferred the right to certificate holders to pursue eminent domain in federal district court or state court,[13] having recognized that states "defeat[] the very objectives of the Natural Gas Act"[14] by conditioning or withholding the exercise of eminent domain. Congress has made that determination. It has codified it into law. The Commission, as an executive agency, is empowered only to implement Congressional mandate, not to second-guess Congressional wisdom.

7. It is true that while "the Commission lacks the authority to deny or restrict the power of eminent domain in a section 7 certificate,"[15] "the Commission unquestionably may . . . stay its own orders."[16] The Commission, however, has no authority to presumptively stay section 7 certificate orders.

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[12] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (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)); *see 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.").

[13] *See* 15 U.S.C. § 717f(h).

[14] S. Rep. No. 80-429, at 3 (1947).

[15] Order No. 871-B, 175 FERC ¶ 61,098 at P 45. It should be recognized that the Commission again preemptively answers a question that it directly posed in the pending Notice of Inquiry (NOI) for which comments are due May 26, 2021: "Under the NGA, does the Commission have authority to condition a certificate holder's exercise of eminent domain?" See Question B6 in *Certification of New Interstate Nat. Gas Facilities*, 174 FERC ¶ 61,125, at P 15 (2021). The Commission continues to lull people into believing that the answers to the questions appearing in the NOI have yet to be resolved.

[16] Order No. 871-B, 175 FERC ¶ 61,098 at P 46.

8. The Commission appears to rely on APA section 705 to issue its presumptive stay, but that section does not grant such power.[17] APA section 705, titled "Relief pending review," provides "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, *pending judicial review*,"[18] meaning the stay must be tied to litigation.[19] The Commission's presumptive stay is not even tied to an application for rehearing let alone any litigation. Further, given the lack of discussion on how the Commission will implement this new policy, the assumption that the mere existence of a "landowner protest" automatically means that a stay is required in the interest of justice is rather questionable. Will the Commission stay a certificate where there is a protest by a landowner with property interests that abut the proposed right-of-way but are not subject to condemnation? And the Commission's policy applies to where there is a "landowner *protest*." Will the Commission apply the stay where a landowner protested but did not intervene? What about in the case where the landowner joined a protest, but may not have active interests in the proceeding? Some commenters have suggested that NGA section 19(c) grants the Commission such power.[20] The Commission does not acknowledge or adopt these arguments. Even so, NGA section 19(c) does not grant the Commission the power to stay its orders *before* a rehearing application is even filed.[21] Section 19(c) sets forth the rule—that "[t]he filing of an application for rehearing under subsection (a) shall not . . . operate as a stay of the Commission's order"—and the exception to that rule—"unless specifically ordered by the Commission."[22] In order for the exception to apply, the general rule must first apply: that is, someone must have filed a request for rehearing. Further, the Commission's new policy elevates the stay from

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[17] *See id*. P 46 n.91 (citing 5 U.S.C. § 705). I am unaware of Commission precedent that relies on APA section 705 as authority to stay Commission orders (other than a handful of hydropower cases granting the stay of the commencement of construction deadline).

[18] 5 U.S.C. § 705 (emphasis added).

[19] *See Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) ("Most significantly, the relevant equitable considerations are not free-floating but, rather, must be tied to the underlying litigation.").

[20] *See* Public Interest Organizations February 16, 2021 Brief at 13-14 (arguing the Commission has discretion under NGA section 19(c) to stay a certificate order); Niskanen Center, *et al*. March 3, 2021 Reply Brief at 4 ("[T]he NGA's only mention of an agency stay is in Section 19(c) . . . . The NGA also does not constrain the Commission's authority as to when it can 'specifically order' a stay . . . .").

[21] *See* 15 U.S.C. § 717r(c).

[22] *Id*.

being the exception to being the rule itself, assuming the legislative power to amend section 19(c) to read: an order is stayed unless specifically ordered by the Commission. Only Congress can amend a statute.

9. Let us also not forget that identical phrases in the same statute are normally given the same meaning.[23] NGA section 19(c) provides that "[t]he commencement of proceedings under subsection (b) of this section shall not, *unless specifically ordered* by the court, operate as a stay."[24] Imagine a scenario in which, in the course of a one-off proceeding, a court of appeals announced that, going forward, it would begin presumptively staying an entire category of Commission orders *before* a petition is filed. Article III courts, of course, have their own procedures, traditions, and powers. Still, such reading of the statute is absurd.

10. Many are quick to turn to NGA section 16 when all else has failed. However, the Commission likewise cannot rely on NGA section 16 in support of a presumptive stay. Section 16 of the NGA 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."[25] This does not create new powers under the NGA or supersede section 19(c), which sets forth the conditions for granting a stay. Moreover, like its counterpart in Federal Power Act section 309,[26] the use of NGA section 16 must be "consistent with the authority delegated to it by Congress."[27]

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[23] *Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 232 (2007) ("identical words and phrases within the same statute should normally be given the same meaning") (citation omitted).

[24] 15 U.S.C. § 717r(c) (emphasis added).

[25] *Id*. § 717o.

[26] 16 U.S.C. § 825h.

[27] *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))).

11. I am aware of no other grant of authority that the majority may be relying upon in support of its new presumptive stay policy.[28] At its root, the Commission's presumptive stay policy impermissibly does what the Commission says it cannot do: the stay is designed to restrict the use of eminent domain.[29] It impedes a certificate holder's right to exercise eminent domain immediately upon the issuance of the certificate, while claiming to allow the pipeline to "continue to engage in development related activities that do not require use of landowner property or that are voluntarily agreed to by the landowner."[30] It effectively permits the stay to be lifted so long as there is "a *commitment by the pipeline developer not to begin eminent domain proceedings* until the Commission issues a final order on any landowner rehearing requests."[31] How a pipeline can conduct any activity authorized by a stayed certificate or why a pipeline would request to lift a stay other than to exercise eminent domain are questions that beg clarification.

12. Even if it were not *ultra vires*, the Commission's interpretation results in unfair surprise. Since at least 1965, the Commission (and the Federal Power Commission) have placed the burden on movants for stays to show that they will be irreparably injured in the absence of a stay.[32] The Commission's policy has been to "refrain from granting stays in

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[28] To the extent that the Commission believes that by "applying the criteria for granting a stay on a case-by-case basis" cures any legal infirmity, it is wrong. Order No. 871-B, 175 FERC ¶ 61,098 at P 51 n.103. It is illogical to have a presumption in advance of a rehearing request and is contrary to the plain text in the NGA.

[29] *See id*. P 45.

[30] *Id.* P 49.

[31] *Id*. P 51 (emphasis added).

[32] *See, e.g.*, *Consol. Edison Co. of N.Y.*, 33 F.P.C. 965, at 969 (1965) ("Four tests have been prescribed by the Court of Appeals, each of which an applicant for stay must satisfy in order to justify the extraordinary relief represented by a stay of an administrative order.") (citations omitted); *see also Midcontinent Indep. Sys. Operator*, 151 FERC ¶ 61,220, at P 27 (2015) ("Otter Tail has not met the burden to show that it will suffer irreparable injury without a stay and that a stay is in the public interest."), *vacated and remanded for reasons not applicable*, *Ameren Servs. Co. v. FERC*, 880 F.3d 571 (D.C. Cir. 2018); *Bradwood Landing LLC*, 128 FERC ¶ 61,216, at P 10 (2009) ("We find that Oregon has not met its burden to demonstrate that it will suffer irreparable harm absent the granting of a stay."); *Acadia Power Partners, LLC*, 108 FERC ¶ 61,076, at P 5 (2004) ("We will deny El Paso's request for a stay, as we find that El Paso has failed to meet its burden of demonstrating that it will suffer irreparable harm absent a stay."); *Se. Hydro-Power, Inc.*, 74 FERC ¶ 61,241, at 61,825 n.12 (1996) ("the burden is on the movant . . . to demonstrate why its request for a stay is justified"); *Constr. Work in Progress for Pub. Utils.*, 24 FERC ¶ 61,071, at 61,190 (1983) ("the burden is upon

order to assure definitiveness and finality in Commission proceedings."[33] Now after merely asking, "[s]hould the Commission modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending,"[34] in an order on rehearing where the issue of eminent domain was not raised, the Commission suddenly departs from its policy favoring finality and shifts the burden to the pipeline before a rehearing is even filed. The Commission never announced that it

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petitioners for such extraordinary action to show that significant harm will be incurred and that the equities favor granting the stay."); *Exemption from the Licensing Requirements of Part I of the Fed. Power Act of Certain Categories of Small Hydroelectric Power Projects with an Installed Capacity of 5 Megawatts or Less*, 20 FERC ¶ 61,061, at 61,134 (1982) ("In the context of their request for a stay . . . the burden is upon the petitioners for such extraordinary action to show that significant harm will be incurred and that the equities favor granting the stay."); *Cities Serv. Oil Co.*, 53 F.P.C. 8, at 8-9 (1975) ("The applicant for a stay has the burden of establishing, absent the grant of such relief, it would be irreparably harmed."); *Columbia Gulf Transmission Co.*, 37 F.P.C. 310, at 310 (1967) ("It is settled that in order to establish a case for a grant of extraordinary relief in the nature of a stay the applicant has the burden of establishing that absent the grant of such relief it would be irreparably injured.") (citation omitted).

[33] *SFPP, L.P.*, 166 FERC ¶ 61,211, at P 7 (2019) ("When considering requests for a stay of Commission action, the Commission's general policy is to refrain from granting stays in order to assure definitiveness and finality in Commission proceedings."); *see also Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012) ("Our general policy is to refrain from granting stays in order to assure definiteness and finality in our proceedings.") (citation omitted); *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 158 (2006) ("The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.") (citation omitted); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001) ("The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.") (citations omitted); *Bos. Edison Co.*, 81 FERC ¶ 61,102, at 61,377 (1997) ("However, the Commission follows a general policy of denying motions for stay based on a need for finality in administrative proceedings."); *CMS Midland, Inc.*, 56 FERC ¶ 61,177, at 61,630-31 (1991) ("We follow, however, a general policy of denying motions for stays, based on the need for definitiveness and finality in administrative proceedings.") (citations omitted); *Holyoke Water Co.*, 30 FERC ¶ 61,283, at 61,575 (1985) ("The Commission has followed a general policy of denying stays, unless a party has demonstrated that it will be irreparably injured in the absence of a stay.") (citations omitted).

[34] Order 871-A, 174 FERC ¶ 61,050 at P 7.

was considering a presumptive stay policy or under what authority. In fact, many commenters did not address the presumptive stay. Those harmed by this surprise issuance should consider that agencies are not given deference "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question.'"[35]

III. The Commission's decision is bad policy

13. On top of being unlawful, the presumptive stay is also bad policy. Contrary to the Commission's claims, the presumptive stay does not strike the appropriate balance between pipelines and landowners.[36] There can be no "balance" when the Commission violates clear Congressional mandate and attempts to withhold a statutory right afforded to certificate holders, especially when applied to applications already pending before the Commission.[37]

14. Further, the Commission's attempt to downplay the industry's concerns (including delayed project timelines, increased regulatory uncertainty, and higher likelihood of project terminations) because "any stay will last *no longer* than approximately 150 days following the issuance of a certificate order"[38] is, to put it mildly, unconvincing. Requiring the passage of four months before a certificate can go into effect is significant, especially since the time required for processing applications has already dramatically increased.[39] "Many of the proposed projects before the Commission, *some pending for*

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[35] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. at 155 (citation omitted); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) ("And recall too that deference turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests.").

[36] Order 871-B, 175 FERC ¶ 61,098 at P 49.

[37] *See* U.S. Senators Hoeven, Manchin, Barrasso, Tester, Capito, Sinema, Cassidy, Cornyn, Cramer, Crapo, Cruz, Daines, Hagerty, Hyde-Smith, Inhofe, Lankford, Marshall, Moran, Risch, Rounds, Sullivan, Tillis, Thune, Toomey, and Wicker, Letter, Docket No. PL18-1-000, at 1 (filed April 30, 2021) ("Delaying and moving the regulatory goalposts on projects filed in good faith is contrary to the otherwise equitable application of the Policy Statement that all stakeholders expect. At a minimum, these projects should not be subject to newly contemplated considerations that fall outside the scope of the current Policy Statement or go beyond the Commission's statutory authority.").

[38] Order 871-B, 175 FERC ¶ 61,098 at P 49.

[39] *See, e.g.*, Northern Natural Gas Company February 5, 2021 Motion for an Expedited Order for the Northern Lights 2021 Expansion Project under CP20-503 (requesting expedited action for application filed on July 31, 2020); Iroquois Gas

more than a year, are critical to addressing supply issues and strengthening our energy infrastructure."[40] It is not inconceivable that those projects whose applications have been pending for more than a year ultimately will be canceled as a result of delay. By way of example, nearly two years ago, Dominion Energy Transmission, Inc. withdrew its application for a certificate for its Sweden Valley Project that it had filed seventeen months prior.

15. Finally, in yet another unexplained deviation from its past precedent, the Commission holds that, in the event the Commission were to grant rehearing for the purposes of requesting further briefing in order to substantively reconsider a ruling, "the original authorization would no longer be in effect and the provisions of Order No. 871 would no longer apply since there would be no final order pursuant to which a notice to proceed could be issued."[41] The Commission provides no citation for this holding, the consequences of which are that granting rehearing for purposes of further consideration causes the original order to be vacated. Not only does the holding find no support in NGA section 19, but it is also contrary to the decades of Commission practice wherein the issuance of tolling orders for the purposes of further consideration did not vacate the original order.

16. Further, this holding will wreak havoc on the Commission's administration of other provisions under the NGA and FPA. For example, if the Commission requests further briefing in response to a request for rehearing of an NGA section 4 or FPA section 205 order on a proposed rate change, what rate should be charged? Or if the Commission requests further briefing on a request for rehearing of a complex order regarding market design, what rules apply to an auction that occurs before the Commission rules on the rehearing request? Would a request for further briefing vacate a Commission order under NGA section 5 or FPA section 206 finding that a certain rate or tariff provision is not just and reasonable and reinstate the prior rate or tariff provision? Is it only orders issued pursuant to NGA section 7 that are vacated when the Commission requests further briefing and, if so, what is the statutory basis for such a distinction? The Commission appears not to have even considered these far-reaching consequences of its holding and provides no explanation as to how these and many other difficult issues should be dealt with.

Transmission System, L.P. January 26, 2021 Request for Prompt Issuance of Certificate of Public Convenience and Necessity under CP20-48 (requesting expedited action for application filed on February 3, 2020).

[40] U.S. Senator Hoeven, *et al*., Letter, Docket No. PL18-1-000, at 1 (filed April 30, 2021) (emphasis added).

[41] Order No. 871-B, 175 FERC ¶ 61,098 at P 27.

IV. Conclusion

17. In the past three months, with barely any warning or process, the Commission has called every existing certificate into question in *Algonquin*, reversed years of significance analysis in *Northern*, and written the right to seek eminent domain upon receipt of a certificate out of the Natural Gas Act. As the Commission continues issuing such unlawful and ill-conceived orders, we will see further severe curtailment of investment in and construction of critical natural gas infrastructure which will inevitably drive up prices and gravely jeopardize reliability.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing — Docket No. RM20-15-002

(Issued August 2, 2021)

DANLY, Commissioner, *dissenting*:

1. I dissent in full from today's order affirming the majority's modification and expansion of Order No. 871.[1] As I stated in my dissent in Order No. 871-B, I would repeal the rule as it is no longer required by law or prudence.[2] I write separately today to further explain how the Commission's new, unnecessary, and unjustifiable presumption to stay certificate orders conflicts with the plain text of the Natural Gas Act (NGA) and is beyond the Commission's authority.[3] I also write to explain how the majority's presumptive stay is not based on reasoned decision making and therefore runs afoul of the Administrative Procedure Act (APA).

I. The Presumptive Stay is Beyond the Commission's Authority and Contrary to the Plain Text of the Natural Gas Act

2. In today's order, the majority states "the Commission's underlying authority derives from NGA section 16."[4] Specifically, the majority relies on the provisions providing the Commission authority "to perform any and all acts . . . necessary or appropriate to carry out the provisions of this [Act]" and to determine the effective date of its orders.[5] Like many before it, the majority has turned to NGA section 16 when all else has failed, placing more weight upon this section than it can reasonably bear. NGA

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[1] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 176 FERC ¶ 61,062 (2021) (Order No. 871-C).

[2] *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 175 FERC ¶ 61,098 (2021) (Danly, Comm'r, dissenting at P 2) (Order No. 871-B).

[3] *See id.* (Danly, Comm'r, dissenting at PP 3, 6-14).

[4] Order No. 871-C, 176 FERC ¶ 61,062 at P 36.

[5] *Id.* (quoting 15 U.S.C. § 717*o*).

section 16 "do[es] not confer independent authority to act."[6] It is "of an implementary rather than substantive character" and "can only be implemented 'consistently with the provisions and purposes of the legislation.'"[7] The majority, however, fails to confront this limitation on section 16's reach and employs this provision in a manner that contravenes the NGA in three respects.

3. *First*, the majority's policy denies pipelines holding certificates the ability to exercise eminent domain for up to 150 days—doing exactly what the majority explicitly concedes it cannot do: "restrict the power of eminent domain in a section 7 certificate."[8] NGA section 7(h) authorizes "*any holder of a certificate*" to exercise eminent domain authority.[9] Other than the issuance of a certificate, Congress ordained no other condition be met in advance of a pipeline pursuing eminent domain. The Commission can only employ NGA section 16 in a manner consistent with the other provisions of the act. Here, the use of section 16 is in direct in conflict with the statute—and the majority does not see fit to argue otherwise.

4. *Second*, presumptively staying a pipeline's ability to pursue eminent domain is not appropriate under section 16 because such a delay is not a "necessary or appropriate" adjunct to the Commission's effectuation of its responsibilities under section 7 of the NGA. That section requires the Commission to issue certificates to applicants whose proposed natural gas facilities are found to be in the public convenience and necessity. The timing of a pipeline's use of eminent domain does not weigh into the Commission's determination of whether proposed pipeline facilities are in the public convenience and necessity. If it did, the majority would rely on the Commission's authority under NGA section 7(e) to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require."[10] The majority,

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[6] *New England Power Co. v. Fed. Power Comm'n*, 467 F.2d 425, 431 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974).

[7] *Id.* at 430 (citation omitted).

[8] Order No. 871-B, 175 FERC ¶ 61,098 at P 45 (citation omitted). Indeed, Order No. 871-B quotes the *Berkley v. Mountain Valley Pipeline, LLC*, as stating, "FERC does not have discretion *to withhold* eminent domain once it grants a Certificate." *Id.* P 45 n.86 (quoting *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018)) (emphasis added).

[9] 15 U.S.C. § 717f(h) (emphasis added).

[10] 15 U.S.C. § 717f(e).

however, does not.[11] Nor does the majority cite any other provision of the NGA for which the Commission's action would be "necessary or appropriate" under section 16.

5. *Third*, the only reasonable reading of NGA section 7 leads to the conclusion that Congress intended for certificates to be effective upon issuance and acceptance, and for the right to exercise eminent domain to attach thereupon. NGA section 7(e) provides, "a certificate *shall be issued*" so long as the applicant is "able and *willing* properly to do the acts . . . ."[12] Further, NGA section 7(h) authorizes "*any holder* of a certificate of public convenience and necessity" to acquire by eminent domain the land necessary for the construction, operation, and maintenance of its pipeline facilities.[13] Black's Law Dictionary defines "holder" as "[a] person with legal possession of a document of title or an investment security," meaning that the title was issued and accepted by that person.[14] This view has been shared by the courts[15] and the Commission.[16] This is not to say that the Commission can never make a certificate effective after its issuance or stay a certificate order. Both may be warranted in certain instances. In my view, however, it is contrary to the purpose of the NGA to adopt a policy that presumptively stays certificates

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[11] *See* Order No. 871-B, 175 FERC ¶ 61,098 at P 45 ("In other words, the Commission lacks the authority to deny or restrict the power of eminent domain in a section 7 certificate.") (citation omitted).

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

[13] *Id.* § 717f(h) (emphasis added).

[14] *Holder*, Black's Law Dictionary (11th ed. 2019).

[15] *See Maritimes & Ne. Pipeline, L.L.C. v. Decoulos*, 146 F. App'x 495, 498 (1st Cir. 2005) ("*Once a CPCN is issued by the FERC*, and the gas company is unable to acquire the needed land by contract or agreement with the owner, the only issue before the district court in the ensuing eminent domain proceeding is the amount to be paid to the property owner as just compensation for the taking.") (emphasis added); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) ("Once FERC *has issued a certificate*, the NGA empowers the certificate holder to exercise 'the right of eminent domain' over any lands needed for the project.") (emphasis added); *Bohon v. FERC*, No. 20-6 (JEB), slip op. at 2 (D.D.C. May 6, 2020) ("FERC's *issuance of a certificate*, moreover, conveys the power of eminent domain to its holder.") (emphasis added); *Paul H. Stitt & Loretta Stitt*, 39 F.P.C. 323, 324 (1968) ("While the condemnation powers granted to certificate holders by Section 7(h) of the Natural Gas Act operate prospectively from *the date of issuance* of a certificate . . . .") (emphasis added).

[16] *See* 18 C.F.R. § 157.20(a) (2020) ("The certificate shall be void and without force or effect unless accepted in writing by applicant . . . .").

for the avowed purpose of delaying a pipeline's Congressionally-authorized entitlement to exercise eminent domain.[17]

6. In addition to NGA section 16, the majority appears to place some reliance on APA section 705, which provides "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review."[18] I presume this is the case because the majority responds to arguments raised by the Interstate Natural Gas Association of America (INGAA) that the phrase "pending judicial review" in APA section 705 means an agency stay must be "tied to litigation."[19] The majority asserts that a more reasonable interpretation of the phrase "pending judicial review" is "in anticipation of [judicial review]."[20] I've found no court that supports that position and multiple courts, in fact, disagree.[21]

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[17] This is and separate apart from the argument that I raised in my earlier dissent that NGA section 19(c), while allowing for stays, requires a specific order by the Commission. Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at PP 8-10; *see also* 15 U.S.C. § 717r(c) ("The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."). Clearly, an automatically-applied presumption is not a specific order and thus violates the unambiguous terms of the statute.

[18] 5 U.S.C. § 705.

[19] Order No. 871-C, 176 FERC ¶ 61, 61,062 at P 37, n.82 (citing INGAA Rehearing at 33).

[20] *Id.* P 37.

[21] *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 150 (S.D.N.Y. 2019) ("A stay is supposed to be grounded on 'the existence or consequences of the pending litigation.'"); *Bauer v. DeVos*, 325 F. Supp. 3d 74, 106 (D.D.C. 2018) ("Most significantly, the relevant equitable considerations are not free-floating but, rather, must be tied to the underlying litigation. Section 705 expressly provides that an agency may 'postpone the effective date of [agency] action . . . *pending judicial review.*'") (emphasis in original); *Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 34 (D.D.C. 2012) ("Where, as in this case, [an agency] seeks to justify a stay of its rules 'pending judicial review,' the agency must have articulated, at a minimum, a rational connection between its stay and the underlying litigation in the court of appeals.").

II. Presumptive Stay is Not Based on Reasoned Decision Making

7. To the extent the majority merely argues that it can apply the three factors of the equitable standard set forth in APA section 705 to determine whether a stay is warranted, I agree. However, the majority's application of the equitable standard is not based on reasoned decision making, and thus violates the APA.[22]

8. As I stated in my dissent to Order No. 871-B, the majority's assumption that the mere existence of a "landowner protest" automatically means a stay is required in the interest of justice is—at best—questionable.[23] This represents a broad category of litigant, whose mere participation in a proceeding would temporarily extinguish a certificate holder's Congressionally-established rights. Surely, the Commission should at least impose rational limits on the rule they are establishing. For example, will the Commission stay a certificate where there is a protest by a landowner with property interests that abut the proposed right-of-way but are not subject to condemnation? And the Commission's policy applies to where there is a "landowner *protest*." Will the Commission apply the stay where a landowner protested but did not intervene and thus cannot seek rehearing or judicial review? What about in the case where the landowner joined a protest, but may not have active interests in the proceeding?

9. The majority also fails to consider the second factor "whether issuing a stay may substantially harm other parties." Will the Commission stay a certificate where the proposed project is delivering natural gas to municipalities that need the gas within six months of certificate issuance? Will the Commission stay a certificate if the delay caused by its stay would cause an additional year's delay in construction because of seasonal restrictions? To what degree will the financial consequences for the project proponent be considered? What about the consequences to the pipeline's customers? It is not inconceivable that those projects whose applications have been pending for more than a year ultimately will be canceled as a result of delay.[24] How can the potential cancellation

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[22] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983). *See also Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1513-14 (D.C. Cir. 1984) ("We defer to the agency's expertise . . . so long as its decision is supported by 'substantial evidence' in the record and reached by 'reasoned decision-making,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made.") (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962); *Memphis Light, Gas & Water Div. v. FPC*, 504 F.2d 225, 230 (D.C. Cir. 1974); 16 U.S.C. § 825*l* (1982)).

[23] Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting at P 8).

[24] *See id.* (Danly, Comm'r, dissenting at P 14) (noting Dominion Energy Transmission, Inc. withdrew its application for a certificate for its Sweden Valley Project

of a project that has been determined by the Commission to be in the public interest itself be in the public interest or, under the second factor, be found not to "substantially harm other parties"?

III. Conclusion

10. The power of eminent domain is surely profound and formidable. I cannot fault my colleagues for the anxiety they have expressed regarding its wise and just exercise. However, the Commission, as a mere "creature of statute," can only act pursuant to law by which Congress has delegated its authority.[25] Congress conferred the right to certificate holders to pursue eminent domain in federal district court or state court,[26] having recognized that states "defeat[] the very objectives of the Natural Gas Act"[27] by conditioning or withholding the exercise of eminent domain. Congress has made that determination. It has codified it into law. The Commission, as an executive agency, is empowered only to implement Congressional mandate, not to second-guess Congressional wisdom or attempt to do indirectly what it cannot directly.[28]

11. Despite this, I doubt that the Commission's arguments will be presented to the courts. It will be challenging for those that are harmed by the issuance of a generally-applicable policy to show aggrievement before it is actually applied in a case. And by the time those harmed are able seek review, the damage of the stay will have been done and the stay will have been lifted. My pessimistic outlook is that despite this order's obvious infirmities, the Commission will avoid judicial scrutiny and thereby thwart the intent of Congress.

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that it had filed seventeen months prior).

[25] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (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); *see 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.").

[26] *See* 15 U.S.C. § 717f(h).

[27] S. Rep. No. 80-429, at 3 (1947).

[28] *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) ("What the Commission is prohibited from doing directly it may not achieve by indirection.").

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner