

179 FERC ¶ 61,226
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.

Docket No. CP15-115-006

ORDER GRANTING REQUEST FOR EXTENSION OF TIME

(Issued June 29, 2022)

1. On January 28, 2022, National Fuel Gas Supply Corporation (National Fuel) and Empire Pipeline, Inc. (Empire) (together National Fuel or companies) filed a motion requesting a 35-month extension of time, until December 31, 2024, to construct and place into service the Northern Access 2016 Project (project).¹ For the reasons discussed below, the extension request is granted.

I. Background

2. On February 3, 2017, the Commission issued an order authorizing the companies to construct and operate the Northern Access Project, which would expand firm transportation service on National Fuel's existing system by 497,000 dekatherms (Dth) per day and expand firm transportation service on Empire's existing system by 350,000 Dth per day.² The project consists of approximately 99 miles of 24-inch pipeline in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York; a new compressor station on Empire's system in Niagara County, New York; and additional compression at National Fuel's existing Porterville Compressor Station in Erie County, New York, as well as various appurtenant facilities. The Certificate Order

¹ National Fuel and Empire January 28, 2022 Request for Extension of Time (Request for Extension of Time).

² *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017) (Certificate Order), *order on reh'g and motion for waiver determination under Section 401 of the Clean Water Act*, 164 FERC ¶ 61,084 (2018) (Section 401 Waiver Order), *reh'g denied* 167 FERC ¶ 61,007 (2019) (Order Denying Rehearing).

required the companies to construct and make the project available for service by February 3, 2019.³ It also required the companies to obtain “all applicable authorizations required under federal law (or evidence of waiver thereof)” prior to commencing construction.⁴

3. On November 26, 2018, the companies requested an extension of time to complete construction and place the project into service due to delays in receipt of a water quality certification from the New York State Department of Environmental Conservation (NYSDEC) or a determination of waiver under section 401 of the Clean Water Act (CWA).⁵ In January, 2019, Commission staff granted an extension request, until February 3, 2022.⁶ The order noted the companies’ good faith effort to obtain all applicable permits and authorizations, and the companies’ expectations of continued delays in commencing construction stemming from litigation regarding whether the NYSDEC had waived its certification authority.⁷

4. On October 16, 2020, the companies filed a second request for an extension of time, until December 1, 2024.⁸ The Commission dismissed the request without prejudice, stating that it was premature.⁹

5. On January 28, 2022, the companies requested an extension of time until December 31, 2024. The companies again cite to the now-concluded litigation, in which the court affirmed the Commission’s determination that NYSDEC had waived

³ Certificate Order, 158 FERC ¶ 61,145 at ordering para. (C)(1).

⁴ *Id.* at app. B, env’t. condition 10.

⁵ November 26, 2018 Request for Extension of Time at 2-3.

⁶ National Fuel Gas Supply Corp. and Empire Pipeline, Inc., Docket No. CP15-115-000 (Jan. 31, 2019) (delegated order).

⁷ *Id.*

⁸ October 16, 2020 Request for Extension of Time at 1-2. The companies cited ongoing litigation in the Second Circuit over the Commission’s determination that the New York DEC had waived its Section 401 Water Quality Certification authority. *Id.*

⁹ *Nat’l Fuel Gas Supply Corp.*, 173 FERC ¶ 61,197 (2020) (dismissing as premature the companies’ request, which was filed 16 months prior to the in-service deadline and noting that typically extension requests are filed no more than 120 days before the in-service deadline).

certification authority,¹⁰ and permitting delays outside of their control as justification for the failure to meet the certificate deadline.¹¹ Specifically, the companies state that they were unable to meet the certificate deadline due to legal delays related to the water quality certification.¹² The companies state that they “anticipate the need to refresh various environmental clearances and permitting processes” before they can request a notice to proceed with construction from the Commission¹³ Specifically, the companies need to update their Section 7 consultation under the Endangered Species Act, reobtain a CWA Section 404 Wetland and Waterbody Crossing Permit from the U.S. Army Corps of Engineers (Corps), Buffalo District,¹⁴ and obtain an extension of their 404 permits from the Corps’ Pittsburgh District, all of which the companies anticipate will require 6-12 months.¹⁵ The companies explain that obtaining the notice to proceed “would facilitate [the companies’] commencement of material procurement activities for long-lead items, such as large-diameter pipe and compression,” which can take nine to twelve months.¹⁶ The companies claim these lead times, coupled with an anticipated twelve month construction period, justify an extension until December 31, 2024.¹⁷

¹⁰ See Section 401 Waiver Order 164 FERC ¶ 61,084 at P 42, *reh’g denied*, 167 FERC ¶ 61,007 at P 24, *aff’d.*, *N.Y. State Dep’t of Env’t. Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021).

¹¹ January 28, 2022 Request for Extension of Time at 1-2.

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ The companies note that it had received from the Buffalo District verification that the project was covered by the Nationwide Permit 12 on September 2, 2020, which expired in March 2022. National Fuel May 9, 2022 Response to Environmental Information Request at 5 (Table 1).

¹⁵ *Id.*

¹⁶ January 28, 2022 Request for Extension of Time at 3-4.

¹⁷ *Id.* at 4.

II. Procedural Issues

A. Notice, Protest and Comments

6. Notice of the companies' Extension of Time Request was issued on February 1, 2022.¹⁸ The notice established February 16, 2022, as the deadline for filing interventions, comments, and protests.

7. Martin Rd. Solar, LLC and Lime Lake Land Enterprises, LLC filed a joint timely motion to intervene. The Sierra Club and Theresa Schueckler each filed timely motions to intervene and comments in opposition to the extension. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules of Practice and Procedure.¹⁹ The NYSDEC filed timely comments in opposition and a motion to reopen the record.²⁰ Over 100 individuals filed comments in opposition. The comments in opposition generally argue that: (1) the Commission's notice failed to provide sufficient time to comment; (2) the companies have not demonstrated good cause to justify granting the requested extension of time; (3) circumstances have changed since the issuance of the Certificate Order such that the project is no longer required by the public convenience and necessity because it runs counter to state law; and (4) new information has rendered the project's EA stale. NYSDEC argues that, in the alternative, the Commission should reopen the record due to changes in fact, policy, and law.

¹⁸ *Federal Register*, 87 Fed. Reg. 6862 (Feb. 7, 2022) (Notice of Request for Extension of Time).

¹⁹ 18 C.F.R. § 385.214(c) (2021).

²⁰ We note that although NYSDEC appears to believe it is a party to this proceeding (*see* NYSDEC Comments at 8), the Commission's policy, as articulated in *Algonquin*, is that parties to the underlying certificate proceeding must indicate their continued interest in the extension of time proceeding by moving to intervene. *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at PP 39-40 (2020); *see also Corpus Christi Liquefaction Stage III, LLC*, 179 FERC ¶ 61,087, at P 7 (2022) (affirming that party status in the original docket does not automatically extend to subsequent proceedings concerning the authorized project). NYSDEC did not file a motion to intervene in this extension of time proceeding. Should NYSDEC wish to become a party, it would need to file a motion to intervene out of time per the requirements of Rule 214. 18 C.F.R. § 385.214.

B. Adequacy of Notice

8. Commenters argue that the Commission failed to give adequate notice of the opportunity to comment on the proceeding.²¹ They claim that 15 days is an inadequate length of time to file comments. Shortly after the companies filed their request with the Commission, one commenter stated that landowners were not notified of National Fuel's and Empire's intention to request an extension.²²

9. The comment period is consistent with Commission policy.²³ In *Algonquin*, the Commission, acknowledging the importance of public involvement and transparency in its decision-making processes, directed the Office of the Secretary and Office of Energy Projects to: (1) notice all requests for extensions of time to complete construction for Natural Gas Act facilities within 7 calendar days of receiving the request and (2) establish a 15-calendar day intervention and comment period deadline. The commenters have not justified extending the comment period.²⁴ They were able to timely file their comments and, as is our policy, we would have considered any late-filed comments, to the extent possible.

III. Discussion

10. The completion date specified in a certificate order provides what the Commission believes—based on its assessment of circumstances relevant to the specific project—to be a reasonable period of time for the project sponsor to complete construction and make the project available for service.²⁵ However, construction deadlines may be extended for

²¹ See, e.g., Diana Strablow February 1, 2022 Comments at 1; Charlie Bowman February 3, 2022 Comments at 1; John Rath February 15, 2022 Comments at 1.

²² See Diana Strablow February 1, 2022 Comments at 1.

²³ *Algonquin*, 170 FERC ¶ 61,144 at P 38 (citing *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 23 (2018)).

²⁴ We also note the companies certified that they served the request for an extension of time upon each person on the official service list for the docket. Request for Extension of Time at 5; see also 18 C.F.R. § 385.2010 (2021) (requiring filer to serve a copy of the filed document on each person on the service list).

²⁵ *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 9 (citing *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165, at P 8 (2016)).

good cause.²⁶ “Good cause” can be shown by a project sponsor demonstrating that it made good faith efforts to meet its deadline but encountered circumstances beyond its control.²⁷ We consider extension requests on a case-by-case basis.²⁸

11. Some commenters raise arguments that would relitigate the issuance of the Certificate Order.²⁹ The Commission has made clear it will not consider arguments that relitigate such an order, including whether the Commission properly found the project to be in the public convenience and necessity.³⁰ Commenters make arguments attacking the Certificate Order itself, including that the Commission did not properly account for public safety,³¹ that the project will have detrimental impacts on streams and wetlands,³² and that there is no public need for the project.³³ These are improper collateral attacks on that the Certificate Order and will not be considered further.

12. Additionally, commenters argue that: (1) good cause for an extension does not exist because the National Fuel is delaying in hopes of an improved market and (2) circumstances have changed such that environmental findings underlying the Commission’s determinations in the certificate proceeding are no longer valid and the

²⁶ 18 C.F.R. § 385.2008(a) (2021) (allowing the relevant decisional authority to extend for good cause the time by which any person is required or allowed to act under any statute rule or order).

²⁷ *See, e.g., Adelpia Gateway, LLC*, 178 FERC ¶ 61,030, at P 15 (2022).

²⁸ *Id.*

²⁹ *See, e.g.,* Barbara Ciepiela February 3, 2022 Comments at 1 (stating that the project should not have been approved due to its impact on climate change); Joseph Wilson February 7, 2022 Comments at 1 (arguing that the project should not have been approved because it is not in the public convenience and necessity).

³⁰ *Algonquin*, 170 FERC ¶ 61,144 at P 40; *Mountain Valley Pipeline Co.*, 173 FERC ¶ 61,026, at P 19 (2020); *see also* February 1, 2022 Notice of Request for Extension of Time.

³¹ Barbara Ciepiela February 3, 2022 Comments at 1.

³² *See e.g.,* Mary Carol-Dearing February 10, 2022 Comments at 1; Theresa Schueckler February 4, 2022 Comments at 1.

³³ Woodrow Rickard February 7, 2022 Comments at 1.

Commission must undertake additional analysis to satisfy the requirements of the National Environmental Policy Act (NEPA). These comments are discussed below.

A. Good Cause Exists for Granting an Extension of Time

13. Commenters argue the Commission should deny the requested extension of time because National Fuel has not demonstrated good cause for an extension. They allege that National Fuel's decision to wait for the resolution of litigation on the Commission's 2019 finding that NYSDEC waived its section 401 water quality certification authority is not sufficient reason for an extension.³⁴ Both the NYSDEC and Sierra Club argue that there was no barrier to construction during the litigation,³⁵ and that no barrier to construction has been present since the Second Circuit issued its decision in March 2021.³⁶ NYSDEC also states that National Fuel has failed to indicate its continued interest in the project through its failure to pursue portions of the project in Pennsylvania.³⁷ Finally, Sierra Club argues that National Fuel provides insufficient detail regarding the "need to refresh various environmental clearances and permitting process."³⁸

14. As discussed above, National Fuel states that the delays to its receipt of confirmation of waiver of water quality certification prevented it from meeting the certificate deadline.³⁹ National Fuel asserts that upon updating its ESA clearances and

³⁴ See e.g., Sierra Club February 16, 2022 Comments at 6; Beth Rickard February 7, 2022 Comments at 1; Holly Dawson February 14, 2022 Comments at 1; Janet Lenichek February 15, 2022 Comments at 1.

³⁵ Sierra Club notes that in 2019, the Commission denied a request for a stay of the 401 waiver determination and no stay of the waiver was sought in the Second Circuit. Sierra Club February 16, 2022 Comments at 6-7 (citing Order Denying Rehearing, 167 FERC ¶ 61,007).

³⁶ New York DEC February 16, 2022 Comments at 5-6; Sierra Club February 16, 2022 Comments at 6-7 (arguing that National Fuel has presented no explanation as to what steps it has taken on the project since the Second Circuit affirmed the Commission's waiver determination).

³⁷ New York DEC February 16, 2022 Comments at 5.

³⁸ Sierra Club February 16, 2022 Comments at 7 (quoting January 28, 2022 Request for Extension of Time at 3).

³⁹ January 28, 2022 Request for Extension of Time at 2-3.

refreshing its CWA Section 404 permit, it can request a notice to proceed with construction and will begin material procurement and intends to complete construction by December 31, 2024.⁴⁰

15. Good cause exists to grant National Fuel the requested extension of time. The Commission has previously found that providing more time for a project applicant to obtain necessary permits can be an appropriate basis for granting an extension of time.⁴¹ We find that National Fuel's intervention in NYSDEC's appeal of the Commission's water quality certification waiver in the Second Circuit was part of its efforts to obtain a state authorization and shows its continued interest in the project.

16. With respect to NYSDEC's claim that "there are many facets of the Project outside [NYSDEC's] purview that National Fuel could pursue, including ... portions of the Project...in Pennsylvania,"⁴² presumably NYSDEC is suggesting that the companies ought to have pursued constructing the Pennsylvania portion of the project. The Commission has never required a sponsor to demonstrate that it has attempted to proceed with partial construction while still awaiting receipt of outstanding federal authorizations

⁴⁰ *Id.* at 3-4; *see also* National Fuel May 9, 2022 Response to Environmental Information Request.

⁴¹ *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026 (granting a two-year extension of time to complete construction due to applicants' litigation and permitting delays); *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,138 (2020) (granting a two-year extension of time to complete construction due to a need to obtain new permits); *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 (granting a further two-year extension of time to accommodate the applicant's efforts to obtain a permit from NYSDEC); *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (granting a two-year extension of time to accommodate a project applicant's efforts to obtain a permit from NYSDEC). *See also Perryville Gas Storage LLC*, Docket Nos. CP09-418-000, et al. (Oct. 12, 2016) (delegated order) (granting two-year extension of time to complete construction to accommodate delays in obtaining a permit from the Louisiana Department of Natural Resources); *Columbia Gas Transmission, LLC*, Docket No. CP13-8-000 (Sept. 30, 2015) (delegated order) (granting pipeline project two-year extension of time to complete construction due to delays in obtaining waterbody crossing permits); *Bobcat Gas Storage*, Docket Nos. CP09-19-000 et al. (Mar. 25, 2015) (delegated order) (granting a two-year extension of time because applicant had not yet obtained required permit from a state agency).

⁴² New York DEC February 16, 2022 Comments at 5.

related to other portions of the project in order to establish good cause for an extension of time.

B. The Certificate Order's Public Interest Findings and Environmental Analysis Remains Valid

17. Commenters argue the Commission should deny National Fuel's request for an extension of time due to changed circumstances since the Commission's issuance of the Certificate Order in 2017. They argue that the project is no longer in the public interest because: (1) National Fuel's statements regarding waiting for gas prices to increase show there is changed demand for the project's gas and that the delay could distort energy markets;⁴³ (2) new development near the project requires the Commission to find that the project's environmental analysis is stale;⁴⁴ and (3) greater understanding of the impacts of climate change and the significance of GHG emissions constitute significant new information requiring updated environmental analysis.⁴⁵ The commenters assert that these are changes of fact or law that would lead the Commission to reconsider its prior findings for the project.⁴⁶ For its part, National Fuel maintains that the project remains fully subscribed under fifteen-year precedent agreements.⁴⁷

18. As we explained above in paragraph 11, to the extent commenters question the market need for the project, the adequacy of the Commission's review of GHG emissions, and the Commission's consideration, in 2017, of the cumulative impacts of the project together with other reasonably foreseeable projects, these arguments are efforts to relitigate matters that the Commission considered in issuing the Certificate Order.⁴⁸ We

⁴³ See e.g., Doug Couchon February 4, 2022 Comments at 1; Deborah Bigelow February 14, 2022 Comments at 1; Victor Lemieux February 15, 2022 Comments at 1; Sierra Club February 16, 2022 Comments at 5 (arguing that National Fuel's delay is distorting energy markets by preventing other interested parties from applying for a certificate); see also New York DEC February 16, 2022 Comments at 20.

⁴⁴ See e.g., Kimberly Lemieux February 7, 2022 Comments at 1; Ann Finneran February 7, 2022 Comments at 1; Angela Passalacqua Comments at 1.

⁴⁵ Sierra Club Feb. 16, 2022 Comments at 9; New York DEC February 16, 2022 Comments at 18-19.

⁴⁶ Sierra Club Feb. 16, 2022 Comments at 8; New York DEC February 16, 2022 Comments at 4, 9.

⁴⁷ January 28, 2022 Request for Extension of Time at 4.

⁴⁸ Certificate Order, 158 FERC ¶ 61,061 at PP 31-32 (addressing market need),

recognize that environmental impacts are subject to change, and that the Commission generally will grant an extension of time if the movant files for an extension of time within a timeframe during which the environmental findings underlying the Commission's authorization can be expected to remain valid.⁴⁹ The Council on Environmental Quality's regulations implementing NEPA provide that agencies "[s]hall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and: (i) [t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."⁵⁰ Here, neither factor for preparation for supplemental NEPA has been triggered. As we have previously explained, granting a request for an extension of time to complete an approved action does not constitute the substantial changes to the proposed action envisioned in the NEPA regulations.⁵¹ Nor has there been a showing of significant new circumstances or information germane to environmental concerns and the proposed action or its impacts. Accordingly, we do not find it necessary to prepare a supplemental environmental analysis.

C. Motion to Reopen

19. NYSDEC moves that if the companies receive an extension the Commission should use Rule 716 of the Commission's Rules of Practice and Procedure to reopen the record in light of changes in fact, policy, and law and conduct a full environmental impact statement under NEPA or issue a supplemental EA.⁵² It argues that the "Commission must balance all factors bearing on the public interest, including the impacts of a project's reasonably foreseeable greenhouse gas (GHG) emissions and the

35-142, 144-167 (addressing GHG emissions, including GHG emissions from upstream production), 168-192 (addressing cumulative impacts). *See also Nat'l Comm. for the New River v. FERC*, 433 F.3d 830, 834 (D.C. Cir. 2005) (rejecting challenge to a post-certification compliance order claiming that the Commission failed to consider an alternative route, where the Commission and court had addressed the same claim in the certificate proceeding).

⁴⁹ *See Adelfia Gateway, LLC*, 178 FERC ¶ 61,030 at P 24; *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 9.

⁵⁰ 40 C.F.R. § 1502.9(d)(1) (2021).

⁵¹ *Adelfia Gateway, LLC*, 178 FERC ¶ 61,030 at P 23.

⁵² New York DEC February 16, 2022 Comments at 8.

resulting impact on climate change”⁵³ and that the record for the project, including the EA, lacks sufficient analysis of reasonably foreseeable GHG emissions, and cites to the Commission’s recent changes in policy regarding GHG emissions.⁵⁴ To remedy this insufficient analysis, NYSDEC requests that the Commission conduct a new environmental impact statement under NEPA that considers both upstream and downstream GHG emissions and whether those emissions are consistent with the state’s mandated reductions in GHG emissions under the Climate Leadership and Community Protection Act.⁵⁵

20. Rule 716 is not applicable here. Rule 716 allows the Commission to reopen the evidentiary record in limited circumstances if the Commission “has reason to believe that reopening of a proceeding is warranted by any changes in conditions of fact or of law or by the public interest.”⁵⁶ To persuade the Commission to reopen the record, the requesting party must demonstrate the existence of “extraordinary circumstances.”⁵⁷ However, Rule 716 does not provide the Commission with additional authority to reopen the record underlying the Certificate Order here, where a final, non-appealable order has issued.⁵⁸ Accordingly, we deny the request to reopen the record underlying the Certificate Order, or to revisit the terms and conditions of the Certificate Order.

21. In view of the above, we grant National Fuel and Empire’s request for a 35-month extension of time to complete construction and place into service the Northern Access 2016 Project.

22. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the motion and exhibits thereto, and upon consideration of the record.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 9-10, 15.

⁵⁵ *Id.* at 11, 16.

⁵⁶ 18 C.F.R. § 385.716(c) (2021).

⁵⁷ *Algonquin Gas Transmission, LLC*, 178 FERC ¶ 61,029, at P 27 (2022) (citing *Millennium Pipeline Co.*, 142 FERC ¶ 61,077, at P 8 (2013)).

⁵⁸ *Old Dominion Elec. Coop. v. Pub. Serv. Elec. & Gas Co.*, 105 FERC ¶ 61,094, at P 15 (2003); *see also N. Nat. Gas. Co.*, 113 FERC ¶ 61,060, at P 22 (2005).

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The Commission orders:

National Fuel Gas Supply Corporation and Empire Pipeline, Inc. are granted a 35-month extension of time, to December 31, 2024, to construct the facilities and make available for service the Northern Access 2016 Project.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

National Fuel Gas Supply Corporation
Empire Pipeline, Inc.

Docket No. CP15-115-006

(Issued June 29, 2022)

DANLY, Commissioner, *concurring*:

1. I concur in the Commission's decision to grant National Fuel Gas Supply Corporation's and Empire Pipeline, Inc.'s request for a 35-month extension of time, until December 31, 2024, to construct and place into service the Northern Access 2016 Project.¹
2. In today's order, the Commission states that it lacks "authority to reopen the record underlying the Certificate Order here, where a final, non-appealable order has issued";² I agree. I have taken this position in several separate statements.³

¹ See National Fuel Gas Supply Corporation and Empire Pipeline, Inc. January 28, 2022 Request for Extension of Time.

² *Nat'l Fuel Gas Supply Corp.*, 179 FERC ¶ 61,226, at P 20 (2022).

³ See *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly, Comm'r, dissenting); *id.* (Danly, Comm'r, dissenting at P 26) ("Rule 716, which allows the Commission to reopen the record in certain proceedings, explicitly applies only to initial or revised initial decisions and, moreover, *does not apply* to final, unappealable orders.") (citations omitted) (emphasis in original); see also *Algonquin Gas Transmission, LLC*, 178 FERC ¶ 61,029 (2022) (Danly, Comm'r, concurring in part & dissenting in part at P 9) ("If the majority intended to calm what they believed to be unnecessary and overstated fears that the Commission had reopened a final certificate, or to prove that, as my colleague neatly put it, 'the British are not actually coming,' it has failed to do so. The majority's refusal to explain the Commission's authority only highlights the obvious fact that it had none. And instead of acknowledging this plain fact, the majority leaves the door open to revisit whether a project is in the public convenience and necessity at its whim.") (quoting *Transcript of the 1079th Meeting*, FERC, at 12 (May 20, 2021), <https://www.ferc.gov/media/transcript-6>) (Order on Briefing); *Algonquin Gas Transmission, LLC*, 175 FERC ¶ 61,150 (2021) (Danly, Comm'r, dissenting at PP 4-11) (explaining that the Commission reopened the record for a final, non-appealable certificate order). Cf. *Adelphia Gateway, LLC*, 178 FERC ¶ 61,030 (2022) (Danly, Comm'r, concurring in part & dissenting in part at P 6) ("To be

3. Nonetheless, recent Commission orders for extensions of time, some of which I have voted for, have included language that I believe reinforces the Commission's misguided view in *Algonquin Gas Transmission, LLC*,⁴ issued in 2021, that it may revisit determinations made in final, unappealable certificate orders.⁵ In that proceeding, in the face of more than 80 years of contrary precedent, the Commission reopened the record of a judicially-final certificate order without even an *attempt* to offer a statutory basis for its action.⁶ Although the Commission has since terminated the proceeding,⁷ in doing so it refused to identify the authority that would permit it to reopen a certificate proceeding

clear: the Commission lacks authority to revisit its public convenience and necessity determinations once the order making those findings is final.”).

⁴ 174 FERC ¶ 61,126 (Danly, Comm'r, dissenting).

⁵ For example, recently in *Delfin LLG LLC*, the Commission stated, “[i]n *Chestnut Ridge*, we explained that when we act on an application, we rely on information available at that time but that the data that underpin our conclusions on the need for a project, its commercial prospects, and its environmental impacts are subject to change. As we stated there, ‘the validity of our conclusions and environmental mitigation conditions *cannot be sustained indefinitely*.’” 178 FERC ¶ 61,031, at P 12 (2022) (quoting *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 8 n.9 (2012)) (emphasis added). As I note above the line, I have voted for other orders that have included similar language. *See, e.g., Transcon. Gas Pipe Line Co., LLC*, 175 FERC ¶ 61,148, at P 17 (2021). In my concurrence in part and dissent in part in *Delfin LNG LLC*, I explained how that language reinforces the misguided view in *Algonquin Gas Transmission, LLC*. *See* 178 FERC ¶ 61,031 (Danly, Comm'r, concurring in part & dissenting in part at P 3).

⁶ *See Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126; *id.* (Danly, Comm'r, dissenting at PP 18, 22); Former Commissioners Mike Naeve, Elizabeth A. Moler, Donald F. Santa, Jr., Pat Wood, III, Nora Mead Brownell, Joseph T. Kelliher, and Suedeen G. Kelly April 12, 2021 Letter to the Commission, Docket No. CP16-9-000, et al., at 1-2 (“We are troubled by the novel assertion of authority to reconsider a long-since-final certificate order, without any suggestion that the terms of that order were violated, and long after a private company built and placed into service the facilities in question, at a cost of approximately a half billion dollars. We are unaware of any other instance, in the eight-decade history of the Natural Gas Act, where the Commission has taken such a step.”). *Cf. U.S. v. Seatrains Lines, Inc.*, 329 U.S. 424 (1947) (affirming district court's holding that the Interstate Commerce Commission had exceeded its statutory authority in reopening the proceeding and altering the certificate).

⁷ *See* Order on Briefing, 178 FERC ¶ 61,029.

once final, while still leaving the door open to later revisit whether an approved project is still in the public convenience and necessity.⁸

4. And while I am pleased by the Commission's recognition in the instant order that reopening a final, non-appealable certificate order is not within the Commission's authority, statements by the Commission undercut that assertion. For instance, in today's order, the Commission recognizes "that environmental impacts are subject to change," and then goes on to state that "the Commission generally will grant an extension of time if the movant files for an extension of time within a timeframe *during which the environmental findings underlying the Commission's authorization can be expected to remain valid.*"⁹ As I have explained, the Commission should exercise caution when inquiring into whether a prior authorization order's public interest findings and environmental analysis remain valid.¹⁰ This is because the question of the validity of "findings underlying the Commission's authorization" is intertwined with the public interest findings.¹¹

5. One final observation: citing to the Order on Briefing, the Commission asserts that "[t]o persuade the Commission to reopen the record, the requesting party must

⁸ *Id.* (Dally, concurring in part & dissenting in part at P 9) ("The majority's refusal to explain the Commission's authority only highlights the obvious fact that it had none. And instead of acknowledging this plain fact, the majority leaves the door open to revisit whether a project is in the public convenience and necessity at its whim.").

⁹ *Nat'l Fuel Gas Supply Corp.*, 179 FERC ¶ 61,226 at P 18 (citations omitted) (emphasis added). I note that similar language has been included in prior Commission orders, including orders that I have voted for. *See, e.g., Trunkline Gas Co., LLC*, 179 FERC ¶ 61,086, at P 8 (2022) ("The Commission generally will grant an extension of time if the movant files for an extension of time within a timeframe during which the environmental findings underlying the Commission's authorization can be expected to remain valid."); *Transcon. Gas Pipe Line Co., LLC*, 175 FERC ¶ 61,148 at P 17 ("We recognize that environmental impacts are subject to change . . . The Commission generally will grant an extension of time if the movant files for an extension of time within a timeframe during which the environmental findings underlying the Commission's authorization can be expected to remain valid.").

¹⁰ *E.g., Trunkline Gas Co., LLC*, 179 FERC ¶ 61,086 (Dally, Comm'r, concurring at P 1).

¹¹ *Nat'l Fuel Gas Supply Corp.*, 179 FERC ¶ 61,226 at P 18.

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demonstrate the existence of ‘extraordinary circumstances.’”¹² Circumstances, no matter how extraordinary, cannot themselves grant jurisdiction where Congress has conferred no power. In the absence of authority provided by Congress, the Commission simply cannot revisit its public convenience and necessity determinations once a certificate order becomes final and unappealable.

For these reasons, I respectfully concur.

James P. Danly
Commissioner

¹² *Id.* P 20 (citing Order on Briefing, 178 FERC ¶ 61,029 at P 27 (quoting *Millennium Pipeline Co.*, 142 FERC ¶ 61,077, at P 8 (2013))).

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