

150 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
Norman C. Bay, and Colette D. Honorable.

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP13-551-001

ORDER DENYING STAY

(Issued March 12, 2015)

1. On February 12, 2015, Delaware Riverkeeper Network filed a request for stay of the Commission's December 18, 2014 Order¹ granting a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company, LLC (Transco) to construct the Leidy Southeast Project (Leidy Project). As discussed below, we deny the motion, because we conclude that justice does not require a stay.

I. Background

2. On December 18, 2014, the Commission issued an order for the Leidy Project, authorizing Transco to construct and operate approximately 29.97 miles of new pipeline loop, consisting of four pipeline loops segments, the Dorrance Loop, Franklin Loop, Pleasant Run Loop, and Skillman Loop, and to add a total of 71,900 horsepower at four compressor stations, located in Pennsylvania and New Jersey. The Leidy Project would expand Transco's existing pipeline system capacity, enabling Transco to provide firm transportation service for an additional 525,000 dekatherms per day. The project is fully subscribed.

3. The order concluded that the project, if constructed and operated in accordance with Transco's application, as supplemented, and with the additional environmental conditions imposed by the Commission, would not constitute a major federal action affecting the quality of the human environment.²

¹ *Transcontinental Gas Pipe Line Company, LLC*, 149 FERC ¶ 61,258 (2014) (December 18 Order).

² *Id.* P 44.

4. Delaware Riverkeeper filed a timely request for rehearing on January 16, 2015, as did two other parties. Those requests are pending before the Commission.

5. On February 12, 2015, Delaware Riverkeeper filed a motion to stay any construction activity and any other land-disturbing activity conducted under the certificate, pending rehearing of the December 18 Order on rehearing. Delaware Riverkeeper contends that a stay is appropriate because: (1) it is necessary to avoid irreparable injury; (2) Transco will not be significantly harmed by a stay; (3) a stay is in the public interest; and (4) Delaware Riverkeeper is likely to succeed on the merits of its pending request for rehearing.

6. On February 23 and 24, 2015, as supplemented on February 26 and March 3, 2015, Transco filed a request to begin limited, non-mechanized tree-felling along the Dorrance and Franklin Loops and Compressor Stations 515 and 520 in Luzerne, Monroe, and Lycoming Counties, Pennsylvania, and along segments of the Pleasant Run and Skillman Loops in Mercer, Somerset, and Hunterdon, New Jersey, in order to comply with the U.S. Fish and Wildlife Service's recommendations to fell between November 15 and April 1 trees in which Indiana Bats (which are listed as endangered under the Endangered Species Act) might roost later in the year.³ The company stated that it had received the authorizations necessary for the activities included in the request.

7. On February 23 and 25, 2015, Delaware Riverkeeper filed comments opposing Transco's request, asserting that the Commission should reject the request until such time the Commission rules on Delaware Riverkeeper's request for rehearing and motion for a stay. The Municipality of Princeton, Princeton Ridge Coalition, Stony-Millstone Watershed Association, and some individuals opposed Transco's request. All express concern about wetlands in the tree-felling area and argue that Transco should not be able to begin work until New Jersey Department of Environmental Protection (New Jersey DEP) issues permits for the Leidy Project. New Jersey also filed comments requesting the Commission not approve tree-felling activities until Transco gets all required approvals from New Jersey DEP and until Transco has demonstrated compliance with any pre-construction conditions included in those permits. New Jersey DEP asserts that allowing tree-felling prior to permit issuance may impact available alternatives for project design and mitigation.

8. On March 9, 2015, Commission staff issued a notice authorizing Transco to proceed with limited tree-felling activities, based on staff's verification that Transco had received clearances from the Pennsylvania and New Jersey State Historic Preservation

³ This approval does not include tree-felling for approximately 7.6 acres of proposed additional workspace along the Franklin Loop that Transco excluded from its February 24, 2015 request.

Offices and the Fish and Wildlife Service, and that the U.S. Army Corps of Engineers had confirmed in a January 28, 2015 letter (appended to Transco's February 24, 2015 filing) that tree-felling activities for the Leidy Project in Pennsylvania wetlands, which would not disturb root systems, would not result in a discharge of dredged and/or fill material and therefore do not require a Clean Water Act permit from that agency. Staff also reviewed and found adequate Transco's commitments that tree-felling activities would be monitored by an environmental inspector, that employees would be properly trained, and that approved areas would be clearly marked, as outlined in its March 3, 2015 filing.⁴

II. Discussion

9. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act,⁵ and grants a stay when "justice so requires."⁶ In assessing a request for stay, we consider several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.⁷ Our general policy is to refrain from granting stays in order to ensure definiteness and finality in our proceedings.⁸ If the party requesting the stay is

⁴ For appropriate projects, like Leidy, a pipeline company can request authorization to proceed with construction of discrete segments of the overall project once it has complied with all the environmental conditions relevant to that particular section of the approved pipeline route. *See, e.g., Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103, at P 8 (2011) (*Ruby*). Upon verification that all applicable environmental conditions have been satisfied, Commission staff issues a "notice to proceed" with construction of, as appropriate, all or a portion of the project covered by the request.

⁵ 5 U.S.C. § 705 (2012).

⁶ *See, e.g., Millennium Pipeline Company, L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012) (*Millennium*); *Ruby*, 134 FERC ¶ 61,103 at P 17; *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 18 (2009) (*AES*); *Columbia Gas Transmission LLC*, 129 FERC ¶ 61,021, at P 6 (2009) (*Columbia Gas*); *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at 61,869 (2001) (*Guardian*).

⁷ *Id.*

⁸ *See, e.g., Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine the other factors.⁹

10. In *Wisconsin Gas Co. v. FERC*,¹⁰ the D.C. Circuit recognized that, although the concept of irreparable harm does not readily lend itself to definition, courts have developed well-known principles to guide a determination, which include that the injury must be both certain and great, it must be actual and not theoretical, and injunctive relief will not be granted with respect to something merely feared as liable to occur at some indefinite time.¹¹ Implicit in these principles is the further requirement that the movant substantiate the claim that irreparable injury is “likely” to occur.¹² Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur.¹³ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.¹⁴ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.¹⁵

11. Both the Commission and the courts have denied stays in circumstances similar to those presented here. For example, in *Millennium Pipeline Company, L.L.C. (Millennium)*,¹⁶ the Commission denied a request for stay that was based on claims that tree cutting would cause irreparable harm to local residents, including injury to endangered species and reduced property values. Similarly, in *Ruby Pipeline, L.L.C. (Ruby)*, the Commission found that allegations of environmental and cultural harm did

⁹ See, e.g., *Millennium*, 141 FERC ¶ 61,022 at P 14; *Ruby*, 134 FERC ¶ 61,103 at P 18; *AES*, 129 FERC ¶ 61,245 at P 18; *Columbia Gas*, 129 FERC ¶ 61,021 at P 6; *Guardian*, 96 FERC ¶ 61,204, at 61,869.

¹⁰ 758 F.2d 669 (D.C. Cir. 1985) (*Wisconsin Gas*).

¹¹ *Id.* at 674 (citation omitted).

¹² *Id.* (citation omitted).

¹³ *Id.* (emphasis in original).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Millennium*, 141 FERC ¶ 61,022 (2012).

not support grant of a stay.¹⁷ The court denied requests for judicial stay in these and other pipeline construction cases.¹⁸

12. Delaware Riverkeeper argues that it will suffer irreparable harm in the absence of a stay because “members of [the group] who live in the immediate vicinity of the proposed Project route will suffer irreparable harm, including the irretrievable loss of pristine forest lands, wetlands, and streams in and around which they live, work, and recreate, the permanent alteration of the unique character of their rural community, and the devaluation of their property.”¹⁹ Delaware Riverkeeper cites *Amoco Production Co. v. Village of Gambell*²⁰ for the proposition that where environmental harm can be established, irreparable harm is almost always present because compensation is not a sufficient remedy. Additionally, the group asserts that the public interest heavily favors preventing irreparable harm to the environment.

13. We find that Delaware Riverkeeper has not demonstrated that it will suffer irreparable injury in the absence of a stay. The group has provided only unsupported allegations in the form of generalized environmental assertions about the project. Delaware Riverkeeper includes no analysis incorporating facts or specific information. In approving the Leidy Project, the Commission considered the environmental assessment prepared by Commission staff to analyze the Leidy Project, and determined that, on balance, approving the pipeline along the recommended route is an environmentally acceptable action, the impacts of which would not result in significant impacts to the environment.²¹ Moreover, the December 18 Order requires Transco to

¹⁷ *Ruby*, 134 FERC ¶ 61,103; *see also Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020 (2011).

¹⁸ *See Minisink Residents for Environmental Preservation and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013), order denying motion for stay; *In re Minisink Residents for Environmental Preservation and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012), order denying petition for stay; *Defenders of Wildlife v. FERC*, No. 10-1407 (D.C. Cir. Feb. 22, 2011), order denying motion for stay; *Summit Lake Paiute Indian Tribe v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011), order denying motion for stay. *See also Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 8, 2013), order denying motion for stay; *Delaware Riverkeeper v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013), order denying motion for stay; *Coalition for Responsible Growth and resource Conservation v. FERC*, No. 12-566 (2d. Cir. Feb. 28, 2012), order denying motion for stay.

¹⁹ Delaware Riverkeeper’s February 12, 2015 Request for Stay at 10.

²⁰ 480 U.S. 531, 545 (1987).

²¹ December 18 Order, 149 FERC ¶ 61,258 at P 126.

comply with 24 broad-ranging environmental conditions and mitigation measures, protecting the environment against any irreparable harm.

14. As for Delaware Riverkeeper's assertion that its members' property will be devalued, while the Commission recognizes the general potential for property values to be negatively impacted by the construction of nearby energy infrastructure, such potential impacts are indicative of only economic harm, which, without more, is not considered irreparable injury sufficient to support granting the extraordinary remedy of a stay.²² In any event, Delaware Riverkeeper provides no evidence to support its vague claims regarding property values.

15. Delaware Riverkeeper also contends that Transco will not be significantly harmed, or only slightly delayed, by a stay. It cites *Citizen's Alert Regarding the Environment v. U.S. Dep't. of Justice*²³ for the proposition that the potential loss of revenue, jobs, and monetary investment due to project delay does not outweigh permanent destruction to the environment. The group further asserts that Transco cannot begin construction because it has not obtained all required federal authorizations, specifically a Clean Water Act section 404 dredge and fill permit, and a Clean Water Act section 401 water quality certificate.

16. In the March 9, 2015, notice to proceed with limited tree-felling activity, Commission staff determined that Transco had all authorizations necessary for the work it proposed to undertake. As noted, the U.S. Army Corps of Engineers has confirmed that a permit from it is not required. Transco's activities in New Jersey are limited to upland areas that the company has stated are outside of New Jersey DEP-regulated forest areas in which state Clean Water Act authorization is required: the authorized activities do not include tree-felling in forest habitat with riparian or wetland forest or in forest transitional areas.²⁴ In Pennsylvania, non-mechanized tree-felling activities do not require Clean Water Act authorization.²⁵

²² See, e.g., *Wisconsin Gas*, 758 F.2d 669, 674; *Millennium*, 141 FERC ¶ 61,022 at P 17; *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 10 (2008); *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037, at P19 (2008); *Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 11 (2005).

²³ 1995 WL 748246, *11 (D.D.C., 1995).

²⁴ See Transco's February 23, 2015 filing.

²⁵ See Pennsylvania Department of Environmental Protection *Timber Harvest Operations: Field Guide for Waterways, Wetlands, and Erosion Control* (pub. 3930-BK-DEP4016).

17. We need not conclude that Transco will be harmed to find that the public interest argues against issuing a stay here. Transco has a small window of opportunity to comply with the Fish and Wildlife Service's recommendations to fell potential Indiana Bat roost trees. It must do so by April 1, 2015, or delay until November.²⁶ The Commission found that the Leidy Project is required by the public convenience and necessity, and any delay in construction could delay delivery of needed gas supplies on the fully-subscribed expansion project, the shippers of which include four local distribution companies that provide service to residential, industrial, and commercial customers. On balance, the public interest favors denying the stay.

18. Delaware Riverkeeper also argues that the Commission should not prejudge the outcome of its request for rehearing by allowing construction to proceed before the issues raised in the rehearing are fully resolved.²⁷ The factors we examine when considering whether to grant a stay, enumerated above, do not include the likelihood of success on the merits.²⁸ We have not yet considered the merits of the petitions on rehearing, and we will not prejudge them in any manner. To the extent that the company elects to proceed with construction, it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal. If this were to occur, the company might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation. Given our conclusion that the Leidy Project will not have significant environmental impacts, we do not believe that denying the request for a stay puts the environment at risk.

19. In its stay request, Delaware Riverkeeper also contends that when the procedural harm caused by the Commission's failure to undertake adequate National Environmental Policy Act analysis, as it claims on rehearing, is combined with potential environmental

²⁶ The U.S. Fish and Wildlife Service recommendation calls for tree-felling between November 15 and April 1 in Pennsylvania and between September 30 and April 8 in New Jersey.

²⁷ It cites *Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1987), for the proposition that the purpose of a stay is to preserve the status quo pending the Commission's review of its decision, and that a stay ensures there is the possibility that the agency will change its plans in ways of benefit to the environment.

²⁸ *Millennium*, 141 FERC ¶ 61,022 at P 18; *Ruby Pipeline L.L.C.*, 134 FERC ¶ 61,020 at P 16.

injury, courts are likely to find irreparable injury.²⁹ However, as discussed above, in its stay request Delaware Riverkeeper only asserts generalized environmental harm to its members without identifying specifics. Thus, what is relevant here is that the group has not substantiated its claim of irreparable environmental injury.

20. As a general matter, we do not favor stays, which can result in regulatory uncertainty.³⁰ Given that Delaware Riverkeeper has not demonstrated the likelihood of irreparable injury in the absence of a stay or that justice otherwise requires issuance of a stay, and that the group will have the opportunity to make its case at both the administrative and appellate levels, we conclude that a stay is not required here, and therefore deny the motion for stay.

The Commission orders:

The request for stay filed on February 12, 2015, by Delaware Riverkeeper Network is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ Delaware Riverkeeper's February 12, 2015 Request for Stay, citing *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.2d 1, 24 (D.D.C. 1998); *see, e.g. Fund for Animals v. Clark*, 27 F. 2d 8, 14 (D.D.C. 1998).

³⁰ *See Millennium*, 141 FERC ¶ 61,022 at P 22.