

156 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constitution Pipeline Company, LLC

Docket No. CP13-499-002

ORDER ON MAY 13, 2016 FILING

(Issued July 13, 2016)

1. On May 13, 2016, the Attorney General for the State of New York made a filing styled as a complaint and petition (May 13 Filing) against Constitution Pipeline Company, LLC (Constitution), in which it alleges violations of the Natural Gas Act (NGA), Commission regulations, and the Commission's December 2, 2014 order issuing a certificate of public convenience and necessity (Certificate Order).¹ The May 13 Filing requests an investigation and requests a related stay of the Certificate Order.
2. Constitution responded to the May 13 Filing on June 2, 2016. In that response, it denied the key factual allegations, challenged certain of the legal arguments, and requested that the matter be set for a hearing before an Administrative Law Judge.

Background

3. On June 13, 2013, Constitution filed an application, pursuant to section 7(c) of the NGA and Part 157 of the Commission's regulations, for authorization to construct and operate an approximately 124-mile-long interstate pipeline and related facilities

¹ *Order Issuing Certificates and Approving Abandonment*, 149 FERC ¶ 61,199 (2014), *order on reh'g*, 154 FERC ¶ 61,046 (2016).

extending from Susquehanna County, Pennsylvania to Schoharie County, New York. The Commission conditionally granted that request in the December 2, 2014 Certificate Order.²

4. The Certificate Order included a requirement that “[p]rior to receiving written authorization from the Director of OEP [(Office of Energy Projects)] to commence construction of their respective project facilities, the Applicants shall file documentation that they have received all applicable authorizations required under federal law (or evidence of waiver thereof).”³

5. The May 13 Filing alleges that Constitution has failed to obtain a water quality certification from New York State, as is required under section 401 of the Federal Clean Water Act.⁴

6. The May 13 Filing further alleges that there is “a reasonable basis to conclude that Constitution expressly or tacitly authorized, encouraged and/or condoned the tree and vegetation cutting, clear-cutting, and other ground disturbance activities within the pipeline right of way in New York on which Constitution holds easements for the sole purpose of constructing and operating the pipeline.”⁵

7. The May 13 Filing states that “the NY Attorney General is not requesting and would oppose any enforcement action against the fee landowners on whose property the conduct giving rise to this complaint and petition took place.”⁶

² *See id.*

³ *Id.* at 51 (emphasis omitted).

⁴ 33 U.S.C. § 1341(a)(1) (2014).

⁵ May 13, 2016 Filing at 2.

⁶ *Id.* at 3.

8. As a procedural matter, the NY Attorney General erred by stylizing the May 13 Filing as a complaint and petition submitted under sections 385.206 and 285.207 of the Commission's regulations.⁷ Based on the substance of the filing, the filing should have been submitted as a request for investigation pursuant to section 1b.8 of the Commission's regulations.⁸

9. If the Commission were to treat the May 13 Filing as a complaint, it would reject the filing for failure to comply with section 206(b) of the Commission's regulations. Neither the allegations regarding supposed affirmative acts nor those regarding supposed omissions "clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements" and "explain how the action or inaction violates applicable statutory standards or regulatory requirements."⁹

10. As for affirmative acts, the May 13 Filing broadly alleges that Constitution "expressly or tacitly authorized, encouraged, or condoned the tree and vegetation cutting and clear-cutting, and other ground disturbance activities within the pipeline right of way."¹⁰ However, the May 13 Filing does not include any specific facts to support such allegations, but instead relies upon speculation that Constitution had a role in the land clearing that has occurred within its right of way. For these reasons, the Commission finds that the May 13 Filing fails to satisfy the Commission's complaint rules.¹¹

⁷ See 18 C.F.R. §§ 385.206 & 385.207 (2015).

⁸ 18 C.F.R. § 1b.8 (2015).

⁹ See 18 C.F.R. § 385.206(b)(1) & (b)(2). Nor did the May 13 Filing include the form of notice of complaint required by 18 C.F.R. § 385.206(b)(10). There is no indication in the filing that the relief or action sought through petition differed in any way from the relief or action sought through the complaint. To the degree that the filing was intended as a petition for the Commission to initiate an investigation, such a request is more properly made pursuant to the procedures outlined in 18 C.F.R. § 1b.8 (2015). *Cf.* 18 C.F.R. §§ 207(a)(5) (2015) (requiring a person to file a petition seeking discretionary action "for which [18 C.F.R. Ch. I] prescribes no other form of pleading").

¹⁰ May 13, 2016 Filing at 64.

¹¹ See, e.g., *O'Connor & Hewitt, Ltd*, 122 FERC ¶ 61,103, at PP 19-20 (2008) (quoting 18 C.F.R. § 385.206(b)(1)); *Californians for Renewable Energy, Inc. v. Pac.*

11. The allegations regarding supposed omissions are also insufficient. The May 13 Filing claims that Constitution had the duty to force landowners and other third parties to cease ground disturbance activities once it was put on notice of those activities. This claim relies on the argument that a certificate holder “has the duty to not only to comply with the [Certificate] Order, but to ensure that others do not cause violations of the Order within the pipeline right of way property once it knows of those activities.”¹² The filing provides no authority for such a theory of vicarious liability and, therefore, fails to “[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.”¹³

12. While procedurally-deficient as a complaint and petition, the May 13 Filing may constitute a valid request for investigation, pursuant to section 1b.8 of the Commission’s regulations, of Constitution’s alleged affirmative acts. Accordingly, the Commission construes it as such and refers this matter to Commission staff for further examination and inquiry as may be appropriate.¹⁴

13. To the degree that the request for stay in the May 13 Filing seeks relief beyond an investigation to address potential violations, the filing fails to demonstrate that justice so requires a stay.¹⁵ Constitution is reminded that it must comply with the NGA, Commission regulations, and all terms of its certificate or face potential sanctions.

Gas & Elec. Co., 129 FERC ¶ 61,141, at P 11 (2009) (*CARE*)(quoting *Ill. Mun. Elec. Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996)).

¹² *E.g.*, May 13, 2016 Filing at 80.

¹³ 18 C.F.R. § 385.206(b)(2); *see also CARE*, 129 FERC at P 11.

¹⁴ Because the Commission is construing the May 13 Filing as a request for investigation, it need not rule on Constitution’s request to set the complaint for evidentiary hearing before an Administrative Law Judge.

¹⁵ *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,236 at P 8 (2016); *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

The Commission orders:

Therefore, the Commission refers this matter to Commission staff as discussed herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.