

157 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Algonquin Gas Transmission, LLC

Docket No. CP14-96-002

ORDER AMENDING CERTIFICATE

(Issued October 6, 2016)

1. On July 1, 2016, Algonquin Gas Transmission, LLC (Algonquin) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA) to amend the certificate of public convenience and necessity issued on March 3, 2015, authorizing construction and operation of the Algonquin Incremental Market Project (AIM Project).¹ Algonquin seeks to amend its initial rates to reflect an overall increase in the cost of construction of the facilities. As discussed below, the Commission will grant the requested amendment.

I. Background and Proposal

2. The Certificate Order, among other things, authorized Algonquin to construct and operate approximately 37.4 miles of pipeline and related facilities in New York, Connecticut, and Massachusetts, including the 4.1 mile West Roxbury Lateral. The AIM Project will enable Algonquin to provide 342,000 dekatherms (Dth) per day of firm transportation service to eight local distribution companies and two municipal utilities

¹ *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163 (2015) (“Certificate Order”), *reh’g denied*, 154 FERC ¶ 61,048 (2016) (“Rehearing Order”). The Certificate Order and Rehearing Order are currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. *City of Boston Delegation v. FERC*, D.C. Cir. No. 16-1081, consolidated with *Riverkeeper v. FERC*, D.C. Cir. No. 16-1103 and *Town of Dedham v. FERC*, D.C. Cir. No. 16-1098.

(collectively, Project Shippers).² Algonquin states that all Project Shippers have entered into negotiated rate agreements for service on the expansion capacity.

3. The Certificate Order approved Algonquin's request for incremental rates for the AIM Project, under Rate Schedule AFT-1, and the West Roxbury Lateral, under Rate Schedule AFT-CL. However, the Commission stated that Algonquin may also propose a usage charge under Rate Schedule AFT-1 to recover any variable costs of providing service on the AIM Project, pursuant to section 284.10(c)(2) of the Commission's regulations.³

4. Algonquin proposes to amend its certificated initial reservation charges to reflect increases in the estimated construction costs of the AIM Project and West Roxbury Lateral. Specifically, Algonquin proposes to increase its initial reservation charge for the AIM Project from an estimated \$42.5748 per Dth to \$48.507 per Dth for Rate Schedule AFT-1 service and initial reservation charge for the West Roxbury Lateral from an estimated \$18.1976 per Dth to \$24.378 per Dth for Rate Schedule AFT-CL service.⁴ Due to the increase in construction costs, the proposed initial rates reflect a first-year cost of service of \$199,074,096 and \$29,253,221 for the AIM Project and West Roxbury Lateral, respectively.⁵ Algonquin also proposes a commodity charge of \$0.0069 per Dth for Rate Schedule AFT-1 to recover \$603,667 in variable costs.

II. Notice, Comments, Protests, and Answers

5. Notice of Algonquin's application for a certificate amendment was published in the *Federal Register* on July 7, 2016, with interventions due by July 18, 2016.⁶ No motions to intervene or notices of intervention were filed in this proceeding.

² The Project Shippers are Bay State Gas Company; Boston Gas Company; Colonial Gas Company; Connecticut Natural Gas Corporation; Middleborough Gas and Electric; The Narragansett Electric Company; Norwich Public Utilities; NSTAR Gas Company; The Southern Connecticut Gas Company; and Yankee Gas Services Company.

³ Certificate Order, 150 FERC ¶ 61,163 at P 35.

⁴ See Revised Exhibit K in the amended application.

⁵ The first-year cost of service approved in the Certificate Order for the AIM Project and West Roxbury Lateral was \$174,726,962 and \$22,337,066, respectively.

⁶ 81 Fed. Reg. 45,467 (2016).

6. Numerous individuals and entities that intervened in 2014 in the original certificate proceeding filed comments and protests concerning Algonquin's proposed cost of service increase.⁷ Many of the commenters also requested an evidentiary hearing. In addition, several community and environmental individuals and entities that intervened in the original certificate proceeding filed a joint protest (collectively, Community Protestors)⁸ and moved to dismiss the application claiming that the Commission lacks jurisdiction to address Algonquin's proposals.⁹ That protest was joined by the City of Boston Delegation.¹⁰ Project Shippers did not oppose the rate increase.

7. On August 3, 2016, Algonquin submitted an answer to the comments and protests.¹¹ Although the Commission's Rules of Practice and Procedure do not permit answers to protests, we will accept Algonquin's answer because it clarifies the concerns raised and provides information that has assisted in our decision-making process.¹²

8. The comments and protests are discussed below.

⁷ Congressman Steven F. Lynch of Massachusetts; Senators Elizabeth Warren and Edward Markey of Massachusetts; Martin J. Walsh, Mayor of the City of Boston; Michael Rush, Massachusetts State Senator; Paul McMurtry and Edward F. Copping, Massachusetts State Representatives; and Matt O'Malley, Boston City Councilor also filed comments opposing Algonquin's proposals.

⁸ Community Protestors consist of Reynolds Hill, Inc., Nancy Vann, Food & Water Watch, Stop the Algonquin Pipeline Expansion, Better Future Project, Charles River Spring Valley Neighborhood Association, West Roxbury Saves Energy, Capitalism versus the Climate, Fossil Free Rhode Island, Jessica Porter, Pramilla Malick, Paul Dunn, Alexandra Shumway, Jan White, Virginia Hickey, Mary McMahan, Audrey Brait, William and Robin Cullinane, Linder Sweeney, and Rickie Harvey. Community Protestors have appealed the Certificate Order to the United States Court of Appeals for the D.C. Circuit.

⁹ Community Protestors July 18, 2016 Protest at 6-7 (Protest).

¹⁰ The Boston Delegation includes Congressman Stephen F. Lynch; Mayor of the City of Boston Martin J. Walsh; Boston City Councilors Matt O'Malley, Michelle Wu, Michael Flaherty, Ayanna Pressley, and Stephen J. Murphy; Massachusetts State Representative Edward F. Copping; and Massachusetts State Senator Michael Rush.

¹¹ Algonquin August 3, 2016 Answer at 5 (Answer).

¹² 18 C.F.R. § 385.213(a)(2) (2016).

III. Discussion

9. Because revising the initial rates requires amending the authorization issued in the Certificate Order, Algonquin's request is subject to the jurisdiction of the Commission and the requirements of NGA sections 7(c) and (e).

1. Community Protestors' Protests

a. Jurisdiction

10. Community Protestors contend that the Commission lacks subject-matter jurisdiction to consider Algonquin's proposed amendment because petitions for review of the Certificate and Rehearing Orders are pending before the D.C. Circuit.¹³ Specifically, Community Protestors state that the D.C. Circuit has exclusive jurisdiction over the underlying orders pursuant to section 19(b) of the NGA,¹⁴ which states that "[u]pon the filing of [a petition for review], the court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." Community Protestors claim that section 19(b) imposes a categorical bar to consideration of Algonquin's application while the underlying orders await disposition of a pending appeal.¹⁵ Community Protestors conclude that section 19(b) compels the Commission to dismiss Algonquin's application for lack of subject-matter jurisdiction.¹⁶

11. Algonquin states that an administrative agency has jurisdiction to modify an order during a pending appeal.¹⁷ Furthermore, Algonquin argues that interpreting section 19(b) to constitute a bar to consideration of a request to amend an order during a pending appeal of an unrelated issue would make little practical sense as it would prevent the Commission from considering routine or uncontroversial requests.¹⁸

¹³ Protest at 6-7.

¹⁴ 15 U.S.C. §717r(b) (2006).

¹⁵ Protest at 6-7.

¹⁶ To reach the merits of Algonquin's application, Community Protestors assert that the Commission must seek voluntary remand of the petition for review from the D.C. Circuit and reopen the certificate proceeding. Protest at 7.

¹⁷ Answer at 5.

¹⁸ *Id.* at 6-7.

12. We reject Community Protestors' argument that section 19(b) is a jurisdictional bar to consideration of Algonquin's application. The Certificate Order and subsequent Rehearing Order are final orders. However, nothing in section 19(b) prohibits Algonquin from initiating a new proceeding, noticed by the Commission, to amend its certificated rates, as it did here.¹⁹ The Commission has jurisdiction to examine and consider a party's proposed amendment during a pending appeal, especially when the proposal does not concern the issues before the court on appeal.²⁰ Because Algonquin's application constitutes a new proceeding, the Commission's action herein on Algonquin's request to amend its initial rates does not modify or reopen the record on appeal to the D.C. Circuit. Accordingly, we find no bar to taking action on Algonquin's application.

b. Collateral Attack

13. Community Protestors contend that the Commission must deny Algonquin's request as a late, collateral attack on the Certificate Order, alleging that the majority of the cost increases are a result of Algonquin's compliance with conditions contained in the Final Environmental Impact Statement (EIS), which was issued in January 2015, and included in the Certificate Order, which was issued in March 2015.²¹ As a result, Community Protestors argue that Algonquin knew of the increased costs at that time the Certificate Order was issued, should have objected by requesting rehearing of the Certificate Order, and is therefore now barred from increasing project costs.²²

¹⁹ See *Ruby Pipeline L.L.C.*, 136 FERC ¶ 61,054 (2011) (amending certificate to authorize revised initial recourse rates reflecting increases in projected costs and the impact of a revised capital structure); *Columbia Gas Transmission Corp.*, 125 FERC ¶ 61,112, at P 24 (2008) (finding that the applicant must file to amend a certificate when seeking to change approved initial rates prior to commencement of service).

²⁰ See *Alabama Power Co. v. FPC*, 511 F.2d 383, 388 (D.C. Cir. 1974) (explaining that the Federal Power Commission "retain[ed] power under the Federal Power Act [which has substantially similar judicial review provisions to the NGA] to consider a petition for amendment" during a pending appeal); see also *Chamber of Commerce v. SEC*, 443 F.3d 890, 898 (D.C. Cir. 2006) (rejecting argument that the Securities and Exchange Commission lacked authority to consider modifications of a rule prior to the issuance of the appellate court's mandate).

²¹ Protest at 9-10.

²² *Id.*

14. Algonquin contends that it is not challenging the Certificate Order or the Commission's approval of the initial incremental recourse rates but merely seeking to amend the initial recourse rates to reflect the project's actual capital costs.²³ Algonquin asserts that it would have been impractical to file for rehearing since, at the rehearing deadline, it would not have been fully aware of all of the cost increases resulting from negotiations with landowners and contractors and implementation of route variations, construction techniques, and other procedures to address conditions in the Certificate Order.²⁴

15. We reject the argument that Algonquin's application is a collateral attack on the Certificate Order. A collateral attack improperly challenges a prior order. Here, Algonquin's application does not challenge any finding in the Certificate Order, but rather seeks to amend previously approved rates. It does not seek to re-litigate issues disposed of by the Certificate Order. The Commission has repeatedly recognized its ability to change initial rates when, as here, the pipeline seeks to adjust initial rates prior to newly authorized facilities being placed into service to account for updated estimates and actual construction costs.²⁵ Accordingly, we reject the argument that Algonquin should have filed for rehearing to amend its proposed rates.

c. Factual Support and Commission Policy

16. Community Protestors assert that Algonquin bears the burden of proof when seeking a rate increase and claim Algonquin has not provided any factual support for its proposed cost increases.²⁶ Community Protestors state that the Commission should require Algonquin to demonstrate that it took all reasonable efforts to reduce its costs prior to seeking authority to increase its cost of service.²⁷

²³ Answer at 16.

²⁴ *Id.* at 16-17.

²⁵ See *Ruby Pipeline L.L.C.*, 136 FERC ¶ 61,054 at P 9; *Cheniere Creole Trail Pipeline, L.P.*, 122 FERC ¶ 61,116 (2008) (granting requested authorization to revise the initial transportation rates to reflect increases in capital costs estimates that account for costs already incurred); *Hardy Storage Co., LLC*, 118 FERC ¶ 61,200 (2007) (amending initial rates, consistent with a settlement agreement, to account for an updated cost estimate using the actual prices from contracts executed with suppliers and contractors).

²⁶ Protest at 8.

²⁷ *Id.*

17. Algonquin contends that the Commission's regulations do not require applicants to submit actual costs when filing a certificate application because applicants cannot predict actual costs before regulatory review and stakeholder input.²⁸ Instead, Algonquin asserts that the Commission's regulations only require detailed estimates based on preliminary bids and cost data from similar facilities. Algonquin also points out that nothing in the regulations indicates that the actual costs of constructing a project may not differ from the estimated costs. Here, Algonquin identifies increases in material and labor costs, costs associated with multiple changes to the initial proposed route and construction techniques, and costs associated with compliance measures in response to permits and authorizations from federal, state, and local authorities.²⁹

18. The Commission finds that Algonquin's application contains adequate support to justify the proposed increase in the AIM Project's initial incremental recourse rates. Algonquin's revised Exhibit K reflects known costs at this stage of construction and estimates more accurate costs as the project nears completion. This good faith estimate is all that we require.³⁰ Community Protestors's contention that Algonquin must support its application with work orders, contracts, and task and expenditure data for past and future construction is burdensome and not required by our regulations.³¹

19. The Certificate Order, as conditioned, found, that Algonquin's proposal was consistent with the criteria in the Commission's Certificate Policy Statement³² and was in the public convenience and necessity. Algonquin's proposed amendment does not alter this finding. Accordingly, we will approve Algonquin's proposed revised Rate Schedule AFT-1 and AFT-CL reservation charges for the AIM Project and West Roxbury Lateral

²⁸ Answer at 11-12.

²⁹ *Id.* at 12.

³⁰ See, e.g., *Texas Eastern Transmission, LP*, 145 FERC ¶ 61,016 (2013); *Golden Pass Pipeline LP*, 117 FERC ¶ 61,015, at P 5 (2006).

³¹ See 18 C.F.R. § 157.14(13) (2016).

³² *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

and approve Algonquin's proposed Rate Schedule AFT-1 commodity charge for the AIM Project.³³

20. Many commenters contend that the Commission should not allow Algonquin's increased costs to be passed on to ratepayers. The Project Shippers are paying negotiated rates and did not object to the increased costs because they will not pay them. Algonquin's existing customers will not pay the costs because Algonquin is charging incremental rates. Potential new customers will know the rates to be charged by Algonquin on the AIM Project facilities and can make a decision on whether to contract for capacity. Thus, the increased costs will not be passed on to ratepayers.

21. Community Protestors state that the Commission considered alternatives to the Roxbury Lateral in the EIS and, had the Commission known of the cost increases, it may have adopted an alternative to the West Roxbury Lateral or have denied authority for Algonquin to construct the entire AIM Project.³⁴ The Certificate Order authorized the AIM Project. Algonquin is not proposing new construction in this proceeding. It is merely proposing to revise its rates. Thus, Community Protestors's arguments about relocating the West Roxbury Lateral or not approving the AIM Project amount to a collateral attack on a final certificate order. We will not entertain arguments to alter the AIM Project.

22. Community Protestors contend that the Commission should, as a matter of policy, require project sponsors to absorb cost overruns that exceed the original estimated costs by more than 10 percent because project sponsors are in control of costs and denying recovery for cost overruns incentivizes pipelines to accurately estimate and disclose project costs.³⁵ This proceeding involves an application by Algonquin to revise their AIM Project costs because of increases in its construction costs. To hold here that, as a matter of policy, all project sponsors should absorb cost overruns that exceed the original estimated costs by more than 10 percent is beyond the scope of this proceeding.

23. None of this order's findings changes Algonquin's authorization granted in the Certificate Order. Accordingly, the Commission's action herein qualifies for

³³ The Certificate Order required Algonquin to remove certain variable costs from its incremental firm rate. Certificate Order, 150 FERC ¶ 61,163 at P 35. Algonquin did so in the amended application.

³⁴ Protest at 9-10.

³⁵ *Id.* at 10.

the categorical exclusion from the need for environmental review set forth in section 380.4(a)(27) of the Commission's regulations.³⁶

2. Request for Evidentiary Hearing

24. Some protests and comments contend that the Commission should hold an evidentiary hearing to address cost increases and whether cost overruns merit a reexamination of Algonquin's certificate authority to construct and operate the AIM Project.³⁷

25. Although our regulations provide for a hearing, neither section 7 of the NGA nor our regulations require that such hearings be trial-type evidentiary hearings. When, as is usually the case, the written record provides a sufficient basis for resolving the relevant issues, it is our practice to provide for a paper hearing.³⁸ That is the case here, as all of the issues raised in the protests and comments were resolved on the basis of the existing record. Thus, we find that there is no need for an evidentiary hearing.

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

The Commission orders:

(A) The Certificate Order is amended, as discussed in the body of this order. In all other respects, the Certificate Order is unchanged.

³⁶ 18 C.F.R. § 380.4(a)(27) (2016).

³⁷ See, e.g., Food & Water Watch, July 18, 2016 Protest at 1; Rickie Harvey, July 18, 2016 Comment at 1; Mary McMahon, July 18, 2016 Comment at 1; Karen Weber, July 18, 2016 Comment at 1; James O. Michel, July 17, 2016 Comment at 1.

³⁸ See *NE Hub Partners, L.P.*, 83 FERC ¶ 61,043, at 61,192 (1998), *reh'g denied*, 90 FERC ¶ 61,142 (2000); *Pine Needle LNG Co., LLC*, 77 FERC ¶ 61,229, at 61,916 (1996). Moreover, the courts have repeatedly recognized that even where there are disputed issues “[the Commission] need not conduct such [an evidentiary] hearing if they may be adequately resolved on the written record.” *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993). See also *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993); *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993).

(B) The proposed revised Rate Schedule AFT-1 and AFT-CL initial rates are approved, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.