

157 FERC ¶ 61,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Constitution Pipeline Company, LLC

Docket No. CP13-499-004

ORDER DENYING REHEARING

(Issued November 22, 2016)

1. On July 13, 2016, the Commission issued an order¹ interpreting a May 13, 2016 filing (May 13 Filing) by the New York Attorney General to be a valid request for an investigation by Commission staff. The July 13 Order noted that the May 13 Filing would have been rejected as a complaint and petition because it was procedurally deficient. On August 12, 2016, the NY Attorney General filed a timely request for rehearing. For the reasons discussed below, the request for rehearing is denied.

2. On December 2, 2014, the Commission issued an order under section 7 of the Natural Gas Act (NGA) authorizing Constitution Pipeline Company, LLC (Constitution) to construct and operate the Constitution Pipeline Project, an approximately 124-mile-long pipeline extending from Susquehanna County, Pennsylvania, to Schoharie County, New York (Certificate Order).² The Certificate Order prohibits Constitution from commencing construction of the project until it obtains “all applicable authorizations required under federal law (or evidence of waiver thereof).”³ On April 22, 2016, the New York State Department of Environmental Conservation denied Constitution’s application for a required Water Quality Certification under section 401 of the Clean Water Act.⁴ Constitution has appealed the denial in federal court. Until this matter is resolved, Constitution may not proceed with pipeline construction.

¹ *Constitution Pipeline Company, LLC*, 156 FERC ¶ 61,035 (July 13 Order).

² *Constitution Pipeline Company, LLC*, 149 FERC ¶ 61,199 (Certificate Order).

³ *Id.* 149 FERC ¶ 61,199 at envtl. condition 8.

⁴ 33 U.S.C. § 1341 (2012).

3. In its May 13 Filing, the NY Attorney General alleged that Constitution “expressly or tacitly authorized, encouraged, and/or condoned” the removal of vegetation and other ground disturbance activities within the pipeline right-of-way in New York without written authorization under the certificate.⁵ The NY Attorney General styled its May 13 Filing as a complaint and petition under Rules 206 and 207 of the Commission’s Rules of Practice and Procedure, respectively,⁶ and invoked sections 13, 20, and 21 of the NGA.⁷ The May 13 Filing requested that the Commission investigate, initiate an enforcement action against, and penalize Constitution.⁸ The May 13 Filing also stated 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.”⁹

4. In the Commission’s July 13 Order, the Commission concluded that the NY Attorney General had erred by styling the May 13 Filing as a complaint and petition. Based on its substance, the filing more properly should have been submitted as a request for investigation under section 1b.8 of our regulations.¹⁰ The Commission concluded that the May 13 Filing may constitute a valid request for investigation and referred the matter to staff for further examination and inquiry as may be appropriate.¹¹

5. The Commission also concluded that the May 13 Filing failed to satisfy the procedural requirements of Rule 206 for a complaint. A complaint must “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.”¹² The Commission explained that the May 13 Filing relied upon speculation, without specific supporting facts, to allege that

⁵ NY Attorney General May 13, 2016 Filing at 28-29.

⁶ 18 C.F.R. §§ 385.206, 385.207 (2016).

⁷ 15 U.S.C. §§ 717l (complaints by states), 717s (enforcement authority), 717t (penalty authority) (2012).

⁸ May 13 Filing at 42-43.

⁹ *Id.* at 3.

¹⁰ July 13 Order, 156 FERC ¶ 61,035 at P 8; *see* 18 C.F.R. § 1b.8 (2016).

¹¹ *Id.* P 12.

¹² 18 C.F.R. § 385.206(b)(1), (b)(2) (2016).

Constitution affirmatively acted in the ground-disturbing activities in the project right-of-way.¹³ The Commission further explained that the May 13 Filing cited no authority making Constitution vicariously liable for the ground-disturbing activities of land owners or other third parties¹⁴ in the project right-of-way, and so failed to explain how Constitution's inaction to stop third parties' ground-disturbing activities "violates applicable statutory or regulatory requirements."¹⁵ The July 13 Order explained that these procedural deficiencies would have led to the rejection of the complaint and petition.

6. In its August 12, 2016 request for rehearing, the NY Attorney General argues that the Commission should have read NGA section 13 more broadly as a basis to formally address the factual allegations and legal issues raised in the May 13 Filing and a supplemental affidavit filed July 28, 2016. The NY Attorney General also argues that the Commission's referral of the matter to staff for investigation was in error both because the Commission did not give more detailed instructions to staff about how to conduct the investigation and because the NY Attorney General believes that Commission staff has made no progress in the investigation since the Commission issued the July 13 Order.

7. We will deny the request for rehearing. Section 13 of the NGA provides that if a state "complain[s] of anything done or omitted to be done by any natural-gas company in contravention of the provisions of [the NGA]" then the Commission will forward the complaint to the natural gas company "which shall be called upon to satisfy the complaint or to answer the same in writing"¹⁶ Constitution did respond to the May 13 Filing on June 2, 2016. Contrary to the NY Attorney General's assertion, section 13 of the NGA does not relax the procedural requirements described for a complaint in Rule 206 of our Rules of Practice and Procedure.

8. The request for rehearing does not correct the procedural deficiencies of the May 13 Filing. The NY Attorney General asserts, but provides no supporting evidence, that Constitution and the Commission were aware that "extensive clear-cutting and other

¹³ July 13 Order, 156 FERC ¶ 61,035 at P 10.

¹⁴ The NY Attorney General does not assert that Constitution engaged in any tree clearing. Nor does the NY Attorney General's May 13 Filing state who engaged in the tree clearing and other construction-related activities; rather it only states that tree cutting activity occurred which Constitution was aware of and was obligated to stop. See May 13 Filing at PP 46-47.

¹⁵ *Id.* P 11.

¹⁶ 15 U.S.C. § 717l (2012).

activities have occurred on the project right-of-way” over which the Commission has jurisdiction and Constitution has control, and that Constitution did not act to stop those activities. To support its claim the NY Attorney General cites to the Commission’s regulations governing “blanket certificate” holders, which regulations forbid ground-disturbing activities that are inconsistent with applicable law, including the Clean Water Act, or that have a significant adverse impact on a sensitive environmental area.¹⁷ Constitution is not yet a blanket certificate holder.¹⁸ Blanket certificates are only available to an interstate pipeline with an effective NGA section 7 certificate who has applied for and obtained such authorization.¹⁹ Constitution, which will first become a natural gas company upon commencement of operations of the project, obtained a blanket certificate in the Certificate Order for “future” activities only.²⁰ Because Constitution does not yet have an effective blanket certificate the cited regulations are inapplicable as they govern construction activities and other actions taken under the Commission’s blanket certificate regulations.²¹

9. More broadly, the Commission’s jurisdiction under section 7 of the NGA applies to natural gas companies. The Certificate Order’s environmental conditions apply to the certificate “applicant” and its agents. The Commission’s *Upland Erosion Control Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*, which prescribe certain construction and restoration techniques for particular situations, apply to the “project sponsor” and its agents.²² The Commission’s jurisdiction and these legal requirements do not extend to private landowners or other third parties taking action in a project right-of-way.

¹⁷ NY Attorney General August 12, 2016 Request for Rehearing at 6 (citing 18 C.F.R. §§ 157.206(b)(2), (b)(4)) (2016).

¹⁸ See 18 C.F.R. § 157.202(b)(1) (defining “certificate holder” as an interstate pipeline with an effective blanket certificate).

¹⁹ *Id.* §§ 157.201(b), 157.204(a), 157.206.

²⁰ Certificate Order, 149 FERC ¶ 61,199 at PP 11, 45.

²¹ See 18 C.F.R. § 157.203 (2016). A certificate holder can use its “blanket certificate” to engage in certain specified activities.

²² Both documents were updated in May 2013 and are available on the Commission’s website at <http://www.ferc.gov/industries/gas/enviro/plan.pdf> and <http://www.ferc.gov/industries/gas/enviro/procedures.pdf>.

10. Again, even if we were to accept the NY Attorney General's alleged facts, it cites no authority making Constitution vicariously liable for the ground-disturbing activities of third parties in the project right-of-way, and so fails to explain how Constitution's inaction to stop third parties' ground-disturbing activities "violates applicable statutory or regulatory requirements,"²³ as required for a complaint by Rule 206 of our Rules of Practice and Procedure. Therefore we will reject the NY Attorney General's argument.

11. Regarding the July 13 Order's referral of this matter to staff for further examination and inquiry, the NY Attorney General in effect requests that the Commission issue an Order of Investigation to initiate a formal investigation.²⁴ The NY Attorney General asserts that the Commission's referral should have specified the questions for an investigation, the time-frame, the reporting of results to the NY Attorney General and interested parties, and the further actions to be taken. The Commission's investigation authority is discretionary under section 14 of the NGA.²⁵ Though section 1b.8 of our regulations allows a state governmental entity to request an investigation, it does not require that the Commission grant the request or do so in any particular form.²⁶ The Commission has explained that it has discretion to make referrals to its enforcement staff of potential violations.²⁷ In such circumstances, enforcement staff must consider the information it develops in a preliminary examination and, relying upon the factors we established in the Revised Policy Statement on Enforcement, decide whether there is a substantial basis for opening an investigation.²⁸ There are no parties to an investigation and no person may intervene or participate as a matter of right.²⁹ All information or documents obtained during the course of an investigation are treated as nonpublic by the Commission and its staff with limited exceptions, including if the

²³ July 13 Order, 156 FERC ¶ 61,035, at P 11.

²⁴ 18 C.F.R. § 1b.5 (2016). An Order of Investigation "outline[s] the basis for the investigation, the matters to be investigated, and the officer(s) designated to conduct the investigation and their authority." *Id.*

²⁵ 15 U.S.C. §717m (2012).

²⁶ 18 C.F.R. § 1b.8(a) (2016).

²⁷ *Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156, at P 23 (2008) (Revised Policy Statement on Enforcement).

²⁸ *Id.* P 25.

²⁹ 18 C.F.R. § 1b.11 (2016).

Commission directs or authorizes the public disclosure of the investigation.³⁰ Nonetheless, as noted above, the Commission did refer this matter to staff for further review, and staff is conducting a diligent review of the matter. We will exercise our discretion to deny the NY Attorney General's requests both that the Commission issue an Order of Investigation and that the Commission require disclosure of investigative information to the NY Attorney General or other interested entities.

The Commission orders:

The request for rehearing is hereby denied in accordance with the discussion above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ *Id.* § 1b.9.