

157 FERC ¶ 61,145
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. CP13-499-003

ORDER DENYING REHEARING

(Issued November 22, 2016)

1. On December 2, 2014, the Commission issued an order authorizing Constitution Pipeline Company, LLC (Constitution) to construct and operate the Constitution Pipeline Project, an approximately 124-mile pipeline extending from Susquehanna County, Pennsylvania, to Schoharie County, New York (Certificate Order).¹ By letter order issued July 26, 2016 (July 26 letter order), the Director of the Division of Pipeline Certificates (Director) granted Constitution's requested two-year extension of time to construct the project. On July 29, 2016, Catskill Mountainkeeper and several other environmental groups (collectively, Catskill Mountainkeeper)² filed a joint, timely request for rehearing.³ For the reasons discussed below, the rehearing request is denied.

Background

2. The Certificate Order requires that Constitution must complete the authorized construction of the proposed facilities and make them available for service within 24 months, i.e., by December 2, 2016.⁴ However, Constitution is prohibited from

¹ *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) (Certificate Order).

² Catskill Mountainkeeper, Clean Air Council, Delaware-Otsego Audubon Society, Delaware Riverkeeper Network, Riverkeeper, Inc., and Sierra Club.

³ Catskill Mountainkeeper July 29, 2016 Request for Rehearing (Rehearing Request).

⁴ Certificate Order, 149 FERC ¶ 61,199 at ordering para. (E)(1) (citing 18 C.F.R. § 157.20(b) (2016), which states that the "period of time [is] to be specified by the Commission in each order . . .").

commencing construction until it has obtained “all applicable authorizations required under federal law (or evidence of waiver thereof).”⁵

3. On July 22, 2016, Constitution requested a two-year extension of this time limit, to December 2, 2018, because it has not secured all required federal authorizations. Specifically, Constitution asserts that despite best efforts to obtain all applicable authorizations required under federal law, on April 22, 2016, the New York State Department of Environmental Conservation (NYSDEC) denied Constitution’s application for a water quality certification under section 401 of the Clean Water Act. Constitution states that it is diligently pursuing judicial review but will suffer a delay in its planned construction.⁶

4. The Director’s July 26 letter order granted Constitution’s request, extending the time limit to December 2, 2018. In this order the Director noted that NYSDEC’s denial of the water quality certificate for the project, Constitution’s pending appeal before the U.S. Court of Appeals for the Second Circuit, and the resulting delay will make it impossible for Constitution to meet the two-year time frame specified in the Certificate Order.

5. In their July 29 request, Catskill Mountainkeeper seeks rehearing and rescission of the Director’s decision. Catskill Mountainkeeper contends that there is no good cause to extend the time limit because Constitution caused the foreseeable delay by ignoring early notice from NYSDEC about deficiencies and submitting an inadequate application in bad faith. Catskill Mountainkeeper also faults Constitution for seeking judicial review of NYSDEC’s denial rather than filing a new, corrected application with the agency.

6. Catskill Mountainkeeper asserts that the Director’s decision in the July 26 letter order is arbitrary because the Commission did not solicit public input to counterbalance any bias in Constitution’s request. Catskill Mountainkeeper also argues that the Director’s July 26 letter order did not state a reasonable basis for its decision.

7. Catskill Mountainkeeper contends that the Director abdicated his responsibility under the Natural Gas Act by assuming without additional analysis or explanation that the economic rationale supporting the Certificate Order’s finding of public convenience

⁵ Certificate Order, 149 FERC ¶ 61,199 at envtl. condition 8.

⁶ Constitution has filed suits against the New York State Department of Environmental Conservation in both the U.S. Court of Appeals for the Second Circuit (No. 16-1568) and in the U.S. District Court for the Northern District of New York (No. 1:16-cv-00568NAM). Briefing is complete in the Second Circuit appeal, and oral argument is scheduled to be heard on November 16, 2016.

and necessity has not changed and will not change by the extended deadline of December 2, 2018.

8. Catskill Mountainkeeper further argues that the analysis and conclusions in Commission staff's October 2014 final environmental impact statement for the Constitution Pipeline Project will no longer be valid by the extended deadline of December 2, 2018. Catskill Mountainkeeper asserts that nothing in the final environmental impact statement or the Certificate Order indicate that the Commission expected or intended that the required mitigation measures be implemented at some unspecified time in the future.⁷ Catskill Mountainkeeper complains that neither Constitution's request nor the Director's July 26 letter order explained how the environmental analysis will remain sufficient for an additional two years.

9. Catskill Mountainkeeper also takes the position that it was improper for the Director to grant a two-year extension before Commission staff and Constitution have responded to allegations by the New York Attorney General that Constitution was complicit in the removal of vegetation at several locations along the project right-of-way in New York in violation of the Certificate Order and that Constitution removed markers from the affected locations after the New York Attorney General warned against it. Catskill Mountainkeeper argues that before receiving an extension Constitution should have proven that it is in compliance with the Certificate Order or that Constitution can ensure compliance.

Discussion

10. The Commission's certificate orders include completion deadlines, in part, because the information supporting our public convenience and necessity determinations can go stale with the passage of time.⁸ However, construction deadlines may be extended for good cause.⁹ 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 conclude any necessary marketing efforts, complete construction, and make the project available for service.¹⁰ But if a certificate holder files for an extension of time within a timeframe

⁷ Rehearing Request at 7 (quoting *Wyoming-California Pipeline Co.*, 70 FERC ¶ 61,041, at 61,130 (1995)).

⁸ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165, at P 8 (2016) (citing *Iroquois Gas Transmission System, L.P.*, 104 FERC ¶ 61,307, at P 14 (2003)).

⁹ *Id.* at P 8 n.6 (quoting *Iroquois Gas Transmission System, L.P.*, 104 FERC ¶ 61,307 at P 14); *see also* 18 C.F.R. § 385.2008(a) (2016).

¹⁰ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 at P 8 (citing *Chestnut Ridge*

during which the environmental and other public interest findings underlying the Commission's authorization can be expected to remain valid, the Commission, or staff wielding delegated authority, generally will grant an extension of time if the movant demonstrates good cause for failing to meet the initial deadline.¹¹ As the Commission has explained, "good cause" can be shown by a project sponsor demonstrating that it made good faith efforts to meet its deadline but encountered unforeseeable circumstances.¹² The Commission has previously found that providing more time for a project applicant to obtain necessary federal permits can be an appropriate basis for granting an extension of time.¹³

11. Catskill Mountainkeeper argues that Constitution did not make a good faith effort to meet the two-year deadline and did not encounter unforeseeable circumstances because Constitution knowingly submitted a deficient application to NYSDEC for the water quality certificate. Catskill Mountainkeeper asserts that because the application was so deficient and because the standard of review on appeal is deferential to NYSDEC's

Storage LLC, 139 FERC ¶ 61,149, at P 11 (2012)).

¹¹ *Id.*; see also 18 C.F.R. § 385.2008(a) (2016) (providing for extensions of construction and other deadlines for good cause). Section 375.308(w)(4) of the Commission's regulations authorizes the Director of the Office of Energy Projects or her designee to take appropriate action on "applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order of the Commission." 18 C.F.R. § 375.308(w)(4) (2016).

¹² See, e.g., *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149 at P 11 (denying request for extension of time).

¹³ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (granting two year extension of time to accommodate the project applicant's ongoing efforts to obtain a permit from the New York State Department of Environmental Conservation). See also October 12, 2016 letter order in Docket Nos. CP09-418-000, *et al.* (granting two-year extension of time to complete construction to accommodate delays in obtaining a permit from the Louisiana Department of Natural Resources); August 2, 2016 letter order in Docket No. CP13-502-000 (granting two-year extension of time where applicant has diligently pursued a required air permit and has initiated court review in the U.S. Court of Appeals of the state agency's inaction); September 30, 2015 letter order in Docket No. CP13-8-000 (granting pipeline project two-year extension of time to complete construction due to delays in obtaining waterbody crossing permits); March 25, 2015 letter order in Docket No. CP09-19-000 (granting a two-year extension of time because applicant had not yet obtained required permit from a state agency).

decision, Constitution cannot “demonstrate credible prospects for its project’s completion.”¹⁴

12. These issues – whether the Constitution’s application was adequate, whether NYSDEC’s denial was valid, and whether that denial sits in tension with the Natural Gas Act – are pending before the federal courts. We do not have authority to decide these issues.¹⁵ Catskill Mountainkeeper is correct that NYSDEC has authority to deny a water quality certification if the requirements of Clean Water Act section 401 are not satisfied. Without the required water quality certification Constitution may not commence construction.¹⁶ But Constitution also has a right to appeal the denial.¹⁷ The choice to seek judicial review rather than file a new application with NYSDEC does not show a lack of good faith by Constitution. Given that our regulations allow an extension of time for good cause, we find no reason to terminate Constitution’s project by denying the extension before the courts reach their decisions.¹⁸

13. The July 26 letter order described the circumstances that resulted in the delay of Constitution’s project, accepting this as a reasonable basis for granting an extension of time. We affirm the Director’s determination that extending the deadline to construct the Constitution Pipeline Project and place it into service within four years will not undermine the Commission’s findings in the Certificate Order that the project is required by the public convenience and necessity. The Certificate Order found market need for the Constitution Pipeline Project based on Constitution’s long-term precedent agreements for 100 percent of the project’s capacity.¹⁹ The term of these agreements extends many

¹⁴ *Id.* at P 10.

¹⁵ *Cf. American Rivers v. FERC*, 129 F.3d 99, 110-11 (2d Cir. 1997) (holding that the Commission may determine limited questions regarding whether the proper state has timely issued a water quality certification but may not determine the validity of substantive aspects of state-imposed conditions).

¹⁶ Certificate Order, 149 FERC ¶ 61,199 at envtl. condition 8.

¹⁷ *See* 15 U.S.C. § 717r(d)(1) (2012) (giving U.S. Court of Appeals jurisdiction over a state agency’s denial of a permit required under Federal law).

¹⁸ *Cf. Altamont Gas Transmission Co.*, 75 FERC ¶ 61,348, at 62,103-04 (1996) (granting an extension of time pending an appellate decision on a new Commission rule that could have an impact on the certificate-holder’s project).

¹⁹ Certificate Order, 149 FERC ¶61,199 at PP 27-28.

years beyond December 2, 2018, and Catskill Mountainkeeper provides no evidence to suggest that this two year extension would impact those agreements.²⁰

14. We recognize that environmental impacts are subject to change, and that the validity of our conclusions and environmental conditions cannot be sustained indefinitely. However, we do not believe that any changes of fact or of law require that we reconsider our prior findings that the project, as conditioned, is an environmentally acceptable action. The Council on Environmental Quality issued regulations to address circumstances where supplemental environmental analysis is necessary due to stale environmental information; for example, where an agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or where there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”²¹ New information must be sufficient to show that the remaining federal action will affect the environment in a significant manner or to a significant extent not already considered.²² The Director’s July 26 letter order changes only the timing of the Constitution Pipeline Project. The Commission is not aware of any new circumstances or information that were not already considered. Catskill Mountainkeeper provides no contrary evidence. Moreover, Commission staff will review all environmental conditions before Constitution will receive any authorization to proceed with construction. This will help to ensure that no changes of fact or law are overlooked.

15. Our decision to rescind two certificates in *Wyoming-California Pipeline Company*, cited by Catskill Mountainkeeper, is not comparable.²³ There the company had provided no precedent agreements, customer contracts, or market data in its application; it received

²⁰ Moreover, construction of the project cannot commence until service agreements have been executed for the volume of service subscribed under the precedent agreements. Certificate Order, 149 FERC ¶61,199 at ordering para. (G).

²¹ 40 C.F.R. § 1502.9(c)(1)(i)-(ii) (2016).

²² *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

²³ 70 FERC ¶ 61,041 (1995).

two optional certificates based on the company's assumption of all economic risk.²⁴ The certificates established five-year deadlines to construct the facilities and initiate service. When the Commission finally rescinded the certificates, one construction deadline was ten months expired and the other would expire in the next month, the company had not commenced any construction, nor had it requested any extension of time.

16. By contrast, here Constitution approached the Commission to request an extension of time five months before the two-year deadline. Constitution has demonstrated progress toward satisfying the conditions of the Certificate Order in anticipation of construction and has explained the delay. Given that the project is fully subscribed under long-term contracts, we are confident that we can still rely on the demonstrated economic need for the Constitution Pipeline Project. With respect to the environmental mitigation measures, the Commission may at any time impose additional mitigation as necessary.²⁵ Unlike Wyoming-California Pipeline Company's failure to commence construction almost six years after receiving its first certificate or to file for an extension of time establishing good cause for having not done so, there is no reason for the Commission to believe that Constitution will not construct its facilities and place them into service within the extended four-year deadline, assuming a timely favorable decision from the federal court. The Commission has frequently authorized infrastructure projects with initial deadlines of four or five years without expressing concerns about the certificate order's economic or environmental findings becoming stale.²⁶

²⁴ *Id.* at 61,130. The Commission's optional certificate regulations established a rebuttable presumption that a project would be required by the public convenience and necessity if the applicant would assume all the economic risk of a new service. For example the applicant could not shift costs originally allocated to the new service or facility to any other service and could not reduce the certificated level of billing determinants used to design the initial rates for a project or service. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408, at 31,584 (Oct. 18, 1985). The Commission removed the optional certificate regulations after it issued the 1999 Certificate Policy Statement. 65 Fed. Reg. 45,856 (July 26, 2000).

²⁵ Certificate Order, 149 FERC ¶ 61,199 at envtl. condition 2 (Commission may modify any of the environmental conditions and/or "implement additional measures . . . (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact[s]. . . .").

²⁶ See e.g. *Golden Triangle Storage, Inc.*, 121 FERC ¶ 61,313, at ordering para. (M) (2007) (six years to complete gas storage project); *Trunkline Gas Co., LLC*, 153 FERC ¶ 61,300, at ordering para. (B)(1) (2015) (four years to complete pipeline project).

17. The argument about whether Commission staff or Constitution have responded to the New York Attorney General's allegations of noncompliance is not material to the Director's decision to grant a two-year extension. On July 13, 2016, the Commission issued an order referring the New York Attorney General's allegations to Commission staff for further examination and inquiry as may be appropriate.²⁷ The Commission's investigation authority is discretionary under section 14 of the NGA.²⁸ If Commission staff decides to pursue an investigation, our regulations direct that all obtained information or documents and all investigative proceedings will be treated as nonpublic, with limited exceptions.²⁹ We will not require at this time any disclosure by Constitution regarding the New York Attorney General's allegations.

18. Last, the Commission is not required to solicit public input before acting upon a certificate-holder's request for an extension of time.³⁰ Nothing in the Commission's regulation suggests that an opportunity for notice and comment is necessary.³¹ Moreover, "[d]ue process requires only a 'meaningful opportunity' to challenge new evidence,"³² and, rehearing provides parties that meaningful opportunity.³³ The absence of a discrete opportunity to comment on Constitution's extension request prior to the issuance of the Director's letter order granting the extension in no way adversely affected the environmental groups' rights. They were able to raise on rehearing any concerns about the extension and they have.

19. Because we continue to find that Constitution has demonstrated good cause, and based on the foregoing discussion, we will deny the environmental groups' request for rehearing of the Director's July 26 letter order granting a two-year extension to

²⁷ Certificate Order, 149 FERC ¶ 61,199 at P 12.

²⁸ 15 U.S.C. § 717m (2012).

²⁹ 18 C.F.R. § 1b.9 (2016).

³⁰ Actions by staff under delegated authority, such as the July 26 letter, are final agency actions subject to the Commission's rehearing process. 18 C.F.R. § 375.301(a) (2016) (citing 18 C.F.R. § 385.1902) (2016).

³¹ See 18 C.F.R. pt. 385 (Commission's Rules of Practice and Procedure).

³² *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1327 (D.C. Cir. 2015) (quoting *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006), and *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)).

³³ See *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Jepsen v. FERC*, 420 Fed. Appx. 1, 2 (D.C. Cir. 2011) (unpublished opinion); *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010).

Constitution until December 2, 2018, to complete construction of the Constitution Pipeline Project and make it available for service.

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.