162 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Tennessee Gas Pipeline Company, L.L.C. Docket No. CP14-529-002

ORDER DENYING REQUEST FOR REHEARING AND LATE INTERVENTIONS, REJECTING REQUEST FOR REHEARING, AND DISMISSING STAY

(Issued January 10, 2018)

1. On March 11, 2016, the Commission issued, pursuant to section 7(c) of the Natural Gas Act (NGA),[1] a certificate of public convenience and necessity authorizing construction and operation of Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee) Connecticut Expansion Project in Albany County, New York; Berkshire and Hampden Counties, Massachusetts; and Hartford County, Connecticut.[2] On April 12, 2017, Commission staff issued a notice to proceed, thereby granting Tennessee's April 6, 2017, request to proceed with tree clearing and full construction activities for the project.

2. Untimely motions to intervene in the proceeding were filed by Patty Woodbury on March 23, 2016, and by the Narragansett Indian Tribal Historic Preservation Office (NITHPO) on April 10, 2017.

3. Two requests for rehearing challenging the April 12 notice to proceed were filed by intervenor Massachusetts PipeLine Awareness Network (Mass PLAN) on April 24, 2017, and NITHPO on May 9, 2017.[3] In addition, on April 24, 2017, Mass PLAN filed a motion to stay the construction authorized by the notice to proceed.

[1] 15 U.S.C. § 717f(c) (2012).

[2] *Tennessee Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,191 (2016) (Certificate Order), *order on reh'g*, 160 FERC ¶ 61,027 (2017) (Rehearing Order).

[3] *See* 18 C.F.R. § 385.1902(a) (2017) (any staff action, except for actions under subpart E of the Commission's Rules and Regulations, taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing).

4. As discussed below, the Commission dismisses Mass PLAN's motion for stay, denies Mass PLAN's rehearing request and Ms. Woodbury's and NITHPO's motions to intervene out-of-time, and rejects NITHPO's rehearing request.

I. Background

5. The Connecticut Expansion Project will enable Tennessee to provide 72,100 dekatherms (Dth) per day of firm transportation service to Connecticut Natural Gas Corporation (Connecticut Natural), Southern Connecticut Gas Company (Southern Connecticut), and Yankee Gas Services Company (Yankee) from Tennessee Gas' interconnection with Iroquois Gas Transmission System, L.P. in Wright, New York, to existing delivery points on Tennessee's existing system in Hartford County, Connecticut. Pertinent to this order, Tennessee proposes to construct and operate, as part of this project, the Massachusetts Loop, a 3.81-mile-long, 36-inch-diameter loop on its existing 200 Line[4] near the Town of Sandisfield, Massachusetts. About two miles of the Massachusetts Loop will cross Otis State Forest, protected as conservation land by Article 97 of the Amendments to the Massachusetts Constitution. As part of a cultural resources survey along the Massachusetts Loop, 73 ceremonial stone landscapes were identified as significant to tribes.

6. On February 4, 2017, the Commission lost a quorum of Commissioners necessary to transact business.[5] On April 12, 2017, Commission staff issued a notice to proceed to Tennessee for tree clearing and full construction activities in connection with the project. Prior to issuing the notice to proceed, Commission staff verified that Tennessee had received all applicable authorizations required by the Certificate Order, including a final Water Quality Certification from Massachusetts and compliance with section 106 of the National Historic Preservation Act (NHPA).[6] On April 30, 2017, Tennessee commenced tree-clearing activities.[7]

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[4] The 200 Line consists of 24- to 36-inch-diameter pipelines extending from Compressor Station 200 in Greenup County, Kentucky, through Ohio, Pennsylvania, and New York, to termini in Massachusetts, New Hampshire, and Rhode Island.

[5] *See* 42 U.S.C. § 7171(e) (2012); *accord* 18 C.F.R. § 375.101(e) (2017). The Commission regained a quorum on August 10, 2017.

[6] Certificate Order, 154 FERC ¶ 61,191 (Environmental Condition Nos. 9, 17 and 18). 54 U.S.C.A. § 306108 (West 2017).

[7] Tennessee's May 9, 2017 Notice of Commencement of Construction.

II. Procedural Matters

7. On May 5, 2017, Tennessee filed a motion to answer, responding to both Mass PLAN's motion for stay and request for rehearing. On April 12, 2017, Tennessee also filed a motion to answer, responding to NITHPO's late intervention, and on May 24, 2017, Tennessee filed an answer to NITHPO's rehearing request.

8. Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure prohibit answers to a request for rehearing.[8] Therefore, we reject the portions of Tennessee's answer that pertain to Mass PLAN's rehearing request and its answer to NITHPO's rehearing request. However, because our regulations do not prohibit answers to motions for stay or late interventions, we accept the portions of Tennessee's answer that pertain to Mass PLAN's motion for stay, as well as its answer to NITHPO's late intervention.

III. Discussion

A. Patty Woodbury's and NITHPO's Late Interventions are Denied

9. The deadline to intervene in the proceeding was September 4, 2014.[9] Ms. Woodbury filed her late intervention on March 23, 2016, two weeks after the Certificate Order was issued. NITHPO filed an untimely motion to intervene on April 10, 2017, about thirteen months after the Certificate Order was issued.

10. In determining whether to grant a late motion to intervene, the Commission may consider such factors as whether the movant had good cause for filing late, whether the movant's interest is adequately represented by other parties to the proceeding, and whether granting the intervention might result in disruption to the proceeding or prejudice to other parties.[10] Movants for late intervention must, among other things, demonstrate good cause why the time limit should be waived.[11] When intervention is sought after the issuance of a dispositive order, as is the case here, the movant bears a higher burden to show good cause because the prejudice to other parties and the burden on the

[8] 18 C.F.R. §§ 385.213(a)(2) and 385.713(d)(1) (2017).

[9] 79 Fed. Reg. 49,296 (2014) (Notice of Application setting the intervention date).

[10] 18 C.F.R. § 385.214(d) (2017).

[11] *Id.* § 385.214(b)(3).

Commission of granting late intervention are substantial,[12] and generally it is Commission policy to deny late intervention at the rehearing stage.[13]

11. In her March 23, 2016 motion to intervene out-of-time, Ms. Woodbury did not provide any justification for her late intervention. Her filing only states that she opposes Tennessee's tree-clearing activities because Tennessee had not yet received a required federal authorization (i.e., a water quality certification) from the Massachusetts Department of Environmental Protection.[14] Therefore, having not met the higher burden to show good cause to intervene after issuance of the dispositive Certificate Order, we deny Ms. Woodbury's late intervention.

12. To support its late motion to intervene, NITHPO contends that the Commission's regulations are unclear as to whether a consulting Tribal Historic Preservation Office (THPO) is permitted to intervene.[15] The Narragansett Indian Tribe is a federally-recognized Indian tribe, with settlement lands located within Charlestown, Rhode Island.[16] NITHPO's function is to preserve and protect the Narragansett Indian Tribe's cultural and religious customs, traditions, and history.[17] NITHPO states that the Massachusetts Loop is located in territory historically associated with the Narragansett Indian Tribe.[18]

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[12] *See, e.g., Natural Fuel Gas Supply Corp.,* 139 FERC ¶ 61,037 (2012); *Florida Gas Transmission Co.,* 133 FERC ¶ 61,156 (2010).

[13] *See California Department of Water Resources and the City of Los Angeles,* 120 FERC ¶ 61,057, at n.3 (2007) *reh'g denied,* 120 FERC ¶ 61,248, *aff'd sub nom. California Trout and Friends of the River v. FERC,* 572 F.3d 1003 (9th Cir. 2009).

[14] Indeed, the Commission did not issue the notice to proceed until staff confirmed that Tennessee had received all required federal authorizations including the Water Quality Certification.

[15] NITHPO's Motion to Intervene Out-of-Time at 6. NITHPO also argues that its interest cannot be represented by another party. *See id.* at 2.

[16] *See* Department of the Interior, Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (1983).

[17] NITHPO's Motion to Intervene Out-of-Time at 3.

[18] It is not clear that Narragansett Indians are historically associated with the project site in which the 73 ceremonial stone landscapes are located. Unlike the

13. To support its argument, the NITHPO cites to the Commission's *ex parte* communications exemption for tribal agencies that are not party to the proceeding.[19] Because NITHPO had been engaging in *ex parte* communications with the Commission in its role as a THPO, it assumed that the exemption prohibited it from intervening.[20] Moreover, it states that, in general, the Commission's form letters sent to tribes requesting consultation are misleading because the letters invite tribes to comment but are silent regarding tribes' right to intervene.[21]

14. In response, Tennessee requests that we deny NITHPO's late intervention because confusion about the Commission's intervention regulation is not good cause for intervening over two years late.[22] Tennessee states that NITHPO was aware of the project in 2014 and had the opportunity to timely intervene.[23]

15. We find that NITHPO failed to show good cause to intervene at this late stage of the proceeding. NITHPO fails to explain why it waited to seek clarification about the

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Stockbridge-Munsee Community Band of the Mohican Indians (Stockbridge-Munsee), which submitted a 1737 land deed to the project site and has claimed the strongest cultural affiliation to the project site, *see* Tennessee's Treatment Plan for the Massachusetts Loop filed as Supplemental Information on March 7, 2017 at 1, NITHPO's filings lack discussion of any historical connection to the project site. NITHPO states that the Narragansett Indians' historic territorial boundaries include Rhode Island and bordering submerged lands, and that some of its members traveled to Stockbridge and others settled in Great Barrington or Sheffield in the 17th century. *See* NITHPO's Motion to Intervene Out-of-Time at 2-3. The Massachusetts Loop route, however, affects none of these areas.

[19] 18 C.F.R. § 385.2201(e)(v) (2017) (providing an exemption to the prohibition against ex parte communications involving certain off-the-record communications to or from tribal agencies that are not parties to the proceeding).

[20] *See* NITHPO's Motion to Intervene Out-of-Time at 6.

[21] *See id.* at 7 (referencing a letter that the Commission sent to the Narragansett Tribe for the Algonquin Incremental Market Project, Docket Nos. PF13-16 and CP14-96, which is not related to the Connecticut Expansion Project). *See also* Commission's Feb. 27, 2015 letter inviting Narragansett Indian Tribe to participate in the review of the Connecticut Expansion Project.

[22] *See* Tennessee's April 12, 2017 Answer at 3.

[23] *See id.* at 4.

Commission's intervention policy until 13 months after the Certificate Order was issued. Further, we disagree with NITHPO's argument that the Commission's *ex parte* communication regulations muddles our intervention policy. Rule 2201(e)(1)(v) provides that the Commission's general *ex parte* prohibition excludes "an off-the record communication to or from a Federal, state, local, or Tribal agency *that is not a party in the Commission proceeding*" if it involves certain matters.[24] In addition, the notice of application for the project described how an interested entity could intervene in the proceeding and cited the relevant regulations.[25] The Commission has previously explained that an entity cannot "sleep on its rights" and then seek untimely intervention.[26]

16. NITHPO also suggests that the timing of the survey and identification of the ceremonial stone landscapes along the project route, which occurred after the Certificate Order was issued, justify its late intervention. The Commission has explained that the fact that studies submitted during the course of a proceeding provide additional information about an issue of concern for the late intervenor does not excuse late interventions.[27] NITHPO was aware when the application was filed, or at the latest by December 2015, prior to the issuance of the Commission order authorizing the project in March 2016, that the project could impact ceremonial stone landscapes, yet it did not move to intervene at that time.[28] It is the responsibility of interested entities to intervene if, as occurred early on here, they became aware that resources of concern to them may be affected by the proposed action. While the Commission has a liberal policy of accepting late interventions in natural gas certificate proceedings, provided that the

[24] 18 C.F.R. § 385.2201(e)(1)(v) (2017) (emphasis added).

[25] 79 Fed. Reg. 49,296.

[26] *See California Department of Water Resources*, 120 FERC ¶ 61,057 at P 14 (footnote omitted); *see also Constitution Pipeline Company, LLC*, 154 FERC ¶ 61,046, at P 6 (2016) (holding that entities or individuals with potentially affected interests are not entitled to wait until the outcome of a proceeding is known and then file a motion to intervene if the outcome conflicts with their interests).

[27] *See, e.g.*, *California Department of Water Resources*, 120 FERC ¶ 61,057 at P 14 (denying late intervention sought by entity that was well aware from beginning of proceeding that project could impact the fish species of interest to it).

[28] *See* NITHPO Motion to Intervene Out-of-Time at 3 (acknowledging that in December 2015 NITHPO was made aware that a survey of ceremonial stone landscapes would be completed for the entire Massachusetts Loop).

motion to intervene is filed before the order on the certificate application issues,[29] allowing an intervention filed 13 months after the Certificate Order was issued would delay, prejudice, and place additional burdens on the Commission and the certificate holder.

17. Moreover, NITHPO's contention that the Commission's consultation letters inviting tribes to comment on the project should provide intervention instructions is unavailing. The issuance of consultation letters relate to NHPA requirements. Separately, stakeholders like the Narragansett Indian Tribe are given two separate notices of the project which explicitly provide an opportunity to and instructions for intervening in the proceeding.[30]

18. For the foregoing reasons, we deny NITHPO's motion to intervene.

B. Mass PLAN's Rehearing Request is Denied

19. Mass PLAN contends that the Commission failed to comply with NHPA, NGA, and National Environmental Policy Act (NEPA)[31] prior to issuing the notice to proceed.[32] By issuing it, when the Commission lacked quorum, Mass PLAN argues that the

[29] *See, e.g.*, *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at n.8 (2017) (granting a motion to intervene filed 17 months after notice of application but six months before the certificate order issued); *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at P 9 (2016) (noting that the Commission's practice in certificate proceedings generally is to grant motions to intervene filed prior to issuance of the Commission's order on the merits).

[30] *See e.g.*, *Notice of Application*, 79 Fed. Reg. 49,296 (2014) and *Notice of Intent to Prepare and Environmental Assessment for the Connecticut Expansion Project* at 7 (issued Oct. 10, 2014) (stating "In addition to involvement in the EA scoping process, you may want to become an 'intervenor' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are in the User's Guide under the 'e-filing' link on the Commission's website.").

[31] 42 U.S.C. §§ 4321 *et seq.* (2012).

[32] Because Mass PLAN's April 7, 2017 filing, titled Answer in Opposition to Requests for Notices to Proceed, also presented similar arguments, we address those arguments in this order. Although NITHPO lacks party status to request rehearing, its arguments are similar to Mass PLAN's and are addressed in this section.

Commission exceeded its authority. Thus, Mass PLAN requests that we rescind the notice to proceed. Specifically, Mass PLAN argues five points: (1) the Commission's Director of the Office of Energy Projects (OEP) lacked delegated authority to issue the notice to proceed; (2) the Commission's section 106 consultation under NHPA was inadequate; (3) a conditional Certificate Order was inappropriate; (4) the Commission was required to reexamine need for the project; and (5) the Commission's NEPA analysis was deficient and required a supplemental environmental assessment.

1. Delegated Authority to Issue Notice to Proceed is Valid

20. Mass PLAN argues that OEP lacked authority to issue the notice to proceed when the Commission lacked a quorum and the request was contested.[33] Therefore, according to Mass PLAN, the notice to proceed should be voided.[34]

21. Mass PLAN misconstrues the Commission's delegation authority. The Commission may delegate to its designated agents the authority to conduct any hearing or other inquiry necessary or appropriate to its functions.[35] The Commission has, through its regulations, delegated authority to conduct specific enumerated functions to different Commission offices.[36] The Commission also routinely delegates authority through its orders, as in this proceeding.[37]

22. Relevant to Mass PLAN's rehearing, the basis of the Director of OEP's authority to authorize tree-clearing and construction activities is rooted in the Certificate Order, not section 375.308 of the Commission's regulations or in the Commission's order on agency

[33] Mass PLAN's Rehearing Request at 10-11.

[34] *Id.*

[35] 42 U.S.C. § 7171(g) (2012).

[36] *See* 18 C.F.R. §§ 375.301-315 (2017). *See also Streamlining Commission Procedures for Review of Staff Action*, Order No. 530, 55 Fed. Reg. 50,677, 50,678 (1990) (defending the Commission's statutory authority to delegate Commission functions to office directors).

[37] *See, e.g., Rockies Express Pipeline, LLC*, 128 FERC ¶ 61,045, at P 21 (2009) (affirming the Commission's delegation of authority in a certificate order to the Director of OEP to approve project construction); *Agency Operations in the Absence of Quorum*, 158 FERC ¶ 61,135 (2017) (order delegating further authority to staff in absence of quorum).

operations in the absence of quorum,[38] as Mass PLAN contends. Here, in the Certificate Order, the Commission delegated to the Director of OEP the authority to take action on activities and requests related to the construction and operation of the Connecticut Expansion Project.[39] The Certificate Order included conditions that must be met before construction or operation may begin. The purpose of the Director of OEP's review of a request for notice to proceed is not to reexamine the Commission's conclusions;[40] it is to ensure that the Commission's conditions have been met before the Director of OEP (or his designees)[41] authorizes commencement of construction activities. This has been the Commission's longstanding practice of having the Director of OEP (or his designees), not the Commission, verify that certificate conditions have been met before issuing notices to proceed with construction or granting other authorizations related to the construction and operation of a Commission-certificated natural gas project.[42]

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[38] *Agency Operations in the Absence of Quorum*, 158 FERC ¶ 61,135.

[39] *See, e.g.*, Environmental Condition No. 5 ("For each area, [Tennessee's] request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area . . . Each area must be approved in writing by the Director of OEP before construction in or near that area."); Environmental Condition No. 9 ("Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities, Tennessee shall file with the Secretary documentation that it has received all applicable authorization required under federal law (or evidence of waiver thereof)"); Environmental Condition No. 22 ("Tennessee shall not begin construction activities until . . . Tennessee has received written notification from the Director of OEP that construction . . . may begin."); and Environmental Condition No. 26 ("Prior to construction . . . Tennessee shall . . . ensure that Commission staff reviews and the Director of OEP approves all cultural resources reports and plans, and notifies Tennessee in writing that . . . construction may proceed.").

[40] The proper recourse for an aggrieved party intent on reexamining the Commission's conclusions in an order is to file a timely request for rehearing. 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713 (2017). Mass PLAN failed to do so.

[41] Delegated authority may be further subdelegated to designees of the delegee. 18 C.F.R. § 375.301(b) (2017).

[42] *See Rockies Express*, 128 FERC ¶ 61,045 at P 23 (rejecting challenge to the Director of OEP's authority to issue notice to proceed with construction of a pipeline project).

23. Mass PLAN's argument that action by delegated authority was improper here because the notice to proceed was "contested" is not appropriate. The Commission's general delegation regulations define "[f]or purposes of Subpart C," the terms *uncontested* and *in uncontested cases*.[43] Unless a particular delegation is explicitly limited to "uncontested" proceedings, the delegation of authority to the Director of OEP under a subsection of 375.308 is in force for both contested and uncontested proceedings. Here, the delegation of authority to issue notices to proceed, variances, and other authorizations arises from the Certificate Order and nothing in the Certificate Order limited the authority to uncontested matters.[44] Thus, we need not consider whether the request to commence construction was "contested."[45]

24. Last, Mass PLAN's argument that any delegation of authority was invalidated after the Commission lost its quorum is without merit. As the Commission reiterated prior to the loss of quorum on February 4, 2017, Commission staff members to whom authority is delegated while an agency has a quorum retain that authority during periods when the agency lacks a quorum.[46] This position has been upheld by multiple courts.[47]

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[43] 18 C.F.R. § 375.301(c) (2017).

[44] *See* Certificate Order, 158 FERC ¶ 61,061 at Appendix B, Environmental Conditions Nos. 2 and 9.

[45] In any event, the "uncontested" designation would be inapplicable to notices to proceed, variances and other actions that the Director of OEP routinely takes pursuant to the environmental conditions appended to the Certificate Order. "Uncontested" is defined to mean no motion to intervene, or notice of intervention, in opposition to the pending matter made under 18 C.F.R. § 385.214 (intervention) has been received by the Commission. 18 C.F.R. § 375.301(c) (2017). Because issuance of notices to proceed and variances are not among the types of proceedings that afford interested parties an opportunity to intervene, we find that they are not "contested proceedings" under the meaning of the regulations.

[46] *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135, at n.5 (affirmed that all pre-existing delegations of authority by the Commission to its staff would continue to be effective in absence of quorum).

[47] *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1193 (10th Cir. 2014) (holding that delegated authority survives a later loss of a quorum of commissioners) (citing *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 140 (2d Cir. 2013); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 852-54 (5th Cir. 2010)); *see also New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 676 (2010) (that the agency lacked a quorum did "not cast doubt on the prior

Here, the Commission had a quorum when it issued the March 11, 2016 Certificate Order that delegated authority to the Director of OEP; thus, the delegated authority remained valid after February 4, 2017.

25. In sum, we decline to invalidate the notice to proceed issued to Tennessee because the delegated authority granted by the Certificate Order is proper even in the absence of quorum, affirm our practice of delegating authority to Commission staff through our certificate orders, and adopt the Director of OEP's action, through his designee, as our own.

2. The Commission Complied with NHPA

26. Mass PLAN makes several arguments about the sequence of the Commission's actions made pursuant to the NHPA and the adequacy of Commission's section 106 consultation with NITHPO.

a. The Commission Timely Consulted with Tribes and Invited Public Participation

27. Section 106 of the NHPA provides that the licensing agency, "prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property" and "shall afford the [Advisory Council on Historic Preservation (Council)] a reasonable opportunity to comment with regard to the undertaking."[48] An "undertaking" includes a project that requires federal approval.[49] As part of this responsibility, agencies must "consult with any Indian tribe . . . that attaches religious and cultural significance to property [that may be determined to be eligible for inclusion on the National Register.]"[50]

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delegations of authority to [staff]"); *UC Health v. NLRB*, 803 F.3d 669, 670, 672, 675-81 (D.C. Cir. 2015) (finding that an agency staff member maintained his previously delegated authority to conduct a union election and certify the results when the agency lacked a quorum); and *SSC Mystic Operating Co., LLC v. NLRB*, 801 F.3d 302, 308-09 (D.C. Cir. 2015) (same).

[48] 54 U.S.C.A. § 306108 (West 2017).

[49] *Id.* § 300320, *accord* 36 C.F.R. § 800.16(y) (2017) (defining "undertaking").

[50] 54 U.S.C.A. § 302706(b) (West 2017), *accord* 36 C.F.R. § 800.2(c)(2)(ii)(D) (2017) (describing the responsibilities of the participants in the section 106 process).

28. Referring to a NITHPO filing,[51] Mass PLAN contends that the Commission violated NHPA by not consulting with NITHPO after the ceremonial stone landscapes survey was filed[52] and by failing to involve the public in resolving the adverse effects to the ceremonial stone landscapes.[53]

29. We disagree. NHPA regulations define "consultation" as a "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process."[54] NHPA regulations attach different responsibilities to agencies based on whether the undertaking will be on or off tribal lands. Here, the ceremonial stone landscapes are not on Narragansett Indian tribal land, where the THPO would stand in for the SHPO.[55] Instead the Narragansett Indian Tribe, as an Indian tribe that attaches religious and cultural significance to the historic properties that may be affected by an undertaking,[56] is a consulting party. A consulting party is entitled to a reasonable opportunity to identify its concerns about the historic properties, advise on the identification and evaluation of historic properties, articulate its views on the undertaking's effect on such properties, and participate in the resolution of adverse effects.[57] The Commission's consultation should

[51] *See* NITHPO's April 12, 2017 Answer in Opposition to Tennessee's Two Requests for Notices to Proceed.

[52] Mass PLAN's Rehearing Request at 12.

[53] *Id.* at 12-13.

[54] 36 C.F.R. § 800.16(f) (2017).

[55] *See id.* § 800.2(c)(2)(i) (providing that if a THPO has assumed the responsibilities of the State Historic Preservation Office for undertakings occurring on or affecting historic properties on tribal lands, the agency official must consult with the THPO instead of the SHPO; otherwise, the agency official must consult with a designated tribal representative in addition to the SHPO for those undertakings).

[56] *See id.* § 800.2(c)(2)(ii). Because of time constraints, the Commission decided to treat the ceremonial stone landscapes as eligible for listing on the National Register of Historic Places. *See* Memorandum of Agreement at 2 (appended as Appendix F of Tennessee's Treatment Plan, filed as Supplemental Information on March 7, 2017).

[57] 36 C.F.R. § 800.2(c)(2)(ii)(A) (2017).

commence early in the planning process[58] and must recognize the government-to-government relationship between the federal government and tribes.[59]

30. The Commission complied with these requirements by initiating consultation with the Narragansett Indian Tribe by sending the October 10, 2014 *Notice of Intent to Prepare and Environmental Assessment* and sending consultation letters to the Narragansett Indian Tribe and other interested tribes on February 27, 2015.[60] The Narragansett Indian Tribe did not reply to either of these consultation requests. On December 8, 2015, Commission staff held a section 106 meeting, during which NITHPO staff and other tribes' representatives walked along the Massachusetts Loop route, determined a survey of the ceremonial stone landscapes was necessary, and prepared a schedule for the survey.[61] The Commission subsequently sent a follow-up consultation letter to the Narragansett Indian Tribe and other interested tribes on December 9, 2015.[62]

31. With the help of a consultant, four THPO's, including NITHPO, conducted the survey between August 24 and September 15, 2016, and completed the survey report on September 30, 2016, pursuant to sections 800.3 and 800.4 of the NHPA regulations. The survey was filed in the Commission's eLibrary on October 1, 2016. As stated earlier, the survey determined the project would adversely affect 73 ceremonial stone landscapes that tribes attached cultural significance to and are eligible to be listed in the National Register of Historic Places. NITHPO and the other THPOs requested that the

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[58] *Id.* § 800.2(c)(2)(ii)(A).

[59] *Id.* § 800.2(c)(2)(ii)(C).

[60] Letter inviting Narragansett Indian Tribe to participate in the review of the Connecticut Expansion Project (issued Feb. 27, 2015) (stating that the Commission was "interested in receiving your comments on the Project to ensure that the concerns of the Narragansett Indian Tribe are identified and properly considered in our environmental analysis. We also request your assistance in identifying properties of traditional, religious, or cultural importance to the Narragansett Indian Tribe that may be affected by the proposed Project."). Even earlier, on October 17, 2014, the Commission met with tribes, including NITHPO staff, about a different proposed natural gas project in the same area as the Connecticut Expansion Project and concluded that a survey of ceremonial stone landscapes along part of the Massachusetts Loop was appropriate. *See* Commission staff's November 5, 2014 Section 106 Consultation Meeting Notes at 1; Enclosure to Commission's December 29, 2016 Letter to the Council at 9.

[61] *See* Commission's December 29, 2016 Letter to the Council at 2.

[62] Filed as Accession Number 20151209-3018.

Commission resolve the adverse effects pursuant to section 800.6 of the NHPA regulations.

32. In instances where an undertaking would adversely affect historic properties, NHPA regulations require the agency to consult further to resolve the adverse effect,[63] which includes consulting with THPOs and other consulting parties to develop and evaluate alternatives or modifications to the project that could avoid, minimize, or mitigate the adverse effects on historic properties, and notify the Council of the adverse effect finding.[64] However, because the project is not located on Narragansett Indian Tribe's lands, section 800.2(c)(2)(ii) of the NHPA regulations only requires that NITHPO be given "a reasonable opportunity . . . [to] participate in the resolution of adverse effects."[65]

33. In accordance with NHPA regulations, the Commission provided NITHPO the opportunity to help resolve the adverse effect. For instance, on December 5, 2016, Commission staff met with NITHPO and other tribes to discuss Tennessee's draft Treatment Plan to resolve the adverse effects.[66] This meeting was followed by a teleconference with the tribes in early January 2017 to discuss the draft Treatment Plan and propose next steps.[67] On December 29, 2016, the Commission sent a letter to the Council, notifying it of the adverse effect finding and requesting its participation in resolving the adverse effects as a signatory to a Memorandum of Agreement (MOA).[68] The Commission copied NITHPO on the letter[69] and NITHPO submitted its concerns to the Council.[70] Thus, although NITHPO ultimately declined to sign the MOA that the

[63] 36 C.F.R. § 800.5(d)(2) (2017).

[64] *Id.* § 800.6(a).

[65] *Id.* § 800.2(c)(2)(ii)(A). *See also* Council's January 30, 2017 Letter to the Commission at 3 (clarifying that section 800.6 does not require agencies to ensure that tribes such as NITHPO be physically engaged in carrying out actions that are part of the resolution of adverse effects).

[66] *See* Commission staff's December 29, 2016 Letter to the Council at 9.

[67] *See* Council's January 30, 2017 Letter to the Commission at 2.

[68] Commission's December 29, 2016 Letter to the Council.

[69] *See id.*

[70] *See, e.g.*, NITHPO's January 3, 2017 Comment.

Commission entered into with the Council,[71] the Commission provided NITHPO a reasonable opportunity to participate in the resolution of the adverse effects and fulfilled its consultation responsibilities.

34. With regard to public comments, NHPA regulations require agencies to provide the general public with information about the undertaking, its effects on historic properties, and resolution of any adverse effects, and seek public comment and input.[72] Consistent with our longstanding practice, we complied with this requirement by making the record available to the public through our public eLibrary website and seeking comments on our Environmental Assessment (EA),[73] which discussed the possible presence of ceremonial stone landscapes in the project area.[74]

b. The Notice to Proceed Does Not Restrict Consideration of Alternatives

35. Mass PLAN argues that allowing Tennessee to start construction will restrict consideration of alternatives to avoid, minimize, or mitigate the project's adverse effects on the ceremonial stone landscapes.[75]

36. Mass PLAN's argument is misplaced. The Commission issued the notice to proceed only after section 106 consultation had concluded. The Commission considered alternatives to the Massachusetts Loop in the EA and worked to avoid, minimize, and mitigate the adverse effects to the ceremonial stone landscapes after the survey was

[71] The MOA was executed on February 24, 2017. *See* Appendix F of Tennessee's Treatment Plan filed as Supplemental Information on March 7, 2017.

[72] 36 C.F.R. §§ 800.2(d), 800.6(a)(4) (2017).

[73] *See Notice of Availability of the Environmental Assessment for the Proposed Connecticut Expansion Project*, 80 Fed. Reg. 66,524 (2015).

[74] *See* Environmental Assessment for the Connecticut Expansion Project at 91 (issued on Oct. 29, 2015).

[75] *See* Mass PLAN's Rehearing Request at 11 (citing 36 C.F.R. § 800.1(c), providing in part that agencies are not prohibited from conducting or authorizing nondestructive project planning activities before completing compliance with section 106 of the NHPA so long as that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties).

completed, culminating in the acceptance of Tennessee's Treatment Plan and execution of the MOA with the Council.

3. Remaining Arguments Are an Impermissible Collateral Attack on the Certificate Order

37. Mass PLAN's remaining three challenges are an impermissible collateral attack of the Certificate Order. The scope of this rehearing order is narrow; it involves only the issuance of the notice to proceed, which is a mere "ministerial action."[76] At issue in a notice to proceed with construction is the applicant's compliance with the Certificate Order, specifically the environmental conditions, including condition 9 which requires Tennessee to document that it has obtained all applicable authorizations required under federal law. Challenges regarding the Commission's compliance with NEPA, NGA, and NHPA are outside the scope of this rehearing and are belated challenges to the Certificate Order. Any grievances about the Certificate Order should have been raised in a timely request for rehearing of that order.[77] While several other parties did seek rehearing of the Certificate Order, Mass PLAN did not. Nonetheless, for clarity, we explain why Mass PLAN's arguments are unavailing.

a. Conditional Certificate Order is Appropriate

38. Mass PLAN generally argues that the Certificate Order is invalid because it was issued prior to completing the section 106 process.[78] The Commission has previously affirmed that a conditional certificate could be issued prior to completion of cultural resource surveys and consultation procedures required under the NHPA because destructive construction activities would not commence until surveys and consultation are complete.[79]

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[76] *Arlington Storage Co., LLC*, 149 FERC ¶ 61,158, at 62,010 (2014).

[77] *See, e.g., Arlington Storage Co., LLC*, 149 FERC ¶ 61,158 (notice rejecting request for rehearing of notice to proceed noting that the rehearing constitutes a collateral attack of the order issuing the certificate), *order denying reh'g*, 151 FERC ¶ 61,160, at P 20 (2015) (noting that arguments that staff prematurely issued a notice to proceed where the gas storage company's plan fails to satisfy the certificate order conditions is a collateral attack on the certificate order).

[78] Mass PLAN's Rehearing Request at 11.

[79] *See generally Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194, at 61,758-64 (1990). *See also City of Grapevine, Texas v. Department of Transportation*, 17 F.3d 1502, 1509 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1043 (1994) (upholding the

b. The NGA and the Certificate Policy Statement Do Not Require a Re-examination of Project Need

39. Mass PLAN alleges that predictions for natural gas demand in Connecticut have not been realized, and therefore the project is no longer needed. According to Mass PLAN's interpretation, the NGA requires the Commission to reevaluate project need prior to issuing the notice to proceed. Because the Commission failed to do so, it contends the Commission violated the NGA.

40. Mass PLAN's argument is misplaced. Once the Commission issues a Certificate Order, the Commission does not reexamine a project's need outside of a request for rehearing of the Certificate Order.[80] Nothing in the NGA requires that Commission to re-investigate project need after we have issued a certificate.

41. Moreover, Mass PLAN's general argument regarding need was addressed in the Rehearing Order.[81] Mass PLAN is also mistaken that the Certificate Policy Statement[82] requires the Commission to re-investigate need before authorizing the start of construction. We have found that long-term commitments serve as "significant evidence of demand for the project." In this case, the Commission determined that Tennessee had entered into long-term precedent agreements for 100 percent of the design capacity for the project. The Certificate Order found that project demand exists and that public

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agency's conditional approval because it was expressly conditioned on the completion of section 106 process).

[80] *See Jordan Cove Energy Project, L.P.*, 157 FERC ¶ 61,194, at PP 16-19 (2016) (explaining that a party seeking to reopen the record to permit new evidence on rehearing must demonstrate the existence of extraordinary circumstances that changed the "very heart of the case." The Commission explained the reason for such a heavy burden is the need for finality in the administrative process.).

[81] Rehearing Order, 160 FERC ¶ 61,027 at PP 10-14, 31-32 (affirming that Tennessee's system has capacity constraints in the region making additional facilities necessary to transport gas supplies from LNG import and storage facilities). *See also* Yankee, Connecticut Natural, and Southern Connecticut's February 1, 2017 Joint Filing (stating that the additional capacity from the project "is critical to meet the growing needs of Connecticut customers reliably and cost effectively").

[82] *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).

convenience and necessity requires the project be approved.[83] Moreover, Tennessee was required to—and did—execute firm contracts for the volumes equal to those in the precedent agreements prior to commencing construction.[84] Thus, Mass PLAN has failed to demonstrate that the project is not needed or that the NGA or the Certificate Policy Statement requires a reinvestigation of public demand after a certificate has been issued.[85]

c. Supplemental EA is Not Required or Necessary

42. Mass PLAN argues that the Commission violated NEPA by failing to conduct a supplemental environmental review when new circumstances and information became available about project need, the ceremonial stone landscapes, and a project route alternative located south of Agawam, Massachusetts that became available after Tennessee withdrew its application on May 23, 2016 to construct its Northeast Energy Direct Project.[86]

43. Section 1502.9(c) of the Council of Environmental Quality's (CEQ) regulations implementing NEPA requires agencies to prepare supplements to the draft or final environmental impact statements if "there are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts."[87] The regulation also permits agencies to prepare supplements when they find that it would further the purposes of NEPA.[88]

44. Here, the Commission prepared an environmental assessment, not an environmental impact statement, after finding that approval of the project would not constitute a major federal action significantly affecting the quality of the human

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[83] Certificate Order, 154 FERC ¶ 61,191 at P 17.

[84] *See id.* at ordering para. E.

[85] Mass PLAN also notes that the Connecticut Public Utilities Regulatory Authority requires the project's local distribution company customers to revisit their contracts if demand projections prove substantively inaccurate. This concern involves matters to be determined by the state agency and are beyond the scope of the Commission's jurisdiction.

[86] FERC Docket No. CP16-21-000.

[87] 40 C.F.R. § 1502.9(c) (2017).

[88] *Id.* § 1502.9(c)(2).

environment.[89] While there is no corresponding regulation requiring supplemental EAs, a supplemental EA is permitted if significant new information is introduced.[90] CEQ regulations do not define "significant." In determining whether new information is significant, some courts have provided that agencies should consider if the "the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS."[91] Under this definition, Mass PLAN has not introduced any significant new information to justify preparing a supplemental EA.

45. Regarding project need, as previously discussed, Mass PLAN presents no new information to alter our previous finding that the project is needed. Regarding ceremonial stone landscapes, the survey results also do not constitute as significant new information or circumstance.[92] The EA envisioned the likely environmental consequences of the proposed action on ceremonial stone landscapes and the Certificate Order included a mandatory condition to protect these resources.[93] Through the survey consultation with tribes and mitigation measures proposed by the applicant, the project

[89] *See* Certificate Order, 154 FERC ¶ 61,191 at P 146.

[90] *See, e.g., Klein v. U.S. Department of Energy*, 753 F.3d 576, 584 (6th Cir. 2014); *Price Road Neighborhood Association, Inc. v. U.S. Department of Transportation*, 113 F.3d 1505, 1510 (9th Cir. 1997).

[91] *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984). *See also City of Olmsted Falls, Ohio v. F.A.A.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (applying the rule from *Wisconsin v. Weinberger*); *Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (5th Cir. 1987) (describing that "significant" requires that "the new circumstance must present a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.").

[92] *See Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 63 (4th Cir. 1990) (holding that the listing of historic properties on the National Register of Historic Places was not significant new information).

[93] *See* EA at 91-92 (stating that Commission staff and the tribes agreed that a survey for ceremonial stone landscapes would be appropriate, recommending that the survey be filed with the Commission prior to construction of the project, and recommending that the Director of OEP approve of cultural resource reports and plans before issuing a notice to proceed); Certificate Order, 158 FERC ¶ 61,191 (adopting the EA's recommendations as Environmental Condition No. 26).

will avoid 53 ceremonial stone landscapes. The MOA and required Treatment Plan[94] would mitigate or resolve the adverse effects on remaining ceremonial stone landscapes below a level of significance.[95] Thus, the Commission's finding of no significant impact would not have changed. Lastly, Mass PLAN's contention that the Commission should now evaluate a loop that was once proposed for Tennessee's Northeast Energy Direct Project as a viable alternative to the Massachusetts Loop is incorrect. The loop in question was proposed to be located parallel to Tennessee's existing 300 Line in Connecticut,[96] not on Tennessee's existing 200 Line in Massachusetts, which is the location of the proposed Massachusetts Loop, and would not be able to provide the service requested by the shippers. The EA found that eliminating the Massachusetts Loop would result in reduced pressure and reliability for Tennessee's customers in Massachusetts.[97] Thus, Mass PLAN's alternative is not a significant new circumstance or information that warrants preparation of a supplemental EA.

C. NITHPO's Rehearing Request is Rejected

46. Because NITHPO is not a party to the proceeding, we must reject its request for rehearing pursuant to section 19(a) of the NGA[98] and Rule 713(b) of the Commission's regulations.[99] In any event, most of the issues raised by NITHPO were also raised by Mass PLAN and have been addressed in this order.

47. To the extent not already addressed in this order, NITHPO also contends that the Commission violated its fiduciary duty to the tribe by violating the NHPA.[100] As discussed above, the Commission complied with NHPA with respect to the ceremonial stone landscapes; thus, NITHPO's argument is without merit. Section 106 is a

[94] *See* Certificate Order, 158 FERC ¶ 61,191 at Environmental Condition No. 26.

[95] MOA at 2-3.

[96] *See* Tennessee's November 20, 2015 Application for the Northeast Energy Direct Project at 16.

[97] *See* EA at 122.

[98] 15 U.S.C. § 717r(a) (2012).

[99] 18 C.F.R. § 385.713(b) (2017).

[100] *See* NITHPO's Rehearing Request at 7-8.

procedural statute; it does not require a particular substantive outcome.[101] The Commission's fiduciary responsibility to tribes does not require us to afford them greater rights than they would otherwise have under federal law.[102]

48. NITHPO also argues that the MOA[103] signed between the Commission and the Council is invalid because it was not a signatory to it.[104] Because the project occurs off of the Narragansett Indian Tribe's lands, the Narragansett Indian Tribe is not required to be a signatory, although the tribe may be invited to be a signatory.[105] The MOA, signed pursuant to section 800.6(c)(1)(iii), correctly had the agency and the Council as signatories.[106] While the Commission invited the Narragansett Indian Tribe via the NITHPO and other interested tribes to sign the MOA as concurring parties, NITHPO's refusal to sign does not invalidate the MOA.[107]

D. Mass PLAN's Motion for Stay is Dismissed

49. Mass PLAN separately filed a motion seeking to stay all tree felling and construction of the project pending the Commission's action on its request for rehearing

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[101] *See Neighborhood Association of the Back Bay, Inc. v. Federal Transit Administration*, 463 F.3d 50, 60 (1st Cir. 2006); *National Mining Association v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003).

[102] *See, e.g., Skokomish Indian Tribe*, 72 FERC ¶ 61,268, at 62,182 (1995).

[103] Section 800.6(c) of the NHPA regulations explain that an MOA evidences an agency's compliance with section 106 and the NHPA regulations. *See* 36 C.F.R. § 800.6(c) (2017).

[104] NITHPO's Rehearing Request at 13-14.

[105] 36 C.F.R. § 800.6(c)(2)(ii) (2017). NITHPO also argues that the NHPA regulations should be construed to favor tribes under the Indian canon of construction. In other words, NITHPO requests that we interpret the NHPA regulations as requiring NITHPO to be a signatory of the MOA even though the project does not occur on Narragansett tribal lands. We find section 800.6 to be unambiguous and thus, we follow the plain meaning of the regulations regarding the signatory requirements. *See South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 506 (1986) (stating that the Indian canon of construction only applies where a statute is ambiguous).

[106] 36 C.F.R. § 800.6(c)(1)(iii) (2017).

[107] *Id.* § 800.6(c)(2)(iv).

of the notice to proceed. Mass PLAN argues that construction of the project, and in particular the Massachusetts Loop, would cause irreparable harm from felling mature trees in Otis State Forest and "bulldozing" historic indigenous sites.[108] The Commission has already considered and denied motions to stay construction of this project in which the Commission found that tree-clearing activities on the Massachusetts Loop and concerns regarding the adequacy of the environmental review would not result in irreparable harm.[109] Further, because this order addresses and denies Mass PLAN's request for rehearing, we dismiss the request for stay as moot.

The Commission orders:

(A) Patty Woodbury's and NITHPO's untimely motions to intervene are denied.

(B) Mass PLAN's request for rehearing is denied.

(C) NITHPO's request for rehearing is rejected.

(D) Mass PLAN's motion for stay is dismissed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

[108] Mass PLAN's Motion to Stay at 3.

[109] *Tennessee Gas Pipeline Company, L.L.C.*, 154 FERC ¶ 61,263 (2016) (Order denying stay of construction activity associated with the Connecticut Expansion Project); *Tennessee Gas Pipeline Company, L.L.C.*, 155 FERC ¶ 61,087 (2016) (same).