

129 FERC ¶ 61,115
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Kern River Gas Transmission Company

Docket No. CP08-429-001

ORDER DENYING REHEARING

(Issued November 9, 2009)

1. On June 4, 2009, the Commission issued a certificate to Kern River Gas Transmission Company (Kern River) pursuant to section 7(c) of the Natural Gas Act (NGA) authorizing it to construct, modify, and operate the facilities necessary to increase the certificated maximum allowable operating pressure (MAOP) on its pipeline from Lincoln County, Wyoming to Kern County, California from 1,200 pounds per square inch gauge (psig) to 1,333 psig in order to expand the firm capacity of the pipeline (2010 Expansion).¹ In the Certificate Order, the Commission declined to limit the MAOP of the pipeline on the portion running through Summerlin, a master-planned community in Clark County, Nevada, to 1,200 psig, as requested by Summerlin's developer, Howard Hughes Properties, Inc. and the Howard Hughes Corporation (collectively, Hughes Properties), and rejected Hughes Properties' arguments that the increased MAOP would adversely impact Summerlin.
2. On July 2, 2009, Hughes Properties filed a request for rehearing of the June Order.² Reiterating its claim that a 1993 easement agreement between its predecessor and Kern River limits the MAOP of the pipeline to 1,200 psig and bars Kern River from increasing the pipeline's MAOP within Summerlin, Hughes Properties argues that Kern River is not "able" to do the acts and perform the services proposed, as required by NGA

¹ *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,223 (2009) (Certificate Order).

² The Commission addressed a June 8, 2009 request for rehearing filed by Kern River in a separate order issued July 14, 2009. *Kern River Gas Transmission Co.*, 128 FERC ¶ 61,024 (2009).

section 7(e). Hughes Properties also argues that the Commission failed to consider Hughes Properties' economic and safety concerns. On July 14, 2009, Kern River filed a motion for leave to answer and answer to Hughes Properties request for rehearing.³ As discussed below, the Commission denies Hughes Properties' request for rehearing.

I. Background and Certificate Order

3. On June 20, 2008, Kern River filed its application for its 2010 Expansion to meet increasing residential and commercial market demand in Utah, Nevada and California, as well as to provide a reliable supply of additional natural gas to existing and new power generation facilities. On June 4, 2009, the Commission issued its Certificate Order authorizing the 2010 Expansion, increasing Kern River's summer design day capacity by 145,000 Dth/day to 1,876,126 dekatherms per day (Dth/d). The Certificate Order authorized Kern River, inter alia, to install additional compression at its Muddy Creek compressor station in Lincoln County, Wyoming.

4. The additional compression at the Muddy Creek compressor station will increase Kern River's operating pressures to allow more gas to flow through the existing Kern River pipeline system. Specifically, the Certificate Order authorized Kern River to increase the existing certificated MAOP of its pipeline facilities from 1,200 psig to 1,333 psig, and the MAOP of its meter stations and compressor stations from 1,250 psig to 1,350 psig.⁴

5. A portion of Kern River's pipeline traverses Hughes Properties' Summerlin development in Las Vegas, Nevada, a 22,500-acre, mixed-use, master-planned community of residential neighborhoods, employment centers, business parks, shopping centers, parks, and schools, with a population of more than 97,500 residents as of January 2008, and projected to have more than 200,000 residents when completed. When Kern

³ Although Rule 213 of the Commission's Rules of Practice and Procedure does not permit the filing of answers to requests for rehearing, the Commission will grant Kern River's motion and accept its answer as it provides information that has assisted the Commission in its decision-making process. 18 C.F.R. § 384.213(a) (2009).

⁴ On November 6, 2008, the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) had issued a special permit to Kern River authorizing the MAOP increases, subject to 56 safety-related conditions. Kern River filed a copy of the PHMSA's special permit with the Commission in this docket on November 21, 2008.

River first obtained certificate authorization to construct and operate its 36-inch diameter natural gas pipeline in 1990, Kern River initiated eminent domain proceedings against Hughes Properties' predecessor-in-interest, Howard Hughes Properties, Limited Partnership (Hughes LP) to acquire the rights to a 10-mile undeveloped area owned by Hughes LP to enable it to construct its pipeline through Summerlin. Kern River and Hughes LP settled the eminent domain litigation, executing a Global Settlement Agreement and subsequently the 1993 easement agreement, which gives Kern River the right to operate and maintain its pipeline on Hughes Properties' land in the Summerlin, Nevada community.

6. In response to Kern River's filing of its application for the 2010 Expansion, Hughes Properties filed comments in opposition to the proposed increase in the MAOP through Summerlin, challenging the safety of raising the pressure of a natural gas pipeline within in a densely populated area and arguing that such safety concerns could negatively impact the appeal and economic viability of Summerlin.⁵ Hughes Properties requested that the Commission condition any certificate for the expansion project upon Kern River continuing to operate the portion of its pipeline running through the Summerlin development at an MAOP not to exceed 1,200 psig. Hughes Properties maintained that the 1993 easement expressly limits the MAOP of the pipeline through its property to 1,200 psig, preventing Kern River from increasing the MAOP within the Summerlin development, and that the Global Settlement Agreement prohibits Kern River from seeking regulatory approval to increase the MAOP. Hughes Properties argued that as a result of these prohibitions, Kern River is not "able" to do the acts and perform the services proposed, as required by NGA Section 7(e).

7. Hughes Properties also filed an action in Nevada federal court on April 13, 2009 seeking, among other things: (1) specific performance of Kern River's obligations under the 1993 easement agreement and (2) a declaration that the terms of the 1993 easement agreement (a) prohibit Kern River from operating its pipeline within Summerlin at an MAOP in excess of 1,200 psig; (b) are valid and enforceable against Kern River; (c) prohibit Kern River from further pursuing an application with the Commission to increase the MAOP of its pipeline within Summerlin; and (d) prohibit Kern River from acting and/or implementing any certificate granted by the Commission to commence a

⁵ See December 23, 2008 Motion to Intervene and Comments of Hughes Properties.

condemnation action, or otherwise acting to increase the pipeline's MAOP within Summerlin beyond the level specified in the easement.⁶

8. In the Certificate Order, the Commission rejected Hughes Properties' claims, finding that if Kern River needs to renegotiate its 1993 easement agreement with Hughes Properties to permit the MAOP increase approved by the Commission, it can seek to acquire the necessary new property rights through the eminent domain process.⁷ Further, with regard to the safety of the MAOP increase, the Certificate Order found, consistent with the environmental assessment prepared for the project, that there will be no adverse safety impacts resulting from Kern River's operation of the facilities at the higher MAOP since the 2010 Expansion must be constructed and operated in accordance with the DOT's Minimum Federal Safety Standards, as well as with the numerous conditions imposed by the PHMSA special permit granted to Kern River authorizing the MAOP increases.⁸ The Certificate Order dismissed Hughes Properties' concerns regarding the impact of the proposed MAOP increase on the marketability of its Summerlin development as too speculative to be meaningfully addressed by the Commission.

II. Request for Rehearing and Kern River's Answer

9. Hughes Properties raises two main issues in its rehearing request. First, Hughes Properties asserts that in the Certificate Order, the Commission disregarded or misunderstood its argument that Kern River is not "able . . . to do the acts and to perform the service proposed" as required by NGA section 7(e) because the 1993 easement agreement and Global Settlement Agreement with Hughes LP prohibit Kern River from increasing the MAOP with the Summerlin development above 1,200 psig.⁹ Hughes

⁶ Howard Hughes Properties, Inc. and The Howard Hughes Corporation, Complaint and Application for Declaratory and Permanent Injunctive Relief, No. 2:09-cv-00657 (D. Nev. Apr. 13, 2009), filed with the Commission in Docket No. CP08-429-000 on April 15, 2009.

⁷ See Certificate Order, 127 FERC ¶ 61,223, at P 37 (2009).

⁸ *Id.* at P 55. See PHMSA Special Permit, issued in Docket No. PHMSA-2007-29078 (Nov. 6, 2008).

⁹ NGA Section 7(e) states, in pertinent part: "Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefore, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application if it is found

(continued...)

Properties continues to maintain that: (1) the 1993 easement expressly limits the MAOP of the pipeline to 1,200 psig within Summerlin; and (2) the Global Settlement Agreement prohibits Kern River from seeking a certificate or initiating an eminent domain action to increase the MAOP set forth in the agreement. Hughes Properties states that it relied upon such limitations in designing, developing, marketing, and selling portions of the Summerlin development, and that Kern River is bound by these obligations and, therefore, not legally “able” to do the acts it has proposed. Thus, Hughes Properties argues that the Commission’s issuance of a certificate permitting Kern River to increase the MAOP in Summerlin is inconsistent with, and violates, NGA Section 7(e), and the Commission’s failure to condition the certificate to prohibit an increase in the MAOP above 1,200 psig within Summerlin is arbitrary and capricious, an abuse of discretion, and does not constitute reasoned decision making.

10. Further, Hughes Properties argues that since the Commission held in the Certificate Order that matters related to the easement between Kern River and Hughes LP are matters for a federal or state court, the Commission should: (1) await the outcome of the litigation between Hughes Properties and Kern River before ruling on the request for rehearing; or alternatively, (2) condition the certificate so that Kern River may not increase the MAOP of its pipeline within Summerlin, unless and until Kern River receives a favorable ruling from the Nevada district court.

11. Second, Hughes Properties argues that the Commission failed to consider Hughes Properties’ economic and safety concerns regarding an increase in the pressure of a natural gas pipeline running through a densely populated community, and thereby failed to properly apply the Commission’s Certificate Policy Statement.¹⁰ Hughes Properties asserts that the Commission erred by dismissing the potential economic impacts on Hughes Properties and Summerlin as “speculative” and a matter for federal or state

that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, . . . , to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. 15 U.S.C. § 717f.

¹⁰ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

courts, and by addressing its alleged safety concerns by reference to Kern River's required compliance with the DOT's Minimum Federal Safety Standards.

12. In its answer, Kern River disputes and rejects Hughes Properties' assertion that Kern River agreed in the Global Settlement Agreement to limit the MAOP of its pipeline and to not seek regulatory approval to increase the MAOP, or that the 1993 easement agreement expressly or implicitly limits the MAOP to 1,200 psig.¹¹ Kern River maintains that prohibitions, restrictions, or limitations on Kern River seeking regulatory approval to increase the MAOP are entirely absent from either agreement. Kern River argues that the plain language of the 1993 easement agreement, a copy of which is attached to its answer, demonstrates that the sole reference to the "maximum allowable operating pressure of 1,200 psig" in the agreement is merely a description of the type of pipeline authorized by the Commission and subject to the easement, and not a limitation on the MAOP. Thus, Kern River argues that it is "able" to perform pursuant to the certificate issued.

13. Kern River also argues that it is entitled to make full use of the rights granted in the easement to enable it to maintain its transportation facilities in a manner consistent with the public interest, and that absent plain language expressly stating otherwise, an easement holder may increase the manner, frequency, and intensity of use to keep up with technological advances.¹² Kern River explains that since December 1993, advances in pipeline assessment tools and maintenance practices have increased pipeline safety, so that beginning in 2005, interstate pipelines began requesting waivers of the established MAOP on a case-by-case basis, via the special permit process, to allow operation at higher MAOPs. Kern River notes that in 2008, the PHMSA established an alternative

¹¹ Kern River notes that it recognizes that the two agreements are not jurisdictional to the Commission and it is not seeking the Commission's interpretation of them, but that it is compelled to address the 1993 agreements to answer Hughes Properties' claim that it is not "able" to perform under the certificate due to the agreements.

¹² Kern River cites *Centerpoint Energy Houston Electric, LLC v. Bluebonnet Drive, LTD.*, 264 S.W. 3d 381, 389 (Tex. App. 2008); *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 858 (Wyo. 1996); and *Minnkota Power Coop. v. Lake Shore Properties*, 295 N.W. 2d 122, 124 (N.D. 1980). Answer of Kern River at 6, n.17.

(higher) MAOP of 1,333 psig for all interstate natural gas pipeline systems meeting additional design requirements.¹³

14. Kern River further argues that the 1993 agreements must be read in light of the Commission's exclusive jurisdiction over the transportation and sale of natural gas for resale in interstate commerce bestowed by the NGA, which necessarily must underlie and inform their construction. As a result, Kern River argues that it could not have, by agreement, disposed of its service obligation to meet public demands for service, or foreclosed the Commission's right to promote the public interest by issuing a certificate permitting interstate pipeline capacity expansion.

15. In addition, Kern River informs the Commission that since 1993, Hughes Properties has transferred ownership of most of the underlying property subject to the easement and, as of July 7, 2009, retained ownership of only 1.26 miles of undeveloped property.¹⁴ Thus, Kern River points out that Hughes Properties' position is that Kern River is not "able" to perform under the Certificate with respect to only just over one mile of the approximately 1,380 miles of Kern River's mainline pipeline certificated for the MAOP uprate. Kern River argues that Hughes Properties failure to disclose its limited ownership of undeveloped property undercuts its alleged economic and safety concerns of increasing the MAOP through "such a densely populated area."¹⁵

¹³ See *Standards for Increasing the Maximum Allowable Operating Pressure for Gas Transmission Pipelines*, 73 Fed. Reg. 62148 (October 17, 2008), codified at 49 C.F.R. §§ 192.112 and 192.619 (2009). We note that Kern River requested its special permit to increase its MAOP in August 2007, before the PHMSA published its final rule in October of 2008.

¹⁴ Kern River states that it has obtained easement amendments from the new property owners, e.g., the City of Las Vegas, Clark County, Sienna Golf Club, and M.P.I. Properties, LLC, replacing the reference to a pipeline "with a maximum allowable operating pressure of 1200 p.s.i.g." with the phrase, "with a maximum allowable operating pressure as determined pursuant to regulations of the United States Department of Transportation."

¹⁵ See Answer of Kern River at 3, n.10, quoting Request for Rehearing of Hughes Properties at 6.

III. Discussion

A. Kern River's Ability to Perform Under the Certificate and the Commission's Issuance of the Certificate under NGA Section 7(e)

16. Hughes Properties' primary argument on rehearing is that the existing 1993 agreements prevent Kern River from increasing or seeking to increase the MAOP of its pipeline through Summerlin, rendering Kern River not "able" under NGA section 7(e) from performing the service proposed and, therefore, the Commission unable to issue a certificate. By invoking section 7(e), Hughes Properties is attempting to argue that a private contract can circumscribe the Commission's authority to determine whether an expansion is required by the public convenience and necessity and issue a certificate. However, private agreements, especially those not approved by the Commission, cannot limit the Commission's authority or jurisdiction to act.

17. Congress has given the Commission exclusive jurisdiction over matters involving the transportation and sale of natural gas in interstate commerce under the NGA.¹⁶ The Supreme Court determined that the NGA and the corresponding federal regulations preempt and wholly occupy the field concerning the transportation and sale of natural gas.¹⁷ This overriding comprehensive authority to determine the public interest as it relates to natural gas pipeline facilities or expansions of capacity takes precedence over and preempts a pipeline's easement or settlement agreement ostensibly binding a pipeline from seeking to construct necessary expansion facilities. Thus, private parties, including the pipeline itself, cannot by agreement limit or restrict the Commission's jurisdiction.

18. Therefore, whether or not the Global Settlement Agreement or the 1993 easement agreement bars Kern River from seeking to increase its MAOP through Summerlin is irrelevant to the Commission's ability to exercise its authority. Once an application is filed and before the Commission, the Commission's responsibility is to determine whether the proposal is required by the public convenience and necessity. In other

¹⁶ See Natural Gas Act, 15 U.S.C. 717f. See *Williams v. City of Oklahoma City*, 890 F.2d 255 (10th Cir. 1989); see, also, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

¹⁷ *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1097 (9th Cir. 2008) (NGA gives Commission "comprehensive authority" over the control of natural gas companies' facilities).

words, whether Kern River bound itself in a private settlement or easement agreement not to expand is of no concern to the Commission because it cannot impact the Commission's overriding ability to act and determine whether the 2010 Expansion is in the public interest.

19. Rather, the issue Hughes Properties raises of whether the 1993 agreements prohibit Kern River from seeking authorization to increase its MAOP through Summerlin is a contract issue properly resolved in state or federal court.¹⁸ Since, as stated above and in the Certificate Order,¹⁹ the outcome is irrelevant to our authority to act on Kern River's application and determine whether an MAOP increase is in the public interest, and the question is outside of our jurisdiction, the Commission did not need to address and resolve in the Certificate Order whether the language of the agreements limit the MAOP to 1,200 psig and prevent a future increase in MAOP and whether, as a result of the agreements, Kern River is "able" to perform the service proposed, as required by section 7(e). Hence, the Commission did not ignore or misunderstand Hughes Properties' argument. Rather, the Commission addressed Hughes Properties' argument as follows:

Furthermore, we do not agree with Hughes Properties' contention that the 1993 easement acts as a legal bar to disqualify Kern River as a certificate applicant in this proceeding. Pursuant to section 7(c) of the NGA, the

¹⁸ Indeed, as indicated above, Hughes Properties has filed such an action in Nevada federal court seeking a variety of remedies, and that case is still pending. The court will interpret the language of the Global Settlement Agreement and the easement agreement to determine if Kern River contractually committed in those agreements to limit the MAOP of its pipeline to 1,200 psig through Summerlin. In any event, the court would only have jurisdiction to find that Kern River was liable for damages; it would have no authority to vacate our certificate or to prevent Kern River from increasing the MAOP of its pipeline through Summerlin as authorized by our certificate. As we stated in the Certificate Order, "courts are not authorized to interfere by injunction or declaratory order with the conduct of pending administrative proceedings." Certificate Order at P 36.

¹⁹ "[Hughes Properties civil action] has no bearing on the Commission's authority to process Kern River's application and issue any certificate that the Commission deems required by the public convenience and necessity." Certificate Order at P 36.

Commission is required to authorize a pipeline when, as here, we find that it is required by the public convenience and necessity.²⁰

20. Nevertheless, Hughes Properties' argument that the Commission erred by issuing a certificate permitting Kern River to increase the MAOP of its pipeline through Summerlin because Kern River is not "able" under section 7(e) to increase the MAOP as a result of the settlement and easement agreements is misplaced. The Commission finds that Kern River is able in all respects to do the acts and perform the service proposed and certificated as intended by and within the meaning of NGA section 7(e). The determination whether an applicant is able and willing to do the acts and services proposed, required by section 7(e), relates to an applicant's ability and willingness to perform with respect to matters that are within the Commission's jurisdiction to determine. Thus, in fulfilling its responsibility under section 7(e), the Commission assesses an applicant's financial and commercial ability, its engineering and technical ability, and its ability to meet the conditions of the certificate, all matters within the Commission's regulatory expertise and responsibility. It is only within the context of the exercise of its jurisdiction that the Commission considers whether, for example, there are any technical, financial, or legal impediments to performing the service.²¹ We conclude that Kern River is fully able to expand its pipeline by increasing the MAOP pressure of its pipeline, and the Commission committed no error under section 7(e) in issuing the certificate to Kern River.

21. In any event, although the interpretation of the settlement agreement and 1993 easement agreement is beyond the scope of the Commission's jurisdiction, and the Commission has had access only to the easement agreement for review, it does not appear to the Commission from the language of the easement agreement that Kern River

²⁰ *Kern River Gas Transmission Co.*, 127 FERC ¶ 61,223, at P 37 (2009).

²¹ A legal impediment or bar that would render an applicant unable to perform would need to be one the Commission has authority to analyze and act on, such as one stemming from a Commission-imposed policy, or Commission-approved settlement. While the Commission may consider contractual commitments that a pipeline has made in weighing the public interest, the 1993 agreements are outside the scope of the Commission's authority and cannot render Kern River "unable" to perform within the context of section 7(e).

made a contractual commitment not to seek to increase the MAOP of its pipeline within Summerlin.²² The only portion of the easement referencing the pipeline's MAOP states:

Howard Hughes Properties . . . does hereby grant, sell and convey unto said Grantee [Kern River], its successors and assigns, a right-of-way and easement to locate, survey a route, construct, entrench, maintain, protect, inspect and operate a single 36 inch diameter, interstate natural gas pipeline with a maximum allowable operating pressure of 1,200 p.s.i.g., with all necessary appurtenances, including but not limited to²³

22. The Commission agrees with Kern River that the easement's reference to an interstate natural gas pipeline "with a maximum allowable operating pressure of 1,200 p.s.i.g." appears to merely describe the pipeline and its maximum allowable operating pressure as authorized by the Commission in 1993.²⁴ That is, the reference defines the

²² Nor has Hughes Properties presented to the Commission any language in the Global Settlement Agreement to indicate that it contains a contractual prohibition against Kern River seeking to increase or increasing the 1,200 p.s.i.g. or that Kern River bargained away its right to expand its pipeline to meet its public service obligation.

²³ 1993 Easement Agreement. *See* Exhibit A to Hughes Properties' April 13, 2009 Original Complaint and Application for Declaratory and Permanent Injunctive Relief, filed in Nevada federal district court in No. 2:09-cv-00657, and submitted to the Commission in this docket on April 15, 2009. *See, also*, Attachment A of July 14, 2009 Answer of Kern River.

²⁴ Kern River also asserts that the term "maximum allowable operating pressure" is defined by Part 192 of the federal pipeline safety regulations as the "maximum pressure at which a pipeline or segment of a pipeline may be operated under [Part 192]." *See* 49 C.F.R. § 192.3. Thus, Kern River states that the same term, "maximum allowable operating pressure," used in the 1993 easement, refers to the maximum allowable operating pressure which is "allowable" under Part 192 of the federal pipeline safety regulations. Kern River states that in 1990 when Kern River received its certificate, the federal pipeline safety regulations authorized Kern River to operate its pipeline up to 1,200 psig, which constituted the design factor of .50, and in 1993, at the time of the easement agreement, did not permit Kern River to operate its pipeline above the established design factor. Since, under federal safety regulations, Kern River was authorized an MAOP up to 1,200 psig, but the easement agreement did not set forth a lower MAOP, and pipelines were not permitted to exceed the MAOPs by waiver until 2005, the Commission suspects that there would have been no reason to specify the

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nature of the rights granted at that time, but does not preclude the pipeline's MAOP from later being increased and the negotiation of new easements to reflect the increased MAOP of the pipeline. Indeed, Hughes Properties' position here is akin to an argument, for example, that an easement specifying a 50-foot right of way precludes a pipeline company from further expanding the dimensions of the right of way in the future if necessary for the operation of pipeline, to fulfill its existing service obligations or to provide additional service subject to the Commission's jurisdiction. Thus, the Commission views the MAOP designation of 1,200 psig in the 1993 easement as no different than the specifications of the diameter of a pipeline or width of a right of way in standard pipeline easements. In any case, the construction of the agreement is ultimately a matter for judicial determination.

23. Finally, as we have discussed, the outcome of the litigation in Nevada district court between Hughes Properties and Kern River has no bearing on the Commission's ability to exercise its exclusive authority to determine whether the 2010 Expansion is required by the public convenience and necessity. Even if the court were to conclude that Kern River did make a contractual commitment not to seek to increase its pipeline's MAOP through Summerlin, it would not change our conclusion that it is in the public interest to authorize the increase in the MAOP. If Kern River has violated its agreement, the court may impose appropriate damages, but cannot prevent the expansion, which is within the Commission's exclusive jurisdiction. Therefore, there is no reason to condition the certificate to prevent Kern River from increasing the MAOP, or to defer ruling on the merits of this rehearing request, until the conclusion of the district court litigation.

B. Consideration of Safety and Economic Concerns Under the Certificate Policy Statement

24. Hughes Properties emphasizes that the Commission's Certificate Policy Statement provides that the Commission will consider the effects of a proposed project on landowners, as well as on the surrounding community. Hughes Properties argues that the Commission in the Certificate Order failed to consider and take seriously its concerns

MAOP for limiting purposes. The Department of Transportation's federal safety regulations established the limits. Hence, as noted, *supra*, the new easements Kern River negotiated with the subsequent landowners through Summerlin contain the phrase, "with a maximum allowable operating pressure as determined pursuant to regulations of the United States Department of Transportation" rather than defining a specific MAOP.

regarding the adverse safety and economic impacts it alleges will occur from increasing the MAOP of Kern River's pipeline to 1,200 psig within Summerlin.

25. First, with regard to safety, contrary to Hughes Properties' assertion, the Commission fully and adequately responded to its safety concerns in the environmental section of the Certificate Order. There, the Commission summarized the discussion and findings of the environmental assessment (EA) the Commission's staff prepared for the project.²⁵ As explained in the EA, the DOT is charged with ensuring the safe transportation of natural gas and other hazardous materials by pipeline, and the DOT's PHMSA has promulgated Minimum Federal Safety Standards.²⁶ Pursuant to the Commission's regulations, a pipeline applicant must certify that it will comply with these standards, unless it has been granted a waiver by DOT. The Commission considers this certification sufficient and does not impose its own additional safety standards. However, as explained in the EA, if the Commission assesses the existence of a potential safety problem, the Commission is required to notify DOT.

26. More importantly, the PHMSA fully considered the safety of Kern River's proposed increase in the MAOP to 1,333 psig in acting on Kern River's special permit application.²⁷ On November 6, 2008, the PHMSA granted Kern River a special permit authorizing the MAOP increase subject, however, to 56 safety-related conditions and five limitations related to compliance with the conditions and the PHMSA's authority to revoke the special permit.²⁸ Thus, the 2010 Expansion must not only comply with the Minimum Federal Safety Standards in Part 192, but must comply with the extensive conditions and limitations of the PHMSA's special permit. Further, the EA explained that Kern River also implements a number of its own additional reliability and safety

²⁵ Certificate Order, 127 FERC ¶ 61,223 at PP 55-57.

²⁶ Environmental Assessment for Kern River Gas Transmission Company's 2010 Expansion Project, issued November 24, 2008 (73 Fed. Reg. 73322), at 20-23.

²⁷ Kern River filed its petition for a special permit with the PHMSA on August 20, 2007 in Docket No. PHMSA-2007-29078. The Commission notes that a public comment period expired on February 4, 2008, but no comments were filed.

²⁸ See PHMSA Special Permit, issued in Docket No. PHMSA-2007-29078 (Nov. 6, 2008).

measures.²⁹ In addition, the EA responded in detail to other safety concerns raised by homeowner association, Sun City Summerlin Association, Inc.

27. The Commission is confident, as we found in the Certificate Order, that Kern River's compliance with the Minimum Federal Safety Standards and the extensive conditions in the special permit issued by the PHMSA will ensure that Kern River's operation of its facilities at the increased MAOP will cause no adverse safety impacts.

28. In the Certificate Order, the Commission found Hughes Properties' concerns of the impact of the MAOP increase on the desirability and marketability of lots in the Summerlin development to be speculative.³⁰ However, even if Hughes Properties had presented evidence to support its assertion that potential purchasers may be deterred by safety concerns over the MAOP of the pipeline through Summerlin, the weight given by the Commission to such concerns would still depend on how justified the concerns were. As discussed in the Certificate Order and herein, the Minimum Federal Safety Standards and the extensive conditions in the special permit issued by the PHMSA will ensure that Kern River's pipeline can be safely operated at the higher MAOP. Furthermore, even if Hughes Properties is correct that the value of lots of Summerlin may be less if the MAOP of Kern River's pipeline is increased and a court will not take this into account in setting compensation in an eminent domain proceeding for property rights actually taken, there is no evidence that lower lot values could result in hardship to individuals or the community that might outweigh the need for increased capacity on Kern River's system, which cannot be achieved effectively without increasing the pipeline's MAOP through Summerlin.

²⁹ See EA at 22.

³⁰ Certificate Order at PP 38-39.

The Commission orders:

Hughes Properties' request for rehearing of the Commission's June 4, 2009 order in this proceeding is denied, as discussed herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.