

142 FERC ¶ 61,025
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Tennessee Gas Pipeline Company, L.L.C.

Docket No. CP11-161-001

ORDER ON REHEARING, CLARIFICATION, AND STAY

(Issued January 11, 2013)

1. On May 29, 2012, the Commission issued an order granting Tennessee Gas Pipeline Company, L.L.C. (Tennessee) authorization under section 7 of the Natural Gas Act (NGA) to construct and operate its Northeast Upgrade Project located in Pennsylvania and New Jersey.¹ The project is designed to provide up to 636,000 dekatherms (Dth) per day of firm transportation service on Tennessee's existing 300 Line System. This order grants, in part, and denies, in part, the requests for rehearing and/or clarification and denies requests for stay of the May 29 Order.

I. Background

2. On March 31, 2011, Tennessee filed its application in this proceeding requesting authorization to construct and operate the Northeast Upgrade Project consisting of five pipeline loop segments totaling 40.3 miles of 30-inch-diameter pipeline, and modifications and upgrades at four compressor stations and one meter station. The pipeline loops would be collocated with Tennessee's existing 24-inch-diameter 300 Line pipeline for 33.8 miles (84 percent) of the proposed project. The remaining 6.4 miles of pipeline (16 percent) is part of Loop 323, and would be installed outside of the existing right-of-way, in order to route around the Delaware Water Gap National Recreation Area (Delaware Water Gap NRA), part of the National Park System.

3. Tennessee entered into binding precedent agreements for long-term transportation services utilizing the full capacity of the project with Chesapeake Energy Marketing, Inc. (Chesapeake) and Statoil Natural Gas LLC (Statoil).

¹*Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161 (2012) (May 29 Order).

4. To satisfy the requirements of the National Environmental Policy Act (NEPA), Commission staff prepared an Environmental Assessment (EA) for the Northeast Upgrade Project that addresses geology and soils, water resources, fisheries and wetlands, vegetation and wildlife, land use, recreation and visual resources, socioeconomics, cultural resources, air quality and noise, reliability and safety, cumulative impacts, and alternatives. The EA concludes that, with the imposition of the recommended mitigation measures, the project would not constitute a major federal action significantly affecting the quality of the human environment.² The May 29 Order adopted the findings in the EA and authorized Tennessee to construct and operate the Northeast Upgrade Project, subject to modifications and 19 environmental conditions recommended by staff.³ The majority of the issues raised on rehearing relate to the Commission's environmental analysis in the EA.

5. Relevant to issues raised on rehearing, the Northeast Upgrade Project is one of four projects that Tennessee has proposed in separate certificate applications on its 300 Line System over the last few years. A summary of the other three projects follows:

- In July 2009, Tennessee filed its 300 Line Project proposing to construct and operate pipeline facilities and replace certain compression facilities in Pennsylvania and New Jersey on its 300 Line System to increase overall system reliability (the Reliability Component) and increase pipeline capacity by an incremental 350,000 Dth per day (the Market Component). The Market Component included the construction of eight pipeline loop segments totaling 127.4 miles of 30-inch diameter pipe, two new compressor stations and the upgrading/restaging of compressor units at three other compressor stations. The incremental capacity was fully subscribed by EQT Energy LLC. The Commission approved the project subject to conditions by order issued on May 14, 2010.⁴ Tennessee completed construction of its 300 Line Project and placed the facilities in service on November 1, 2011.⁵
- In November 2010, Tennessee filed its Northeast Supply Diversification (NSD) Project proposing to increase capacity on its 200 Line and 300 Line by 250,000 Dth per day by reserving unsubscribed capacity on its system,

² EA at 4-1.

³ The environmental conditions are listed in Appendix B of the May 29 Order.

⁴ *Tennessee Gas Pipeline Co.*, 131 FERC ¶ 61,140 (2010).

⁵ Tennessee's Notification of Placing Facilities In-Service dated November 4, 2011.

installing 6.8 miles of looped pipeline in one segment on its 300 Line in Northern Pennsylvania, and leasing capacity from Dominion Transmission, Inc. The incremental capacity was fully subscribed by Anadarko Energy Services Company, Seneca Resources Corporation, Cabot Oil & Gas Corporation, and Mitsu E&P USA, LLC. The Commission approved the project subject to conditions by order issued on September 15, 2011.⁶ The NSD Project was placed in-service on November 1, 2012.⁷

- In December 2011, Tennessee filed its MPP Project proposing to increase capacity on its 300 Line by 240,000 Dth per day by reserving unsubscribed existing capacity, and installing 7.9 miles of looped pipeline in one segment in Pennsylvania. Tennessee also proposed facility modifications to allow for bidirectional flow at four existing compressor stations in Pennsylvania. The capacity of the project was fully subscribed by Southwestern Energy Company and Chesapeake Energy Marketing, Inc. The Commission approved the project subject to conditions by order issued on August 9, 2012.⁸ On December 11, 2012, Tennessee was authorized to commence construction of the MPP Project in certain counties in Pennsylvania.⁹

II. Requests for Late Intervention and Rehearing

6. Over 30 individuals and entities filed motions for late intervention after issuance of the May 29 Order.¹⁰ On June 28 and August 23, 2012, Tennessee filed answers in opposition to the untimely interventions.

7. In ruling on a motion to intervene out-of-time, the Commission applies the criteria set forth in Rule 214(d),¹¹ and considers, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether any disruption to the proceeding might result from permitting the intervention, and whether

⁶ *Tennessee Gas Pipeline Co.*, 136 FERC ¶ 61,173 (2011).

⁷ Tennessee's Notification of Placing Facilities In-Service dated November 2, 2012.

⁸ *Tennessee Gas Pipeline Co., L.L.C.*, 140 FERC ¶ 61,120 (2012).

⁹ Delegated letter order issued in Docket No. CP12-28-000.

¹⁰ A list of individuals and entities that filed motions to intervene out of time after the issuance of the May 29 Order is included as Appendix A to this order.

¹¹ 18 C.F.R. § 385.214(d) (2012).

any prejudice to or additional burdens upon the existing parties might result from permitting the intervention. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.¹²

8. None of the movants requesting late intervention adequately addressed the factors required to grant a late intervention under Rule 214(d) nor explained why they waited until after the issuance of a dispositive order to request to intervene in this proceeding. Accordingly, we find that these individuals and entities have not shown good cause to be granted intervention at this late stage of the proceeding. Allowing late intervention at this point in the proceeding could create prejudice and additional burdens to the Commission, other parties, and the applicant. Therefore, we deny the late motions to intervene filed after the issuance of the May 29 Order.

9. The majority of the individuals and entities that filed late motions to intervene also filed requests for rehearing. On October 26, 2012, Barbara Buono, a New Jersey State Senator, filed a separate request that the Commission hold a rehearing in this docket based on concerns raised by constituents that they were not given sufficient opportunity to comment regarding the project. Under Rule 713(b) of the Commission's Rules of Practice and Procedure, only parties to a proceeding are entitled to request rehearing of a Commission decision.¹³ Because none of these entities are parties to this proceeding, they have no standing to seek rehearing of the May 29 Order. However, we note that most of these movants raised issues similar to those raised on rehearing by Mr. George Feighner regarding the pipeline loop around the Delaware Water Gap NRA, which are addressed below. Other issues raised, including public safety and opportunity to comment, have been addressed in the EA and the May 29 Order.¹⁴

¹² See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 17-19 (2003); *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

¹³ 18 C.F.R. § 713(b) (2012).

¹⁴ See, e.g., May 29 Order, 139 FERC ¶ 61,161 at P 129 (public safety); May 29 Order, 139 FERC ¶ 61,161 at P 63 (opportunity to comment). We also note that a number of individuals and entities submitted comments after issuance of the May 29 Order that raised similar concerns.

III. Requests for Rehearing, Clarification, and Stay

10. Requests for rehearing were timely submitted by Tennessee; jointly by Delaware Riverkeeper Network, New Jersey Highlands Coalition, and the New Jersey Chapter of the Sierra Club (collectively, Sierra Club); and by Mr. George Feighner, a landowner in New Jersey. Mr. Feighner also requested a stay of the Commission's May 29 Order.

11. On July 11, 2012, Mr. Feighner filed an answer in opposition to Tennessee's rehearing request. On July 27, 2012, as supplemented on July 30, 2012, Tennessee filed a request for leave to answer and answer to the requests for rehearing of the Sierra Club and Mr. Feighner. On August 3, 2012, Sierra Club filed a motion to strike Tennessee's answer to the extent it addressed arguments it raised on rehearing, or alternatively, if the Commission considers Tennessee's answer, an opportunity to respond. On August 13, 2012, Mr. Feighner filed an answer in opposition to Tennessee's motion for leave to file an answer and a motion to expedite. On August 23, 2012, Tennessee filed a motion for leave to answer and answer to Mr. Feighner's answer, and on September 7, 2012, Mr. Feighner filed an answer to Tennessee's motion. Answers to requests for rehearing are prohibited under Rule 713(d)(1) of the Commission's Rules of Practice and Procedure¹⁵ and neither Mr. Feighner nor Tennessee has established any need for an exception to this rule. Accordingly, we reject Mr. Feighner's and Tennessee's answers to the requests for rehearing. Mr. Feighner's and Tennessee's subsequent responses are dismissed as moot.

12. On November 12, 2012, Sierra Club filed a motion to expedite consideration of intervenors' rehearing requests and a motion to stay construction activity.¹⁶ On December 7, 2012, Sierra Club filed a motion for a stay of the Commission's May 29 Order and a stay of any construction activity pending review of the May 29 Order on rehearing. On December 13, 2012, Mr. Feighner filed a motion to join in Sierra Club's motions for stay. On December 14, 2012, Tennessee filed an answer in opposition to the requests to stay construction activity.

A. Tennessee's Request for Rehearing

1. Mr. Feighner's Party Status

13. On November 28, 2011, Mr. Feighner filed a motion to intervene in the subject proceeding. Appendix A of the May 29 Order identifies Mr. Feighner as a party filing a timely, unopposed motion to intervene.

¹⁵ 18 C.F.R. § 385.713(d)(1) (2012).

¹⁶ On July 13 and December 3, 2012, Sierra Club filed separate motions to expedite consideration of intervenors' request for rehearing.

14. Tennessee opposes granting Mr. Feighner party status and asserts that the Commission erred in considering Mr. Feighner's intervention as timely under Rule 214(c).¹⁷ Tennessee points out that while Mr. Feighner commented on the application during the environmental scoping process, he did not move to intervene until November 28, 2011, almost seven months after the May 4, 2011 deadline for interventions. Tennessee contends that Mr. Feighner's late motion to intervene should be denied because he has not shown any cause for such an untimely request to become a party.

Commission Response

15. Rule 214(c) of the Commission's Rules of Practice and Procedure provides that timely, unopposed motions to intervene in Commission proceedings are those filed within the time period prescribed by the Commission's notice of the proceeding for filing interventions.¹⁸ In this case, interventions were due by May 4, 2011. Further, the Commission regulations provide that any person who files a motion to intervene on environmental grounds on the basis of a draft Environmental Impact Statement (EIS) is deemed to have filed a timely motion to intervene so long as it is filed within the comment period for the draft EIS.¹⁹ Here, the Commission prepared an EA, not an EIS. However, even if we consider Mr. Feighner's motion to intervene as untimely, we would grant intervention.²⁰ In the interests of giving full consideration to the issues raised during proceedings for authorization of natural gas projects, the Commission has a liberal intervention policy prior to the time an order on the merits has been issued.²¹ Here, Mr. Feighner moved to intervene during the comment period on the EA and six months before we issued the May 29 Order. Mr. Feighner has demonstrated an interest in this proceeding as a land owner whose property will be impacted by the project. Further,

¹⁷ Tennessee Request for Rehearing at 6-8.

¹⁸ 18 C.F.R. § 385.214(c) (2012).

¹⁹ 18 C.F.R. §§ 157.10 and 380.10(a) (2012).

²⁰ The Commission's regulations addressing motions for late intervention state that, in acting on such a motion, the decisional authority may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting intervention. 18 C.F.R. § 385.214(d) (2012).

²¹ *Cameron LNG, LLC*, 118 FERC ¶ 61,019, at P 21 (2007) (citing *Gulfstream Natural Gas System, L.L.C.*, 95 FERC ¶ 61,100 (2001) and *Iroquois Gas Transmission System, L.P.*, 59 FERC ¶ 61,094, at 61,358 (1992)).

granting Mr. Feighner's intervention filed during the comment period of the EA did not cause undue delay or disruption or otherwise prejudice the applicant or other parties.²²

16. Thus, we affirm our determination in the May 29 Order to grant party status to Mr. Feighner and deny Tennessee's rehearing request on this point.

2. Initial Rates

17. In the May 29 Order, the Commission rejected Tennessee's proposal to base the initial recourse rate for the Northeast Upgrade Project on the combined costs and capacities of both the Northeast Upgrade Project and the Market Component of the 300 Line Project. The Commission found that although it would have been possible to amend the previously-authorized initial rate for the 300 Line Project Market Component to reflect the costs of the instant project in an NGA section 7 proceeding before that project went into service, once the 300 Line Project Market Component went into service in November 2011, the rate for service on that project can only be changed pursuant to section 4 of the NGA. The Commission further stated that this rejection "is without prejudice to Tennessee proposing in an NGA section 4 proceeding to consolidate the rates of the Northeast Upgrade Project and the 300 Line Project Market Component rates into a single incremental rate."²³

18. Tennessee requests clarification that it may file a limited-purpose section 4 filing to consolidate the rates of the Northeast Upgrade Project and the 300 Line Project into a single incremental rate. Tennessee argues that both the 300 Line Project and the Northeast Upgrade Project involve looping and compression along Tennessee's existing 300 Line System in northern Pennsylvania and New Jersey. Tennessee explains that the Northeast Upgrade Project created more capacity at lower costs because of the pipeline loops and compression added with the 300 Line Project and consolidating the rates conforms to the Commission policy for rolling cheap expansibility into prior projects that enabled the expansion. Furthermore, Tennessee points out that the Commission recently approved a settlement of Tennessee's first general rate proceeding in 16 years²⁴ and the settlement includes a moratorium in which Tennessee's next general rate proceeding may not become effective until at least April 2014. Thus, Tennessee maintains that requiring the filing of a general section 4 rate proceeding to consolidate the rates would delay the rolling in of the cheap expansibility into the initial rates of the 300 Line Project.

²² We note that no party, including Tennessee, filed an answer opposing Mr. Feighner's motion to intervene within the 15 days prescribed in the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.213(d) (2012).

²³ May 29 Order, 139 FERC ¶ 61,161 at P 25.

²⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 137 FERC ¶ 61,182 (2011) (Settlement).

Commission Response

19. Under these circumstances, we grant Tennessee's requested clarification and find that Tennessee may make a filing under section 4 of the NGA for the limited purpose of consolidating the rates of the Northeast Upgrade Project and the 300 Line Project into a single incremental rate.²⁵ Our ruling is procedural in nature and does not address the merits of Tennessee's specific proposal or Tennessee's right to make such a rate filing under the terms of the Settlement.²⁶

3. Commencement Date of Service

20. Ordering Paragraph (C) of the May 29 Order requires Tennessee to construct and make available for service the project facilities within one year from the date of the order, May 29, 2013. Tennessee explains that its precedent agreements with the project's shippers, Chesapeake and Statoil, do not require Tennessee to commence service until November 1, 2013. Therefore, Tennessee requests that the Commission clarify that Tennessee has until November 1, 2013, to place the project facilities in service.

Commission Response

21. Given the terms of the precedent agreements Tennessee has entered into for service on the project, we find it is reasonable to provide Tennessee until November 1, 2013, to place the project facilities in service and we amend Ordering Paragraph (C), accordingly.

B. Sierra Club's Requests for Rehearing and Stay

1. Request for Stay

22. In its November 12, 2012 motion for stay of construction activities, Sierra Club asserts that a number of federal and state permits have not been issued for the project, and therefore any construction activity that occurs prior to the issuance of all required permits violates Environmental Condition No. 8 of the May 29 Order. Sierra Club also alleges

²⁵ The Commission permitted Tennessee to make a limited section 4 filing in a similar situation in *Tennessee Gas Pipeline Co.*, 76 FERC ¶ 61,022, at 61,109 (1996) (authorizing incremental rates and stating that Tennessee could make a limited section 4 filing to combine the Phase II and Phase III rates as approved).

²⁶ As we explained in the May 29 Order, if Tennessee seeks to accomplish this rate change before the in-service date of the Northeast Upgrade Project, it should combine its limited NGA section 4 filing with a filing under section 7 to amend the initial rate approved in the May 29 Order.

that Tennessee failed to provide construction status reports for the Northeast Upgrade Project pursuant to Environmental Condition No. 7.²⁷

23. In its December 7, 2012 motion, Sierra Club requests that the Commission grant a stay and prohibit Tennessee from commencing any construction or land disturbing activity until the Commission completes its review of the May 29 Order on rehearing. Sierra Club notes that Tennessee has submitted a Notice to Proceed that includes a construction schedule that indicates Tennessee plans on beginning construction on January 2, 2013. Sierra Club asserts that unless a stay is granted, irreparable harm to the environment will occur. Sierra Club also claims that Tennessee is either unwilling or unable to comply with the terms and conditions of its underlying permits, referring to compliance matters related to the 300 Line Project. Sierra Club asserts that the balance of equities favors the granting of a stay because any short-term delay to Tennessee's construction schedule that would result from the grant of a stay would not outweigh the permanent environmental damage that will occur absent a stay. In addition, Sierra Club claims that a stay is in the public interest because it will preserve existing environmental conditions pending review of the adequacy of the review of the environmental impacts of the project. Finally, Sierra Club asserts that it is likely to succeed on the merits for the reasons specified in its rehearing request. Sierra Club maintains that the Commission's decision to rely on an EA and its failure to prepare an EIS was arbitrary and capricious, in violation of applicable statutory and regulatory requirements, and not supported by substantial evidence.

Commission Response

24. The Commission's standard for granting a stay is whether justice so requires.²⁸ The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. Our general policy is to refrain from granting stay to assure definiteness and finality in our proceedings.²⁹ For the reasons discussed below, we deny the stay requests.

²⁷ Sierra Club states that the status report from October 4 through October 10, 2012, is missing and Tennessee had not filed construction status reports from October 25, 2012.

²⁸ Administrative Procedure Act, 5 U.S.C. § 705 (2006); *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

²⁹ See, e.g., *Sea Robin Pipeline Co.*, 92 FERC ¶ 61,217, at 61,710 (2000).

25. Sierra Club makes no showing that it will be irreparably harmed. The Northeast Upgrade Project consists of approximately 40 miles of pipeline, the majority (84 percent) of which will be collocated with Tennessee's existing 300 Line. In its environmental review, the Commission fully considered and addressed the comments of the Sierra Club and others individuals and entities. The EA in this proceeding took a hard look at the environmental impacts and concluded that the proposed action would not have a significant impact on the human environment, which, according to the Council on Environmental Quality (CEQ) regulations, provides a basis for proceeding without preparing an EIS.³⁰ Under these circumstances, we deny Sierra Club's requests for stay. In any event, this order addresses the requests for rehearing and affirms our finding in the May 29 Order that, with the imposition of the adopted mitigation measures, the project would not constitute a major federal action significantly affecting the quality of the human environment.

26. On December 14 and December 19, 2012, notices to proceed were issued authorizing Tennessee to, among other things, commence construction and tree clearing for certain limited portions of the Northeast Upgrade Project in Pennsylvania, and to commence construction at Compressor Station 325 in Sussex County, New Jersey. These notices found that Tennessee had met the pre-construction conditions of the Commission's May 29 Order for the authorized construction activities, including providing documentation that it had received all relevant federal authorizations.³¹

2. New Studies/Reports Submitted with Rehearing Request

27. Sierra Club attaches four new documents, studies, or reports to its rehearing request that it relies on, in part, to support certain issues it raises on rehearing. These include: a Tennessee Combined Project Map (Attachment A); *Accufacts' Evaluation of Tennessee Gas Pipeline 300 Line Expansion Projects in PA and NJ*, dated June 27, 2012 (*Accufacts*) (Attachment B); a letter from Demicco and Associates, LLC detailing the results of its review of potential impacts to ground water resources from pipeline installation associated with the project, dated June 27, 2012 (Attachment C); and *Impacts of Shale Development on Bat Populations in the Northeast United States*, dated June 2012 (*Impacts of Shale Development*) (Attachment D). All four studies are introduced for the first time in Sierra Club's rehearing request.

³⁰ See 40 C.F.R. §§ 1501.4(e), 1508.13 (2012).

³¹ The status reports for weeks October 4 through October 10, 2012, and October 25 through October 31, 2012 were filed by Tennessee on November 14, 2012. Tennessee states that the reports were late due to administrative oversight. As we discuss *infra*, compliance matters related to the 300 Line Project are appropriately addressed in that proceeding, not here.

Commission Response

28. The Commission's long-standing policy is not to accept additional evidence at the rehearing stage of a proceeding, absent a compelling showing of good cause.³² Because other parties are precluded under Rule 713(d)(1)³³ from filing answers to requests for rehearing, allowing these parties to introduce new evidence at this stage would raise concerns of fairness and due process for other parties to the proceeding. In addition, accepting such evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality. Sierra Club does not explain or justify why the additional studies should be admitted after the close of the record and after the issuance of a dispositive order in this proceeding. Accordingly, we reject the efforts of Sierra Club to introduce supplemental evidence at the rehearing stage of this proceeding.

29. In any event, as discussed below, even if we considered the information in these studies, it would not change our rulings in the May 29 Order.

3. Segmentation

30. Sierra Club argues that the Commission violated NEPA and erred by unlawfully segmenting NEPA review of the environmental impacts of the Northeast Upgrade Project from the three other projects proposed by Tennessee on the eastern leg of the 300 Line System; namely, the 300 Line Project, the MPP Project, and the NSD Project (collectively, Eastern Leg Projects).³⁴ According to Sierra Club, the Commission should have completed a single EIS on these projects because they loop the entire eastern leg of Tennessee's 300 Line and are inter-related and functionally inter-dependent projects.

31. Sierra Club argues that the Northeast Upgrade Project and the other projects fail to meet the independent utility test, the factor it states is most often dispositive in a segmentation analysis, because all four projects are functionally dependent. In support, Sierra Club references Tennessee's certificate application for the MPP Project that states that the availability of this project capacity is based on the assumption that the Northeast Upgrade Project, 300 Line Project, and NSD Project will all be operational by November 2013.³⁵ Sierra Club also relies on the study from *Accufacts* that it states it recently

³² See, e.g., *Nevada Power Co.*, 111 FERC ¶ 61,111, at P 10 (2005), *Midwest Independent Transmission Sys. Operator, Inc.*, 122 FERC ¶ 61,178, at P 11 (2008).

³³ 18 C.F.R. § 385.713(d) (2012).

³⁴ Sierra Club Request for Rehearing at 8-27.

³⁵ *Id.* at 15 (citing MPP Project Certificate Application at 4).

commissioned for the purpose of presenting this argument on rehearing. According to Sierra Club, that study shows that all four projects are one master inter-dependent project to complete the looping of the 300 Line because: (1) the four projects provide a total of 1,500,000 Dth per day above what the original 24-inch pipeline could transport demonstrating that the projects are designed and intended to act as a full loop of the 300 Line System; (2) the distribution of horsepower by compressor station demonstrates that the 30-inch pipeline is designed to act as a complete loop; (3) the addition of greater capacity on the Northeast Upgrade Project compared to the capacity created by the Line 300 Project shows that the Northeast Upgrade Project is piggybacking off the 300 Line Project; (4) the NSD and MPP Projects rely on the 300 Line Project and Northeast Upgrade Project because the NSD and MPP Projects only add a relatively small amount of pipe and no compression and yet are able to add almost 500,000 Dth per day of capacity; and (5) the ability of the MPP Project to reverse gas flow on the western leg of Tennessee's 300 Line relies on excess capacity from previously installed compressor station horsepower.

32. Sierra Club also claims that the unlawful segmentation of the Northeast Upgrade Project and the other Eastern Leg Projects is further demonstrated by specific factors that show the projects were sufficiently connected, or cumulative, or related pursuant to NEPA.³⁶ Sierra Club maintains that the four projects were conceived as an integrated whole because the common overarching design of the four projects demonstrate that Tennessee meant those four projects to complete the eastern leg of the 300 Line.³⁷ In support, Sierra Club refers to Tennessee's statement in the certificate application for its MPP Project that the availability of project capacity is based on the assumption that the other three projects (300 Line Project, NSD Project and the Northeast Upgrade Project) are placed in service before, or contemporaneously with, the MPP Project. In addition, Sierra Club refers to Tennessee's certificate application for the Northeast Upgrade Project where it contends that Tennessee admits that the Northeast Upgrade Project will activate additional capacity that otherwise would not have been available without the 300 Line Project.

33. Sierra Club contends that the projects are economically interdependent because the 300 Line Project would allow Tennessee to create capacity on the Northeast Upgrade Project at a lower cost than what would be possible in the absence of the 300 Line Project and that construction of the Northeast Upgrade Project would lower rates on the 300 Line Project.³⁸ According to the Sierra Club, Tennessee failed to demonstrate that it would

³⁶ *Id.* at 18-27.

³⁷ *Id.* at 19-21 (citing *Florida Wildlife Federation v. United States Army Corps of Engineers*, 401 F. Supp. 2d 1298 (S.D. Fla. 2005) (*Florida Wildlife*)).

³⁸ *Id.* at 21-24.

have been able to successfully negotiate the contracts with their shippers solely on the basis of the costs associated with a single project without cost savings resulting from the related upgrade projects. In addition, Sierra Club argues the projects are not economically independent because the primary term of the contracts for the Northeast Upgrade Project last 20 years with an option to extend for five-year terms compared to the 40-year lifespan of the pipeline.

34. Sierra Club adds that the subsequent projects are reasonably foreseeable because Tennessee was always contemplating extending the new 30-inch looped sections across the entire eastern leg of the 300 Line into New Jersey based on maps and documents submitted by Tennessee.³⁹ In support, Sierra Club cites to Tennessee's statement in the subject certificate application that Tennessee and the shipper agreed to a rate adjustment to the negotiated rate "to the extent a subsequent project meeting certain criteria would be constructed and eventually placed in service within a specified time frame."⁴⁰

35. Sierra Club asserts that under 40 C.F.R. § 1508.25(a)(3), the "common timing" of the projects weighs in favor addressing them all together in a single EIS. Sierra Club asserts that all four projects are to be placed in service within 24 months of each other with the Northeast Upgrade Project and the MPP Project having the same in-service date.

36. Finally, Sierra Club argues under 40 C.F.R. § 1508.25(a)(3) the fact that the projects share a geographic proximity weigh in favor of a combined EIS. Sierra Club argues that all four projects are being constructed in a contiguous, uninterrupted pipeline across Pennsylvania into New Jersey.

Commission Response

37. The issue of whether we had improperly segmented the environmental review of the Northeast Upgrade Project from the 300 Line Upgrade Project was raised on comments to the EA and addressed in the May 29 Order. We found that each project is a stand-alone project and designed to provide contracted-for volumes of gas to different customers within different timeframes.⁴¹ We also found that the 300 Line Project is currently in operation and is not dependent on the Northeast Upgrade Project facilities. As further discussed below, we affirm our ruling in the May 29 Order.

³⁹ *Id.* at 24-25 (citing *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214-15 (9th Cir. 1998) (*Blue Mountain Biodiversity*)).

⁴⁰ *Id.* at 25 (citing certificate application at 14).

⁴¹ May 29 Order, 139 FERC ¶ 61,161 at P 92.

38. Here, Sierra Club contends that we unlawfully segmented for environmental review the environmental impacts of the Northeast Upgrade Project from not only the 300 Line Project but from two other certificate projects proposed by Tennessee (the MPP and NSD Projects). Sierra Club asserts that all four Eastern Leg Projects are interrelated and inter-dependent projects and the environmental impacts should have been reviewed in a single EIS. The issue of whether we improperly segmented environmental review of the Northeast Upgrade Project from the NSD and MPP Projects is being raised for the first time in this proceeding on rehearing. We find no reason that this argument could not have been raised prior to our issuance of our May 29 Order on the merits. As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented, e.g., claims based on information that only recently became available or concerns prompted by a change in material circumstances.⁴² We do so because (1) our regulations preclude other parties from responding to a request for rehearing,⁴³ and (2) "such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision."⁴⁴ We therefore will not entertain this new argument on rehearing.

39. In any event, if we determined not to dismiss this issue on procedural grounds, we would dismiss it on substantive grounds. Sierra Club claims that we should have completed a single EIS for all four Eastern Leg Projects. As an initial matter, we note that the 300 Line Project was filed in July 2009, more than 18 months before the certificate filing for the MPP Project, the most recent project Sierra Club claims was improperly segmented from the rest, in December 2011. The 300 Line Project was placed in service on November 1, 2011, before the MPP Project application was even filed. To accomplish what Sierra Club requests, the Commission presumably would have had to hold up environmental review of the 300 Line Project, as well as the NSP and Northeast Upgrade Projects, until the MPP Project was proposed. Sierra Club's approach is unworkable, would unduly delay natural gas infrastructure development, and is not required by NEPA.

40. The CEQ regulations provide that actions are "connected," thus requiring consideration in the same environmental analysis, if they: (1) automatically trigger other actions which may require an environmental impact statement; (2) cannot or will not

⁴² See Rule 713(c)(3) of our Rules of Practice and Procedure, which states that any request for rehearing must "[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought, based on matters not available for consideration by the Commission at the time of the final decision or final order." 18 C.F.R. § 385.713(c)(3) (2012).

⁴³ 18 C.F.R. § 385.713(d) (2012).

⁴⁴ *Westar Energy, Inc.*, 134 FERC ¶ 61,176, at P 23 (2011).

proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification.⁴⁵ Where “proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.”⁴⁶ The courts have held that improper segmentation is usually concerned with projects that have reached the proposal stage.⁴⁷ Applying these principles here, we conclude that there was no reason to consider all four projects together for environmental review.

41. Sierra Club’s assertion that the environmental consequences of all four Eastern Leg projects must be evaluated together because the projects are functionally dependent and designed to act as a complete loop of the 300 Line has no merit. Sierra Club’s arguments are largely premised on the fact that the subsequent expansion projects are designed based on the facilities proposed in earlier projects. For example, Sierra Club references Tennessee’s certificate application for the MPP Project that states that the availability of the MPP project capacity is based on the assumption that the Northeast Upgrade Project, 300 Line Project, and NSD Project will all be operational by November 2013. But the fact that existing or previously proposed infrastructure will have an impact on the design of subsequent capacity reflects engineering principles; it does not demonstrate these actions are connected for NEPA purposes and cannot move forward independently. Each of the four projects that Sierra Club identifies has independent utility. Each project is designed to provide contracted-for volumes of gas to specific customers and can stand alone.⁴⁸

42. For example, the Line 300 Upgrade Project was constructed and placed in service on November 1, 2011, more than six months before the Commission authorized the Northeast Upgrade Project, thus demonstrating the independent utility of this project. Here, Tennessee has signed binding precedent agreements for the full incremental capacity of the Northeast Upgrade Project. It is reasonable to assume Tennessee would have proposed a project to provide this contracted-for service, even in the absence of the

⁴⁵ 40 C.F.R. §§ 1508.25(a)(1)(i)-(iii) (2012).

⁴⁶ *Reilly v. United States Army Corps of Engineers*, 477 F.3d 225, 236 (5th Cir. 2007) (citing *Fritiofson v. Alexander*, 772 F.2d 1225, 1241, n. 10 (5th Cir. 1985) (*Reilly*)).

⁴⁷ *Id.* at 236-237.

⁴⁸ Of course, the design of the subsequent projects may have looked different had any of the preceding projects not received Commission authorization.

300 Line Project and/or the NSD Project.⁴⁹ Similarly, there is no support in this record that Tennessee will not move forward with the Northeast Upgrade Project if the MPP Project is not constructed and placed in service.

43. We also find that the *Accufacts* study does not support Sierra Club's position that the Eastern Leg Projects are interdependent projects. The study makes several assertions regarding the design of Tennessee's 300 Line Project, Northeast Upgrade Project, MPP Project and NSD Project, including that the four projects were inter-related and functionally dependent on one another, that some of the projects created excess capacity, and that some of the projects did not include enough facilities. The study also asserts that the projects are potentially unsafe because of the potentially high gas velocities and bi-directional flow. However, the study provided no engineering support, such as hydraulic studies, to support the operational claims. Nor did the study cite to any scientific papers or industry studies supporting the claims about problems resulting from gas velocities and bi-directional flow. The study acknowledges that the analysis utilized only public documents, thus excluding critical information related to the operational design of the facilities such as flow diagrams and pipeline simulations provided by Tennessee. Commission staff analyzed each of these proposals based upon all of the information in the record and confirmed that the design of each project was appropriate to meet the specified contractual demand.

44. As noted above, the courts have held that improper segmentation is usually concerned with projects that have reached the proposal stage.⁵⁰ This is not the case with the projects here. For instance, the EA for the 300 Line Project was issued in February 2010, before the certificate proposals for any of the other three projects were filed.

45. We also disagree with Sierra Club's assertion that the subsequent projects are "reasonably foreseeable" and thus the EA's failure to consider them provides further proof of improper segmentation. In *Reilly v. United States Army Corps of Engineers*, the court explained that, whether subsequent projects are "reasonably foreseeable" is relevant to the issue of the sufficiency of a cumulative impact analysis, not to the issue of segmentation.⁵¹ Moreover, as discussed in more detail below, we find that the EA adequately addressed the cumulative impacts of the 300 Line, as well as other

⁴⁹ If the assumptions on which Tennessee's certificate application were based had changed during the pendency of the proceeding, Tennessee could have filed an amended application to add, delete, or modify facilities.

⁵⁰ *Reilly*, 477 F.3d at 236-237.

⁵¹ 477 F.3d at 237.

jurisdictional pipeline projects that could potentially cause a cumulative impact with the project.⁵²

46. While all four projects are proposed to be connected to Tennessee's 300 Line, the record does not support Sierra's Club's contention that Tennessee contemplated these four actions as an integrated whole that would progress in phases.⁵³ The *Florida Wildlife* case cited by Sierra Club is inapposite. In *Florida Wildlife* the court held that the U.S. Army Corps of Engineers should have evaluated the 1,919 acres planned for an integrated development, rather than issuing a permit to develop 535 acres.⁵⁴ The *Florida Wildlife* case involved breaking down a larger project into component parts, a situation not present here, as discussed above. Sierra Club also has not demonstrated that the four actions are so interconnected in geography and timing that any one is dependent on the other to require a single environmental review.

47. Sierra Club has not shown that these projects are economically interdependent. The fact that the 300 Line Project would allow Tennessee to create capacity on the Northeast Upgrade Project at a lower cost than would be possible in the absence of the 300 Line Project and that the construction of the Northeast Upgrade Project may lower rates on the 300 Line Project reflects the fact that some expansion projects are less costly because of earlier construction and Commission policy permits rolled-in pricing in this situation.⁵⁵ This, too, is a function of pipeline engineering and does not demonstrate that the projects are economically interdependent. Sierra Club does not offer any support for

⁵²For this reason, Sierra Club's cite to *Blue Mountains Biodiversity* is unavailing. In that case, the court found multiple deficiencies in the EA for a salvage logging project, including the agency's failure to mention, much less analyze and address, the cumulative impacts of three other salvage logging projects that were part of the agency's coordinated recovery strategy for the same area.

⁵³ An agency need not evaluate an entire universe in a single environmental document. "[J]ust because the [new highway] project at issue connects existing highways does not mean that it must be considered as part of a larger highway project; all roads must begin and end somewhere [citations omitted]." *Preserve Endangered Areas of Cobb's History, Inc. v. Army Corps of Engineers*, 87 F.3d 1242, 1247 (11th Cir. 1996).

⁵⁴ 401 F. Supp. 2d 1298, 1317 (S.D. Fla. 2005).

⁵⁵ *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). We fail to understand how the terms of the precedent agreements (e.g., 20 years plus 5 year extensions) Tennessee has entered into for the capacity of the Northeast Upgrade Project have any bearing on whether the project has independent utility under NEPA.

its contention that without cost savings resulting from the 300 Line Project, Tennessee would not have been able to successfully negotiate the contracts with their shippers solely on the basis of the costs associated with the single project.

48. Finally, since the 300 Line Upgrade Project and the NSD Project are completed and in service, there would be no purpose in conducting a single environmental document that included those projects.⁵⁶

49. In sum, we find that the Commission's environmental review of the Northeast Upgrade Project in a single environmental document is consistent with NEPA.

4. Whether the Northeast Upgrade Project is a Major Pipeline Project

50. Sierra Club contends that the Commission erred in not treating the Northeast Upgrade Project as a major new pipeline project necessitating an EIS.⁵⁷ Sierra Club argues that the project, standing alone, should be treated as a major new project given the doubling of the width of the right-of-way, the miles of the new 30-inch pipeline to be installed, and the undisturbed area to be affected by new right-of-way for the project.

51. Sierra Club also maintains that the Commission has considered other pipeline construction projects similar in scope to the Northeast Upgrade Project and the other Eastern Leg Projects as a whole to be major and require an EIS. Specifically, Sierra Club argues that in *Floridian Natural Gas Storage Co.*,⁵⁸ the Commission prepared an EIS for a liquefied natural gas storage facility that utilized 55.58 acres for the storage facility and 71.45 acres for the construction right-of-way area and other facilities. According to the Sierra Club, the Northeast Upgrade Project exceeds these figures, asserting that the project will disturb over 640 acres of land, require over 120 acres of permanent right-of-way across over 300 water bodies, as well as have significant portions of the right-of-way cut through virgin forests and sensitive habitats.

52. Sierra Club also points out that the Commission prepared an EIS for a proposed project by Colorado Interstate Gas Company that consisted of four segments of 24-inch and 30-inch pipeline totaling approximately 164 miles in length, where a significant

⁵⁶ See *U.S. Dep't of Transp. v. Public Citizen (Public Citizen)*, 541 U.S. 752, 767-768 (2004) ("Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS").

⁵⁷ Sierra Club Request for Rehearing at 27-29.

⁵⁸ 124 FERC ¶ 61,214 (2008) (*Floridian*).

portion of the proposed pipeline route was along an exiting utility right-of-way.⁵⁹ Again, Sierra Club faults the Commission for not considering the Eastern Leg Projects as a whole and requiring an EIS because the combined eastern leg is larger than the project in *Colorado Interstate*, because it involves, among other things, over 185 miles of pipeline and requires over 620 acres of new permanent right-of-way.

Commission Response

53. The Commission's regulations implementing NEPA only require preparation of an EIS for "[m]ajor pipeline construction projects under section 7 of the Natural Gas Act using rights-of-way in which there is no existing natural gas pipeline."⁶⁰ As we explained in the May 29 Order, based on our regulations and the Commission's years of experience with NEPA implementation for pipeline projects, a new 40.3-mile-long, 30-inch-diameter pipeline that will be co-located within or adjacent to existing rights-of-way for 84 percent of its length normally would not fall under the "major" category for which an EIS is automatically prepared.⁶¹ We have prepared EAs for a number of natural gas pipeline projects similar in scope to the Northeast Upgrade Project.⁶² We affirm our ruling that the Northeast Upgrade Project is not a "major" pipeline project for which an EIS is automatically prepared.

54. The cases cited by Sierra Club where the Commission performed an EIS are distinguishable. In *Floridian*, the project involved a large permanent aboveground liquefied natural gas facility, as opposed to the proposal here involving buried underground pipeline and work at existing above ground facilities. In addition, Sierra Club's comparison of the Northeast Upgrade Project combined with Tennessee's other three projects on the 300 Line with *Colorado Interstate* is not appropriate. As we

⁵⁹ Sierra Club Rehearing Request at 29 (citing *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,256 (2008) (*Colorado Interstate*)).

⁶⁰ 18 C.F.R. § 380.6(a)(3) (2012).

⁶¹ May 29 Order, 139 FERC ¶ 61,161 at P 42.

⁶² See, e.g., *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 (2011) (EA issued for new Magnum Gas Storage Project which included gas storage field on 2,050-acre site in Millard County, Utah, and associated 61.6-mile, 36-inch-diameter pipeline traversing three counties in Utah); *Colorado Interstate Gas Co.*, 131 FERC ¶ 61,086 (2010) (EA issued for Colorado Interstate Gas Co.'s Raton 2010 Expansion Project which included two new 16-inch-diameter pipeline laterals totaling 118 miles in length traversing four counties in southeastern Colorado); *Equitrans L.P.*, 117 FERC ¶ 61,184 (2006) (EA issued for Big Sandy Pipeline Project which included 68 miles of new 20-inch-diameter pipeline traversing four counties in eastern Kentucky).

discussed in the May 29 Order and *infra*, the Northeast Upgrade Project is a stand-alone project and, as such, is considerably smaller in scope than the project in *Colorado Interstate*. For example, the Northeast Upgrade Project involves approximately 40 miles of new pipeline, while the proposal in *Colorado Interstate* involved over 160 miles of new pipeline.

5. Finding of No Significant Impact

55. Sierra Club contends that the Commission erred in concluding the Northeast Upgrade Project would not have a significant impact of the quality of the human environment and therefore that an EIS is not warranted.⁶³

56. Sierra Club asserts that the EA is full of significant information gaps, which Sierra Club argues the Commission admits when it states that such information will become available on completion of further studies, surveys, and permitting requirements by Tennessee. Sierra Club argues the May 29 Order also fails to respond to the list of alleged deficiencies identified. Sierra Club argues that because the missing information increases the uncertainty of the project's impacts, the Commission should have prepared an EIS.

57. Sierra Club argues the Commission's defense that it had sufficient information to complete the EA, that Tennessee's belated submission of data before the May 29 Order informed the Commission's decision in reaching its finding of no significant impacts, or that more details would be worked out during other federal and state permitting processes is unavailing. Sierra Club argues that these alleged deficiencies render the EA insufficient as a matter of law because it is the EA, not some outside permit, which must contain the Commission's environmental impacts review.⁶⁴ Furthermore, Sierra Club argues that by denying Sierra Club and the public the right to review and comment on the information upon which the finding of no significant impact was based, the Commission violated NEPA.⁶⁵

58. Sierra Club also maintains that the Commission failed to adequately consider the context and intensity of the project when determining to prepare an EA. Sierra Club argues the EA failed to analyze the context of the project, which it considers to be the rapid industrialization of rural areas in Pennsylvania and the construction of the project in

⁶³ Sierra Club Rehearing Request at 29-38.

⁶⁴ *Id.* at 32 (citing *Blue Mountains Biodiversity Project*, 161 F.3d 1208, 1214 (9th Cir. 1998)).

⁶⁵ *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (*Robertson*)).

high-value resource areas, and that, therefore, the Commission should reconsider its analysis of the context of the project in order to determine whether an EIS is necessary. Furthermore, Sierra Club argues the Commission erred in determining that the NEPA intensity factors do not warrant preparation of an EIS, specifically intensity factors 3, 4, 6, 8, and 9.⁶⁶

59. Based on intensity factors 3 and 8, Sierra Club argues that the project will affect each and every one of the six categories of unique geographic characteristics identified by CEQ regulations including, historically and culturally significant areas, park lands, prime farmlands, wetlands,⁶⁷ ecologically critical areas, and under the Delaware River, a federally-designated Wild and Scenic River. In addition, Sierra Club argues that the May 29 Order failed to address the expert comments in the Heatley Report that it states details the EA's deficiencies in addressing the significance of short-and long-term impacts of forest fragmentation and edge effects, adverse impacts to forest regeneration, biological invasion by invasive species, and the cumulative impacts of maintaining the right-of-way throughout the service life of the project.

60. Sierra Club argues that it and other commenters submitted evidence with their comments showing that a substantial dispute existed, intensity factor 4. Sierra Club argues that the substantial expert comments submitted in response to the EA demonstrate that the project's effects are highly controversial with regard to many affected resources.

⁶⁶ The CEQ regulations state that determinations of whether a project will have significant impacts on the environment depend on consideration of both "context" and "intensity." Context means the "significance of an action must be analyzed in several contexts," including "the affected region, the affected interest, and the locality." With respect to "intensity," the CEQ regulations set forth 10 factors agencies should consider, including: the unique characteristics of the geographic area (1508.27(b)(3)); the degree to which the effects are likely to be highly controversial (1508.27(b)(4)); the degree to which the action may establish a precedent for future actions (1508.27(b)(6)); the degree to which the action may adversely affect districts, sites, highway, structures, or objects listed in the National Register of Historic Places (1508.27(b)(8)); and the degree to which the action may adversely affect threatened and endangered species (1508.27(b)(9)). *See* CEQ regulations at 40 C.F.R. §§ 1508.27(a) and (b) (2012).

⁶⁷ Sierra Club states that the Demicco and Associates report that it submitted with its rehearing request documents the potential that the pipeline installation will affect ground water movement and thus potentially have larger permanent impacts to wetlands and ground water resources than the Commission discussed in the EA.

Sierra Club also argues the Commission cannot “ignore[] the conflicting view of other agencies having pertinent expertise.”⁶⁸

61. Sierra Club submits that the precedent setting action, intensity factor 6, the Commission took in deciding to prepare an EA rather than an EIS was the alleged segmentation of the project from the 300 Line, NSD, and MPP Projects. Sierra Club argues it is reasonable to assume that pipeline companies will continue to file certificate applications to develop pipeline projects in the Marcellus Shale region and it is reasonable to assume that the Commission will permit these companies to segment their applications, therefore implicating intensity factor 6.

62. Sierra Club reiterates that the project will affect endangered species and, therefore, intensity factor 9 weighs in favor of the preparation of an EIS. Sierra Club argues that the EA failed to describe the methodologies used to gather the data discussed in the EA, and that given the difficulties in determining whether or not Indiana bats and their habitat are present in a given area based on mist net surveys, more in-depth study and an EIS was necessary. In addition, Sierra Club argues the Commission failed to respond to the expert opinion of Dr. DeeAnn Reeder regarding the inadequacy of mist net surveys for an already-endangered species whose numbers have dropped due to White Nose Syndrome.⁶⁹ In addition, Sierra Club argues that data deficiencies cannot be cured by the subsequent submission of surveys for threatened and endangered species because the data must be contained in the EA. Sierra Club asserts that the Commission denied intervenors’ requests to examine endangered species surveys completed by Tennessee and that the Commission’s Endangered Species Act section 7 consultation does not remedy deficiencies.

Commission Response

63. CEQ regulations implementing NEPA state that one of the purposes of an EA is to assist agencies in determining whether to prepare an EIS or a finding of no significant impact.⁷⁰ Here, staff prepared an EA to determine whether the Northeast Upgrade Project would indeed have significant impacts, thus necessitating the preparation of an EIS. As explained in the May 29 Order, the EA concludes, and we agree, that the

⁶⁸ Sierra Club Rehearing Request at 36 (citing *Davis v. Mineta*, 302 F.3d 1104, 1123 (10th Cir. 2002)).

⁶⁹ Sierra Club also refers to the *Report on Shale Gas Development* that it states further documents the significant impacts to endangered bats from shale gas development.

⁷⁰ 40 C.F.R. § 1501.4(c) (2012).

Northeast Upgrade Project would not have a significant impact on the quality of the human environment. Therefore, an EIS is not required.

64. We disagree that the EA for the Northeast Upgrade Project was based on inadequate information. Our review of Tennessee's application under the requirements of the NGA and NEPA, discusses and identifies those limited NEPA issues requiring further study treatment and requires their completion and review prior to commencement of construction. The extensive record on environmental issues provided sufficient information regarding the proposed action to be able to fashion adequate mitigation measures to support a determination that the Northeast Upgrade Project will cause no significant environmental impacts upon compliance with those mitigation measures.

65. As the Supreme Court stated in *Robertson* "NEPA does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated."⁷¹ Here, the Commission made extensive efforts to assure that environmental issues were resolved appropriately. The issues the parties raise were discussed in considerable detail in the EA and were subject to public comment. Based on the information in the record, we imposed additional measures to mitigate any adverse environmental impact associated with the project. As is the case with virtually every order issued by the Commission that authorizes construction of facilities, the instant approval is subject to Tennessee's compliance with the environmental conditions set forth in the order.

66. We also disagree with Sierra Club's assertion that we have improperly deferred determinations of potential negative impacts to other agencies that will determine and require mitigation. We rely on other agencies to conduct certain studies because they are the resource agencies with expertise and responsibilities over the particular subject matters. Moreover, the Commission requires that the results of these studies be filed in this proceeding. To the extent any of the pending consultations or studies in this case indicate a need for further review, or indicate a potential for significant adverse environmental impacts, the Director of the Office of Energy Projects (OEP) will not provide the necessary clearances for commencement of construction. Additionally, that office's final resolution of those conditions will be subject to Commission rehearing, which is also part of the paper hearing for this proceeding. Thus, Sierra Club's claim that our process denies them the right to review and comment on information the Commission relies on in its environmental review is unavailing.

67. Sierra Club's contention that in assessing significance we failed to properly consider the context or intensity factors set forth in CEQ regulations is without merit. Context, as used in the NEPA regulations, requires the significance of an action to be analyzed with respect to the affected region and the affected interest. Here, we

⁷¹ 490 U.S. at 352.

considered Tennessee's proposal to construct approximately 40 miles of pipeline, the majority of which is collocated with Tennessee's existing 300 Line, and evaluated the project impacts on resources including geology and soils, water resources, fisheries and wetlands, vegetation and wildlife, land use, recreation and visual resources, socioeconomics, cultural resources, air quality and noise. We found that any impacts of the project would be limited.

68. The May 29 Order addressed Sierra Club's arguments that the project will affect numerous unique geographic areas and may cause destruction of significant scientific, cultural, and historical resources, the third and eighth intensity factors, respectively.⁷² We explained that the EA considered these issues in depth, including impacts to waterbodies/wetlands and groundwater,⁷³ satisfying our responsibility under NEPA to take a hard look at the project's impacts, and concludes with a finding of no significant impact. Sierra Club incorrectly asserts that we did not address the expert comments in the Heatley Report attached to the Sierra Club's scoping comments. The May 29 Order addresses issues raised in the Heatley report including fragmentation and found that these impacts would be minimized by Tennessee expanding its existing right-of-way in most areas and that edge effects would be offset to the new right-of-way edge.⁷⁴ The order also acknowledged that fragmentation would impact areas where a new right-of-way was created and species composition in these areas would change.

69. The May 29 Order explained why we disagreed with Sierra Club's claim that the potential environmental impacts of the proposed project are "highly controversial," intensity factor 4. For an action to qualify as highly controversial, there must be a "dispute over the size, nature or effect of the action, rather than the existence of opposition to it."⁷⁵ Although we found Sierra Club presented some evidence of the potential for the degradation of habitat, we found that the EA thoroughly analyzed these issues, and appropriately concluded there would be no significant impacts. We also find that Sierra Club's assertion that we ignored the conflicting views of other agencies having pertinent expertise is without merit. While the Sierra Club does not specify which agencies comments it refers to, the Commission considered and addressed all substantive

⁷² May 29 Order, 139 FERC ¶ 61,161 at PP 132-136, 196.

⁷³ Nothing in the Demicco and Associates report alters our conclusion that, based on measures within Tennessee's Environmental Construction Plan, the impact on groundwater will be minimized.

⁷⁴ May 29 Order, 139 FERC ¶ 61,161 at PP 139-140.

⁷⁵ *Id.* P 138 (citing *Foundation for North American Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982) (quoting *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973))) (internal quotations omitted).

comments including those of other agencies participating in this proceeding. Indeed, the EA recommended and we adopted mitigation measures put forth by other agencies.⁷⁶

70. The May 29 Order also disagreed with Sierra Club's claim that intensity factor 6, precedent setting action, is implicated here. We found that Sierra Club's argument that Commission staff's EA for the project would establish a precedent is without merit because the EA is a non-binding document and creates no precedent to which the Commission is bound.⁷⁷ Further, we pointed out that each proposed project is unique and has different effects on different resources. Sierra Club's contention that the precedent setting action is the segmentation of the project from the 300 Line, NSD, and MPP Projects is equally unavailing. As we explain *infra*, we did not improperly segment the Northeast Upgrade Project from other projects Tennessee proposed on its 300 Line. The Northeast Upgrade Project has independent utility and we based our decision to perform an EA, as opposed to an EIS, on our evaluation of the project and its affects on different resources informed by the Commission's many years of implementing NEPA requirements.

71. The May 29 Order addressed Sierra Club's comments on the impact to endangered species, factor 9, and concluded that no significant impact would occur.⁷⁸ As relevant to Sierra Club's rehearing request, we explained that Tennessee had completed the necessary Indiana bat surveys in Pennsylvania and New Jersey.⁷⁹ In order to avoid any effects of the project on the Indiana bat in New Jersey, the U.S. Fish and Wildlife Service (FWS), New Jersey Field Office, recommended that Tennessee implement a seasonal

⁷⁶ See, e.g., May 29 Order, 139 FERC ¶ 61,161 at P 73 (addressing Pennsylvania and New Jersey concerns regarding the Indiana bat).

⁷⁷ *Id.* P 151 (citing *Town of Cave Creek v. FAA*, 325 F.3d 320, 332 (D.C. Cir. 2003) (finding that the Federal Aviation Administration reasonably concluded that an EIS was unnecessary and preparing an EA for the agency review of high-altitude arrival and departure procedures would not be binding precedent)).

⁷⁸ *Id.* PP 153-160. Sierra Club's issues with survey protocol should be taken up with the United States FWS and/or the appropriate state agency for state-listed species.

⁷⁹ Sierra Club erroneously asserts that the Commission denied its requests to examine endangered species surveys completed by Tennessee. On November 9, 2011, Sierra Club filed a letter in this proceeding requesting that Tennessee's designation of these studies as privileged and confidential be denied. However, we have no record of Sierra Club filing a request to obtain these documents in accordance with the requirements set forth in 18 C.F.R. § 388.108 of the Commission's Rules of Practice and Procedure (Requests for Commission Records not available through the Public Reference Room (FOIA requests)).

tree-clearing restriction for the eastern 2.5 miles of Loop 323. The Commission adopted this recommendation in Environmental Condition No. 13 in the May 29 Order. The Pennsylvania Field Office of the FWS recommended mitigation and stated that with the implementation of the mitigation, the effects of the project on Indiana bats will be insignificant or discountable. Environmental Condition No. 14 of the May 29 Order requires Tennessee to file a plan that addresses Indiana bat habitat loss with the Pennsylvania FWS and the Secretary before starting construction over those loops. Tennessee will not receive our approval to proceed until it completes the studies that confirm the project will be consistent with our and other agencies' federal or federally-delegated authorizations.⁸⁰ As the Commission has found, "if the studies do not support such a finding, the project cannot proceed until it is modified or measures are put in place to ensure the project will not cause any unacceptable adverse environmental impacts."⁸¹

6. Cumulative Impact Analysis

72. Sierra Club argues the Commission failed to adequately address the cumulative impacts of past, present, and reasonably foreseeable projects when it ignored not only the impacts of other Eastern Leg Projects but also the impacts of shale gas development on resources affected by the project.⁸²

73. Sierra Club argues that the Commission improperly found that the analysis of Marcellus Shale impacts sought by commentors is outside the scope of the project analysis because the exact location, scale, and timing of future facilities are unknown.⁸³ Sierra Club claims knowledge of the exact location is not necessary under NEPA, which requires the agency engage in reasonable forecasting. According to the Sierra Club, the Commission inappropriately ignored available sources of information provided in the comment period, including publicly available maps of permitted wells in Pennsylvania. Sierra Club points out that the EA states that Tennessee has had numerous requests from producers for interconnections to Tennessee's system, but the Commission then claims ignorance of ongoing and future related development. Further, Sierra Club argues that

⁸⁰ Consultation required under section 7 of the Endangered Species Act has been completed with both the Pennsylvania and New Jersey Field Offices of the FWS. All surveys required for the completion of section 7 of the Endangered Species Act consultations were completed according to FWS protocols and reviewed by that agency. Thus, Tennessee has met the requirements of Environmental Conditions Nos. 13 and 14.

⁸¹ *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245 (2009) (citing *Cal. Public Utilities Comm'n*, 900 F.2d 269, 282 (D.C. Cir. 1990)).

⁸² Sierra Club Request for Rehearing at 39-50.

⁸³ *Id.* at 40.

courts have held that induced development related to large scale development projects has properly been considered cumulative actions under NEPA.

74. Sierra Club also contends that the scope of a cumulative impact analysis is not categorically delimited by a requirement of causality. According to Sierra Club, the impacts of past, present, and reasonably foreseeable future actions considered in the cumulative impact analysis need not be directly initiated by the project as the Commission suggests.⁸⁴ Thus, Sierra Club contends that the fact that some natural gas development may or may not occur with or without the project's construction is irrelevant. Rather, Sierra Club contends that what controls here is that there will be significant natural gas development around the project. Furthermore, Sierra Club maintains that even if there is some "independent utility" for the project, the Commission's failure to consider reasonably foreseeable natural gas development the project will induce, as well as related and other projects within the project area, is still unlawful.

75. Sierra Club maintains that the Commission is a "gatekeeper" for private action arguing that upstream activities in the Marcellus Shale region will only proceed if the Commission continues to expand access to markets through approval of interstate pipeline projects.⁸⁵ Sierra Club argues there is no doubt that construction of an interstate transmission line to enable producers to bring gas to market is causally related to the development of shale gas resources in the project area. But for the approval of the pipeline by the Commission, Sierra Club argues, producers would be unable to access interstate transmission lines.

76. To the extent that the EA addresses impacts related to gas development, Sierra Club asserts that it does not independently assess the impacts from such activities and only points to compliance with other agencies' permitting requirements as a basis for concluding that no significant cumulative impacts exist. According to Sierra Club this does not suffice as a hard look under NEPA.⁸⁶

77. Furthermore, Sierra Club argues that the cumulative effects analysis in the EA is insufficient because it failed to consider the scope of the project individually, and as an

⁸⁴ *Id.* at 41-42 (citing *Nat. Res. Def. Council v. Hodel*, 865 F.2d, 288, 298 (D.C. Cir. 1988)).

⁸⁵ *Id.* at 46-47 (citing *Humane Society of U.S. v. Johanns*, 520 F.Supp.2d 8, 25 (D.D.C. 2007)).

⁸⁶ *Id.* at 43 (citing *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm.*, 449 F.2d 1109, 1123 (D.C. Cir. 1971)).

integrated whole with the 300 Line, NSD, and MPP Projects.⁸⁷ Sierra Club argues that although the EA identifies ten other pipelines within 50 miles of the project, the EA provides no detailed information or analysis relating to the additive environmental impacts of these other projects. Specifically, Sierra Club argues the cumulative impacts section of the EA contains five omissions, namely: (1) it does not mention the MPP Project; (2) it references the NSD Project but discusses none of its impacts, such as acreage affected, stream and wetland crossings, and sensitive habitat disturbance; (3) it does not analyze or mention the specific acreage and stream crossing affected by the 300 Line Project ; (4) it fails to consider Tennessee's violations from construction of the 300 Line Project; and (5) it fails to consider the Northeast Upgrade Project as an integrated whole with regards to the simultaneous and cumulative impacts of the 300 Line, NSD, and MPP Projects.

78. Sierra Club maintains that the cumulative impacts analysis is devoid of detailed, reasoned conclusions and quantified information and thus the EA fails to take a hard look to justify its conclusions.⁸⁸ For example, Sierra Club argues the EA lists gathering line projects in the project area, but only states that land requirements would be less significant for a gathering system. Sierra Club maintains that a more comprehensive analysis is necessary. Additionally, Sierra Club argues the EA failed to adequately assess information that quantifies the increased long-term emissions of criteria pollutants, hazardous air pollutants (HAP), and greenhouse gases (GHG) within the region or to consider how such emissions might contribute to climate change or impact the public health under 40 CFR § 1508.27(b)(2), but instead disregards such significant impacts as outside the scope of our analysis. In addition, Sierra Club argues the Commission's greenhouse and climate change analysis is deficient because it only includes direct emissions, rather than indirect emissions cumulatively resulting from the project like pipeline leaks, well pad flaring, and compressor station emissions.

Commission Response

79. The EA includes an analysis of the cumulative impacts of related past, present, and reasonably foreseeable activities in the project area.⁸⁹ Here, the EA describes the impacts of existing and pending jurisdictional natural gas pipelines, natural gas facilities associated with the project but that are not under the Commission's jurisdiction, unrelated projects, and development of the Marcellus Shale.

⁸⁷ *Id.* at 43-45.

⁸⁸ *Id.* at 49-50.

⁸⁹ EA at 2-121 to 2-134.

80. The EA considered the general development of the Marcellus Shale region in the vicinity of the project. Specifically, the EA considered the impact of Marcellus Shale development on the following resources: soils; ground water; surface water and wetlands' vegetation and wildlife; land use; air quality; land use; socioeconomics; and air quality and noise.⁹⁰ We disagree with Sierra Club's contention that this level of discussion is not adequate. As explained in the May 29 Order, we correctly determined that a fuller analysis is not required by NEPA because the Marcellus Shale development is not causally-related, and anticipated future activities are not reasonably foreseeable.

81. The May 29 Order discussed and dismissed Sierra Club's argument that there is no causality requirement for cumulative impacts.⁹¹ We explained that the Supreme Court has found that NEPA requires a "reasonably close causal relationship" between the environmental effect and the alleged cause.⁹² Sierra Club fails to distinguish this precedent.

82. The May 29 Order addressed and rejected Sierra Club's claim that the Commission is a gatekeeper for approval of development of Marcellus Shale upstream activities because it is able to promote, prevent, or otherwise affect upstream development in the Marcellus Shale region.⁹³ We relied on the court decision in *Sylvester v. U.S. Army Corps of Engineers*, where the court explained the definition of cumulative impacts as follows:

Environmental impacts are in some respects like ripples following the casting of a stone in a pool. The simile is beguiling but useless as a standard. So employed it suggests that the entire pool must be considered each time a substance heavier than a hair lands upon its surface. This is not a practical guide. A better image is that of scattered bits of broken chain, some segments of which contain numerous links, while others have only one or two. Each segment stands alone, but each link within a segment does not.⁹⁴

⁹⁰ *Id.* 2-128 to 2-133.

⁹¹ May 29 Order, 139 FERC ¶ 61,161 at PP 183-188.

⁹² *Public Citizen*, 541 U.S. at 767 (citing *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).

⁹³ May 29 Order, 139 FERC ¶ 61,161 at PP 186-188.

⁹⁴ 884 F.2d 394, 400 (9th Cir. 1989).

83. Contrary to Sierra Club's claims, Marcellus Shale production activities are not links in the same chain that requires a more detailed cumulative impact analysis. As we explained in the May 29 Order, the Northeast Upgrade Project is designed as a high-pressure, high-capacity pipeline to transport natural gas in interstate commerce supporting Tennessee's entire system, not as a gathering system for shale gas produced in the region.⁹⁵ Development of natural gas resources in the Marcellus Shale region will continue even without the project and unregulated developers will continue to build new wells and gathering systems to serve the shale gas.

84. While NEPA requires reasonable forecasting it does not require an agency to "engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."⁹⁶ As we explained in the May 29 Order, the available maps do not provide the degree of specificity necessary for an in-depth review and meaningful analysis in the EA.⁹⁷ Knowing the location of a permitted, yet unconstructed, well does not mean that other specific factors are known such as the specific location of gathering lines, access roads, and other associated infrastructure and related facilities, information that is not provided in the maps cited by Sierra Club.⁹⁸ As we noted, Pennsylvania has issued thousands of well permits, and continues to do so, and it is unknown when, or even if, these wells will be drilled. Accordingly, we affirm our determination that a more in-depth analysis of potential impacts from Marcellus Shale development is not required.

85. The May 29 Order also addressed Sierra Club's assertion that we improperly deferred our NEPA responsibilities to other agencies.⁹⁹ For instance, we explained that the EA finds that based on the regulation of natural gas producers by Pennsylvania, the Susquehanna River Basin Commission, the Delaware River Basin Commission, and other federal agencies, cumulative impacts of the project will not be significant. The fact that we take these laws and measures into account in assessing the environmental impact of the project is not an abdication of our responsibility.

⁹⁵ May 29 Order, 139 FERC ¶ 61,161 at P 188.

⁹⁶ *N. Plains Res. Council v. Surface Trans. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (citation omitted).

⁹⁷ May 29 Order, 139 FERC ¶ 61,161 at P 190.

⁹⁸ We fail to see how the fact that Tennessee has had numerous requests from producers for interconnections to Tennessee's system provides the Commission with sufficient details regarding Marcellus Shale development to perform a more in-depth analysis.

⁹⁹ May 29 Order, 139 FERC ¶ 61,161 at P 199.

86. We also disagree with Sierra Club's assertion that our cumulative analysis was deficient because we failed to consider the scope of the project individually, or as an integrated whole with the 300 Line, NSD, and MPP projects. These three projects are also expansions of Tennessee's existing 300 Line System. Concerning the MPP Project, the certificate application was submitted in December 2011, after the NEPA evaluation was completed for the Northeast Upgrade Project; therefore, the potential impacts of the MPP Project were not known during environmental review of the subject project. The 300 Line Project has been in service since November 1, 2011 and restoration activities were also completed in 2012. The EA examines the other jurisdictional pipelines in the region and concludes that the impacts from some of these projects are too distant from the Northeast Upgrade Project (over 25 miles) to include in the cumulative impact analysis. In addition, the EA found that these projects would be constructed and maintained in accordance with our approved procedures which would, in effect, minimize these projects' contribution to cumulative impacts in the project area. The other FERC projects were examined within the context of the cumulative discussion, which concluded that the Northeast Upgrade Project, along with these other projects, would not result in any significant cumulative impacts. While the MPP Project was not specifically addressed in the EA, it is also located over 25 miles from the Northeast Upgrade Project and would also follow existing rights-of-way. Therefore, we do not believe the MPP Project would result in significant cumulative impacts when added to the effects of the other projects in the Northeast Upgrade Project area.

87. Sierra Club's contention that the EA is devoid of detailed information regarding long-term emissions of criteria pollutants, HAPs, and GHGs within the region is unavailing. The EA states that the project, the ongoing drilling activities of Marcellus Shale natural gas reserves, and other projects in the area would cumulatively generate air emissions.¹⁰⁰ However, the EA concludes that pipeline construction is intermittent and short-term, and many of the cumulative impacts would occur over a large geographical area with varying construction schedules, and therefore, they are not likely to significantly affect long-term air quality in the region. The EA also addresses air emissions related to operation of the project, ongoing drilling activities, and other projects in the area.¹⁰¹ The EA states that each of these projects would need to comply with federal, state and local air regulations and that drilling activities would result in increased long-term emissions of criteria pollutants, HAPs, and GHGs within the region. The EA concludes that the project's operating emissions would be mitigated by federal, state, and local permits and approvals and is not anticipated to contribute to the cumulative impact on regional air quality. Fugitive methane emissions are typically estimated as part of the operating emissions for projects that include compressor stations.

¹⁰⁰ *Id.* at 2-133.

¹⁰¹ *Id.*

The EA quantifies GHG emissions associated with compressor station construction and operation.¹⁰² Although the exact location, scale, and timing of future Marcellus shale facilities are unknown, and therefore a comprehensive analysis is not provided, the EA does recognize that Marcellus shale development, which includes well pad flaring, would result in long-term emissions of GHG in the project area.

7. Mitigation Measures

88. Sierra Club argues that the Commission erred in concluding that the mitigation measures proscribed in the EA, and incorporated in the May 29 Order will be fully complied with and will be sufficient to avoid significant adverse impacts.

89. Sierra Club contends that the Commission failed to consider Tennessee's record of false promises regarding environmentally damaging construction techniques for the 300 Line Project.¹⁰³ Specifically, Sierra Club asserts that Tennessee failed to follow through on a promise to minimize open-cut stream crossings on the 300 Line Project pointing out that Tennessee used a wet open-cut crossing method at the West Branch of the Lackawaxen in Pike County. On this basis, the Sierra Club contends that the ecosystem was impacted in ways that were not anticipated and thus not addressed in the EA. According to the Sierra Club, Tennessee makes the same promises here and suggests that similar likely impacts were not addressed in the EA for the Northeast Upgrade Project.

90. Sierra Club also faults the Commission for assuming that Tennessee will fully, adequately, and timely implement a series of mitigation measures to reduce a wide range of potential environmental degradation, from wetland habitat impacts, and restoration activities, to addressing landslide risks.¹⁰⁴ Sierra Club argues that Tennessee's record of non-compliance with environmental mitigation measures warrants stricter scrutiny in the form of an EIS rather than an EA to determine whether Tennessee's failure to comply with environmental laws and requirements increase the likelihood of significant environmental impacts. Sierra Club argues Tennessee's past compliance record on the 300 Line Project suggests a risk that in constructing the Northeast Upgrade Project Tennessee will violate the Clean Water Act, Federal Safe Drinking Water Act, and Pennsylvania Clean Streams Act, weighing in favor of an EIS based on Tennessee's reputation for non-compliance and accumulated violations based on failed environmental inspections. Specifically, Sierra Club states that it pointed to more than 45 violations of the Clean Streams Law in its comments on the EA, including 10 violations in Pike County, Pennsylvania and 15 violations in Wayne County, Pennsylvania. In addition,

¹⁰² *Id.* at 2-105.

¹⁰³ Sierra Club Rehearing Request at 52-53.

¹⁰⁴ *Id.* at 53-56.

Sierra Club states that in 28 out of 38 weekly summary reports for the environmental compliance monitoring program for the 300 Line Project, there was at least one recorded incident where construction activity was not in compliance with the project specifications, mitigation measures, and Commission-approved plans and there were 10 incidents where the summary reports stated that a follow-up report would be provided, but which never appeared online. According to Sierra Club all this information was before the Commission in this proceeding, but was not sufficiently addressed in the EA or the May 29 Order.

91. In addition, Sierra Club argues the Commission abrogated its NEPA responsibilities to ensure proper mitigation techniques are identified, established, and enforced. Sierra Club argues that the mitigation measures identified in the EA are not mitigation measures, but rather conditions for approval of the project, as listed in Appendix B of the May 29 Order, and a number of the conditions are the environmental and cultural studies that are normally performed during an EIS. Sierra Club argues this is tacit recognition by the Commission that Tennessee's design is not final, and that numerous permits and studies need to be completed before construction can begin. Therefore, Sierra Club maintains, the Commission should not have approved the project before it could demonstrate that Tennessee had secured the proper permits and that proper environmental mitigation had been agreed upon.

Commission Response

92. The Commission takes matters of non-compliance seriously but such matters must be addressed in the proper venue. The non-compliance issues that Sierra Club raises here involve completely different proceedings and are properly addressed in those proceedings, not here. Although, we note that the information supporting Tennessee's request to use a different crossing method at the West Branch of the Lackawaxen River was filed in the record and independently evaluated by the Commission prior to being approved by the Director of OEP. It is often the case during construction that circumstances may be encountered in the field that are slightly different from what was expected. For this reason, the environmental conditions in most Commission orders proscribe the criteria under which changes can be made.

93. We find that the conditions imposed in the May 29 Order, viewed as a whole, are sufficient to ensure Tennessee's compliance with the requirements of the Commission order. The EA discusses Tennessee's environmental inspection program, which will consist of trained individuals to ensure implementation of appropriate measures to minimize impacts and ensure compliance with federal, state, and local permit stipulations. In addition, Tennessee has agreed to fund a third-party environmental monitoring program that will include full-time personnel working under the direction of the Commission. Environmental Condition No. 7 requires that the applicant identify any area of non-compliance during construction in the weekly status reports, as well as the report filed after the in-service date of the facilities, so that we can take appropriate action. We will ensure that Tennessee is fulfilling its duties by conducting our own compliance

monitoring during construction, including regular field inspections. We impose sanctions and/or penalties for non-compliance on a case-by-case basis in order to tailor our remedies to the specific facts presented (e.g., degree of non-compliance and resulting impacts). If Tennessee fails to comply with the conditions of the order, it is subject to sanctions and the potential assessment of civil penalties.¹⁰⁵

94. The Environmental Conditions adopted in the May 29 Order are mandatory and enforceable. Sierra Club's suggestion that studies or mitigation measures would have been completed if an EIS had been prepared instead of an EA is without merit. The Commission typically authorizes natural gas projects pursuant to its NGA jurisdiction subject to conditions that must be satisfied by an applicant or others before the authorizations can be effectuated by constructing and operating the project, including projects where an EIS has been prepared,¹⁰⁶ and this approach has been sanctioned by the courts.¹⁰⁷

8. Evaluation of Project Alternatives

95. Sierra Club claims that the EA failed to adequately analyze and consider reasonable and viable project alternatives as required by NEPA.¹⁰⁸ Sierra Club argues that the Commission's decision to issue a finding of no significant impact based on the deficient EA violated NEPA by relying on inflated or unrealistic assessments of market demand for natural gas. Specifically, Sierra Club argues need for this project is dubious at best because there is an oversupply of natural gas with prices at historic lows, prompting project sponsors to propose the construction of LNG export terminals.

96. Sierra Club asserts that the Commission failed to analyze whether renewable energy sources or conservation measures would have adequately met whatever energy demands do exist. Sierra Club takes issue with the EA's definition of the purpose and need for the project "to expand the natural gas delivery capacity to the northeast U.S." and "meet market demand for new transportation services." Sierra Club asserts that by so narrowly defining the purpose and need for the project, the Commission precluded adequate analysis and consideration of other alternatives, thereby violating NEPA.

¹⁰⁵ See 15 U.S.C. § 717t-1(c) (2006).

¹⁰⁶ See, e.g., *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

¹⁰⁷ See *Robertson*, 490 U.S. at 352 (mitigation measures need not be laid out to the finest detail, even in an EIS).

¹⁰⁸ Sierra Club Rehearing Request at 57-59.

Commission Response

97. Sierra Club's assertions are without merit. Section 1.2 of the EA explains that Tennessee's stated purpose of the project is to expand the natural gas delivery capacity to the northeast region of the United States by up to 636,000 Dth per day. Section 3 of the EA sets forth the criteria that were employed for evaluating potential alternatives to the project proposed by Tennessee. These criteria include whether they were technically feasible and practical, offered significant environmental advantage over the proposed project, and met project objectives. The EA identified and evaluated alternatives to the project including No Action or Postponed Action Alternatives, system alternatives; and route alternatives and variations.

98. We disagree with Sierra Club's assertion that we narrowly defined the purpose and need for the project so as to preclude adequate analysis and consideration of other alternatives thereby violating NEPA. As explained in the EA, we adopted the applicant's objectives and goals for NEPA purposes. The courts have upheld federal agencies' use of applicants' identified objectives as the basis for evaluating alternatives.¹⁰⁹ This general principle, however, is subject to the admonition that the goals of a project may not be so narrowly defined as to preclude consideration of what may actually be reasonable choices.¹¹⁰ Thus, objectives must be reasonably identified and defined. Sierra Club provides no basis to support its contention that objectives were not reasonably identified or defined except to note that the EA did not examine renewable sources or conservation measures. We note that, since this issue was not raised in the environmental review process, we have had no previous opportunity to respond. In any event, we did not examine renewable sources or conservation measures because they did not meet the definition of reasonable alternatives (e.g., there is no indication that such alternatives would be feasible or practical within the time frame of the project).

99. Sierra Club's claim that the EA was deficient and violated NEPA by relying on inflated or unrealistic assessments of market demand for natural gas is equally unpersuasive. Tennessee has signed binding precedent agreements with two shippers for

¹⁰⁹ *City of Grapevine, Texas v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994).

¹¹⁰ *Simmons v. U.S. Army Corps. of Engineers*, 120 F.3d 664 (7th Cir. 1997); *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190 (D.C. Cir. 1991).

the full capacity of the project, demonstrating there is strong market demand for the project.¹¹¹

9. Whether the Northeast Upgrade Project Is Required by the Public Convenience and Necessity

100. Sierra Club argues the Commission erred in concluding that certification of the project is required by the public convenience and necessity.¹¹² Sierra Club asserts the Commission erred in determining that the project will not have significant environmental impacts and erred in failing to conduct an adequate analysis of the public need for the project. Therefore, Sierra Club argues that the Commission cannot show that the environmental impacts of the project are outweighed by Tennessee's purported demonstrated need and claimed benefits of the project.

101. We affirm our finding in the May 29 Order that authorizing the Northeast Upgrade Project is in the public convenience and necessity. As explained in the May 29 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of (1) the applicant's existing customers, (2) existing pipelines in the market and their captive customers, and (3) landowners and communities affected by the construction.

102. The May 29 Order concluded that the Northeast Upgrade Project would have no adverse economic impacts on either Tennessee's existing customers or on other existing pipelines or their captive customers. Further, the Commission found that Tennessee had taken steps to minimize any adverse economic impacts on landowners and surrounding communities by, among other things, proposing to locate the pipeline loop segments within or parallel to existing rights-of-way for approximately 84 percent of the length of the proposed segments.¹¹³ As noted in the May 29 Order, Tennessee has executed

¹¹¹ As discussed in our Certificate Policy Statement, service commitments for new capacity constitute "important evidence of demand for a project." Consequently, when "an applicant has entered into contracts or precedent agreements for the proposed capacity," we take this as "significant evidence of demand for the project." Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748.

¹¹² Sierra Club Rehearing Request at 59-60.

¹¹³ May 29 Order, 139 FERC ¶ 61,161 at P 16. One goal of the Certificate Policy Statement was to protect the interests of landowners whose land might be condemned for right-of-way under the eminent domain rights conferred by the Commission's certificates from unnecessary construction. *See* 88 FERC ¶ 61,227 at 61,737, 61,746, 61,748, and 61,749.

binding precedent agreements for firm service utilizing 100 percent of the design capacity of the Northeast Upgrade Project with initial terms of 20 years. Based upon the strong showing of public benefits (i.e., the creation of capacity to meet the firm contractual commitments of the project shippers) and the localized and relatively minimal, though not non-existent, impacts the project may have on the economic interests of landowners in the vicinity, the Commission found and continues to find that, on balance, pursuant to the criteria set forth in the Certificate Policy Statement, the Northeast Upgrade project will serve the public interest.

103. Moreover, after finding that the project will serve the public interest under the criteria of the Certificate Policy Statement, we turned to the completion of the analysis and consideration of the environmental impacts of the project pursuant to the requirements of the NEPA and found that record developed supported a finding that the project would have no significant impacts.

C. Mr. Feighner's Request for Rehearing and Stay

1. Routing of Loop 323

a. Background

104. As explained in the EA, Tennessee initially proposed to construct Loop 323 adjacent to its existing 24-inch-diameter pipeline across the Delaware Water Gap NRA. Tennessee's existing pipeline crosses the Delaware Water Gap NRA for 1 mile in Pike County, Pennsylvania and Sussex County, New Jersey, and was installed prior to the 1965 establishment of the Delaware Water Gap NRA.¹¹⁴ The National Park Service (NPS), which has statutory responsibility to preserve the Delaware Water Gap NRA, commented that any new right-of-way across the Delaware Water Gap NRA would have significant impacts on natural and cultural resources of the area and would require legislation by the U.S. Congress, which NPS would likely oppose. In response, Tennessee revised its original alignment and proposed to route Loop 323 around the northern end of the Delaware Water Gap NRA.

105. The EA analyzes two route alternatives that would cross the Delaware Water Gap NRA and finds that each of the alternatives would result in fewer environmental impacts than the proposed alignment in this area.¹¹⁵ However, the EA does not recommend either alternative because of a substantial land use conflict. The EA explains that the legislation that created Delaware Water Gap NRA precludes the NPS, which manages the Delaware Water Gap NRA, from approving any route across the Delaware Water Gap NRA

¹¹⁴ EA at 3-3 to 3-4.

¹¹⁵ *Id.* at 3-4 to 3-8.

without federal legislation allowing it to do so, and the NPS has stated its opposition to any routing across the Delaware Water Gap NRA. Therefore, if the Commission were to approve one of the alternatives crossing the Delaware Water Gap NRA, Tennessee would not, at least in a timely manner, be able to construct the project as approved.

Accordingly, the EA finds that neither alternative is reasonable or feasible. As a result, the EA concludes that while the alternative routes may be environmentally preferable, the proposed route for Loop 323, with the mitigation proposed by Tennessee and recommended by staff, is considered environmentally acceptable and would not result in significant impacts.

106. The May 29 Order also addressed an additional recommendation for an alternative that would replace the existing 24-inch-diameter pipeline with a new 36-inch-diameter pipeline for the stated purpose of obviating the need for Tennessee's proposed route outside of the Delaware Water Gap NRA.¹¹⁶ We noted that because of concerns with the Delaware River being designated as a National Scenic and Recreational River within the Delaware Water Gap NRA and the possible presence of the federally-listed endangered dwarf wedgemussel, this alternative would require an horizontal directional drill (HDD) to avoid impacts. An HDD at this river location would require workspace outside of Tennessee's existing easement on NPS property, which would still require congressional approval. In addition, we explained that Tennessee would be required to take its existing line out of service to install the new line within the same trench, and this would require Tennessee to stop service for an extended amount of time during construction, preventing it from fulfilling its existing contractual obligations during that time. Therefore, we considered this alternative infeasible due to the NPS opposition, the permitting conflicts within the Delaware Water Gap NRA, and contractual obligation conflicts for operation of Tennessee's existing pipeline.

b. Mr. Feighner's Rehearing Request

107. Mr. Feighner opposes the Commission's approval of Tennessee's proposed route of Loop 323, that deviates from the existing right-of-way to avoid the Delaware Water Gap NRA, in lieu of adopting an alternative route using the existing easement through the park. Mr. Feighner asserts that condemnation of private land on this record does not meet the standard of public convenience and necessity.

108. Mr. Feighner argues that it was error for the Commission to accept the NPS' determination that Tennessee could not use its existing easement through the park and across park service land. He cites extensively to state and federal law, including NPS'

¹¹⁶ May 29 Order, 139 FERC ¶ 61,161 at P 105.

authorizing legislation and “the Organic Act,”¹¹⁷ as support for his contention that the existing easement allows for construction of Loop 323 through the park. Mr. Feighner faults the Commission for not examining the specific provisions of Tennessee’s existing easements across the land that traverses the Delaware Water Gap NRA.

109. In addition, Mr. Feighner argues that Tennessee should have applied to the NPS or litigated the issue for the use of the easement rather than accede to the NPS’s opinion.¹¹⁸ Mr. Feighner submits that Tennessee should have also shown it tried to obtain legislation to expand its easement through the park. Mr. Feighner contends that hypothetical service interruptions, which he claims the Commission partially relied upon for its decision in the May 29 Order, are not sufficient grounds to abandon the alternative routes through the Delaware Water Gap NRA.

Commission Response

110. As discussed above, the Commission has found that the strong showing of public benefits associated with this project outweigh the localized and relatively minimal, adverse impacts the project may have on the economic interests of landowners in the vicinity.

111. In addition, the Commission has taken a hard look at the impacts of the project on environmental resources, and has analyzed reasonable alternatives to the proposal. However,

it is well settled that NEPA does not mandate that agencies reach particular substantive results. Instead, NEPA simply sets forth procedures that agencies must follow to determine what the environmental impacts of a proposed action are likely to be. If an agency adequately identifies and evaluates the adverse environmental effects of a proposed action, ‘the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.’¹¹⁹

¹¹⁷ Mr. Feighner cites to 16 U.S.C. 1 and “subsequent amendments” for the proposition that, among other things, the Organic Act “is a basis for the NPS to have the latitude to allow for access to pipeline easement areas in order to protect the environment.”

¹¹⁸ Mr. Feighner refers to a letter dated June 25, 2012, from the NPS to United States Senator Toomey, where he states “NPS acknowledged the existing easement rights and stated they would be available for appropriate use” and “NPS also state that improper denial of an application would be an unlawful taking.” Mr. Feighner’s Rehearing Request at 13 (citing June 25 letter attached as Exhibit H to his rehearing request).

¹¹⁹ *KN Wattenberg Transmission Limited Liability Co.*, 90 FERC ¶ 61,322, at

112. In this proceeding, we approved the proposed route of Loop 323 finding that it did not result in significant impacts. We did so after considering three alternatives to the proposed route of Loop 323, two in the EA and one in the May 29 Order. While we recognized that the two alternative routes considered in the EA would result in less environmental impact, we found that they were not reasonable or practical because of the land use conflict raised by the NPS. We also found that the alternative to replace the existing 24-inch-diameter pipeline with a larger diameter pipe would similarly require a new easement in the park and additionally would require that Tennessee curtail service.¹²⁰ We disagree with Mr. Feighner's contention that our findings in the EA and the May 29 Order regarding the feasibility or reasonableness of the route alternatives were not supported.

113. We do not agree with Mr. Feighner's assertion that our finding that the alternative routes were not feasible unreasonably relied on the position taken by the NPS. The NPS is the federal agency that has jurisdiction and management authority over the Delaware Water Gap NRA and their position on this matter was given appropriate weight. We note that the NPS has not filed any pleadings in this proceeding to indicate that their position on this matter has changed.¹²¹ As we explained in the EA, given the uncertainty of obtaining favorable legislation, as well as the timing of any such legislation or action, approving one of the alternative routes and requiring Tennessee to pursue Congressional authorization would likely result in the project not getting built in time to meet the demand evidenced by the precedent agreements. We find that this result is not in the public interest. This reasoning holds true regarding Mr. Feighner's position that Tennessee be required to file an easement application. Finally, we did not examine or interpret the existing easement in question because we have no jurisdiction to do so.

114. While Mr. Feighner's property and that of other landowners will be impacted by construction of Loop 323 as approved in the May 29 Order, Tennessee's construction plans would minimize impacts on these resources including those specific to Mr. Feighner's property. As we explained in the May 29 Order, Tennessee would be required to complete all remaining surveys, conduct any necessary agency consultations, and

62,083 (2000) (citing and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)).

¹²⁰ This route alternative was found not to be reasonable or feasible because it would require a new easement in the park, in addition to requiring Tennessee to take its existing line out of service for some time period. Under this alternative, we believe that service interruptions would be real, not hypothetical as Mr. Feighner contends.

¹²¹ We do not view the June 25, 2012 letter from the NPS to United States Senator Toomey as indicating a change of position on this matter.

implement measures to address issues identified by the surveys.¹²² We believe that this process, coupled with the construction and restoration measures described in the EA and input from Mr. Feighner and other landowners, will minimize effects on property impacted by the project to the greatest extent practicable. The loss of some mature trees may be unavoidable; however, Tennessee will compensate landowners for damages and the temporary and permanent easement on their land.

c. **Mr. Feighner's Request for a Stay**

115. Mr. Feighner requests a stay of the proceeding in order to provide time to properly analyze the easement issue.

116. We deny Mr. Feighner's request. As explained above, the Commission's standard for granting a stay is whether justice so requires.¹²³ The most important element of the stay standard is a showing that the movant will be irreparably injured without a stay. Mr. Feighner makes no attempt to argue that it meets this standard. Moreover, as described above, the Commission has found that the approved route for Loop 323 would result in no significant impacts and Tennessee is required to compensate landowners for damages and the temporary and permanent easement on their land.

The Commission orders:

(A) The requests for rehearing and/or clarification are granted, in part, and denied, in part, as discussed in the body of this order.

(B) The requests for stay of the May 29 Order and construction activities are denied, as discussed in the body of this order.

(C) Mr. Feighner's and Tennessee's answers to the requests for rehearing are dismissed and Mr. Feighner's and Tennessee's subsequent responses are dismissed as moot.

(D) The late motions to intervene filed after the issuance of the May 29 Order are denied. The requests for rehearing filed by non-parties are dismissed.

¹²² May 29 Order, 139 FERC ¶ 61,161 at P 58.

¹²³ 5 U.S.C. § 705 (2006); *Duke Energy Carolinas*, 124 FERC ¶ 61,254, at P 8 (2008). Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest. *Pub. Util. Dist. No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

(E) Ordering Paragraph (C) of the May 29 Order is amended to read as follows:

(C) Tennessee shall complete the construction of the facilities and make them available for service by November 1, 2013, pursuant to section 157.20(b) of the Commission's regulations.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A

Motions to Intervene Out of Time Filed After May 29, 2012

Eileen Ahearn
Oscar J. Alvarado
Richard E. Buckley
Susan Carroll
Crawford Hills Community Association
Twila L. Decker
Jolie DeFeis
Susana and Bertrand Delanney
Judith Falk
Robert Fean
Kari Goginsky
Natalie Green
Mark Heiblim
Rebecca R. Hoffman
Nora T. Hoffman
Sharon Kinard
Gregg N. Kirsopp
Linda C. Klee
Daniel E. Lawson
Julius Litman
Tim Lovely
Patricia Melzer
Marie More
Rita Pecoriello
Pike County Commissioners, PA
Kenneth Rosanelli
Jade Ruben
Carlos F. Torres
Michael Trenner
Walter Van Beers
Steven Vitale
Westfall Township
Kathleen C. Wieboldt
Debra Wildick
Sharon T. Woll
Marlene D. Zimmerman