

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

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

Northwest Pipeline, GP

Docket No. CP12-471-001

ORDER DENYING CLARIFICATION AND REHEARING

(Issued October 3, 2013)

1. On May 10, 2013, the Director, Division of Pipeline Certificates, issued pursuant to delegated authority a certificate of public convenience and necessity to Northwest Pipeline, GP (Northwest) authorizing the South Seattle Delivery Lateral Expansion Project (South Seattle Expansion Project) in King County, Washington.¹ The May 10 Order, under sections 7(b) and (c) of the Natural Gas Act (NGA),² authorized Northwest to: (1) abandon and replace certain pipeline on the South Seattle Delivery Lateral (South Seattle Lateral); (2) replace taps at two meter station locations; and (3) install miscellaneous appurtenances. The project will enable Northwest to provide approximately 74,850 Dth per day of new incremental transportation service to Puget Sound Energy Inc. (Puget Sound).

2. On June 7, 2013, Northwest filed a timely request for clarification or, in the alternative, rehearing of the May 10 Order's requirement that Northwest must file a tariff record setting forth its incremental facilities charge for the costs of the South Seattle Expansion Project. On June 10, 2013, the State of Washington, Department of Ecology (Ecology) filed a timely request for rehearing challenging the May 10 Order's compliance with the Clean Water Act (CWA) and the Coastal Zone Management Act (CZMA).

3. As discussed below, the Commission denies Northwest's request for clarification and its alternative request for rehearing and denies Ecology's request for rehearing.

¹ *Northwest Pipeline, GP*, 143 FERC ¶ 62,106 (2013) (May 10 Order).

² 15 U.S.C. § 717f(b) and (c) (2012).

I. The May 10 Order

4. The May 10 Order approved Northwest's request for authority to: (1) abandon by removal 3.85 miles of existing 10-inch diameter pipeline on the South Seattle Lateral and replace it with 16-inch diameter pipeline; (2) abandon in place approximately 0.15 miles of existing 10-inch and 16-inch diameter pipeline under the Cedar River and install approximately 0.15 miles of new 16-inch diameter pipeline adjacent to the existing pipeline; (3) replace taps at two meter station locations; and (4) and install miscellaneous appurtenances. Northwest estimated a total cost for the proposed project of \$13,597,409 and asserted that these modifications would enable it to provide approximately 74,850 dekatherms per day of incremental service to Puget Sound on the South Seattle Lateral. According to the terms of the Facilities Agreement between Puget Sound and Northwest, Puget Sound would reimburse Northwest for all of the costs of constructing and operating the proposed expansion, (except for the cost of a pig launcher needed for pipeline integrity inspection purposes) through its payment of a Facilities Charge.

5. The May 10 Order approved Northwest's plan to recover the costs associated with the South Seattle Expansion Project from Puget Sound. The order determined that the proposed Facilities Charge was consistent with section 21 of the General Terms and Conditions (GT&C) of Northwest's tariff, which provides that the party requesting new interconnected facilities, such as the South Seattle Expansion Project, must pay Northwest an incremental Facilities Charge to recover all applicable costs over an agreed-upon term. The order required Northwest to file a tariff record setting forth the Facilities Charge and to update that tariff record when the charge is annually revised.

6. The May 10 Order's authorization of Northwest's South Seattle Expansion Project was subject to 14 environmental conditions. One of these, Environmental Condition No. 8, specified that Northwest may not commence construction of the project until it files documentation evidencing that it received all applicable authorizations required under federal law.³

II. Northwest's Request for Clarification/Rehearing

7. Northwest seeks clarification or, in the alternative, rehearing as to whether it must file a tariff record setting forth its incremental Facilities Charge for the costs of the South Seattle Expansion Project. Northwest argues that this tariff filing requirement is not necessary because, it states: (1) its incremental Facilities Charges, as provided for in section 21 of its GT&C, are included and explained in Exhibit C of its transportation service agreements with its shippers; (2) it provides affected shippers with the right to audit its accounting records and work papers documenting the annual calculation of the

³ May 10 Order, Appendix, Environmental Condition No. 8.

Facilities Charge; and (3) it publishes the component costs of the Facilities Charge annually on its Form 2.

Commission Response

8. Section 4(c) of the NGA states that “every natural-gas company shall file with the Commission . . . schedules showing *all rates and charges* for any transportation or sale subject to the jurisdiction of the Commission.”⁴ Therefore, because Northwest’s Facilities Charge is the Commission-approved incremental rate for jurisdictional transportation service, that charge must be on file with the Commission. While, as Northwest describes, the initially applicable Facilities Charge will be set forth in Exhibit C of its transportation service agreement with Puget Sound, Northwest’s agreement with Puget Sound calls for the charge to be updated annually in reflection of actual costs.⁵ Therefore, the Facilities Charge on file with Commission must also be updated annually. Accordingly, we deny Northwest’s request for clarification and its alternative request of rehearing and affirm the requirement that Northwest must file a tariff record setting forth the initial incremental Facilities Charge at least 30 days and not more than 60 days prior to the date the South Seattle Delivery Lateral expansion capacity is placed in service, and file updates tariff records annually to reflect the changed rate charged to its customer.

III. Ecology’s Request for Rehearing

A. Ecology’s Argument

9. Ecology contends the Commission violated the CWA by issuing the May 10 Order before Northwest received a section 401 certificate.⁶ This section of the CWA provides that “[n]o license or permit shall be granted until the certification required by this section has been obtained or has been waived”⁷ Ecology states that this provision is unambiguous on its face and bars the Commission from taking any action until after the

⁴ 15 U.S.C. § 717c (2012) (emphasis added).

⁵ See May 10 Order at n.6.

⁶ On June 8, 2012, Northwest filed a Joint Aquatic Resource Permit Application (JARPA) with Ecology for a CWA section 401 water quality certificate. On June 13, 2013, in an effort to expedite approval of the project, Northwest withdrew and re-filed its JARPA with Ecology without the inclusion of the Cedar River crossing. Subsequently, on July 9, 2013, Ecology certified that Northwest’s revised project complies with the applicable provisions of the CWA. In its certification, Ecology stated that Northwest must submit a separate JARPA for the Cedar River crossing.

⁷ 33 U.S.C. § 1341(a)(1).

state issues a section 401 certificate. Ecology, citing *City of Tacoma, Washington v. FERC*,⁸ avers that the Commission has an obligation to determine that a section 401 certificate has been obtained and without such a certificate, the Commission lacks authority to issue authorization. Ecology further asserts that the Commission's issuance of the May 10 Order before Northwest's receipt of a section 401 certificate was contrary to Commission precedent.⁹

10. Ecology next argues that the CZMA includes a similar restriction on the Commission's authority to issue a certificate of public convenience and necessity until the applicant has obtained a consistency concurrence from Ecology.¹⁰ The CZMA applies when "any applicant" seeks "a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water or use or natural resource of the coastal zone of [a] state."¹¹ Under the CZMA, the applicant must provide the state permitting agency certification that the proposed activity complies with the state's approved program and that such activity will be conducted in a manner consistent with the program. The state then notifies the federal agency whether it concurs or objects to the applicant's certification. The CZMA further states that "[n]o license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification"¹²

11. Ecology also argues that our issuance of the May 10 Order creates confusion and potential conflict because, for example, Ecology's 401 certificate for the project may contain conditions that conflict with the conditions contained in the May 10 Order, calling into question the continued validity of the Commission's original authorization.

12. Finally, Ecology notes that the Commission has stated that its reason for issuing certificates conditioned on the applicant's compliance with Federal laws such as the

⁸ 460 F.3d 53 (D.C. Cir. 2006).

⁹ Ecology cites *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 (2004).

¹⁰ On November 6, 2012, Northwest submitted a request to Ecology for a certificate of consistency with the Washington State Coastal Zone Management Program, the state program that implements the CZMA. After its submittal, and as stated in n.6 above, Northwest revised its JARPA and removed the Cedar River crossing from its requested approval. On July 9, 2013, Ecology issued a coastal zone consistency determination for the revised application and stated that Northwest is required to submit a separate CZMA consistency determination for the Cedar River crossing.

¹¹ 16 U.S.C. §1456(c)(3)(A).

¹² *Id.*

CWA and CZMA was its desire to issue timely decisions and avoid unduly delaying projects.¹³ Ecology argues that the Commission's concerns of preventing undue delay do not justify issuing such conditioned certificates because pipelines cannot construct their projects until they receive the missing federal authorizations.

B. Commission Response

13. Although we have found that the South Seattle Expansion Project is consistent with the public interest under the NGA, we recognize that the project cannot proceed until it receives all other necessary federal authorizations, including those delegated to the states. As Ecology has noted, these include relevant authorizations under the CWA and CZMA. The Commission's practice has been to issue certificates for natural gas pipelines pursuant to its NGA authority after it has completed its review.¹⁴ Accordingly, as permitted by NGA section 7(e),¹⁵ the Commission typically authorizes natural gas projects pursuant to its NGA jurisdiction subject to conditions that must be satisfied by an applicant before commencing construction or operation of the project.¹⁶ As is the case with virtually every order issued by the Commission that authorizes construction of natural gas facilities, the approval in this proceeding is subject to Northwest's compliance with the environmental and other conditions set forth in the order.

14. As an initial matter, we find that Ecology's arguments are for the most part moot. Ecology has issued a water quality certificate and a determination of consistency with the state's CZMA program for the entire South Seattle Expansion Project, with the exception of the Cedar River crossing. Accordingly, Ecology's arguments are purely academic except with respect to that crossing, which Ecology does not address separately.

¹³ Citing *Bradwood Landing, LLC*, 126 FERC ¶ 61,035 (2009), *vacating order, Oregon v. FERC*, 636 F.3d 1203 (9th Cir. 2011).

¹⁴ *See, e.g., Crown Landing LLC*, 117 FERC ¶ 61,209, at P 26 (2006); *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 108-15 (2006); *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 41-44 (2003); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at PP 225-31 (2002).

¹⁵ Section 7(e) of the NGA grants the Commission the "power to attach to the issuance of the certificate and to the exercise of rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717(f)(e) (2012).

¹⁶ *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003) (citations omitted), *aff'd sub nom., Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

15. In any event, we disagree that our order was inconsistent with the CWA and the CZMA. As required by Environmental Conditional No. 8 in the Appendix to the May 10 Order, Northwest must receive the necessary state approvals under these federal statutes prior to construction. Because construction cannot commence before all necessary authorizations are obtained, there can be no impact on the environment until there has been full compliance with all relevant federal laws.

16. As we have stated before, the Commission's approach is a practical response to the reality that, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a natural gas project in advance of the Commission's issuance of its certificate without unduly delaying the project.¹⁷ To rule otherwise could place the Commission's administrative process indefinitely on hold until states with delegated federal authority choose to act. Such an approach, which would preclude companies from engaging in what are sometimes lengthy pre-construction activities while awaiting state or federal agency action, would likely delay the in-service date of natural gas infrastructure projects to the detriment of consumers and the public in general.

17. In fact, as explained above, the challenges Northwest has encountered with obtaining these authorizations required Northwest to resubmit both its applications for a CWA section 401 certificate and a CZMA consistency determination without the Cedar River crossing portion of its proposal and to separately seek authorization from the state for its crossing of the Cedar River. To date, Ecology has approved the proposal absent the Cedar River crossing, but has yet to approve the river crossing portion of the proposal. Thus, contrary to Ecology's assertion, our concerns related to preventing delay are not misplaced.

18. Our policy is supported by *Public Utility Commission of the State of California v. FERC*,¹⁸ where the court affirmed the Commission's determination that, contingent upon the completion of its environmental review, there were no non-environmental bars to construction of a proposed pipeline,¹⁹ noting that the "Commission's non-environmental approval was expressly not to be effective until the environmental hearing was completed[.]" and that an agency can make "even a final decision so long as it assessed the environmental data before the decision's effective date."²⁰ Further, in *Delaware*

¹⁷ See, e.g., *Crown Landing LLC*, 117 FERC 61,209, at P 26 (2006); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at PP 225-31 (2002).

¹⁸ 900 F.2d 269 (D.C. Cir. 1990).

¹⁹ See *Ruby Pipeline, L.L.C.*, 133 FERC ¶ 61,015, at P 17 (2010).

²⁰ 900 F.2d at 282.

Department of Natural Resources and Environmental Control v. FERC,²¹ the court dismissed for lack of standing Delaware’s appeal of Commission orders authorizing a liquefied natural gas terminal on the Delaware River conditioned on the favorable outcome of Delaware’s environmental reviews under the CZMA and the Clean Air Act. The court stated that it was “unable to see how [the Commission’s] allegedly illegal procedure causes Delaware any injury in light of [the Commission’s] acknowledgment of Delaware’s power to block the project”²²

19. In *City of Grapevine, Texas v. Department of Transportation*,²³ the court upheld the Federal Aviation Administration’s (FAA) approval of a runway, conditioned upon the applicant’s compliance with the National Historic Preservation Act (NHPA). As we noted in *Georgia Strait Crossing Pipeline LP*, the NHPA is analogous to the CWA and the CZMA because section 106 of the NHPA states that the head of a federal agency “shall” take into account the effect of an undertaking on historic properties “prior to the approval of the expenditure of any Federal funds on the undertaking” or prior to the issuance of any license.²⁴ Thus, the Commission explained, “this language expressly prohibits a federal agency from acting prior to compliance with its terms, a fact that did not deter the *City of Grapevine* court from upholding the FAA’s conditional approval of a runway.”²⁵

20. The court’s holding in *State of Idaho v. Interstate Commerce Commission*²⁶ also supports the issuance of the conditioned authorization in this proceeding. In that case, the court reviewed the Interstate Commerce Commission’s (ICC) issuance of conditional authorization for a railroad to abandon and salvage a stretch of track, but only after it had completed necessary consultations and received required federal authorizations, including compliance with the Endangered Species Act. The court stated that it is “important to note that the [ICC] has still not given final approval to salvage operations; it has merely set forth the conditions under which [the railroad] may undertake them if it chooses to do so.”²⁷ The court quoted a statement from counsel for the ICC at oral argument that the

²¹ 558 F.3d 575 (2009).

²² *Id.* at 578.

²³ 17 F.3d 1502, 1509 (D.C. Cir. 1994) (*City of Grapevine*).

²⁴ *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053 (2004) at P 16.

²⁵ *Id.*

²⁶ 35 F.3d 585 (D.C. Cir. 1994).

²⁷ *Id.* at 595.

ICC's interpretation of its authorization was that the railroad had to prepare a biological assessment, followed by the U.S. Fish and Wildlife Service's issuance of a biological opinion, at which point the railroad would come back before the ICC, which would then decide what to do, based on the findings of the biological assessment and the biological opinion.²⁸

21. Ecology's citation to *City of Tacoma, Washington v. FERC*²⁹ is unpersuasive. Ecology cites this case for the proposition that the Commission lacks authority to issue a license without a CWA section 401 certification, and, by analogy, lacks authority to issue a natural gas certificate without a CWA section 401 certification. However, the court in *City of Tacoma* did not hold that the Commission's issuance of a conditional license or certificate violates the terms of the CWA. Rather, the court found that where a state's notice procedures under section 401 of the CWA have been called into question, the Commission has a responsibility to verify compliance with state notice procedures before it issues a non-conditional license.³⁰

22. Ecology incorrectly asserts that the Commission may not issue hydropower project licenses before the finalization of all state and federal authorizations. In *Finavera Renewables Ocean Energy, Ltd.*,³¹ the Commission, in upholding its issuance of a conditional license for an offshore hydrokinetic project, confirmed that conditional licenses do not violate the CWA or the CZMA because they do not authorize on-site construction or installation until all such federal authorizations are obtained by the applicant.³²

23. Although the Commission may to date have elected to generally follow a policy of not issuing hydropower licenses before receiving all authorizations under federal law while generally doing the opposite with respect to natural gas project authorizations, there are sound reasons for such a distinction. Water-related issues are in many cases highly significant in hydropower proceedings, while they are often less so in natural gas matters. Accordingly, we have elected to issue gas project authorizations while awaiting final action by other agencies, because our experience is that such authorizations will not

²⁸ *Id.* at 598.

²⁹ 460 F.3d 53 (D.C. Cir. 2006).

³⁰ *Id.* at 68 (“[W]here public notice has been called into question, we think FERC has a role to play in verifying compliance with state public notice procedures at least to the extent of obtaining an assertion of compliance from the relevant state agency.”).

³¹ 122 FERC ¶ 61,248 (2008).

³² *Id.* PP 10-18.

conflict with or require substantial changes to our orders. For hydropower projects, however, these actions by other agencies may go to critical issues, such as minimum flow releases, and we have accordingly found it prudent to delay the issuance of licenses until these issues are resolved.³³ It is also the case that to this point a substantial number of hydropower cases have involved the relicensing of existing projects, so that a delay in order issuance has not precluded the continued generation of power. Most gas cases, however, involve the construction of new facilities, the absence of which could result in the lack of ability to deliver necessary natural gas volumes where and when they are needed, thus calling for Commission action while awaiting final action by other entities.

24. In regard to Ecology's argument that our issuance of the May 10 Order creates confusion and potential conflict because the project may need to be revised after it has received a certificate of public convenience and necessity but before it has received other required federal and state authorizations, the practical reality of most natural gas projects, such as the one here, is that they take considerable time and effort to develop. Perhaps more importantly, their development is subject to many significant variables whose outcomes cannot be predetermined. The natural consequence of these variables is that some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality. If every aspect of the project were required to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project.

25. While we have identified the majority of impacts for Northwest's proposed project and described and analyzed general mitigation measures, additional post-authorization plans, studies, and conditions will serve to refine the mitigation to address site-specific circumstances prior to construction. It is typical that applicants file data after the Commission issues an order; these filings are made in the public record for the proceeding and therefore can be publicly reviewed. This process is transparent, and Ecology retains full authority to grant or deny the specific requests under the CWA and the CZMA.

³³ See, e.g., *Puget Sound Energy, Inc.*, 107 FERC ¶ 61,331 (2004), cited by Ecology. In *Puget Sound*, the Commission issued a license for a hydroelectric project rather than a natural gas pipeline project and incorporated the section 401 water quality certificate issued by Ecology to Puget Sound into Puget Sound's license. However, Commission policies developed in regard to hydroelectric licenses are not necessarily applicable to natural gas certificate proceedings. See *California Trout v. FERC*, 572 F.3d 1003, 1023-24 (9th Cir. 2009) (stating that natural gas projects may involve special circumstances distinguishing such projects from hydroelectric projects).

26. For these reasons, Ecology's request for rehearing is denied.

The Commission orders:

(A) The request for clarification or, in the alternative, rehearing filed by Northwest Pipeline, GP is denied, as discussed in this order.

(B) The request for rehearing filed by the State of Washington, Department of Ecology is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.