

170 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

PennEast Pipeline Company, LLC

Docket No. CP15-558-000

ORDER GRANTING REQUEST FOR EXTENSION OF TIME

(Issued February 20, 2020)

1. On January 19, 2018, the Commission issued an order authorizing PennEast Pipeline Company, LLC (PennEast) to construct and operate the PennEast Project, a new natural gas pipeline system extending from Luzerne County, Pennsylvania, to Mercer County, New Jersey.¹ The Certificate Order required that PennEast construct the project and make it available for service within two years of the date of the Certificate Order.² On December 30, 2019, PennEast filed a request to extend the deadline to complete construction and make the project available for service by two years, to January 19, 2022. For the reasons discussed below, we grant the requested extension.

I. Background

2. The PennEast Project consists of: (1) a new, 116-mile-long mainline natural gas transmission pipeline originating in Luzerne County, Pennsylvania, and extending to Mercer County, New Jersey; (2) three pipeline laterals; (3) a new compressor station; and (4) other appurtenant facilities.³ The Certificate Order required that PennEast complete the construction of the authorized facilities and make them available for service within

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Certificate Order), *order on reh'g*, 164 FERC ¶ 61,098 (2018) (Rehearing Order).

² Certificate Order, 162 FERC ¶ 61,053 at ordering para. (B)(1).

³ On January 30, 2020, PennEast filed an application to amend its certificate to construct the PennEast Project in two phases; phase one would include project facilities from its origination in Luzerne County, Pennsylvania through milepost (mp) 68 in Northampton County, Pennsylvania; phase two would include project facilities from mp 68 to the project's terminus in Mercer County, New Jersey. *See* PennEast's January 30, 2020 Amendment Application in Docket No. CP20-47-000. PennEast's phasing amendment is pending before the Commission.

two years.⁴ The Certificate Order also required PennEast to obtain “all applicable authorizations required under federal law (or evidence of waiver thereof)” prior to commencing construction.⁵

3. On December 30, 2019, PennEast requested a two-year extension of the Certificate Order’s deadline to complete construction, to January 19, 2022, because PennEast has not been able to secure all approvals and permits necessary to enable PennEast to commence construction of the project.⁶ With respect to portions of the project in Pennsylvania, PennEast states that its proposed Amendment Project⁷ necessitated amendments to its approvals and permits, including additional consultation under the National Historic Preservation Act, as well as new permits under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act, and that PennEast has yet to receive these approvals and permits.⁸

4. For portions of the project in New Jersey, PennEast states that it has not yet completed National Historic Preservation Act consultation with the New Jersey State Historic Preservation Office or received its Clean Water Act section 404 permit from the New Jersey Department of Environmental Protection (New Jersey DEP).⁹ PennEast further notes that the United States Court of Appeals for the Third Circuit (Third Circuit) issued a ruling¹⁰ which held that PennEast cannot exercise eminent domain on lands over which a state (in this case, New Jersey) holds an interest.¹¹ PennEast comments that while it will file a Petition for a Writ of Certiorari with the United States Supreme Court

⁴ *Id.*

⁵ *Id.* at Appendix A, envtl. condition 10.

⁶ PennEast’s December 30, 2019 Request for Extension of Time at 1-2.

⁷ On February 1, 2019, PennEast filed an application to amend its certificate to include several route realignments and workspace modifications to address landowner requests and constructability concerns. *See* PennEast’s February 1, 2019 Amendment Application in Docket No. CP19-78-000. The Amendment Project is pending before the Commission.

⁸ PennEast’s December 30, 2019 Request for Extension of Time at 1-2.

⁹ *Id.*

¹⁰ *In re: PennEast Pipeline Co., LLC*, 938 F.3d 96 (3d Cir. 2019) (*In re: PennEast*).

¹¹ PennEast’s December 30, 2019 Request for Extension of Time at 2.

to review the Third Circuit's opinion, for now, the New Jersey DEP will not consider PennEast's Clean Water Act section 404 Freshwater Wetlands permit application "administratively complete" as a result of the Third Circuit's opinion.¹² For the aforementioned reasons, PennEast asserts that despite its best efforts and continued commitment to constructing the project, it has been unable to commence construction, and good cause exists for an extension of time to construct the project and place it into service.

5. The Commission received comments in opposition to PennEast's request from numerous individuals and landowners, the New Jersey Conservation Foundation (Conservation Foundation),¹³ the Sourland Conservancy (Sourland), Delaware Riverkeeper Network (Riverkeeper), the Lower Delaware Wild & Scenic River Management Council (Lower Delaware), Sierra Club – New Jersey Chapter (Sierra Club), and the Washington Crossing Audubon Society (Audubon Society). In opposing PennEast's request, commenters generally argue that: (1) good cause does not exist to grant the requested extension of time and (2) the Commission should require PennEast to re-apply for a certificate of public convenience and necessity for the project.

II. Discussion

A. Good Cause for Issuing the Extension

6. Commenters argue that PennEast's request for an extension of time does not demonstrate that good cause exists to grant such an extension.¹⁴ Commenters assert that PennEast failed to make "good faith efforts" to meet the deadline in the Certificate Order.¹⁵ Commenters further contend that PennEast knew for some time it would not be able to meet the deadline, yet waited until the "eleventh hour" to request an extension.¹⁶

¹² *Id.*

¹³ Conservation Foundation's January 6, 2020 filing was on behalf of The Watershed Institute and Riverkeeper; however, on January 9, 2020, Riverkeeper filed comments in addition to Conservation Foundation's.

¹⁴ *See, e.g.*, Conservation Foundation Comments at 1-2; Riverkeeper Comments at 1; Sierra Club Comment 1 at 1; Sourland Comments at 1; Audubon Society Comments at 1.

¹⁵ *See, e.g.*, Conservation Foundation Comments at 2, Sierra Club Comment 1 at 1.

¹⁶ *See, e.g.*, Conservation Foundation Comments at 1-2; Riverkeeper Comments at 1; Sierra Club Comment 2 at 1; Sourland Comments at 1; Audubon Society Comments at 1.

In addition, Audubon Society states that as a result of the Third Circuit's opinion in *In re: PennEast*, regardless of whether or not the deadline is extended, PennEast would not be able to acquire state property along the certificated route via eminent domain, and that as a result, PennEast's request should be denied.¹⁷

7. As the Commission has explained, "good cause" can be shown by a project sponsor demonstrating that it made good faith efforts to meet its deadline but encountered unforeseeable circumstances.¹⁸ The Commission has previously found that providing more time for a project applicant to obtain necessary permits can be an appropriate basis for granting an extension of time.¹⁹ The Commission has also found that a certificate holder is free to decide how to satisfy the Certificate Order's prerequisites for construction.²⁰

8. We find that PennEast has demonstrated good cause exists to grant the two-year extension. PennEast has not yet received the federal permits it must obtain before Commission staff may authorize it to commence construction of the project in either Pennsylvania or New Jersey. In Pennsylvania, as a result of the Amendment Project, PennEast is still in the process of obtaining permits pursuant to the National Historic Preservation Act, and is working with the U.S. Army Corps of Engineers to obtain Clean Water Act section 404 and Rivers and Harbors Act section 10 permits.²¹ With respect to the permitting delays caused by PennEast's proposing the Amendment Project, we encourage certificate holders and stakeholders to work together to resolve concerns

¹⁷ Audubon Society Comments at 1.

¹⁸ See, e.g., *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 11 (2012) (denying request for extension of time).

¹⁹ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (granting a two-year extension of time to accommodate the project applicant's ongoing efforts to obtain a permit from the New York State Department of Environmental Conservation). See also *Perryville Gas Storage LLC*, Docket No. CP09-418-000, et al. (Oct. 12, 2016) (delegated order) (granting two-year extension of time to complete construction to accommodate delays in obtaining a permit from the Louisiana Department of Natural Resources); *Columbia Gas Transmission, LLC*, Docket No. CP13-8-000 (Sept. 30, 2015) (delegated order) (granting pipeline project two-year extension of time to complete construction due to delays in obtaining waterbody crossing permits); *Bobcat Gas Storage*, Docket No. CP09-19-000 et al. (Mar. 25, 2015) (delegated order) (granting a two-year extension of time because applicant had not yet obtained required permit from a state agency).

²⁰ *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 14 (2018).

²¹ PennEast's December 30, 2019 Request for Extension of Time at 1-2.

regarding the construction of pipelines, and thus, generally consider delays in construction that may occur as a result of such coordination good cause for granting an extension of time to commence and complete construction.

9. Similarly, in New Jersey, PennEast has been unable to obtain a Clean Water Act section 404 Freshwater Wetlands permit from New Jersey DEP and is still in the process of consulting with the New Jersey State Historic Preservation Office under section 106 of the National Historic Preservation Act.²² Further, as PennEast states, New Jersey DEP found that “PennEast’s application cannot be ‘administratively complete’” as a result of the Third Circuit’s decision in *In re: PennEast*.²³ However, PennEast states that it intends to file a Writ of Certiorari with the United States Supreme Court to review the Third Circuit’s decision and thus will continue to attempt to obtain the permit from New Jersey DEP.²⁴ The record demonstrates that despite PennEast’s efforts, it has been unable to obtain permits necessary to enable it to commence and complete construction of the New Jersey portion of the project by the deadline set forth in the Certificate Order.

10. We disagree with Conservation Foundation’s assertion that this proceeding is distinguishable from the proceeding in *Constitution Pipeline Company, LLC*,²⁵ because in *Constitution* the project sponsor had appealed the state’s denial of its Clean Water Act section 401 permit application, and here, PennEast has not done so. Here, as there, the company’s tactical choices on how to satisfy the Certificate Order’s prerequisites for construction are informed by its assessment of the relative probabilities of timely success. That PennEast will file a new application with New Jersey DEP rather than appeal a denial does not show bad faith on behalf of PennEast. Further, as discussed above, obtaining a Clean Water Act section 401 permit from New Jersey DEP is not the only federal permit or approval preventing PennEast from commencing construction.

11. Nor does the timing of PennEast’s extension of time request demonstrate bad faith on behalf of PennEast. PennEast filed its request on December 30, 2019, several weeks in advance of the January 19, 2020 deadline established by the Certificate Order. We note that requests for extensions of time are not required to be filed any set period of time before expiration of the construction deadline set forth in the Certificate Order. Therefore, commenter’s assertions that we should reject PennEast’s request because it

²² *Id.* at 2.

²³ *Id.*

²⁴ *Id.*

²⁵ 157 FERC ¶ 61,145 (2016) (*Constitution*).

was submitted at the “eleventh hour”²⁶ are without merit. The original deadline for completing construction was tolled by the filing of the request for extension.

12. Finally, regarding Audubon Society’s assertion that the Third Circuit’s opinion in *In re: PennEast* finding that PennEast may not sue the State of New Jersey in federal court to obtain access to property over which the state holds a possessory interest via eminent domain,²⁷ essentially prevents PennEast from constructing its project,²⁸ we note that PennEast is still free to negotiate agreements with the State of New Jersey to obtain the needed property rights. Further, as noted above, PennEast states that it will appeal the Third Circuit’s opinion to the United States Supreme Court, and we find no reason to terminate PennEast’s certificate while the appeals process is still ongoing.²⁹

13. In sum, PennEast has and continues to work towards obtaining all necessary approvals and permits needed to enable construction to commence. The record before us reflects no bad faith or delay on PennEast’s behalf, but rather reasonable efforts to move the project forward. Therefore, we find that good cause exists to grant the two-year extension of time to complete construction of the PennEast Project.

B. Project Need, Route, and Environmental Review

14. Commenters assert that the Commission should deny PennEast’s request for an extension of time and require PennEast to submit a new application for the project.³⁰ Conservation Foundation states that the justification for the project “has gone stale with the passage of time” and argues that PennEast’s request should be denied as “the findings that initially underlied [sic] the Commission’s authorization are no longer valid.”³¹

²⁶ Riverkeeper Comments at 2; Sierra Club Comment 1 at 1; Sierra Club Comment 2 at 1; Conservation Foundation Comments at 4.

²⁷ *In re: PennEast*, 938 F.3d 96 (3d Cir. 2019).

²⁸ Audubon Society Comments at 1.

²⁹ *Altamont Gas Transmission Co.*, 75 FERC ¶ 61,348 at 62,103-04 (1996) (granting an extension of time pending an appellate decision on a new Commission rule that could have an impact on the certificate-holder’s project).

³⁰ See, e.g., Conservation Foundation Comments at 2; Riverkeeper Comments at 1-2.

³¹ Conservation Foundation Comments at 3 (citing *Chestnut Ridge Storage, LLC*, 139 FERC ¶ 61,149 at P 2).

Commenters assert that the project is no longer supported by market demand,³² and that the “Certificate’s expiration is the opportunity for the Commission to require PennEast to demonstrate that a need for more natural gas capacity actually exists in New Jersey.”³³

15. In addition, commenters allege that because PennEast may not acquire New Jersey state lands along the project route via eminent domain, the final route will likely look considerably different than the project’s approved route, and state that PennEast should refile its application with a “legally viable” or “legally tenable” route.³⁴

16. Commission regulations do not establish a particular time period to complete construction of an authorized natural gas facility.³⁵ The Commission’s certificate orders include completion deadlines, in part, because the information supporting our public convenience and necessity determinations can go stale with the passage of time.³⁶ The purpose of conditioning certificate authority with a deadline for completion of construction is to “diminish[] the potential that the public interest might be compromised by significant changes occurring between issuance of the certificate and commencement of the project.”³⁷ The completion date specified in a certificate order provides what the Commission believes—based on its assessment of circumstances relevant to the specific project—to be a reasonable period of time for the project sponsor to complete construction and make the project available for service.³⁸ However, where good cause can be demonstrated, the Commission or staff will generally grant an extension of time if the extension is filed within a timeframe during which the environmental and other public

³² See, e.g., Conservation Foundation Comments at 2-3; Riverkeeper Comments at 1-2; Sourland Comments at 1; Sierra Club Comment 1 at 1; Sierra Club Comment 2 at 1.

³³ Conservation Foundation Comments at 2.

³⁴ Riverkeeper Comments at 2; Conservation Foundation Comments at 4.

³⁵ 18 C.F.R. § 157.20(b) (2019) (requiring, among other things, that authorized construction be completed and made available for service within the period of time to be specified by the Commission in each order).

³⁶ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165, at P 8 (2016) (citing *Iroquois Gas Transmission System, L.P.*, 104 FERC ¶ 61,307, at P 14 (2003)).

³⁷ *Altamont Gas Transmission Co.*, 75 FERC at 62,103.

³⁸ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 at P 8 (citing *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149 at P 11).

interest findings underlying the Commission's authorization can be expected to remain valid.³⁹

17. We conclude that extending the deadline to construct the PennEast Project and place it into service within four years of the date of the Certificate Order (i.e. January 19, 2022) will not undermine the Commission's findings in the Certificate Order that the project is required by the public convenience and necessity and is an environmentally acceptable action. The Commission has frequently authorized infrastructure projects with initial deadlines of four, five, or six years without expressing concerns about the certificate order's economic or environmental findings becoming stale.⁴⁰ The Certificate Order found market need for the project based on PennEast's long-term precedent agreements for approximately 90 percent of the project's capacity,⁴¹ and we upheld this finding on rehearing.⁴² The terms of these agreements extend many years beyond January 19, 2022, and commenters provide no evidence to suggest that this two-year extension would negatively impact the need or desire for service under these agreements. Moreover, construction of the project cannot commence until service agreements have been executed for the volume of service subscribed under the precedent agreements.⁴³

18. Regarding comments that PennEast must refile its application to include a "legally viable" or "legally tenable" route, as discussed above, PennEast is still in the process of appealing the Third Circuit's decision and may still acquire necessary state lands by means other than eminent domain, i.e. through negotiation with the State of New Jersey. That the Third Circuit's opinion may impede PennEast's efforts to exercise eminent domain over certain parcels of land along the project's route does not affect our finding that PennEast has demonstrated good cause for granting the requested extension, nor impact our finding that the project remains required by the public convenience and

³⁹ *Id.*; 18 C.F.R. § 385.2008(a) (2019); *see also* 18 C.F.R. § 375.308(w)(4) (2019) (authorizing the Commission's Director of the Office of Energy Projects to take appropriate action on "applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order of the Commission.").

⁴⁰ *See, e.g., Golden Triangle Storage, Inc.*, 121 FERC ¶ 61,313, at ordering para. (M) (2007) (six years to complete gas storage project); *Trunkline Gas Co., LLC*, 153 FERC ¶ 61,300, at ordering para. (B)(1) (2015) (four years to complete pipeline project).

⁴¹ Certificate Order, 162 FERC ¶ 61,053 at PP 19-36.

⁴² Rehearing Order, 164 FERC ¶ 61,058 at PP 14-23.

⁴³ Certificate Order, 162 FERC ¶ 61,053 at ordering para. (E).

necessity. In the event PennEast proposes modifications to the certificate route, the environmental impacts of PennEast's proposed modifications will be assessed at that time, in the appropriate proceeding.⁴⁴

19. We recognize that environmental impacts are subject to change and that the validity of our conclusions and environmental conditions cannot be sustained indefinitely. However, we do not believe that any changes of fact or of law require that we reconsider our prior finding that the project, as conditioned, is an environmentally acceptable action. The Council on Environmental Quality issued regulations to address circumstances where supplemental environmental analysis is necessary due to stale environmental information; for example, where an agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or where there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."⁴⁵ New information must be sufficient to show that the remaining federal action will affect the environment in a significant manner or to a significant extent not already considered.⁴⁶ PennEast requests only to change the timing of the project. The Commission is not aware of any new circumstances or information that were not already considered, nor have commenters provided any contrary evidence. Moreover, PennEast is still required to comply with all relevant environmental conditions before PennEast will receive authorization to proceed with construction.

The Commission orders:

PennEast is granted an extension of time to January 19, 2022, to construct the PennEast Project's facilities and make them available for service.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁴ See Environmental Assessment for the Amendment Project in Docket No. CP19-78-000.

⁴⁵ 40 C.F.R. § 1502.9(c)(1)(i)-(ii) (2019).

⁴⁶ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

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PennEast Pipeline Company, LLC

Docket No. CP15-558-000

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GLICK, Commissioner, *dissenting*:

1. I dissented from the Commission's order granting PennEast Pipeline Company, LLC (PennEast) a certificate of public convenience and necessity. As I explained, the record did not show a need for the pipeline and the Commission erred by finding that the pipeline was required by the public convenience and necessity when many permits and details about the proposed route remained unanswered.¹ Those issues, as well as a host of others, are now being litigated in the federal courts. The only question before us today is whether to grant PennEast's request for an extension of time in which to complete construction of the pipeline.

2. The record before us shows that PennEast is pursuing the relevant federal permits and does not indicate any bad faith or intentional delay on PennEast's part. PennEast's inability to timely complete the pipeline seems to be due in significant part to the number of issues that were unresolved when the Commission granted the certificate.² In other words, the delay is primarily the result of the Commission issuing the certificate prematurely. Under these circumstances, I would grant the extension.

3. But I would do so only if we simultaneously stayed the certificate. In light of both the number of permits outstanding and the uncertain status of the various cases in federal court,³ the certificate should be stayed so that PennEast cannot further exercise eminent

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (Glick, Comm'r, dissenting at 1) (Certificate Order); see *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 (2018) (Glick, Comm'r, dissenting at 1) (order on rehearing).

² Certificate Order, 162 FERC ¶ 61,053 (Glick, Comm'r, dissenting at 3) (criticizing the Commission's decision to "conditionally" issue the certificate given the number of outstanding permits and the extent to which the proposed route that had not been surveyed for potential, environmental, historical, and other issues).

³ In addition to the litigation in the U.S. Court of Appeals for the Third Circuit, whose decision PennEast states it will appeal to U.S. Supreme Court, *PennEast Pipeline Company, LLC*, 170 FERC ¶ 61,138, at P 4 (2020), various parties filed a petition for review of the Commission's decision to issue the certificate in the United States Court of

domain until at least some of those issues are resolved and we have a better understanding of the likelihood that any land condemned would actually be used to build the pipeline. Since the Commission is not staying the certificate, I cannot join today's order.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

Appeals for the District of Columbia Circuit. That litigation is being held in abeyance pending a final resolution of the Third Circuit proceedings, Order, No. 18-1128 (Oct. 1, 2019).