

170 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Algonquin Gas Transmission, LLC

Docket No. CP16-9-009

ORDER DENYING REHEARING

(Issued February 21, 2020)

1. On December 26, 2018, Commission staff issued a letter order granting Algonquin Gas Transmission, LLC (Algonquin) a two year extension of time to complete construction of the Atlantic Bridge Project.¹ The Town of Weymouth, Massachusetts (Weymouth), and the Fore River Residents Against the Compressor Station, City of Quincy, Massachusetts, Weymouth Councilor Rebecca Haugh, Michael H. Hayden, and the Food and Water Watch (collectively, Petitioners) filed requests for rehearing of the December 26 Letter Order. For the reasons discussed below, we deny rehearing.

I. Background

2. On January 25, 2017, the Commission issued an order authorizing Algonquin and Maritimes & Northeast Pipeline, LLC (Maritimes) to construct and operate the Atlantic Bridge Project, consisting of pipeline and compression facilities in New York, Connecticut, and Massachusetts.² The Certificate Order required Algonquin to obtain a determination of consistency with the Coastal Zone Management Act from the Massachusetts Office of Coastal Zone Management prior to construction of a compressor station in the Town of Weymouth, Massachusetts (Weymouth Compressor Station).³ The

¹ Approval for Extension of Time to Complete Project, CP16-9-000 (Dec. 26, 2018) (December 26 Letter Order).

² *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (Certificate Order), *reh'g denied*, 161 FERC ¶ 61,255 (2017).

³ Certificate Order, 158 FERC ¶ 61,061 at Appendix B, Environmental Condition 16.

Certificate Order also required Algonquin and Maritimes to complete construction of the authorized facilities and make them available for service within two years.⁴

3. On December 26, 2018, Algonquin requested a two year extension of time to complete construction of the project facilities. The same day, the Chief of Branch 1 of the Commission's Office of Energy Projects, Division of Pipeline Certificates (Certificates Branch Chief) granted the request. The December 26 Letter Order explains that Algonquin experienced permitting delays for the construction of the Weymouth Compressor Station, but expected those permits to be issued by mid-2019,⁵ and that the horizontal directional drill (HDD) of the Taconic Parkway in New York was ongoing and additional time was required to complete this construction.⁶

4. On January 25, 2019, Weymouth and Petitioners each filed requests for rehearing of the December 26 Letter Order. Petitioners argue that: (1) the Certificate Branch Chief did not have authority to issue the extension of time; and (2) there was not sufficient time between the filing of the request and Commission staff's issuance for the request to have been properly considered. Weymouth argues that: (1) the Commission cannot presume that the project is in the public convenience and necessity beyond the timeframe specified in the Certificate Order; (2) the environmental analysis for the original certificate proceeding is time-specific and no longer valid for the extension; and (3) good cause does not exist to extend the in-service date.

II. Procedural Issues

5. On February 15, 2019, Algonquin filed an answer to the requests for rehearing. Although the Commission's rules do not permit answers to requests for rehearing,⁷ this

⁴ *Id.* at ordering para. (B)(1). The dissent mistakenly states that "the certificate required the developers to secure the necessary federal and state approvals prior to beginning any construction." Dissent at P 2. The Certificate Order and Commission policy only require that a certificate holder have all necessary federal permits before it commences construction. The Commission encourages project sponsors to cooperate with state and local agencies.

⁵ On November 13, 2019, Algonquin filed with the Commission the Massachusetts Office of Coastal Zone Management's finding that the proposed natural gas compressor station in the Town of Weymouth is consistent with the Coastal Zone Management enforceable program policies. November 13, 2019 filing at 4.

⁶ December 26 Letter Order at 1.

⁷ 18 C.F.R. § 385.213(a)(2) (2019).

provision may be waived for good cause.⁸ Good cause exists to do so in this instance because Algonquin's answer provides information that will assist in the decision-making process.

III. Discussion

A. Delegated Authority to Issue Extensions of Time

6. Petitioners argue that neither the Certificate Order nor the Commission's regulations delegate authority to the Certificates Branch Chief to grant extensions of time to complete construction in contested proceedings.⁹ Petitioners assert that the regulation cited in the Certificate Order establishing the two-year deadline to complete construction does not contemplate an extension of time and that it requires a certificate holder to meet the order's deadline and inform the Commission within 10 days if it is unable to do so.¹⁰ Petitioners also note that the Commission's regulations state that a certificate is only effective so long as the applicant continues the operations authorized by the order issuing the certificate.¹¹ Thus, Petitioners conclude that the Commission's regulations do not allow the issuance of an extension of time to complete construction of the project.

7. The regulations cited by Petitioners describe the general conditions applicable to all certificates,¹² and among these conditions is the requirement to complete construction within the timeframe specified in the certificate order.¹³ However, the Commission's regulations authorize the Director of the Office of Energy Projects (OEP Director) or the Director's designee¹⁴ to grant extensions of time of certificate conditions. Specifically, the Director (or designee) is authorized to take appropriate action on "applications for extensions of time ... to perform ... acts required at or within a specified time by any ... certificate or order by the Commission."¹⁵ Moreover, the Commission's practice has

⁸ 18 C.F.R. § 385.101(e) (2018).

⁹ Petitioners' Request for Rehearing at 2.

¹⁰ *Id.* at 4 (citing 18 C.F.R. § 157.20 (2019)).

¹¹ *Id.*

¹² 18 C.F.R. § 157.20 (2019).

¹³ *Id.*

¹⁴ 18 C.F.R. § 375.308 (2018).

¹⁵ *Id.* § 375.308(w)(4).

long been for requests for extensions of time to complete construction of certificated facilities to be resolved by delegated orders.¹⁶

8. Next, Petitioners contend that the Certificate Order does not provide for delegated authority to issue the extension of time.¹⁷ Petitioners state that the only delegated authority set forth in the Certificate Order allows the OEP Director to take steps to ensure the protection of environmental resources.¹⁸ Petitioners argue that the Commission's regulations only allow sub-delegation in instances where the Commission expressly permits it.¹⁹ Even if such delegated authority exists, Petitioners contend that the Commission's regulations do not contemplate the delegation of authority to issue extensions of time in contested proceedings.²⁰

9. Petitioners are correct that the Certificate Order delegates certain authorization to the OEP Director or his designee.²¹ However, any authority delegated through Commission orders is additive to the delegated authority enumerated in the Commission's regulations. As explained above, the Commission's regulations delegate

¹⁶ See, e.g., *Southern Natural Gas Company*, Docket No. CP00-231-000 (July 25, 2001) (delegated order) (Certificate Branch Chief granting extension of time to complete construction and place facilities into service); *Rockies Express Pipeline, L.L.C.*, Docket Nos. CP04-413-000, et al. (May 11, 2006) (delegated order) (same); *UGI LNG, Inc.*, Docket Nos. CP06-442-000, et al. (Apr. 17, 2009) (delegated order) (same); *Midwestern Gas Transmission Company*, Docket No. CP11-489-000 (July 18, 2012) (delegated order) (same); *Floridian Natural Gas Storage Company, LLC*, Docket No. CP08-13-000 (Aug. 11, 2014) (delegated order) (same); *D'Lo Gas Storage, LLC*, Docket Nos. CP12-39-000 and CP18-524-000 (Aug. 28, 2018) (delegated order) (same).

¹⁷ Petitioners' Request for Rehearing at 4, 8.

¹⁸ *Id.* at 4-5, 8 (citing Certificate Order, 158 FERC ¶ 61,061 at Appendix B). Petitioners also note that there are several other environmental conditions that also require applicants to submit information for approval by the Director of the Office of Energy Projects. *Id.* at 9.

¹⁹ *Id.* at 5-6 (citing 18 C.F.R. § 375.301(b) (2019)).

²⁰ *Id.* at 6.

²¹ *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287, at P 17 (2017) (describing the breadth of the Commission's authority to delegate to its designated agents the authority to conduct actions appropriate to the Commission's functions through its orders and regulations).

the authority to take action on extensions of time to the OEP Director or designee.²² While some delegations require the proceeding be uncontested,²³ the regulation concerning extensions of time contains no such qualification.²⁴ Again, Commission practice demonstrates that the OEP Director or designee can issue extensions of time for projects that had contested certificate proceedings.²⁵

10. Last, Petitioners assert that even if the Commission's regulations allow the OEP Director or designee to issue extensions of time, there is no evidence that the OEP Director expressly delegated this function to the Certificates Branch Chief.²⁶ Petitioners argue that *Rockies Express Pipeline, LLC* requires internal documentation of the sub-delegation as well as information concerning the level of review completed by the Certificate Branch Chief and other Commission staff.²⁷ Petitioners further contend that where the Commission's regulations permit sub-delegation, this delegation must be to "the deputy of such official, the head of a division, or a comparable official as designated by the official to whom the direct delegation is made."²⁸ Petitioners assert that the Certificates Branch Chief is not a "comparable official," and therefore had no authority to issue the extension of time.²⁹

11. Delegated authority may be further sub-delegated to designees of the delegee.³⁰ The Commission has previously clarified that it "delegates authority to its Directors with the understanding that the Director may further delegate such authority to a designee,"

²² 18 C.F.R. § 375.308(w)(4) (2019).

²³ *Id.* § 375.308(w)(1) (authorizing the OEP Director to take action on "any notice to intervene ... filed in an uncontested application for pipeline facilities.").

²⁴ *Id.* § 375.308(w)(4).

²⁵ See, e.g., *Sabal Trail Transmission, LLC*, Docket No. CP15-17-000 (Jan. 31, 2018) (delegated order); *Rockies Express Pipeline, L.L.C.*, Docket Nos. CP04-413-000, et al. (May 11, 2006) (delegated order).

²⁶ Petitioners' Request for Rehearing at 7.

²⁷ *Id.* (citing *Rockies Express Pipeline, LLC*, 128 FERC ¶ 61,045 (2009) (*Rockies Express*)).

²⁸ *Id.* at 9-10 (citing 18 C.F.R. § 375.301(b) (2019)).

²⁹ *Id.* at 10.

³⁰ 18 C.F.R. § 375.301(b) (2019).

and that “sub-delegations to Branch Chiefs and similar level officials are appropriate.”³¹ In the same order, the Commission clarified that this practice is “routine,” “usual, and longstanding.”³² In accordance with the usual practice, the OEP Director designated the Certificates Branch Chief, who has direct knowledge of the project’s status and therefore is a comparable official to a deputy or division head in this situation, to act on Algonquin’s request for an extension of time.³³

12. We also disagree with Petitioners’ assertion that *Rockies Express* requires internal documentation of the sub-delegation.³⁴ In that case, the Commission found that the OEP Director’s delegation to the Branch Chief was “in accordance with usual and longstanding practice, and supported by internal documentation.”³⁵ This statement does not suggest that internal documentation is required in order for a sub-delegation to be valid. On the contrary, in *Rockies Express*, the Commission stated that, “unless explicitly prohibited, a Director may further delegate authority delegated by order of the Commission...to Branch Chiefs and similar level officials.”³⁶ Petitioners do not address this language, nor do they identify any Commission authority that would “explicitly

³¹ *Rockies Express*, 128 FERC ¶ 61,045 at P 21; see also *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at PP 19-20 (affirming that sub-delegations to gas branch chiefs and similar level officials are appropriate); *East Tennessee Natural Gas Co.*, 106 FERC ¶ 61,159, at P 12 (2004) (rejecting argument that letter order authorizing pipeline to place facilities in service signed by the Director of the Division of Gas – Environment and Engineering was not valid because it was not actually signed by the Director of OEP).

³² *Rockies Express*, 128 FERC ¶ 61,045 at PP 21, 22; *East Tennessee Natural Gas Co.*, 106 FERC ¶ 61,159 at P 12 (affirming Director of OEP’s sub-delegation as “usual and longstanding” practice).

³³ See supra note 14. See also *Rockies Express*, 128 FERC ¶ 61,045 at P 23 (“[w]ith respect to clearances for environmental conditions and authorization to begin construction, the Chief of Gas Branch 2 who has direct responsibility for ensuring compliance with the conditions is appropriately situated to evaluate whether those conditions have been met, and therefore is a ‘comparable official’ to a deputy or division head in this situation, as required by section 375.301(b) of the Commission’s regulations.”).

³⁴ See *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at P 23 (rejecting same argument).

³⁵ *Rockies Express*, 128 FERC ¶ 61,045 at P 22.

³⁶ *Id.* PP 21, 23.

prohibit” a sub-delegation to the Certificates Branch Chief in this case. Further, there would be no purpose served by requiring documentation of a sub-delegation. If a Director is not satisfied with action taken under sub-delegated authority, the Director can rescind the action.

B. Public Convenience and Necessity and Environmental Review

13. Weymouth asserts that the Commission’s conclusions in the Certificate Order were based on market conditions and the impact of the project’s construction on affected communities assuming a completion date in 2019.³⁷ Weymouth states that the Certificate Order includes completion deadlines because “information supporting its public convenience and necessity order goes stale with the passage of time” and the completion date provides a “reasonable period of time for the project sponsor to conclude any necessary marketing efforts, complete construction, and make the project available for service.”³⁸ Thus, Weymouth concludes that the Commission must determine if the project would still be in the public convenience and necessity if construction is not completed until 2021.³⁹

14. Weymouth also asserts that the Commission’s determination that the Atlantic Bridge Project is not likely to have significant adverse effects on the environment is time-specific and cannot form the justification for an extension of the in-service date.⁴⁰ Weymouth argues that if the extension is granted, the Commission’s conclusion that the Atlantic Bridge Project’s impact would be minimal would be based on an evaluation conducted, and circumstances that existed, in May of 2017, more than four years before the new in-service date.⁴¹ Moreover, Weymouth avers that where new evidence demonstrates that the EA is based on outdated information, the extension of time request must be denied.⁴² Weymouth contends that the finding of no significant impact was

³⁷ Weymouth Request for Rehearing at 16.

³⁸ *Id.* (citing *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (2016)).

³⁹ *Id.*

⁴⁰ *Id.* at 14.

⁴¹ *Id.* at 15 (noting that December 26 Letter Order does not address how the prior Environmental Assessment would apply to the project’s now-delayed in-service timeline).

⁴² *Id.* at 14-15 (citing *Wyoming-California Pipeline Company*, 70 FERC ¶ 61,041 (1995) (“[t]he Commission did not expect or intend that the mitigation measures included in the original certificates would be adequate with respect to construction undertaken at

based on incorrect information—that coal ash at the Weymouth site did not need to be remediated and contamination would be dealt with in compliance with the Massachusetts Contingency Plan (MCP)—because Algonquin is refusing to comply with the MCP.⁴³ Weymouth argues that if contamination must be remediated, the EA must be revised and any conclusions based on the EA, revisited.⁴⁴

15. The Commission’s regulations do not establish a general time period for the completion of construction of all authorized natural gas facilities.⁴⁵ This is, at least in large part, because the prescribed time period to complete construction in individual certificates varies depending on the specific project.⁴⁶ 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.⁴⁷ But that is not the case here as explained below. The purpose of establishing a deadline for the 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.”⁴⁸ However, construction deadlines may

some unspecified time in the future. That was one reason for the certificate condition requiring construction to be completed within five years.”)).

⁴³ *Id.* at 15-16. Weymouth contends that Algonquin and Maritimes have submitted to the Massachusetts Department of Environmental Protection a final version of the Permanent Solution with Conditions Statement that wrongly asserts that the arsenic at the Weymouth Compressor Station site was associated with “Historic Fill” in violation of the MCP. *Id.* at 5-6.

⁴⁴ *Id.* at 15-16.

⁴⁵ 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).

⁴⁶ See e.g. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (three year deadline to complete construction); *Trunkline Gas Co., LLC*, 153 FERC ¶ 61,300, at ordering para. (B)(1) (2015) (four years to complete pipeline project); *Cheniere Creole Trail Pipeline, L.P.*, 142 FERC ¶ 61,137, at ordering para. (B)(1) (2013) (two years to complete Phase 1 pipeline facilities and four years to complete Phase 2 pipeline facilities).

⁴⁷ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 at P 8 (citing *Iroquois Gas Transmission System, L.P.*, 104 FERC ¶ 61,307, at P 14 (2003)).

⁴⁸ *Altamont Gas Transmission Co.*, 75 FERC ¶ 61,348, at 62,103 (1996).

be extended for good cause.⁴⁹ 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.⁵⁰ However, if a certificate holder files for an extension of time within a timeframe during which the environmental and other public interest findings underlying the Commission’s authorization can be expected to remain valid (as is the case here), the Commission, or staff exercising delegated authority, generally will grant an extension of time if the movant demonstrates good cause.⁵¹

16. Extending the two year deadline for the Atlantic Bridge Project to be constructed and placed into service will not undermine the Commission’s findings in the Certificate Order that the project is required by the public convenience and necessity and is not a major federal action significantly affecting the quality of the human environment. The completion date specified in the order is not intended to establish a limit for the period during which the environmental and other public interest findings are expected to remain valid. The Commission has authorized infrastructure projects with initial in-service deadlines of four, five, or six years (comparable to the four-year period allowed here by the extension), where it found such timeframes appropriate.⁵² The Certificate Order found market need for the Atlantic Bridge Project based on 15 year long-term precedent agreements for 100% of the project’s capacity.⁵³ The term of these agreements extends many years beyond January 25, 2021, and Weymouth provides no evidence to suggest that this two year extension would obviate those agreements.⁵⁴

⁴⁹ 18 C.F.R. § 385.2008(a) (2019) (allowing the relevant decisional authority to extend for good cause the time by which any person is required or allowed to act under any statute rule or order).

⁵⁰ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 at P 8 (citing *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 11 (2012)).

⁵¹ *Id.*

⁵² *See, e.g., supra* n.45; *see also Golden Triangle Storage, Inc.*, 121 FERC ¶ 61,313, at ordering para. (M) (2007) (six years to complete gas storage project).

⁵³ Certificate Order, 158 FERC ¶ 61,061 at P 74.

⁵⁴ Moreover, construction of the project cannot commence until service agreements have been executed for the volume of service subscribed under the precedent agreements. Certificate Order, 158 FERC ¶ 61,061 at ordering para. (E).

17. We recognize that environmental impacts are subject to change, and that the validity of our conclusions and environmental conditions cannot be sustained indefinitely. However, the record here does not reflect any environmental changes in the project area or any new information that calls into question our prior findings that the Atlantic Bridge Project, as conditioned, is not a major federal action significantly affecting the quality of the human environment.

18. The Council on Environmental Quality's regulations 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."⁵⁵ 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.⁵⁶ Moreover, the environment conditions of the Certificate Order anticipate that environmental impacts may change during construction and, therefore, authorize the OEP Director to implement any additional measures deemed necessary avoid or mitigate adverse environmental impacts.⁵⁷

19. Here, Algonquin requests to change only the timing of the Atlantic Bridge Project and no new circumstances or information have been presented that were not already considered. Weymouth wrongly asserts that there is new information concerning the presence of coal ash at the Weymouth Compressor Station site. The EA states that samples collected at the site showed that the fill materials exceed some Massachusetts environmental standards, including arsenic, and that these high levels were attributed to the presence of coal ash from historic use of the site as an oil terminal and coal storage facility.⁵⁸ The EA also finds that if contaminated soil or groundwater is encountered during construction, all on-site personnel would stop work, evacuate the area, and implement the Unexpected Contamination Encounter Procedure.⁵⁹ The Certificate Order states that a Licensed Site Professional will oversee soil and groundwater management activities at the Weymouth site during construction for compliance with the applicable provisions of the MCP and related Massachusetts Department of Environmental

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

⁵⁶ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

⁵⁷ Certificate Order, 158 FERC ¶ 61,061 at Appendix B, Environmental Condition 2.

⁵⁸ EA at 2-67.

⁵⁹ EA at 2-8.

Protection (Massachusetts DEP) policies and guidance.⁶⁰ Moreover, on rehearing, the Commission reiterated that compliance with state requirements is sufficient to address concerns associated with disturbing contaminated soils at the Weymouth Compressor Station site and the environmental inspector is empowered to order correction of acts that violate the environmental conditions of the Certificate Order.⁶¹ Finally, we note that in its answer, Algonquin states that it remains in compliance with the applicable provisions of the MCP.⁶²

20. Last, Petitioners state that Environmental Condition 1 of the Certificate Order requires Algonquin to explain how a modification provides an equal or greater level of environmental protection than the original measure.⁶³ Petitioners argue that the December 26 Letter Order fails to discuss how the extension of time meets this requirement.⁶⁴ Petitioners' argument is inapt as Environmental Condition 1 refers to changes to construction procedures and mitigation measures and is not applicable to requests for an extension of time.

C. Good Cause for Issuing the Extension

21. Weymouth asserts that neither Algonquin's request nor the December 26 Letter Order demonstrates that good cause exists for granting the two year extension.⁶⁵ Weymouth argues that, for good cause to exist, the pipeline must demonstrate that "it made good faith efforts to meet its deadline but encountered unforeseeable circumstances, such as difficulties in obtaining deliveries of needed materials or discovery of cultural remains on an approved right-of-way."⁶⁶ Weymouth also contends that the pipeline company "bears a heavy burden of showing good cause as to why it should not be held to the prompt development requirements."⁶⁷

⁶⁰ Certificate Order, 158 FERC ¶ 61,061 at P 129.

⁶¹ *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255, at P 67 (2017).

⁶² Algonquin Answer at 11.

⁶³ Petitioners' Request for Rehearing at 14.

⁶⁴ *Id.*

⁶⁵ Weymouth Request for Rehearing at 9.

⁶⁶ *Id.* (citing *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165).

⁶⁷ *Id.* (citing *Gary and Catherine Wright*, 37 FERC ¶ 62,165, at 63,171 (1986)).

22. Weymouth contends that nothing in the record supports Algonquin's assertion that it is likely to obtain necessary approvals by mid-2019,⁶⁸ and argues that Algonquin's inability to obtain the required permitting is a direct result of its failure to cooperate with the State of Massachusetts and Weymouth, as required by the Certificate Order.⁶⁹

Weymouth states that when Algonquin requested the extension of time, Algonquin was still waiting for its Coastal Zone Management Act consistency determination from the Massachusetts Office of Coastal Zone Management because Algonquin had not obtained licenses under the Massachusetts Wetlands Protection Act and Massachusetts Waterways Program.⁷⁰

23. Weymouth asserts that Algonquin failed to obtain a Waterways Program license because it refused to file a request for a municipal zoning certificate with Weymouth under the assumption that all municipal zoning ordinances are preempted by the Natural Gas Act (NGA).⁷¹ Weymouth contends that Algonquin must comply with those aspects of the zoning ordinance that do not unreasonably delay the project or frustrate the purpose of the NGA.⁷² Weymouth avers that, despite knowing its position, Algonquin waited nearly one year to file suit in federal district court asserting that the Weymouth's zoning ordinance is preempted.⁷³ Weymouth argues that Algonquin's refusal to file for a zoning permit and waiting nearly one year to file its lawsuit demonstrates that Algonquin is responsible for any delay in obtaining a Waterways Program license.⁷⁴

24. With respect to the Wetlands Protection Act license, Weymouth states that the Weymouth Conservation Commission denied Algonquin a permit under the Town's local ordinance on May 25, 2016, and, rather than appealing that decision with the Weymouth Conservation Commission, Algonquin filed a lawsuit in federal district court on

⁶⁸ *Id.* at 13-14 (citing *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 10 ("an extension of time ... might not be warranted unless the company can demonstrate credible prospects for its project's completion"))).

⁶⁹ *Id.* at 9.

⁷⁰ *Id.* at 9-10.

⁷¹ *Id.* at 10.

⁷² *Id.* (citing *Maritimes & Ne. Pipeline, L.L.C.*, 81 FERC ¶ 61,166, at 61,729-30 (1997) and *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 143-145 (2006)).

⁷³ *Id.* at 10-11 (stating that Algonquin knew Weymouth's position on July 10, 2017, and filed suit on May 3, 2018).

⁷⁴ *Id.* at 11.

May 4, 2017, nearly a year after the denial.⁷⁵ Weymouth notes that this lawsuit was filed over six months after Massachusetts DEP stayed the administrative appeal of the Wetlands Protection Act license.⁷⁶ Weymouth argues that had Algonquin appealed the denial under the local ordinance, this extensive delay would not have occurred.⁷⁷ Weymouth further notes that even after the administrative appeal was lifted, Algonquin refused to file a required plan of record with Massachusetts DEP reflecting a jurisdictional change to the Riverfront Area until it was ordered to do so.⁷⁸

25. Weymouth notes that the Commission has granted more time to “encourage ... project sponsors to cooperate with state and local agencies” and provide “more time for state and local agencies to act.”⁷⁹ Weymouth argues that in this case Algonquin had refused to work cooperative with state and local agencies, and, therefore, any delay is Algonquin’s responsibility.⁸⁰

26. With respect to the license under the Wetlands Protection Act, Algonquin states that it applied to the Weymouth Conservation Commission for approval on February 22, 2016, nearly a year before receiving its certificate, and the Conservation Commission issued a decision denying Algonquin’s application on June 15, 2016.⁸¹ Algonquin states that, on June 29, 2016, it requested a superseding order from Massachusetts DEP that would override the Conservation Commission’s decision, and Massachusetts DEP issued that order on September 7, 2016.⁸² However, because the September 7, 2016 order was appealed by Weymouth, it did not become final until the appeal was completed.⁸³

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 11-12.

⁷⁸ *Id.* at 12.

⁷⁹ *Id.* (quoting *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 at P13).

⁸⁰ *Id.* (noting that on two occasions the Weymouth Conservation Commission had to contact Algonquin concerning absent or incorrect information filed with its application and, in a separate instance, failed to comply with Massachusetts the Subdivision Control Law).

⁸¹ Algonquin Answer at 4.

⁸² *Id.*

⁸³ *Id.*

Algonquin asserts that Weymouth twice supported holding the appeal in abeyance – first until Certificate Order was issued, then until Algonquin obtained a judgment regarding whether the local wetlands protection ordinance was preempted.⁸⁴ Algonquin states that it filed suit in federal district court less than one month after the administrative presiding officer agreed with Weymouth on the continued abeyance,⁸⁵ and, the court subsequently found that Weymouth’s ordinance is preempted.⁸⁶

27. As to the Waterways Program license, Algonquin states that it filed an application for a license with Massachusetts DEP on December 8, 2015, less than two months after filing its certificate application, and, on May 17, 2017, the Massachusetts DEP issued a “Written Determination” expressing its intent to approve Algonquin’s application, which was subsequently appealed by Weymouth.⁸⁷ Algonquin asserts that, like the Wetlands Protection Act license, the Waterways Program license cannot become final until the appeal is completed. However, Weymouth has obtained a stay of its appeal pending completion of the litigation over whether federal law preempted Weymouth’s wetlands ordinance.⁸⁸

28. Algonquin asserts that it has also been forced to file a separate lawsuit to address Weymouth’s argument in the Waterways Program proceeding that Algonquin’s proposed compressor station is subject to Weymouth’s Zoning Ordinance.⁸⁹ Algonquin states that, in ruling that the Zoning Ordinance is preempted, the district court stated that “the issues of the [Waterways Program] License has been delayed for nearly two years, in part,” due to Weymouth’s insistence that Algonquin comply with “a local zoning ordinance subject to federal preemption.”⁹⁰

⁸⁴ *Id.* at 4-5.

⁸⁵ *Id.* at 5 (noting that administrative presiding officer issued its order on April 7, 2017, and Algonquin filed suit on May 4, 2017).

⁸⁶ *Algonquin Gas Transmission, LLC v. Weymouth, Massachusetts*, No. 17-10788-DJC, 2017 WL 6757544 (D. Mass. Dec. 29, 2017), *aff’d*, 919 F.3d 54 (1st Cir. 2019).

⁸⁷ Algonquin Answer at 5.

⁸⁸ *Id.* at 5-6.

⁸⁹ *Id.* at 6.

⁹⁰ *Id.* (citing *Algonquin Gas Transmission, LLC v. Town of Weymouth*, 365 F. Supp. 3d 147, 155 (D. Mass. 2019)).

29. Algonquin contends that Weymouth wrongly blames Algonquin for not applying for a municipal zoning certificate, noting that the district court has confirmed that federal law preempts Weymouth from applying any provisions of its zoning ordinance.⁹¹ With respect to Weymouth's claim that Algonquin should have appealed the Weymouth Conservation Commission's decision, Algonquin notes that the district court held that the NGA prevents Weymouth from applying its local wetlands ordinance and that it filed a suit less than 30 days after the administrative presiding officer agreed with Weymouth to hold the state proceeding in abeyance until the preemption claims were adjudicated.⁹² Algonquin argues even if it had filed this lawsuit earlier, it would not have obviated the need to extend the January 25, 2019 deadline for constructing the Weymouth Compressor Station, given the timing and status of the required permits.⁹³

30. Algonquin also contends that Weymouth's claim that it refused to file a required plan of record with Massachusetts DEP reflecting a jurisdictional change to the Riverfront Area is unfounded.⁹⁴ Algonquin asserts that the presiding officer in that proceeding explained that whether or not a revised plan had been formally filed, "[a]ll of the parties have been familiar with the revised plan" and there was "no need to delay th[e] proceeding," apart from a two day adjustment for pre-filed direct testimony.⁹⁵

31. Algonquin concludes that its consistent diligent efforts to move the permitting process forward despite these obstacles, constitute ample good cause for extending the deadline for the project's in-service date.⁹⁶

32. Construction deadlines may be extended for good cause.⁹⁷ 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

⁹¹ *Id.* at 7.

⁹² *Id.* at 8.

⁹³ *Id.* (noting that Weymouth argued in court that state-law challenges must be adjudicated by Massachusetts DEP prior to the federal court's preemption ruling).

⁹⁴ *Id.* at 8-9.

⁹⁵ *Id.* at 9 (citing Weymouth Rehearing Request at Exhibit G).

⁹⁶ *Id.* at 7-8.

⁹⁷ 18 C.F.R. § 385.2008(a) (2019) (allowing the relevant decisional authority to extend for good cause the time by which any person is required or allowed to act under any statute rule or order).

circumstances.⁹⁸ 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.⁹⁹ The Commission has also found that a certificate holder is free to decide how to satisfy the Certificate Order's prerequisites for construction.¹⁰⁰

33. Here, Algonquin has demonstrated good cause exists to grant the two year extension. At the time of its request, Algonquin had yet to receive two state permits necessary for the consistency determination under the Coastal Zone Management Act. In both instances, Algonquin applied for these licenses before the Certificate Order was issued, and in both instances Massachusetts Department of Environmental Protection has held proceedings in abeyance and required Algonquin to seek declaratory judgments in district court. As detailed above, Weymouth has participated in the proceedings before the Massachusetts Department of Environmental Protection and has supported the agency's decision to hold proceedings in abeyance while the district court determined what local ordinances were preempted by the NGA. The fact that Algonquin chose to argue that certain local ordinances are preempted by the NGA is an argument it is entitled to make.

34. We also are not persuaded by Weymouth's assertion that Algonquin unduly delayed filing lawsuits in district court. Algonquin filed its suit challenging the applicability of the wetlands ordinance less than one month after the administrative presiding officer issued its order holding the Wetlands Protection Act proceeding in abeyance. With respect to the suit challenging the applicability of the zoning ordinance, we find that Algonquin did not unduly delay seeking a court judgment and an earlier filing would not have allowed Algonquin to proceed with construction any sooner.

⁹⁸ See, e.g., *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 11 (denying request for extension of time).

⁹⁹ *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 Nos. 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 Nos. 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).

¹⁰⁰ *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 14 (2018).

35. Last, neither Petitioners nor Weymouth challenge the December 26 Letter Order's assertion that the extension was warranted to allow Algonquin to complete the HDD of the Taconic Parkway in New York.

36. In sum, Algonquin has been engaged in complex litigation as part of its efforts to obtain state authorization. The record before us reflects no bad faith or delay on the company's part, but rather what appears to be 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 Atlantic Bridge Project.

D. Time between Filing the Request and Issuance of the December 26 Letter Order

37. Petitioners argue that because the December 26 Letter Order was issued only 34 minutes after Algonquin filed its request, the Certificates Branch Chief could not have properly considered the request.¹⁰¹ Petitioners and Weymouth note that in January 2018, Congressman Stephen Lynch had requested that the Commission not grant any extensions of time for the project and that the Chairman responded by saying that there was no pending extension of time request in the proceeding.¹⁰² In light of this prior letter, Weymouth contends Commission staff wrongly granted the extension prior to the public having an opportunity to comment, and that if the public had an opportunity to comment, the comments would have supported a denial of the request.¹⁰³ Petitioners contend that given the prior correspondence concerning extensions of time, the Commission must document the level of review completed, including what additional staff participated in such review.¹⁰⁴

38. We disagree that the timing of the December 26 Letter Order implies that the request was not properly considered. Commission staff closely monitors projects during the construction phase and was aware of the ongoing delays resulting from the litigation discussed above. Accordingly, staff was in a position to determine immediately that an extension was warranted. Additionally, the Commission is not required to solicit public input before acting upon a certificate-holder's request for an extension of time,¹⁰⁵ and

¹⁰¹ Petitioners' Request for Rehearing at 11-12.

¹⁰² *Id.* at 12-13 (citing Chairman McIntyre's March 21, 2018 Letter); Weymouth Request for Rehearing at 13.

¹⁰³ Weymouth Request for Rehearing at 13.

¹⁰⁴ Petitioners' Request for Rehearing at 13.

¹⁰⁵ *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 23.

nothing in the Commission's regulations suggests that an opportunity for notice and comment is required.¹⁰⁶ In any event, rehearing provides a full opportunity to challenge the staff action,¹⁰⁷ and we have considered and addressed Weymouth and Petitioners' concerns in this order.¹⁰⁸

39. Further, while not required, as a matter of practice the Commission itself generally acts on requests for extensions of time to complete construction for NGA facilities when such requests are contested before order issuance.¹⁰⁹ To ensure that the Commission acting as whole act on requests that may be contested, and further increase transparency and durability of Commission orders, going forward the Office of the Secretary and Office of Energy Projects are directed to notice all requests for extension of time to complete construction for NGA facilities within 7 calendar days of receiving the request.

¹⁰⁶ Cf. *Bangor Hydro-Elec. Co.*, 87 FERC ¶ 61,035 (1999) (grant of extension of time is an administrative matter between Commission and licensee; intervention denied and request for rehearing rejected); *Wis. Valley Improvement Co.*, 88 FERC ¶ 61,054 (1999) (motion to intervene and request for rehearing in proceeding granting extension of time for post-license compliance dismissed; proceeding not type in which intervention and rehearing lie); *Felts Mills Energy Partners, L.P.*, 86 FERC ¶ 61,120, *reh'g denied*, 87 FERC ¶ 61,094 (1999) (motions to intervene and requests for rehearing regarding extensions of time generally are not entertained).

¹⁰⁷ See *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Jepsen v. FERC*, 420 F. Appx 1, 2 (D.C. Cir. 2011) (unpublished opinion); *Blumenthal v. FERC*, 613 F.3d 1142, 1145-46 (D.C. Cir. 2010).

¹⁰⁸ The Chairman's letter to Congressman Lynch merely notes that there was no pending request for an extension of time at the time of the correspondence and in no way implies that the public would be afforded an opportunity to comment on any subsequent request. See Chairman McIntyre's March 21, 2018 Letter.

¹⁰⁹ See, e.g., *Constitution Pipeline Co.*, 165 FERC ¶ 61,081; *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165. The dissent states that "[w]hether to modify a significant deadline in a section 7 certificate is an important issue that should be resolved by the Commission acting as a whole, not Commission staff acting through its delegated authority." We agree that the Commission as a whole should act on contested extensions of time to complete construction. Indeed, the Commission generally does. In this case, the OEP Director's designee acted before the extension request was protested. As discussed above, we find the designee's action was permissible under the Commission's regulations and proper as Algonquin demonstrated good cause. Nevertheless, to ensure the Commission as a whole may act on contested extensions of time for NGA facilities, we announce in this case a process by which the Commission will notice extensions of time for NGA facilities for comment and intervention.

Each notice shall establish a 15 calendar day intervention and comment period deadline. Only interventions from entities that were party to the underlying proceeding will be accepted. No reply comments or answers will be considered.

40. For all of those extension requests that are contested,¹¹⁰ the Commission acting as a whole will aim to issue an order acting on the request within 45 days. The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension. The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act.¹¹¹ At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance. The OEP Director, or his or her designee, will act on all of those extension requests that are uncontested.

41. We encourage pipeline applicants requesting such extensions to sufficiently demonstrate good cause necessitates the extension of time, and to file their requests no more than 120 days before the deadline to complete construction. Upon receipt of extension of time, the deadline for completing construction will be tolled pending Commission action. Further, when making an NGA application, the applicant may request a construction timeline that recognizes that potential permitting or other delays may impact the project.

¹¹⁰ Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 C.F.R. § 385.2201(c)(1) (2019).

¹¹¹ Similarly, the Commission will not re-litigate the issuance of an NGA section 3 permit, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

The Commission orders:

(A) Petitioners' January 25, 2019 request for rehearing of the December 26 Letter Order is denied.

(B) Weymouth's January 25, 2019 request for rehearing of the December 26 Letter Order is denied.

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC

Docket No. CP16-9-009

(Issued February 21, 2020)

GLICK, Commissioner, *dissenting*:

1. On December 26, 2018, the Commission's staff extended by two years the deadline to complete construction of the Atlantic Bridge pipeline just hours after the project's developer—Algonquin Gas Transmission, LLC (Algonquin)—asked for the additional time.¹ I dissent from today's order denying rehearing of Commission staff's action because, in my opinion, such a significant modification of a condition in a natural gas pipeline certificate requires consideration and action by the Commission as a whole, not Commission staff on its own. This proceeding presents important issues and the parties deserve better than a cursory response from Commission Staff.

2. The relevant facts are straightforward. On January 25, 2017, the Commission issued a certificate of public convenience and necessity under Natural Gas Act (NGA) section 7² for the Atlantic Bridge pipeline.³ The certificate required that the project be completed and put into service within two years—*i.e.*, by January 25, 2019.⁴ In addition, the certificate required the developers to secure the necessary federal approvals prior to beginning any construction. Before long, it became clear that those approvals would not be immediately forthcoming and that the project would not be finished as originally anticipated. Although the parties disagree vehemently over who bears responsibility for that delay, the fact of the delay is all that matters for these purposes. On the day after Christmas—December 26, 2018—a month before the deadline to complete construction,

¹ According to the eLibrary entries, the extension request was received by the Commission at 8:00:17 AM on December 26, 2018, and was published to the docket at 10:51:53 AM. Commission staff's letter order granting the extension request appeared on the docket less than an hour later at 11:40:41 AM.

² 15 U.S.C. § 717f (2018).

³ *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061, *reh'g denied*, 161 FERC ¶ 61,255 (2017).

⁴ *Id.* Order Para. B(1).

Algonquin submitted a request for a two-year extension of that deadline.⁵ As noted above, Commission staff granted the request a few hours later, just minutes after it appeared on the docket.⁶

3. Whether to modify a significant deadline imposed by a section 7 certificate is an important issue that should be resolved by the Commission acting as a whole, not Commission staff acting through its delegated authority.⁷ For one thing, a deadline to complete construction helps to limit the disruption caused by constructing a new pipeline by ensuring that any disruption occurs within a discrete timeframe and that construction is not prolonged for years into the future. In addition, a deadline to complete construction helps to ensure that the Commission does not award certificates to speculative projects or projects that cannot or will not be timely completed. Finally, as today's order explains, a deadline for completing construction "diminish[es] the potential that the public interest might be compromised by significant changes occurring between issuance of the certificate and commencement of the project."⁸ In short, deadlines to complete construction are an important tool for the Commission to use in ensuring that an interstate natural gas pipeline is developed in a manner that is consistent with the public interest.⁹

4. In some cases, there may be a good reason for a delay in a new pipeline's construction schedule and, in those instances, it may be consistent with the public interest to extend the relevant deadline. But whether good cause exists and whether an extension is consistent with the public interest is an important question that each Commissioner should decide for themselves. After all, it is the Commissioners that are nominated by

⁵ See *supra* n.1.

⁶ *Id.*

⁷ In any case, the Commission's delegation of authority to its staff is permissive. Nothing requires Commission staff to exercise delegated authority in every instance in which it is conceivably authorized to do so. Commission staff, acting on its own or at the direction of the Chairman or the Commission, could choose not use its delegated authority, allowing the Commission to issue an order on the merits. Such forbearance is not uncommon in other areas where the Commission has delegated its authority.

⁸ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 15 (2020) (internal quotation marks and alterations omitted) (Order).

⁹ Indeed, the Commission's regulations provide that a deadline to complete construction is one of the standard conditions that it attaches to section 7 certificates. See 18 CFR § 157.20(b) (2019).

the President and confirmed by the Senate to make the decisions entrusted to the Commission pursuant to our various statutory authorities.

5. That is especially true here, where the Commission was on notice that any extension in this proceeding was likely to be disputed.¹⁰ A proceeding in which the relevant law and facts are subject to significant disagreement is likely to raise important questions that deserve the Commissioners' attention and demand a reasoned response from the Commission as a whole. Under those circumstances, Commission staff's exercise of delegated authority will rarely, if ever, constitute an adequate response.

6. Although my concerns would apply to any exercise of delegated authority under these circumstances, I am particularly troubled by the facts before us here. As explained above, the extension request was approved the same morning it came in and only minutes after it was published on the docket.¹¹ That means that the parties who opposed the extension had no opportunity whatsoever to be heard before it was granted. Moreover, I do not see how, on the record before us, a few hours was anywhere near enough time to meaningfully evaluate whether good cause existed to extend the deadline, much less to render the type of reasoned decision that the Administrative Procedure Act requires.¹²

7. Actions like these only lend further credence to those who view the Commission as a rubber stamp in pipeline proceedings. We can and must do better. The process of producing an order that is voted on by the full Commission may not be perfect—and the Commissioners may not always agree—but that process will almost certainly deliver more reasoned and considered decisionmaking than the parties received here.

8. The Commission responds to my concerns by asserting that it “generally acts” on contested requests for an extension of time and proposing a new policy for noticing and

¹⁰ In January 2018, a member of Congress representing one of the towns affected by the project sent a letter to the Commission urging that it deny any request to extend the deadline to commence construction. *See* February 22, 2018 Letter from Congressman Stephen F. Lynch. The Chairman responded to this letter by noting that no request for an extension had been filed, *see* March 21, 2018 Letter from Chairman McIntyre, which was true at the time. The request was filed several months later and only a couple of hours before the delegated order was issued, likely without time to notify the Chairman that such a request had been subsequently filed. I certainly received no such notification.

¹¹ *See supra* n.1.

¹² *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983) (requiring that agency action be the product of reasoned decisionmaking).

responding to extension requests.¹³ That assertion is more than a little sanctimonious coming in a proceeding where the requested extension was granted less than an hour after it appeared on the docket, well before any party had an opportunity to object.

9. Nevertheless, I recognize that the new policy is a step in the right direction and, insofar as it represents progress, I support it. But it cannot cure the error that already took place in this proceeding. In any case, because I believe that these extension requests represent important questions, I would prefer not to truncate parties' opportunity to be heard by prohibiting reply comments and answers.¹⁴ In addition, although I agree that extension requests should not be a forum to re-litigate the underlying certificate,¹⁵ parties must have the right to argue that developments since the issuance of the certificate have called into question the Commission's finding of public convenience and necessity. That said, I will keep an open mind in evaluating how this policy plays out and whether it provides parties with adequate process for addressing extension requests.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

¹³ Order, 170 FERC ¶ 61,144 at P 39.

¹⁴ *Id.*

¹⁵ *Cf. Eagle Crest Energy Co.*, 167 FERC ¶ 61,117 (2019) (Glick, Comm'r, dissenting in part at P 3).