UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

East Tennessee Natural Gas Company Docket No. CP01-415-017

ORDER DENYING REHEARING

(Issued February 18, 2004)

1. On November 14, 2003, by letter order, the Director of the Division of Gas-Environment and Engineering of the Commission's Office of Energy Projects (OEP), approved a request by East Tennessee Natural Gas Company (East Tennessee) to begin service on portions of its Patriot Project. Thereafter, on December 1, 2003, the National Committee for the New River (the Committee) timely filed a request for rehearing of the November 14 letter order. For the reasons discussed below, we are denying the request for rehearing.

Background

2. On November 20, 2002, the Commission issued a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act authorizing East Tennessee to construct and operate gas pipeline facilities (known as the Patriot Project) in Tennessee, Virginia, and North Carolina.[1] As pertinent, the Patriot Project includes an approximately 94-mile long extension of its mainline facilities in Virginia and North Carolina. In an order issued February 27, 2003, the Commission denied requests for rehearing, including a request for rehearing by the Committee and a request by the Committee that the Commission stay construction on the Patriot Project Extension.[2]

3. On July 2, 2003, the Commission denied a request by the Committee that the Commission require East Tennessee to serve all parties to the Patriot Project application proceeding with copies of pleadings, reports, and other filings it makes with the

[1] 101 FERC ¶ 61,188 (2002).

[2] 102 FERC ¶ 61,225 (2003).

Commission to comply with conditions incorporated in the November 2002 certificate.[3] Thereafter, in an order issued October 27, 2003, the Commission denied requests for rehearing by the Committee of several letter orders authorizing construction of various portions of the Patriot Project, a motion by the Committee to declare the horizontal directional drill (HDD) under the New River a failure, and another request by the Committee for stay of further construction on the Patriot Project Extension. [4]

4. On October 10, 2003, East Tennessee requested permission from the Commission to place the Patriot Project facilities in service. The Committee objected to this request as premature and procedurally defective. On November 14, 2003, permission to begin service as of November 18, 2003 was granted by letter order. The letter order found that restoration of the right-of-way (ROW) was proceeding satisfactorily, and directed East Tennessee to complete restoration and to monitor the ROW using the Final Restoration Plan and Winter Monitoring Plan, filed on November 3, 2003. The letter order further directed East Tennessee to continue to file weekly progress reports until all construction-related activities are complete, and to inform Commission staff of anticipated dates for the detailed spring walkover of the ROW described in the above plans. On November 24, 2003, East Tennessee notified the Commission that it had placed the subject facilities in service.

The Committee's Request for Rehearing

5. In its latest request for rehearing, the Committee argues that East Tennessee's request to place the project in service is procedurally defective because it did not include a certificate of service on parties to the proceeding, and that the Commission should accordingly have rejected the request as not in the proper form. The Committee contends that the November 14 letter order is likewise defective because the signer of the letter, the Director of the Division of Gas Environment and Engineering of the Commission's Office of Energy Projects, did not have authority to issue the letter order.

6. The Committee also repeats earlier arguments it has made in this proceeding that: a) the route of the pipeline actually placed in service is outside the scope of the authority granted by the Commission in the November 2002 certificate order; b) that consideration of the project after the November 2002 certificate order has been improperly conducted in an ex parte manner; and c) that the record contains insufficient information regarding the New River/New River Trail State Park horizontal directional drill (HDD) to warrant placing the project in service.

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[3] 104 FERC ¶ 61,019 (2003).

[4] 105 FERC ¶ 61,139 (2003).

7. The Committee also contends now, for the first time, that the Commission's environmental process was defective because it did not consider an alternative route from Max Meadows to Hillsville, Virginia that would have avoided impact to the Foster Falls area of the New River Trail State Park. The Committee argues that the Patriot Project extension should not be placed in service until that route is addressed in a supplemental environmental impact statement.

Commission Response

8. In the October 27, 2003 Order the Commission specifically addressed virtually the same contentions that the Committee now raises regarding service of pleadings, the allegedly improper ex parte nature of the post-certificate compliance process, the pipeline route, and the completion of the New River HDD. As we explained in the October 27, 2003 Order in some detail, the procedures the Commission observed in this proceeding follow longstanding practice the Commission employs in every certificate it grants under the NGA. The Commission explained that East Tennessee does not have to serve parties to the application proceeding with copies of post-certificate filings because the application proceeding has been completed, that the Commission's ex parte communications rules no longer apply once a certificate has been issued, and that the route adjustments approved by the Commission do not involve any new environmental issues or impacts. We also explained that, based on personal inspections by Commission staff and independent reports from the third party compliance inspector, we were satisfied that the HDD had been successfully completed and the pipeline properly installed and tested. We noted in the October 27 Order that restoration of disturbed areas was progressing well, and would continue to be monitored. Indeed, the November 14, 2003 letter order permitting East Tennessee to begin service requires continuing monitoring of restoration on this and other portions of the pipeline ROW. There is no reason to revisit those findings here.

9. The Committee's contention that the Commission should have considered an alternate route for the Patriot Project extension between Max Meadows and Hillsville is untimely. In accordance with the National Environmental Policy Act (NEPA) and Commission policy, the Commission evaluates alternatives to a proposed project to determine whether they would be reasonable and environmentally preferable to a proposed action. In this proceeding, the Commission considered 13 route alternatives in the environmental impact statement and in the November 2002 certificate order. Thereafter, it addressed objections to its findings regarding alternatives in its order on rehearing issued February 27, 2003. [5] The Committee should have raised any issues

[5] 102 FERC ¶ 61,225 (2003).

relating to an alternate route at that time, before the pipeline was constructed and placed in service, but did not. [6]

10. The Committee suggests that the Commission deliberately withheld information on the so-called Max Meadows Alternative from the NEPA process. This is not true. East Tennessee's Resource Report 10, filed with the Commission on January 14, 2002, does mention that it looked at the feasibility of a pipeline route between Max Meadows and Hillsville during the initial planning stages for the Patriot Project. The report explained, however, that East Tennessee did not propose this as the route for the Patriot Project because the pipeline would have had to cross previously mined areas with visible subsidence that East Tennessee believed could collapse under a pipeline, and because the route it did propose was shorter. Because of the instability of the ground the pipeline would traverse and the attendant danger for a pipeline, the Commission did not accord this route consideration as a viable alternative. NEPA requires the Commission to consider and discuss reasonable alternatives;[7] it does not require consideration of patently unsuitable alternatives like a Max Meadows to Hillsville route.

11. The Committee's argument that the November 14 letter order is not valid because it is not actually signed by the Director of OEP, but rather by his deputy and designee, lacks merit. The Commission delegates authority to its staff in certain circumstances in order to use Commission resources more efficiently.[8] This practice allows the Commission time to devote to the more complex issues of law and policy that come before it and benefits both the regulated entities and the public interest.

12. Here, the Commission delegated authority to the OEP Director to determine the point at which East Tennessee's compliance with conditions adopted by the Commission as part of the November 2002 certificate was sufficient to permit gas service through the new pipeline.[9] In accordance with usual and longstanding practice, the Director, in turn, assigned the matter, as his designee, to the Division Director with direct daily responsibility over environmental compliance matters. The Division Director, based on additional staff inspections, granted East Tennessee permission to begin service on

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[6] In fact, aside from a reference by East Tennessee in its Resource Report 10, no one mentioned a possible alternative route between Max Meadows and Hillsville at any of the scoping meetings or in any pleading filed with the Commission.

[7] See American Rivers v. F.E.R.C., 201 F.3d 1186, 1200 (9th Cir. 2000).

[8] See 18 C.F.R. § 375.301 et seq.

[9] 101 FERC ¶ 61,188 (2003), Appendix, Condition 9.

portions of the Patriot Project. As noted above, the division director's permission was subject to continued monitoring and completion of ROW restoration. We affirm the practice of delegating authority to Commission staff, and we adopt the OEP Director's action, through his designee, as our own.

The Commission orders:

The request for rehearing is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.