

105 FERC ¶ 61,139
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

East Tennessee Natural Gas Company

Docket Nos. CP01-415-010
CP01-415-011
CP01-415-012
CP01-415-013
CP01-415-015

ORDER DENYING REQUESTS FOR REHEARING AND STAY

(Issued October 27, 2003)

1. On July 2, 2003, the Commission denied a request by the National Committee for the New River, Inc. (Committee) that the Commission require East Tennessee Natural Gas Company (East Tennessee) to serve all parties to East Tennessee's Patriot Project with copies of filings it makes with the Commission to comply with conditions imposed in the Commission's November 20, 2002 order certifying the project. On July 7, 2003, the Committee requested rehearing of the Commission's July 2, 2003 order, and on July 22, 2003, the Committee filed a supplement to the July 7 rehearing request.
2. On June 5, June 24, July 15, and July 17, 2003, as pertinent, letter orders were issued authorizing construction of portions of the Patriot Project Extension. The Committee has also filed timely requests for rehearing of these letter orders authorizing construction of the Patriot Project extension, and for stay of the construction authorizations.
3. Also on July 7, 2003, the Committee filed a motion to declare the horizontal directional drill (HDD) under the New River in Virginia a failure, and for stay of further construction on the Patriot Project Extension.
4. On August 20, 2003, East Tennessee filed a request for permission to modify the location of the HDD under Reed Creek in Virginia and for use of temporary workspace and an alternate access road to the new workspace. The request was approved by letter order issued August 22, 2003. On September 16, 2003, the Committee requested rehearing of this letter order.

5. East Tennessee has responded to the Committee's requests. For the reasons set forth below, we are denying the Committee's requests for rehearing and stay, and the motion to declare the New River HDD a failure.

Procedural Issues

6. On August 12, 2003, the Commission issued notice that under Rule 713(f)¹ of the Commission's Rules of Practice and Procedure the Committee's rehearing request filed June 26, 2003 was denied by operation of law because the Commission took no action on the request within 30 days of its filing. The grounds for rehearing in the June 26 filing, however, largely duplicate the grounds advanced in the later requests for rehearing, which are fully addressed in this order.

7. On July 15, 2003, East Tennessee filed a motion to answer the Committee's various pleadings, and submitted its answer. On August 4, 2003, the Committee filed a motion to reject East Tennessee's July 15 motion and answer, and its July 28 answer because East Tennessee did not state that the pleadings had been served on parties to the proceeding. On August 19, 2003, East Tennessee resubmitted these documents with an appropriate statement that it had filed copies with all parties on the service list in the application proceeding, thus seemingly mooting the Committee's objection. However, the Committee filed yet another motion to reject the answers on September 8, 2003, this time, on the grounds that the resubmitted pleadings were now untimely filed, and East Tennessee did not request an extension of time for filing. On September 15, 2003, East Tennessee filed a motion for permission to file answers and the answers to the Committee's requests for rehearing and stay of the July 15 and July 17, 2003 letter orders authorizing construction, and to the Committee's September 8 motion. On September 23, 2003, the Committee filed a motion for permission to reply to East Tennessee's September 15 motion and answer.

8. On September 25, East Tennessee responded to the Committee's request for stay of the August 22, 2003 letter order approving the Reed Creek HDD modification and alternate access road. The Committee then filed a motion on October 1, 2003 requesting permission to reply to East Tennessee's September 25 reply to the Committee's stay request.

¹ 18 C.F.R. § 385.713(f).

9. We find good cause for waiver of the filing deadline for replies to motions.² Moreover, although the Commission's procedural rules do not allow answers to requests for rehearing or replies to answers, we may, for good cause, waive this provision.³ We find good cause to do so here in order to insure a complete record and an informed decision.

Background

10. On November 20, 2002, the Commission issued a certificate of public convenience and necessity under section 7(c) of the NGA authorizing East Tennessee to construct and operate gas pipeline facilities (known as the Patriot Project) in Tennessee, Virginia, and North Carolina.⁴ 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.⁵

11. In accordance with the conditions set forth in the November 2002 order, East Tennessee submitted an implementation plan for the extension portion of the Patriot Project (Implementation Plan 3) on January 30, 2003. It filed supplements to the plan on February 7, March 6 and 18, April 23, May 13, and June 3 and 13, 2003. The Committee filed objections to the plan and the various supplements. Under authority delegated by the Commission, Commission staff issued letter orders on June 5, June 24, July 15, and July 17, 2003 to East Tennessee authorizing construction of specific portions of the Patriot Project extension.

² East Tennessee's original July 15 motion included a request for permission to file two days late its answers to the Committee's request for stay and rehearing of the June 5 construction authorization. East Tennessee explained in its July 15 filing that it was consolidating this answer along with answers to other Committee filings in one document to reduce the number of pleadings filed with the Commission and to facilitate resolution of issues raised by the Committee in multiple submissions.

³ See 18 C.F.R. § 385.213(a)(2), and Florida Gas Transmission Company, 100 FERC ¶ 61,282 (2002).

⁴ 101 FERC ¶ 61,188 (2002).

⁵ 102 FERC ¶ 61,225 (2003).

12. 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 Commission to comply with conditions incorporated in the November 2002 certificate. We explained in the July 2 order that the certificate proceeding before the Commission has been completed, and that the Committee has filed a request for judicial review of the orders granting the certificate. For reasons detailed in the July 2 order, including the fact that East Tennessee has filed copies of its pleadings in public libraries and has offered to serve all persons expressing interest in receiving copies of its filings, and the fact that all public pleadings are available on the Commission's internet site, the Commission found that all parties interested in compliance activities relating to the Patriot Project have reasonable access to filings with the Commission and sufficient notice of Commission actions. Accordingly, the Commission found that it was not necessary to require that East Tennessee directly serve construction compliance filings on all who were parties to the application proceeding.

13. The July 2 order also explained that our approval of the project in the November 20, 2002 certificate order did not confer permission for East Tennessee to begin construction. We explained that before the pipeline may begin constructing any particular segment of the approved project, the pipeline must show that it has complied with the environmental conditions applicable to that segment. We noted that the Patriot Project certificate included 69 such conditions that East Tennessee must meet. Some of these conditions are standard environmental conditions that are applied to most pipeline certificates, but others are specifically tailored to the Patriot Project. Once the Director of the Office of Energy Projects (Director) is satisfied that conditions are met with respect to a particular portion of the project, the Director or a delegated staff member will issue construction clearance for that portion. Only at that point may the pipeline begin construction of the particular segment authorized and cleared. We explained that in this manner the Commission insures that construction will occur in accordance with its findings approving the project.

The Committee's Requests for Rehearing

14. Although it has filed several rehearing requests, the grounds for those requests are essentially duplicative. Essentially, the Committee argues in its various pleadings that the Commission's construction clearance process is flawed and that the construction activities authorized are inconsistent with the terms of the certificate issued in November 2002. The Committee also raises separate specific objections to the HDD under the New River. We will discuss each of these areas in turn.

A. Service of Compliance Documents

15. The Committee has filed several pleadings relating to the Commission's post-certificate construction clearance process. The recurring contention in these pleadings is that under the Commission's Rules, East Tennessee must serve copies of each compliance filing on all parties on the service list of the application proceeding, and that parties must then have an opportunity to respond to the filing before the Commission can issue a clearance order authorizing construction related to the compliance filing. The Committee states that East Tennessee has either not provided such service at all, or that where it has served parties, it has done so in such a manner that the parties do not have an opportunity to respond before a clearance order is issued. The Committee claims that this is a closed-loop, ex parte process between the Commission and the pipeline that violates the due process rights of parties to the application proceeding.

East Tennessee's Response

16. East Tennessee avers that its post-certificate filings with the Commission are not prohibited ex parte communications under the Commission's rules. The prohibition of off-the-record communications between Commission staff and the pipeline ended with issuance of the February 2003 rehearing order, it argues. East Tennessee avers that the Commission struck an appropriate balance in the July 2 order by ensuring that the public has reasonable access to East Tennessee's filings.

Commission response

17. We explained in the July 2 order, addressing essentially the same arguments advanced here, that the certificate application proceeding before the Commission has been completed, and we found that East Tennessee did not have to serve all parties to the certificate application with copies of its post-certificate compliance filings.⁶ There is

⁶ In proceedings under the Federal Power Act, the Commission has long held that Commission proceedings and the party status of intervenors terminates after a rehearing order has been issued and the time for judicial review has expired. Consequently, the Commission has explained, Rule 2010 requiring service does not require that former parties be served with pleadings after a permit, license, or exemption has been issued. See Pacific Gas and Electric Company, 40 FERC ¶ 61,035 (1987); Joseph M. Keating, 40 FERC ¶ 61,254 (1987); and Kings River Conservation District, 36 FERC ¶ 61,365 (1986). The statutory language in the Federal Power Act on which this approach is based is identical to language contained in section 19 of the NGA.

nothing improper regarding the compliance process employed for this construction project. The Commission has followed longstanding practice it employs in every certificate it grants under the NGA.

18. Rule 2201 of the Commission's Rules of Practice and Procedure prohibits off-the-record (ex parte) communications between a pipeline and a decisional employee of the Commission in a contested proceeding before the Commission. The Commission's ex parte rules, however, do not apply to the construction compliance process that occurs after the Commission certifies a project and the proceeding has ended. The ex parte prohibitions thus end after the final Commission decision on the merits and the Commission has addressed all requests for rehearing or clarification of that decision.⁷ Here, as we explained in the July 2 order, the application proceeding has been completed. Thus, the Commission's ex parte communications rules do not apply.

19. In accordance with Rule 1902, the Committee has sought rehearing of the various orders issued by the Director of OEP under the authority delegated to him in the underlying certificate proceeding. These requests are addressed below.

B. Objections to Construction Implementation

20. In its requests for rehearing, the Committee contends that East Tennessee's Implementation Plan 3 does not comply with the November 2002 certificate's environmental conditions. Specifically, the Committee states that, taken as a whole, the route realignments East Tennessee submitted in Implementation Plan 3, and approved by the Commission in its clearance orders differ significantly from the route the Commission approved in the November 2002 certificate order. Altogether, states the Committee, these realignments total more than 16 miles in length. As an example of the magnitude of these changes, the Committee points to one route adjustment (number 72B) that is 15,880 feet in length, with an offset of up to 1,330 feet from the original route. The Committee contends that these realignments do not constitute implementation of the November 20, 2002 order, but rather "relocation of a significant portion of the project"

⁷ The prohibition of ex parte communications remains in force until "a final Commission decision or other final order disposing of the merits of the proceeding is issued; or, when applicable, after the time for seeking rehearing of a final Commission decision, or other final order disposing of the merits expires." 18 C.F.R. § 2201(d)(2)(i). See Regulations Governing Off-the-Record Communications, FERC Stats. and Regs., Proposed Regs. 1988-1998 ¶ 32,534, at p. 33,503 (1998); and Final Rule, ¶ 31,079, at p. 30,893 (1999).

approved in the Commission order, and thus comprise a proposed amendment to the permit. Furthermore, it asserts, a document identified as “FWS Consultation” is not signed by the Fish and Wildlife Service, and thus cannot constitute concurrence with realignments as required by condition 5 in the November 2002 order.

21. The Committee asserts that the June 5 and June 24 letter orders authorizing construction are inconsistent with a permit (submitted by East Tennessee as part of Implementation Plan 3) issued by the Virginia Marine Resources Commission (Virginia Commission). Specifically, the Committee asserts, the Virginia Commission requires successful installation of the New River HDD before installation of stream crossings identified by the Virginia Commission. The June 5 and June 24 construction clearances were issued before completion of the HDD, it charges. The Committee also alleges that there are a number of unauthorized discrepancies between the stream crossing locations approved in the November 2002 certificate order and the Virginia Commission’s permit. The Committee also claims in its objections to the plan that, contrary to condition 31 in the November 2002 order, East Tennessee has not filed any final wetland plan and permit prior to seeking to begin construction.

East Tennessee’s Response

22. East Tennessee asserts that the construction authorizations in the clearance letter orders are proper, and the realignments in the clearances do not amount to an amendment to the certificate order. East Tennessee states that the November 2002 certificate order contemplated route modifications like those proposed by East Tennessee in Implementation Plan 3 and approved in the clearances. East Tennessee avers that realignments are necessary for a variety of reasons, such as responses to landowner concerns, adjustments resulting from access to previously unsurveyed parcels, and minor design improvements. The most extensive realignment, it asserts, resulted from a request by the landowner. The Commission, it says, routinely approves such adjustments to a proposed route. Moreover, states East Tennessee, Implementation Plan 3 does not alter alignments filed with the Virginia Marine Resources Commission. What the Committee identifies as realignments for stream crossings are the same alignments East Tennessee filed with the Virginia commission and the Virginia commission approved in its Virginia permit.

Commission Response

23. Condition 6 of the November 2002 order issuing the Patriot Project certificate, in accordance with standard Commission practice, required East Tennessee to file with the Commission an “initial” Implementation Plan for review and approval by the OEP Director describing how East Tennessee proposed to implement the environmental

mitigation measures required in the order. Condition 6 described this implementation plan as an initial plan because the Commission expected East Tennessee to fine tune the project route as it conducted surveys of land to which East Tennessee had previously been denied access, and as it completed environmental and cultural resource studies and consultation with other state and Federal agencies.

24. As noted above, East Tennessee filed the required plan for the Patriot Project Extension (Implementation Plan 3) on January 30, 2003. Subsequently, in February, March, April, May, and June, 2003, East Tennessee filed supplements to the implementation plan as more information became available, and as Commission staff reviewed the construction plan and directed East Tennessee to provide more information.

25. As the Committee points out, East Tennessee has made a number of changes to the precise alignment of the pipeline route. The Commission, however, routinely approves adjustments to the certificate route after the pipeline obtains all the necessary consultations, clearances, permits, and landowner concurrences. We have explained in other proceedings that to require the pipeline to amend the application for every route adjustment would hamstring all future environmental analysis of adjustments to avoid sensitive areas.⁸ The November 2002 certificate order, moreover, stated clearly that the specific route for the Patriot Project extension would be determined at a later date, after all surveys and environmental studies were completed. Where, as here for example, the pipeline is unable to obtain permission from a large number of landowners to conduct surveys or other tests prior to the Commission's issuing a certificate, route realignments are necessary and expected. The environmental conditions attached to the certificate clearly contemplate route realignments, and describe procedures for their implementation and approval.

26. Review of the compliance materials submitted by East Tennessee shows a variety of reasons for the various route realignments. For example some of the realignments move the pipeline farther away from residences, and others improve the engineering or environmental design of the route by, for example, adjusting the route to follow the edge of a cleared field, to follow property lines, or avoid sensitive areas. The majority of adjustments, however, have been made to accommodate the requests of landowners. The 1,330-foot offset adjustment pointed out by the Committee as its example of an inappropriately large modification from the route approved in the November 2002 certificate falls in this category. In connection with a requirement in Condition 58 that East Tennessee consult with the landowner, Primeland, Inc., to determine construction

⁸ See Southern Natural Gas Company, 85 FERC ¶ 61,134, at p. 61,516 (1998).

timing to minimize impact on recreational hunting and outdoor activities, East Tennessee and the landowner reached an agreement to move the pipeline to a different location on the Primeland property. Several refinements to the route involve changes in stream crossing locations to comply with permits issued by the Virginia Marine Resources Commission on December 17, 2002, or by the COE and the Virginia Department of Environmental Quality, jointly, in their permit.

27. In charging that the route realignments constitute an amendment to the application, the Committee merely adds numbers to reach its conclusion. In fact, for the size of this project, the number of route adjustments and the distances involved are neither unexpected nor unusual. The changes, moreover, are relatively minor and do not adversely affect the environment. None of the route adjustments involve new landowners, changes in the character of the land involved, or sensitive environmental resources.

28. The Committee also alleges that Implementation Plan 3 contains unsigned documents that cannot serve as evidence of compliance with the Commission's environmental conditions. As we stated above, the implementation plan is a working document. While it is true, as pointed out by the Committee, that East Tennessee submitted an unsigned document identified as a "Draft COE-Virginia Nationwide Permit" as part of Implementation Plan 3, on March 6, 2003, East Tennessee submitted the actual signed joint permit dated February 28, 2003. East Tennessee has thus complied fully with the requirements of sections 401 and 404 of the Clean Water Act, section 10 of the Rivers and Harbors Act, and with our requirement for consultation in Condition 31. Similarly, the Committee argues that East Tennessee has not complied with the requirement in Condition 5 that it consult with the FWS because Implementation Plan 3 contains only an unsigned document identified as "FWS Consultation" as evidence of consultation regarding Federally listed threatened or endangered species. On April 22, 2003, the Commission received written communication from the Virginia office of the FWS, following up an earlier Biological Opinion in March 2003, that it did not object to East Tennessee's proposed route realignments. A similar communication was received from the FWS office in North Carolina relating to the North Carolina portion of the extension on June 26, 2003. Thus, contrary to the Committee's assertion, the FWS has concurred with the realignments. The Virginia State Historical Preservation Officer (SHPO) notified the Commission on May 28, 2003, that it agreed with the Commission that no significant properties would be affected by the realignments. New tap locations were approved, moreover, within the same trench, so there will be no additional environmental impact.

29. Finally, the condition prohibiting installation of stream crossings until completion of the New River HDD is a State condition, included in the Virginia Commission permit.

It was not part of the conditions this Commission adopted in its certificate. As we stated in the November 2002 certificate order, any state or local permits issued with respect to this project must be consistent with the conditions in the FERC certificate.⁹ In any event, as discussed below, the New River HDD was completed in early August. The stream crossings identified by the Virginia Commission were conducted after successful completion of the New River HDD. Accordingly, this issue is moot.

30. Commission staff reviewed all the route adjustments requested by East Tennessee and approved them as appropriate because they did not involve any new environmental issues or impacts. Similarly, we are satisfied that staff made certain that all required consultations with other Federal and State agencies were conducted and completed, and that any necessary approvals or permits were obtained. We find that the construction clearances issued by the Commission on June 5, June 24, July 15, and July 17, 2002 were properly issued after East Tennessee had fully complied with all applicable environmental conditions contained in the Commission's November 22, 2002 order issuing the certificate for the Patriot Project.

C. The New River/New River Trail State Park Horizontal Directional Drill

31. In its July 7 motion, the Committee stated that East Tennessee had made several unsuccessful HDD attempts to cross under the New River at the location approved in the November 2002 certificate order. On two occasions, stated the Committee, East Tennessee failed to bring the pipe through the hole drilled for that purpose, allegedly damaging the pipe in the process. The Committee argues that under the terms of HDD failure criteria set forth in East Tennessee's Directional Drill Contingency Plan (contingency plan) set forth in Appendix C-3 of the FEIS, as approved by the Commission, there have been both hole opening (reaming) and pullback failure. East Tennessee's attempts, it asserts, have resulted in "substantial and severe ground disturbance as drilling mud has been forced ... to the surface and reportedly into the New River." It suggests that more attempts at this location could result in "surface or riverbed collapse or other severe environmental impacts."

32. The Committee argues in the motion that under the criteria set forth in the contingency plan, the Commission should declare the New River HDD crossing a failure and stay further construction of the Patriot Extension pending relocation of the HDD. The Committee, moreover, asserts that before a new HDD can be attempted, East

⁹ See 101 FERC ¶ 61,188, at para. 109 (2002).

Tennessee must conduct a relocation study as required by the Commission's Condition 22, serve all parties on the service list with all documents relating to the study, and prepare an amended or supplemental environmental impact statement relating to the relocation.

33. In its August 1, 2003 request for rehearing of the July 15 clearance order authorizing East Tennessee to begin construction in the New River exclusion zone,¹⁰ the Committee argues that the order is deficient because it was based solely on unsupported “assurances” from East Tennessee that the HDD has been successfully completed. Neither East Tennessee’s filings nor the Commission’s order, it asserts, included any certificate from the HDD contractor, or from the third-party environmental inspectors on-site. Moreover, contends the Committee, the order does not address the concerns it raised regarding the HDD crossing in its July 7 motion that the HDD crossing of the New River be declared a failure. It suggests that, if the Commission had not acted so hastily in entering the July 17 order, it may have received a number of comments disputing the claim of success by East Tennessee.

East Tennessee’s Reply

34. East Tennessee states that the New River HDD has been completed and that the Committee’s motion is thus moot. East Tennessee avers, moreover, that the fundamental premise underlying the motion is flawed. It states that its contingency plan and the failure criteria described therein merely establish the minimum conditions under which East Tennessee may declare that the HDD is a failure prior to utilizing a different crossing method. Conversely, the fact that one or more of the situations described in the plan may occur does not automatically mandate that the HDD be deemed a failure. Under the circumstances existing here, states East Tennessee, East Tennessee and its HDD contractor determined that efforts to continue the HDD should continue despite the problems experienced.

Commission Response

35. The Committee has misconstrued the purpose of the directional drill failure criteria described in its contingency plan. The purpose of the plan is to help preserve the

¹⁰ Condition 21 in East Tennessee’s certificate states that East Tennessee must complete HDD crossing of the New River and the New River State Park before beginning construction activities in an approximately 4-mile area encompassing both sides of the river and park, referred to as the exclusion zone.

environment by establishing minimum criteria under which the pipeline may avoid using the HDD method mandated by the Commission or avoid using that method at a location approved by the Commission. The plan thus limits the ability of the pipeline to declare failure unilaterally so that it can employ a different crossing method or move to a new location. The plan does not mandate failure under certain prescribed circumstances; rather, it allows East Tennessee to declare failure under those circumstances so that it could submit a new plan to the Commission. Here, East Tennessee properly chose to continue drilling operations, thus limiting further damage to the environment from moving to a new location.

36. In any event, the fact is that the New River HDD crossing has been completed successfully without any of the serious consequences predicted by the Committee. East Tennessee began drilling the HDD pilot hole on March 27, 2003, and notified the Commission on July 15, 2003 that it had completed the HDD and installation of the entire 1,666 foot long pipeline segment under New River and the New River Trail State Park (State Park) on July 11, 2003. During this period, East Tennessee filed weekly construction reports with the Commission as required by the certificate's environmental conditions. These weekly filings described the progress being made on the drilling project, noting difficulties it encountered during the drill, including several broken drill bits and problems in installing the pipe through the hole. The reports also acknowledged some seepage of drilling mud at several locations and described the methods undertaken to contain the seepage. Only on one occasion did any drilling materials enter the New River, and the problem was corrected quickly and effectively. On several occasions during the drill, Commission staff inspected the site to assess progress and compliance with environmental conditions in the certificate. Third party compliance inspectors under the sole direction of the Commission also regularly monitored progress and compliance with the environmental conditions. East Tennessee reports that, on at least one occasion, representatives of the Virginia Department of Conservation and Recreation and the State Park conducted an inspection of the HDD site, but identified no problems or concerns. Representatives from the State Park and the Virginia Department Conservation and Recreation contacted by Commission staff expressed satisfaction with the overall HDD operation and the cleanup of drilling mud.

37. The drilling has now been completed, the pipe has been installed, and appropriate steps have been completed to restore the construction areas along the riverbank to their former state. Contrary to the allegations of the Committee that construction approval for the exclusion zone was based on unverified statements by East Tennessee, Commission staff have personally inspected the site. This inspection and reports from the third party compliance inspector independently confirm that the HDD drilling has been successfully completed and the pipeline properly tested and installed. The areas where drilling mud seeped to the surface have been cleaned and seeded. Restoration of disturbed areas is

progressing well, and will continue to be monitored. With completion of the New River HDD, the Committee's arguments are moot, and there is no reason to declare the drill a failure or to invoke other procedures for examining alternative sites.

The Reed Creek Horizontal Directional Drill

38. On August 20, 2003, East Tennessee requested permission to modify the Reed Creek HDD plan by relocating the HDD entry point to the north side of Interstate 81, and by conducting the Interstate 81 crossing separately. To accomplish this, East Tennessee also requested permission for temporary workspace approximately 200 feet by 200 feet along the pipeline route right-of-way (drill path), and for use of a road to provide access to the new workspace (Access Road S1-7 Alternate). East Tennessee's request was granted in a letter order dated August 22, 2003.

39. The Committee alleges that East Tennessee has not properly shown that the FWS and the Virginia SHPO have concurred in the project site changes proposed by East Tennessee. The Committee states that it is not possible to ascertain whether the SHPO has actually concurred with the proposal because East Tennessee submitted the concurrence letter as privileged material not subject to public release. It contends that using privilege in this manner improperly deprives parties of any opportunity to review agency concurrence letters. Moreover, the Committee argues, East Tennessee has misstated the scope of the FWS concurrence regarding the absence of threatened or endangered species in the vicinity of the project. The Committee states that the FWS did not make a finding regarding a one thousand foot area, as contended by East Tennessee, but rather stated in an April 22, 2003 e-mail communication to the Commission that it was not aware of any listed species located "within or near" the project area. The Committee states that East Tennessee later requested confirmation from FWS that its finding included a one thousand foot area, but that the record contains no response to East Tennessee's request. The Committee asserts that the August 22, 2003 letter order should be rescinded pending formal FWS concurrence with the changes in the project proposed by East Tennessee on August 20.

Commission Response

40. The Virginia SHPO's findings regarding the road are contained in a letter dated August 14, 2003. In accordance with Commission regulations, East Tennessee identified the August 14, 2003 letter from the Virginia SHPO as containing privileged information not available to the public because it contains specific references to a site that is eligible

for inclusion on the National Register of Historic Places.¹¹ If the Committee disagrees, it may file a request for release under the Freedom of Information Act and the Commission's regulations. In pertinent part, however, leaving out references to specific sites, the letter states as follows:

Inspection of the road itself also found no evidence of cultural materials... We have determined, therefore, that construction and use of Access Road S1 Alternate [S1-7 Alternate] will have no effect upon known archaeological resources.

Thus, the Commission's letter order properly concluded that the use of the involved areas would not affect properties on or eligible for the National Register of Historic Places.

41. Moreover, there is no need for additional concurrence from the FWS. Although the Committee is correct that the FWS makes no specific written reference to a one thousand foot area, both the additional workspace and the new alternate access road are within the area surveyed for the Patriot Project Extension and already considered by the FWS prior to issuance of the FWS Biological Opinion. We are fully satisfied that the S1-7 Alternate access road and the additional workspace will have no additional effect on federally-listed threatened or endangered species.

Requests for Stay

42. In its June 26, July 7, and August 1, 2003 pleadings, the Committee again requests that the Commission stay construction of the entire Extension portion of the overall Patriot Project. As grounds for its requests, the Committee argues that the lack of service of compliance documents on all parties to the application proceeding by East Tennessee amounts to irreparable harm to those parties and to the interest of due process. The Committee contends that there is a compelling public interest in granting a stay because the lack of service strikes at the heart of due process before the Commission, affecting public confidence in the Commission's processes.

43. The Committee also argues that environmental impacts allegedly associated with the New River HDD require a stay of construction for reexamination of issues regarding the crossing of the New River and other environmentally sensitive areas along the approved pipeline route that, like the New River HDD crossing, were found by the

¹¹ 18 C.F.R. § 380.12(f)(4).

Commission to involve little or no impact on the environment. In its August 1 stay request, filed after East Tennessee announced completion of the New River HDD, the Committee argues that the Commission should require that a professional evaluation of the New River HDD be served on all parties to the application to permit them effectively to address East Tennessee's claim that it has, in fact, successfully completed the New River HDD crossing.

44. The Committee believes that it is likely to prevail on appeal of these issues. It states that East Tennessee would suffer no substantial harm from a stay, but that any harm it would experience would be outweighed by irreparable harm to the Committee, to other interested parties, and to the public interest from not granting a stay.

45. In its reply, East Tennessee argues that the requests for stay must be denied because the Committee's arguments do not satisfy the Commission's threshold criteria for granting a stay, as there has been no showing of irreparable harm.

Commission Response to Stay Requests

46. In its consideration of motions for a stay, the Commission applies the standards set forth in Section 705 of the Administrative Procedure Act,¹² and grants a stay when "justice so requires."¹³ In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.¹⁴ The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.¹⁵ If the party

¹²5 U.S.C. § 705.

¹³See, e.g., Clifton Power Corp., 58 FERC ¶ 61,094 (1992); United Gas Pipe Line Co., 42 FERC ¶ 61,388 (1988); Trinity River Authority of Texas, 41 FERC ¶ 61,300 (1987); City of Centralia, Washington, 41 FERC ¶ 61,028 (1987).

¹⁴See, e.g., CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership, 56 FERC ¶ 61,177 at 61,631 (1991), aff'd sub nom., Michigan Municipal Cooperative Group v. FERC, 990 F.2d 1377 (D.C. Cir.), cert denied, 510 U.S. 990 (1993); NE Hub Partners, L.P., 85 FERC ¶ 61,105 (1998); Boston Edison Company, 81 FERC ¶ 61,102 (1997).

¹⁵Id. at 61,630. See also Sea Robin Pipeline Company, 92 FERC ¶ 61,217 (2000).

requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.¹⁶

47. We find that the Committee has not shown that there will be irreparable injury absent a stay of the construction activities authorized by the Commission. Conversely, an interruption in construction of the project would add considerably to East Tennessee's construction costs and deprive contracting shippers with service they have shown they need. The Committee relies essentially on arguments it advances in its rehearing request as grounds for its stay request. We have addressed all the Committee's arguments regarding the Commission's compliance process and application of the certificate's environmental conditions in this order and have found them to be without merit. We have explained that the compliance process does not violate the Commission's Rules of Practice and Procedure, and does not deprive participants to the application proceeding of their legitimate rights to participate in the process. The Commission found previously in certifying the Patriot Project that it is in the public interest, and is environmentally acceptable, if constructed in accordance with described mitigation measures on which the Commission conditioned its approval of the project. We have found here that the construction authorized thus far complies fully with those environmental mitigation measures. The Committee has presented no convincing argument why we should delay construction of this project. The requests for stay will be denied.

The Commission orders:

(A) The requests for rehearing and stay, and the request to declare the horizontal directional drill of the New River a failure, filed by the National Committee for the New River, Inc. are denied.

(B) The motions of the National Committee for the New River, Inc. to reject the answers to the Committee's pleadings originally filed by East Tennessee on July 22 and July 28, 2003 are denied, and the answers are accepted for filing.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

¹⁶Id.