

## **After Williams/Transco received their Certificate of Public Convenience & Necessity from FERC (May 3, 2019)**

### **Williams/Transco must obtain all permits from NY & NJ under the Clean Water Act.**

Although a FERC certificate authorizes a pipeline under the Natural Gas Act, it cannot preempt other federal laws that may apply—such as the Endangered Species Act, the Coastal Zone Management Act, or the Clean Water Act—so any requirements under other federal statutes must still be met by the developer. These may include, for example, securing authorizations for water crossings from the Army Corps of Engineers, permission to cross federal lands from the Bureau of Land Management, and other federal approvals. A developer must secure these other federal approvals before proceeding with pipeline construction.

FERC's Certificate Order states the terms and conditions of the approval, including the pipeline route that has been authorized, as well as any construction or environmental mitigation measures required for the project. A FERC certificate confers on the developer eminent domain authority (15 U.S.C. §717f(h)). Also, federal law preempts any state or local law that duplicates or obstructs that federal law (e.g., siting or zoning) relevant to the project. In this way a FERC certificate provides a pipeline developer with the authority to secure property rights to lay the pipeline if the developer cannot secure the necessary rights-of-way from landowners through negotiation. In practice, however, eminent domain authority is considered a last resort and is seldom used by developers.

### **Post-Certificate Proceedings**

Once FERC issues an order granting or denying a pipeline certificate, parties to the proceeding (e.g., intervenors) who object to the order for any reason may formally request a rehearing so that the commission can reconsider its decision. A party to the proceeding must file a request for rehearing within 30 days after issuance of the final order—a statutory deadline which the commission cannot waive or extend (15 U.S.C. §717(r)). There is no time limit for FERC to consider or conclude a rehearing. If a pipeline certificate is approved after rehearing, the pipeline project may proceed even if additional challenges have been filed in federal court. Once the developer has provided FERC with any outstanding information or taken other actions to satisfy the terms and conditions of the certificate order, including an implementation plan, FERC can issue a Notice to Proceed with Construction Activities and construction can begin. The pipeline developer must then file weekly status reports with the commission documenting project inspection and certificate compliance until construction is completed.

### **Request for Rehearing of the Certificate Order**

Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order. Because the 30-day rehearing deadline is a statutory requirement, it cannot be waived or extended.

Under NGA section 19(a) and Rule 713(b) of the Commission's Rules of Practice and Procedure, only a party to a proceeding has standing to request rehearing of a final Commission decision. *(Thus, only Intervenor can file.)*

## Typical Tolling Order

### (ORDER GRANTING REHEARINGS FOR FURTHER CONSIDERATION)

In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)<sup>1</sup> would be deemed denied.

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

<sup>1</sup> See *San Diego Gas & Electric Company v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

See *Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969) (construing the NGA to allow orders granting rehearing for further consideration); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597 (5th Cir. 1969).

### FERC has also written:

The Commission routinely issues such orders to afford it additional time to consider matters raised on rehearing and to ensure that timely filed rehearing requests will not be deemed denied by operation of law under section 19 of the NGA and Rule 713 of our Rules of Practice and Procedure.

15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713 (2015).

<p align="center"><b>FERC Certificate of Public Convenience &amp; Necessity a.k.a FERC Order</b></p>		<p align="center"><b>May 3, 2019</b></p>
<p><b>Intervenors can Request Rehearing within 30 days of the date of FERC’s Order. This 30-day rehearing deadline cannot be extended or waived.</b></p>	<p><b>Make sure that all people &amp;/or groups are listed in the caption, introduction &amp; at the end.</b></p>	<p align="center"><b>by June 1, 2019</b></p>
<p><b>Request for Rehearing must specify the grounds on which it is based</b> – provide the basis, in fact and law, for each alleged error including representative Commission and court precedent</p> <ul style="list-style-type: none"> <li>• state concisely the alleged error in the final decision (FERC’s Order)</li> <li>• include a separate section entitled ‘Statement of Issues,’ listing each issue in a separately enumerated paragraph that includes precedent relied upon</li> </ul> <p>Do not just state a conclusion. Provide an argument.</p> <p>Do not provide a verbatim or near-verbatim copy of a comment previously submitted.</p> <p>The aim of the NGA’s rehearing requirement is “to give the Commission the first opportunity to consider challenges to its orders and thereby narrow or dissipate the issues before they reach the courts.” Simply repeating prior arguments regarding an entirely separate document does not serve this purpose.</p>	<ul style="list-style-type: none"> <li>• Point to specific inaccuracies in the FEIS or Certificate.</li> <li>• Do not be vague.</li> <li>• Use citations from FEIS or Cert. Order.</li> <li>• Include supporting documentation.</li> </ul> <p>Do not incorporate by reference arguments from a prior pleading because such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant.</p> <p>You are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.</p>	
	<p>If you are not an Intervenor, or if you file beyond the 30-day limit, your request will be denied.</p>	
<p><b>FERC has to grant/deny the request within 30 days</b></p>		<p align="center"><b>(depends on date of request for rehearing)</b></p>
<p><b>Usually, FERC grants a “Rehearing for Further Consideration” a.k.a. Tolling Order. This leaves FERC with an unlimited timeframe to then grant or deny the request for a rehearing.</b></p> <p><b>In the past 8 years, FERC issued the tolling orders for 99% of the Requests for Rehearing.</b></p>	<p>This allows for construction to proceed once Williams/Transco obtains all State permits and FERC’s Office of Energy Project (OEP) Written Authorization to Proceed. This is because the approval process &amp; rehearing process are on parallel paths.</p>	
<p><b>At some point, FERC will deny or grant the Request for Rehearing.</b></p> <p><b>On average, FERC does not issue their denial of the Request for Rehearing until 175 days after issuing the tolling order.</b></p>	<p>Do not make a second Request for Rehearing if FER’s order denying the request merely changes the reasoning of their Order. You can’t simultaneously seek both Agency consideration &amp; Judicial Review of FERC’s Order.</p>	
<p><b>If FERC’s Rehearing Order = Deny the Request, then the person/people/group(s) who were listed in the Request for Rehearing caption, introduction and ending can file a Petition for Judicial Review in a U.S. Court of Appeals.</b></p>	<p>All administrative remedies have been exhausted after FERC denies the Request for Rehearing.</p>	<p><b>Petition for Judicial Review must be filed within 60 days after FERC denies the Request for Rehearing</b></p>