

**BEFORE THE UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION**

Transcontinental Gas Pipe Line Company, LLC     )  
Northeast Supply Enhancement Project            )

Docket No. CP17-101-003

**REQUEST FOR REHEARING AND RESCISSION OF MAY 20, 2021 ORDER  
BY  
NY/NJ BAYKEEPER, FOOD & WATER WATCH, CENTRAL JERSEY SAFE ENERGY  
COALITION, AND THE PRINCETON MANOR HOMEOWNERS ASSOCIATION**

Pursuant to Section 19(a) of the Natural Gas Act (“NGA”)<sup>1</sup> and Rule 713 of the Federal Energy Regulatory Commission’s (“FERC’s” or “Commission’s”) Rules of Practice and Procedure,<sup>2</sup> NY/NJ Baykeeper, Food & Water Watch, Central Jersey Safe Energy Coalition, and the Princeton Manor Homeowners Association (collectively “Intervenors”) hereby request rehearing and rescission of the Commission’s May 20, 2021 Order granting Transcontinental Gas Pipe Line Company, LLC’s (“Transco’s”) request for an extension of time to commence and complete construction of the proposed Northeast Supply Enhancement Project (“NESE Project” or “Project”).<sup>3</sup> FERC granted the Intervenors’ respective motions to intervene in this proceeding.<sup>4</sup> Thus, the Intervenors are “parties” to this proceeding and have standing to file this request for rehearing.<sup>5</sup> Furthermore, this request for rehearing is timely filed within 30 days of FERC’s May 20, 2021 Order.<sup>6</sup>

Intervenors seek rehearing and rescission of the Commission’s Order because the Order blindly accepted Transco’s unsupported assertions regarding its purportedly good faith efforts to meet the Commission’s deadline. In addition, the Order failed to address ongoing and changed circumstances that required a denial of the requested extension. As part of Intervenors’ request

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<sup>1</sup> 15 U.S.C. § 717r(a).

<sup>2</sup> 18 C.F.R. § 385.713.

<sup>3</sup> Transcontinental Gas Pipe Line Company, LLC, 175 FERC ¶ 61,148 (May 20, 2021).

<sup>4</sup> See May 20, 2021 Order at P 4.

<sup>5</sup> See 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

<sup>6</sup> 30 days from the issuance of FERC’s Order is Saturday, June 19, 2021. Consequently, filing this request by the close of the next business day (Monday, June 21, 2019) is timely. See 18 C.F.R. § 385.2007(a).

for rehearing, they incorporate by reference their April 6, 2021 comments to FERC on Transco's Request for Extension of Time.<sup>7</sup>

## I. STATEMENT OF RELEVANT FACTS

On March 27, 2017, Transco submitted to FERC an application under Section 7(c) of the NGA requesting authorization to construct and operate its proposed NESE Project. NESE is a \$926.5 million proposed natural gas pipeline project that would transport fracked natural gas through New Jersey from the Marcellus Shale in Pennsylvania to energy markets in New York City and the surrounding area. The specific elements of the project primarily consist of (1) a new compressor station in Somerset County, New Jersey, (2) increased pipeline pressure and capacity throughout existing Pennsylvania and New Jersey pipelines, and (3) almost twenty-seven miles of new pipeline from Sayreville, New Jersey across the Raritan Bay to gas terminals in Rockaway, Queens. The Project would provide up to 400,000 dekatherms per day (Dth/d) of natural gas to "National Grid's residential and commercial customers in the New York City area."<sup>8</sup>

On January 25, 2019, FERC issued a Final Environmental Impact Statement ("FEIS") on the NESE Project in which FERC staff concluded that the Project would not cause significant adverse environmental impacts with the implementation of Transco's proposed and FERC's recommended mitigation measures. On May 3, 2019, FERC issued an Order "find[ing] that the project, if constructed and operated as described in the final EIS, is an environmentally acceptable action"<sup>9</sup> and "find[ing], consistent with the Certificate Policy Statement and NGA section 7(c), that the public convenience and necessity requires approval of the project, subject to the environmental and other conditions in this order."<sup>10</sup> The May 3, 2019 FERC Certificate Order states that "Environmental Condition 10 requires that Transco receive all applicable authorizations required

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<sup>7</sup> EELC Comments on Transco's Request for Extension of Time (dated April 6, 2021) (FERC Docket # CP17-101-000, Accession # 20210406-6140).

<sup>8</sup> Final Environmental Impact Statement ("FEIS") for NESE Project (January 25, 2019), ES-1.

<sup>9</sup> FERC's May 20, 2021 Order, P 91.

<sup>10</sup> *Id.* at P. 18.

under federal law (including those delegated to states) prior to construction.”<sup>11</sup> Thus, Transco must first obtain Clean Water Act Section 401 Water Quality Certifications from the State of New York and the State of New Jersey before construction and operation of the Project may commence. In addition, the May 3, 2019 FERC Certificate Order required Transco to “complet[e] ... construction of the proposed facilities and mak[e] them available for service within two years of the date of this order [i.e., by May 3, 2021].”<sup>12</sup>

On June 3, 2019, Intervenors – along with the Surfrider Foundation – filed (1) a Request for Rehearing and Rescission and (2) a Motion for Stay of the May 3, 2019 FERC Certificate Order. On April 16, 2020, FERC issued an Order (1) denying this Request for Rehearing and (2) dismissing this Motion for Stay as moot. On May 15, 2020, the State of New York and the State of New Jersey each denied a Water Quality Certification for the Project. To date, Transco has neither (1) appealed New York’s or New Jersey’s denial of a Water Quality Certification nor (2) resubmitted new applications for Water Quality Certifications to the New York State Department of Environmental Conservation or the New Jersey Department of Environmental Protection. On June 15, 2020, Intervenors filed in the U.S. Court of Appeals for the D.C. Circuit (“D.C. Circuit”) a Joint Petition for Review of (1) the May 3, 2019 FERC Certificate Order, (2) FERC’s July 2, 2019 Tolling Order, and (3) FERC’s April 16, 2020 Order Denying Rehearing and Stay. On July 16, 2020, Intervenors submitted multiple filings in the D.C. Circuit, including (1) their Statement of Issues to be Raised and (2) an Unopposed Motion to Hold the Petition for Review in Abeyance. On July 21, 2020, the D.C. Circuit granted the Unopposed Motion to Hold the Petition for Review in Abeyance.

On March 19, 2021, Transco submitted to FERC a “request[] [for] a two-year extension of time...to construct and place into service [the NESE Project].”<sup>13</sup> On March 22, 2021, FERC

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<sup>11</sup> *Id.* at P. 89.

<sup>12</sup> *Id.* at P. 93(B)(1).

<sup>13</sup> Transco’s Request for Extension of Time (March 19, 2021), pg. 1.

issued a Notice of Transco's Request for Extension of Time. On April 6, 2021, the Eastern Environmental Law Center ("EELC") submitted to FERC comments – on behalf of Intervenors – on Transco's Request for Extension of Time. On May 20, 2021, FERC issued the Order granting Transco's Request for Extension of Time, until May 3, 2023, to commence and complete construction of the proposed NESE Project.

## **II. BASIS FOR REHEARING**

For the reasons set forth below, the Commission should grant Intervenors' request for rehearing and rescind the Order.

### **A. CONCISE STATEMENT OF THE ALLEGED ERRORS IN THE ORDER**

1. *The Commission's Order is Arbitrary and Capricious Because "Good Cause" Does Not Exist for Granting Transco an Extension of Time*
  - a. *NESE Delays were Caused by Transco's Failure to Make Good Faith Efforts to Timely Obtain Water Quality Certification - Not the COVID-19 Pandemic.*
  - b. *New York and New Jersey's Repeated Denials of Water Quality Certifications Have Rendered the Certificate for NESE Stale, Null and Void.*
2. *FERC's Order Violates the NGA, NEPA, and the APA in its Determination that the May 3, 2019 Certificate Order's Public Interest Findings and Environmental Analysis are Still Valid*
  - a. *FERC's Determination that the Certificate Order's Public Interest Finding is Still Valid Violates the NGA*
  - b. *FERC's Determination that the Certificate Order's Environmental Analysis is Still Valid Violates NEPA and the APA*

### **B. STATEMENT OF THE ISSUES**

1. *The Commission Acted in an Arbitrary and Capricious Manner in Finding that "Good Cause" Exists for Granting Transco an Extension of Time*

There is no good cause<sup>14</sup> for an extension of time to commence and complete construction of NESE. In May of 2020, the States of New York and New Jersey properly denied necessary Water

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<sup>14</sup> 18 C.F.R. § 385.2008.

Quality Certifications (“WQCs”) for NESE pursuant to section 401 of the Clean Water Act. Transco has not filed any legal challenge of those denials, nor has Transco presented any changed project plans in an attempt to address the bases for those denials. Moreover, in ongoing regulatory proceedings<sup>15</sup> before the New York Public Service Commission (“NYPSC”), National Grid has moved forward with an alternative to NESE for meeting projected need in its Downstate NY service area, and the resolution of those proceedings will bear on the Commission’s previous finding of need for NESE. Additionally, the Commission’s failure to properly account for NESE’s reasonably foreseeable upstream and downstream greenhouse gas emissions under the National Environmental Policy Act (“NEPA”) was explicitly acknowledged and condemned by now-Chairman Glick and is the subject of a pending lawsuit in the U.S. Court of Appeals for the D.C. Circuit.<sup>16</sup> Accordingly, the Commission should have denied Transco’s extension request and taken the above circumstances and any further developments into account if Transco eventually obtains WQCs for NESE and reapplies to the Commission for a new certificate of public convenience and necessity.

*a. NESE Delays were Caused by Transco’s Failure to Obtain Water Quality Certification - Not the COVID-19 Pandemic.*

In its extension request, Transco recited the general adverse impacts of the pandemic on government and business operations, and claimed that “Transco’s development of the Project, too, has been adversely impacted by this unforeseeable event.” The Commission’s acceptance of Transco’s purported link of its delay to the ongoing COVID-19 pandemic is arbitrary and capricious and calls for an in-depth reconsideration. The principal reason that Transco has not, and legally could not have, proceeded with construction of NESE is *not* the COVID-19 pandemic - it is that the

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<sup>15</sup> *Proceeding on Motion of the Commission to Investigate Denials of Service Requests by National Grid USA, The Brooklyn Union Gas Co. d/b/a National Grid NY and KeySpan Gas East Corp. d/b/a National Grid*, 19-G-0678.

<sup>16</sup> *NY/NJ Baykeeper, et al. v. FERC*, Dkt. No. 20-1211 (filed Jun. 15, 2020). This lawsuit is now pending in the U.S. Court of Appeals for the D.C. Circuit and the Commission’s May 3, 2019 certificate order and April 16, 2020 rehearing denial are under review therein. Thus, Transco’s claim (at n. 1 of its request for extension of time) that “[n]o appeal of the Commission’s decision was filed; thus, the Certificate Order is final and no longer subject to rehearing or appeal”, is false.

States of New York and New Jersey have repeatedly denied WQCs for the Project due to water quality impacts. Specifically, on May 15, 2019, and again on May 15, 2020, the New York State Department of Environmental Conservation (“NYSDEC”) denied WQCs for the Project due to significant water quality impacts from the resuspension of sediments and other contaminants, including mercury and copper. Notably, these water quality impacts were acknowledged by the Commission.<sup>17</sup> The New Jersey Department of Environmental Protection (“NJDEP”) similarly denied WQCs for the Project on June 5, 2019 and again on May 15, 2020 due to the Project’s impacts on exceptional resource value wetlands, riparian zone vegetation and surface water quality.

Transco also wrongly claimed (and the Commission wrongly accepted) that its delay in commencing construction of NESE is due to short-term demand reductions caused by the pandemic, and that “the Project will be essential to meeting National Grid’s needs once New York City returns to a more normal state of business and affairs.” Transco’s claim is belied by National Grid’s supplemental report, which reexamined projections of long-term demand and available options for meeting that demand.<sup>18</sup> National Grid’s initial long-term capacity report<sup>19</sup> projected a long-term supply gap of 265 - 415 Mdth/day by 2032-35, and presented several purported options (including NESE) for bridging that gap. However, National Grid’s supplemental report substantially reduced the projected long-term supply gap to 185 - 375 Mdth/day by 2032-35. This long-term reduction was based not only on the impact of the pandemic, but also on supply increase and implementation of low-carbon initiatives. Moreover, in its supplemental report, National Grid identified a new distributed infrastructure option<sup>20</sup> that would not rely on NESE, and included this alternative to

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<sup>17</sup> See Final Environmental Impact Statement at 4-123, Table 4.5.2-8.

<sup>18</sup> “Natural Gas Long-Term Capacity Supplemental Report for Brooklyn, Queens, Staten Island and Long Island (‘Downstate NY’)” (filed May 8, 2020) (available at: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-g-0678&submit=Search>).

<sup>19</sup> “Natural Gas Long-Term Capacity Report for Brooklyn, Queens, Staten Island and Long Island (‘Downstate NY’)” (filed Feb. 24, 2020) (available at: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-g-0678&submit=Search>).

<sup>20</sup> LNG vaporization and Iroquois Gas compression enhancements to existing infrastructure, combined with incremental energy efficiency and demand response.

NESE in its recommended solutions for meeting long-term demand. National Grid is actively pursuing this alternative to NESE.<sup>21</sup> Thus, contrary to Transco's assertion (which the Commission arbitrarily accepted in its Order) the reduction in projected demand is long-term, and NESE is not needed to meet that demand.

*b. New York and New Jersey's Repeated Denials of Water Quality Certifications Have Rendered the Certificate for NESE Stale, Null and Void.*

The Commission arbitrarily and capriciously approved Transco's request for an extension without any analysis of Transco's lack of effort to meet the Commission's deadline. If the Commission made any attempt to look, it would have seen that Transco has done nothing for over a year and has been waiting for surrounding market conditions to improve. In addition, the Commission arbitrarily ignored the fact that Transco cannot overcome the reasons for New York's and New Jersey's denials of Water Quality Certificates ("WQCs") by simply re-submitting new applications for the Project as-is. The only way Transco could re-apply to these States in good faith would be to substantially change the Project. Yet, Transco failed to put forth any supporting details, so the Commission could not rely on anything to grant an extension based on whether Transco intends to make such a change or why it has waited so long to do so. Therefore, because Transco cannot obtain the requisite approvals from New York and New Jersey for the same proposed Project that was actually approved by the Commission, the Commission's approval of the Project is now stale, null and void.

The Commission has expressly held that its "...orders authorizing projects include completion deadlines because the information supporting our public convenience and necessity determination **goes stale with the passage of time.**" Chestnut Ridge Storage LLC, 139 F.E.R.C. P61,149 (F.E.R.C. May 23, 2012) [emphasis added.]. In that matter, the Commission expressly decided that it does *not* "...automatically grant additional time solely because a company expresses

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<sup>21</sup> See e.g. Monitor's Eighth Quarterly Report (filed Mar. 8, 2021) (available at <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-g-0678&submit=Search>).

a preference, or even need, to place a hold on its project until more agreeable market conditions materialize.” Ibid. The Commission denied the request for an extension in that case. For the same reasons, the Commission should have denied Transco’s request for an extension in this matter. The original authorization issued to Transco has gone stale with the passage of time, which is especially highlighted by New Jersey and New York’s detailed denials of the requisite WQCs on May 15, 2020. Nearly a year has passed with no subsequent application submissions by Transco, which indicates that Transco has been biding its time “until more agreeable market conditions materialize,” as was the case in Chestnut Ridge Storage LLC.

The denials by New York and New Jersey of WQCs for the Project are based on the Project’s significant, inescapable and unjustifiable water quality impacts. Transco will not be able to overcome these denials by merely fine-tuning the Project. For example, the NYSDEC’s May 15, 2020 denial set forth the reasons it would not allow Transco to construct a pipeline through 17.4 miles of New York State waters. These reasons included Transco’s failure to adequately address “resuspension of sediments and other contaminants, including mercury and copper” and that “[t]he Project would cause impacts to habitats due to the disturbance of shellfish beds and other benthic resources.” NYSDEC decided that “[r]esuspension of contaminated sediment caused by the construction of the Project will release contaminants into the water column...” Furthermore, NYSDEC denied Transco’s application on the basis that Transco proposed to bury the pipeline *only four feet* under the sea floor, while NYSDEC ordinarily requires a *six foot depth* to avoid foreseeable and significant problems. NJDEP relied on concerns similar to those of NYSDEC, when it denied Transco’s proposal to construct the pipeline across 6 miles of New Jersey State waters, with additional unacceptable impacts to highly regulated inland coastal areas and freshwater wetlands. It should be apparent from these denials that Transco cannot construct its proposed pipeline, which would cross through 23 miles of the Raritan Bay in both New York and New Jersey



state waters, without fundamentally changing the Project. Thus, the Commission's approval is now stale and should not be extended.

Furthermore, Transco has sat on its hands for almost an entire year since New Jersey and New York issued final denials of the requisite WQCs and, therefore, has not acted in good faith to meet the deadlines in the Commission's authorization. Transco has not acted quickly and in good faith to submit new permit applications since New York and New Jersey denied its proposed WQCs on May 15, 2020. Under Section 401 of the CWA, "If the State...fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." 33 U.S.C. § 1341(a)(1). The legislative intent behind Section 401 includes timeliness and expediency. See Hoopa Valley Tribe v. FERC, 913 F.3d 1099 (D.C. Cir. 2019); Constitution Pipeline Co., LLC, 169 F.E.R.C. P61,102 (F.E.R.C. November 8, 2019). Therefore, the Commission must adhere to the same legislative intent, or principles of timeliness and expediency, when faced with an extension request by an applicant, like Transco, that has not diligently and in good faith sought to obtain the requisite WQCs within the Commission's original deadline. How can the one year time-frame be so important to the Commission with regard to a State's review of the requisite WQC, but so insignificant with regard to an applicant's request for an extension?

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....**" In re Northwest Pipeline LLC, 171 F.E.R.C. P61,077 (F.E.R.C. April 27, 2020) [emphasis added]. Accordingly, the Commission should not have granted Transco's request for an extension because Transco did not show that it made good faith efforts to meet its deadline. Transco did not appeal New Jersey's or New York's WQC denials, nor has it submitted new applications. It was illogical (arbitrary and capricious) for Transco to receive an extension for good cause, when it has done *absolutely nothing*

to meet its deadlines for almost an entire year - especially since New York and New Jersey were required to issue a decision within one year of receiving a new application from Transco under Section 401 of the CWA.

2. *FERC's Order Violates the NGA, NEPA, and the APA in Determining that the May 3, 2019 Certificate Order's Public Interest Findings and Environmental Analysis are Still Valid*

a. *FERC's Determination that the Certificate Order's Public Interest Finding is Still Valid Violates the NGA*

The Commission's original finding of need for the Project has been undercut by developments in the NYPSC's ongoing regulatory proceedings concerning long-term demand in National Grid's Downstate NY service area and long-term gas supply planning procedures.<sup>22</sup> As noted above, since the Commission issued the subject Certificate, National Grid has substantially reduced its projections for long-term demand and has moved ahead with an alternative to NESE for meeting that demand. In New York's long-term gas supply planning proceedings, NYPSC recently released a proposal which would require each utility - including National Grid - to file a comprehensive supply plan that includes a "no-infrastructure option" with a mix of utility sponsored demand reduction measures that will close any projected supply gap and one or more contingency solutions.<sup>23</sup> National Grid expects to be among the first utilities to report through this new planning process, and that this would likely occur next year.<sup>24</sup> These developments weigh in favor of *denying* Transco's extension request, such that the Commission may consider the prevailing circumstances bearing on need if and when Transco has obtained the necessary WQCs and applies to the Commission for a new Certificate for the Project.

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<sup>22</sup> Case 20-G-0131 - *In the Matter of Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*.

<sup>23</sup> "Staff Gas System Planning Process Proposal" (filed Feb. 12, 2021) (available at: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=20-g-0131&submit=Search>).

<sup>24</sup> "The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid's comments in response to the National Grid Monitorship: Eighth Quarterly Report" (filed Mar. 8, 2021) (available at: <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=19-g-0678&submit=Search>).

The Commission's grant of Transco's request for an extension was arbitrary and capricious because it did not address these facts and circumstances. In its Order, the Commission concluded:

“Transco requests only to change the timing, not the nature, of the project. Extending the deadline to construct the Northeast Supply Enhancement Project and place it into service within four years of the date of the Certificate Order will not undermine the Commission's findings in the Certificate Order that the project is required by the public convenience and necessity.”

The Commission missed the point here. Intervenors' primary contention is not that the Commission's findings in the Certificate Order would become stale *at some point during the extension*. Rather, as Intervenors explained in their comment letter, the Commission's findings have *already* been rendered stale, null and void - irrespective of whether an extension is granted. Moreover, the fact that Transco has not sought to change the nature of the proposed project and reapply for WQCs for *over a year* since New York and New Jersey denied the WQCs indicates a *lack* of good faith effort by Transco. That is because Transco would need to fundamentally change the nature of its proposed project as part of any good faith effort to address the bases for New York and New Jersey's denials and reapply for WQCs. The fact that Transco has made no attempt to do so is clearly *not* a “circumstance beyond the control” of Transco.

The Commission also concluded:

“The Certificate Order found a market need for the project based on Transco's execution of long-term firm transportation precedent agreements with the two National Grid affiliates for the entirety of the project's capacity. The terms of these agreements extend far beyond May 3, 2023, and commenters do not provide evidence that either shipper intends to cancel the contract.”

In reaching that conclusion, the Commission failed to address that National Grid is publicly pursuing regulatory approvals *for an alternative to NESE* as part of ongoing investigative proceedings by the New York Public Service Commission. A reconsideration and rescission of the Commission's extension would also cohere with the Commission's pending notice of inquiry

regarding the certification of new interstate natural gas facilities,<sup>25</sup> which calls into question the Commission's methodology for determining whether there is a need for a proposed project, including the consideration of precedent agreements and contracts for service as evidence of such need.

*b. FERC's Determination that the Certificate Order's Environmental Analysis is Still Valid Violates NEPA and the APA*

In their April 6, 2021 Comments, Intervenors made two arguments for why the Commission's finding with respect to the Project's greenhouse gas ("GHG") emissions were no longer valid. In the May 20, 2021 Order, FERC does not even address Intervenors' first argument: that there is a pending judicial appeal of both (1) FERC's May 3, 2019 Certificate Order and (2) FERC's April 16, 2020 Rehearing Denial before the D.C. Circuit, which was brought by Intervenors on June 15, 2020.<sup>26</sup> Because FERC did not address this first argument, we highlight it again here.

In Intervenors' July 16, 2020 Statement of Issues to Be Raised in the D.C. Circuit case, Intervenors list the following issue:

Did the Commission act arbitrarily, capriciously, and in violation of the National Environmental Policy Act [NEPA], 42 U.S.C. § 4321, *et seq.* and the Council on Environmental Quality regulations, 40 C.F.R. Parts 1500-1508 by (1) not quantifying the "*reasonably foreseeable*" greenhouse gas emissions from *downstream* combustion and *upstream* production due to the Project and (2) not analyzing the "*significance*" of the Project's greenhouse gas emissions?<sup>27</sup>

Intervenors had previously raised this issue as one of the grounds for their June 3, 2019 Request for Rehearing<sup>28</sup> of FERC May 3, 2019 Certificate Order. In their Request for Rehearing, they noted the following:

As Commissioner Glick thoroughly explained in his dissent from the Order, the

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<sup>25</sup> *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125, Docket No. PL18-1-000 (issued Feb. 18, 2021).

<sup>26</sup> See D.C. Circuit Docket No. 20-1211.

<sup>27</sup> Petitioners' Statement of Issues to be Raised at 1-2, D.C. Circuit Docket No. 20-1211 (citations omitted) (emphasis added).

<sup>28</sup> Intervenors were also joined in the June 3, 2019 Request for Rehearing by the Surfrider Foundation.

Commission's "failure to identify the *reasonably foreseeable* [GHG emissions from *downstream* combustion and *upstream* production due to] the Project" and "refusal to consider the *significance* of the Project's contribution to climate change" are both arbitrary and capricious.<sup>29</sup>

Thus, Intervenor maintain that the Certificate Order's environmental analysis violated NEPA and thus was not valid in the first place when that Order was issued on May 3, 2019. FERC's reaffirmation of its May 3, 2019 environmental analysis in its May 20, 2021 Order constitutes a continuing violation of NEPA. Moreover, there remains the possibility that, if the D.C. Circuit were to rule in the Intervenor's favor, the court could vacate FERC's May 3, 2019 and April 16, 2020 Orders and remand them to FERC.

In their April 6, 2021 Comments, Intervenor made a second argument: that there has been a "significant change" of law -- in the Commission's March 22, 2021 Order regarding the Northern Natural Gas Company<sup>30</sup> -- and this new FERC policy on GHG emissions may well lead the Commission to find that the NESE Project's contribution to climate change will in fact be significant. Yet in its May 20, 2021 Order, FERC apparently overlooked this argument when it declared that "the commenters have not identified any specific change of fact or law that would require the Commission to reconsider our prior findings that the project, as conditioned, is an environmentally acceptable action."<sup>31</sup> FERC, citing the April 1, 2021 Comments of Township of Franklin, does acknowledge that "Commenters...argue that because the Commission has announced an intention to change its policy regarding GHG emissions, the existing environmental analysis must be stale."<sup>32</sup> But FERC failed to address Intervenor's specific argument that the Commission's March 22, 2021 Order regarding the Northern Natural Gas Company constituted a "significant change" of law. In fact, Intervenor pointed out that, in the Commission's March 22, 2021 Order, Commissioner Christie in his dissent characterized the Commission's policy shift on

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<sup>29</sup> June 3, 2019 Request for Rehearing, FERC Docket No. CP17-101-000 (citations omitted) (emphasis added).

<sup>30</sup> *Northern Natural Gas Company*, 174 FERC ¶ 61,189 (2021).

<sup>31</sup> FERC's May 20, 2021 Order, P 17.

<sup>32</sup> *Id.* at P 15.

GHG emissions as “deciding [a] major question of law.”<sup>33</sup> FERC’s failure to address Intervenors’ specific argument in its May 20, 2021 Order is unlawful under the Administrative Procedure Act’s (“APA’s”) arbitrary and capricious standard of review.<sup>34</sup>

### III. CONCLUSION

For the foregoing reasons, the Commission must **GRANT** the Intervenors’ request for rehearing and **RESCIND** the Order.

Respectfully Submitted,

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<sup>33</sup> *Id.* (Christie, Comm’r, dissenting at p. 2) (emphasis added).

<sup>34</sup> 5 U.S.C. § 706 (“The reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

Document Content(s)

EELC Request for Rehearing of Grant of Extension.PDF.....1