NATURAL GAS REGULATION REPORT OF THE GAS, OIL, AND LIQUIDS STEERING COMMITTEE

This report summarizes policy developments and legal decisions that occurred at the Federal Energy Regulatory Commission (Commission), the Pipeline and Hazardous Materials Safety Administration (PHMSA), and the United States Courts of Appeals in the area of natural gas regulation between July 1, 2019, and June 30, 2020.*

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I. RULEMAKING ACTIONS

A. Order No. 871, Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

On June 9, 2020, the Commission issued Order No. 871, a final rule amending its regulations to preclude the issuance of authorizations to proceed with construction activities with respect to a Natural Gas Act (NGA) section 3 authorization or section 7(c) certificate order until the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.[1] The Commission issued the rule as a final rule without a period for public comment.[2] The Commission stated that the " . . . public notice and comment, otherwise required by 5 U.S.C. § 553, do[es] not apply to 'rules of agency organization, procedure, or practice,'" and that " . . . this rule concerns only matters of agency procedure, and will not significantly affect regulated entities or the general public."[3]

The Commission noted the increased participation in NGA sections 3 and 7 proceedings by stakeholders, " . . . such as landowners, community members, non-governmental organizations, property rights advocates, and governmental entities, who have raised concerns about proposed projects."[4] The Commission stated that a party dissatisfied with the Commission's certificate determination may apply for rehearing, and only after the Commission has issued an order on the merits of a rehearing request may a party seek judicial review.[5] The Commission explained that often, because of the complex nature of the matters raised, the Commission issues an order (known as a tolling order) to provide it more time to consider the issues raised on rehearing.[6] However, the Commission noted that once it issues a certificate order, a project sponsor may request that the Commission authorize construction while rehearing is pending.[7] In order to balance the Commission's commitment to expeditiously respond to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by

1. *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 F.E.R.C. ¶ 61,201 (2020) [hereinafter Order No. 871].

2. *Id.* at P 20.

3. *Id*.

4. *Id*. at P 7.

5. *Id*. at P 8.

6. Order No. 871, *supra* note 1, at P 8. The Commission, in its order stated that tolling orders continue for 30 days after the filing of the rehearing request.

7. *Id.* at P 10.

the possibility of construction proceeding prior to the completion of Commission review, the Commission, in Order No. 871, exercised its discretion to adopt a new regulation to ensure that construction of an approved natural gas project will not commence until the Commission acted upon the merits of any request for rehearing, regardless of land ownership or the time for filing such request has passed.[8]

B. Order No. 865, Civil Monetary Penalty Inflation Adjustments

On January 2, 2020, the Commission issued a final rule amending its regulations governing the maximum civil monetary penalties assessable for violations of statutes, rules, and orders within the Commission's jurisdiction.[9] The Commission stated that the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015[10] (2015 Adjustment Act), which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990,[11] required the head of each federal agency to issue a rule by July 2016 adjusting for inflation each civil monetary penalty provided by law within the agency's jurisdiction and to make further inflation adjustments on an annual basis every January 15 thereafter.[12] Pursuant to the 2015 Adjustment Act, the Commission issued the final rule to adjust the civil monetary penalty for violations under section 22 of the NGA from $1,269,500 per violation, per day to $1,291,894 per violation, per day.[13] Similarly, the civil monetary penalty for violations under section 504(b)(6)(A)(i) of the Natural Gas Policy Act is adjusted from $1,269,500 per violation, per day to $1,291,894 per violation, per day.[14]

C. Waiver of Tariff Requirements, 171 F.E.R.C. ¶ 61,156 (2020)

On May 21, 2020, the Commission issued an order that clarified its policy regarding requests for waiver of tariff provisions.[15] The Commission proposed to no longer grant retroactive waivers of tariff provisions except in certain situations.[16] The Commission proposed that when seeking remedial relief in connection with actions or omissions that have already occurred prior to the date relief is sought from the Commission, requesting entities should not describe the requested relief as a waiver.[17] Rather, the Commission stated such filings should be characterized as a request for remedial relief.[18] In response to such a request, "the Commission will focus on what remedy, if any, is required to cure acknowl-

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8. *Id.* at P 12.

9. *Civil Monetary Penalty Inflation Adjustments*, Order No. 865, 170 F.E.R.C. ¶ 61,001 (2020) [hereinafter Order No. 865].

10. Sec. 701, Pub. L. 114-74, 129 Stat. 584, 599 (2015).

11. Pub. L. 101-410, 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note (2006)).

12. 28 U.S.C. 2461 note, at (4).

13. Order No. 865, *supra* note 9, at P 8.

14. *Id.*

15. *Waiver of Tariff Requirements*, 171 F.E.R.C. ¶ 61,156 (2020).

16. *Id.* at P 11.

17. *Id.* at P 12.

18. *Id*.

edged or alleged deviations from a filed tariff."[19] The Commission proposed that the term "waiver" should be confined to: (a) requests for prospective relief when a requested future deviation from the filed tariff has not yet occurred at the time a request is filed; or (b) petitions for remedial relief when a tariff expressly authorizes regulated entities to seek a remedial waiver from the Commission for past non-compliance with the filed tariff.[20]

The Commission further proposed "that when the entity requesting remedial relief is the entity that acted in a manner inconsistent with the tariff, or believes it may have done so, such requests should be filed as petitions for declaratory order under Rule 207 of the Commission's Rule of Practice and Procedure."[21] The Commission proposed "that when the filing entity alleges that a different entity has acted in a manner inconsistent with the tariff, such requests should be filed as complaints under Rule 206."[22] Additionally, "for petitions or complaints seeking remedial relief for actions or omissions that occurred prior to the date of filing, where the petitioner acknowledges or the complainant alleges violation of a tariff filed under . . . the NGA," the Commission proposed that "such petitions or complaints should expressly request the Commission action pursuant to . . . NGA section 16."[23]

The Commission also proposed to find that it is appropriate to require a stronger showing when a petitioner is seeking remedial relief for its own failure to comply with a tariff.[24] Finally, the Commission proposed that "petitioners requesting remedial relief will generally be denied when a protester credibly contends that the petition for remedial relief . . . will result in undesirable consequences, such as harm to third parties."[25] However, the Commission proposed to find that the absence of a protester does not necessarily mean that there is no harm to other parties. In certain circumstances, the Commission may determine that the effects of a waiver will result in harm to third parties.[26]

The Commission noted that the proposed guidance is limited to "requests for remedial relief to address tariff-related actions or omissions that have already occurred before a petition or complaint is filed."[27] "Requests for remedial relief are distinct from prospective requests to waive the 30-day prior notice requirement under NGA section 4(d), which the Commission has discretion to waive 'for good cause shown.'"[28]

19. *Id.*
20. 171 F.E.R.C. ¶ 61,156 at P 12.
21. *Id.* at P 13; 18 C.F.R. § 385.207 (2020).
22. 171 F.E.R.C. ¶ 61,156 at P 13; 18 C.F.R. § 385.206 (2019).
23. 171 F.E.R.C. ¶ 61,156 at P 14.
24. *Id.* at P 20.
25. *Id.*
26. *Id.*
27. *Id.* at P 21.
28. 171 F.E.R.C. ¶ 61,156 at P 21.

II. RATES, TERMS, AND CONDITIONS OF SERVICE

A. Accumulated Deferred Income Taxes, Alliance Pipeline L.P.

On June 18, 2020, the Commission issued an order accepting in part Alliance Pipeline LP's (Alliance) filings seeking approval of certain accounting entries with respect to its deferred tax balances and income taxes (Accounting Request).[29] Alliance stated that "it has historically reflected deferred taxes for purposes of its annual Form No. 2 on the supporting worksheets of the Form No. 2, not on the balance sheet, and supplementary income tax information on the supporting worksheets of the Form No. 2, not on the income statement."[30] Alliance proposed to account for accumulated deferred income taxes (ADIT) on the balance sheet and impute income taxes on the income statement.[31] Alliance stated that all firm shippers are under negotiated rate contracts that do not provide for a rate adjustment for reductions in the U.S. federal income taxes.[32] The excess ADIT would not impact future revenues from the negotiated rate shippers, thus, Alliance asserted that it is not recording the excess ADIT as a regulatory liability.[33] Alliance stated that it will record deferred income taxes in Accounts 282 (Accumulated Deferred Income Taxes – Other Property) and 283 (Accumulated Deferred Income Taxes – Other) on the balance sheet of the Commission's Uniform System of Accounts.[34] Alliance also committed to reflect income taxes on the Form No. 2 income statement. Indicated Shippers protested Alliance's Account Request.[35]

In its order, the Commission approved Alliance's proposal to: (1) record ADIT on the balance sheet as reflected in Accounts 282 and 283; and (2) reflect income taxes on the Form No. 2 income statement.[36] However, the Commission denied Alliance's request to not record excess ADIT as a regulatory liability.[37] The Commission noted "that in a future ratemaking proceeding a negotiated rate shipper should generally be treated as if it were paying the maximum recourse rate to ensure that shippers paying the maximum recourse rate are not adversely affected by the pipeline's negotiated rate transactions."[38] The Commission noted that this is a shift from the position in the previously issued delegated letter order, "which approved [a] proposal to account for the portion of the excess ADIT associated with its negotiated rate customers as a non-operating deferred income tax benefit instead of a regulatory liability."[39] However, following additional consideration of how excess ADIT may be used for future rate setting, irrespec-

29. *Alliance Pipeline L.P.*, 171 F.E.R.C. ¶ 61,226 at P 1 (2020).
30. *Id.* at P 2.
31. *Id.*
32. *Id*.
33. *Id.*
34. 171 F.E.R.C. ¶ 61,226 at P 3.
35. *Id*. at P 4.
36. *Id*. at P 9.
37. *Id*. at P 10.
38. *Id.*
39. 171 F.E.R.C. ¶ 61,226 at P 10.

tive of currently negotiated rates, the Commission found its determination "to be a more accurate interpretation of the Commission's accounting and ratemaking requirements."[40]

B. Acquisition Premium

1. Adelphia Gateway, LLC

On December 20, 2019, the Commission issued a certificate for the Adelphia Gateway pipeline project, granting a rate base adjustment allowing the use of the acquisition price of existing facilities for rate base purposes.[41] The Commission applied the *Longhorn* test, which requires that the acquiring party first "must show that it is either converting utility assets to a new public use, or it must show that it is placing utility assets in FERC-jurisdictional service for the first time," and then "it must prove by clear and convincing evidence that the write-up will confer substantial benefits on ratepayers . . . ."[42] The Commission found that Adelphia met both prongs of the test and that the acquisition of the facilities would result in "substantial, quantifiable benefits to ratepayers because the acquisition cost is lower than the cost to replicate these facilities for interstate natural gas transportation service with entirely new construction."[43]

C. Bankruptcy

1. ETC Tiger Pipeline, LLC

On June 22, 2020, the Commission issued an order granting, in part, a petition for declaratory order filed by ETC Tiger Pipeline, LLC (ETC Tiger) requesting a finding that the Commission has concurrent jurisdiction with the United States Bankruptcy Courts under sections 4 and 5 of the Natural Gas Act (NGA) with respect to ETC Tiger's transportation agreements with Chesapeake Energy (Chesapeake) and that Commission approval of any abrogation or modification of these agreements is statutorily required.[44]

The Commission granted the petition and found that "[w]here a party to a Commission-jurisdictional agreement under the NGA seeks to reject the agreement in bankruptcy, that party must obtain approval from both the Commission and the bankruptcy court to modify the filed rate and reject the contract, respectively."[45] The Commission explained that the natural gas transportation agreements at issue constitute filed rates and FERC-jurisdictional agreements.[46] As such is, if an entity files a bankruptcy petition and seeks to reject such Commission-jurisdictional agreements in bankruptcy court, the filer must petition the

40. *Id.*

41. *Adelphia Gateway*, *LLC*, 169 F.E.R.C. ¶ 61,220 at P 60. (2019).

42. *Longhorn Partners Pipeline*, 73 F.E.R.C. ¶ 61,355 at p. 62,112 (1995); *see also* Missouri Pub. Serv. Comm'n v. FERC, 783 F.3d 310, 312 (D.C. Cir. 2015).

43. 169 F.E.R.C. ¶ 61,220 at P 59.

44. *ETC Tiger Pipeline, LLC*, 171 F.E.R.C. ¶ 61,248 (2020).

45. *Id.* at P 20.

46. *Id*. at P 24.

Commission "for approval to abrogate, modify, or amend the filed rate."[47] However, the Commission noted that a company need not seek Commission approval before a bankruptcy court can determine whether to reject the agreement.[48]

The Commission explained that it "neither presumes to sit in judgment of rejection motions nor seeks to arrogate the role of adjudicating bankruptcy proceedings."[49] The Commission "recognized that rendering a determination on rejection motions is solely within the province of the bankruptcy court."[50] However, the Commission found that "a bankruptcy court's decision to approve rejection of a FERC-jurisdictional contract cannot modify the filed rate or excuse a violation of the filed rate"; in the Commission's view, only the Commission "has the authority to modify the public law duties set forth in the filed rate."[51] Moreover, the Commission explained that "a reorganization plan that purports to authorize the modification or abrogation of a FERC-jurisdictional filed rate cannot be confirmed unless the Commission agrees to any rate change provided in the reorganization plan or confirmation is made contingent on the Commission's approval."[52] According to the Commission, such an agreement from the Commission can only occur via an order.[53]

D. Force Majeure

1. Columbia Gulf Transmission, LLC

On May 29, 2020, the Commission issued an order accepting tariff records filed by Columbia Gulf Transmission (Columbia Gulf) that modified the reservation charge crediting provisions set forth in the General Terms and Conditions (GT&C) of the pipeline's tariff.[54]

Columbia Gulf proposed, among other things, to switch from the No-Profit method, which provides shippers a partial credit with no delay period, to the Safe Harbor method, which provides full credits after a delay period, for determining when it must grant reservation charge credits (RCC).[55] To implement its change to the Safe Harbor method, Columbia Gulf proposed that:

> when it is unable to schedule or deliver up to a shipper's eligible gas quantities, for a period greater than 10 consecutive days due to a *force majeure* event, it will credit to shippers the full contract reservation rate applicable to the eligible RCC volume not delivered by Columbia Gulf as calculated . . . for each day beyond 10 consecutive days that it is unable to provide service.[56]

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47. *Id.*

48. *Id.* at P 25.

49. 171 F.E.R.C. ¶ 61,248 at P 25 (citing *NextEra, Inc. v. Pac. Gas & Elec. Co.*, 167 F.E.R.C. ¶ 61,096 at P 16 (2019)).

50. *Id*.

51. *Id*.

52. 171 F.E.R.C. ¶ 61,248 at P 25.

53. *Id.*

54. *See Columbia Gulf Transmission, LLC*, 171 F.E.R.C. ¶ 61,179 (2020).

55. *Id.* at P 12.

56. *Id.* at P 3.

Columbia Gulf's revised tariff also described the scenario "when Columbia Gulf provides advance notice of an event that may result in the unavailability of service."[57] In such circumstances, the volume eligible for RCC will be equivalent to a shipper's seven-day usage history.[58] Columbia Gulf proposed "that only firm service which is affected by either a *force majeure* or non-*force majeure* event" will "be included in the daily usage utilized to calculate a shipper's seven-day historical average daily usage, for purposes of determining the volumes eligible for RCC."[59] Additionally, Columbia Gulf clarified "that volumes flowing under secondary service shall not be eligible for RCC under either a *force majeure* or non-*force majeure* event, respectively."[60]

Various parties raised objections to Columbia Gulf's proposals to use historical average usage to determine crediting during an outage, and that Columbia Gulf would not include nominations through secondary points when calculating credits.[61]

The Commission accepted the revised tariff record, effective June 1, 2020, and addressed objections to the changes regarding how RCC are calculated.[62] The Commission explained that its policy holds that:

> when the pipeline gives advance notice of an outage before shippers have submitted scheduling nominations for the day (or days) of an outage, it is reasonable for the pipeline to calculate the RCC based on an appropriate historical average of usage, such as the shipper's prior seven days utilization of firm capacity.[63]

Further, the Commission noted it found no reason that Columbia Gulf "may intentionally delay the posting of notices" because doing so "could harm the pipeline's ability to protect its own system."[64] Regarding the secondary points, the Commission explained that "while pipelines are free to provide credits above and beyond its requirements, the Commission only requires RCC for primary firm service, not secondary firm service."[65]

2. Columbia Gas Transmission, LLC

On May 29, 2020, the Commission accepted Columbia Gas Transmission's (Columbia Gas) tariff records that modified the reservation charge crediting provisions set forth in the general terms and conditions of its tariff.[66] "Specifically, Columbia Gas proposed to change its methodology for calculating the volumes to which reservation charge credits (RCC) apply, and switch from the No-Profit method to the Safe Harbor method for determining when it must grant RCC."[67]

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57. *Id.*
58. *Id.*
59. 171 F.E.R.C. ¶ 61,179 at P 4.
60. *Id.* at P 6.
61. *Id.* at P 9.
62. *Id.* at P 12.
63. *Id.* at P 13.
64. 171 F.E.R.C. ¶ 61,179 at P 13.
65. *Id*. at P 14.
66. *See Columbia Gas Transmission, LLC*, 171 F.E.R.C. ¶ 61,178 at P 1 (2020).
67. *Id*.

To implement its change to the Safe Harbor Method, Columbia proposed that when Columbia Gas is unable to schedule or deliver up to a shipper's eligible gas quantities for a period greater than 10 consecutive days due to a force majeure event, "it will credit to shippers the full contract reservation rate applicable to the eligible RCC volume not delivered by Columbia Gas for each day beyond 10 consecutive days that it is unable to provide service."[68] Additionally, when Columbia Gas provides advanced notice, the volume eligible for RCC will be equivalent to a shipper's average daily usage during the most recent seven days during which Columbia Gas did not experience either a force majeure or non-force majeure event, prior to the notice date on its electronic bulletin board.[69] Columbia Gas stated "that only firm service which is affected by either a *force majeure* or non-*force majeure* event shall be included in the daily usage utilized to calculate a shipper's seven-day historical average daily usage, for purposes of determining the volumes eligible for RCC."[70] Additionally, Columbia Gas clarified that "volumes flowing under secondary service shall not be eligible for RCC under either a *force majeure* or non-*force majeure* event, respectively."[71]

Various parties protested taking issue with Columbia Gas's proposal to determine a shipper's RCC-eligible volumes using a seven-day usage history.[72] Protesters also argued that Columbia Gas's proposed tariff language for the no-notice service provided through a combination of storage and transportation services fails to account for the fact that the transportation component for such no-notice service varies by season.[73]

The Commission accepted the revised tariff record, subject to Columbia Gas filing a revised tariff record consistent with the tariff language regarding seasonality.[74] Regarding the historical average usage, the Commission explained that its policy recognizes that, when advance notice of an outage has been given, the shippers' scheduling nominations may not accurately reflect what they would have scheduled "without advance knowledge that the scheduling nominations would not be accepted".[75] The Commission found no reason to find that Columbia Gas may intentionally delay the posting of notices to manipulate credits, as that could harm the pipeline's ability to protect its own system.[76] Regarding the secondary points, the Commission stated that "while pipelines are free to provide credits above and beyond the Commission's requirements, it only requires RCC for primary firm service, not secondary firm service."[77]

68. *Id*. at P 3.
69. *Id*.
70. *Id.* at P 5.
71. 171 F.E.R.C. ¶ 61,178 at P 7.
72. *Id.* at P 11.
73. *Id.* at P 12.
74. *Id.* at P 15.
75. *Id.* at P 17.
76. 171 F.E.R.C. ¶ 61,178 at P 17.
77. *Id.* at P 18.

3. Rio Grande LNG, LLC and Rio Bravo Pipeline Company, LLC

On November 22, 2020, the Commission authorized Rio Grande LNG (Rio Grande) to construct and operate facilities for the liquefaction and export of domestically-produced natural gas at a proposed LNG terminal located on the north embankment of the Brownsville Ship Channel in Cameron County, Texas (Rio Grande LNG Terminal).[78] Additionally, the Commission authorized the construction and operation of a new interstate natural gas pipeline system (Rio Bravo Pipeline Project).[79]

Rio Bravo's proposed general terms and conditions included a definition of *force majeure* and provided for reservation charge credits.[80] Rio Bravo defined *force majeure* as "the inability of Transporter's pipeline system to deliver gas . . . ."[81] Rio Bravo's proposed definition of *force majeure* events also included "acts of civil or military authority (including, but not limited to, courts, the government or any administrative or regulatory agencies) . . . ."[82]

In its order, the Commission found that Rio Bravo's definition of *force majeure* was overly broad as it would include circumstances that are not both unexpected and outside the pipeline's control, which conflicts with established Commission policy.[83] The Commission also found that Rio Bravo's proposed definition of *force majeure* events "conflicts with Commission policy because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as force majeure events."[84] The Commission clarified "that outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline" are non-*force majeure* events requiring full reservation charge credits.[85] The Commission explained that "outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are force majeure events requiring only partial crediting."[86] The Commission directed Rio Bravo to revise its GT&C to comply with Commission policy.[87]

4. Venture Global Plaquemines LNG, LLC and Venture Global Gator Express, LLC

On September 30, 2019, the Commission issued an order authorizing Venture Global Plaquemines LNG (Plaquemines LNG) to site, construct, and operate a new liquefied natural gas (LNG) export terminal and associated facilities along

78. *See Rio Grande LNG, LLC, et al.*, 169 F.E.R.C. ¶ 61,131 at PP 1, 3 (2019).
79. *Id.* at PP 2-3.
80. *Id.* at P 46.
81. *Id.* at P 47.
82. *Id.* at P 48.
83. 169 F.E.R.C. ¶ 61,131 at P 47.
84. *Id.* at P 48.
85. *Id.*
86. *Id.*
87. *Id.*

the Mississippi River in Plaquemines Parish, Louisiana (Plaquemines LNG Project).[88] Additionally, the Commission's order authorizes Venture Global Gator Express (Gator Express) to construct and operate a new natural gas pipeline system within Plaquemines Parish (Gator Express Pipeline Project).[89]

Gator Express's proposed definition of *force majeure* events included "priority limitation or restraining orders of any kind of the government of the United States or a State or of any civil or military entity."[90] Additionally, Gator Express's general terms and conditions defined *force majeure* events, in part, as "any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension, which by due diligence such party is unable to overcome."[91]

In its order, the Commission found that "Gator Express's proposed tariff language conflicts with Commission policy because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as *force majeure* events."[92] The Commission clarified "that outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities . . . including the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration's integrity management regulations, are non-force majeure events requiring full reservation charge credits."[93] However, the Commission also stated that "outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are *force majeure* events requiring only partial crediting."[94] Additionally, the Commission directed Gator Express to revise its definition of *force majeure* outages as events that are both unexpected and uncontrollable.[95]

E. Gas Quality

1. Rager Mountain Storage Co. LLC, et al.

In its "Order on Filings in Compliance with Order No. 587-Y," dated July 29, 2019, the Commission rejected the requests of Total Peaking Services, LLC, B-R Pipeline Company, and USG Pipeline Company, LLC (collectively, the Pipelines) for waivers of the North American Energy Standards Board Wholesale Gas Quadrant (NAESB WGQ) gas quality posting related standards (the Standards).[96] The Standards require pipelines to post gas quality information on its informational postings website if the pipeline separately measures gas quali-

88. *Venture Global Plaquemines LNG, LLC, et al.,* 168 F.E.R.C. ¶ 61,204 at PP 1, 3 (2019).
89. *Id.* at PP 2-3.
90. *Id.* at P 51.
91. *Id.* at P 53.
92. *Id.* at P 52.
93. 168 F.E.R.C. ¶ 61,204 at 52.
94. *Id.*
95. *Id.* at P 53.
96. *Rager Mountain Storage Co. LLC et al.*, 168 F.E.R.C. ¶ 61,061 at PP 7-8 (2019).

ty.[97] The Commission explained that, where the Standards "merely describe the process by which a pipeline must perform a business function, if it performs that function, and where the standard does not require the pipeline to perform the business function," requests for waivers or extensions of time would not be granted.[98] Because none of the Pipelines separately measure gas quality and are not required by the Standards to perform this business function, the Commission denied the Pipelines' waiver requests as unnecessary.[99] The Commission directed the Pipelines to file revised tariff records to remove NAESB WGQ Version 3.1 Standards 4.3.23 (as it relates to gas quality posting) and 4.2.89 through 4.3.93 from the section titled "Standards for which Waiver or Extension of Time to comply has been granted," and include NAESB WGQ Version 3.1 Standards 4.3.23 and 4.3.89 through 4.3.93 in their respective tariffs.[100]

2. Venture Global Plaquemines LNG, LLC, et al.

On September 30, 2019, the Commission authorized a proposal by Venture Global Plaquemines LNG, LLC under section 3 of the NGA to site, construct, and operate a new liquefied natural gas export terminal and associated facilities along the Mississippi River in Plaquemines Parish, Louisiana.[101] The Commission also approved Venture Global Gator Express, LLC's (Gator Express) proposal under section 7(c) of the NGA to construct and operate a new natural gas pipeline system within Plaquemines Parish.[102] Section 3.5 of the GT&C of Gator Express's *pro forma* tariff stated:

> Delivery Point Obligations. Upon mutual agreement between Transporter and a downstream Interconnecting Party, Transporter may temporarily deliver Gas that does not conform to the quality specifications set forth in GT&C Section 3.1, if Transporter, in its reasonable operational judgment and in a not unduly discriminatory manner, determines that such delivery will not interfere with its ability to: (1) maintain prudent and safe operation of part or all of Transporter's pipeline system, and (2) ensures [sic] that such agreement does not adversely affect Transporter's ability to provide firm services. Transporter *may post waivers on its [Electronic Bulletin Board] at its discretion* and will report waivers in accordance with Part 358 of the Commission's Regulations.[103]

The Commission found the emphasized language was inconsistent with section 358.7(i) of its regulations requiring "a transmission provider to post on its internet web site notice of each waiver of a tariff provision that it grants in favor of an affiliate, unless the waiver has been approved by the Commission."[104] The Commission directed Gator Express to revise GT&C Section 3.5 accordingly.[105]

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97. *Id*. at P 7.
98. *Id*. at P 5.
99. *Id*. at P 7.
100. *Id*. at P 8.
101. *Venture Global Plaquemines LNG, LLC*, 168 F.E.R.C. ¶ 61,204 at P 1 (2019).
102. *Id*. at P 3.
103. *Id*. at P 43 (emphasis in original).
104. *Id*. at P 44.
105. *Id*.

F. Jurisdiction

1. Alaska Gasline Development Corp.

The Commission found that it had jurisdiction under section 3 of the NGA over a gas treatment plant, two natural gas pipelines, liquefaction facilities, and an approximately 806.9-mile, 42-inch pipeline that collectively comprised the Alaska LNG Project located on Alaska's North Slope.[106] The Commission acknowledged that while it had "never exerted NGA section 3 jurisdiction over a project of this size" and usually invoked jurisdiction over interstate pipelines delivering gas to LNG terminals under NGA section 7, both the unique nature of Alaska and NGA section 2(11) supported its exercise of jurisdiction over these facilities.[107]

The Commission explained that the definition of "LNG Terminal" in NGA section 2(11) includes not only the "traditional liquefaction and terminaling LNG terminal facilities," but also any other facilities that are necessary to transport gas to such traditional facilities that are not otherwise subject to the Commission's jurisdiction under NGA section 7.[108] The Commission found that the Alaska LNG Project's gas treatment and pipeline facilities met this broad definition because they were necessary to transport gas from Alaska's North Slope to the Alaska LNG Project's liquefaction facilities, and therefore considered these facilities to be part of the proposed LNG terminal.[109] The Commission also acknowledged that while it had previously declined to exercise discretionary jurisdiction over pipelines delivering gas to LNG terminals in Alaska, such determinations had been made prior to the addition of NGA section 2(11) vis-à-vis the Energy Policy Act of 2005.[110]

2. Annova LNG Common Infrastructure, LLC

The Commission found that while Annova LNG Common Infrastructure LLC's (Annova) proposed LNG terminal facilities are subject to its jurisdiction under section 3 of the NGA, the anticipated approximately nine-mile supply lateral that would deliver natural gas from Valley Crossing Pipeline, LLC's existing intrastate system to the proposed LNG terminal is not subject to its jurisdiction under NGA section 7.[111] The Commission explained that "[t]ransporting gas to an LNG facility for export does not confer NGA section 7 jurisdiction on an otherwise intrastate pipeline"[112] and found that, under the circumstances presented by Annova, the anticipated supply lateral will not be jurisdictional regardless

106. *Alaska Gasline Dev. Corp.*, 171 F.E.R.C. ¶ 61,134 at P 1 (2020).

107. *Id*. at P 9; *see also* Natural Gas Act, 15 U.S.C. §717a(11)-717f(h) (2019).

108. 171 F.E.R.C. ¶ 61,134 at P 11.

109. *Id*.

110. *Id*. at P 11 n.18.

111. *Annova LNG Common Infrastructure, LLC*, 169 F.E.R.C. ¶ 61,132 at PP 2-5, 15-25, 33 (2019), *reh'g denied*, 170 F.E.R.C. ¶ 61,140 (2020).

112. *Id.* at P 33.

of whether it is "constructed and operated as a new intrastate pipeline or is constructed and operated through an expansion of an existing intrastate pipeline."[113]

3. Atmos Pipeline – Texas

On July 18, 2019, the Commission issued an "Order on Statement of Operating Conditions and Technical Conference" in which it accepted revisions to Atmos Pipeline – Texas' (Atmos) statement of operating conditions.[114] On January 25, 2018, Atmos had filed tariff records to revise its Statement of Operating Conditions and its Rate Statement.[115] DCP Guadalupe Pipeline, LLC (Guadalupe) protested the filing.[116] Guadalupe contended that Atmos' operation of the Waha Header was inconsistent with, and therefore breached, two related contractual agreements between these two parties, and that Atmos should instead operate the Waha Header "as an independent facility and allocate capacity for Waha Header shippers on an unbundled basis."[117] However, both Atmos and Guadalupe stated that such agreements were "executed outside the Commission's jurisdiction," and neither party asked the Commission to interpret such contracts.[118] The Commission declined to exercise jurisdiction over contractual disputes between Atmos and Guadalupe.[119] The Commission explained that because no party had asked it to decide the issue of breach and because it had otherwise found Atmos' current operation of its own facilities and the leased facilities complied with Commission policies and the Natural Gas Policy Act (NGPA) of 1978, "we will go no further in this order."[120]

4. BH Wyoming Gas, LLC

BH Wyoming Gas, LLC (BH Wyoming Gas) filed an application for a limited jurisdiction blanket certificate under section 7(c) of the NGA and section 284.224 of the Commission's regulations to sell or transport gas in interstate commerce.[121] BH Wyoming Gas requested this blanket certificate following its formation vis-à-vis the consolidation of three Wyoming gas distribution utilities to allow it to continue providing the same interstate services that one of these utilities had provided before the merger.[122] BH Wyoming Gas explained that the consolidation and transfer of the assets of one of the three utilities—Black Hills Gas Distribution LLC—to BH Wyoming Gas would cause that utility to "no longer operate as a utility within the state of Wyoming," thereby voiding or requiring termination of that utility's previously granted blanket certificate.[123]

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113. *Id*.
114. *Atmos Pipeline – Tex.*, 168 F.E.R.C. ¶ 61,031 at P 1 (2019).
115. *Id.*
116. *Id.* at P 3.
117. *Id.* at P 45.
118. *Id.* at PP 3, 47.
119. 168 F.E.R.C. ¶ 61,031 at P 47.
120. *Id*.
121. *BH Wyo. Gas, LLC*, 171 F.E.R.C. ¶ 62,076 at P 1 (2020).
122. *Id*. at P 2.
123. *Id*.

The Director of the Commission's Office of Pipeline Regulation (Office Director) found that BH Wyoming Gas, a public utility in the state of Wyoming, qualified for regulation as a Hinshaw pipeline under NGA section 1(c) because it receives and delivers all natural gas within the state boundaries of Wyoming, end users consume such gas within Wyoming, and its rates, services and facilities are subject to regulation by the Wyoming Public Service Commission.[124] The Office Director explained that "BH Wyoming Gas' primary role will continue to be that of a state-regulated pipeline."[125] Therefore, the Office Director granted BH Wyoming Gas a limited jurisdiction blanket certificate to sell or transport gas in interstate commerce and accepted BH Wyoming Gas' proposed interruptible transportation rate election subject to certain conditions.[126]

5. Black Hills/Kansas Gas Utility Company

On April 16, 2020, the Commission approved Black Hills/Kansas Gas Utility Company, LLC's (Black Hills) application for a limited jurisdiction blanket certificate to sell or transport gas in interstate commerce.[127] Black Hills, a Hinshaw pipeline, is generally subject to the jurisdiction of the Kansas Corporation Commission (KCC).[128] Black Hills filed this application because its customers had "expressed an interest in transporting natural gas" acquired from Black Hills in Kansas to end users in Oklahoma.[129] Specifically, Texas-Kansas-Oklahoma Gas, LLC had filed a service area determination with the Commission pursuant to NGA section 7(f) "to acquire gas from Black Hills in Kansas, cross the Oklahoma border, and sell all the gas to agricultural end users [to] power [] their irrigation operations."[130]

The Commission found that approval of Black Hills' application would "allow Black Hills to provide service to engage in other transactions of the type authorized by subparts C and D of Part 284 of the Commission's regulations," that Black Hills had "propose[d] to offer interruptible service to the extent [it] can be rendered within the limits of its operating conditions and facilities, [and that] Black Hills' primary role [would] continue to be that of a state-regulated pipeline."[131] The Commission also found Black Hills' election to base its rates on those approved by the KCC were fair and equitable because such election was consistent with the rates that can be charged by a Hinshaw pipeline under the Commission's regulations.[132] The Commission determined that Black Hills' proposal met the requirements of section 284.224 of the Commission's regulations, and accordingly found Black Hills' proposal to be in the public conven-

124. *Id*.; *see also id.* at Ordering Para. (D) (explaining that issuance of this order by the Office Director was taken pursuant to the authority delegated to the Office Director under the Commission's regulations).

125. *Id*. at P 5.

126. 171 F.E.R.C. ¶ 62,076 at PP 1, 6-7, Ordering Para. (A)-(C).

127. *Black Hills/Kan. Gas Util. Co., LLC,* 171 F.E.R.C. ¶ 62,052 at P 1 (2020).

128. *Id.* at P 2.

129. *Id*.

130. *Id*.

131. *Id*. at P 5.

132. 171 F.E.R.C. ¶ 62,052 at P 6.

ience and necessity.[133] The Commission therefore granted Black Hills' request for a limited jurisdiction blanket certificate.

6. Columbia Gas Transmission, LLC

On March 25, 2020, the Commission affirmed its prior determination that it lacked jurisdiction over the Mountaineer Eastern Panhandle Expansion Project (the Mountaineer Project), and therefore it was not required to consider the Mountaineer Project as a similar or connected action in its environmental review of Columbia Gas Transmission, LLC's jurisdictional Eastern Panhandle Expansion Project because the Mountaineer Project is not a federal action.[134]

In rejecting the argument "that the non-jurisdictional Mountaineer Gas Pipeline should be considered a federal action due to its interstate nature," the Commission explained that the Mountaineer Project is a distribution pipeline that transports natural gas to customers in West Virginia, that the NGA explicitly exempts the distribution of natural gas from Commission jurisdiction, and that the Mountaineer Project is not subject to the Commission's jurisdiction because it will transport natural gas that has been transported on a Commission-jurisdictional interstate pipeline.[135]

7. Sabine Pipe Line LLC

On May 21, 2020, the Commission granted a limited jurisdiction certificate to Bridgeline Holdings LP (Bridgeline), authorizing it to lease 300,000 Dth per day of capacity to Sabine Pipe Line LLC (Sabine) while continuing to operate the leased capacity in interstate commerce under the NGA during the term of the lease.[136] The Commission explained that it "looks closely at proposals that would create dual jurisdiction facilities, i.e., facilities that would be subject to state and federal regulation, in order to avoid duplicative and/or potentially inconsistent regulatory schemes over the same facilities."[137] The Commission clarified that Bridgeline and Sabine would "be subject to exclusive federal regulation" with respect to the leased capacity "and any issues that [] arise thereunder."[138] However, the Commission limited its jurisdiction over Bridgeline "to its role as the lessor and operator of the leased capacity to be used . . . to provide Sabine's interstate services, and its NGPA section 311 activities," finding that Bridgeline remained non-jurisdictional as to its intrastate activities.[139] The Commission also waived all jurisdictional filing and accounting requirements otherwise applicable to an interstate pipeline under the NGA.[140]

133. *Id*. at P 5.

134. *Columbia Gas Transmission, LLC*, 170 F.E.R.C. ¶ 61,247, at PP 22-23 (2020).

135. *Id*.

136. *Sabine Pipe Line LLC*, 171 F.E.R.C. ¶ 61,147, at PP 30-31 (2020).

137. *Id*. at P 31.

138. *Id*.

139. *Id*. at P 32.

140. *Id*. at P 33.

8. Spire STL Pipeline LLC

On November 21, 2019, the Commission affirmed on rehearing that it lacks jurisdiction over issues related to a state-regulated "utility's ability to recover costs associated with its decision to subscribe for service" on a FERC-regulated interstate pipeline, and that those issues instead "involve matters to be determined by the relevant state utility commissions."[141] The Commission explained that exercising such jurisdiction "would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate."[142]

The Commission also affirmed its determination that it lacks authority to dictate a non-jurisdictional affiliate shipper's practices for procuring services, explaining that the Commission's "jurisdiction does not extend to costs incurred by local distribution companies (LDCs) or the rates they charge to their retail customers."[143] Instead, the Commission noted, "state regulatory commissions are responsible for approving any expenditures by state-regulated utilities."[144]

9. Texas-Kansas-Oklahoma Gas, LLC

On April 16, 2020, the Commission granted a service area determination under section 7(f) of the NGA to Texas-Kansas-Oklahoma Gas LLC (TKO), which requested a determination that it qualified as a local distribution company (LDC) for purposes of section 311 of the NGPA and a waiver of the Commission's filing and accounting requirements otherwise applicable to an natural gas companies under the NGA and NGPA.[145] TKO purchases natural gas from various wholesale suppliers and sells the gas to its end-users, primarily irrigation customers in Kansas and Oklahoma.[146] As relevant here, TKO sought to acquire gas from Black Hills/Kansas Gas Utility Company, LLC in Kansas, and then transport such gas across the Kansas-Oklahoma border and sell such gas primarily to irrigation customers in Oklahoma to power their irrigation equipment.[147]

The Commission explained TKO's requested Service Area Determination is consistent with the purpose of NGA section 7(f), which is designed to allow an LDC "to enlarge or expand its facilities to supply market [requirements] without prior Commission approval," even though it is "subject to the Commission's NGA jurisdiction because its facilities cross state lines."[148] Specifically, the Commission found that TKO satisfied the Commission's four factors to qualify for a service area determination: (1) TKO's operations, rates and services will continue to be regulated by state or local agencies in Kansas and in Oklahoma; (2) TKO's facilities are distribution facilities which do not constitute an "extensive gas transmission system;" (3) TKO's request will have no effect on other LDCs, as there are no other companies providing the same service as TKO in the

141. *Spire STL Pipeline LLC*, 169 F.E.R.C. ¶ 61,134, at PP 16, 27-28 (2019).

142. *Id*.

143. *Id*. at P 19.

144. *Id*.

145. *Texas-Kansas-Oklahoma Gas, LLC*, 171 F.E.R.C. ¶ 62,048, at PP 1-2 (2020).

146. *Id*. at P 3.

147. *Id*. at P 4.

148. *Id*. at P 10.

requested service area and no LDC filed comments or protests; and (4) TKO will not provide service to any other customers outside of its requested service area.[149] The Commission also found that the requested waivers are consistent with those previously granted in similar circumstances.[150]

G. Market-Based Rates

1. ANR Storage Company

On remand from the U.S. Court of Appeals for the District of Columbia Circuit,[151] on September 26, 2019, the Commission reconsidered its orders denying ANR Storage Company market-based rates for open access storage service[152] and, applying the Alternative Rate Policy Statement,[153] granted market-based rates. The Commission found that its original "analysis was inconsistent . . . [because] it suggested that intrastate competitors are less viable alternatives than interstate competitors."[154] On further consideration, the Commission determined that "intrastate competitors, as a class, are eligible to qualify as good competitors under Commission policy, and that the record shows that the actual intrastate competitors of ANR Storage do indeed qualify as good competitors in this particular case.[155] The Commission further found that capacity release was an appropriate alternative to be considered in a market-based rate analysis.[156]

2. Tennessee Gas Pipeline Company, LLC

On April 30, 2020, the Commission issued a declaratory order authorizing Tennessee Gas Pipeline Company, LLC to charge market-based rates for a new FS Flex storage service based on the pipeline's firm storage capacity in the Pine Prairie Energy Center LLC (Pine Prairie).[157] Pine Prairie charges market-based rates for the storage services it provides directly.[158] The Commission based its approval on the traditional analysis under the Alternative Rate Policy Statement and concluded that there are low barriers to entry in the relevant market, alterna-

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149. *Id*. at PP 10-14.

150. 171 F.E.R.C. ¶ 62,048, at P 17.

151. ANR Storage Co. v. FERC, 904 F.3d 1020 (D.C. Cir. 2018) (The Commission failed to adequately justify treating ANR Storage differently from other storage companies in the region who were granted market-based rate authority, with specific reference to the storage affiliates of DTE Energy Co., and also failed to explain an apparent inconsistency in its characterization of competing intrastate storage facilities.).

152. *ANR Storage Co.*, Opinion No. 538, 153 F.E.R.C. ¶ 61,052 (2015*) reh'g denied*, 155 F.E.R.C. ¶ 61,279 (2016).

153. Statement of Policy and Request for Comments, *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 61 Fed. Reg. 4633 (1996) (to be codified at 10 C.F.R. pt. 605).

154. *ANR Storage Co*., 168 F.E.R.C. ¶ 61,195 at P 21 (2019).

155. *Id*.

156. *Id*. at P 22.

157. *Tennessee Gas Pipeline Co., L.L.C.,* 171 F.E.R.C. ¶ 61,085 at PP 3, 5, 25 (2020), 85 Fed. Reg. 11,361 (2020); *see also*, *Pine Prairie Energy Center, LLC,* 72 Fed. Reg. 46,983 (2007) (*order issuing certificate, requiring new open season, and amending tariff*, 85 Fed. Reg. 19940 (2020)).

158. 171 F.E.R.C. ¶ 61,085 at P 22.

tives available to shippers, and Tennessee has no market power over storage in the geographic area.[159]

H. Open Seasons

1. Northern Natural Gas Company, 169 F.E.R.C. ¶ 61,268 (2019)

On December 31, 2019, the Commission rejected Northern Natural Gas Company's (Northern Natural) proposal to post only winning bids in open seasons.[160] The proposal was identical to one that the Commission denied in 2012.[161] In both instances, the Commission rejected the argument that "the posting of unsuccessful bids is not relevant and only serves to create a distorted perception regarding the value of the capacity posted."[162] The Commission explained that not posting unsuccessful bids limits the data available to the market and gives the pipeline a competitive advantage in the secondary capacity market.[163] The Commission ruled that market transparency requires a pipeline to post all bids received in an open season, including the bids that the pipeline did not accept.[164] The Commission further required that the pipeline post "the full net present value analysis for the highest bid received," even if it accepted no bids.[165]

2. Jordan Cove Energy Project, LP and Pacific Connector Gas Pipeline, LP

On March 19, 2020, the Commission denied a prospective shipper's challenge to an LNG export project's open season based on the shipper's inability to meet the pipeline's credit requirement.[166] The shipper executed a precedent agreement that included the project's creditworthiness requirements.[167] Upon the close of the open season, however, the shipper was unable to provide adequate assurances that it would be able to post the required credit.[168] The Commission observed that the affiliated anchor shipper and the contesting shipper had identical credit support requirements.[169] The Commission also declined to look behind the affiliate's precedent agreement to evaluate its business decision to acquire capacity and therefore concluded that the rejection of the shipper's bid did not constitute undue discrimination.[170] The Commission further concluded "that [the shipper's] inability to review the tariff before submitting its bids does not render

159. *Id*.

160. *Northern Natural Gas Co.,* 169 F.E.R.C. ¶ 61,268 at PP 37-38, 41 (2019).

161. *Northern Natural Gas Co*., 140 F.E.R.C. ¶ 61,047 at P 6, 22 (2012).

162. 169 F.E.R.C. ¶ 61,268 at P 41.

163. *Id.*

164. *Id*. at P 42.

165. *Id.* at P 43.

166. *Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP*, 170 F.E.R.C. ¶ 61,202 at PP 66-68, 77 (2020).

167. *Id*. at P 76.

168. *Id*.

169. *Id.*

170. *Id.* at PP 77-78.

[the] open season process discriminatory" because the shipper did "not explain how this impacted its bids or formed a basis for [the bids] denial."[171]

I. Rate Investigations

1. Panhandle Eastern Pipe Line Co., LP, Panhandle Eastern Pipe Line Co., LP, and Sw. Gas Storage Co.

On June 18, 2020, the Commission denied rehearing requests of a September 30, 2019, order that authorized the Chief Judge to consolidate two separate NGA sections 4 and 5 rate proceedings involving Panhandle Eastern Pipe Line Co., LP (Panhandle).[172] During the course of a FERC NGA section 5 rate investigation into whether Panhandle's rates were unjust and unreasonable, Panhandle made an NGA section 4 rate filing on August 30, 2019.[173] In its September 30, 2019, suspension order in the NGA section 4 proceeding, the Commission expressly left to the discretion of the Chief Judge the determination whether to consolidate the section 5 and section 4 proceedings.[174] On October 1, 2019, the Chief Judge consolidated the two cases.[175]

Despite rehearing objections that the effect of the consolidation essentially nullified the NGA section 5 investigation due to the procedural reality that it could not be completed before the section 4 rates were moved into effect, the Commission held that the pre-existing lawful rate was the rate effective before the end of the NGA section 4 suspension period on March 1, 2020: The Commission concluded that "[S]ubsequent Commission action in the section 5 Proceeding after March 1, 2020, cannot [reduce] the refund floor."[176] The Commission thus reaffirmed the principle that once a pipeline has moved into effect rates proposed under NGA section 4, subsequent the Commission action in a pending NGA section 5 rate investigation cannot reduce the refund floor.[177] Nonetheless, the Commission denied Panhandle's motion to terminate the section 5 Proceeding on the basis that "there are overlapping test periods in the section 4 Proceeding and section 5 Proceeding, some of the data used in the section 5 Proceeding may be used in the section 4 Proceeding, and, in addition, consolidation will have administrative benefits."[178]

Despite being the subject of a separate NGA section 5 proceeding, the Commission's investigation into whether Southwest Gas Storage Company's (Southwest Gas) rates were unjust and unreasonable was consolidated with the above Panhandle proceeding in the September 2019 Suspension Order.[179] A Panhandle affiliate, Southwest Gas, filed an uncontested settlement on July 10,

171. 170 F.E.R.C. ¶ 61,202 at P 79.

172. *Panhandle Eastern Pipe Line Co., LP*, & *Southwest Gas Storage Co.*, 171 F.E.R.C. ¶ 61,244 (2020).

173. *Id.*; FERC Docket No. RP19-000 (Aug. 30, 2019).

174. *Panhandle Eastern Pipe Line Co., LP*, 168 F.E.R.C. ¶ 61,208 at P 36 (2019).

175. Consolidation Order, FERC Docket Nos. RP19-78-000, *et al*. (Oct. 1, 2019).

176. 171 F.E.R.C. ¶ 61,244 at P 30.

177. *Id*. at PP 31, 33.

178. *Id*. at P 51.

179. September 2019 Suspension Order, 168 F.E.R.C. ¶ 61,208 at P 41.

2019, that resolved all of the issues in the investigation of Southwest's rates under NGA section 5, except for one: the treatment of "a negotiated rate contract between Southwest and Panhandle."[180] On July 22, 2019, the Chief Judge consolidated the Southwest and Panhandle negotiated rate agreement issue in the Southwest and Panhandle negotiated rate agreement issue in the Southwest proceeding in Docket No. RP19-257-005 with the Panhandle NGA section 5 proceeding in Docket No. RP19-78-000.[181] In the September 2019 Suspension Order, the Commission consolidated the Southwest proceeding with the Panhandle NGA section 4 proceeding in Docket No. RP19-1523-000 on the grounds that it was "administratively efficient" to do so.[182] The consolidated cases are pending as of July 2020.[183]

J. Termination

1. Cheyenne Connector, LLC and Rockies Express Pipeline LLC

On September 20, 2019, the Commission ruled that Cheyenne Connector, LLC's (Cheyenne Connector) General Terms and Conditions (GT&Cs), with respect to right of first refusal (ROFR) policies, must provide that "a shipper is not required to elect how much capacity it will seek to retain through [a] ROFR process until after receiving notification from Cheyenne Connector as to the best offer(s) for its expiring capacity."[184] The Commission directed Cheyenne Connector to remove the language "Transporter and Shipper may mutually agree to a notice period different than that specified in the preceding sentence," because such language "would impermissibly allow the deadline for a shipper to notify the pipeline to be negotiated separately from the generally applicable notice deadline."[185] The Commission explained that "Commission policy entitles the ROFR shipper to decide how much capacity it wishes to retain, and that [] decision . . . does not [need] to be made until after the pipeline presents the ROFR shipper with the best bid for the purpose of matching."[186] Further, the Commission held that a pipeline's GT&Cs may not allow a ROFR to be superseded by a contract.[187]

2. Dominion Energy Cove Point LNG, LP

On December 13, 2019, the Commission found that Dominion Energy Cove Point LNG, LP's (Dominion Cove Point) proposed Rate Schedule LTS agreement granting a shipper the right to terminate its contract early and convert its capacity to Rate Schedule FTS service impermissibly represented a valuable special right that was not available to other shippers under the generally applica-

180. *Id*. at P 37.

181. *Panhandle Eastern Pipe Line Co., LP & Southwest Gas Storage Co.,* 168 F.E.R.C. ¶ 63,007 (2019).

182. September 2019 Suspension Order, 168 F.E.R.C. ¶ 61,208 at P 41.

183. 171 F.E.R.C. ¶ 61,244 at P 51.

184. *Cheyenne Connector, LLC*, 168 F.E.R.C. ¶ 61,180 at P 47 (2019).

185. *Id*.

186. *Id*.

187. *Id*.

ble tariff provision.[188] The Commission found that this was a material deviation from the Dominion Cove Point's *pro forma* service agreement and constituted a substantial risk of undue discrimination.[189] The Commission explained that under its policy regarding non-conforming provisions in negotiated rate agreements, "[a] material deviation is permissible only if the Commission finds that such deviation does not constitute a substantial risk of undue discrimination."[190] Thus, the Commission required Dominion Cove Point to either eliminate the early termination provision in Mattawoman Energy, LLC's negotiated rate agreement or revise the Rate Schedule LTS to offer the same special rights as were set forth in the negotiated rate agreement.[191]

3. Gas Transmission Northwest LLC

On October 4, 2019, the Commission approved Gas Transmission Northwest, LLC's (GTN) proposal to add language to the GT&C of its tariff, which would allow it to issue an accelerated right of first refusal (ROFR) notice to firm shippers in certain instances where GTN proposes a fully subscribed expansion to its pipeline within thirty-six (36) months prior to the termination of the shipper's service agreement.[192] The Commission noted that under its policy:

> a pipeline may include in its tariff a provision permitting it to initiate an early ROFR process up to 36 months in advance of the termination of a shipper's contract in certain situations involving fully subscribed expansion projects because an early ROFR process can help the pipeline ensure that its proposed expansion project is correctly sized.[193]

4. Jordan Cove Energy Project, LP and Pacific Connector Gas Pipeline, LP

On March 19, 2020, the Commission denied Pacific Connector Gas Pipeline, LP's (Pacific Connector) proposed section 10.4 of its general terms and conditions of its *pro forma* open-access tariff (GT&C Section 10.4), which would allow Pacific Connector to "hold an open season for capacity that is subject to a [ROFR], no earlier than eighteen (18) [m]onths prior to the termination or expiration date or potential termination date for the eligible Service Agreement."[194] The Commission explained that it has previously determined holding open seasons six (6) months to twelve (12) months before contract expiration or termination to be reasonable because this represents the normal time period during which shippers would indicate their interest in renewing their contracts.[195] Accordingly, the Commission directed Pacific Connector to revise its *pro forma*

188. *Dominion Energy Cove Point LNG, LP*, 169 F.E.R.C. ¶ 61,200 at P 8 (2019).

189. *Id*. at P 7.

190. *Id*. at P 6.

191. *Id*. at P 9.

192. *Gas Transmission Northwest LLC*, 169 F.E.R.C. ¶ 61,011 at P 4 (2019).

193. *Id*. at P 23.

194. *Jordan Cove Energy Project L.P. and Pacific Connector Gas Pipeline, LP,* 170 F.E.R.C. ¶ 61,202 at PP 49-50 (2020), *reh'g granted in part, denied in part*, 171 F.E.R.C. ¶ 61,136 (2020).

195. *See id*. at P 128 (citing *Transcontinental Gas Pipe Line Corp.*, 103 F.E.R.C. ¶ 61,295 at P 20 (2003)).

tariff to allow open seasons to begin six (6) to twelve (12) months before contract expiration or termination for capacity that is subject to a ROFR.[196]

On May 22, 2020, the Commission reviewed Pacific Connector's proposed GT&C section 10.4 on rehearing and found it to be reasonable.[197] The Commission permitted Pacific Connector the flexibility to hold open seasons for ROFR capacity as much as eighteen (18) months before contract termination due to the unique relationship between Pacific Connector, an interstate pipeline that predominantly serves an LNG terminal, and Jordan Cove Energy Project, LP (Jordan Cove), the LNG terminal served by Pacific Connector, as compared to the domestic natural gas pipeline market.[198] The Commission noted that LNG terminal market demands require Jordan Cove "to contract for capacity more than one year in advance and Jordan Cove's liquefaction agreements currently require customers to exercise extension options at least three years in advance."[199] The Commission also noted that Pacific Connector's service agreements contain identical optional extension periods in order to ensure that Jordan Cove and Pacific Connector are able to remarket capacity at the same time.[200] Accordingly, the Commission held that the different balance of interests between existing shippers and potential third-party bidders in the LNG terminal market merited a different reasonable time period for open seasons held prior to contract terminations or expirations than that required of the domestic natural gas pipeline market.[201]

5. Transcontinental Gas Pipe Line Co.

Transcontinental Gas Pipe Line Company, LLC (Transco) filed tariff records to add two non-conforming negotiated rate service agreements (Agreements), with Deepwater Development Co., LLC and LLOG Omega Holdings, LLC (Customers), to Transco's FERC Gas Tariff (Tariff) to replace and amend the existing service agreements with the Customers.[202] The Agreements, as proposed, contained a non-conforming provision in Article IV (the Amendment), allowing the Customers to terminate the Agreements under specified conditions, so long as the Customers provided ten (10) days prior notice.[203] Transco asserted that, although the Amendment does not conform to Transco's *pro forma* Form of Service Agreement under its Tariff, the Amendment is consistent with its Tariff, which "allows Transco and a customer to mutually agree to the term of the service agreement."[204] Transco also asserted that Article IV "is not unduly discriminatory" towards any other shippers.[205]

196. 170 F.E.R.C. ¶ 61,202 at P 128.
197. 171 F.E.R.C. ¶ 61,136 at P 52.
198. *Id*.
199. *Id*.
200. *Id*. at P 23.
201. *Id.* at P 52.
202. *Transcontinental Gas Pipe Line Co., LLC*, 168 F.E.R.C. ¶ 61,209, at PP 1-2 (2019).
203. *Id*. at P 2.
204. *Id*.
205. *Id*. at P 3.

Despite Transco's assertions, the Commission found the Amendment to be: (i) inconsistent with Transco's Tariff, which allows Transco and a customer to mutually agree to the term of a service agreement, or not to agree to the early termination of a service agreement, and (ii) to be an impermissible material deviation because the Amendment provided Customers with a right of early termination that was not provided to other customers.[206] The Commission explained that it has stated it will not allow provisions that deviate materially from the corresponding *pro forma* agreement and present significant potential for undue discrimination among shippers.[207] The Commission noted that early termination of a service agreement is a valuable provision that would be desired by any reasonable shipper, and, thus, presented significant potential for discrimination among shippers.[208] Accordingly, the Commission directed Transco to either remove the Amendment from the Agreements or to modify its tariff to allow for early termination negotiations for other similarly situated shippers.[209]

III. INFRASTRUCTURE

A. Pipelines

1. U.S. Forest Service v. Cowpasture River Preservation Ass'n.

As part of efforts to permit "an approximately 604-mile natural gas pipeline from West Virginia to North Carolina," Atlantic Coast Pipeline acquired a special use permit from the U.S. Forest Service for a right-of-way for a segment of pipe below a portion of the Appalachian National Scenic Trail, which also crosses the National Forest.[210] The Cowpasture River Preservation Association and other respondents successfully petitioned the Fourth Circuit to vacate the permit for violating the Mineral Leasing Act.[211]

On appeal, the U.S. Supreme Court reversed the Fourth Circuit's judgment.[212] The Court considered whether a transfer of jurisdiction between the Forest Service and the National Park Service had actually occurred to make the federal lands in question part of the National Park System.[213] Rooting its reasoning in easement principles[214] and in the language of the National Trails System Act[215] and Mineral Leasing Act,[216] the Court characterized the Trail as an easement granted to the Department of the Interior by the Forest Service and administered by the National Park Service, leaving the land itself (*i.e.*, "the lands over which the easement passes") the responsibility of the Forest Service and within

206. *Id*. at P 8.
207. 168 F.E.R.C. ¶ 61,209 at P 5 (citing *Equitrans, L.P.*, 130 F.E.R.C. ¶ 61,024, at P 5 (2010)).
208. *Id*. at P 6.
209. *Id*. at P 8.
210. U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837 (June 15, 2020) (slip op.).
211. *Id.* at 1842.
212. *Id.* at 1850.
213. *Id.* at 1844.
214. *Id.* at 1844-45.
215. *U.S. Forest Serv.*, 140 S. Ct. at 1845-46.
216. *Id.* at 1844, 1846.

its jurisdiction.[217] The Court found that the Forest Service thus retained the authority to issue the permit to build beneath the Trail.[218] Justices Sotomayor and Kagan dissented on the grounds that the language of the cited federal acts does not support the idea that the Trail and the land itself should be thought of as the separately regulable entities of "easement" and "lands," respectively.[219]

2. In re PennEast Pipeline Co., LLC, PennEast Pipeline Company, LLC

In 2018, upon receipt of its certificate of public convenience and necessity to build a proposed 116-mile pipeline from Pennsylvania to New Jersey,[220] PennEast Pipeline Company (PennEast) filed for orders of condemnation in New Jersey District Court for properties along the proposed pipeline route,[221] forty-two of which were either owned by or featured property interests held by New Jersey (or its agencies), and the state responded by invoking its Eleventh Amendment state sovereign immunity.[222] The District Court granted PennEast's request for orders of condemnation, noting that, per the NGA, "PennEast ha[d] been vested with the federal government's eminent domain powers" through its certificate.[223] New Jersey moved for reconsideration on the grounds that Congress is unable to delegate to a private entity the ability to sue a state, but the District Court denied the motion.[224] The state appealed, and the Third Circuit vacated the District Court's order in favor of New Jersey.[225] The Third Circuit held that the delegation of eminent domain authority did not also "constitute a delegation to private parties of the federal government's exemption from Eleventh Amendment immunity."[226] On February 18, 2020, PennEast filed a writ of certiorari with the U.S. Supreme Court appealing the Third Circuit Opinion.[227] On June 29, 2020, the solicitor general was invited by the Court to file a brief expressing the views of the administration on the issue.[228]

Concurrently, on January 30, 2020, the Commission granted in part and denied in part a petition for a declaratory order from PennEast regarding the scope of the eminent domain authority granted through section 7(h) of the NGA,[229] specifically: (1) whether a certificate holder's right to condemn land extends to

217. *Id.* at 1847.

218. *Id.* at 1848.

219. *Id.* at 1851 (Sotomayor, J., dissenting).

220. *PennEast Pipeline Co.*, 170 F.E.R.C. ¶ 61,064 at PP 2-3 (2020); In re PennEast Pipeline Co., 938 F.3d 96, 100 (3d Cir. 2019).

221. *PennEast*, 938 F.3d at 100-01.

222. *Id.* at 101.

223. *Id.* at 101-02 (quoting *In re PennEast Pipeline Co.*, Civ. A. No. 18-1585, 2018 WL 6584893 at 12 (D.N.J. Dec. 14, 2018)).

224. *Id.* at 102.

225. *Id.* at 102, 113.

226. *PennEast*, 938 F.3d at 112-13.

227. *In re PennEast Pipeline Co*., 938 F.3d 96, 100 (3d Cir. 2019), *petition for cert. filed*, 2020 WL 1307881 (U.S. Feb. 18, 2020) (No. 19-1039).

228. *See* Docket No. 19-1039, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/docket/docketfiles/html/public/19-1039.html# (last visited Sep. 18, 2020).

229. *PennEast Pipeline Co.*, 170 F.E.R.C. ¶ 61,064, at P 1 (2020).

property in which a state holds an interest, (2) whether section 7(h) delegates federal eminent domain authority solely to certificate holders, and (3) whether section 7(h) delegates to certificate holders the federal exemption from state sovereign immunity claims.[230] In its Declaratory Order, the Commission answered in the affirmative on the first two points,[231] but declined to reach the third point because, although the Commission's interpretation of the statute supports a finding of delegation,[232] the Commission ultimately lacks the authority to adjudicate the constitutionality of Congress's potential delegation of the federal exemption from state sovereign immunity.[233]

The Commission also addressed the implications of the Third Circuit's opinion, criticizing it as "impair[ing] full application of the NGA" by allowing states to prevent, by withholding easements, the effectuation of the Commission-approved projects: essentially enabling states to "nullify" the Commission certificates.[234] Commissioner Glick dissented on both procedural and substantive grounds, stating both that weighing in on "what is primarily a constitutional question" is a matter for the federal courts, not the Commission,[235] and that he considers whether Congress intended NGA section 7(h) to apply to state lands to be a more ambiguous matter than the majority does.[236]

On May 22, 2020, the Commission denied Delaware Riverkeeper Network's (Riverkeeper) request for rehearing of the January 30, 2020, Declaratory Order.[237] Riverkeeper raised several threshold issues separate from the merits of the Declaratory Order, which were each dismissed by the Commission.[238] Riverkeeper also reiterated arguments from the Third Circuit's decision and Commissioner Glick's dissent against the declaratory order.[239] The Commission dismissed these arguments with references to its order, and again stressed the seriousness of the impact the Third Circuit decision could have on pipelines.[240] Commissioner Glick dissented, reaffirming the inappropriateness of *Chevron* deference in these circumstances and the inaptness of the cases cited by the majority in support.[241]

3. El Paso Natural Gas Co.

On November 21, 2019, the Commission issued El Paso Natural Gas Co., LLC (El Paso) a certificate of public convenience and necessity for the construc-

230. *Id.* at P 6.

231. *Id.* at PP 25-26.

232. *Id.* at P 27.

233. *Id.* at P 55.

234. 170 F.E.R.C. ¶ 61,064 at P 58.

235. *PennEast Pipeline Co.*, Docket No. RP20-41-000, at P 1 (Jan. 30, 2020) (Glick, C., dissenting in part).

236. *Id.* at P 2.

237. *PennEast Pipeline Co.*, 171 F.E.R.C. ¶ 61,135 at P 1 (2020).

238. *Id.* at P 11.

239. *See id.* at PP 21, 24-26, 29, 31, 35-36, 39.

240. *Id.* at PP 22-24, 27-29, 30-39.

241. *Id.* at P 7.

tion and operation of its South Mainline Expansion Project.[242] El Paso stated that a portion of the project's transportation service was subscribed by Sempra Gas & Power Marketing, LLC (Sempra), and that this gas would "likely be used to generate electric power."[243] Though the D.C. Circuit decisions in *Sierra Club v. FERC* and *Birckhead v. FERC* respectively state the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible" where it is known that the transported gas will be used for a specific end-use combustion, and that "the Commission must at least attempt to obtain information regarding the end-use of the gas," the Commission asserted that it did not recognize greenhouse gas (GHG) emissions arising from Sempra's use as "reasonably foreseeable" emissions requiring inclusion in the Environmental Assessment.[244] The Commission explained that Sempra's role as a power marketer that does not own or control any generation or transmission facilities and sells to various unfixed customers and destinations, along with El Paso's generalized statement about end-use, were not enough evidence to make it reasonably foreseeable that the gas that will be transported using Sempra's capacity will be used for electric generation.[245]

In his partial dissent, Commissioner Glick wrote that the Commission violated the NGA and the National Environmental Policy Act (NEPA) by refusing to consider "whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction and operation as well as a fraction of its downstream GHG emissions."[246] Commissioner Glick argued that the D.C. Circuit has "unambiguously" held that "the Commission must identify and consider reasonably foreseeable downstream GHG emissions as part of its NEPA analysis."[247] Instead, the Commission has "continue[d] to thumb its nose at the court"[248] and insists that it is unable to evaluate GHG emissions because no standard methodology for assessing their significance exists.[249]

In his concurrence, Commissioner McNamee wrote that contrary to Commissioner Glick's belief, he disagrees with the assertion that the:

> NGA authorizes the Commission to reject a certificate application based on the environmental effects that result from the upstream production and downstream use of natural gas, that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment."[250]

Commissioner McNamee noted that he intended his concurrence to "assist the Commission, the courts, and other parties in their arguments regarding the

242. *El Paso Natural Gas Co.*, 169 F.E.R.C. ¶ 61,133 (2019).

243. *Id.* at P 39.

244. *Id*. at P 40.

245. *Id.*

246. *Id.*; *See also Commissioner Richard Glick Dissent Regarding PennEast Pipeline Co.*, Docket No. RP20-41-000, at P 2.

247. 169 F.E.R.C. ¶ 61,133 at P 9.

248. *Id.* at P10.

249. *Id.* at P13.

250. *Id.*, McNamee, C., *concurring* at P 2.

meaning of the 'public convenience and necessity' and the Commission's consideration of a project's effect on climate change," providing arguments not previously presented to the courts.[251]

Commissioner McNamee argues that the Commission's analysis is meant to consider the "public convenience and necessity" of a given project,[252] and the text of the NGA "illuminate[s]"[253] that the "public interest" at stake in that analysis is the public's access to natural gas,[254] not a generalized public welfare.[255] That said, he stated he is in agreement that consideration of direct emissions from a proposed project can be part of the Commission's public convenience and necessity determination and must be part of the Commission's NEPA analysis. However, Commissioner McNamee explained that "the Commission cannot unilaterally establish measures to mitigate GHG emissions, and there currently is no suitable method for the Commission to determine whether GHG emissions are significant."[256]

4. Constitution Pipeline, LLC

In 2013, Constitution Pipeline, LLC (Constitution) initiated proceedings to build a 125-mile-long pipeline from Pennsylvania into New York.[257] As part of the federal approval process, section 401(a)(1) of the Clean Water Act obligated Constitution to seek a water quality certification from New York, but waived the requirement if the state did not respond to a request for certification within one year.[258] After submitting its request in 2013, Constitution twice "simultaneously withdr[e]w and resubmit[ted]" its application for certification in 2014 and 2015, finally being denied by the New York State Department of Environmental Conservation (NYSDEC) in 2016.[259] After an appeal by Constitution to the Second Circuit, which held that "it lacked jurisdiction to address Constitution's claim that [NYSDEC] had waived its authority" but upheld the denial on the merits,[260] Constitution then filed a petition with the Commission, which issued a Declaratory Order holding that withdrawing an application for certification restarted the clock of the one-year waiver period (2018 Declaratory Order).[261]

Constitution subsequently sought review of its case in the D.C. Circuit, but before a determination was made, the court held in *Hoopa Valley Tribe v. FERC* that a state waives its section 401 authority when an applicant repeatedly withdraws and resubmits its water quality certification application pursuant to an agreement between the state and the applicant.[262] In February 2019, the Com-

251. *Id.* at P 4.
252. 169 F.E.R.C. ¶ 61,133 at P 5.
253. *Id.* at P 24.
254. *Id*. at PP 18-23.
255. *Id.* at PP 15-17.
256. *Id.* at P 14.
257. *Constitution Pipeline Co., LLC*, 168 F.E.R.C. ¶ 61,129 at P 2 (2019).
258. *Id.* at P 3.
259. *Id*. at PP 4-6.
260. *Id.* at P 7.
261. *Id.* at PP 7-8.
262. 168 F.E.R.C. ¶ 61,129 at PP 9-10.

mission successfully filed to voluntarily remand the Constitution case to the Commission in order to consider the effect of *Hoopa Valley Tribe*.[263]

On remand (Remand Order), the Commission held that it "interprets [*Hoopa Valley Tribe*] to stand for the general principle that where an applicant withdraws and resubmits a request . . . for the purpose of avoiding section 401's one-year time limit, and the state does not act within one year," the state "has waived its section 401 authority."[264] In Constitution's case, NYSDEC requested that Constitution withdraw and resubmit, in order to give the NYSDEC more time to review its received materials.[265] In this regard, the Commission reversed its determination in the 2018 Declaratory Order, and concluded that irrespective of the formality of the parties' arrangement[266] or the intent or reasonableness of the delay,[267] NYSDEC had waived its section 401 authority.[268] Notably, the Commission declined to answer the question, left open by *Hoopa Valley Tribe*, of "how different a subsequent request must be to constitute a 'new request' such that it restarts the one-year clock."[269] The Commission received and denied several requests for rehearing of the Remand Order and two requests for stay, affirming the determination in the Remand Order that NYSDEC waived its authority.[270] On December 30, 2019, NYSDEC filed a petition for review of the Remand Order and rehearing denial with the Second Circuit Court of Appeals.[271] As of July 17, 2020, NYSDEC's petition for review is still pending.[272]

5. City of Oberlin, Ohio v. FERC

On September 6, 2019, in *City of Oberlin v. FERC*,[273] the D.C. Circuit remanded without vacatur, thus requiring the Commission to provide further explanation as to whether it was lawful under the Natural Gas Act, the Takings Clause, and judicial precedent to credit contracts with foreign shippers serving foreign demand as part of a pipeline's application for a certificate of public convenience and necessity.[274] While the court dismissed most of the petitioners' concerns, the court held that the Commission had insufficiently explained why it was correct for the agency to credit such contracts in its analysis of project need.[275] As the Commission did not do a separate analysis without the contracts with foreign shippers serving foreign customers, the court held that it could only

263. *Id.* at P 1.

264. *Id.* at P 31.

265. *Id.* at P 28.

266. *Id.* at P 33-34.

267. 168 F.E.R.C. ¶ 61,129 at P 37.

268. *Id*. at PP 33-40.

269. *Id.* at P 39 (quoting *Hoopa Valley*, 913 F.3d at 1104).

270. *PennEast Pipeline Co., LLC*, 171 F.E.R.C. ¶ 61,135 (2019).

271. New York State Dep't. of Envtl. Conservation v. FERC, Docket No. 19-4338, *petition for rev. filed* (2d Cir. Dec. 30, 2019).

272. New York State Dep't. of Envtl. Conservation v. FERC, Docket No. 19-4338, (2d Cir. Dec. 30, 2019) (order granting motion to stay).

273. City of Oberlin, Ohio v. FERC, 937 F.3d 599, 603 (D.C. Cir. 2019).

274. *Id.* at 611.

275. *Id.* at 601.

affirm the Commission's determination if the inclusion of demand demonstrated by such agreements was valid.[276] The court noted that legitimate questions were raised by petitioners' argument that because section 7 gives a certificate holder eminent domain authority, "crediting export agreements toward a finding of need runs afoul of the Takings Clause, as a private pipeline selling gas to foreign shippers serving foreign customers does not serve a 'public use' within the meaning of the Fifth Amendment."[277]

6. Mountain Valley Pipeline, LLC

On June 18, 2020, the Commission issued Mountain Valley Pipeline, LLC (Mountain Valley) a certificate of public convenience and necessity for the Southgate Project, an approximately 75.1-mile natural gas pipeline and associated aboveground facilities in Virginia and North Carolina,[278] as an expansion of Mountain Valley's authorized and partially constructed Mainline System.[279]

In evaluating need for the Southgate Project, the Commission rejected requests from certain commenters to examine the need for pipeline infrastructure on a region-wide basis, restating its policy that it "examines the merits of individual projects and assesses whether each project meets the specific need demonstrated."[280] The Commission also rejected overbuilding concerns, finding need for the pipeline, as the existing pipelines that could possibly be used as system alternatives were already fully subscribed,[281] and affirmed that precedent agreements are significant evidence of project demand and that it is the Commission policy not to look beyond those agreements "to make judgements about the needs of individual shippers."[282]

While the Commission ultimately authorized the Southgate Project,[283] it conditioned any approval to commence construction on Mountain Valley receiving the necessary federal permits for the Mainline System, and the Office of Energy Projects lifting the stop-work order and authorizing Mountain Valley to continue constructing the Mainline System.[284] Commissioner Glick dissented in part arguing, among other things, that "neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating the project."[285] Commissioner McNamee concurred, arguing—contrary to Commissioner Glick's assertions—that "the Commission does not have the authority under the NGA or NEPA to deny a pipeline certificate application based on the environmental effects of the upstream production or down-

276. *Id.* at 606-08.

277. *Id.* at 606-07.

278. *Mountain Valley Pipeline, LLC*, 171 F.E.R.C. ¶ 61,232, at PP 1-3 (2020).

279. *Id.* at PP 3-8.

280. *Id.* at P 41.

281. *Id.* at P 44.

282. *Id.* at P 39.

283. *Mountain Valley Pipeline, LLC*, 171 F.E.R.C. ¶ 61,232, at Ordering Para. A.

284. *Id.* at Ordering Para. B. *See also id.* PP 4-9 (describing delays to and construction stoppages on the Mainline System due to a number of issues).

285. *Id.* at P 1 (Glick, dissenting in part).

stream use of natural gas nor does the Commission have the authority to unilaterally establish measures to mitigate GHG emissions."[286]

7. Allegheny Defense Project v. FERC

On June 30, 2020, the D.C. Circuit issued an opinion holding that the Commission's tolling orders are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review.[287]

When the Commission issues a certificate of public convenience and necessity, a private company holding the certificate can exercise the governmental power of eminent domain to "construct, operate and maintain the pipeline, unless the property owner agrees to its use."[288] An affected landowner must seek rehearing of the Commission's certificate order before obtaining judicial review.[289] In response to the rehearing request, the Commission can "act upon" the request by: (1) granting rehearing; (2) denying rehearing; (3) abrogating its order; or (4) modifying its order without further hearing.[290] If the Commission fails to act within 30 days of when the rehearing request was filed, section 19 of the NGA provides that the rehearing request is deemed denied and the party can then seek judicial review of the certificate order.[291]

In 2017, the Commission issued a certificate of public convenience and necessity to Transco for its Atlantic Sunrise Project.[292] Various parties, including homeowners and environmental associations, requested rehearing, and the Commission issued a tolling order that granted rehearing for the limited purpose of further consideration for an open-ended period of time.[293] While the requests for rehearing were pending, Transco moved forward with its condemnation actions against the homeowners.[294] The Commission ultimately denied rehearing, and the pipeline was built and became operational.[295] Subsequently, the D.C. Circuit panel rejected the homeowners' and environmental associations' arguments and denied the petitions for review.[296] However, the D.C. Circuit "subsequently granted the homeowners' petition for rehearing *en banc* and vacated" the prior panel's judgment.[297]

The D.C. Circuit took the case *en banc* to address whether the Commission "acts upon" a rehearing request when it issues a tolling order that prevents a request for rehearing from being deemed denied by agency inaction and precludes

286. *Id.* at P 3 (McNamee, concurring).

287. Allegheny Defense Project v. FERC, 964 F.3d 1 (D.C. Cir. 2020).

288. *Id.* at 4.

289. *Id.*

290. *Id.* at 4-5.

291. *Id*. at 6.

292. *Allegheny Defense Project*, 964 F.3d at 10-11.

293. *Id.* (quoting *Transcontinental Gas Pipeline Co.*, 162 F.E.R.C. ¶ 61,192 at P 4 (2018)); *see also* 18 C.F.R. § 385.713(a), (d)-(f) (2006).

294. *Allegheny Defense Project*, 964 F.3d at 7.

295. *Id.*

296. *Id.* at 9.

297. *Id.*

the requesting party from seeking judicial review until the Commission acts.[298] In its decision the D.C. Circuit determined that the Commission lacks authority to issue tolling orders for the sole purpose of preventing rehearing from being deemed denied by its inaction and the statutory right to judicial review attaching.[299] The court found that section 19(a) of the NGA unambiguously forecloses such a tolling order.[300] The court stated that the tolling order amounts only to inaction on the application, which triggers the possibility of judicial review as a deemed denial.[301] The court, however, emphasized that while it is deciding that the Commission cannot use tolling orders to change the statutorily prescribed jurisdictional consequences of its inaction, this is not the same as saying that the Commission must actually decide the rehearing application within a thirty-day window, as there are mechanisms that would permit more time.[302]

In sum, the court held that, "after thirty days elapsed from the filing of a rehearing application without Commission action, the [t]olling [o]rder could neither prevent a deemed denial nor alter the jurisdictional consequences of agency inaction."[303] To the extent prior decisions upheld the use of tolling orders in that manner, the court stated that such cases are overruled in relevant part.[304]

B. LNG Projects

During the past year, the Commission approved ten (10) major liquefied natural gas (LNG) export projects, including, in some cases, associated pipelines under sections 3 and 7, respectively, of the NGA: (1) the Gulf LNG and Pipeline Project to be integrated with its existing LNG import project located near Pascagoula, Mississippi, and its gas pipeline interconnected with Gulfstream Natural Gas System and Destin Pipeline, consisting of two liquefaction trains and associated facilities with a combined export capacity of approximately 10.9 million metric tons per annum (MTPA);[305] (2) the Eagle LNG Partners Jacksonville LLC Project to be located on the St. Johns River in Jacksonville, Florida and to receive its gas from the Peoples Gas System, consisting of three liquefaction trains and associated facilities with a combined capacity of approximately 1.0 MTPA;[306] (3) the Venture Global Plaquemines LNG and Pipeline Project to be

298. *Id*.

299. *Allegheny Defense Project*, 964 F.3d at 9.

300. *Id*. at 12.

301. *Id.* at 13.

302. *Id*. at 14-16.

303. *Id.* at 18-19.

304. *Allegheny Defense Project*, 964 F.3d at 19.

305. *Gulf LNG Liquefaction Co., et al.*, 168 F.E.R.C. ¶ 61,020 at P 6-7 (2019) (Comm. Glick dissenting); *see also* Office of Fossil Energy, *Gulf LNG Liquefaction Co: Order Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel From the Gulf LNG Energy, LLC Terminal To Free Trade Agreement Nations*, Order No. 3104, DEP'T OF ENERGY (June 15, 2012); Office of Fossil Energy, *Gulf LNG Liquefaction Co.: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4410, DEP'T OF ENERGY (July 31, 2019).

306. *Eagle LNG Partners Jacksonville, LLC*, 168 F.E.R.C. ¶ 61,181 at PP 3-5 (2019); *see also* Office of Fossil Energy, *Eagle LNG Partners Jacksonville, LLC: Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from, or in Iso Containers Loaded at, the Proposed Eagle LNG Facility in Jacksonville, Florida, to Free Trade Agreement Nations*, Order No. 3867, DEP'T OF ENERGY (July

located along the Mississippi River in Plaquemines Parish, Louisiana, consisting of two pipelines of ten (10) and fifteen (15) miles interconnected with Tennessee Gas Pipeline and Texas Eastern Transmission and thirty-six (36) liquefaction trains and associated facilities with a combined capacity of approximately 20.0 MTPA;[307] (4) the Texas Brownsville LNG Project to be located on the north side of the Brownsville Texas Ship Channel, consisting of an approximately ten (10) mile pipeline interconnecting with Valley Crossing Pipeline, an intrastate pipeline with access to both Texas and interstate gas supply, and two liquefaction trains and associated facilities with a combined capacity of approximately 4.0 MTPA;[308] (5) the Rio Grande LNG and Pipeline Project to be located on the north side of the Brownsville Ship Channel, consisting of a 135-mile pipeline, compressor stations and header system interconnected with the interstate pipeline grid in the Agua Dulce area and six liquefaction trains and associated facilities with a combined capacity of approximately 27.0 MTPA;[309] (6) the Annova Brownsville LNG Project to be located on the south side of the Brownsville Texas Ship Channel, consisting of six liquefaction trains and associated facilities with a combined capacity of approximately 6.0 MTPA, also having its gas supply delivered by Valley Crossing Pipeline but to a 9-mile pipeline lateral contemplated to be built by a third-party;[310] (7) the Third Stage of the Corpus Christi

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21, 2016); Office of Fossil Energy, *Eagle LNG Partners Jacksonville, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4445, DEP'T OF ENERGY (Oct. 3, 2019).

307. *Venture Global Plaquemines LNG, LLC, et al.*, 168 F.E.R.C. ¶ 61,204 at PP 5-8 (2019); *see also* Office of Fossil Energy, *Venture Global Plaquemines LNG, LLC: Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Plaquemines LNG Terminal in Plaquemines Parish, Louisiana, to Free Trade Agreement Nations*, Order No. 3866, DEP'T OF ENERGY (July 21, 2016); Office of Fossil Energy, *Venture Global Plaquemines LNG, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4446, DEP'T OF ENERGY (Oct. 16, 2019).

308. *Texas LNG Brownsville, LLC*, 169 F.E.R.C. ¶ 61,130 at PP 1, 4-7 (2019); *Texas LNG Brownsville, LLC*, 170 F.E.R.C. ¶ 61,139 (2020) (rehearing denied); *Vecinos Para el Bienestar de la Comunidad Costera, et al. v. FERC*, No. 20-1094 (D.C. Cir. filed Aug. 10, 2020) (appeal pending); *see also* Office of Fossil Energy, *Texas LNG Brownsville, LLC: Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed LNG Terminal at the Port of Brownsville in Brownsville, Texas, to Free Trade Agreement Nations*, Order No. 3716, DEP'T OF ENERGY (Sept. 24, 2015); Office of Fossil Energy, *Texas LNG Brownsville, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4489, DEP'T OF ENERGY (Feb. 10, 2020) (non-FTA Nations).

309. *Rio Grande LNG, LLC, et al.*, 169 F.E.R.C. ¶ 61,131 at PP 5-6, 9 (2019); *Rio Grande LNG, LLC, et al.*, 170 F.E.R.C. ¶ 61,046 (2020) (rehearing denied); *Vecinos para el Bienestar de la Comunidad Costera, et al. v. FERC*, No. 20-1045 (D.C. Cir. filed Aug. 10, 2020) (appeal pending); *see also* Office of Fossil Energy, *Rio Grande LNG, LLC: Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Rio Grande LNG Terminal in Brownsville , Texas, to Free Trade Agreement Nations*, Order No. 3869, DEP'T OF ENERGY (Aug. 17, 2016); Office of Fossil Energy, *Rio Grande LNG, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations,* Order No. 4492, DEP'T OF ENERGY (Feb. 10, 2020).

310. *Annova LNG Common Infrastructure, LLC, et al.*, 169 F.E.R.C. ¶ 61,132 at PP 4, 6, 8-10 (2019); *Annova LNG Common Infrastructure, LLC, et al.*, 170 F.E.R.C. ¶ 61,140 DEP'T OF ENERGY (Feb. 21, 2020) (rehearing denied); *Vecinos para el Bienestar de la Comunidad Costera, et al. v. FERC*, No. 20-1093 (D.C. Cir. filed Aug. 10, 2020) (appeal pending); *see also* Office of Fossil Energy, *Annova LNG Common Infrastructure, LLC: Order Amending Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas to Free*

LNG Project, located on the north shore of Corpus Christi Bay, consisting of a new 21-mile pipeline connecting to multiple pipelines and seven additional liquefaction trains and associated storage facilities having a combined additional capacity of approximately 11.5 MTPA;[311] (8) the Third Berth of the Sabine Pass LNG Project, located on the Sabine Pass Channel in Cameron Parish, Louisiana, consisting of an additional marine LNG loading berth; [312] (9) the Jordan Cove LNG and Pipeline Project to be located in Coos Bay, Oregon, consisting of a 229-mile pipeline connected to Canadian and Rockies gas supplies, along with three compressors and five liquefaction trains and associated facilities having a combined capacity of approximately 7.8 MTPA;[313] and (10) the Alaska LNG and Pipeline Project to be located in Nikiski, Alaska on the Kenai Peninsula, consisting of a nearly 900-mile pipeline from the gas production areas in Prudhoe Bay capable of delivering natural gas for the first time to certain communities along the pipeline's path, multiple pipeline compressor stations and three liquefaction trains and associated facilities with a combined capacity of approximately 20 MTPA.[314] The Commission also issued an order to show cause as to why a LNG receiving terminal and associated facilities located in San Juan, Puerto Rico, is not subject to the Commission's jurisdiction under section 3 of the NGA.[315]

C. Abandonment

1. Texas Eastern Transmission, LP and Columbia Gas Transmission, LLC

On July 8, 2019, the Commission granted the request of Texas Eastern Transmission, LP (Texas Eastern) and Columbia Gas Transmission, LLC (Columbia) to abandon a specified individually certificated natural gas exchange service between the two companies.[316] The order addressed a motion to inter-

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Trade Agreement Nations, Order No. 3394-A, DEP'T OF ENERGY (July 11, 2019); Office of Fossil Energy, *Annova LNG Common Infrastructure, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4491, DEP'T OF ENERGY (Feb. 10, 2020).

311. *Corpus Christi Liquefaction Stage III, LLC, et al.*, 169 F.E.R.C. ¶ 61,135 at PP 1, 5, 7, 13 (2019*); see also* Office of Fossil Energy, *Corpus Christi Liquefaction Stage III, LLC: Order Granting Long-Term, Multi-Contract Authorization to Export Liquefied Natural Gas by Vessel from the Proposed Stage 3 LNG Facilities to be Located at the Corpus Christi LNG Terminal in San Patricio and Nueces Counties, Texas, to Free Trade Agreement Nations*, Order No. 4277, DEP'T OF ENERGY (Nov. 9, 2018); Office of Fossil Energy, *Corpus Christi Liquefaction Stage III, LLC: Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas to Non-Free Trade Agreement Nations*, Order No. 4490, DEP'T OF ENERGY (Feb. 10, 2020).

312. *Sabine Pass LNG, L.P.*, 170 F.E.R.C. ¶61,145 at PP 1,7 (2020).

313. *Jordan Cove Energy Project, L.P., et al.,* 170 F.E.R.C. ¶ 61,202 (2020) (Comm. Glick dissenting in part)*, rehearing denied*, 171 F.E.R.C. ¶ 61,136 (2020) (Comm. Glick dissenting), *appeal pending, Deborah Evans et al. v. FERC, D.C. Circ. Case Nos. 20-1161, et al. See also* long-term LNG export authorizations *DOE Order No. 3041-A* (July 20, 2018) (FTA Nations) & *Order No. 3413-A* (July 6, 2020) (non-FTA Nations).

314. *Alaska Gas Development Corporation*, 171 F.E.R.C. ¶ 61,134 (2020*)* (Comm. Glick dissenting in part), *rehearing denied*, (Comm. Glick dissenting), *appeal pending. See also* long-term LNG export authorizations *DOE Order No. 3554* (Nov. 21, 2014) (FTA Nations) & *Order No. 3643* (May 28, 2015) (non-FTA Nations).

315. *New Fortress Energy LLC*, 171 F.E.R.C. ¶ 61,230 (2020).

316. *Texas Eastern Transmission, LP, Columbia Gas Transmission, LLC*, 168 F.E.R.C. ¶ 61,008 (2019), *Order Denying Reh'g*, 171 F.E.R.C. ¶ 61,050 (2020).

vene and protest filed by Washington Gas Light Company (Washington Gas) arguing that abandonment would result in increased costs to Columbia's shippers, cause decreased long-term reliability and flexibility, and impact Columbia's replacement capacity.[317] The Commission stated that the public convenience and necessity "does not require that Columbia and its customers continue to receive service at a price lower, or a quality higher, than that available to other shippers."[318] The Commission denied Washington Gas' subsequent request for rehearing, which argued that the Commission should have deferred action on the request to abandon service until the Commission could act on Columbia's request to pass through increased rates from its substitute services through its annual Transportation Costs Rate Adjustment (TCRA) mechanism.[319] On rehearing, the Commission noted Washington Gas' concerns do not lie with the abandonment of the exchange agreement, but rather with the costs associated with Columbia's replacement capacity release agreements, which are appropriately considered in the TCRA proceeding—the Commission is not "required to deny an abandonment application when customers could experience future rate impact."[320]

2. Texas Eastern Transmission, LP and Transcontinental Gas Pipe Line Company, LLC

On July 18, 2019, the Commission granted the requests of Texas Eastern Transmission, LP, Transcontinental Gas Pipe Line Company, LLC, and Northern Natural Gas Company (Northern) to abandon pipelines and related facilities onshore and offshore of Louisiana.[321] The applicants explained that because gas production in the offshore area had been declining, current average daily flows equaled less than 0.80% of the certificated design capacity, and that Texas Eastern had therefore been unable to use conventional techniques to maintain its facilities and provide the services specified in the underlying certificates.[322] The Commission concluded that it had no discretion to withhold abandonment of a certain line because the applicable line's primary function was non-jurisdictional gathering.[323] It further concluded the public convenience and necessity permits abandonment of a different line based on the extremely low flows, the fact that there are no firm shippers, and the existence of feasible alternatives for moving the currently flowing gas to market.[324]

On August 19, 2019, Peregrine Oil & Gas II, LLC (Peregrine) filed a combined emergency motion for stay and request for hearing.[325] With respect to the public convenience and necessity determination, the abandonment order ex-

317. 171 F.E.R.C ¶ 61,050 at P 4.

318. *Id.* at P 6.

319. *Id.* at P 7; see *also Columbia Gas Transmission, LLC*, 170 F.E.R.C. ¶ 61,181 (2020) (Order Following Technical Conference affirming FERC's acceptance and suspension of applicable tariff records).

320. 171 F.E.R.C. 61,050 at PP 12-13.

321. *Texas Eastern Transmission, LP*, 168 F.E.R.C. ¶ 61,037 (2019).

322. *Id.* at P 12.

323. 170 F.E.R.C ¶ 61,235 at P 5 (2020).

324. *Id.*

325. *Id.* at P 6.

plained that even if the system was performing a transmission function, circumstances supported the finding that permitted the abandonment because, among other reasons, nobody sought to subscribe for firm service or acquire the facilities until a "tepid" inquiry by Peregrine in 2018.[326] In its motion, Peregrine argued that their 2018 inquiry about subscribing for firm service was more than "tepid" and that Texas Eastern was required to grant its request for service.[327] However, in denying Peregrine's motion, the Commission characterized the request as "merely a late-submitted statement of interest," and "was repeatedly qualified."[328] As such, the Commission could not find that Peregrine's request for firm service to be compelling evidence that the facilities are needed to satisfy market demand and consumer needs.[329]

3. Transcontinental Gas Pipe Line Company, LLC and Columbia Gas Transmission, LLC

On January 24, 2020, the Commission granted the request of Transcontinental Gas Pipe Line Company, LLC (Transco) and Columbia Gas Transmission, LLC (Columbia) to abandon an individually certificated natural gas exchange service between the two companies.[330] The order addressed comments by UGI Gas, a customer of Columbia, that the applicants had failed to establish that the abandonment is in the public convenience and necessity, arguing that the Commission had previously allowed the abandonment of similar exchange services based on the applicants continuing to provide firm transportation to its customers.[331] UGI Gas claimed that abandonment of the exchange service agreement could not relieve Columbia of its duties to provide it service.[332] The Commission disagreed and stated that requiring Transco to continue to provide a service that is no longer operationally viable that was terminated according to the contract with appropriate notice was not justified.[333] Further, UGI Gas' service agreements with Columbia expressly contemplate the rights and obligations of parties upon the termination of the exchange agreement.[334] However, in order to provide UGI Gas time to resolve any gas supply issues, the Commission delayed the effectiveness of the abandonment by two months to March 31, 2020.[335]

326. *Id.* at PP 12-13.

327. *Id.* at PP 12-13.

328. 170 F.E.R.C. ¶ 61,235 at P 15.

329. *Id.* at P 17.

330. *Transcontinental. Gas Pipe Line Co., LLC and Columbia Gas Transmission, LLC*, 170 F.E.R.C. ¶ 61,055, at P 1 (2020).

331. *Id.* at PP 7-9.

332. *Id.* at PP 20-21.

333. *Id.* at P 22.

334. *Id.*

335. 170 F.E.R.C. ¶ 61,055 at P 23.

IV. PHMSA & PIPELINE SAFETY

A. Pipeline Safety: Safety of Gas Transmission Pipelines: MAOP Reconfirmation, Expansion of Assessment Requirements, and Other Related Amendments

On April 8, 2016, PHMSA published a Notice of Proposed Rulemaking (NPRM) to seek public comments on proposed changes to the gas transmission pipeline safety regulations.[336] On October 1, 2019, PHMSA issued its Final Rule, which is intended to increase the level of safety associated with the transportation of gas.[337] PHMSA finalized requirements to address the causes of several recent incidents by clarifying and enhancing existing requirements.[338] PHMSA also addressed certain statutory mandates of the 2011 Pipeline Safety Act and NTSB recommendations.[339]

While the NPRM addressed sixteen (16) major topic areas, PHMSA indicated in its Final Rulemaking that it determined the most efficient way to manage the proposals in the NPRM was to divide them into three rulemaking actions.[340] Thus, the Final Rule represents the first step in a three-part rulemaking process. PHMSA indicated in its Final Rule that it anticipates completing a second rulemaking which will address: repair criteria in HCAs and the creation of new repair criteria for non-HCAs; requirements for inspecting pipelines following extreme events; updates to pipeline corrosion control requirements; codification of a management of change process; clarification of certain other IM requirements; and strengthening IM assessment requirements.[341] The third and final rulemaking is expected to address requirements related to gas gathering lines.[342]

PHMSA's Final Rule incorporates elements of the 2011 Pipeline Safety Act into the Pipeline Safety Regulations at 49 CFR parts 190-199.[343] These changes include a six-month grace period, with written notice, for the completion of periodic integrity management reassessments that otherwise would be completed no later than every seven calendar years, a requirement that operators explicitly consider and account for seismicity in identifying and evaluating potential threats, and a requirement that operators report exceedances of the maximum allowable operating pressure (MAOP) of gas transmission pipelines.[344] The October 1 Final Rule "also requires operators of certain onshore steel gas transmission pipeline segments to reconfirm the MAOP of those segments and gather any necessary material property records they might need to do so, where the records

336. Notice of Proposed Rulemaking, *Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines*, 81 Fed. Reg. 20,722 (2016) (to be codified at 49 C.F.R. pts. 191-92).

337. Final Rulemaking, *Pipeline Safety: Safety of Gas Transmission and Gathering Pipelines*, 84 Fed. Reg. 52,180 (2019).

338. *Id*.

339. *Id*.

340. *Id.* at 52,181.

341. *Id.*

342. 84 Fed. Reg. 52,180, at 52,181.

343. *Id*.

344. *Id*.

needed to substantiate the MAOP are not traceable, verifiable, and complete," including for previously untested or "grandfathered" pipelines operating at or above 30 percent of specified minimum yield strength.[345] Records to confirm MAOP include pressure test records or material property records (mechanical properties) that verify the MAOP is appropriate for the class location.[346] Operators with missing records can choose one of six methods to reconfirm their MAOP, and must keep the record that is generated by this exercise for the life of the pipeline.[347] PHMSA has created a method for operators with insufficient material property records to obtain such records.[348] These physical material property and attribute records include the pipeline segment's diameter, wall thickness, seam type, grade (the minimum yield strength and ultimate tensile strength of the pipe), and Charpy V-notch toughness values (full-size specimen and based on the lowest operational temperatures) if applicable or required.[349] PHMSA determined that it is "insufficient" for material property records to not document the pipeline's physical material properties and attributes in traceable, verifiable, and complete records.[350]

The Final Rule requires operators to perform integrity assessments on certain pipelines outside of HCAs, in order to fulfill the section 5 mandate from the 2011 Pipeline Safety Act.[351] Pipelines in Class 3 locations, Class 4 locations, and in the newly defined "moderate consequence areas" must be assessed initially within fourteen (14) years of the rule's publication date and then must be reassessed at least once every ten (10) years thereafter.[352] The assessments will provide important information to operators about the conditions of their pipelines, including the existence of internal and external corrosion and other anomalies, and will provide an elevated level of safety for those located in MCAs while continuing to allow operators to prioritize the safety of HCAs.[353]

Finally, the Final Rule:

> explicitly requires devices on in-line inspection (ILI), launcher or receiver facilities that can safely relieve pressure in the barrel before inserting or removing ILI tools, and requires the use of a device that can indicate whether the pressure has been relieved in the barrel or can otherwise prevent the barrel from being opened if the pressure is not relieved.[354]

PHMSA explained that it included this requirement in the Final Rule because it is aware of incidents where operator personnel have been killed or seriously injured due to pressure build-up at these stations.[355]

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345. *Id*.
346. *Id*.
347. 84 Fed. Reg. 52,180, at 52,181.
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. 84 Fed. Reg. 52,180, at 52,181.
353. *Id.*
354. *Id.*
355. *Id.*

V. ENVIRONMENTAL

A. Clean Air Act

1. Friends of Buckingham v. State Air Pollution Control Bd.

In *Friends of Buckingham v. State Air Pollution Control Board*, the Fourth Circuit vacated and remanded a decision of the Virginia Air Pollution Control Board, which awarded a permit for construction of a compressor station because the Board: (1) failed to provide a sufficient explanation of its failure to consider electric turbines, instead of gas powered turbines; (2) failed to provide a sufficient analysis of its decision to exclude an option based on the redefining the source doctrine; and (3) failed to perform its statutory duty under Va. Code Section 10.1-1307(E).[356]

Atlantic Coast Pipeline, LLC (ACP) sought to construct three compressor stations along the pipeline—one in West Virginia, one in Virginia, and one in North Carolina.[357] For the Virginia Compressor Station, ACP argued that the location was "the only feasible location" because it had an interconnection opportunity with Transco, it was available for purchase, and the only other location that satisfied the previous two criteria was disqualified by the Commission.[358] ACP filed an application with the Virginia Department of Environmental Quality (DEQ) for a permit to construct and operate the Compressor Station.[359] DEQ held an informational session for the residents of Buckingham County and several comment periods.[360] DEQ received more than 5,300 comments.[361] DEQ representatives assured all public commenters that they could address the Virginia Air Pollution Control Board (Board) and asserted that all comments would be considered before final action on the permit application was taken.[362] The comments addressed concerns ranging from whether the facility should use electric turbines instead of natural gas turbines, critiques of the Environmental Protection Agency's (EPA) "[a]ir quality standards," and "[e]nvironmental [j]ustice" and "[s]ite suitability issues."[363] Many comments expressed concerns of the "potential disproportionate impacts of the proposed facility on the African American population in Union Hill."[364] Board members made inquiries into the demographics of the Union Hill community and the interpretation of site suitability and environmental justice obligations.[365] After two Board meetings, the Board further deferred its decision on the permit and ordered a limited period of public

356. Friends of Buckingham v. State Air Pollution Control Bd., 947 F.3d 68, 71-72, 85-86 (4th Cir. 2020).

357. *Id.* at 71.

358. *Id.* at 76.

359. *Id.* at 77.

360. *Id.*

361. *Friends of Buckingham,* 947 F.3d 68 at 77.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

comment on documents pertaining to demographics and site suitability.[366] At the Board's final meeting, a DEQ official made a presentation stating that "[r]egardless of the demographics of the area surrounding the compressor station, [it] will not cause a disproportionate adverse impact to the community" for two reasons: (1) the residents in the surrounding area "are already breathing air that is cleaner than the air breathed by 90% of the residents of Virginia"; and (2) although "air modeling does indicate" an "increase in air pollution concentration [from the Compressor Station], the increase is [merely] slight."[367] The Board then voted and unanimously adopted the DEQ's recommendation and approved the permit. Two Board members—including the Board Chairman—noted that, for the purposes of its review, there was an assumption that the community around the Compressor Station may be an Environmental Justice community. The Board's decision noted that it "does not adopt any legal views expressed by DEQ regarding the Board's authority under Va. Code Section 10.1-1307(E)."[368]

The court applied the arbitrary and capricious standard in its review of the Board's actions.[369] The court noted that, under Virginia law, a reviewing court may set aside an agency's determination, even if it is supported by substantial evidence, if the court's review discloses that the agency failed to comply with a substantive statutory directive, therefore the result would be the same, even if the substantial evidence standard was applied.[370]

The court found that the Board did not provide a sufficient and rational explanation of its failure to consider electric turbines and found that DEQ responses to the public were also insufficient in doing so.[371] The court determined that the DEQ comments and the Board's Decision Statement did not reference case law, regulations or any information that sufficiently defined the "redefining the source" doctrine under Virginia law.[372] The court noted that the EPA advised that when applying the federal doctrine, decisions to exclude an option based on the doctrine must be explained and documented in the permit record.[373] As a result of the Board's failure to clearly explain its basis for ignoring the alternative electric turbines during the permitting phase, the court found that this decision "was arbitrary and capricious and unsupported by substantial evidence."[374]

Further, the court ruled that the Board erred when it: (1) failed to make any findings regarding the character of the local population at Union Hill when presented with conflicting evidence; (2) failed to consider the potential degree of injury to the local population independent of NAAQS and state emission standards; and (3) adopted DEQ's final permit analysis which relied on incomplete or

366. *Friends of Buckingham*, 947 F.3d 68 at 77-78.
367. *Id.* at 79.
368. *Id.* at 79-80.
369. *Id.* at 81.
370. *Id.* at 81-82.
371. *Friends of Buckingham*, 947 F.3d 68 at 83.
372. *Id.*
373. *Id.*
374. *Id.* at 85.

discounted evidence.[375] The court found it was improper under federal and state law that, when presented with conflicting evidence, the Board failed to consider the demographics of the predominantly African American Union Hill community when considering ACP's application for the Station, and the Board provided no analysis on the air quality and health impacts the Station would have on Union Hill's residents.[376] This failure to properly consider the Station's impact on air quality standards led the Board to dismiss the various environmental justice concerns and potential impact of inhalable particles particulate matter to be emitted by the Compressor Station.[377] Finally, the court found that the Board relied on improper information when considering site suitability.[378] The court noted that information the Board relied on—an October 2017 site evaluation—was inadequate in representing the nature of the area surrounding the Station when considering other studies and public comments which had been presented.[379] The Board did not address the conflicting evidence.[380] The court concluded that the Board relied on insufficient evidence to support a finding on the air quality standards for an environmental justice community.[381]

The court held that "the Board failed in its statutory duty to determine the character and degree of injury to the health of the Union Hill residents, and the suitability of the activity to the area."[382] The court vacated the Board's decision, and remanded the matter for the Board to make findings with regard to conflicting information in the record, studies it relied on, and the potential impacts of the Compressor Station on the surrounding community.[383]

B. Clean Water

1. EPA Clean Water Act Section 401 Certification Rule

On June 1, 2020, the EPA Administrator signed a final rule titled, "Clean Water Act Section 401 Certification Rule" which was published in the *Federal Register* on July 13, 2020.[384] The final rule clarifies the scope of the Clean Water Act (CWA) section 401 certification process, helps promote the timely review of infrastructure projects, and protects and preserves the quality of America's water resources.[385] Of note, this rule clearly specifies the timeline for state review and action on a section 401 certification by requiring a reviewing state or

375. *Id.* at 86.
376. *Friends of Buckingham*, 947 F.3d 68 at 87-89.
377. *Id.* at 91.
378. *Id.* at 92.
379. *Id.*
380. *Id.* at 92-93.
381. *Friends of Buckingham*, 947 F.3d 68 at 93.
382. *Id.*
383. *Id.*
384. *Clean Water Act Section 401 Certification Rule,* RIN 2040-AF86, 85 Fed. Reg. 42,210 (July 13, 2020).
385. *Id.* at 42,236-37.

tribe to take final action within one year of receiving a certification request.[386] The final rule provides no tolling provision to stop the one-year clock.[387]

The rule also clarifies that the scope of section 401 reviews is limited to impacts to waters regulated by the CWA and that states that expand their reviews to issues beyond water quality are exceeding the scope of section 401.[388] According to EPA, a section 401 review "is not unbounded and must be limited to considerations of water quality."[389] Further EPA noted that the imposition of conditions unrelated to water quality, such as requiring payments to state agencies for improvements or enhancements that are unrelated to the project, is not consistent with the scope of the CWA generally or section 401.[390] Attempts by certifying authorities to address all potential environmental impacts from the permitted project, such as impacts associated with air emissions and transportation effects are also inconsistent with the CWA.[391] The final rule took effect on September 11, 2020.[392]

C. NEPA

1. Executive Order - Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities (2020)

On June 4, 2020, President Trump issued an Executive Order (EO) *Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities*. The purpose of the EO is to facilitate agencies and executive departments to take all appropriate steps to use their emergency authority, or other authority, to respond to the national emergency caused by COVID-19 and to facilitate the nation's economic recovery.[393] Specifically, the EO seeks to increase the speed that infrastructure investments and other actions will impact the economy and return Americans to work, while also providing appropriate protection for public health and safety, natural resources, and the environment.[394]

The EO instructs the Secretaries of Transportation, the Army, Defense, Interior, and Agriculture to use all relevant emergency and other authorities to expedite work, and particularly work relating to infrastructure, energy, environmental, and natural resource projects.[395] In furtherance of that, these entities were instructed to provide an initial report within thirty (30) days of the issuance

386. *Id.* at 42,211-14.
387. *Id*. at 42,233.
388. *Id.* at 42,231.
389. 85 Fed. Reg. 42,210 at 42,230.
390. *Id*.
391. *Id*.
392. *Id.* at 42,210.
393. Exec. Order No. 13927, 85 Fed. Reg. 35,165 (June 4, 2020).
394. *Id.* at 35,165-66.
395. *Id.* at 35,166.

of the EO listing all projects that have been expedited pursuant to the EO, with further ongoing reporting requirements thereafter.[396]

The EO addresses the emergency authority allowed by NEPA,[397] the Endangered Species Act (ESA),[398] the Clean Water Act,[399] section 10 of the Rivers and Harbors Act of March 3, 1899,[400] and section 103 of the Marine Protection Research and Sanctuaries Act of 1972.[401] On NEPA, the EO orders that within thirty (30) days all agency heads must identify planned or potential actions to facilitate the Nation's economic recovery that: (i) may be subject to emergency treatment as alternative arrangements pursuant to CEQ's NEPA regulations and agencies' own NEPA procedures; (ii) may be subject to statutory exemptions from NEPA; (iii) may be subject to the categorical exclusions that agencies have included in their NEPA procedures pursuant to the NEPA regulations; (iv) may be covered by already completed NEPA analyses that obviate the need for new analyses; or (v) may otherwise use concise and focused NEPA environmental analyses.[402] Further, agency heads must provide a summary report listing such actions to the OMB Director, the Assistant to the President for Economic Policy, and the Chairman of CEQ.[403] For the ESA, all agency heads must identify all planned or potential actions to facilitate economic recovery that may be subject to the regulation on consultations in emergencies promulgated by the Secretaries or Interior and Commerce pursuant to the ESA, and "use, to the fullest extent possible and consistent with applicable law, the ESA regulation on consultations in emergencies, to facilitate the Nation's economic recovery."[404] Agency heads were similarly instructed to identify and utilize the emergency provisions of the Clean Water Act in coordination with the Army Corps of Engineers.[405]

Finally, the EO instructs all agency heads to review all "statutes, regulations, and guidance documents for their own agency that may provide for emergency or expedited treatment (including waivers, exemptions, or other streamlining)" for "infrastructure, energy, environmental, or natural resources matters" no later than thirty (30) days after the issuance of the EO.[406] Agencies are instructed to "identify planned or potential actions, including actions to facilitate the Nation's economic recovery, that may be subject to emergency or expedited treatment," and provide a summary report listing those actions.[407] Agencies are further instructed to use the identified emergency statutes and regulations to the fullest extent permitted by law to facilitate America's economic recovery.[408]

396. *Id.*
397. 42 U.S.C. §§ 4321-4370 (1970).
398. 16 U.S.C. §§ 1531-1544 (2013).
399. 33 U.S.C. § 1251-1387 (1987).
400. 33 U.S.C. § 403 (1947).
401. 33 U.S.C. § 1413 (1972).
402. 85 Fed. Reg. 35,165 at 35,167.
403. *Id.*
404. *Id.* at 35,168.
405. *Id.* at 35,169.
406. *Id.*
407. 85 Fed. Reg. 35,165 at 35,169.
408. *Id.*

D. Nationwide Permit

1. Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al.

The primary issue in *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al*. (*Northern Plains*) was whether the U.S. Army Corps of Engineers (Corps) acted arbitrarily and capriciously when they reissued the Nationwide Permit 12 (NWP 12) in 2017.[409] The plaintiffs, Northern Plains Resource Council, claimed that the Corps failed to use ESA section 7(a)(2) Consultation, which requires the Corps to ensure that actions they authorize will not jeopardize the existence of any listed species or destroy or adversely modify designated critical habitat.[410] The Corps is required to start formal consultation with the Services if they determine that an action may impact listed species or critical habitat.[411] The Corps determined that General Condition 18 also ensures that a nationwide permit does not allow an activity that would harm a listed species or critical habitat, therefore, they did not need to initiate formal consultation.[412]

The district court stated that "programmatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat."[413] Furthermore, the district court stated that the duty to ensure an action does not harm listed species or critical habitat is ongoing and that the Corps failed to fulfill their duty under ESA section 7(a)(2) when they reissued NWP 12 in 2017. The district court also decided that General Condition 18 fails to ensure compliance under ESA section 7(a)(2) because it gives non-federal permittees the ability to determine the initial effect an action would have on listed species and critical habitat.[414] The district court explained that this method requires only that the permittees submit a form to a district engineer if they think their action may have a negative effect on listed species or critical habitat.[415] Finally, the district court found that the Corps did not consider relevant expert analysis and failed to express a connection between the facts and their decision.[416]

The district court issued summary judgement on the plaintiff's ESA claim and remanded NWP 12 back to the Corps for ESA compliance.[417] In doing so, the district court indicated that it assumed this action would also address the rest of the plaintiff's claims.[418]

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409. Northern Plains Resource Council v. U.S. Army Corps of Engineers, No. CV-19-44-GF-BMM, 2020 WL 1875455, at *2 (D. Mont. April 15, 2020).

410. *Id.* at *3.

411. 50 C.F.R. § 402.14; 16 U.S.C. § 1536(a)(2).

412. *Northern Plains Resource Council,* No. CV-19-44-GF-BMM, 2020 WL 1875455, at *3.

413. *Id.* at *7.

414. *Id.*

415. *Id.*

416. *Id.*

417. *Northern Plains Resource Council,* No. CV-19-44-GF-BMM, 2020 WL 1875455, at *9.

418. *Id.*

GAS, OIL, AND LIQUIDS STEERING COMMITTEE