UNITED STATES OF AMERICA 102FERC ¶ 61,225
FEDERAL ENERGY REGULATORY COMMISSION

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

East Tennessee Natural Gas Company Docket Nos. CP01-415-004
CP01-415-007
CP01-375-001
CP01-375-002

ORDER ON REHEARING AND DENYING STAY

(Issued February 27, 2003)

1. On November 20, 2002, the Commission issued a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act (NGA) to East Tennessee Natural Gas Company (East Tennessee) to construct and operate gas pipeline facilities in Tennessee, Virginia, and North Carolina known as the Patriot Project to provide up to 510,000 Dth per day of natural gas service.[1] The Patriot Project consists of an expansion of East Tennessee's existing mainline facilities in Tennessee and Virginia, and an extension of its mainline facilities in Virginia and North Carolina. The Commission also authorized East Tennessee under Section 7(b) of the NGA to abandon certain facilities that will be replaced by the new facilities. The Blue Ridge Coalition, Barbara Smith, and Ron Meadows, jointly (collectively Coalition), and Shirley Holland, David Carroll, R. Darryl Holland, Vickie Holland Collins, and the National Committee for the New River, Inc. (Committee) separately, filed timely requests for rehearing of the November 20 order. The Committee also requested that the Commission stay construction on the Patriot Project Extension. For the reasons discussed below, we are denying the requests for rehearing and the request for stay.

[1] 101 FERC ¶ 61,188 (2002).

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Procedural Matters

Answer by East Tennessee to the Requests for Rehearing

2. On January 14, 2003, East Tennessee filed a motion for leave to answer and an answer to the requests for rehearing of the November 20, 2002 order. On January 21, 2003, the Committee filed a motion to strike East Tennessee's motion and the answer to the rehearing requests as untimely filed, or in the alternative, to deny the request to answer unless all parties are afforded an opportunity to respond to the answer. The Committee contends that if the Commission permits East Tennessee to state its positions on the issues raised by the parties seeking rehearing of the Commission's November 21 order, the Commission should allow all parties to file briefs on the issues or otherwise to respond to East Tennessee.

3. The Commission's Rules of Practice and Procedure generally do not permit answers to requests for rehearing. See 18 C.F.R. § 385.213(a)(2). However, in order to ensure a complete and accurate record in this proceeding, we find good cause to waive Rule 213 and permit East Tennessee's answer. On the other hand, we do not believe that further statements answering East Tennessee, whether in the form of briefs or otherwise are necessary or appropriate from the other parties to this proceeding. All parties have now had ample opportunity to present their views and legal opinions regarding the November 20 order.

Request for Stay by the Committee

4. The Committee requests that the Commission stay any construction authorized on the Patriot Project by the November 20 order beginning at what it refers to as the Reed Creek/I-81 crossing in Wythe County, Virginia, and extending for the remaining portion of the Patriot Project Extension. As justification for stay, the Committee states merely that the stay is warranted for the same reasons for which it requests rehearing.

5. East Tennessee replied to the request for stay, arguing that the request does not satisfy the Commission's criteria for granting a stay, and states that the request must be denied. East Tennessee asserts that the Committee has not demonstrated that it will suffer irreparable injury as a result of the construction of the pipeline, but that a stay will harm East Tennessee and its customers. A stay, it says, would deprive the marketplace of the benefits of the Patriot Project, and would delay East Tennessee's construction schedule, resulting in significant losses for East Tennessee.

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6. In its consideration of motions for a stay, the Commission applies the standards set forth in Section 705 of the Administrative Procedure Act,[2] and grants a stay when "justice so requires."[3] In deciding whether justice requires a stay, the Commission generally considers several factors, which typically include: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.[4] The Commission's general policy is to refrain from granting stays of its orders, in order to assure definiteness and finality in Commission proceedings.[5] If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, the Commission need not examine the other factors.[6]

7. We find that the Committee has not shown irreparable injury in its pro forma request for stay. The Committee relies generally and solely on arguments it advances in its rehearing request as grounds for its stay request. The Committee's request thus makes no attempt to address any of the established criteria for granting a stay. As explained below, in this order we are addressing the Committee's arguments and denying the request for rehearing. The Patriot Project has been found to be in the public interest, and to be environmentally acceptable if constructed in accordance with the mitigation measures on which the Commission's approval is conditioned. East Tennessee, moreover, cannot commence construction of the facilities until it receives all necessary Federal permits, including Federal permits issued by the State through its delegated authority. The request for stay will be denied.

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[2]5 U.S.C. § 705.

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

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

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

[6]Id.

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Background

8. In July 2001, East Tennessee filed an application for a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act (NGA), to construct and operate pipeline facilities in Tennessee, Virginia, and North Carolina known as the Patriot Project. The proposed facilities consist of an expansion of East Tennessee's existing mainline facilities in Tennessee and Virginia, and a new extension of its mainline pipeline facilities in Virginia and North Carolina. As pertinent here, the extension would involve constructing an approximately 93.6 mile mainline (Line 3600) from a point on East Tennessee's existing Line 3300 near Wytheville, Virginia, to an interconnect with facilities of Transcontinental Gas Pipe Line Corporation (Transco) at Eden, North Carolina, and an approximately 7-mile lateral line from the mainline extension to a new electric power plant in Henry County, Virginia.

9. On March 26, 2002, the Commission issued a preliminary determination, based on non-environmental issues, finding that the Patriot Project was in the public interest because it will provide fuel for new electric generation plants, provide additional gas supplies to existing local distribution companies (LDCs) in Virginia and North Carolina, and bring natural gas service to portions of southwestern Virginia for the first time. The Commission found that the public benefits of the proposed project will outweigh any adverse impacts. [7]

10. In April 2002, a Draft Environmental Impact Statement (DEIS), inviting comment was issued. As part of the environmental review process, the Commission held five additional public comment meetings in Virginia and Tennessee in order to provide interested groups and individuals the opportunity to present oral comments on the impacts described in the DEIS. The Commission also received additional verbal comments from the Blue Ridge Coalition and others at a public meeting in Washington, D.C. After reviewing the comments received, the Commission issued a Final Environmental Impact Statement (FEIS) for the Patriot Project in September 2002.

11. On November 20, 2002, the Commission accepted a proposed amendment to the proposal relating to the mainline portion of the project, and having completed environmental analysis of the Patriot Project proposal, issued a certificate to East Tennessee authorizing the Patriot Project, subject to environmental compliance conditions. The November 20 order denied a request for rehearing by Ms. Barbara Smith and contentions by the Blue Ridge Coalition, who raised issues related to the need for the

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[7] See 98 FERC ¶ 61,331 (2002).

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proposed pipeline and the public benefits expected from the pipeline, including the installation of taps at various locations along the pipeline. The November 20 order also addressed environmental issues discussed in the FEIS, in late-filed written comments to the DEIS, and in comments on the FEIS from the Virginia Department of Environmental Quality (Virginia DEQ), the U.S Environmental Protection Agency, the Tennessee Historical Commission, and the Blue Ridge Coalition. The Commission largely adopted the conclusions presented in the FEIS and found that the Patriot Project, if constructed and operated in accordance with the 69 environmental mitigation conditions set forth in the appendix to the November 20 order, is environmentally acceptable.

Rehearing Issues

Need for Patriot Project Extension and the Associated Taps

12. The Coalition and the Committee renew arguments previously made and addressed in this proceeding that there is no need for the Patriot Project in general, and the taps to be placed along the Patriot Extension in particular. David Carroll also questions the need for the pipeline. The Coalition continues to argue that there is an insufficient market for the project, based largely on the fact that the Henry County Power Plant construction has been delayed at the request of its developer, and on assertions that the Commission's findings regarding projections for increased electric power use and concomitant natural gas demand and infrastructure in the Southeast are outdated. The Coalition also points out that the proposed Duke Energy North America (DENA) Wythe power plant is still undergoing environmental assessment and has not yet been approved by the Commonwealth of Virginia. The Committee contends that there is no need for the taps authorized by the November 20 order, that the locations of the taps is arbitrary, that there was no notice to the public that taps were part of the proposed project, and that in any event, there will be little or no gas available on the Patriot Extension for use at the taps. The Coalition and the Committee also contend that the inclusion of the taps as part of the project improperly narrowed the consideration of alternatives to the route proposed by East Tennessee.

13. In response, East Tennessee avers that the pipeline route was determined by strong market support for the project from power plants, local distribution companies, the Town Council of Hillsville, Virginia, and several county development boards from two different states. It states that it proposed to install taps at its own expense to facilitate development of these local markets for gas. While the local markets are strongly supportive of the benefits of natural gas for future economic development, it says, neither the Commission nor East Tennessee can reasonably foresee exactly which taps will be

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utilized, and environmental analysis of the impacts of the taps sought by the Committee is neither required nor warranted.

Commission Response

14. We affirm our findings in the Preliminary Determination and the November 20 order that strong market support for the Patriot Project demonstrates that the project is required by the public convenience and necessity. Approximately 87 percent of the project's total capacity of 510,000 Dth a day is subscribed for terms of from 10 to 25 years. As we explained in the November 20 order, the high level of subscription for the project, by itself, warrants the project's approval. Since the November 20 order the Commission has received, in accordance with the terms of the order, executed service contracts from three of the shippers supporting the project for 130,000 Dth a day. Notwithstanding the concerns regarding the proposed DENA Wythe and Henry County Power Plants expressed by opponents of the project, we have had no indication from those shippers that their support for the project has diminished since the November 20 order.

15. Moreover, as we explained in the November 20 order, predictions vary, but we are confident that the need for electric power and natural gas service will continue to increase in the southeastern states. We explained also that sufficient infrastructure must be in place so that increased natural gas demand from electric power plants and distribution companies can be served when needed and not subject to delays.

16. With respect to the taps, we reiterated in the November 20 order our finding from the preliminary determination that installation of underground taps along the pipeline represents a potential added benefit to the region from the project because the Patriot Project will bring natural gas service to portions of southwestern Virginia for the first time. As we stated,

> Groups along the proposed route in Virginia and North Carolina believe that the Patriot Project and the taps to be attached to the pipeline are essential for bringing economic development to their region. Without the availability of natural gas service, some believe, there is little chance of attracting new business. The benefits from increased potential access to natural gas from taps along the proposed route in Virginia cannot be quantified with precision because there are as yet no customers at those locations. It is likely that not all the taps will be employed; nevertheless, we believe, along with those who support their installation, that their presence along East Tennessee's pipeline will make locations near the taps

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> more attractive for commercial use and local gas distribution. Thus, we continue to believe that the taps proposed by East Tennessee will provide a public benefit to the region, and are an appropriate goal for the Patriot Project.

We also explained that the locations of the taps had been developed in consultation with local governments and business groups; thus, their location is not arbitrary. Because service at the taps is not subscribed, we do not know how much gas will be needed at any particular location; however, 64,000 Dth a day is not currently subscribed and will be immediately available. Additional gas can be made available at taps by a variety of means, as for example, through capacity release or by adding compression. In any event, we are not finding in this proceeding that the taps will satisfy every service request that may arise at a given tap location in the future; rather, we are authorizing the taps as a means of bringing a degree of gas service to an area that has no gas service. We continue to believe that this potential will be a real benefit to the region.

17. We also addressed in the November 20 order contentions that consideration of including taps as part of the Patriot Project inappropriately narrowed the consideration of alternate routes. For the reasons set forth immediately above, we explained that the taps are an appropriate goal of the project that must be considered in determining the pipeline route. We explained in the order (paragraphs 43, 67, 68, and 105) that the Commission examined 13 major alternatives to the route proposed by East Tennessee. The Coalition has raised arguments on rehearing regarding the alleged superiority of an alternative route along the AEP powerline right-of-way north of the approved route that would bypass that portion of the approved route in Patrick and Henry Counties on which taps would be located, and the advantages of combining East Tennessee's Patriot Project with another project sponsored by Dominion Greenbrier Pipeline Company (the one-pipe alternative). We have already discussed and rejected these same arguments in paragraphs 105, 106, and 107 of the November 20 order. We explained (paragraphs 105 and 106) why the AEP alternative was not superior to the proposed route from an environmental standpoint, even if service to the tap locations was not considered (that is, if laterals to the tap locations were not necessary). We also explained (paragraphs 93 and 107) why consideration of a single East Tennessee-Dominion Greenbrier pipeline was not appropriate in these circumstances, and found that the cumulative impacts from the two separate proposals would be within acceptable limits.

18. The Committee's assertion that the public was not afforded adequate notice that taps were considered as part of the Patriot Project Extension is unfounded. The basis for the Committee's allegation is that there was no specific reference to taps in the Commission's October 2, 2001 Notice of Intent to Prepare an Environmental Statement

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(NOI) regarding the Patriot Project. The purpose of an NOI is to inform members of the public that an energy project is being proposed in their vicinity, to describe the nature of the project, and to explain where more information regarding the proposal may be obtained. The NOI stated that the project, as pertinent, involved the construction of a gas pipeline extending through Wythe, Carroll, Floyd, Patrick, and Henry Counties, Virginia, new meter stations, and associated mainline valves and appurtenant facilities. The Commission distributed the NOI widely, sending it to, for example, 2,460 individuals (including all persons owning land on the proposed route), Federal, State and local government agencies and elected officials, environmental and public interest groups, and local libraries and newspapers. The notice invited and encouraged all interested parties to attend public scoping meetings that, the NOI explained, would provide more detailed information on the proposal. The NOI also noted that representatives of East Tennessee would be present at the meetings to describe its proposal.

19. Subsequently, the Commission held four such public scoping meetings and two public working meetings at locations along the proposed route to provide an opportunity for the general public to learn more about the proposed pipeline project. The proposed taps were discussed at these scoping meetings, in the Commission's March 26, 2002 preliminary determination, in the DEIS, and at additional public scoping meetings held after issuance of the DEIS. The Committee does not suggest that anyone affected by the taps did not have actual notice of the proposal's tap component, and under the circumstance it seems unlikely that anyone interested in this project could not be aware that East Tennessee was proposing to install a series of taps along its pipeline route. Thus, we find that the NOI provided adequate notice to the public of the nature of the project.

Environmental Issues

A. Incomplete Environmental Review

20. The Coalition and the Committee argue that the DEIS and ultimately the FEIS were inadequate and incomplete because they did not provide sufficient description of the entire project, so that the public was denied a meaningful opportunity to comment. They contend that the Commission's November 20 order is based on incomplete environmental analysis that does not meet NEPA standards. Specifically, they maintain that the environmental analysis contains many gaps or blank spots (so-called skip zones) on which environmental analysis has not been completed, and that environmentally sensitive areas, such as river and stream crossing points, lacked site-specific plans necessary for proper analysis. The Coalition also contends that the Commission failed to

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identify or analyze the impacts from the project on a number of existing or proposed residential developments, recreational areas, and commercial areas. It asserts that the Commission should likewise have considered the cumulative impact from a proposed major highway project, Interstate Highway 73. Both the Coalition and the Committee contend that the DEIS should have been revised and reissued for another round of comment. The fact that the order provides for eventual approval of site-specific plans by the Commission's Director of the Office of Energy Projects (OEP) before construction may begin does not cure this problem, they argue, because the public will not have been afforded opportunity for comment.

21. East Tennessee replies that challenges to the Commission's environmental analysis of the Patriot Project are without merit. East Tennessee argues that the Committee's assertion that the DEIS did not provide meaningful notice of the scope of particular impacts is inappropriately premised on lack of site-specific plans for various aspects of the Patriot Extension. The purpose of a DEIS, it states, is to put interested parties on notice of the types of activities contemplated and their impacts.[8] East Tennessee avers that the DEIS put the public on notice of potential impacts of the project and it argues that the Commission was well within its discretion to issue the DEIS before site-specific plans had been finalized.

Commission Response

22. Under NEPA, the purpose of an EIS is to ensure that an agency, in reaching its decisions, will have available and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audiences that may also play a role in both the decision making process and the implementation of that decision.[9] The EIS prepared by Commission staff for East Tennessee sets forth the information necessary to achieve those purposes.

23. As we explained in the recent Islander East proceeding,[10] consistent with long-standing practice, and as authorized by NGA Section 7(e), the Commission typically issues certificates for natural gas pipelines subject to conditions that must be satisfied by

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[8]Citing Piedmont Heights Civic Club, Inc. v. Moreland, 637 F.2d 430, 442 (5th Cir. 1981).

[9]See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

[10]See 102 FERC ¶ 61,054 (2003).

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an applicant or others before the grant of a certificate can be effectuated by constructing and operating a pipeline project.[11] As is the case with virtually every certificate issued by the Commission that authorizes construction of facilities, the instant approval is subject to East Tennessee's compliance with the environmental conditions set forth in the order. In this proceeding there are 69 separate conditions.

24. The practical reality of large projects such as the Patriot Project is that they take considerable time and effort to develop. Perhaps, more importantly, their development is subject to many significant variables whose outcome cannot be predetermined. For example, as is the case in this proceeding, many individuals have denied or limited East Tennessee's access to property that it needs to complete its surveys and environmental studies. Depending on state law, the pipeline needs NGA Section 7 certificate authorization, including eminent domain authority under NGA Section 7(h), to access this property.[12]

25. The natural consequence of this is that some aspects of a project may remain in the early stages of planning even as other portions of the project become a reality. If every aspect of the project were required to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project. Here, the Commission processed East Tennessee's application and issued it a certificate under the requirements of the NGA and NEPA. The exercise of that authority was conditioned on the pipeline's completing the necessary survey and environmental studies. We find that the final EIS contains sufficient information for the Commission to determine under NEPA that the proposed East Tennessee Patriot Project is an environmentally acceptable action. Therefore, the issuance of a certificate of public convenience and necessity to East Tennessee to construct and operate the facilities under the NGA is not premature.

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[11]Section 7(e) of the Natural Gas Act provides that "[t]he Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." See also Iroquois Gas Transmission System, L.P., 52 FERC at 61,402 n. 195 (the Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions)(citing Texas Eastern Gas Transmission Corp., 47 FERC ¶ 61,341 (1989); CNG Transmission Corp. 51 FERC ¶ 61,267 (1990); Columbia Gas Transmission Corp. 48 FERC ¶ 61,050 (1989).

[12]Id.

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26. Despite assertions by the Coalition that the Commission did not identify or analyze locations impacted by the Patriot Extension, we are confident that our environmental review was thorough. The Coalition raised essentially these same arguments in comments to the FEIS on November 14, 2002, which we received too late to be specifically addressed as part of our analysis in the November 20 order. We will address them briefly here.

27. According to the Coalition, the alternative route along the AEP powerline right-of-way would have substantially less impact on residences than the proposed Patriot Extension route. The Coaltion also maintains that the conclusions in the FEIS regarding wetland impacts along the AEP alternative are not supported by fact. We disagree with both contentions. As noted in the November 20 order, part of the reason for the discrepancies results from the fact that the Coalition's contentions are based on its own, different alternative route, and are, thus, not directly related to our analysis in the FEIS. Nonetheless, we have reviewed the detailed topographic maps of the AEP alternative to reassess the number of residences and structures along the route, and we confirm our earlier finding that there would be a greater number of residences and structures impacted by the AEP route alternative than the comparable section of the approved route even without the construction of any laterals that would be needed to provide service to any of the taps along the Patriot Extension. With laterals, construction along the AEP route would result in even greater impact on residences. Moreover, the Coalition's argument that the existence of skipped areas precluded a comparison of wetland impacts is inaccurate. The FEIS clearly states that the comparison was based on interpretation of National Wetlands Inventory (NWI) maps and aerial photographs. The existence of skip areas has nothing to do with the accuracy of the wetlands comparison in the Alternatives section of the FEIS because the skip areas were assessed identically to non-skip areas.

28. The Coalition's November 14, 2002 filing provides a list of items that it maintains the Commission should have evaluated; however, it does not offer any information with respect to the relevancy of these locations to the proposed route or the impacts it believes would result. The Coalition asserts that the FEIS failed to identify impacts to several existing or future residential subdivisions along the Patriot Extension. Based on Commission staff field surveys and assessment of photo-alignment sheets, responses to requests for information from local governments, from comments received in writing or at public hearings, and from East Tennessee data request responses, the Commission analyzed and evaluated all reasonably potential impacts along the proposed route that came to its attention.

29. The Coalition states that the Commission should have evaluated the impact of the pipeline on Virginia State Route (SR) 8 because it is has been designated a scenic

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highway. The Patriot Project Extension will cross SR 8 along a segment of road that it shares with Highway 58 immediately east of Stuart, Virginia. The pipeline will cross under the road by a boring technique at a location where there are commercial businesses and a Virginia Department of Transportation highway project. There should be no additional aesthetic impacts resulting from the construction of the Patriot Project across SR8.

30. The Coalition asserts that Commission failed to consider impacts of routing the pipeline through properties comprising the upstream water sources for the Talbott Dam, the Townes Reservoir, and the Marrowbone Reservoir. Talbott Dam and Townes Reservoir are not discussed in the FEIS because they are not public water supplies, and there are apparently no established recreational facilities associated with either of them, other than a parking lot and access for fishing and boating at the Talbott Dam. The Talbott Dam is an impoundment on the Dan river used for power generation. The project crosses the Dan River two miles upstream from the reservoir. As discussed below in this order, the November 20 order requires East Tennessee to consult with the NPS regarding the method for crossing the Dan River and receive approval from the Director of OEP prior to construction. The Commission's approved method will minimize or avoid any downstream impacts to the Talbott Reservoir. The Townes Reservoir is fed by the Dan River. There are Dan River tributaries crossed by the project that flow into this reservoir located 1.5 to 2.0 miles upstream of the reservoir. The use of dry crossing techniques will minimize impact to the water quality of the Townes Reservoir. The proposed pipeline will cross Marrowbone Creek at two locations in the vicinity of the Marrowbone Creek Reservoir – one, 2-3 miles upstream of the reservoir, and the other, less than one mile downstream of the reservoir. This reservoir is a public water source discussed in the FEIS at Section 3.3.2, page 3-33. We do not believe that the proposed crossing would impact the public water supply using the proposed dry crossing method and mitigation measures described in the FEIS. Nevertheless, environmental condition 27 in the November 20 order requires advance notice and coordination of instream construction activity with local water supply agencies.

31. The Coalition also faults the Commission for not considering the impact of the project on the Cerulean warbler in a forest area through which the pipeline will run. This species has no Federal legal status, and the US Fish and Wildlife Service (FWS) has expressed no concern in this species.

32. Interstate Highway 73 is a proposed Virginia road project that would extend from Interstate Highway 81 near Roanoke, Virginia in a southeast direction east of U.S. Highway 220, passing through Roanoke, Franklin, and Henry Counties, to the North Carolina border. Although the Commonwealth Transportation Board has proposed a

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route for the highway, no funding has yet been approved for the project and there is no proposed construction schedule. Estimates on when construction could begin vary widely from 5 years up to 20 years. This project is too speculative at this stage to include in our determinations here.

B. New River and New River Trail State Park

33. The Coalition and the Committee fault the Commission's analysis of the crossing of the New River and the New River Trail State Park (State Park), arguing that the DEIS did not adequately address impacts on either the River or the State Park. The Coalition argues that the Commission should have addressed a recent rulemaking by the U.S. Department of Transportation (DOT) revising its definition of high consequence areas. The Committee maintains that routing the pipeline through the State Park campground would interfere with use of the property and that the Commission should have addressed a provision of the Federal Land and Water Conservation Act which prohibits the conversion of certain recreational land from recreational use without the approval of the U.S. Secretary of Interior. The Committee also believes that the Commission has not stated unambiguously that crossing of the New River must be accomplished by the horizontal directional drill (HDD) method, rather than by the open cut method. It contends that HDD crossing of the New River must be accomplished before any other construction on the Patriot Extension is authorized.

34. East Tennessee charges that the Committee's request that the Patriot Extension should not be constructed until a successful HDD crossing of the New River has been accomplished reveals that the Committee's real goal is to stop the entire project, and that issues associated with the New River crossing are a pretext to achieve that objective. East Tennessee states that its HDD contractor has expressed confidence in a successful drill, and maintains that there is no reason to delay all work on the 94-mile Patriot Extension until a single river crossing has been achieved. East Tennessee avers that the Commission has struck the proper balance by establishing a four-mile construction exclusion zone that will allow other parts of the project to proceed while preserving the flexibility to locate another section of the New River for HDD crossing if that should prove necessary.

Commission Response

35. The Committee and the Coalition express a number of concerns regarding the impact of the Patriot Project Extension on the New River and the State Park. Although the Committee remains unconvinced regarding the method the Commission is requiring

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for crossing these locations, we stated unequivocally in the November 20 order at paragraph 86:

> As set forth in the environmental conditions attached to this order, we are requiring East Tennessee to cross under the river, the State Park campground, and the New River Trail by horizontal direction drill (HDD. Any specific HDD plan the Commission approves will provide that there will be no surface disturbance or any clearing within the State Park property. The entry and exit holes would be located outside the boundaries of the State Park. The pipeline would be located approximately 25 feet under the river bed. After it reaches the river bank, the pipeline would rise gradually under the State Park until it reaches normal pipeline depth outside the State Park. The depth of the pipeline under the State Park would range from 40 feet as it leaves the river to 15 feet as it moves under the State Park away from the river. The pipeline would be at least 15 feet deep at any point where it crosses under State Park property.

The specific requirements for HDD crossing of the New River are found in Environmental Conditions 21, 22, and 25. Condition 21, for example, states that "East Tennessee shall complete the crossing of the New River and the New River Trail State Park and associated areas by HDD ... before beginning construction of any other facilities... ." Condition 25 provides that, "East Tennessee shall develop a site-specific contingency plan for each HDD crossing in the event HDD is determined to not be feasible at the site (except for the New River crossing, which requires HDD)."

36. Should the Committee have any lingering doubts regarding the intention of the order and the construction conditions, we state again that the only method for crossing the New River and the State Park that we are authorizing is by HDD. If HDD should not prove possible at the proposed location, the Environmental Conditions set forth a procedure for HDD at another location.

37. In the event an HDD crossing of the New River is not successful at the proposed location, environmental condition 22 in the November 20 order requires East Tennessee to identify another location to install the New River crossing, by HDD, within the area of the exclusion zone . The purpose of the four-mile exclusion zone is to provide opportunity for alternative crossings either up or down river reasonably close to the proposed crossing point. We believe that our exclusion zone provides ample flexibility to relocate the New River HDD crossing within the vicinity of the proposed location should the need arise. If an HDD fails at the proposed location, we believe that the first option might well be a minor realignment within the approved right-of-way, on either

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side, and parallel to, the proposed location. Other potential alternate crossing locations along the river within the exclusion zone area exist also. East Tennessee must develop any necessary alternate route for an HDD crossing of the New River within the exclusion zone area in compliance with environmental conditions 21, 22, and 23 of the November 20 order. If the approved right-of-way cannot be used, compliance with environmental condition 5 for route variations would be applicable also. All these conditions require review and approval by the Director of OEP prior to construction.

38. Normal pipeline depth is between three and five feet below ground. Here, as the order points out, the pipeline depth under the State Park will range from 40 feet to 15 feet. Because of this unusual depth, we concluded that neither the existence of the campground, nor use of any HDD under the campground would necessitate additional safety requirements. The November 20 order, nevertheless, required East Tennessee in Environmental Condition 23 to develop a construction and maintenance plan for crossing the New River and the State Park area in coordination with State Park officials, appropriate state agencies, and the COE, and to file the plan with the Director of OEP for approval prior to beginning any construction within the four-mile exclusion zone described in the order and conditions. We remain confident that the pipeline will have no adverse impact on the New River or State Park, nor will the pipeline restrain recreational activities in the State Park.

39. Section 6(f)(3) of the Land and Water Conservation Act provides in relevant part as follows:

> No property acquired or developed with assistance under this section shall without the approval of the Secretary [of Interior], be converted to other than public outdoor recreation use.[13]

Contrary to the suggestion of the Committee, this provision has no applicability to this proceeding. The quoted statutory language addresses a situation in which land that has been acquired for public outdoor recreation with Federal Government assistance is proposed to be used for another purpose. The pipeline right of way under the State Park does not constitute a conversion of use of the property from public outdoor recreational use. We remain confident that the pipeline will have no effect on recreational activities in the State Park.

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[13] 16 U.S.C. § 460l(8)(f)(3).

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40. The DOT is the Federal Agency responsible for pipeline safety. East Tennessee's existing system is subject to DOT safety regulations.[14] In August 2002, the DOT revised its pipeline safety regulations to define areas of high consequence where the potential results from a gas pipeline accident may be significant or may do considerable harm to people and their property.[15] The State Park appears to qualify as a high consequence area under the new definition as a place where people gather regularly for recreational purposes. This definition, DOT explained, is the first step in a two-step process to develop integrity management program requirements for gas transmission operators. The agency states in the rulemaking proceeding, that in the second step, it will propose requirements to improve the integrity (i.e. structural soundness) of gas transmission lines in these newly defined high consequence areas.[16] Neither the new definition of high consequence area nor any new standards that may be adopted for pipelines have any direct applicability to the siting of the pipeline in this proceeding. The construction and maintenance of the pipeline we have authorized here are already subject to all DOT safety regulations. East Tennessee will likewise be subject to any new pipeline integrity management standards that DOT may adopt.

C. Proposed DENA Wythe Power Plant and Taps

41. Both the Coalition and the Committee contend that the Commission's Patriot Project environmental analysis should have included impacts associated with the proposed DENA Wythe power plant because the route of the pipeline appears to have been determined in order to provide service to the plant. The Committee argues that there would be no pipeline through this area were it not for the plant. The Committee also argues that the Commission's environmental analysis should have addressed the impact of the taps along the Patriot Extension. It maintains that any economic benefits from the taps must be balanced with environmental and cultural impacts associated with lateral line construction and industrial development resulting from the taps.

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[14]Mr. Carroll also raises safety issues. Safety standards related to construction and operation of the pipeline are addressed in detail at pages 3-145 through 3-154 of the FEIS.

[15]Pipeline Safety: High Consequence Areas for Gas Transmission Pipelines, 67 Fed. Reg. 50824 (2002) (codified at 49 C.F.R. pt. 192).

[16]DOT issued a notice of proposed rulemaking on January 28, 2003 proposing to require pipeline operators to develop integrity management programs that would focus on requiring operators to evaluate their pipelines and take measures to protect pipeline segments located in high consequence areas. See 68 Fed. Reg. 4278 (2003).

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Commission Response

42. In the FEIS and in paragraph 85 of the November 20 order we addressed the issue of including environmental review of the proposed DENA Wythe Power Plant as part of the Patriot Project analysis. Although the Committee argues that the Commission should make the DENA Wythe plant part of our analysis here because there will assertedly be no power plant without a gas pipeline to provide fuel for the plant, essentially a "but for" test, we have explained that the Commission must ultimately determine whether there is sufficient Federal control and responsibility over the proposed plant to warrant extension of this Commission's environmental review to include those nonjurisdictional facilities.[17] Applying these standards we find that the Commission does not need to review the DENA Wythe Power Plant as part of the Patriot Project analysis. The FEIS notes that the Commission has no authority over the permitting, funding, construction, or operation of these proposed facilities. The plant and its location would be regulated by the Commonwealth of Virginia.[18] Moreover, as the FEIS also points out, the Federal Government has no financial involvement in the project and no Federal lands are involved. While the pipeline is of course routed to serve the DENA Wythe plant, this does not constitute Federal control over the project warranting the Commission's environmental review of a nonjurisdictional project.

43. With respect to the Committee's contention that the Commission should have considered environmental impacts of the taps along the extension route, quite simply, there are none at this point. The only impacts associated with the taps are those arising from the pipeline extension itself, which we have discussed in the EIS process and in our orders in this proceeding. The taps will be part of the underground installation of the

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[17]Citing Algonquin Gas Transmission Company, 59 FERC ¶ 61,255. As we explained in paragraph 85 of the November 20 order, to make this determination the Commission evaluates the following: (i) whether or not the regulated activity comprises merely a link in a corridor type project (for example, a transportation or utility transmission project); (ii) whether there are aspects of the nonjurisdictional facility in the immediate vicinity of the regulated activity that uniquely determine the location and configuration of the regulated activity; (iii) the extent to which the entire project would be within the Commission's jurisdiction; and (iv) the extent of cumulative Federal control and responsibility.

[18]At this point in time the Commonwealth of Virginia has not approved the DENA Wythe project

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pipeline itself, and will have no impacts apart from the pipeline. We do not know how the taps will be used in the future, so we cannot determine what impacts there would be from future projects attached at a tap point, or whether those impacts would even be subject to this Commission's environmental review. If at some point in the future, East Tennessee or another entity proposes to attach jurisdictional facilities at any tap location, we would perform an environmental review at that time.

D. Dan River and Vicinity, Smith River, and Big Reed Island Creek

44. The Committee contends that the DEIS contains no record of consultation with the National Park Service or other appropriate agencies regarding the crossings of the Dan River, the Smith River, and Big Reed Island Creek, all three of which are candidates for inclusion on the National Rivers Inventory (NRI).[19] The Committee also contends that the DEIS did not give adequate consideration of the impacts from the project on the upper Dan River Valley and its watershed, which it describes as rugged terrain with potentially high impact.

45. The Committee asserts that the Commission erred in not directing use of HDD for crossing Big Reed Island Creek and in not directing consideration of alternatives to lessen the visual impact of the crossing. It contends that the DEIS presents no description of the environment of that stream, and no analysis of the severe impact on the stream and its environment from a "wet" crossing of the stream by the pipeline. It does acknowledge, however, that the FEIS describes the stream and notes that East Tennessee is proposing a "dry" method of crossing the stream. The Committee points out that the FEIS finds that there will be permanent and significant visual impact at the selected crossing point. The Committee believes that what it calls the "remarkable" qualities of Big Reed Island Creek warrant HDD crossing of the stream and relocation of the proposed crossing point to minimize or avoid visual impact, and impact on steep wooded slopes along the stream.

46. With respect to the method of crossing Big Reed Island Creek, East Tennessee states that it is not accurate to assert that the DEIS neither describes the environment of that stream, nor analyzes the impacts from the project. East Tennessee states that although the Committee believes that this waterbody should be crossed by HDD, this method is not technically practical for this crossing because there is a difference in

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[19]Streams listed on the NRI are viewed by the NPS as potential candidates for inclusion in the Wild and Scenic Rivers System. Big Reed Island Creek, the Dan River, and the Smith River, according to the NPS, already have segments listed on the NRI.

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elevation between the two sides of the stream that increases the risk of the release of drilling mud into the water. Accordingly, it says, the Commission correctly did not require HDD for this crossing.

Commission Response

47. The FEIS does in fact discuss the Dan River, the Smith River, and Big Reed Island Creek crossings. The DEIS and the FEIS both note that Big Reed Island Creek is listed for its scenic beauty and geologic resource values, including a largely undeveloped adjacent area with forest cover, that the Dan River is listed for scenic and recreational values, and is also known for its geologic, fishing, wildlife, and historic values, and that the Smith River is listed for a number of values, especially its rapids, which make it popular for canoeing and kayaking. The FEIS notes that East Tennessee's contractor has determined that the HDD method for crossing Big Reed Island Creek and the Dan River stream would be feasible, but not practical, and that East Tennessee proposes to cross both by a dry crossing method, which will result in a permanent right-of-way on the banks of the stream resulting in a significant visual impact. (FEIS, at 3-33 and 3-105). The FEIS points out the East Tennessee proposes to cross the Smith River by HDD along an existing powerline right-of-way, which would avoid any permanent impacts. The FEIS also noted that East Tennessee had already received approval from two Virginia agencies and the COE for the dry crossing method of Big Reed Island Creek and the Dan River, and that it had requested concurrence and mitigation suggestions from the NPS regarding all three waterbodies.

48. East Tennessee plans to cross the Smith River using HDD and proposes to use dry crossing method for Big Reed Island Creek and the Dan River. The November 20 order did not approve any specific method of crossing Big Reed Island Creek or the Dan River, but instead, required East Tennessee to file the results of the NPS consultation, including any suggested mitigation conditions, with the Commission. The order conditions crossing of these waterbodies on written approval of a method of crossing from the Director of OEP. East Tennessee has since provided the Commission with a copy of the recommendations it received from the NPS. NPS recommends using sound best management practices (BMPs), such as straw bales and sediment fences, to avoid or reduce runoff, maintaining a 100-foot buffer, using HDD where geologically feasible, developing a monitoring, mitigation, and contingency plan in order to avoid post-construction impacts, and requiring construction activities be conducted during dry periods. East Tennessee has also filed its final Patriot Project Stream Mitigation Plan for stream crossings in Virginia, including those in the upper Dan River watershed. Commission staff is currently reviewing NPS's recommendations and East Tennessee's stream mitigation plan.

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49. As to the potential impact from the project on the soil and rock along the pipeline route in the upper Dan River valley area, as the FEIS explains, East Tennessee's Erosion and Soil Control Plan (E&SCP) addresses mitigation of potential impacts to soil. This plan incorporates our standards set forth in the Commission's Upland Erosion, Revegetation, and Maintenance Plan and the Commission's Wetland and Waterbody Construction and Mitigation Procedures. In various construction conditions in the November 20 order, we have required modifications to the E&SCP where we found them necessary. As the FEIS explains, East Tennessee will also submit the E&SCP to the permitting agency in each state, including Virginia, for review and comment. East Tennessee will then incorporate any necessary changes into its E&SCP as necessary and file any revisions with the Commission prior to construction. Pages 3-3 through 3-5 of the FEIS discuss East Tennessee's procedures for insuring that blasting impacts are minimal or non-existent. The FEIS noted that all blasting activities would comply with Federal, State, and local requirements. With the addition of conditions regarding prior notice to landowners, and pre and post blasting surveys for certain structures near wells, we approved these procedures in the November 20 order.

E. Small-anthered Bittercress

50. Mr. Holland and Ms. Collins express concern that environmental studies related to the small-anthered bittercress, a Federally-listed endangered plant species under the Endangered Species Act (ESA), will be conducted during the winter, which they say is an inappropriate season of the year for conducting such studies. Mr. Holland and Ms. Collins state that these studies can only be conducted properly during the months of April and May.

51. East Tennessee responds that the construction of the Patriot Project will comply with the ESA. It notes that in December 2002, Commission staff requested formal consultation with the FWS concerning impact of the Patriot Project on the small-anthered bittercress, and that staff requested that the FWS issue a biological opinion, with conservation measures, for the project. East Tennessee states that it will coordinate with Commission staff in connection with any conservation measures required by FWS.

Commission Response

52. The Commission has not yet received comments from the FWS. Pursuant to environmental condition 37 of the November 20, 2002 order, however, East Tennessee may not begin any construction or implement conservation measures until the

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consultation process with the FWS on this Federally-listed species has been completed in accordance with Section 7 of the ESA.

Federal, State, and Local Permits

53. The November 20 order stated that any state or local permits issued with respect to the jurisdictional facilities authorized must be consistent with the conditions of the certificate. It explained that the Commission encourages cooperation between interstate pipelines and local authorities. However, the Commission pointed out that state and local agencies, through application of state or local laws, may not prohibit or unreasonably delay the construction or operation of facilities approved by the Commission.[20]

54. The Coalition contends that this provision drives the results of State regulatory permit programs in contravention of State and Federal law. It states, for example, that, under State law, the Virginia Marine Resources Commission (Virginia MRC) and the Virginia Department of Environmental Quality (Virginia DEQ) must consider certain water quality issues before issuing permits. The Coalition states that the November 20 order improperly directs that the results of such state permit proceedings must be consistent with the terms of the order and cannot prohibit or delay the Patriot Project. Thus, maintains the Coalition, the order enables the applicant to ignore any lawful condition imposed by the Commonwealth of Virginia.

55. In a similar vein, the Coalition argues that the Commission cannot issue a certificate authorizing the Patriot Extension until water quality certification under the Clean Water Act (CWA) has been obtained.[21] The Coalition states that East Tennessee has not applied to the Virginia DEQ for a water quality certificate under the CWA. The CWA certification process, it contends, is created by Federal law and administered by the State, and its requirements cannot be preempted by the Commission under the NGA. The Coalition acknowledges that East Tennessee has applied to the U.S. Army Corps. of Engineers (COE) for a joint water quality certificate, but asserts that COE has not yet issued any certificate. The Coalition argues that in issuing its certificate before the

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[20]See, e.g., Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); National Fuel Gas Supply v. Public Service Commission, 894 F.2d 571 (2d Cir. 1989); and Iroquois Gas Transmission System, L.P., et al., 52 FERC ¶ 61,091 (1990) and 59 FERC ¶ 61,094 (1992).

[21]Citing PUD No. 1 v. Washington Dept. of Ecology, 511 U.S. 700 (1994).

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Commonwealth of Virginia has made its own CWA determinations, the Commission has unlawfully ignored procedures established under Federal law.[22]

56. East Tennessee responds that it has in fact submitted an application for CWA certification to the Commonwealth of Virginia under the Virginia Joint Permit Application process. This program, it states, provides concurrent Federal and state review of a project and serves as Virginia's certification program. Furthermore, states East Tennessee, as part of the COE's Nationwide Permit program, Virginia has approved Nationwide Permit 12, which provides automatic certification for utility line activities such as the Patriot Project. East Tennessee asserts that under Virginia's joint permit regime, it has made all necessary permit applications, even though CWA certification is automatic under the Nationwide Permit.

Commission Response

57. In Schneidewind v. ANR Pipeline Co. (Schneidewind), the Supreme Court held that because the Commission has exclusive jurisdiction over the rates and facilities of natural gas companies, a state agency may not regulate matters directly considered by the Commission pursuant to its authority under the NGA.[23] Subsequently, in National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York (National Fuel),[24] the U.S. Court of Appeals for the Second Circuit specifically addressed the issue of a state's ability to impose additional requirements on a pipeline construction project authorized by the Commission. The court held that a New York statute requiring an interstate pipeline to apply for and obtain a certificate of environmental compatibility from the New York PSC was preempted by the NGA on the grounds that either the NGA explicitly vested exclusive jurisdiction in the Commission to regulate interstate pipeline facilities or Congress had so occupied the field of regulation of interstate pipelines by enactment of the NGA that there was no room for the states to regulate.[25] Accordingly,

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[22]Citing 33 U.S.C. § 1341.

[23]485 U.S. 293 (1988).

[24]894 F.2d 571(2nd Cir. 1990).

[25]The court noted that Congress established the Commission as "a federal body that can make choices in the interests of energy consumers nationally," and reasoned that because the Commission "has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all

(continued...)

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the court held that the pipeline did not have to comply with New York's regulatory scheme.

58. Shortly after National Fuel was decided, the Commission, citing that case, found that a New York State Constitutional provision that would prohibit the taking of land for a pipeline route through State Reforestation Lands was preempted by the NGA, which vests sole authority to determine an interstate pipeline route in the Commission.[26] Subsequently, the Commission explained its policy of encouraging applicants to cooperate with State and local authorities, stating:

> Although the Natural Gas Act and the regulations promulgated by the Commission pursuant to that statute generally preempt state and local law, the Commission has encouraged applicants to cooperate with state and local agencies with regard to the siting of pipeline facilities, environmental mitigation measures, and construction procedures. This is especially true with regard to the Commission's Stream and Wetland Construction and Mitigation Procedures which require pipelines to apply for state-issued stream crossing permits. However, the Commission's practice of encouraging cooperation between interstate pipelines and local authorities does not mean that those agencies may undermine through their regulatory requirements, the force and effect of a certificate issued by the Commission.[27]

59. With regard to a local authority's denial of a permit to a pipeline to conduct regulated activities within the town because the local agency thought another route was superior to the Commission-approved route, the Commission stated that the NGA "preempts state and local law to the extent the enforcement of such laws or regulations would conflict with the Commission's exercise of its jurisdiction under the federal

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[25](...continued)
the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states." National Fuel, 894 F.2d at 579.

[26]Iroquois Gas Transmission System, L.P., 52 FERC ¶ 61,403-404.

[27]Iroquois Gas Transmission System, L.P., 59 FERC ¶ 61,094, at 61,346-47 (1992).

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statute."[28] The Commission further explained:

[28]Id. at p. 61,360. See also Maritimes & Northeast Pipeline, L.L.C. (Maritimes), 81 FERC ¶ 61,166, at 61,728-31 (1997)

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> [a] state or local agency may challenge a Commission decision by filing a timely request for rehearing and appealing a Commission decision to the courts. A state or local agency may not use its regulatory power to challenge a decision by this Commission.[29]

In sum, as held by the court in National Fuel, the NGA preempts state and local agencies from regulating the construction and operation of interstate pipeline facilities.[30]

60. Citing the Supreme Court's ruling in Schneidewind, the Commission for over ten years has included language in virtually every order in which a construction certificate is issued, including the September 19 order issued here, at paragraph 109, explaining its policy requiring applicants to cooperate with state and local agencies, but noting that such agencies may not, "through the application of state and local laws, . . . prohibit or unreasonably delay the construction of facilities approved by the Commission."

61. That a state or local authority requires something more or different than the Commission, however, does not make it unreasonable for an applicant to comply with both the Commission's and another agency's requirements. It is true that additional state and local procedures or requirements could impose more costs on an applicant or cause some delays in constructing a pipeline. However, not all additional costs or delays are unreasonable in light of the Commission's goal to include state and local authorities to the extent possible in the planning and construction activities of pipeline applicants. A rule of reason must govern both the state's and local authorities' exercise of their power and an applicant's bona fide attempts to comply with state and local requirements.[31]

62. If a conflict arises, however, between the requirements of a state or local agency and the Commission's certificate conditions, the principles of preemption will apply and the Federal authorization will preempt the state or local requirements. The Commission cannot act as a referee, on an ongoing basis, between applicants and state and local authorities regarding each and every procedure or condition imposed by such agencies.

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[29] Id.

[30] 894 F.2d at 575-56 (setting forth circumstances under which the Supremacy Clause of the Constitution, Article VI, clause 2, provides for preemption of State and local law).

[31] Maritimes, 81 FERC at 61,730-31.

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In the event compliance with a state or local condition conflicts with a Commission certificate, parties may bring the matter before a Federal court for resolution.[32]

63. While state and local permits are preempted under the NGA, state authorizations required under Federal law are not. The Commission, however, has the flexibility to issue conditional certificates and routinely issues certificates for natural gas pipeline projects subject to the Federal permitting requirements of the CWA.[33] This approach is founded on practical grounds. In spite of the best efforts of those involved, it is often impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate.

64. This approach was approved in City of Grapevine, Texas v. DOT.[34] In that case, the Federal Aviation Administration (FAA) approved a proposed runway before completion of the review process required by the National Historic Preservation Act (NHPA). To ensure compliance with the NHPA, the FAA conditioned its approval of the runway upon completion of the NHPA review. The court rejected a challenge to the validity of this approach, concluding that "because the FAA 's approval of the West Runway was expressly conditioned upon completion of the Section 106 process, we find here no violation of the NHPA."[35] Here, East Tennessee's authorization to construct its proposed facilities is conditioned on its receiving CWA certification.[36]

65. The Coalition's reliance on the Supreme Court's ruling in PUD to support its argument that the Commission can not issue a certificate to East Tennessee until it receives a permit under the CWA is misplaced. In PUD, the Supreme Court addressed the issue of whether a state could condition a CWA permit on the maintenance of specific minimum stream flows to protect salmon and steelhead runs. In the background section of the opinion, the Court discusses requirements of CWA Section 401. While it states that the CWA "requires States to provide a water quality certification before a federal license or permit can be issued," it goes on to explain that "[s]pecifically,

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[32]Id.

[33]See, e.g., Gulfstream Natural Gas System, L.L.C., 94 FERC ¶ 61,185 (2001); Florida Gas Transmission System, 90 FERC ¶ 61,212 (2000).

[34]17 F.3d 1502 (D.C. Cir. 1994).

[35]Id. at 1509.

[36]See Maritimes, 81 FERC ¶ 61,166, at 61,734 (1997).

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[section] 401 requires an applicant for a federal license or permit to conduct any activity 'which may result in any discharge into the navigable waters' to obtain from the State a certification "that any such discharge will comply with . . . " the CWA.[37] East Tennessee is required to fulfill all Federal permitting and certification requirements, including CWA requirements, before it can commence construction. Accordingly, while the Commission has issued its certificate, East Tennessee cannot commence construction of the approved facilities until it complies with all required Federal permits. This is consistent with the court's ruling in PUD.

Public Trust Land and Eminent Domain

66. The Coalition alleges that the Commission does not have authority to grant East Tennessee the right to exercise eminent domain over the land underlying the New River Trail State Park because it is owned by the Commonwealth of Virginia. No right in this property may be transferred, it argues, without permission from the Commonwealth. It argues that such land is held in public trust for the people through their respective state governments and cannot be subject to seizure by a for-profit private company for its own purposes. The Coalition argues that the Commission has arrogated powers to itself that it does not possess, and that the order intrudes on the sovereignty of the state. The Coalition contends that to the extent that the order purports to grant East Tennessee the authority to install pipeline on state public trust land, the order violates the Tenth Amendment to the United States Constitution.[38]

67. In response, East Tennessee argues that it is well settled that a grant of the power of eminent domain to natural gas companies in Section 7(h) of the NGA is a constitutionally appropriate delegation of the Federal Government's sovereign power to appropriate land for public use.[39] It states that it is also well settled that the Federal Government may exercise eminent domain over State owned land.[40] Thus, it states, once the Commission has granted a certificate to a natural gas company, the natural gas

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[37]PUD, 511 U.S. at 707.

[38]The Tenth Amendment provides that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively or to the people.

[39]Citing, e.g., Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644 (5th Cir. 1950).

[40]Citing Kohl v. United States, 91 U.S. 367 (1875).

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company has the same ability as the Federal Government, as its delegate, to condemn property necessary for the construction of certificated facilities.

Commission Response

68. The Tenth Amendment does not apply here, and indeed the Commonwealth of Virginia does not argue that it does. In NGA Section 7(c), the Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, Congress authorized the natural gas company, under NGA Section 7(h), to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain, in Court, if it cannot acquire the easement by an agreement with the landowner. The Commission itself does not grant the pipeline the right to take the property by eminent domain.

Unauthorized Entry on Land

69. Shirley Holland requests rehearing based on East Tennessee's practices regarding entering on and surveying land without appropriate permission from landowners. Ms. Holland alleges that East Tennessee has not furnished information regarding state property law requested in a Commission staff data request, overstated the number of landowners giving permission for surveys, misstated that improper entries on land had ceased, violated Virginia state trespass law, and misstated the reasons for such trespass. Ms. Holland urges the Commission to investigate these matters.

Commission Response

70. Ms. Holland raised similar issues in her comments on the DEIS. In the November order, the Commission addressed Ms. Holland's allegations, explaining that entry to land is a local matter outside the jurisdiction of this Commission. We suggested that landowners who considered themselves aggrieved should contact East Tennessee, and that those landowners unable to resolve their complaints should pursue their claims in court. On December 3, 2002, the Office of the Attorney General for the Commonwealth of Virginia filed a copy of a letter responding to a letter from a Virginia state senator regarding the survey issue. In that letter, the Attorney General's office stated that East Tennessee was subject to state or local trespass laws until the FERC should issue a certificate, and to the extent landowners believe that state or local trespass laws may have

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been violated "they may wish to contact their local commonwealth's attorney". [41] Ms. Holland's request is denied.

The Commission orders:

The requests for rehearing and the request for stay are denied.

By the Commission.

(S E A L)

Magalie. R. Salas,
Secretary.

[41]Letter to the Honorable Wm. Roscoe Reynolds from Judith Williams Jagdmann, Deputy Attorney General.