

107 FERC ¶ 61, 192
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Northwest Pipeline Corporation

Docket No. CP01-49-004

ORDER DENYING REHEARING

(Issued May 27, 2004)

1. On February 18, 2004, the Commission issued an order in this proceeding amending Northwest Pipeline Corporation's (Northwest) certificate to construct and operate the Everett Delta Lateral project to provide lateral transportation capacity for Puget Sound Energy (Puget).¹ Roland and Edmee Van Haefen and Avinash Prasad (jointly the Van Haefens)² and Greg Deer filed timely requests for rehearing.³ We deny the requests for rehearing, as discussed below. This order benefits the public by affirming our previous approval of facilities that will provide additional service to Puget to meet load growth on its local distribution system.

I. BACKGROUND

2. On October 25, 2001, the Commission issued an order in this proceeding authorizing Northwest to construct and operate the Everett Delta Lateral.⁴ As originally proposed, Northwest intended to construct a lateral pipeline off of its mainline facilities to provide service to a new electric generation customer and additional service to Puget. The total capacity for the original project was 133,000 Dth per day, of which Puget had subscribed for 43,000 Dth per day. After the Commission issued the certificate to

¹Northwest Pipeline Corp., 106 FERC ¶ 61,174 (2004)(Northwest) (February 18 Order).

²The Van Haefen's intervened in the Lake Stevens Residents' motion.

³We note that on May 13, 2004, Mr. Deer amended his request for rehearing.

⁴Northwest Pipeline Corp., 97 FERC ¶ 61,089 (2001)(Northwest) (October 25 Order).

construct the proposed facilities, the electric generation customer notified Northwest that it was not going to construct the proposed power plant. On June 25, 2003, Northwest filed an application seeking authorization to downsize the originally proposed project to provide service only to Puget. The amended project will provide Puget with 113,117 Dth per day of service.

3. In the original proceeding, the Commission prepared an Environmental Assessment (original EA). The original EA, among other things, recommended and the Commission approved a condition requiring that Northwest cross Catherine Creek with a horizontal directional drill (HDD). Northwest's subsequent geotechnical investigation and site analysis determined that an HDD had a less than a 25 percent probability of success due to the amount of subsurface gravels and cobbles that would be encountered along the path of the HDD.

4. As a result of the geotechnical investigation, Northwest proposed a route deviation that would be within the right-of-way (ROW) of Callow Road and Holly Lane (Callow Road route). The Callow Road route would cross Catherine Creek where a culvert had already been installed under a private drive and would eliminate the need to construct facilities at the original Catherine Creek crossing. The Commission prepared a supplemental EA to review the modifications proposed in the amended application, including the Callow Road route.

5. The Commission received significant responses from the public concerning the Callow Road route. Therefore, the supplemental EA analyzed two alternatives to that route, an intermediate route located between the certificated route and the Callow Road alternative, and the modified certificated route.⁵ The supplemental EA and the February 18 Order determined that the modified certificated route was the preferred route. The route would not affect future development and, except for the minimal forested wetland impact, the pipeline crossing of Catherine Creek would be primarily a temporary impact.

6. The original EA also included an analysis of a route variation that would follow along the ROW on the south side of State Highway 92. In preparing the original EA, the Commission's staff consulted with the Washington Department of Transportation (DOT). Based on those consultations, the original EA determined that construction of the proposed pipeline in the State Highway 92 ROW would not be feasible. Specifically, the

⁵The modified certificated route included a minor adjustment from the originally approved route that would minimize tree removal, especially mature conifers. It included a flumed crossing of Catherine Creek and a traditional (open-cut) of the associated wetland complex instead of an HDD.

original EA determined that because the highway is elevated on fill in several sections, construction of the pipeline in these sections could undermine the integrity of the road. Further, Washington DOT plans to widen State Highway 92 under its 10- to 20-year plan.

7. Since the Commission determined that construction in the ROW was not feasible, the original EA analyzed the impact of constructing the pipeline along the south side of State Highway 92 on the outside the existing ROW. Based on that analysis, the original EA determined that while this route would cross fewer non-forested wetlands, it would cross more waterbodies, potentially affect up to seven additional residences, and cross more forested and scrub-shrub wetlands. It also determined that the residences on the south side of the highway would restrict the available construction area and there would be permanent adverse visual and temporary noise impact to the Sunny Crest Elementary School that is located 275 feet north of the State Highway 92 route. As such, the original EA determined that this was not an environmentally preferable route and dismissed it from further consideration.

8. While the purpose of the supplemental EA was to review just the modifications from the original application, in response to numerous requests, it also re-examined the State Highway 92 variation from the original EA. The supplemental EA, however, also analyzed the pipeline route paralleling the ROW on the north side of State Highway 92. The supplemental EA determined that northern route would have impacts similar to the southern route and determined that the northern route is not environmentally preferable to either the proposed Callow Road route or the modified certificate route approved in the February 18 Order.

II. REHEARING REQUESTS

A. Commission Jurisdiction

9. On rehearing, the Van Haefkens contend that the Commission does not have jurisdiction over the Everett Delta Lateral project because the purpose of the project is to supply gas to a local distribution facility. They contend that because Puget is fully funding the construction of the facilities, Northwest is acting merely as a contractor for Puget. The Van Haefkens state that the Commission should not exercise jurisdiction in this case to allow Puget to access federal condemnation powers. They maintain that the arrangement between Puget and Northwest puts the Commission's process up for sale to the highest local bidder who can pay an interstate natural gas company to handle the certification process for them. The Van Haefkens argue that this is an abuse of the Commission's system and should not be allowed.

Commission Response

10. In response to a data request Northwest states that Puget has seen substantial growth in the past ten years due to new residential and commercial development and substantial electric to gas conversion on its system.⁶ To supply this new growth, Puget had been evaluating projects to provide the increased gas supply. While considering its alternatives, a power developer approached Puget seeking gas service to a power plant it was proposing in North Everett. As a result, Puget proposed to build a lateral, similar to the Everett Delta lateral, to Northwest's system to satisfy its increasing demand and to provide service to the proposed power plant. Puget began route selection and the permitting process for its proposed lateral.

11. Subsequently, however, the power developer elected to obtain service directly from Northwest, making Puget's project economically and environmentally redundant. As such, Puget elected to participate in Northwest's project as the preferred solution to supply additional gas to its system. When the power developer later terminated its involvement in Northwest's project, Puget determined that in order to meet its obligations to provide reliable service to its customers in the north Seattle area by November 1, 2004, it would need to rely on Northwest's acquiring the necessary permits and approvals and constructing a revised Everett Delta Lateral project.

12. When the power company terminated its agreement with Northwest in 2002, Puget faced a decision of whether to construct its own facilities or to enter into an agreement with Northwest for a revised Everett Delta Lateral project. The process for planning, designing, permitting, and constructing new pipeline facilities can take a considerable amount of time. While the Commission had already approved the Northwest project, Puget would have needed to commence an entirely new proceeding under Washington state law in order to build its own project. Given its pressing need for new gas supplies for the 2004-2005 heating season, Puget opted to have Northwest construct the facilities. However, Northwest informed Puget that, due to its current capital constraints, Northwest would require Puget to fund any revised project. As a result, Northwest and Puget negotiated an arrangement where Puget would own the facilities and Northwest would lease the facilities and operate them as part of its interstate system. As such, the proposed project is subject to the Commission's Natural Gas Act (NGA) jurisdiction.

⁶See Response No. 1 to December 11, 2003 data request.

13. Based on these circumstances, the Commission determined that it was in the public interest to issue a certificate to Northwest to construct and operate the proposed facilities. The Commission has approved passive ownership/lease agreements in other cases.⁷ The Commission has stated that it is not unlawful to structure transactions either to qualify for or avoid state or federal jurisdiction.⁸ For these reasons, we find that the project proposed by Northwest is properly subject to the jurisdiction of the Commission.

B. Public Convenience and Necessity and Need

14. Mr. Deer states that because the proposed electric generation plant was cancelled there is no longer a proven need for the proposed pipeline and there is not a public purpose or public benefit. He contends that the only benefit is to give Northwest the power of federal condemnation law at the expense of the individuals that live along the route.

15. Similarly, the Van Haefkens state that when the power plant was cancelled the public convenience and necessity of the original certificate was removed. They point out that the amended project approved 113,117 Dth per day for Puget. However, they state that Puget only sought 43,000 Dth in the original proceeding to meet system demand for the 2004-05 season. They reason that if you deduct the 43,000 Dth per day from the 133,000 Dth per day, the total capacity of the original project, there has been a 68 percent reduction in need. The Van Haefkens maintain that the reduction in need removed the necessity for this project.

Commission Response

16. In the February 18 Order, the Commission addressed the argument that the cancellation of the electric generation facility eliminated the public convenience and necessity of Northwest project.⁹ In short, Puget stated that it has determined that it needs 113,117 Dth per day to meet short and long-term needs for additional supply and that the proposed Northwest project was the timeliest means of fulfilling its immediate need for

⁷See, e.g., Questar Pipeline Co., 93 FERC ¶ 61,279 (2000), order issuing certificate, 95 FERC ¶ 61,404 (2001).

⁸See, e.g., KansOk Partnership, Kansas Pipeline Partnership, Kansas Natural Partnership, and Riverside Pipeline Company, L.P., 71 FERC ¶ 61,242, at 61,921 (1995), citing Riverside Pipeline Co., L.P., 48 FERC ¶ 61,309, at 62,015-16 (1989).

⁹Northwest, 106 FERC at P 30.

additional supplies for the 2004-05 heating season. The Commission found that this was sufficient to demonstrate a present and future need for the facilities. The parties have not raised any new arguments that would warrant any further Commission action on this issue.

C. Catherine Creek Crossing

17. Citing the National Environmental Policy Act (NEPA), Mr. Deer argues that the significant adverse environmental impacts on his property raise substantial questions as to whether this project is a major federal action significantly affecting the quality of the human environment. He maintains that the Commission did not evaluate all potential environmental impacts of the Catherine Creek crossing and therefore did not consider whether the Everett Delta Lateral project significantly affects the quality of the human environment.

18. Mr. Deer contends that the Commission erred by approving the modified certificated route because it has the greatest environmental impact on his property. Mr. Deer states that in 1999, the Commission found that the same open cut would not be acceptable because of the environmental consequences and later ruled that Northwest could only cross his property if it did so by HDD. Mr. Deer maintains that there is nothing new or different about the location, the environment, or the impacts associated with the open cut that make the Catherine Creek crossing on his property and wetlands more desirable or less harmful today than it was five years ago.¹⁰

19. The Van Haefkens raise similar arguments. Further, the Van Haefkens contend that the Commission failed to take a hard look at the modified certificate route. They claim that neither the Commission nor Northwest have visited the property where the proposed cut would occur and have no first hand site specific information. The Van Haefkens state that without specific knowledge of the wetland conditions on the property it is not possible for the Commission to conclude that the proposed route avoids wetlands to the maximum extent possible.

20. Mr. Deer contends that the Commission erred in failing to adequately consider the wetland impacts of open cutting Catherine Creek. He claims that there are obvious impacts associated with open cutting over 1,000 feet of wetlands and that there is nothing

¹⁰We note that Mr. Deer cites to several Federal Power Act (FPA) requirements concerning the Commission's authority to license hydropower projects to support his arguments concerning the Northwest project. As discussed above, the Commission's jurisdiction in this proceeding is subject to the requirements of the NGA.

in Northwest's proposal or the Commission's February 18 Order that restricts access or intrusion of trucks and heavy equipment on his property and the wetlands adjacent to Catherine Creek.

21. Mr. Deer contends that the wetlands consist of thick peat that is porous and sponge-like. He argues that heavy trucks and equipment will sink into the peat bog and destroy the wetland functions associated with the bog. Mr. Deer claims that at a minimum, Northwest will need to build an entire new road (at least 1,000 feet long) over those wetlands just to allow the access needed to dig the 1,000 feet trench and place the pipeline in the wetlands. Mr. Deer maintains that the Commission did not evaluate the need for this road.

22. Mr. Deer states that while Environmental Condition No. 3 of the February 10 Order requires Northwest to include information detailing the feasibility of a flumed crossing and measures it intends to use to reduce impacts associated with vehicle transport across the wetlands, he contends that these are after the fact justifications for a course of action that is improperly authorized. He maintains that the information will not be used to change, modify, or deny Northwest's right to initiate and perform the work in the wetlands. Mr. Deer states that this evaluation work needs to be done before Northwest is granted construction rights.

23. Mr. Deer also claims that the Commission made its decision based on faulty information. He states that the photographs provided to the Commission as evidence show Catherine Creek as a seasonal stream. However, Mr. Deer states that photographs do not portray Catherine Creek in the area of the authorized open cut trench. He states that on his property Catherine Creek is a year-round stream which is why Catherine Creek is designated as a valuable habitat for threatened species. He also contends that the wetlands surrounding Catherine Creek store and supply water year round. Mr. Deer maintains that destruction of over 1,000 feet of wetlands will significantly affect the hydrology of the wetlands and the creek itself.

24. Mr. Deer points out that the EAs state that Catherine Creek is an established spawning habitat for native coho, chinook salmon, and bull trout. He contends that the habitat of these threatened species will be seriously affected by a flume crossing of Catherine Creek and the 1,000 feet of open cut trench and associated road. Mr. Deer states that although Environmental Condition No. 4 requires that Northwest complete Endangered Species Act (ESA) consultations, the Commission should have considered the ESA prior to the issuance of the order. He argues that the order provides little assurance that the appropriate mitigation measures will be identified or implemented to protect the endangered and threatened species.

25. Mr. Deer states that the approved route will endanger a 1,500 by 100 foot swath of fully mature and healthy Douglas fir, cedar, and hemlock trees. He contends that it constitutes the entire southern exposure of a 20 acre forested area. Mr. Deer states that in addition to the removal of many hardwoods and mature conifers, the construction will impact root systems that extend and intertwine in areas that will be open cut. He contends that the severing these tree roots will also be fatal to more trees outside the alignment area.

26. Mr. Deer asserts that the proposed temporary work area will result in destruction to his yard, a historic family orchard, and an organic garden. He states that the proposed work staging area will result in the removal of three antique apple trees, which cannot be replaced, plus the removal of 15-30 orchard trees and evergreen trees, which cannot be replaced because of their size and age. Mr. Deer claims that the Commission's approval of a temporary staging area having this degree of impacts is unwarranted and unconscionable. Mr. Deer maintains that the Commission's requirement that Northwest submit a site-specific plan for this area before construction begins is inadequate protection for his property because it does not identify, address, or resolve the impact arising from the construction before it is authorized.

27. Finally, Mr. Deer contends that construction of the open cut on his property will seriously endanger his well water. He argues that his property is served by a shallow well that is located downstream from the proposed construction area. Mr. Deer states that Northwest plans to dig a trench perpendicular to the flow of both the surface and ground water that feeds his well. Mr. Deer also points out that two other creeks flow on the property and supply his well. He maintains that the supplemental EA does not mention or even address these water sources. He states that the well water impacts must be evaluated before allowing the impact to occur.

Commission Response

28. Under NEPA, the purpose of an environmental analysis 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.¹¹ The original EA and the supplemental EA prepared by Commission staff for Northwest's project sets forth the information necessary to achieve those purposes.

¹¹See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

29. The Commission completed two extensive environmental reviews of Northwest's proposed project. It completed an EA on the original proposed project and a supplemental EA to evaluate the minor modifications in the amended application. Commission staff solicited public comments and held three informal public meetings in the project area. It visited the site of the facilities on four separate occasions and consulted and conferred with various state and federal agencies and interested landowners.

30. The original EA and supplemental EA address geology, soils, groundwater, surface water, fisheries, wetlands, vegetation, wildlife, threatened and endangered species, land use, aesthetics, cultural resources, air and noise quality, pipeline safety, and alternatives. The supplemental EA also adopted by reference the findings of the original EA. Because the proposed project was substantially similar to the original project, the supplemental EA only addressed the facilities or the portion of the route that had been changed.¹²

31. One of those changes involved the Catherine Creek crossing. In the original proceeding, the Commission required that Northwest use a HDD to cross Catherine Creek and associated wetlands. The original EA stated that the purpose of the drilled crossing was to avoid impacts to the waterbodies and the significant wildlife habitats, recreational opportunities, and associated wetlands. As stated, however, a geotechnical investigation and site analysis determined that an HDD in this area had a less than 25 percent chance of success due to the amount of subsurface gravel and cobbles that would be encountered along the path of the HDD.

32. As a result an HDD of Catherine Crossing was not possible, in the amended application Northwest proposed a route deviation that would be within the ROW of Callow Road and Holly Lane. The proposed route deviation would cross Catherine Creek where a culvert has already been installed under a private drive. The Commission received significant responses from the public concerning the Callow Road alternative. Based on comments received in response to the Commission's notice of its intent to prepare a supplemental EA and at an informal public meeting held in the project area, the supplemental EA analyzed an intermediate alternative located between the certificated route and the proposed Callow Road route and a modified certificated route that included a flumed crossing of Catherine Creek and a traditional (or open cut) crossing of the associated wetland complex instead of an HDD.

¹²Except at the request of numerous individuals, the supplemental EA revisited the State Highway 92 alternative.

33. During a field review in the area, the Washington Department of Ecology (DOE) noted that a minor adjustment in the pipeline alignment along the originally certificated route (with a flumed crossing of Catherine Creek) could minimize tree removal, especially mature conifers. On November 3, 2003, the U.S. Army Corps of Engineers (COE) visited the site and stipulated that they would consider the route if Northwest would agree not to remove any of the mature conifers.

34. In addition to the consultations with the Washington DOE and COE, the Commission staff conferred with the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) concerning the modified certificated route. As a result of these consultations and visits to the site, Commission staff designed the modified certificated route alternative recommended in the supplemental EA and approved in the February 18 Order. That alternative would proceed north along the Centennial Trail another 100 to 200 feet prior to turning west (to cross the Catherine Creek wetland complex). With this alternative, tree removal within the forested wetland could be limited to a few hardwood trees (alders/cottonwoods) and possibly a few conifers. The north extension associated with this route would allow the alignment to take advantage of a gap in the conifer trees. Therefore, primary wetland impacts would occur within the emergent and scrub/shrub (Douglas spirea) portion of the wetland, which it appears that Mr. Deer periodically mows.

35. As depicted on alignment sheets filed in Northwest's Implementation Plan, no new access road is proposed for Mr. Deer's property.¹³ Access would occur from the existing roadways and access roads in the area around his property. As is typical with pipeline construction, equipment access through sensitive areas such as wetlands is restricted to the equipment needed for construction at that time. Equipment would be on site when needed and located in the upland extra workspaces when not needed at that location. Therefore, there is not any need for an entirely new road, as all construction will occur in the areas the Commission reviewed in the original and supplemental EA.

36. Further, as stated in the October 25 Order, the Commission staff and Northwest intend to limit tree removal and the impact on the trees in or adjacent to the construction ROW and the Commission does not believe that the removal of these trees constitute a significant adverse impact. The October 25 Order explains that tree removal and the impacts on the trees that are in or adjacent to the construction ROW is an unavoidable impact associated with any underground installation of a public utility.¹⁴ The original EA

¹³On April 28, 2004, Northwest filed its Implementation Plan (Plan) for the proposed project. Commission staff is currently reviewing Northwest's Plan.

¹⁴Northwest, 97 FERC at 61,462.

and the supplemental EA examined several route alternatives in this area and determined, after extensive consultations with the COE, NMFS, FWS, and Washington DOE, that if constructed in accordance with the mitigation measures, the approved route is the environmentally preferred route. During the Implementation Plan evaluation, Commission staff, along with Northwest will continue to work with Mr. Deer to minimize tree removal on his property.

37. Mr. Deer also reiterates concerns that the construction will endanger his well water. The Commission addressed his concerns in the February 18 Order. Specifically, it stated that Northwest has provided procedures for pre- and post-construction water quality testing and water system yield evaluations of wells within 150 feet of the edge of the construction work areas. Northwest would be responsible for repairing or replacing any damaged wells. Environmental Condition No. 2 also requires Northwest to provide the Commission with a report on any wells damaged and how they were repaired. Mr. Deer has not provided any additional information that would warrant that the Commission revisit this issue.

38. 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 an applicant or others before the grant of a certificate can be effectuated by constructing and operating the proposed project.¹⁵ As is the case with virtually every certificate issued by the Commission that authorizes construction of facilities, the instant approval is subject to Northwest's compliance with the environmental conditions set forth in the order.

39. The Commission's approval of this project included several environmental conditions that Northwest has to comply with before it can commence construction of the facilities. Environmental Condition No. 3 requires that Northwest file a site-specific plan to: (1) minimize the impacts to the forested wetlands (especially mature conifers)

¹⁵Section 7(e) of the Natural Gas Act provides that "the 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 ¶ 61,091, 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)).

associated with the route; (2) ensure the feasibility of successfully completing a flumed crossing; and (3) reduce impacts associated with vehicle transport across the wetlands associated with Catherine Creek. It also requires that Northwest provide its plan to the COE for their comments. Environmental Condition No. 4 states that Northwest cannot commence construction until the Commission's staff receives comments and completes formal consultation with the FWS and NMFS, specifically concerning the impacts to endangered species in the area.¹⁶

40. Before the pipeline may begin constructing any particular segment of the approved project, the pipeline must show that it has complied with the environmental conditions applicable to that segment. If Northwest seeks to modify any of these conditions, it must request permission from the Director of the Office of Energy Projects (Director). Once the Director is satisfied that conditions are met, the Director or a delegated staff member will issue construction clearance. At that point, the pipeline may begin construction of the particular segment authorized and cleared. In this manner, the Commission insures that construction will occur in accordance with its conditional findings approving the project.

41. The Commission also notes that condemning the property is not in the pipeline's best interest. Generally, the condemnation process is a prolonged and expensive process that could delay construction of the pipeline and add significant costs to the project. Northwest has the incentive to negotiate its agreements with landowners to avoid the condemnation proceeding. In negotiations for an easement agreement, there is some flexibility to achieve minor shifts in alignment to accommodate individual landowner needs on their property. Such realignments typically do not require further Commission approval. However, if the landowner requests minor shifts in alignment after the property has been taken through condemnation proceedings, such location changes are likely to need further court action because easements acquired by eminent domain are for a specific location. Further, we note that Northwest is responsible for any damage and is required to compensate landowners for any property damage. In the event of any damage, Northwest will need to work with the landowner to correct the situation and/or pay compensation where owed.

¹⁶ In a February 22, 2004 letter, the FWS concurred that the project "may affect, not likely to adversely affect" the bull trout and concluded informal consultation under the ESA. Similarly, in a March 17, 2004 letter, NMFS concurred that the project "may affect, not likely to adversely affect" the Chinook salmon and concluded informal consultations under the ESA.

D. State Highway Route 92 North Alternative

42. The Van Haefkens contend that the Commission failed to take a hard look at the State Highway 92 north alternative as required by NEPA. They state that routing the Everett Delta Lateral project parallel to the north side of State Highway 92 is a viable alternative to the certificated route that the Commission failed to adequately review. The Van Haefkens state that the conclusion in the supplemental EA concerning the Highway Route 92 north alternative is based on inaccurate information supplied by Northwest.

43. The Van Haefkens maintain that Northwest represented to the Commission that it was not possible to locate the proposed pipeline within the ROW of State Highway 92 because of concerns from the Washington DOT. The Van Haefkens argue that there is nothing in the record that would support Northwest's position that the Washington DOT would not approve a pipeline within the State Highway 92 ROW.

44. The Van Haefkens state that the supplemental EA and the Commission agreed with Northwest that the route was not feasible due to potential traffic disruptions. The Van Haefkens assert that closing lanes to accommodate construction is a routine aspect of road maintenance and construction that could easily have been used to accommodate the proposed project. They point out that the Washington Administrative Code (Washington Code) provides guidelines for operating in traffic areas. The Van Haefkens argue that while the Washington Code requires minimum impact on traffic operations, it clearly anticipates that such interruptions to traffic are routine and rather than preventing such interference entirely, the policy simply requires that the interference be well planned.

45. The Van Haefkens also state that the Commission erred by agreeing with Northwest's conclusion that the State Highway 92 north route needed to be located adjacent to but outside the highway ROW. They contend that the Washington DOT Utilities Accommodation Policy seeks to accommodate utility installations and place them as near as practicable to the highway ROW line. The Van Haefkens argue that the policy includes a guideline rule which states unequivocally that it is not Washington DOT's intent to force utilities off of the ROW. They claim that neither Northwest nor Washington DOT has indicated that placing the natural gas pipeline in the roadway or within the ROW would violate any laws or regulations. The Van Haefkens also state that Washington DOT plans improvements to State Highway 92 which include lowering the road to six feet to flatten one of the hills on this route. They contend that this may help address the Commission's concern with regard to the unevenness of the roadway.

46. Further, the Van Haefkens contend that if the proposed pipeline is placed in the existing ROW it would not impact as many wetlands. They state that the analysis in the supplemental EA fails to demonstrate that building the pipeline within the ROW is not possible. Therefore, they argue that the impacts to the wetlands are greatly exaggerated.

47. The Van Haefkens assert that the order incorrectly stated that the State Highway 92 north route would impact more residences within 50 feet of the pipeline ROW. They point out that the supplemental EA admits that there are fewer residences within 50 feet of the State Highway 92 alternative. They state that there is no analysis to support the Commission's conclusion that more residences will be impacted within 50 feet of the pipeline's ROW. The Van Haefkens state that although the supplemental EA claims that individuals will be impacted outside this 50 foot area by having views affected, but there is no similar analysis of individuals living on the modified certificated route to determine which area would be impacted more. The Van Haefkens argue that it is inappropriate for the supplemental EA and the Commission to assume that more residences will be impacted by the State Highway 92 north alternative when there is no evidence that the project cannot be located in the highway ROW entirely away from homes and view protecting trees.

48. Finally, the Van Haefkens state that both the supplemental EA and Northwest's information clearly indicate that the State Highway 92 north alternative is shorter than any other proposed alternative submitted by Northwest, not longer as indicated in the order. They maintain that the Commission has not adequately reviewed the information it has been given if it is mischaracterizing the alternative this way.

Commission Response

49. As stated, because the proposed project was substantially similar to the original project, the purpose of the supplemental EA was to address issues raised by the minor modifications proposed in the amended application. While the State Highway 92 alternative was not an issue raised by the amended application, in response to public comments, the supplemental EA revisited this issue and analyzed a possible alternative on the north side of State Highway 92.

50. Generally, the Van Haefkens' arguments are based on the mistaken presumption that the proposed Everett Delta Lateral project can be constructed within the existing State Highway 92 ROW. During its review of the original proposed project and the State Highway 92 south alternative, Commission staff visited the site and consulted with the Washington DOT concerning locating the proposed pipeline in the highway ROW on the south side of State Highway 92. While Washington DOT Utilities Accommodation Policy may seek to accommodate utility installations, the original EA determined that because the highway is elevated on fill in several sections the construction of the pipeline

in these sections would undermine the integrity of the road in these sections.¹⁷ Further, under Washington DOT's 10 to 20 year plan it intends to widen State Highway 92 which would require construction outside the proposed ROW.¹⁸

51. NEPA requires the Commission to consider and discuss reasonable alternatives; it does not require consideration of patently unsuitable alternatives.¹⁹ Because an elevated highway and side-slope construction would impose attendant danger to the pipeline and State Highway 92, the Commission did not accord any route within the State Highway 92 ROW consideration as a viable alternative. Further, this was not a viable alternative because Washington DOT's long-term plan to widen this highway may necessitate relocating the pipeline. However, the original EA and supplemental EA analyzed alternatives that would locate the pipeline outside the highway ROW on both the north and south side of the road. Based on this analysis, the original EA and the supplemental EA determined that the State Highway 92 south and north alternatives, respectively, were not environmentally preferable for the reasons stated in EAs.²⁰ The Van Haefkens' have not provided any additional information that would warrant a change in that finding.

E. Notice

52. Mr. Deer contends that he did not receive timely notice and adequate opportunity to be heard before the route changed across his property. Mr. Deer argues that failure to provide adequate notice offends the notion of fundamental fairness and procedural due process envisioned by notice statutes and regulations.²¹ He states that he did not learn that

¹⁷We note that while Northwest indicated that construction along State Highway 92 was unsafe due to high traffic volume, the Commission did not rely on that representation in its analysis in the original EA or the supplemental EA as claimed by the Van Haefkens. Accordingly, we will not address that issue in this order.

¹⁸In fact, Washington DOT is currently widening certain areas of State Highway 92 in the area where the pipeline could have been located. See WSDOT Projects, SR92 – SR9 to 84th Street NE Safety Improvements (May 11, 2004)
http://www.wsdot.wa.gov/projects/SR92_SR9_84ave/.

¹⁹See American Rivers v. F.E.R.C., 201 F.3d 1186, 1200 (9th Cir. 2000).

²⁰See original EA at 63-64 and supplemental EA at 3-3 and 3-4.

²¹Citing Glaspey & Sons, Inc. v. Conrad, 521 P.2d 1173, 83 Wn.2d 707 (1974).

the route involved his property until the supplemental EA was issued on December 23, 2003. Therefore, he maintains that he was not able to provide timely comments relating to the proposed Catherine Creek crossing. Therefore, he contends that the Commission did not receive all of the necessary information relating to the significant adverse environmental impacts of the Everett Delta Lateral project, in particular, the Catherine Creek crossing. Therefore, he argues that rehearing is necessary for the Commission to have the necessary information to render a decision.

Commission Response

53. In addition to this request for rehearing, Mr. Deer has filed information concerning the original and amended project on ten other occasions.²² All of these filings contain information concerning the impact the proposed project will have on his property. As originally proposed, the crossing involved an open cut across Catherine Creek on Mr. Deer's property. His original filings in this proceeding specifically addressed an open cut crossing of Catherine Creek on his property. Additionally, Commission staff has met with Mr. Deer during site visits on his property and at the informal public meetings in Everett, Washington and has discussed the proposed project and amended project with him on those occasions. The Commission has specifically addressed the information supplied by Mr. Deer in the original and amendment proceedings in the orders issued in this proceeding.²³ We find that Mr. Deer has had adequate opportunity to participate in the Commission process in this proceeding.

F. Hearing Procedures

54. In the motion to intervene, the Lake Stevens Residents requested that the Commission schedule a hearing near the project areas.²⁴ The Van Haeftens contend that the Commission erred by failing to acknowledge or respond to this request and thus denied an opportunity to the intervenors to have full access to the Commission and present evidence ignored by Northwest and Commission representatives. They also maintain that the Commission erred by failing to provide the parties an opportunity to submit brief or oral arguments as provided under Rule 704 of the Commission's regulations.

²²Specifically, Mr. Deer filed comments on March 4, January 27, January 22, 2004, October 29, 2003, September 10, April 13, March 26, 20, 7, and January 9, 2001.

²³See Northwest, 97 FERC at 61,462 and 106 FERC at P 30, 72-77.

²⁴As stated, the Van Haeften's intervened in the Lake Stevens Residents' motion.

Commission Response

55. Commission staff conducted an informal meeting on October 1, 2003 in Snohomish County along Callow Road in Everett, Washington to hear the stakeholders concerns about the amended project. Additionally, the Commission sent a Notice of Intent to prepare a supplemental EA to individuals and organizations having a potential interest in the project to solicit comments concerning the project, including the Lake Stevens residents. Rule 704 applies to decisions set for hearing. Generally, the Commission determines an evidentiary hearing is necessary only where material issues of fact cannot be resolved on the basis of the written record.²⁵ Here, the record, including the application, responses to data requests, and the pleadings, contains sufficient information and data to make a reasoned decision on the merits of the proposal. Thus, no purpose would be served by conducting an evidentiary hearing.

The Commission orders:

The requests for rehearing are denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

²⁵See *Louisiana Ass'n of Independent Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) and *Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993).