UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Consolidated Record in Natural Gas Proceedings PL05-13-000

POLICY STATEMENT

(Issued September 26, 2005)

1. Section 313 of the Energy Policy Act of 2005 (EPAct 2005)[1] amends section 15 of the Natural Gas Act (NGA)[2] to establish a new, coordinated method for the processing of applications for authorizations for liquefied natural gas (LNG) terminals under NGA section 3[3] and interstate natural gas pipelines under NGA section 7.[4] These procedures include a requirement that the Commission maintain a consolidated record of proceedings before the Commission and before other federal and state agencies with jurisdiction under federal law over aspects of such projects. The Commission intends to issue in the near future a rulemaking promulgating regulations to implement the procedures required by section 313. In the interim, we are issuing this policy statement to give guidance with respect to the development of the consolidated record, pending completion of the rulemaking, to parties who initiate federal appellate proceedings under the revised provisions of the NGA.

Background

2. Section 313 of EPAct 2005 amends NGA section 15 to establish a coordinated method for the Commission and other affected federal and state agencies to work together in processing aspects of LNG terminal and interstate natural gas pipeline applications To achieve this end, section 313 includes three significant provisos.

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[1] Pub. L. No. 109-58, 119 Stat. 594 (2005).

[2] 15 U.S.C. § 717n (1994).

[3] *Id.* at § 717b.

[4] *Id.* at § 717f.

3. First, the Commission is to be the lead agency for coordinating all applicable federal authorizations and for conducting the necessary environmental review. Federal and state agencies that consider aspects of LNG terminal and interstate pipeline applications are to cooperate with the Commission, which will establish a schedule for all federal authorizations.

4. Second,

> [t]he Commission shall, with the cooperation of Federal and State administrative agencies and officials, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State administrative agency or officer acting under delegated Federal authority) with respect to any Federal authorization.

The consolidated record will be the record for appeals or reviews under the Coastal Zone Management Act of 1972 (CZMA),[5] for appeals of federal or state permitting actions under statutes other than the CZMA, and for actions alleging that federal and state agencies have failed to act timely in accordance with the schedule established by the Commission.

5. Third, section 313 amends the NGA with respect to the judicial review of actions by federal and state agencies other than the Commission[6] relative to LNG terminal or natural gas pipeline applications. Under the new provision, the U.S. Court of Appeals for the circuit in which an LNG terminal or natural gas pipeline is proposed to be built, expanded, or operated will have jurisdiction over petitions for the review of orders or actions by federal agencies, or state agencies acting under federal law, to "issue, condition, or deny any permit, license, concurrence, or approval required under Federal law," other than the CZMA.

6. As noted, we intend to promulgate regulations establishing the procedures to be followed in future proceedings. However, the issue arises as to the application of the requirements of section 313 to ongoing proceedings pending development of our rule. Specifically, Islander East Pipeline Company, L.L.C. has, under the NGA as revised by

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[5] 16 U.S.C. § 1451, *et seq* (1994).

[6] Judicial review of Commission actions is governed by NGA section 19(b), 16 U.S.C. § 717r(b) (1994), which was not amended by EPAct 2005.

section 313 of EPAct, recently filed in the U.S. Court of Appeals for the Second Circuit a petition for review of action by the State of Connecticut under the Clean Water Act (CWA)[7] regarding the company's proposed Islander East Project.

7. On September 19, 2002, the Commission issued to Islander East a certificate of public convenience and necessity, authorizing the company to construct, own, and operate a 44.8-mile, 260,000-decatherm pipeline, extending from Northhaven, Connecticut, across Long Island Sound, to Brookhaven, Long Island, New York.[8] The pipeline would begin at an interconnection with the facilities of Algonquin Gas Transmission Company, and would provide service to a number of customers, including KeySpan Gas East Corporation, The Brooklyn Union Gas Company, AES Endeavor, and Brookhaven Energy Limited Partnership.[9] The Commission found that the proposed facilities were necessary to provide additional capacity to Long Island, which is currently served by only one pipeline.[10] The Commission's *Islander East* orders are final Commission orders.

8. Two appeals of the Commission's certificate orders were filed in the U.S. Court of Appeals in the District of Columbia Circuit. The court has issued final decisions disposing of each of these appeals.[11]

9. Pursuant to section 401(a)(1) of the CWA,[12] Islander East is required to obtain from the State of Connecticut a certification (or waiver thereof) that any discharge resulting from construction and operation of the Islander East Project will comply with

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[7] 33 U.S.C. § 1251, *et seq* (1994).

[8] *See Islander East Pipeline Co., L.L.C. and Algonquin Gas Transmission Co.,* 100 FERC ¶ 61,276 at P 4 (2002).

[9] *Id.* at P 5. The order also authorized Algonquin to construct certain facilities and to lease others to Islander East in connection with the proposed project.

[10] *Id.* at P 101.

[11] *Richard Blumenthal, Attorney General of Connecticut v. FERC* (D.C. Cir. No. 03-1066) (motion for voluntary dismissal granted March 8, 2005); *Arthur J. Rocque, Jr., Commissioner v. FERC* (D.C. Cir. No. 03-1075) (motion to dismiss in part and summarily affirm in part granted September 1, 2004).

[12] 33 U.S.C § 1341(a)(1) (1994).

specified provisions of that act. On February 2, 2004, the Connecticut Department of Environmental Protection issued a decision denying the company's request for certification.[13] Islander East thereafter appealed the decision to Connecticut state court.[14]

10. By letter order issued August 5, 2004, Commission staff granted Islander East's and Algonquin's request for an extension of time until September 19, 2005 to complete the authorized facilities.[15]

11. EPAct 2005 was signed into law on August 8, 2005. On the same date, Islander East filed in the U.S. Court of Appeals for the Second Circuit a petition for review of the Connecticut Department of Environmental Protection order denying water quality certification.[16] Islander East requested that its appeal be heard on an expedited basis.

12. By order dated August 19, 2005, the court granted the motion that the appeal be expedited. The court stated that the record on appeal was to be filed no later than August 31, 2005, set briefing dates, and noted that the petition would be scheduled for argument in December 2005.

Discussion

13. EPAct 2005 establishes significant procedural changes in the manner in which NGA energy infrastructure proceedings are conducted. As noted above, it is our intention to issue in the near future regulations governing procedures in future cases and in those that are in the relatively early stages, so that the Commission and other federal and state agencies can work cooperatively, as mandated by EPAct 2005, to develop a single, consolidated record in such proceedings. These procedures will apply to all future cases.

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[13] *See* letter to Magalie Roman Salas (Commission Secretary) from Janet M. Robins (counsel for Islander East) and Steven E. Tillman (Algonquin) (filed July 15, 2004).

[14] That action is pending.

[15] *See* letter to Janet M. Robins and Steven E. Tillman from Michael McGehee (Office of Energy Projects).

[16] *Islander East Pipeline Company, L.L.C. v. Department of Environmental Protection*, (2nd Cir. No. 05-4139).

14. We believe that it is reasonable to interpret section 313 of EPAct 2005 as applying immediately to all pending matters. That being the case, Islander East may properly seek review in the court of appeals of Connecticut's decision denying water quality certification for the project. In any event, given that the case is now before the court, and that other, similar matters may arise, it is necessary for us to determine how we will carry out in such instances section 313's mandate that we maintain a consolidated record that will serve as the basis for judicial review of actions such as Connecticut's.

15. We conclude that with respect to proceedings that were relatively advanced when EPAct 2005 was enacted, we will deal with the issue of the consolidated record on a case-by-case basis. We will work cooperatively with project proponents and other federal or state agencies to determine the best method for gathering the record of proceedings at those agencies, and for filing with the courts those records and any portion of our record that may assist the court in reviewing the matters under appeal. We do not think that it is possible to establish a hard and fast rule for all such cases, since the procedural posture of given proceedings and the state of the record may be different in each instance. We do intend, however, to establish in our forthcoming rulemaking rules of general applicability for all future proceedings and for those ongoing proceedings where it is still possible for a consolidated record to be developed. We anticipate seeking public comment as to the best manner in which to do so.

16. In the *Islander East* case, by the time the company filed its present appeal before the Second Circuit, our certificate orders were final, the appeal of those orders in the District of Columbia Circuit had been resolved, and the record of those proceedings, compiled well before the enactment of EPAct 2005, did not consist of a consolidated record. We did not file the record of the certificate proceeding with the Second Circuit, since the court cannot review our now-final action. We also could not file the record of the Connecticut proceeding, because we did not have in our possession a certified copy of the state's record.[17] Indeed, we are not party to the Second Circuit case, our actions are not under review in that case, and thus we have no role in it, absent a request from the court that we participate in some way. While we had no consolidated record to file with the court in this instance, we remain willing to work with the court and the parties to be of assistance in any way that we can.

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[17] Counsel for Islander East has delivered to the Commission a number of boxes which it states contain the record of the Connecticut proceeding. However, in the absence of certification from the state that such is the case, the Commission cannot in turn certify to the Second Circuit that these boxes in fact represent the state's record.

17. Where, as with *Islander East*, an entity wishes to file an appeal of a state or federal agency decision but where we have not gathered a consolidated record, there appear to be two options for providing the court the necessary state or federal record. First, the appellant and the respondent state or federal agency, as the parties to the appeal, could directly file with the court the record (or a record index) of the state proceeding. This option appears to make the most sense, since those two parties should between them have all the necessary documents and can work with the court to file the necessary material in a timely fashion. If for some reason, that does not appear viable, we could, under the aegis of EPAct 2005, file a request with the state or federal agency that it file a certified copy of its record (or a record index) with us, for forwarding to the court. This may be less satisfactory, given that we have no jurisdiction over the agencies, and that the time needed for the agency to respond to our request, and for us in turn to file the agency record with the court, may result in some delay. We are prepared, however, to determine this issue in ongoing proceedings on a case-by-case basis.[18]

18. In conclusion, until we issue rules implementing the NGA as revised by EPAct 2005, we will work with the parties on a case-by-case basis in developing the record necessary for appellate review of action by other federal and state agencies.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

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[18] We note that in the Islander East appeal, there may be an additional option. Given that Islander East has filed an appeal in state court covering the same subject matter as its federal appeal, it may be that pertinent portions of the record in that proceeding can be provided to the Court of Appeals.