

ORAL ARGUMENT IS SCHEDULED FOR APRIL 19, 2004

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 03-1111

**NATIONAL COMMITTEE FOR THE NEW RIVER, INC., *et al.*
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION
RESPONDENT.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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DECEMBER 24, 2003

FINAL BRIEF: FEBRUARY 12, 2004

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

The parties before this Court are identified in the brief of Petitioners.

B. Rulings Under Review

1. *East Tennessee Natural Gas Company*, 101 FERC ¶ 61,188 (2002); and
2. *East Tennessee Natural Gas Company*, 102 FERC ¶ 61,225(2003).

C. Related Cases

This case has not previously been before this Court or any other court. Two related cases have been filed by Petitioners in this Court: *National Comm. for the New River. v. FERC*, No. 03-1251 (August 26, 2003) and *National Comm. for the New River. v. FERC*, No. 03-1411 (November 18, 2003).

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February 12, 2004

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	1
PERTINENT STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
I. Nature of the Case, Course of Proceedings, and Disposition Below.....	2
II. STATEMENT OF FACTS.....	5
A. Statutory and Regulatory Background.....	5
B. Events Leading To the Challenged Orders.....	7
C. The Orders Under Review.....	9
SUMMARY OF ARGUMENT.....	17
ARGUMENT.....	20
I. STANDARD OR REVIEW.....	20
II. THE EIS PROCESS ALLOWED MEANINGFUL ANALYSIS	21
III. PIPELINE TAPS WERE GIVEN PROPERWEIGHT.....	27
IV. FERC PROPERLY DECLINED TO EXAMINE THE DENA PLANT.....	30
CONCLUSION.....	32

TABLE OF AUTHORITIES

COURT CASES:	PAGE
<i>*Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.</i> , 462 U.S. 87 (1983).....	20, 21
<i>Exxon Mobil Gas Marketing Co. v. FERC</i> , 297 F.3d 1071 (D.C. Cir. 2002), <i>cert denied</i> , 124 S.Ct. 48 (2003).....	20
<i>Public Utils. Comm. v. FERC</i> , 254 F.3d 250 (D.C. Cir. 2001).....	20
<i>Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.</i> , 435 U.S. 519 (1978).....	20
ADMINISTRATIVE CASES:	
<i>*Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)</i> , 88 FERC ¶ 61,227 (1999); <i>order clarifying</i> , 90 FERC ¶ 61,128 (2000); <i>order further clarifying</i> , 92 FERC ¶ 61,094 (2000).....	6, 7
<i>East Tennessee Natural Gas Co.</i> , 98 FERC ¶ 61,331 (2002).....	2, 6, 7, 8, 14
<i>East Tennessee Natural Gas Co.</i> , 101 FERC ¶ 61,188 (2002).....	3, 9, 10, 11, 17, 21, 22, 23, 25, 26, 27, 29, 31

-
- Cases chiefly relied upon are marked with an asterisk

TABLE OF AUTHORITIES

ADMINISTRATIVE CASES:	PAGE
<i>East Tennessee Natural Gas Co.</i> , 102 FERC ¶ 61,225 (2002).....	4, 13, 14, 15, 16, 21, 23, 24, 25, 26, 27, 29, 30, 31
 STATUTES:	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A).....	20
National Environmental Protection Act,	
42 U.S.C. § 4332(2)(C).....	20
Natural Gas Act, 15 U.S.C. § 717 <i>et seq.</i> ,	
Section 7(c), 15 U.S.C. § 717f(c).....	5, 7
Section 7(e), 15 U.S.C. § 717f(e).....	29

GLOSSARY

Br.	Brief of Petitioner
DEIS	Draft Environmental Impact Statement
FEIS	Final Environmental Impact Statement
HDD	Horizontal Directional Drill
<i>Initial Order</i>	<i>East Tennessee Natural Gas Co.</i> , 101 FERC § 61,188 (2002)
JA	Joint Appendix
NGA	Natural Gas Act, 15 U.S.C. § 717 <i>et seq.</i>
Preliminary Determination	<i>East Tennessee Natural Gas Co.</i> , 98 FERC § 61,331 (2002)
<i>Rehearing Order</i>	<i>East Tennessee Natural Gas Co.</i> , 102 FERC § 61,225 (2003)

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**BRIEF FOR RESPONDENT
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STATEMENT OF THE ISSUES

1. Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly followed established information dissemination and gathering procedures for identifying the environmental issues related to whether to certificate the construction and operation of a proposed pipeline extension.

2. Whether the Commission properly determined that the present and future public convenience and necessity justified the construction and operation of a new pipeline extension based on the circumstances presented.

PERTINENT STATUTORY PROVISIONS

Pertinent sections of the Natural Gas Act, 15 U.S.C. § 717 *et seq.* ("NGA"), are set out in an addendum to this Brief.

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Below

As pertinent, this case involves the application by East Tennessee Natural Gas Company ("East Tennessee") to construct: approximately 94 miles of 24-inch pipeline from Wytheville, Virginia, through Wythe, Carroll, Patrick, Floyd, and Henry Counties, Virginia to an interconnect with Transcontinental Gas Pipe Line Corporation in Rockingham County, North Carolina; approximately 7 miles of 16-inch line to service a power plant in Henry County, Virginia; three new meter stations; and, associated mainline valves and appurtenant pipeline facilities, including taps. *East Tennessee Natural Gas Co.*, 98 FERC ¶ 61,331 at 62,392-93 (2002) ("Preliminary Determination"). After the application was noticed, the Commission received "several hundred" interventions, comments or objections to the proposal. *Id.* at 62,394, *and see* 62,403-05 (listing individual submissions).

Following its standard practice in pipeline certificate cases, FERC made “a preliminary determination, based on [its] assessment of only non-environmental issues, that the public benefits of the proposed project will outweigh any adverse impacts.” *Id.* at 62,392. The proposal was found to be in the public interest “because it will provide fuel for new electric generation plants, provide additional gas supplies to existing local distribution companies (LDCs), and bring natural gas service to portions of southwestern Virginia for the first time.” *Id.*

A Draft Environmental Impact Statement (“DEIS”) was issued in April 2002. After its issuance, the Commission held five public meetings in Virginia and Tennessee and another one in Washington, D.C. to ventilate environmental issues. After evaluating comments on the DEIS, a Final Environmental Impact Statement (“FEIS”) was completed in September 2002. On November 20, 2002, the first of the two orders, 101 FERC ¶ 61, 188, JA 556, challenged here “grant[ed] final certificate authorization, subject to environmental compliance conditions.” *Id.* ¶ 4, JA 557.

That Order also responded Petitioners’ rehearing request, alleging that “current data does not support the need for increased gas service in the region involved,” *id.* ¶ 28, JA 566, and that “the preliminary determination overstates the economic benefits reasonably to be expected from the proposed pipeline,” ¶ 33, JA

568. FERC disagreed, finding continued support for the additional supply to be made available by the project. Petitioners pointed to opposition to two proposed electric generation plants that would use a considerable share of the supply as grounds for reversing the earlier ruling. FERC rejected the point based on continued support from the plants' suppliers for the project, a showing of expected growth in population and energy consumption in the Southeastern region., the introduction of natural gas service to previously unserved areas, and the potential added benefit from underground taps to be installed along the route, all as sufficient justification to approve the project. *Id.* ¶¶ 39-42, JA 570-72.

The Order also explained the efforts involved in assuring a full and open process for the environmental analysis, from the initial notice through issuance of the FEIS. ¶¶ 47-51, JA 574-76, and responded to various issues raised during the public comment period regarding the potential environmental impacts. ¶¶ 52-68, JA 576-80, as well as the points made in written comments responding to both the DEIS and the FEIS. ¶¶ 68-107, JA 580-94. As a result of this analysis, the Commission mandated 69 detailed conditions to mitigate environmental impacts of the facilities that East Tennessee must fulfill before construction and operation may proceed. Appendix to Order, JA 597-614. The Commission found that the proposed project, "if constructed and operated in accordance with the

recommended and proposed environmental mitigation measures, is environmentally acceptable.” *Id.* ¶ 108, JA 594.

Petitioners, and others, sought rehearing of that Order, and the National Committee for the New River, Inc. (“Committee”) sought a stay of construction for a certain portion of the project. The rehearing and stay requests were denied in the second challenged order. 102 FERC ¶ 61,225 (February 27, 2003)(“Rehearing Order”) at ¶¶ 1 and 7, JA 723 and 725. The Order denied the stay request because it made “no attempt to address any of the established criteria for granting a stay.” *Id.* ¶ 7, JA 725. The Order addresses the several arguments raised on rehearing: need for the project, *id.*, ¶¶ 14-17, JA 728-29; the adequacy of the notice related to the DEIS, ¶¶ 18-19, JA 729-30: and various environmental issues, ¶¶ 22-26, JA 731-32 and ¶¶ 33-49, JA 734-41. Rehearing was denied on all those issues, largely for the reasons given in FERC’s earlier order, but with additional explanation.

The petition for review followed.

II. STATEMENT OF FACTS

A. Statutory and Regulatory Background

The Commission has delegated authority under the Natural Gas (“NGA”), 15 U.S.C. § 717 *et seq.*, to determine whether the proposed construction and operation of facilities for the transportation or sale of natural gas is in the present

or future public convenience or necessity, and thus should be certificated. NGA § 7, 15 U.S.C. § 717f.” In reaching a final determination on whether a project will be in the public convenience and necessity, the Commission uses a flexible balancing process during which it weighs the factors presented in a particular application. Among the factors that the Commission considers in the balancing process are the proposal’s market support, economic, operational, and competitive benefits, and environmental impact.” *Certification of New Interstate Natural Gas Pipeline Facilities (Policy Statement)*, 88 FERC ¶ 61,227 at 61,743 (1999); *Order clarifying*, 90 FERC ¶ 61,128 (2000); *Order Further Clarifying*, 92 FERC ¶ 61,094 (2000)

Under its policy, the Commission first reviews the non-environmental aspects of a proposed project, and, then, assuming those factors favor certification, an analysis and evaluation of the environmental effects are undertaken. The overall approach in determining whether to authorize a new project “balances the public benefits against the potential adverse consequences” where the goal is “to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant’s responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent

domain in evaluating new pipeline construction.” *Preliminary Determination*, 98 FERC at 62,395.

Part of the review at this stage involves a balancing of the potential benefits and harms in the market to existing pipelines and their captive customers, to “landowners and communities affected by the route of the new pipeline.” *Id.* This determination involves “essentially an economic test” that weighs “the evidence of public benefits to be achieved against the residual adverse effects.” *Id.* Among the factors that would be considered in this evaluation are: “precedent agreements [for gas and/or capacity purchases], demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity serving the market.” *Policy Statement*, 88 FERC at 61,747.

Only if the benefits outweigh the adverse effects “will the Commission proceed to complete the environmental analysis where other interests are considered.” *Preliminary Determination*, 98 FERC at 62,395. Environmental analysis requires evaluation of alternative routes that could provide the same benefits but with lessened impact on the environment. The Commission has made clear that the economic viability of a specific route will not foreclose consideration of alternatives when an environmental analysis is undertaken. “If the environmental analysis following a preliminary determination indicates a preferred

route other than the one proposed by the applicant, the earlier balancing of the public benefits of a project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.” *Policy Statement*, 88 FERC at 61,749.

B. Events Leading To the Challenged Orders

East Tennessee proposed the “Patriot Project” in an NGA § 7 application filed July 26, 2001. As proposed, the Patriot Project would include an extension of about 94 miles of East Tennessee’s mainline facilities from a point near Wytheville, Virginia to an intersection in Eden, North Carolina with Transcontinental Gas Pipe Line Corporation along with a 7-mile extension to serve a power plant in Henry County Virginia, and associated mainline valves and other facilities, including taps. *Preliminary Determination*, 88 FERC at 62,292-93. On the benefit side, FERC found the proposal would: “fuel new electric generation plants and help meet the needs of existing LDCS for additional gas supplies in Virginia and North Carolina . . . bring[] natural gas service to portions of southwestern Virginia for the first time.” *Id.* at 62,402. The proposal had support of many local governmental and business “in the hope that the availability of natural gas service will attract badly needed industry to the region.” *Id.* The high level of subscription for the new capacity, increased operational flexibility and reliability,

and the lack of subsidization by existing customers were other benefits expected from the project. *Id.* On the other side, the Commission expected that many potential adverse effects of the project “will be resolved or mitigated with appropriate conditions in [FERC’s] final order, and landowners will be compensated for any damage to property or for the taking of property necessary for the pipeline right-of-way.” *Id.* As the potential benefits outweighed the potential harms, the Commission found “subject to completion of the environmental review, that East Tennessee’s Patriot Project is required by the public convenience and necessity.” *Id.*

To facilitate the process, the Commission staff issued a notice that it intended to prepare an environmental impact statement, to hold public scoping meetings, to visit the proposed route, and to solicit public comments on these matters. *Id.*; see also *Initial Order* ¶ 47, JA 575 (notice was sent to “2,460 individuals, organizations and interested parties”). Staff’s evaluation would be embodied in the DEIS, which would “discuss environmental impacts that could occur as a result of the construction and operation of East Tennessee’s proposed project, will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.” *Id.* After the DEIS was published, it was “mailed to

Federal, state, and local government agencies, Native American tribes, elected officials, public interest groups, interested individuals, affected landowners, newspapers, libraries, and parties on the Commission's official service list for this proceeding." *Id.* A 45-day comment period would allow submission of comments, all of which were considered in reaching a final decision. *Id.*

C. The Orders Under Review

Four public scoping meetings and two public working meetings were held in various cities along the proposed route during October-November 2001. *Initial Order*, ¶ 48, JA 575. After the DEIS was prepared and filed with the Environmental Protection Agency, and a public notice of its availability issued, the Commission sent copies of it to 1,387 individuals and organizations, "including Federal, state, county, and local agencies; state and local conservation organizations; elected officials . . .; local libraries and newspapers, commentators and intervenors in the FERC proceeding." *Id.* ¶ 49, JA 575. The 45-day period for comments to the DEIS was extended, during which time "the Commission held five public comment meetings in Virginia and Tennessee" as well as another public meeting held in Washington, D.C. *Id.* ¶ 50. The issues raised at those meetings included the "need for the project, eminent domain, dissatisfaction with the company, loss of land use, decreased property values, construction method for

the New River crossing, co-location concerns, blasting and its impact on water wells, springs, groundwater, water quality, protective measure for cemeteries, alternatives, pipeline reroutes, noise, safety, adverse effects on tourism, and environmental justice.” ¶ 52, JA 576.

After the comment period closed on July 1, 2002, the oral and written comments were considered and the FEIS prepared with FERC staff’s responses to the comments. The FEIS was issued on September 22, 2002, and a Federal Register notice by the EPA was published on September 30, 2002. In addition, the Commission mailed the FEIS to “approximately 2,885 government agencies, groups, and individuals on the environmental mailing list for the project.” ¶ 51, JA 576. As noted in the *Initial Order*, comments received “were instrumental in revising and refining the analysis presented in the DEIS.” *Id.* As part of the FEIS evaluation, staff considered “a no action or postponed action alternative, a project system alternative,” but found that the first two would “would not satisfy the objectives of this project” and, on the last one, that “no viable system alternatives could be identified.” *Id.* ¶ 67, JA 580. Staff also “evaluated 13 major route alternatives, but after careful analysis, including multiple site visits, d[id] not recommend adoption of any of them.” *Id.* Besides all those, staff considered “eight

route variations” of which it recommended two, four compressor station alternatives, which were rejected as were two interconnect alternatives. *Id.*

The first challenged order (*Initial Order*, 101 FERC ¶ 61,188) addressed those and other environmental issues. *See generally id.* ¶¶ 47-107, JA 575-94. In addition to the above explanation of the procedures followed, and the alternatives considered, the Order indicates that “East Tennessee has not yet been able to conduct formal engineering or complete environmental studies” in some areas due to an inability to gain access to property involved. *Id.* ¶ 74, JA 582. Thus, the proposed route contains survey gaps, but the Order “is approving the project and the general route, not the final route delineation,” and is subject to “the satisfaction of numerous conditions attached to this order regard such matters as completion of environmental studies, consultation and/or approval by various state and Federal agencies regarding various aspects of the project.” *Id.*; *see also* Appendix to the order, JA 597-614 (listing conditions).

On the need for the project, the Order acknowledges protests that “support may drop substantially if, as [commentators] predict, the DENA Wythe and/or Henry County power plant are not constructed.” *Initial Order* ¶ 39, JA 570. Those predictions were offset, however, by subsequent “confirmation of the continued support of the contracting shipper” for the project. *Id.* In addition, the Order refers

to information obtained from a FERC “Southeast Energy Infrastructure Conference” showing a continued growth in population as well as in demand for electric and natural gas service as indications of support for building the project to avoid delays and problems with trying to meet the forecasted growth. *Id.* ¶ 40, JA 570-71.

As the Commission saw it, the taps that East Tennessee proposed to install at its own expense along the route, did not “inappropriately narrow[] the consideration of alternate routes.” *Initial Order* ¶ 41, JA 571. Rather, Congress expected that an applicant would propose a route for Commission consideration. Here, East Tennessee used “ease of future access as a criteri[on] for route determination,” and then agreed to build the route along areas “of anticipated development as designated by” the affected communities. *Id.* The taps were not given primary weight as a reason for approving the route, but were seen as “a potential added benefit to the region,” even though it is “likely that not all the taps will be employed.” *Id.* ¶ 42, JA 572.

Petitioners, separately, filed for rehearing, and the Committee alone sought a stay. *Rehearing Order*, ¶ 1, JA 723. The Committee’s “*pro forma*” stay request was found defective, as it made “no attempt to address any of the established criteria for grant a stay,” and “has not shown irreparable injury.” *Id.* ¶ 7, JA 725.

Petitioners' requests for rehearing "renew[ed] arguments previously made and addressed" concerning the need for the project in general and the taps in particular. ¶ 12, JA 727. Regarding the general need, the Order found the high (87% of total capacity) subscription rate for terms of 10 to 25 years, "by itself, warrants approval," but went on to note that since the *Initial Order* "executed service contracts" from three shippers had been received, which further bolstered approval. ¶ 14, JA 728. "Notwithstanding [Petitioners'] concerns regarding" the viability of two proposed electric generation plants to be served by the project, nothing was presented to show support from "those shippers . . . had diminished since" the *Initial Order. Id.*

On the installation of underground taps along the route, the Order reiterated that this "represents a potential added benefit to the region," and emphasized the potential aspect, as it did not find here "that the taps will satisfy every service request that may arise at a given tap location in the future," but found "bringing a degree of gas service to an area that has not gas service" was a benefit. *Id.* ¶ 16, JA 728-29. The Order also rejected claims that the taps had "inappropriately narrowed the consideration of alternate routes," given that the Commission "examined 13 major alternatives to the route proposed by East Tennessee." *Id.* ¶ 17, JA 729. Likewise, the claim that "the public was not afforded adequate notice that taps

were considered as part of the Patriot Project Extension is unfounded.” *Id.* ¶ 18. As the Order states, the rehearing request “does not suggest that anyone affected by the taps did not have actual notice,” *id.* ¶ 19, JA 730, but is based on the taps not being mentioned in the original staff notice. That notice “invited all interested parties to attend public scoping meetings that . . . would provide more detailed information on the proposal.” *Id.* The taps were discussed “at these scoping meeting, in the Commission [*Preliminary Determination*], in the DEIS, and at additional public scoping meetings held after issuance of the DEIS.” *Id.* ¶ 18, JA 729. All that constituted adequate notice. ¶ 19, JA 730.

Petitioners raised a claim 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.” *Rehearing Order*, ¶ 20, JA 730. As the Order explains, this is part of the “practical reality of large projects” because they are “subject to many significant variables whose outcome cannot be predetermined.” *Id.* ¶ 24, JA 732. Here, “many individuals have denied or limited East Tennessee’s access to property that it needs to complete its surveys and environmental studies.” *Id.* Consequently, different parts of the project may be at different completion stages. In recognition of this

“natural consequence” of large project variability, *id.*, the Commission has a “long-standing practice” of issuing “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 a pipeline project.” *Id.* ¶ 23, JA 731(footnote omitted). As to specific claims that the skip zones precluded a full review of the potential impacts, the Order indicated that the Commission reviewed various other maps and information about those zones to reach its findings. *Id.* ¶¶ 27-32, JA 732-34 (detailing response).

The Order similarly dismissed claims that “the DEIS did not adequately address impacts on either the [New] River or the State Park” located there. *Rehearing Order* ¶ 33, JA 734. The Order reiterates that earlier conditions placed on the certificate require East Tennessee to use horizontal directional drill techniques (HDD) to place the pipeline from 15 to 40 feet beneath the surface (as compared to 3-5 feet below ground normally used) of the State Park and with entry and exit points outside the Park. *See id.* ¶ 38 and ¶ 35, JA 736 and 735 (describing HDD certificate conditions). In addition, a contingency plan was required for the possibility that HDD would fail at the original site; under the plan, East Tennessee had to propose another HDD site within a limited exclusion zone, so that “the first option [should the contingency apply] might well be a minor

realignment within the approved right-of-way.” *Id.* ¶¶ 36-37, JA 736. Safety concerns related to high consequence use areas, such as the Park, are subject to the Department of Transportation’s jurisdiction, and were being addressed in an ongoing rulemaking to which the project would be subject. *Id.* ¶ 40, JA 737.

On the claim that the environmental review should have included the impacts of the DENA Wythe electric generation plant, the Order indicated that this question turns on “whether there is sufficient Federal control and responsibility over the proposed plant to warrant extension of [FERC’s] environmental review to include those nonjurisdictional facilities.” *Rehearing Order* ¶ 42 & n. 17 (setting out test for evaluation), JA 738. As the FPA provides no authority to FERC over the siting and construction of electric generation plants, which were regulated by Virginia, and no other federal connection was found, there was insufficient “Federal control over the project [to] warrant[] the Commission’s environmental review of a nonjurisdictional project.” *Id.* Nor was environmental review required for the taps because they are “part of the underground installation of the pipeline itself, and will have no impacts apart from the pipeline.” *Id.* 43, JA 739.

The petition for review followed.

SUMMARY OF ARGUMENT

Under the arbitrary and capricious standard of review applicable here, the Court considers whether FERC has taken a hard look at every significant impact of the project's potential environmental consequences. While the agency's decision must inform the public that it has considered environmental concerns, the agency need not elevate environmental concerns over other appropriate considerations.

The process followed by the Commission allowed meaningful ventilation and analysis of the potential environmental impacts of the project. Although not raised by Petitioners below, the Commission did address questions of whether it had a complete analysis on which to base its findings. The gaps in the information resulted from problems that could not be remedied (e.g., the window for studying certain species was open only at limited times of the year), but, in any event, were minimized by the conditions placed in the *Initial Order*, which required completion of various federal and state approval processes before construction or operation could begin. This approach complies with DEQ regulations because it informed the public of what information was lacking, and conditioned the certificate on completion of the incomplete analysis.

The practical reality of large projects, such as that involved here, is that they take considerable time and effort to complete, which means that different stages

will proceed at different speeds. Were every aspect of a large project required to be finalized before any aspect could move forward, it would be difficult, if not impossible, to construct the project. Consequently, the certificate order will approve the general route and overall approach while conditioning actual construction and operation only after the terms of the conditions have been satisfied.

The environmental review process here provided for widespread dissemination of the environmental impact statements to those affected by the project. At each stage, the Commission, in addition to Federal Register notice, mailed the information to a large number of individuals, organizations, and governmental bodies, and held public meetings in the affected areas at which the scope of the project was discussed and the public was given an opportunity to make comments. The Commission also allowed an extended period for written comments on the DEIS, and incorporated many comments into the FEIS. Contrary to Petitioners' claims, the Commission considered more than a dozen major route alternatives as well as route variations and possible alternatives for aboveground and interconnect facilities before reaching its decision that the proposed route was environmentally superior to any of the alternatives.

The underground taps that East Tennessee will install at its own expense along the proposed route were given the proper weight in the decision. First, as noted above, the taps did not foreclose review of multiple alternatives. Second, the Commission realized that the taps represented a hope that their presence would in the future assist in promoting economic growth and would, in some cases, bring natural gas service to previously unserved areas. Such future benefits are properly considered in certificate cases, but they were not given determinative weight here. Rather, the Commission looked to the high degree of precedent agreements and the predicted growth of population and energy consumption in the Southeastern region as sufficient reasons to warrant construction. Finally, there was no need to evaluate the underground taps separately from the pipeline for environmental purposes because the taps will have no environmental impact apart from the pipeline.

The Commission appropriately rejected Petitioners' "but-for" test for deciding whether the impact of the DENA Wythe generation plant should be considered within FERC's environmental assessment. The Commission employed its four-part test to determine whether sufficient federal control and responsibility exists over this nonjurisdictional plant. As Virginia, not FERC, has jurisdiction over the permitting, funding, construction, and operation of the plant, and the federal government had no financial interest nor is the plant located on federal

land, FERC properly found no justification for extending its environmental review to this nonjurisdictional plant.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission orders under the arbitrary and capricious standard set out in 5 U.S.C. § 706(2)(A). *Public Utils. Comm. v. FERC*, 254 F.3d 250, 253-54 (D.C.Cir. 2001). Under this standard, a “court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. . . . The court is not empowered to substitute its judgment for that of the agency.” *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C.Cir. 2002), *cert. denied* 124 S.Ct. 48 (2003)(citations and internal quotation marks omitted).

To the extent that Petitioners challenge the adequacy of the process to develop the DEIS and FEIS under Section 102(2)(C) of the National Environmental Protection Act (“NEPA”), 42 U.S.C. § 4332(2)(C), review is also governed by the arbitrary and capricious standard. Under that standard, an agency has “the obligation to consider every significant aspect of the environmental impact of a proposed action.” *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 553 (1978). To do this, an agency must

“take a ‘hard look’ at the environmental consequences before taking a major action.” *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983)(citation omitted). A hard look requires an agency to “inform the public that it has indeed considered environmental concerns in its decisionmaking process,” but it does not “require agencies to elevate environmental concerns over other appropriate considerations.” *Id.* (citations omitted).

II. THE EIS PROCESS ALLOWED MEANINGFUL ANALYSIS

Petitioners contend that “the DEIS was so incomplete in a number of important environmental areas that it presented an incomplete description of the environment, no full disclosure of impacts, no assessment of those impacts.” Br. 29. As support, Petitioners state that the “November 20, 2002, Order [*Initial Order*, 101 FERC ¶61,188] did not recognize or address the comments filed protesting the incompleteness of the DEIS,” citing ¶ 52 of that Order. Br. 30. Petitioners did not protest or raise concerns about the DEIS at that time, and thus there was no reason for the *Initial Order* to address the point they now raise on appeal. Other parties did raise questions of completeness, all of which were answered in the *Initial Order*. When Petitioners later raised the alleged incompleteness of the DEIS, it was full answered and refuted. *Rehearing Order* ¶¶ 20-32, JA 730-34.

Petitioners are wrong that the *Initial Order* failed to address comments alleging incompleteness in the DEIS and that ¶ 52 was the only place to look for such discussion. Br. 30. Although Petitioners did not raise this issue at that time, other parties did, and their concerns were address in the *Initial Order*. See ¶¶ 14-16, JA 560-61 (addressing request by Virginia DEQ to delay issuance of FEIS to allow completion of DEIS in another matter); ¶ 58, JA 577-78 (indicating that certain surveys had not been completed, and recommending that construction not begin until surveys completed and consultation with resource agencies completed); ¶ 74, JA 582 (explaining that incompleteness does not preclude issuance of certificate because certificate is subject to numerous conditions regarding completion of “environmental studies, consultation and/or approval by various state and Federal agencies” before actual construction can begin); ¶¶ 78-79, JA 583-84 (addressing allegation that “the DEIS was incomplete because” it did not address fully the HDD under the New River).

Petitioners claim that the gaps in the DEIS violate CEQ Reg. Section 1502.22 (Br. 29; *see* Br. Appendix (setting out CEQ Regulations)), and require revision and republishing of the DEIS under Section 1502.9 (Br. 30). The regulations do not, however, mandate that result. Rather, Section 1502.9(a) requires preparation of a new draft if the draft “is so inadequate as to preclude

meaningful analysis.” FERC did not find the DEIS precluded meaningful analysis as to whether the general route and overall project should be approved. *Initial Order* ¶ 74, JA 582. Further, FERC did comply with Section 1502.22, which requires an agency to “make clear that such information is lacking,” and then to take efforts to obtain such information, if feasible.

That is what the Commission did: for example, the *Initial Order* ¶ 58, JA 577-78, explained that certain surveys of three federal or state listed endangered or threatened species had not yet been completed because the “survey time window” for some species had not yet opened, additional surveys of other areas were requested, or that access to the areas could not be obtained. *Id.* The Commission set conditions for requiring the surveys and any resulting consultation be completed prior to construction. *Id.*; *see id.* Appendix Conditions 36-38, JA 607(addressing matter); *see also Rehearing Order* ¶¶ 50-52, JA 741-42 (discussion of small-anthered bittercress conservation measures).

Closely related to this argument, Petitioners also claim error in that the “DEIS as presented did not describe the entire project, nor disclose or analyze the environmental impacts of the entire project,” and is “replete with sequencing environmental analysis so as to avoid a specific description . . . and disclosure of environmental impacts of [certain] portions until after any opportunity for public

comment has expired.” Br. 30. Petitioners assert that these alleged errors denied the public from “meaningful participation in the EIS process.” Br. 31. The *Rehearing Order* ruled that those claims were unfounded, inconsistent with FERC certificate practices, and factually inaccurate. *Rehearing Order* ¶¶ 20-32, JA 730-34.

The Order indicates that the EIS prepared in this case met the purposes of NEPA, namely “that an agency, in reaching its decisions, will have available and will carefully consider, detailed information concerning significant environmental impacts; [NEPA] 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 the system.” *Id.* ¶ 22, JA 731. The Commission has taken a pragmatic approach in these situations in recognition of the “practical reality of large project such as the Patriot Project i[n] that they take considerable time and effort to develop” and are subject to “many significant variables whose outcome cannot be predetermined,” e.g., denial of access to properties needed “to complete the surveys and environmental studies.” *Id.* ¶ 24, JA 732.

The “natural consequence” of this practical reality is that segments of large project proceed at different speeds. ¶ 25. If, as Petitioners seek here, “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.” *Id.* In response to this reality, “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 a pipeline project.” ¶ 23, JA 731 (footnotes listing citations omitted). Here, contrary to Petitioners’ segmenting and sequencing claims, the Commission was “confident that [its] environmental review was thorough.” ¶ 26, JA 732; *see* ¶ 25 (“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.”).

The EIS process here satisfied NEPA’s purpose by making the relevant information available to those affected by the action. The initial notice of intent to prepare an EIS was sent to “2,460 individuals, organizations and interested parties,” and was the subject of “four public scoping meetings and two public working meetings” held in areas to be affected by the project at which the public could comment on the issues. *Initial Order* ¶¶ 47-48, JA 575. The DEIS was sent to “1,387 individuals and organizations,” and during the FERC-extended comment period, “the Commission held five public comment meeting in Virginia and

Tennessee” and another public meeting in Washington, D.C. at which the public could comment “on the environmental impacts described in the DEIS.” *Id.* ¶ 49-50.

The FEIS incorporated many comments “in revising and refining the analysis presented by the DEIS,” and was mailed to “approximately 2,885 government agencies, groups, and individuals.” *Initial Order* ¶ 51, JA 576. The Commission then accepted comments on the FEIS, which were addressed in the *Initial Order* and those matters were subsequently the subject of rehearing request by Petitioners and others that were addressed in the *Rehearing Order*. Petitioners’ claim of lack of meaningful participation in the EIS process rings hollow in the face of FERC’s multi-layered dissemination and comment process.

Nor does the segmenting or sequencing of which Petitioners complain prevent meaningful participation by the public. As required, the Commission identified those areas where gaps were present, and specified conditions to fill the gaps before construction and operation could proceed. *See Rehearing Order* ¶ 23, JA 732 (noting “69 separate conditions” imposed by FERC to assure compliance with environmental concerns); *Initial Order* Appendix, JA 597-614 (setting out the 69 conditions). As the Commission noted, many conditions resulted from public comments about the DEIS that were incorporated into the FEIS. As East Tennessee cannot commence construction or operation until those conditions are

satisfied (or could be subject to enforcement proceedings should it violate them), those conditions assure that the project will comply with the environmental laws.

Petitioners contend that the environmental analysis did not adequately describe or analyze alternative routes. Br. 31-32. That contention is undermined by the fact that the “FEIS evaluate[d] a no action or postponed action alternative, [and] a project system alternative,” but found the first did not satisfy the project objectives and no project system alternative could be identified. *Initial Order* ¶ 67, JA 580. The FEIS also evaluated: “13 major route alternatives” before concluding not to recommend any of them; “eight route variations,” from which it recommended two be adopted; and, several aboveground compressor station and interconnect site alternatives, but recommended none of them for adoption. *Id.*

Beyond that, the *Rehearing Order* explains why other proffered route alternatives were invalid based on the review of maps and aerial photographs of all areas along the route. *Rehearing Order* ¶ 27, JA 732. Indeed, the Commission found little power to Petitioners’ sequencing claims (Br. 30) with the so-called skip areas or gaps in the EIS process because it relied on “Commission staff field surveys and assessments 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” to analyze and

evaluate “all reasonably potential impacts along the proposed route that came to its attention.” *Id.* ¶ 28, JA 733.

III. PIPELINE TAPS WERE GIVEN PROPER WEIGHT

Petitioners argue that the underground taps installed by East Tennessee along the proposed pipeline should not have been a factor in consideration of alternative routes. Br. 33-34. Before it gave any credit to the taps, the Commission found that the precedent agreements and the projected growth in population with a concomitant projected increase in energy consumption, including for additional natural gas supplies, both supported the viability of the project. *Initial Order* ¶¶ 39-40, JA 570-71. The underground taps were thus considered as an added factor that might have some potential benefit to communities along the proposed pipeline route. *Id.* ¶ 41, JA 571.

Petitioners contend that the Commission “erred in permitting such narrowing of consideration [of alternative routes] by adoption of the said taps as project goals.” Br. 33. But defining project goals is the prerogative of the applicant, not FERC. *Initial Order* ¶ 41, JA 571. The underground taps were installed at East Tennessee’s own expense and with the support of many local governments and business groups along the proposed route. *Id.* Although Patrick County, Virginia expressed opposition to the proposed route and disputed the need for the taps

there, FERC determined that “the best route from an economic and environmental perspective will be through Patrick County.” *Id.* ¶ 42, JA 572.

That determination did not result from a narrowing of the proposed alternatives, but resulted after a number of alternatives were evaluated. “[T]he FEIS considered and analyzed a number of major route alternatives and minor route variations for reducing impact to or avoiding environmentally sensitive areas and population centers.” ¶ 43, JA 572. Two of those alternatives would have “mov[ed] all or most of the Patriot Extension to North Carolina,” while other alternatives were evaluated as means for lessening other potential impacts of the project. *Id.* Thus, Petitioners’ narrowing claims are unsupported by the record. After evaluation of the numerous alternatives, the Commission found “that none of the major route alternatives are environmentally superior to the route proposed by East Tennessee, even if some of the taps are not served.” *Id.*

Those points were reiterated in the *Rehearing Order* where the “potential” for the taps to bring “a degree of gas service to an area that has no gas service,” rather than a present use for them. *Rehearing Order* ¶ 16, JA 728. While future benefits are properly considered in certification cases, NGA § 7(e), 15 U.S.C. § 717f(e), the taps, due to their uncertain future usage, had not narrowed its evaluation of alternatives. *See Rehearing Order* ¶ 17, JA 729 (noting that FERC

“examined 13 major alternatives” and explaining why it had rejected to alternatives as “not superior to the proposed route from an environmental standpoint”). This point also disposes of Petitioners’ claim (Br. 34) that “the environmental impact of the use of such taps should also be included in the environmental analysis.” For example, the so-called AEP alternative was not superior “from an environmental standpoint, even if service to the tap locations was considered (that is, if the laterals to the tap locations were not necessary).”¹ ¶ 17; *see id.* ¶ 43, JA 739 (underground taps have no environmental impact separate and apart from the pipeline itself, and thus were not separately examined).

IV. FERC PROPERLY DECLINED TO EXAMINE THE DENA PLANT

Petitioners contend that the environmental impact of the proposed DENA Wythe power plant should have considered as part of FERC’s overall environmental analysis. Br. 34. This rests on Petitioners’ view that a “but for” test controls when FERC must evaluate the environmental impact of nonjurisdictional facilities. *See* Br. 35 (“but for the power plant, the gas line would not impact that sensitive area.”). The Commission ruled that a “but for” test is not controlling here,

¹ In other words, the Commission assumed that the AEP alternative would not have to serve the same locations as served by the proposed taps (hence, it excluded consideration of building lateral pipeline facilities from points on the AEP alternative to points where a proposed tap would be located). Even with that, the AEP alternative was not environmentally superior.

rather it must determine whether a sufficient federal control over nonjurisdictional facilities, such as the DENA Wythe Plant, exist to justify intrusion into matters that fall under state authority.

Petitioners do not contest the point made in the FEIS and *Rehearing Order* that FERC “has no authority over the permitting, funding, construction, or operation of [the DENA Wythe] proposed facilities,” all of which are regulated by Virginia. *Rehearing Order* ¶ 42, JA 738. In such circumstances, the Commission considers four factors in decide whether it should engage in an environmental analysis of the facilities: “(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) where 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.” *Id.* ¶ 42 n. 17.

Besides lack of jurisdiction over the permitting, funding, construction, or operation of the DENA Wythe plant, the federal government “has no financial involvement in the project and no Federal lands are involved.” *Rehearing Order* ¶ 42, JA 738; *see Initial Order* ¶ 85, JA 585 (rejecting Virginia DEQ letter –noted by

Petitioners, Br. 35 – on same point). Those factors weighed in favor of not extending FERC’s environmental review to the plant, and were not overcome by the fact that the pipeline is routed to serve the plant. *Rehearing Order* ¶ 42, JA 738. Accordingly, the Commission properly rejected Petitioners’ but-for claim on this point.

CONCLUSION

For the reasons stated, the Commission submits that the challenged Orders should be upheld in all respects, and the petition for review denied.

Respectfully submitted,

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December 24, 2003
Final Brief: February 12, 2004