

ORAL ARGUMENT IS SCHEDULED FOR SEPTEMBER 23, 2010

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

No. 09-1207

**MURRAY ENERGY CORPORATION, *ET AL.*,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

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**APRIL 28, 2010
FINAL BRIEF: JUNE 24, 2010**

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici:

All parties before this Court, and those that appeared before the agency, are identified in the Petitioners' opening brief.

B. Rulings Under Review:

1. *Rockies Express Pipeline LLC*, Letter Order, Docket No. CP07-208-000 (Mar. 19, 2009) ("Construction Order"), R. 587, JA 1; and
2. *Rockies Express Pipeline LLC*, 128 FERC ¶ 61,045 (July 15, 2009) ("Rehearing Order"), R. 739, JA 3.

C. Related Cases:

This case has not been before this Court or any other court. As listed in Petitioners' opening brief, Petitioners and Rockies Express Pipeline LLC, an intervenor here, are parties to two other cases concerning disputes arising from the pipeline facilities also at issue here:

1. *Rockies Express Pipeline LLC v. 4,895 Acres of Land, More or Less, in Butler County, Ohio, et al.*, No. 2:08-cv-00554-GLF-TPK (S.D. Ohio), a land condemnation action brought by Rockies Express Pipeline LLC, an intervenor here, under section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), against various property owners, including the Petitioners; and
2. *American Energy Corp. and Consolidated Land Co. v. Rockies Express Pipeline LLC*, No. 2:09-cv-00284-GLF-TPK (S.D. Ohio July 14, 2009), *appeal docketed*, No. 09-3864 (6th Cir. July 17, 2009), an

action brought under Ohio law by two of the Petitioners in this case seeking injunctive and declaratory relief against Rockies Express Pipeline LLC for alleged interference with property rights.

/s/ Holly E. Cafer
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June 24, 2010

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GLOSSARY

Br.	Petitioners' Brief
Certificate Clarification Order	<i>Rockies Express Pipeline LLC</i> , 125 FERC ¶ 61,160 (Nov. 10, 2008), R. 354, JA 362
Certificate Order	<i>Rockies Express Pipeline LLC</i> , 123 FERC ¶ 61,234 (May 30, 2008), R. 1, JA 258
Commission or FERC	Respondent Federal Energy Regulatory Commission
Construction Order	<i>Rockies Express Pipeline LLC</i> , Letter Order, Docket No. CP07-208-000 (Mar. 19, 2009), R. 587, JA 1
EIS	Environmental Impact Statement
JA	Joint Appendix
Murray	Petitioners Murray Energy Corporation, Consolidated Land Company, and American Energy Corporation
NGA	Natural Gas Act
Nyman 2007	D.J. Nyman & Associates, Engineering Assessment of Coal Mining Subsidence Effects on Rockies Express Pipeline (June 26, 2007), Appendix F to Rockies Express Pipeline LLC's Construction and Operations Plan (Dec. 23, 2008), JA 530
Nyman 2009	D.J. Nyman & Associates, Engineering Assessment Of Rockies Express Pipeline Subjected To Expected Ground Subsidence Over Long Wall Panels At Century Mine (Jan. 2009), Rockies Express Supplement to Env. Condition 147 Filing (Jan. 16, 2009), JA 743
Peng Report	Peng, S.S., Assessment of Subsidence Influence on Proposed Rockies Express Pipeline due to Longwall Mining (Dec. 18, 2008), Appendix D to Rockies Express's Construction and Operations Plan (Dec. 23,

	2008), JA 426
P	Paragraph number in a FERC order
psig	Pounds per square inch gauge
R.	Record item number
Rehearing Order	<i>Rockies Express Pipeline LLC</i> , 128 FERC ¶ 61,045 (July 15, 2009), R. 739, JA 3
Rockies Express	Rockies Express Pipeline LLC
Weir 2009	Weir International, Inc., Comments Relative To Compliance With FERC'S Environmental Condition No. 147 (Feb. 2009), Appendix B to Murray's Response to Rockies Express's Environmental Condition No. 147 Filing (Feb. 9, 2009), JA 835

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STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) reasonably determined on the basis of substantial record evidence that a natural gas pipeline company demonstrated compliance with safety conditions sufficient to allow the company to proceed with construction of a pipeline over mining reserves.

STATEMENT REGARDING JURISDICTION

This Court has jurisdiction pursuant to section 19(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b). As explained, *infra* at pp. 31-32, 47-49, to the extent Petitioner Murray Energy Corporation (“Murray”) attempts to use post-certificate compliance orders as the vehicle to challenge fundamental public interest findings made in the earlier certificate orders, not presented for judicial review, that effort represents an untimely collateral attack on now-final orders. *See Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 824-825 (D.C. Cir. 2008).

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum.

INTRODUCTION

In the orders on review, the Commission approved Rockies Express Pipeline LLC’s (“Rockies Express”) plans for preventing and mitigating risks associated with constructing approximately eight miles of natural gas pipeline traversing Murray’s coal reserves in eastern Ohio, and authorized Rockies Express to proceed with construction of this pipeline segment. *Rockies Express Pipeline LLC*, Letter Order, Docket No. CP07-208-000 (Mar. 19, 2009) (“Construction Order”), R. 587, JA 1, *reh’g denied*, 128 FERC ¶ 61,045 (July 15, 2009) (“Rehearing Order”), R. 739, JA 3.

In a prior proceeding, under NGA section 7(c), 15 US.C. § 717f(c), the Commission issued Rockies Express a certificate of public convenience and necessity authorizing the construction and operation of the REX-East Project, consisting of 639 miles of pipeline and other facilities extending from Missouri to Ohio, including the approximately eight miles now at issue. *Rockies Express Pipeline LLC*, 123 FERC ¶ 61,234 (May 30, 2008) (“Certificate Order”), R. 1, JA 258, *clarification granted in part and denied in part*, 125 FERC ¶ 61,160 (Nov. 10, 2008) (“Certificate Clarification Order”), R. 354, JA 362. And, in proceedings before that, the Commission authorized two other legs of the Rockies Express Pipeline System, extending from supply basins in Colorado and Wyoming to the interconnect with the REX-East Project in Missouri. Certificate Order at PP 4-6, JA 259-60. Only the Commission’s post-certification compliance orders for the REX-East Project, and not the Commission’s certification proceedings, are on review before this Court.

In the earlier certification proceedings, the Commission acknowledged potential risks associated with the construction and operation of the pipeline over Murray’s underground coal mining operations. *See* Certificate Order at PP 86-97, JA 282-86. Murray utilizes the longwall mining method, which results in the planned and controlled subsidence, or sinking, of the ground surface over the mined area. To address the identified risks, the Commission required Rockies

Express to develop and execute prevention and mitigation measures designed to preserve the integrity of the pipeline, while maintaining the safety of Murray's mining operation. *Id.* at PP 93, 97, JA 284, 285.

Throughout the certification proceeding, and in the instant compliance proceeding, Rockies Express solicited input and information from Murray to inform the development of pipeline construction and operation plans. As required by the Certificate Order, Rockies Express filed the plans, along with supporting technical reports submitted by Rockies Express's experts. Those plans call for: 1) specialized construction materials and techniques to prevent damage to the pipeline and underground mining operations; 2) post-construction measures for monitoring and assessing the potential for damage; and, 3) actions to be taken, including the potential excavation and relocation of the pipeline, in the event of a subsidence event. Rehearing Order at PP 31-78, JA 13-25.

Before the Commission, Murray challenged the Commission's compliance orders as inadequate to preserve the integrity of the pipeline and ensure the safety of the mine workers and surrounding public. In the Rehearing Order, the Commission denied these claims, finding that the required mitigation measures, along with Department of Transportation pipeline safety regulations, were adequate to ensure pipeline integrity and safety. *See, e.g., id.* at PP 35, 41, 46, 71, JA 14, 16, 17, 24.

STATEMENT OF THE FACTS

I. Statutory And Regulatory Framework

Under the NGA, the Commission has jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. § 717(b). Section 7(c) of the NGA, 15 U.S.C. § 717f(c), requires natural gas companies to obtain a certificate of public convenience and necessity from the Commission before they can construct or operate interstate natural gas pipeline facilities. Section 7 certificates are issued upon a finding that the pipeline facilities are “or will be required by the present or future public convenience and necessity” NGA § 7(e), 15 U.S.C. § 717f(e). “FERC can also attach ‘reasonable terms and conditions as the public convenience and necessity may require.’” *Public Utils. Comm’n of Cal. v. FERC*, 100 F.3d 1451, 1456 (9th Cir. 1996) (quoting NGA § 7(e), 15 U.S.C. § 717f(e)). Indeed, such certificates typically include numerous conditions requiring mitigation of impacts on affected landowners and the environment. *See National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1325-26 (D.C. Cir. 2004) (explaining the Commission’s pipeline certification procedures).

Post-certification proceedings addressing the pipeline’s compliance with conditions of the certificate are separate proceedings. *See National Comm. for the New River, Inc. v. FERC*, 433 F.3d 830 (D.C. Cir. 2005) (affirming the

Commission's treatment of an array of landowner and environmental objections to pipeline's compliance with the conditions of certification).

The Department of Transportation Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety, is responsible for safety in the design, construction, testing, operation, maintenance and emergency response of pipeline facilities. *See generally* 49 U.S.C. § 60101 *et seq.* The Department of Transportation's regulations specify standards for the safe construction and operation of the Nation's pipeline systems. *See* 49 C.F.R. pts. 190-92. In 1993, the Commission and the Department of Transportation executed a Memorandum of Understanding to provide guidance to their respective staffs and the regulated natural gas pipeline industry. Memorandum of Understanding Between the Department of Transportation and the Federal Energy Regulatory Commission Regarding Natural Gas Transportation Facilities (Jan. 15, 1993), available at <http://www.ferc.gov/legal/maj-ord-reg/mou.asp>. The Memorandum acknowledges the Department's authority to promulgate federal safety standards for natural gas pipelines, and the Commission's authority, under the NGA, to impose conditions upon pipelines to mitigate the impact of construction or operation on the environment. *Id.*; *see also* Rehearing Order at PP 11-12 (discussing the Department's responsibilities and requirements), JA 6-7.

II. The Commission's Proceedings

A. The Rockies Express Pipeline System

1. Background

Since 2005, the Commission has issued three certificates authorizing Rockies Express to construct a major new pipeline system extending from Colorado and Wyoming to Ohio. First, in 2005, the Commission authorized Rockies Express to construct over 300 miles of pipeline facilities to transport gas out of supply basins in Colorado and Wyoming to the Cheyenne Hub in Weld County, Colorado. Certificate Order at PP 4-5, JA 259-60. In 2007, the Commission authorized Rockies Express to construct over 700 miles of pipeline facilities to connect the Cheyenne Hub in Colorado to existing facilities in Audrain County, Missouri. *Id.* at P 6, JA 260. The third segment of the new system, the REX-East Project, is the sole subject of this appeal. (No other appeal has been filed concerning any other segment of the pipeline system.)

On April 30, 2007, Rockies Express filed its application, under section 7(c) of the NGA, for a certificate of public convenience and necessity authorizing the construction and operation of the REX-East Project, consisting of approximately 639 miles of pipeline facilities, extending from Audrain County, Missouri east to Monroe County, Ohio. Certificate Order at PP 1, 8, JA 258, 261. The Commission had previously conducted a pre-filing review of the REX-East Project, beginning in 2006. *Id.* at P 64, JA 271. The pre-filing review included

issuing public notice of the Commission's intent to prepare an environmental impact statement ("EIS"), which was transmitted directly to affected landowners.

Id. As part of that process, the Commission held nine public scoping meetings and received numerous comments. *Id.* at P 65, JA 277.

The Commission published notice of Rockies Express's application on May 21, 2007. Certificate Order at P 20, JA 265. Many interested individuals, businesses, and state and local authorities moved to intervene. *Id.* at PP 20-21, JA 265.

On November 23, 2007, the Commission issued a draft EIS, and again held public meetings in the project area to solicit comments on the proposal. *Id.* at P 67, JA 277-78. Murray filed late comments on the draft EIS on February 1, 2008, explaining that the pipeline would cross approximately eight miles of coal reserves that will potentially be mined using the longwall mining method. Murray Comments on Draft EIS (Jan. 21, 2008), JA 151. Murray noted that it had met with Rockies Express, and that Rockies Express had requested Murray to submit written comments. *Id.* Murray subsequently moved for late intervention in the certificate proceeding. Certificate Order at P 21, JA 265.

Longwall coal mining is a form of underground mining where large blocks of coal, up to 1,000 feet wide by 5,000 to 10,000 feet long, are excavated at one time through the use of mobile hydraulic roof supports. Rehearing Order at P 5

n.9, JA 5. As the coal is excavated, and the supports are moved, the land above the longwall section subsides in a controlled manner. *Id.* Subsidence “refers to the sinking or settling of the surface land after coal is extracted from the subsurface and the mine supports are removed.” *Id.* Murray’s comments on the draft EIS expressed concern that surface structures, including the pipeline, would be subject to damage when subsidence occurs. Murray Comments on Draft EIS, JA 151.

On April 11, 2008, the Commission issued the final EIS, which responded to the comments submitted on the draft EIS. The Department of Transportation participated in the Commission’s development of the EIS. *See* Final EIS at 1-8, JA 223. In response to Murray’s comments, the final EIS included additional discussion of the potential impact of subsidence on the pipeline and associated risks. Final EIS at 4-10 – 4-11, JA 234-35. Further, the final EIS recommended that Rockies Express file a plan detailing measures to monitor subsidence in areas of underground mines, to prevent damage to the pipeline in the event of subsidence, and to communicate with mining companies to prevent impacts from future mining activities. Final EIS at 4-11, JA 235; *see also* Final EIS, App. K, K1-50 – K1-51, JA 245-46.

Acting in response to Murray’s comments concerning potential conflicts between the pipeline and mining operations, on May 6, 2008, the Commission issued a data request seeking additional information from Rockies Express. FERC

Data Request (May 6, 2008), JA 247. The information requested included the precise location of mining operations and rights with respect to the pipeline and whether Rockies Express considered an alternative route that could avoid Murray's coal reserves by approaching Clarington Hub from the south. *Id.*, JA 249. Rockies Express responded, explaining that the eight-mile area of concern, between mileposts 621 and 629, is not currently being mined but that Murray may decide to mine the area in the future. Rockies Express Data Response at 2 (May 8, 2008), JA 252. Rockies Express explained, based upon information provided by Murray, that at the closest point, the pipeline construction right-of-way will be approximately 500 feet from an active longwall mining panel. *Id.* at 4-5, JA 254-55. The pipeline route will also traverse previously mined panels for 6 miles, between mileposts 629 and 635. *Id.* at 5, JA 255. With regard to an alternative southern route, Rockies Express explained that it only briefly considered this alternative, because rerouting is unnecessary since the pipeline can be safely constructed and operated over the coal reserves. *Id.* at 6, JA 256.

2. Certificate Order

On May 30, 2008, the Commission issued an order granting Rockies Express a certificate to construct and operate the REX-East Project, subject to conditions. Certificate Order at PP 1-2, JA 258. The Commission determined that the Project, as conditioned, is consistent with the public convenience and necessity,

finding, *inter alia*, that “there is a need for increased pipeline capacity to access gas supplies produced in the Rocky Mountain region.” *Id.* at P 34, JA 268. The Commission addressed potential Project impacts on a wide range of resources, including geologic resources, water resources, vegetation, wildlife, historic resources and air quality. *Id.* at PP 81-181, JA 281-303. The Commission imposed a number of conditions relating to safety, including requiring Rockies Express to develop specific mitigation plans to address construction of the pipeline near oil and gas wells (*id.* at P 81, JA 281), subsidence due to other geologic features (*id.* at P 83, JA 282), and the potential for landslides. *Id.* at P 82, JA 281. In addition to these conditions, the Commission emphasized that the pipeline must be constructed and maintained in accordance with Department of Transportation pipeline safety regulations. *Id.* at PP 106, 123, 182, JA 288, 291, 303.

Responding to Murray’s concerns, the Commission recognized that Murray intends to mine an eight-mile stretch of the pipeline route, between mileposts 621 and 629, and that the pipeline route crosses approximately six miles of previously longwall-mined panels, between mileposts 629 and 635. Certificate Order at PP 86-87, JA 282-83. The route also crosses a mine entrance at approximately milepost 630. *Id.* at P 88, JA 283.

With regard to the unexploited coal reserves, the Commission explained that the Ohio Department of Natural Resources requires that an underground mine

applicant prepare a subsidence prevention and control plan, and an inventory of surface features and structures, including pipelines. Certificate Order at P 92, JA 284. Reviewing the proposed pipeline segment between miles 621 and 629, the Commission noted numerous residences and an electric transmission line above the mining reserves, and concluded that the “existing features . . . would offer as much of a limitation on mining as would the proposed pipeline facilities.” *Id.*, JA 284.

In any event, the Commission explained that Rockies Express “developed measures to address the coal industry’s concerns” including: 1) the use of specialized pipe in mining areas designed to better withstand the stress of ground subsidence; 2) the installation of mainline valves that will automatically close at a sudden drop in pressure; 3) the use of granular backfill to reduce friction during a subsidence event; and 4) potential rerouting around certain topographic features such as steep slopes. Certificate Order at P 93, JA 284.

In addition to these measures, the Commission required Rockies Express to comply with Environmental Condition 50, which provides as follows:

Prior to the start of construction, Rockies Express shall file with the Secretary, for review and written approval by the Director of [the Office of Energy Projects], a Mining Subsidence Plan that at a minimum addresses the following:

- a. this plan shall indicate how areas where the pipeline would cross underground mines would be monitored during the life of the project and what steps would be taken if the area were to destabilize in the future; and

b. communications with mining companies planning to use longwall or room and pillar mining techniques in areas of the pipeline. The plan shall outline the monitoring protocol and mitigation measures that may be implemented to prevent subsidence impacts from these specific types of mining to the pipeline.

Certificate Order at Env. Cond. 50, JA 324-25.

Moreover, the Commission confirmed that “Rockies Express will be fully responsible for monitoring and inspecting of the pipeline, properly implementing mitigation measures, any repairs or relocation to the pipe that is determined necessary, and the costs associated with these activities.” Certificate Order at P 93, JA 284. Accordingly, the Commission “conclude[d] that Rockies Express’[s] proposed measures are adequate to ensure safety and will not compromise longwall coal mining operations in the area.” *Id.*, JA 284.

With regard to Murray’s request to reroute the pipeline, the Commission noted that, “although no specific alternative route” was identified, rerouting to avoid Murray’s mining interests would impact between 277 and 346 acres of land, much of which is forested. Certificate Order at P 95, JA 285. In light of the conditions imposed, and Rockies Express’s agreement to be responsible for any costs of monitoring or mitigating the pipeline, the Commission did not recommend rerouting. *Id.* at P 96, JA 285.

In order to allay Murray's concerns, however, the Commission imposed a new mitigation condition on Rockies Express, not proposed in the final EIS.

Certificate Order at P 97, JA 285-86. Condition 147 requires:

Prior to the start of construction from [mileposts] 621 to 635, Rockies Express shall file with the Secretary, for review and written approval by the Director of OEP, a construction and operations plan, developed in collaboration with the Murray Companies, for the segment of the pipeline that traverses the coal mining reserves held by the Murray Companies. The plan shall address the primary concern of maintaining pipeline integrity and operation while not impeding the mining operation. If the collaboration does not culminate in a plan, Rockies Express shall file with the Secretary, for review and written approval by the Director of OEP, an alternative pipeline route that avoids the Murray Companies' coal reserves.

Id. at Env. Cond. 147, JA 341.

3. Certificate Clarification Order

Murray sought rehearing of the Certificate Order, seeking clarification on various points. Certificate Clarification Order at P 1 & n.1, JA 362. On November 10, 2008, the Commission granted in part and denied in part the request clarifications. *Id.* First, at Murray's request, the Commission clarified that the Mining Subsidence Plan required by Environmental Condition 50 should address potential impacts at the pipeline crossing of the mining entrance. *Id.* at P 7, JA 364.

Murray's second request for clarification concerned the relative scope of Commission jurisdiction in relation to federal and state mining authorities. The Commission explained that it has exclusive jurisdiction under the NGA to regulate

the facilities natural gas companies use in interstate commerce. Certificate Clarification Order at P 11, JA 365. At the same time, however, “mining issues, such as subsidence prevention or control plans to be prepared by mine operators, involve federal and state mining regulations that are beyond the scope of this proceeding.” *Id.* The Commission also clarified that Rockies Express’s proposed safety measures, *e.g.*, the installation of thicker-walled pipe and mainline valves, will be included in the plans developed under Conditions 50 and 147. *Id.* at P 14, JA 366. And, the Commission confirmed that it did not make a “specific finding about . . . any alternative southern route that may be proposed in the future.” *Id.* at P 17, JA 366. The Commission acknowledged, consistent with Murray’s request, that it did not prejudge the compliance plans. *Id.* at PP 14, 20, JA 366, 367.

B. The Post-Certification Proceedings

Rockies Express filed its proposed Mining Subsidence Plan on June 19, 2008 (R. 65, JA 342), and a Construction and Operations Plan on December 23, 2008 (R. 434, JA 370), as supplemented on January 16, 2009 (R. 466, JA 724) and February 23, 2009 (R. 528, JA 1163). Rockies Express’s filings included several technical reports prepared by experts, including: 1) an assessment of subsidence influence due to longwall mining, by Dr. Syd S. Peng (Peng Report, JA 426); 2) engineering assessments of coal mining subsidence, by Dr. D. J. Nyman (Nyman 2007, JA 530; Nyman 2009, JA 743); and 3) a report on pipeline longwall mine

mitigation, by Mr. Robert Francini (JA 497). *See* Rehearing Order at P 8, JA 6.

Rockies Express stated that it had shared a draft Construction and Operations Plan with Murray, and received comments from Murray before revising and filing the Plan. *Id.* at PP 25-28, JA 11-12.

Briefly, the Construction and Operations Plan requires three types of mitigation: 1) construction mitigation; 2) post-construction mitigation; and 3) pipeline monitoring and inspection. Construction and Operations Plan, Sec. 5, JA 414-19. Rockies Express's construction mitigation includes: 1) implementation of enhanced welding materials and procedures, including so-called overmatching welds; 2) the use of heavier wall thickness pipe; 3) avoidance of steep slopes; 4) the used of a special trench design in areas of consolidated rock; and 5) the recording of specific as-built conditions. *Id.* at 13-15, JA 415-17. For post-construction mitigation, the Plan sets forth a procedure to be followed at the time Murray notifies Rockies Express that it will be conducting mining activities. *Id.* at 15-17, JA 417-19. The process includes integrity and stress analyses, followed by modeling to predict ground movement from subsidence. This analysis will be used to inform a formal mitigation plan, which will include measures appropriate for the circumstances, ranging from monitoring alone, to exposing the pipeline for monitoring, and even taking the pipeline out of service and repositioning it. *Id.* at 16, JA 418.

The Commission staff facilitated technical conferences between the parties on August 5, 2008 and February 17, 2009 for the purpose of discussing Rockies Express's Mining Subsidence Plan and Construction and Operations Plan. Rehearing Order at P 9, JA 6. During the February 17, 2009 technical conference, the Commission requested additional information from Rockies Express. Rockies Express's February 23, 2009 response, JA 1163, including a supplemental report from Dr. Nyman, addressed the effects of pipeline trench blasting on an underground coal mine, *id.* at 2, JA 1164, the timing of post-construction mitigation measures, *id.* at 5-6, JA 1167-68, and the special trench design, including an increase in the planned depth of cover. *Id.* at 7-8, JA 1169-70.

1. Construction Order

On January 7, 2009 (R. 452, JA 688), as supplemented on February 23, 2009 (R. 529, JA 1179), Rockies Express sought authorization to commence construction of miles 608.9 through 639.1 of the pipeline (Spread K), which includes the eight-mile segment traversing Murray's coal reserves. The Commission, acting through the Chief, Gas Branch 2, Office of Energy Projects, authorized construction of Spread K on March 19, 2009. Construction Order at 1, JA 1. The Construction Order granted approval "in accordance with" numerous Environmental Conditions, including, as relevant here, 50 and 147. *Id.* Further,

the Order reiterated that “Rockies Express must comply with all applicable remaining terms and conditions of the [Certificate] Order.” *Id.* at 2, JA 2.

Murray sought rehearing of the Construction Order, claiming that the Chief, Gas Branch 2 lacked delegated authority to issue the Order and that Rockies Express did not adequately collaborate with Murray in the development of the Construction and Operations Plan. *See* Request for Rehearing (Mar. 27, 2009), R. 598, JA 1208. As to the substance of the plans, Murray argued that the Construction and Operations Plan is deficient and unsafe, and fails to protect Murray’s coal mining operations. *Id.* Murray also filed a request for stay and reconsideration of an earlier March 13, 2009 order authorizing tree-clearing on portions of Spread K. Rehearing Order at P 16, JA 8. (The Commission found these requests moot in the Rehearing Order, *id.*, discussed below, and Murray’s initial brief does not challenge any tree-clearing determination.)

On June 11, 2009, Commission staff requested an update from Rockies Express on its construction schedule in the vicinity of Murray’s coal reserves. R. 671, JA 1281. Rockies Express filed a response and a detailed construction and blasting schedule on June 15, 2009. R. 676, JA 1286. Murray and Rockies Express both submitted several responsive pleadings. Further, on June 29, 2009 (R. 708, JA 1325), Rockies Express filed its final protocol for communications during blasting and, on July 9, 2009 (R. 725, JA 1328), Rockies Express filed its

final protocol governing communications during ground subsidence and construction and mining activities in the vicinity of the pipeline.

2. Rehearing Order

On July 15, 2009, the Commission issued its Rehearing Order, granting rehearing in part and denying rehearing in part. Rehearing Order at P 1, JA 3. Consistent with Commission regulations and practice, the Commission affirmed the Director of the Office of Energy Project's delegation of authority to the Chief, Gas Branch 2 in this proceeding, *id.* at P 21, JA 10, and "adopt[ed] the Director's action, through his designee, as [the Commission's] own." *Id.* at P 23, JA 11. As to the collaboration required by Environmental Condition 147, the Commission confirmed that Rockies Express's actions, including obtaining and responding to Murray's comments on the draft plan, satisfied the collaboration requirement. *Id.* at P 30, JA 13. Thus, the Commission found that Rockies Express was not required to submit a proposed alternative route. *Id.* at P 84, JA 28.

The Commission also addressed Murray's concerns with the Construction and Operations Plan. First, the Commission repeatedly emphasized that the requirements of the Construction and Operations Plan are in addition to any measures required by the Department of Transportation and that "Rockies Express is required to comply with [the Department's] regulations." *Id.* at P 42, JA 16; *see also id.* at PP 12, 55, 76, 77, JA 7, 20, 27, 27.

The Commission, like Rockies Express's experts, acknowledged the risks posed by landslides and subsidence. Rehearing Order at PP 35, 41, 50, 54, JA 14, 16, 19, 54. But the Commission also found that Rockies Express's mitigation measures, as supported by Rockies Express's expert reports, will adequately protect the integrity of the pipeline when implemented in conjunction with Department of Transportation requirements. *Id.* at PP 35-36, 41-42, 71, JA 14-15, 16, 24. The Commission specifically determined that Rockies Express's pipeline trench design will mitigate any damage to the pipeline, and found the changes in the design, including increasing the depth of cover, appropriately responsive to the development of new information. *Id.* at P 46, JA 17-18.

Finally, the Commission explained that it "share[s] Murray's concerns for the safety of its workers and the public at large." Rehearing Order at P 71, JA 24. The Commission found, however, Rockies Express's proposed blasting activities "unlikely to have any impacts on miners working below areas being blasted." *Id.* at P 73, JA 24. Nevertheless, out of an abundance of caution, the Commission added a new condition requiring Rockies Express to provide the Commission with proof that both Murray and the Ohio Department of Natural Resources received actual advanced notice of the planned blasting. *Id.* If blasting activities compel Murray to clear mining personnel from the affected areas (at Murray's sole option), Rockies Express must reimburse Murray for any associated costs. *Id.* The

Commission also approved the communications protocols as reasonable. *Id.* at P 75, JA 25.

3. Later Developments

Rockies Express commenced clearing activities in May 2009, and other construction activities in the following months. R. 676, JA 1288. On August 17, 2009, Rockies Express notified the Commission that it had excavated the portion of the pipeline route over Murray's holdings without conducting blasting. Rockies Express Letter to FERC, Docket No. CP07-208-000 (Aug. 17, 2009).

On November 9, 2009, the Commission granted Rockies Express's request to place the REX-East Project into service. Letter Order, Authorization to Commence Service, Docket No. CP07-208-000 (Nov. 9, 2009).

SUMMARY OF ARGUMENT

Of the approximately 1,700 miles encompassing the Rockies Express Pipeline System, the instant case addresses only eight miles of pipeline near the terminus of the System in Monroe County, Ohio. The Commission's orders issuing a certificate of public convenience and necessity for the REX-East Project, the third leg of the System, recognized the challenges of safely constructing and operating the pipeline segment that crosses Murray's coal mining reserves underlying those eight miles of pipeline. As such, in the earlier Certificate Order, the Commission required Rockies Express to develop specific plans addressing particular construction methods, post-construction monitoring and mitigation, and subsidence mitigation measures to be implemented at the time of a subsidence event.

In the orders on review here, the Commission approved the plans that Rockies Express subsequently developed to ensure the integrity of the pipeline and the safety of Murray's mine workers and the public. Murray challenges the plans as insufficient, and expresses its preference for rerouting the pipeline around Murray's holdings. But Rockies Express consulted with Murray throughout these compliance proceedings, and engaged experts trained in analyzing pipeline response to subsidence and other geologic hazards to assist with the preparation of its plans, in full compliance with pre-conditions to pipeline construction. The

Commission completed its own review of the proposed prevention and mitigation measures, and concluded that the pipeline may be safely constructed and operated consistent with these conditions. In light of substantial record evidence underlying the Commission's conclusion, and because Rockies Express satisfied the certificate requirement to collaborate with Murray, the Commission need not further consider an alternative pipeline route.

Finally, the Commission is not alone in acting to ensure continuing vigilance over the safety of the Rockies Express pipeline, for the Commission expressly required Rockies Express to comply with the Department of Transportation's pipeline safety regulations, and Rockies Express has acknowledged this mandate. In these circumstances, the Commission reasonably concluded that Rockies Express, in compliance with the various conditions designed to preserve the integrity of the pipeline and mining operations, could commence pipeline construction.

ARGUMENT

I. Standard Of Review

Commission orders are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A); *see also, e.g., National Comm. for the New River*, 373 F.3d at 1327 (pipeline construction certificate); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75 (D.C. Cir. 2004) (certificated boundary of natural gas storage field). Under this deferential standard, the Court affirms the Commission’s orders so long as the agency has “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted).

The Commission’s factual findings, if supported by substantial evidence, are conclusive. *See* 15 U.S.C. § 717r(b). The substantial evidence standard “requires more than a scintilla,” but “can be satisfied by something less than a preponderance of the evidence.” *B&J Oil & Gas*, 353 F.3d at 77 (quotation omitted). “When an agency ‘is evaluating scientific data within its technical expertise,’ an ‘extreme degree of deference to the agency’ is warranted.” *National Comm. for the New River*, 373 F.3d at 1327 (quoting *B&J Oil & Gas*, 353 F.3d at 76).

Merely pointing to some contradictory evidence is insufficient, as “the question [the Court] must answer . . . is not whether record evidence supports [petitioner’s] version of events, but whether it supports FERC’s.” *Florida Mun. Power Ag. v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (quoting *Florida Mun. Power Ag. v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003)). Moreover, “where, as here, FERC decides between ‘disputing expert witnesses,’” “the Court applies a ‘particularly deferential standard’ of review.” *Id.* (quoting *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 746 (D.C. Cir. 2001)); *see also Wisconsin Valley*, 236 F.3d at 746-47 (“the presence of disputing expert witnesses” is “‘a factual dispute the resolution of which implicates substantial agency expertise,’” where the Court “‘must defer to ‘the informed discretion of the responsible federal agencies’”) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989)).

II. The Orders On Review Are Consistent With Commission Regulations And Practice Concerning Delegations Of Authority.

Murray’s claim that the Construction Order is invalid because it was not issued directly by the Director of the Office of Energy Projects, Br. 41-42, is without merit. The Commission reasonably interpreted its regulations and found that the Director of the Office of Energy Projects properly delegated authority to issue the Construction Order to the Chief, Gas Branch 2. Rehearing Order at PP

21-23, JA 10-11. And, in any event, the Commission adopted the Construction Order as its own. *Id.* at P 23, JA 11.

The Certificate Order specifically delegated authority to the Director of the Office of Energy Projects to determine compliance with Environmental Conditions 50 and 147, and numerous other conditions. *See* Certificate Order at Env. Conds. 50, 147, JA 324, 341. Murray argues that the Director may not further delegate this authority under 18 C.F.R. § 375.308. Br. 42. As explained in the Rehearing Order, however, “Commission practice clearly demonstrates . . . that the Director may further delegate such authority to a designee in instances where the Director deems it appropriate.” Rehearing Order at P 21, JA 10 (citing *East Tennessee Natural Gas Co.*, 106 FERC ¶ 61,159 at P 12 (2004)). The Commission’s reasoning is consistent with 18 C.F.R. § 375.308, which does not distinguish between the Director and the Director’s designee in describing the types of actions each may take. 18 C.F.R. § 375.308 (“The Commission authorizes the Director or the Director’s designee to . . .”).

Commission regulations further provide that an appropriate Director’s designee is a “deputy . . . , the head of a division, or a comparable official.” 18 C.F.R. § 375.301(b). Here, the Commission specifically found that the Chief, Gas Branch 2, “[w]ith respect to clearances for environmental conditions and authorization to begin construction, . . . has direct responsibility for ensuring

compliance with the conditions [and] is appropriately situated to evaluate whether those conditions have been met” Rehearing Order at P 23, JA 10; *see also id.* at P 22 (the Chief, Gas Branch 2, has “direct daily responsibility over environmental compliance matters”), JA 10. Indeed, the Chief, Gas Branch 2 issued at least 12 other orders on compliance with the Certificate Order. On this basis, the Commission reasonably could determine that the Chief, Gas Branch 2 is a “comparable official” within the meaning of 18 C.F.R. § 375.301(b) and therefore an appropriate designee of the Director. Rehearing Order at P 23, JA 10. *See, e.g., Amerada Hess Pipeline Corp. v. FERC*, 117 F.3d 596, 600 (D.C. Cir. 1997) (“an agency’s interpretation of its own regulations is entitled to considerable deference”).

This Court rejected a similar objection to the Commission’s exercise of delegated authority in *National Committee for the New River*. 433 F.3d at 833. In *National Committee*, this Court deemed “frivolous” a claim that the Director of the Office of Energy Projects could not delegate his authority to issue compliance orders, even those concerning rerouting of previously-certificated pipeline segments, to the deputy director. *Id.* Here, as in *National Committee*, “this Court has no reason to assume that a rogue deputy surreptitiously issued FERC’s order against the Director’s will.” *Id.*

Finally, to the extent that there is any remaining uncertainty as to the legitimacy of the Construction Order, this matter is entirely resolved by reference to the Rehearing Order. In the Rehearing Order, the Commission “adopt[ed] the Director’s action, through his designee, as [its] own.” Rehearing Order at P 23, JA 11; *see also id.* at P 21 (“to the extent it is necessary, we hereby affirm the Director’s delegation of authority in this proceeding”), JA 10. The Commission’s adoption of the Construction Order is all that is necessary for ratification. Indeed, as explained in the following sections, much of Murray’s remaining merits argument is similarly flawed, to the extent its argument (Br. 30-40) is based entirely on the Construction Order, without reference to the Commission’s additional explanation in its Rehearing Order. *See DTE Energy Co. v. FERC*, 394 F.3d 954, 960 (D.C. Cir. 2005) (rehearing “afford[s] the Commission an opportunity to invoke its expertise or to correct any errors prior to judicial review”); *see also Northwest Pipeline Corp. v. FERC*, 863 F.2d 73, 77-78 (D.C. Cir. 1988) (“The obvious (and salutary) purpose of the [NGA] Section 19(b) exhaustion requirement is to afford the Commission an opportunity to bring its knowledge and expertise to bear on an issue before it is presented to a generalist court”).

III. The Commission Reasonably Concluded That Rockies Express Satisfied The Collaboration Requirement In Condition 147, And Therefore Was Not Required To Propose An Alternative Route.

Environmental Condition 147 required Rockies Express to develop the Construction and Operations Plan “in collaboration with” Murray. Certificate Order, Cond. 147, JA 341. Further, Condition 147 provides that “[i]f the collaboration does not culminate in a plan, Rockies Express shall file . . . an alternative pipeline route that avoids Murray Companies’ coal reserves.” *Id.* Murray claims that the collaboration between Murray and Rockies Express “indisputably” did not culminate in a plan. Br. 33-34.

As the Commission explained in the Rehearing Order, Environmental Condition 147 required Rockies Express to collaborate with Murray, but “did not require that Rockies Express necessarily obtain Murray’s concurrence.” Rehearing Order at P 29, JA 12. Murray’s suggestion that the phrase “culminate in a plan” necessarily implies concurrence is unavailing. Br. 33. The Certificate Order required Rockies Express to consult or collaborate with numerous individuals and entities, and Environmental Condition 147 is no different. If the Commission had intended to require concurrence, it would have used that precise term, as it did elsewhere in the Certificate Order. *See* Certificate Order, Env. Cond. 114c (requiring Rockies Express to submit “evidence of landowner concurrence if the construction work area and fencing will be located within 10 feet of a residence”),

JA 336. The Commission’s reasonable interpretation of its own order in determining that collaboration does not require concurrence warrants deference. *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 799 (D.C. Cir. 2007) (“we defer to the Commission’s interpretations of its own precedents”); *see also Transcontinental Gas Pipe Line Corp. v. FERC*, 922 F.2d 865, 871 (D.C. Cir. 1991) (“it is well established that an agency’s interpretation of the intended effect of its own orders is controlling unless clearly erroneous”).

The Commission thoroughly examined the record of communications between Rockies Express and Murray in determining that Rockies Express satisfied the collaboration requirement of Condition 147. In reaching this conclusion, the Commission relied on the following undisputed facts: 1) the parties exchanged information over a period of time; 2) Rockies Express provided Murray with a draft of the Plan approximately one month before filing it with the Commission; 3) the parties met after Murray had the opportunity to review the draft, and Murray provided comments on the plan to Rockies Express; 4) Rockies Express “made changes to the draft plan to take into account Murray’s comments;” and 5) the parties participated in three teleconferences for the purpose of discussing the plan, two of which Commission staff also attended. Rehearing Order at P 30, JA 13.

Murray protests that the information exchange was “largely one-sided,” Br. 33, but does not explain why it is problematic for Rockies Express to obtain information from Murray in order to properly inform the plan Rockies Express – as the Commission-regulated pipeline – was charged with developing. Nor does Murray specify information it sought from Rockies Express but did not receive. Moreover, Murray’s complaints primarily concern Rockies Express’s rejection of Murray’s alternative route. *See* Br. 33 (alleging three reasons, two of which concern Rockies Express’s rejection of Murray’s alternative, why Rockies Express did not fulfill the collaboration requirement). But the Certificate Order required collaboration in the development of the Construction and Operations Plan, not in the development of an alternative route.

Murray endeavors to make this case something that it is not, by claiming that the Commission was, nevertheless, required to consider an alternative route avoiding Murray’s coal reserves. Br. 34-35. As discussed in part V below, Murray’s challenge is time-barred. The Certificate Order, in which the Commission made the section NGA 7(c) finding that the pipeline, including the segment traversing Murray’s coal reserves, is required for the public convenience and necessity, *see* Rehearing Order at P 81, JA 27, is now final. Any challenge to that finding is a collateral attack on the unappealed Certificate Order. *See National Comm. for the New River*, 433 F.3d at 834 (rejecting on *res judicata* grounds

petitioner's challenge to a post-certification compliance order claiming that FERC failed to consider an alternative route, where petitioner had raised, and the Commission and Court had denied, the same claim in the prior certification proceeding).

In any event, the Commission explained that Murray could have, but did not, propose an alternative route with enough specificity that it could have been studied prior to completion of the final EIS. Rehearing Order at P 83, JA 28. Moreover, the Commission, based upon the alternative route description Murray did provide during a technical conference *after* the Certificate Order, explained that the alternative would impact additional wetlands, waterbodies, roads, and new forested land, and also would come within 100 feet of 28 additional structures. *Id.* at P 84, JA 28. For these reasons, the Commission understandably declined to further consider the belated alternative.

The issue here is whether the Commission reasonably determined that Rockies Express satisfied the requirement to collaborate with Murray in the preparation of the Construction and Operations Plan. The totality of the record supports the Commission's finding that "Rockies Express worked with the Murray Companies to develop a plan that would comply with Environmental Condition 147." *Id.* at P 30, JA 13. Having satisfied the collaboration condition, Rockies

Express was not required to propose, and the Commission was not obligated to consider, an alternative route avoiding Murray's coal reserves.

IV. The Commission Reasonably Determined, On The Basis Of Substantial Record Evidence, That Rockies Express's Proposed Mitigation Measures Will Ensure The Safety And Integrity Of The Pipeline And Will Not Impede Mining Operations.

As expressed in the Rehearing Order, the Commission shares Murray's concerns for the safety of its mine workers and the public, and for the integrity of the pipeline. Rehearing Order at P 71, JA 24. Environmental Conditions 50 and 147 are not standard conditions, but rather were imposed here in direct response to Murray's allegations regarding particular safety risks posed by the construction and operation of the pipeline over Murray's longwall mining operations. *See* Certificate Order at PP 93, 97, JA 284, 285.

Murray contends that the Commission erred in allowing Rockies Express to proceed with construction of the pipeline over Murray's coal reserves, arguing that Rockies Express's plans are inadequate to maintain the safety of the mines and the integrity of the pipeline. *See, e.g.*, Br. 45. Both Rockies Express and Murray submitted technical, expert reports in support of their respective positions. The Commission, following its own review, reasonably concluded that, consistent with the conditions in the Certificate Order, as supplemented by the requirements of the Rehearing Order, the pipeline could be constructed and operated without posing a significant safety risk. *See* Rehearing Order at P 71, JA 24.

A. The Commission Reasonably Concluded That Rockies Express's Experts Are Qualified To Provide Expert Opinions In This Proceeding.

Murray contends that Rockies Express's plans did not include "supporting engineering reports signed by qualified engineering experts" and that Rockies Express's experts are not "registered professional engineer[s] in Ohio." Br. 48. The Commission reviewed the "academic and professional qualifications" of Rockies Express's experts and found them "fully qualified to provide expert opinions in this proceeding." Rehearing Order at P 49, JA 18. In fact, Rockies Express selected Dr. Peng, the Chair of the Mining Engineering Department at West Virginia University, upon Murray's recommendation. *Id.* at P 48, JA 18. Nor does Murray dispute that Dr. Nyman is an "internationally recognized expert[]" in analyzing the ability of buried pipelines to withstand the effects of ground movement, including both plan and unplanned subsidence caused by mining." *Id.* Dr. Nyman holds a Ph.D. in Civil Engineering (Structural) and has thirty-five years of experience in the areas of structural engineering, stress analysis, engineering mechanics and failure investigations. Rockies Express Presentation, Consultant Information (D.J. Nyman) (Feb. 19, 2009), R. 522, JA 1055-65. Similarly, Murray does not question that Mr. Francini is an expert, with over twenty years of experience, in analyzing the response of pipelines to subsidence. Rehearing Order at P 48, JA 18; *see also* Rockies Express Presentation, Consultant Information (R.

Francini) (Mr. Francini holds a Master of Science in Engineering Mechanics), JA 1120. *See also* Construction and Operations Plan, Exp. Statement at 16-22 (summarizing expert qualifications and testimony), JA 387-93.

Further, the Commission’s jurisdiction extends to the safe construction and operation of *the pipeline* in light of mining-induced subsidence. Certificate Clarification Order at P 11, JA 365. As the Commission pointed out, Murray itself is subject to state and federal laws requiring it to develop plans for longwall coal mining, including a subsidence prevention and control plan. Certificate Order at P 92, JA 284. The Commission reasonably found Rockies Express’s experts well-qualified in the analysis of pipeline response to subsidence, the precise matter before the Commission. Their testimony is deserving of this Court’s respect.

B. The Commission Reasonably Acknowledged The Risks Of Constructing And Operating The Pipeline Over Murray’s Mining Reserves, But Found, On The Basis of Substantial Evidence, That The Pipeline Can Be Safely Constructed And Operated In This Area.

Murray is correct that Rockies Express’s experts acknowledged the risks that mining-induced subsidence poses for both the pipeline and the surrounding public. Br. 49. The Commission also acknowledged these risks. Rehearing Order at PP 35, 71, JA 14, 24. Both the Commission and Rockies Express’s experts concluded, “[h]owever, [that] this does not mean that a pipeline cannot be constructed and operated safely in this area.” *Id.* at P 35, JA 14; *see also id.* at P 71 (pipeline

construction and operation, as conditioned by the Commission, “will not constitute a significant safety risk”), JA 24.

In particular, Murray claims that Dr. Peng’s report suggests that Rockies Express’s safety measures are insufficient, in that the use of heavier-walled pipe alone may be insufficient to prevent pipeline damage during subsidence. *See* Rehearing Order at P 37, JA 15. The Commission “concur[red] with Murray’s statement . . . that relying solely on wall thickness would not be sufficient protection,” but explained that Rockies Express is employing other measures, “including a special trench design and field bends that, along with the heavier-walled pipe, will protect the pipeline when implemented in conjunction with [Department of Transportation] requirements.” Rehearing Order at P 41, JA 16; *id.* at P 36 (noting that the route will avoid steep slopes), JA 15. Thus, the Commission reasonably found that Dr. Peng’s assessment was used “as a baseline,” from which Rockies Express developed additional protective measures. *Id.* at P 50, JA 19; *see id.* at P 38, JA 15; *see also* Construction and Operations Plan, Exp. Stmt. at 17, JA 388.

Murray also relies, Br. 49, on Dr. Nyman’s statement “[w]hen feasible, pipelines should be routed to avoid areas that may be subject to future mining activity.” Nyman 2007 at 1, JA 543. As the Commission pointed out in the Rehearing Order, however, Dr. Nyman “goes on to state it is practicable to protect

pipelines from the effects of subsidence through design and construction or field mitigation measures once mining is scheduled to happen, or both.” Rehearing Order at P 54, JA 19; Nyman 2007 at 1, JA 543; *see also* Nyman 2009 at 1, 4, 16-17, JA 751, 754, 766-67. Further, Dr. Nyman concluded that “the activity associated with protecting a modern, welded steel pipeline against subsidence effects is relatively minor compared to the potential impact of subsidence on buildings, structures, road, bridges, etc.” Rehearing Order at P 54 (quoting Nyman 2009 at 1, JA 751), JA 19. Murray’s efforts to undermine the value of Rockies Express’s supporting evidence, by focusing on isolated snippets of expert testimony taken out of context, must fail.

Murray next challenges the adequacy of the special trenching method Rockies Express employed to construct the pipeline in the vicinity of Murray’s coal reserves. Br. 51. Because eighty percent of the pipeline route through Murray’s coal reserves consists of consolidated bedrock, Rockies Express developed a special trenching design to mitigate the effects of any subsidence event. *See* Construction and Operations Plan, Exp. Stmt. at 4, JA 375; *id.*, Sec. 5.1 at 14-15, JA 416-17. This method includes the use of granular backfill, using additional depths of backfill beyond that required by industry standards, and using foam or sandbag-constructed breakers to retain the backfill on steep slopes. *See* Rehearing Order at PP 44-45, JA 17; *see also* Construction and Operations Plan,

Sec. 5.1 at 14-15, JA 416-17; *see also id.*, Exp. Statement at 4 n.16, JA 375. The Commission concluded that the design “will help reduce stress on the pipeline in the event of a ground disturbance or during periods of subsidence.” Rehearing Order at P 46, JA 17. In particular, the Commission explained that the use of foam or sandbag breakers is consistent with Rockies Express’s Commission-approved Upland Construction Plan, and will reduce water drainage and soil erosion around the pipeline in the trench. *Id.*; *see* Rockies Express Response to Commission Staff at 3 (Feb. 23, 2009), R. 528, JA 1165.

Murray complains that the trench design is experimental, pointing to changes in the design Rockies Express developed during the Commission’s proceeding. Br. 18. The Commission, however, reasonably found that Rockies Express’s adaptation of its plan to new information is both expected and appropriate. Rehearing Order at P 46, JA 18. The change in Dr. Nyman’s analysis of the appropriate depth of cover over the pipeline, the Commission found, was made “to take into account the more specific information about the project area that he lacked when his first report was prepared.” *Id.* at P 46, JA 18; *see* Nyman 2009 at 11 (noting reliance on pipeline coordinates provided by Kiefner & Associates (Francini)), JA 761. Indeed, the change to Rockies Express’s depth of cover specification was made following the technical conference with Murray and Commission staff. Rehearing Order at P 45, JA 17; *see* Rockies Express Response

to Commission Staff at 7-8 (explaining adoption of increase in planned depth of cover), JA 1169-70.

Thus, the Commission reasonably concluded that the trench design is “appropriate under the circumstances.” Rehearing Order at P 46, JA 17; *see also* Rockies Express Response to Commission Staff at 7 (noting that this design has been used “for at least 25 years to enable pipelines to withstand geotechnical displacements [*e.g.*, fault crossings] that are much more severe than those predicted for the mine subsidence area”), JA 1169. The trench design is not akin to a “novel” theory, Br. 52, but rather is the considered result of Rockies Express’s scientific evaluation of pipeline stress based on established methods, and the Commission’s independent review of the same.

Murray also characterizes as inadequate Rockies Express’s plan to reduce the operating pressure in the pipeline at the time of any subsidence event. Br. 14, 51. The pipeline’s maximum design operating pressure is 1480 pounds per square inch gauge (“psig”). Construction and Operations Plan, Sec. 5.2, JA 418. The Construction and Operations Plan permits a range of mitigation actions to be taken at the time of a subsidence event, but the Plan explains that “[u]nder any scenario that leaves the line in service during subsidence the line pressure would be reduced to no greater than 1200 [psig] during the subsidence event.” *Id.*, JA 418. Indeed,

Murray acknowledges (Weir 2009 at 14-15, R. 504, JA 851-52) Rockies Express's determination that

operating pressure has only a minimal effect, through its effect on the pipeline's hoop stress, on the overall stress level of the pipeline. . . . The thicker wall pipe that Rockies Express will install over any potential future mining area increases the strength of the pipe and will allow the pipeline to operate at 1200 psig (or even 1480 psig) with a hoop stress that is below what [American Society of Mechanical Engineer's Standard] B31.8 allows. . . . As a result, a thicker wall pipe is able to operate at a higher pressure with hoop stress comparable to that of a thinner wall pipe operating at a lower pressure.

Construction and Operations Plan, Exp. Statement at 26, JA 397.

Murray points no data or analysis to contradict Rockies Express's analysis, but merely discussion of the potential effects of a pipeline rupture. Weir 2009 at 14-15, JA 851-52. Moreover, as the Commission explained, reducing the pressure in the pipeline is but one potential mitigation measure. Depending on the site-specific details and, in particular, if required by the Department of Transportation, the pipeline may be taken "completely out of service." Rehearing Order at P 42, JA 16; *id.* ("For example, if [the Department of Transportation] requires Rockies Express to excavate and expose the pipeline during subsidence events, Rockies Express will be required to do so."). Further, the Commission also required the pipeline to be equipped with automatic shut-off valves at points immediately before and after Murray's reserves in order to minimize the amount of gas released. *Id.* at PP 61, 78, JA 21, 26.

Murray’s concerns with the safety measures proposed by Rockies Express and approved by the Commission fundamentally reflect a difference in opinion among experts. The Commission made a reasoned choice in supporting the recommendations of the Rockies Express’s experts, who have demonstrated expertise in the analysis of subsidence-induced pipeline stress, and its selection among disputing expert witnesses is entitled to deference. *Florida Mun. Power Ag.*, 602 F.3d at 461 (citing cases). Murray relies, Br. 43, 47, on *Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. 2008), to support its claim that the Commission lacks sufficient pipeline safety expertise to warrant deference. However, as to the safety issue presented in *Washington Gas Light*, concerning pipeline leakage, the Court “afford[ed] FERC ‘an extreme degree of deference.’” *Id.* at 930, 932. In fact, the Court affirmed the Commission where, as here, it had explained itself (on causation and responsibility for potential leaks) and remanded only as to one issue (timing of repairs) on which the Commission had failed to explain itself. *Id.* at 932-33; *see also Washington Gas Light Co. v. FERC*, 603 F.3d 55, 56 (D.C. Cir. 2010) (affirming FERC’s order on remand from the 2008 *Washington Gas Light* decision and noting that, in 2008, “FERC had not adequately explained its analysis”). In the orders on review here, the Commission relied on substantial expert testimony; therefore, there is no failure of explanation.

C. The Approved Safety Conditions Are Mandatory And Effective Immediately.

Murray errs in claiming that the Commission has merely “deferred” consideration of subsidence risks until a subsidence event occurs. Br. 54. This argument fails in light of the mandatory requirements of Rockies Express’s compliance plans.

The Commission’s orders include definitive measures to be taken immediately, *i.e.*, at the construction stage. As discussed above, those requirements include construction materials and methods designed to prevent unsafe conditions and damage to the pipeline at the time of a subsidence event. *See supra* p. 16. Further, the Commission imposed a new, immediately effective condition in the Rehearing Order, requiring Rockies Express to submit to the Commission proof that it provided Murray and the Ohio Department of Natural Resources with advance notice of blasting, prior to commencement of blasting. Rehearing Order at P 73, JA 24.

Murray also criticizes the Construction and Operations Plan for 1) providing for the development of a formal mitigation plan at the time Murray finalizes the mining maps for its reserves; and 2) providing for a range of mitigation measures to be taken prior to and during any subsidence event depending upon the site-specific details. Br. 52-53. Murray contends that the Commission “wrongly assumes that the measures are mandatory and will be taken in concert with one

another.” *Id.* at 52. To the contrary, the Commission specifically found that “[o]nce Murray finalizes mining maps for its reserves, Rockies Express will be better able to fully evaluate the site-specific effects of subsidence on the pipeline.” Rehearing Order at P 42, JA 16. Modeling the expected stress on the pipeline prior to a subsidence event (as opposed to prior to development of the Construction and Operations Plan) will “allow[] it to determine at such time the most prudent subsidence mitigation measures.” *Id.*; *see also* Rockies Express Response to Commission Staff at 5-6 (explaining that “an integrity analysis can only be done after the mining plan is finalized and the pipeline is actually in the ground,” and that available data is insufficient because Murray does not hold mining rights to certain portions of the area at issue), JA 1167-68. Additionally, selection of specific mitigation measures from the list presented in section 5.2 of the Plan allows appropriate consideration of “the site-specific details.” Rehearing Order at P 42, JA 16.

The Commission emphasized that post-construction subsidence mitigation measures must “comply with [Department of Transportation] regulations to ensure the safety of the pipeline should subsidence of the ground beneath the pipeline occur.” *Id.* As the Commission held in the Certificate Order, and repeated in the Rehearing Order, “Rockies Express will be fully responsible for monitoring and inspecting the pipeline, properly implementing mitigation measures, any repairs or

relocation of the pipe that is determined necessary, and the costs associated with these activities.” *Id.* at P 76, JA 26; *see* Certificate Order at PP 106, 182, JA 288, 303. Murray’s suggestion that Rockies Express may choose to do nothing, Br. 53, or that the Commission is “soft-pedaling” public safety, *Id.* at 54, is an unreasonable reading of the Construction and Operations Plan and the Commission’s orders. *See also* Rehearing Order at P 73 (adding requirement that Rockies Express provide documentation of advance notification of blasting activities to Murray and state officials), JA 24.

D. The Commission Expressly Required Rockies Express To Comply With Department Of Transportation Requirements.

Murray’s claim, Br. 55-59, that the Commission failed to require compliance with the Department of Transportation’s pipeline safety guidelines and regulations is plainly contrary to the language of the Commission’s orders. The Rehearing Order states that Rockies Express must comply with Department of Transportation requirements at least five times. Rehearing Order at PP 12, 36, 55, 76, 77, JA 7, 15, 20, 26, 26. For instance:

We emphasize that the Construction and Operations Plan we required pursuant to Environmental Condition 147 in the May 30 Certificate Order is in addition to any mitigation that [the Department of Transportation] may require and that Rockies Express must comply with any provisions deemed necessary by [the Department of Transportation].

Id. at P 12, JA 7. And, “Rockies Express is required to comply with [Department of Transportation] regulations to ensure the safety of the pipeline should

subsidence of the ground beneath the pipeline occur. For example, if [the Department] required Rockies Express to excavate and expose the pipeline during subsidence events, Rockies Express will be required to do so.” *Id.* at P 42, JA 16; *see also* Certificate Order at P 182, JA 303. Murray’s assertions to the contrary are simply in error.

Moreover, Rockies Express acknowledged that it must comply with Department of Transportation requirements, Rehearing Order at P 40, JA 15, and that industry standards incorporated into those regulations are “legally mandated.” Construction & Operations Plan, Exp. Statement at 15, JA 386. The Commission also noted that “Rockies Express must comply with all applicable state and federal mine safety and health regulations that address blasting activities above mines in addition to the conditions in our orders.” Rehearing Order at P 77, JA 26.

As the Commission explained, the Department of Transportation is “responsible for safety in design, construction, testing, operation, maintenance, and emergency response of pipeline facilities,” Rehearing Order at PP 11-12, JA 6-7, and its regulations require no approval or endorsement from the Commission. The guidelines the Department of Transportation transmitted to the Commission on June 3, 2009 provide that “[i]n areas where mining operations will impact the operational integrity of the pipeline, [Rockies Express] must maintain operational mining procedures in their Operating & Maintenance Plan. The operational

mining procedures must contain” the provisions listed in the document.

Memorandum to Public File, Attachment, Operational Mining Plan Requirements (June 3, 2009), R. 656, JA 1280. The Commission held that Rockies Express “must comply with any provisions deemed necessary by” the Department of Transportation. Rehearing Order at P 12, JA 7. Accordingly, the Commission need not have incorporated the Department of Transportation’s requirements, either those in the document transmitted to the Commission or in the Department’s regulations, into the Commission-approved plans. To the extent Murray has concerns regarding the Department of Transportation’s requirements (*see* Br. 54), Murray’s avenue of recourse lies with the Department of Transportation.

Likewise, the Commission was not required to include Department of Transportation notification procedures in the communications protocols. Br. 56. The Department of Transportation has in place its own notification requirements. As noted in the Rehearing Order, and acknowledged by Murray (Br. 58 n.8), the Department of Transportation requires sixty days advance notification of the commencement of mining operations. Rehearing Order at P 12, JA 7.

Murray contends that the Commission did not complete its review of the plans until after issuing the Construction Order. Br. 39. The record reflects, however, that Commission staff – upon receipt of Murray’s March 27, 2009 request for rehearing – contacted the Department of Transportation on May 13,

2009 “in an effort to gain additional technical expertise from [the Department’s] pipeline engineers who routinely work and inspect natural gas pipelines in operation in areas of coal mining activities in the northeastern and Midwestern U.S.” Memorandum to Public File at 1, JA 1279. This is precisely the type of communication and cooperation contemplated by the Memorandum of Understanding between the two agencies, and reflects cooperative nature of the agencies’ contacts throughout the proceedings. *See* Final EIS at 1-8, JA 223.

Murray’s attempts to conjure a conflict between the Commission and the Department of Transportation are unavailing. The Commission did not fail to respect the Department of Transportation’s views (*see* Br. 56-57), but rather expressly affirmed that Rockies Express must comply with all applicable Department of Transportation requirements. To the extent that the Commission relied upon the existence of the Department of Transportation requirements, as well as the Department’s special expertise acting within its own regulatory authority, such reliance is within the Commission’s authority and is entirely reasonable.

V. To The Extent That Murray Challenges The Certificate Order’s Determination, Under NGA Section 7(c), That The REX-East Project Advances The Public Interest, Such A Challenge Poses A Statutorily-Barred Collateral Attack.

In the Certificate Order, the Commission, acting under NGA section 7(c), determined that the REX-East Project, as conditioned in that order, is required by

the public convenience and necessity. Certificate Order at P 34, JA 268-69. The Certificate Order constituted a final determination of whether Rockies Express would be permitted to construct the pipeline across Murray's coal reserves, as the Commission declined to endorse an alternative route avoiding Murray's holdings. *Id.* at P 96, JA 285. The Certificate Order left open only "technical" issues relating to the precise construction and operation of the pipeline over Murray's reserves. *Id.* at P 97 (recognizing "differences in technical opinions . . . [that] cannot be resolved at this time"), JA 285.

Murray sought rehearing of that order, but did not seek judicial review. Now, Murray's brief suggests that it seeks for this Court to revisit the Commission's section 7(c) public interest determination in this case. *See* Br. 53 (characterizing FERC's action as "[r]eaching a decision on issuing a certificate and imposing conditions under the NGA"); *see also* Br. 54 (relying on a section 7 case, *Atlantic Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378 (1959), to argue that "a permanent certificate should not be issued").

This Court has repeatedly held that "[w]ith few exceptions, a challenge made outside of the statutory period is a collateral attack over which we have no jurisdiction." *Pacific Gas & Elec. Co. v. FERC*, 533 F.3d at 824-825 (dismissing petition as a time-barred collateral attack where the challenged requirement was first announced in prior orders that petitioner did not appeal). Exceptions include

instances where “an order is not final because it leaves an issue contingent on subsequent compliance proceedings,” *id.* at 825 n.1, or where the subsequent order reopens an earlier resolved issue. *American Gas Ass’n v. FERC*, 912 F.2d 1496, 1515 (D.C. Cir. 1990). Here, however, the Certificate Order did not leave open the fundamental question of whether the REX-East Project, including the segment traversing Murray’s reserves, is consistent with the public convenience and necessity. Moreover, the Rehearing Order declined to revisit this determination. Rehearing Order at P 81, JA 27. Consistent with these principles, Murray may challenge whether Rockies Express’s compliance plans satisfy the Certificate Order and its conditions. However, to the extent Murray challenges the basic public interest findings of the Certificate Order itself (balancing need against impacts), its arguments are statutorily-barred collateral attacks.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the orders on review should be affirmed in their entirety.

Respectfully submitted,

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April 28, 2010
FINAL BRIEF: June 24, 2010

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 10,821 words, not including the tables of contents and authorities, the certificates of counsel and the addendum.

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June 24, 2010

ADDENDUM

STATUTES

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Section 5 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), provides as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall ___

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be___
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law.
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Section 1(b), of the Natural Gas Act 15 U.S.C. § 717(b), provides as follows:

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), provides as follows:

(c) Certificate of public convenience and necessity

(1)

(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

Sections 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e), provides as follows:

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. 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.

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), provides as follows:

(b) Review of Commission Order

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which is supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

18 C.F.R. § 375.301(b), provides as follows:

(b) Where the Commission, in delegating functions to specified Commission officials, permits an official to further delegate those functions to a designee of such official, designee shall mean the deputy of such official, the head of a division, or a comparable official as designated by the official to whom the direct delegation is made.

18 C.F.R. § 375.308, provides as follows:

The Commission authorizes the Director or the Director's designee to:

(a) Take appropriate action on uncontested applications and on applications for which the only motion or notice of intervention in opposition is filed by a competing preliminary permit or exemption applicant that does not propose and substantiate materially different plans to develop, conserve, and utilize the water resources of the region for the following:

(1) Licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act;

(2) Exemptions from all or part of the licensing requirements of part I of the Federal Power Act; and

(3) Preliminary permits for proposed projects.

(b) Take appropriate action on uncontested applications for:

(1) Amendments (including changes in the use or disposal of water power project lands or waters or in the boundaries of water power projects) to licenses (including original, new, and transmission line licenses) under part I of the Federal Power Act, exemptions from all or part of the requirements of part I of the Federal Power Act, and preliminary permits; and

(2) Surrenders of licenses (including original and new), exemptions, and preliminary permits.

(c) Take appropriate action on the following:

(1) Determinations or vacations with respect to lands of the United States reserved from entry, location, or other disposal under section 24 of the Federal Power Act;

(2) Transfer of a license under section 8 of the Federal Power Act;

(3) Applications for the surrender of transmission line licenses pursuant to part 6 of this chapter;

(4) Motions filed by licensees, permittees, exemptees, applicants, and others requesting an extension of time to file required submittals, reports, data, and information and to do other acts required to be done at or within a specific time period by any rule, regulation, license, exemption, permit, notice, letter, or order of the Commission in accordance with Sec. 385.2008 of this chapter;

(5) Declarations of intent and petitions for declaratory orders concerning the Commission's jurisdiction over a hydropower project under the Federal Power Act;

(6) New or revised exhibits, studies, plans, reports, maps, drawings, or specifications, or other such filings made voluntarily or in response to a term or condition in a preliminary permit, license, or exemption issued for a hydropower project, or in response to the requirements of an order of the Commission or presiding officer's initial decision concerning a hydropower project;

(7) Requests by applicants to withdraw, pursuant to Sec. 385.216 of this chapter, any pleadings under part I of the Federal Power Act and any pleadings related to exemptions from all or part of part I of the Federal Power Act;

(8) Requests by licensees for exemption from:

(i) The requirement of filing FERC Form No. 80, Licensed Projects Recreation, under Sec. 8.11 of this chapter; and

(ii) The fees prescribed in Sec. 381.302(a) of this chapter in accordance with Sec. 381.302(c) of this chapter and the fees in Sec. 381.601 of this chapter, in accordance with Sec. 381.106 of this chapter;

(9) Requests for waivers incidental to the exercise of delegated authority provided the request conforms to the requirements of Sec. 385.2001 of this chapter;

(10) Proposals for the development of water resources projects submitted by other agencies of the Federal government for Commission review or comment. The Director shall direct comments, when necessary, to the sponsoring agency on matters including, but not limited to, the need for, and appropriate size of, any hydroelectric power installation proposed by any other agency of the Federal government;

(11) The reasonableness of disputed agency cost statements pursuant to Sec. 4.303(e) of this chapter.

(d) Issue an order pursuant to section 5 of the Federal Power Act to cancel a preliminary permit if the permittee fails to comply with the specific terms and conditions of the permit; provided:

(1) The Director gives notice to the permittee of probable cancellation no less than 30 days prior to the issuance of the cancellation order, and

(2) The permittee does not oppose the issuance of the cancellation order.

(e) Issue an order to revoke an exemption of a small conduit hydroelectric facility from the licensing provisions of part I of the Federal Power Act granted pursuant to Sec. 4.93 of this chapter, or an exemption of a small hydroelectric power project from the licensing provisions of part I of the Federal Power Act granted pursuant to Sec. 4.105 of this chapter if the exemption holder fails to begin or complete actual construction of the exempted facility or project within the time specified in the order granting the exemption or in Commission regulations at Sec. 4.94(c) or Sec. 4.106(c) of this chapter, provided:

(1) The Director gives notice to the exemption holder by certified mail of probable revocation no less than 30 days prior to the issuance of the revocation order, and

(2) The holder of the exemption does not oppose the issuance of the revocation order.

(f) Issue an order pursuant to section 13 of the Federal Power Act to terminate a license granted under part I of the Federal Power Act if the licensee fails to commence actual construction of the project works within the time prescribed in the license, provided:

(1) The Director gives notice by certified mail to the licensee of probable termination no less than 30 days prior to the issuance of the termination order, and

(2) The licensee does not oppose the issuance of the termination order.

(g) Require licensees and applicants for water power projects to make repairs to project works, take any related actions for the purpose of maintaining the safety

and adequacy of such works, make or modify emergency action plans, have inspections by independent consultants, and perform other actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment.

(h) For any unlicensed or unexempted hydropower project, take the following actions:

(1) Conduct investigations to ascertain the Commission's jurisdiction,

(2) Make preliminary jurisdictional determinations, and

(3) If a project has been preliminarily determined to require a license, issue notification of the Commission's jurisdiction; require the filing of a license application; and require that actions necessary to comply with part 12 of this chapter or otherwise protect human life, health, property, or the environment are taken.

(i) Take appropriate action on uncontested settlements among non-Federal parties involving headwater benefits.

(j) Dismiss applications for licenses and approve the withdrawal of applications for hydropower project licenses, in instances where no petition for or notice of intervention contending that licensing is required under part I of the Federal Power Act has been filed and the Director determines that licensing is not required by such Part I.

(k) Reject or dismiss an application filed under Part I of the Federal Power Act or an application for an exemption from some or all of the requirements of Part I of the Federal Power Act if:

(1) An application is patently deficient under Sec. 4.32(e)(2)(i);

(2) A revised application

(i) Does not conform to the requirements of Sec. 4.32(a), 4.32(b), or 4.38, under Sec. 4.32(d)(1) or

(ii) If revisions to an application are not timely submitted under Sec. 4.32(e)(1)(iii); or

(3) The applicant fails to provide timely additional information, documents, or copies of submitted materials under Sec. 4.32(g).

(l) Redesignate proceedings, licenses, and other authorizations and filings to reflect changes in the names of persons and municipalities subject to or invoking Commission jurisdiction under the Federal Power Act, where no substantive changes in ownership, corporate structure or domicile, or jurisdictional operation are involved.

(m) Determine payments for headwater benefits from the operation of Federal reservoir projects.

(n) Determine whether to allow a credit against annual charges for the use of government dams or other structures billed to licensees each year for contractual payments for the construction, operation, and maintenance of a Federal dam.

(o) Prepare and issue comments on general water policy and planning issues for the use of the Director of the Water Resources Council or the Assistant Secretaries of the Department of Energy.

(p) Prepare and transmit letters concerning power site lands to the Bureau of Land Management and the U.S. Geological Survey; respond to routine requests for information and any non-docketed correspondence; prepare and transmit letters requesting comments or additional information on applications for hydropower project licenses, preliminary permits, exemptions, amendments of licenses, permits, or exemptions, and other similar matters from Federal, state, and local agencies, from applicants, and from other appropriate persons; and prepare and transmit letters regarding whether transmission lines are works of a hydropower project and are required to be licensed.

(q) Reject an application or other filing under Section 405 of the Public Utility Regulatory Policies Act of 1978, unless accompanied by a request for waiver in conformity with Sec. 385.2001 of this chapter, if it fails patently to comply with applicable statutory requirements or Commission rules, regulations, and orders.

(r) Pass upon petitions filed under Sec. Sec. 292.210 and 292.211 of this chapter.

(s) Make any preliminary determination of inconsistency between a fish and wildlife agency's fish and wildlife recommendation and applicable law, and

conduct through staff whatever consultation with the agency that is necessary or appropriate in order to attempt to resolve any inconsistency, under section 10(j) of the Federal Power Act, and to take such related actions as are required under that section.

(t) Waive the pre-filing consultation requirements in Sec. Sec. 4.38 and 16.8 of this title whenever the Director, in his discretion, determines that an emergency so requires, or that the potential benefit of expeditiously considering a proposed improvement in safety, environmental protection, efficiency, or capacity outweighs the potential benefit of requiring completion of the consultation process prior to the filing of an application.

(u) Approve, on a case-specific basis, and issue such orders as may be necessary in connection with the use of alternative procedures, under Sec. 4.34(i) of this chapter, for the development of an application for an original, new or subsequent license, exemption, or license amendment subject to the pre-filing consultation process, and assist in the pre-filing consultation and related processes.

(v) Take appropriate action on the following types of uncontested applications for authorizations and uncontested amendments to applications and authorizations and impose appropriate conditions:

(1) Applications or amendments requesting authorization for the construction or acquisition and operation of facilities that have a construction or acquisition cost less than the limits specified in column 2 of table I in Sec. 157.208(d) of this chapter;

(2) Applications by a pipeline for the abandonment of pipeline facilities;

(3) Applications for temporary certificates for facilities pursuant to Sec. 157.17 of this chapter;

(4) Petitions to amend certificates to conform to actual construction;

(5) Applications for temporary certificates for facilities pursuant to Sec. 157.17 of this chapter;

(6) Dismiss any protest to prior notice filings made pursuant to Sec. 157.205 of this chapter and involving pipeline facilities that does not raise a substantive issue and fails to provide any specific detailed reason or rationale for the objection;

(7) Applications for temporary or permanent certificates (and for amendments thereto) for the transportation, exchange or storage of natural gas, provided that the cost of construction of the applicant's related facility is less than the limits specified in column 2 of table 1 in Sec. 157.208(d) of this chapter; and

(8) Applications for blanket certificates of public convenience and necessity pursuant to subpart F of part 157 of this chapter, including waiver of project cost limitations in Sec. Sec. 157.208 and 157.215 of this chapter, and the convening of informal conferences during the 30-day reconciliation period pursuant to the procedures in Sec. 157.205(f).

(w) Take appropriate action on the following:

(1) Any notice of intervention or petition to intervene, filed in an uncontested application for pipeline facilities;

(2) An uncontested request from one holding an authorization, granted pursuant to the Director's delegated authority, to vacate all or part of such authorization;

(3) Petitions to permit after an initial 60-day period one additional 60-day period of exemption pursuant to Sec. 284.264(b) of this chapter where the application or extension arrives at the Commission later than 45 days after the commencement of the initial period of exemption when the emergency requires installation of facilities;

(4) Applications for extensions of time to file required reports, data, and information and to perform other acts required at or within a specific time by any rule, regulation, license, permit, certificate, or order by the Commission; and

(5) Requests for waiver of the landowner notification requirements in Sec. 157.203(d) of this chapter.

(x) Undertake the following actions:

(1) Compute, for each calendar year, the project limits specified in table I of Sec. 157.208 and table II of Sec. 157.215(a) of this chapter, adjusted for inflation, and publish such limits as soon as possible thereafter in the Federal Register;

(2) Issue reports for public information purposes. Any report issued without Commission approval must:

(i) Be of a noncontroversial nature, and

(ii) Contain the statement, ``This report does not necessarily reflect the view of the Commission," in bold face type on the cover;

(3) Issue and sign deficiency letters regarding natural gas applications;

(4) Accept for filing, data and reports required by Commission orders, or presiding officers' initial decisions upon which the Commission has taken no further action, if such filings are in compliance with such orders or decisions and, when appropriate, notify the filing party of such acceptance;

(5) Reject requests which patently fail to comply with the provisions of 157.205(b) of this chapter;

(6) Take appropriate action on requests or petitions for waivers of any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of Sec. 385.2001 of this chapter; and

(7) Take whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities, including authority to design and implement additional or alternative measures and stop work authority.

(y) Take appropriate action on the following:

(1) Any action incidental to the exercise of delegated authority, including waiver of notice as provided in section 4(d) of the Natural Gas Act, provided the request conforms to the requirements of Sec. 385.2001 of this chapter; and

(2) Requests or petitions for waivers of filing requirements for statements and reports under Sec. Sec. 260.8 and 260.9 of this chapter.

(z) Approve, on a case-specific basis, and make such decisions and issue guidance as may be necessary in connection with the use of the pre-filing

procedures in Sec. 157.21, `` Pre-filing procedures and review process for LNG terminal facilities and other natural gas facilities prior to filing of applications."

(aa) Take the following actions to implement part 5 of this chapter on or after October 23, 2003:

(1) Act on requests for approval to use the application procedures of parts 4 or 16, pursuant to Sec. 5.3 of this chapter;

(2) Approve a potential license applicant's proposed study plan with appropriate modifications pursuant to Sec. 5.13 of this chapter;

(3) Resolve formal study disputes pursuant to Sec. 5.14 of this chapter; and

(4) Resolve disagreements brought pursuant to Sec. 5.15 of this chapter.

(bb) Establish a schedule for each Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, to issue or deny Federal authorizations required for natural gas projects subject to section 3 or 7 of the Natural Gas Act.

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