

**ORAL ARGUMENT IS SCHEDULE FOR NOVEMBER 10, 2005**

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

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**Nos. 03-1251, 03-1411, and 04-1136**

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

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**AUGUST 30, 2005**

## **CIRCUIT RULE 28(a)(1) CERTIFICATE**

A. Parties and Amici

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

B. Rulings Under Review

1. Unpublished Letter Orders dated June 5, June 24, July 15, and July 17, 2003,
2. *East Tennessee Natural Gas Company*, 104 FERC ¶ 61,019 (2003); and
3. *East Tennessee Natural Gas Company*, 105 FERC ¶ 61,139 (2003);
4. *East Tennessee Natural Gas Company*, 106 FERC ¶ 61,159 (2004).

C. Related Cases

This case has not previously been before this Court or any other court.

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Dennis Lane  
Solicitor

August 30, 2005

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**GLOSSARY**

<b>Br.</b>	<b>Brief of Petitioner</b>
<b>February 18 Order</b>	<i>East Tennessee Natural Gas Co., 106 FERC § 61,159 (2004)</i>
<b>HDD</b>	<b>Horizontal Directional Drill</b>
<b>July 2 Order</b>	<i>East Tennessee Natural Gas Co., 104 FERC § 61,019 (2003)</i>
<b>JA</b>	<b>Joint Appendix</b>
<b>NGA</b>	<b>Natural Gas Act, 15 U.S.C. § 717 <i>et seq.</i></b>
<b>October 27 Order</b>	<i>East Tennessee Natural Gas Co., 105 FERC § 61,139 (2003)</i>
<b>P</b>	<b>Internal paragraph number in FERC order¶</b>

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**BRIEF FOR RESPONDENT  
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**STATEMENT OF THE ISSUES**

1. Whether Petitioner lacks standing to seek review of the challenged orders of the Federal Energy Regulatory Commission (“Commission” or “FERC”).

2. Whether the Commission properly denied Petitioner’s objection to orders issued by FERC or by its designees approving the construction and later operation of various segments of the Patriot Project in accordance with the conditions set out in the certificate order approving the Project under Section 7 of the Natural Gas



Act (“NGA”), 15 U.S.C. § 717f, that was upheld in *National Committee for the New River v. FERC*, 373 F.3d 1373 (D.C.Cir. 2004)(“*Nat’l Comm.*”).

## **PERTINENT STATUTORY AND REGULATORY PROVISIONS**

Pertinent sections of the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (“NGA”), and of FERC’s regulations are set out in an addendum to this Brief.

## **STATEMENT OF THE CASE**

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

This case involves East Tennessee Natural Gas Company’s (“East Tennessee”) efforts to construct and to operate its Patriot Project, an extension of East Tennessee’s mainline in Tennessee, Virginia, and North Carolina. The Patriot Project had previously been certificated subject to 69 conditions regarding potential environmental impacts of the facilities. *See generally Nat’l Comm.*, 373 F.3d at 1325-27.

A routine condition in FERC certificate orders requires the applicant-pipeline to file its implementation plans and modifications with the Commission prior to undertaking actual construction. *East Tennessee Natural Gas Co.*, 105 FERC ¶ 61,139 at PP 23-24, JA 91(2003)(“October 27 Order”). Filing an implementation plan and subsequent modifications is routinely required “because the Commission expected East Tennessee [and other applicant-pipelines] to fine tune the project route as it conducted surveys of land to which East Tennessee had

previously been denied access, and as it completed environmental and cultural resource studies and consultations with other state and Federal agencies.” *Id.* at P 23, JA 98.

Subsequent modifications of an initial implementation plan are expected as more information becomes available. FERC Staff has delegated authority to review implementation plans and modifications for compliance with the certificate conditions, and to authorize construction of particular segments of the proposed facilities when all conditions related to that segment have been completed. *Id.* at P 25. In this, as in almost every, case, adjustments were made to the route set out in the certificate order as more information became known. *See id.* at P 26, JA 98 (noting FERC “routinely approves adjustments to the certificate route after the pipeline obtains all the necessary consultations, clearances, permits, and landowner concurrences”); *see also id.* at P 26 (indicating “majority” of route adjustments here “have been made to accommodate the requests of landowners”).

On April 24, 2003, Petitioner requested that East Tennessee be required to serve all parties to the Patriot Project certificate proceeding with copies of its construction compliance filings. The Commission denied the request, finding that the certificate proceeding had become administratively final, which ended the obligation to serve sometimes voluminous compliance documents pertaining to a specific project segment on all parties to the certificate proceeding, but noting

compliance documents were served on those parties affected by the specific activity. *East Tennessee Natural Gas Co.*, 104 FERC ¶ 61,019 (2003) JA 80, (“July 2 Order”). In addition, copies of the compliance filings were sent to public libraries in the area and were available on FERC’s web site.

Meanwhile, “Commission staff issued letter orders on June 5, June 24, July 15, and July 17, 2003 to East Tennessee authorizing construction of specific portions of the Patriot Project extension.” October 27 Order at P 11, JA 93. Petitioner sought rehearing of those letter orders and also “filed a motion to declare the horizontal directional drill (HDD) under the New River in Virginia a failure, and for stay of further construction on the Patriot Project extension.” *Id.* at P 3, JA 91. All those requests were addressed and denied by the October 27 Order.

By letter order of November 14, 2003, the Commission, through delegated authority, granted East Tennessee’s request to begin service as of December 1, 2003, on certain portions of the Patriot Project. *East Tennessee Natural Gas Co.*, 106 FERC ¶ 61,159 (2004)(“February 18 Order”), JA 117. Petitioner sought rehearing of the November 14 letter order, which was denied by the February 18 Order. In that Order, the Commission found its earlier October 27 Order (JA 91) “specifically addressed virtually the same contentions that [Petitioner] now raises regarding service of pleadings, the allegedly improper or *ex parte* nature of the post-certificate compliance process, the pipeline route, and the completion of the

New River HDD,” and denied those same contentions for the reasons given earlier. *Id.* at P 8, JA 118.

Petitioner also raised a claim that the Commission should have considered an alternative route (the “Max Meadow” route) for the pipeline. *Id.* at P 9, JA 118. That claim was denied on grounds that it should have been raised during the certificate proceeding “before the pipeline was constructed and placed in service.” *Id.*; *see also Nat’l Comm.*, 373 F.3d at 1331-32 (declining to reach merits of whether Max Meadow route should have been considered because Petitioner failed to raise it on rehearing). Petitioner also asserted that “November 14 Letter Order is not valid because it is not actually signed by the Director of OEP, but rather by his deputy and designee.” *Id.* at P 11, JA 118. That argument was found deficient as inconsistent with the delegation of authority regulations. *Id.*

Petitioner filed petitions for review of the October 27 and February 18 Orders as well as of the several letter orders. Those petitions were consolidated by this Court’s Order of November 23, 2004.

## **II. STATEMENT OF FACTS**

### **A. Statutory and Regulatory Background**

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

present or future public convenience or necessity, and thus should be certificated. NGA § 7, 15 U.S.C. § 717f. The Commission has delegated certain aspects of its authority to staff officials, who, in turn, may “delegate those functions to a designee of such official.” 18 C.F.R. § 375.301 *et seq.* (2004).

## **B. Events Leading To the Challenged Orders**

East Tennessee proposed the Patriot Project in an NGA § 7 application to extend East Tennessee’s mainline facilities about 94 miles from North Carolina to Virginia. The application was preliminarily approved based on an evaluation of the non-environmental aspects that the proposed benefits outweighed any adverse impacts. *Preliminary Determination on Non-Environmental Issues*, 98 FERC ¶ 61,331 (2002). Next, the Commission undertook a full environmental review of the Project, including the preparation of draft and final environmental impact statements (“EIS”) as well as comment procedures that ultimately led to issuance of a final certificate approving the Project subject to 69 conditions designed to minimize any potential adverse environmental impacts. *East Tennessee Natural Gas Co.*, 101 FERC ¶ 61,188 (2002).

That Order explained the Commission “was approving the project and general route, but not the final route delineation, due to survey and environmental study gaps resulting from East Tennessee’s inability in some areas to gain access to property, the numerous conditions to be satisfied, and the need to obtain approval

by various state and federal agencies regarding various aspects of the project.” *Nat’l Comm.*, 373 F.3d at 1326, citing 101 FERC at p. 61,756. On this point, Condition 6 to the certificate, 101 FERC at p. 61,765, required that within 60 days of certificate acceptance and “before construction begins,” East Tennessee file “an initial implementation Plan” with expressly identified information “for review and written approval by the Director of OEP [Office of Energy Projects] describing how East Tennessee will implement the mitigation measures required by the Order.” *Id.*

East Tennessee filed the required Plan (called Implementation Plan 3) on January 30, 2003, and supplements to the Plan on “February 7, March 6 and 18, April 20, May 13, and June 3 and 13, 2003.” October 27 Order at P 11, JA 93. Petitioner filed objections to the Plan and to the supplements. After review of the Plan and supplements, “Commission staff issued letter orders on June 5, June 24, July 15, and July 17, 2003 to East Tennessee authorizing construction of specific portions of” the Project. *Id.* The July 2 Order denied Petitioner’s request that all post-certification filings be served on all parties to the certificate proceedings.

## **C. The Orders Under Review**

### **1. The October 27 Order**

The October 27 Order addresses Petitioner’s requests for rehearing of the July 2 Order and the June, 6, June 24, July 15, and July 17 letter orders,

including a request for stay of construction, as well as Petitioner's request to declare the HDD under the New River a failure. 105 FERC at PP 2-3, JA 91. Petitioner essentially asserted in its various pleadings that FERC's "construction clearance process is flawed and that the construction activities authorized are inconsistent with the terms of the certificate," and objected as well to the HDD under the New River. *Id.* at P 14, JA 94.

As to Petitioner's first assertion, that the construction clearance process was flawed because filings were not served on all parties, the Commission stated that it had addressed virtually identical arguments in the July 2 Order. *Id.* at P 17, JA 95. The *ex parte* rules "do not apply to the construction compliance process that occurs after the Commission certifies a project and the proceeding has ended." *Id.* at P 18, JA 96, citing 18 C.F.R. § 385.2201(2004).

As to Petitioner's charge that "taken as a whole, the route realignments East Tennessee submitted in Implementation Plan 3, and approved by the Commission in its clearance orders differ significantly from the route" approved in the certificate order. *Id.* at P 20, JA 96, the Order notes that the Commission "routinely approves adjustments to the certificate route after the pipeline obtains all the necessary consultations, clearances, permits, and landowner concurrences." *Id.* at P 25, JA 98.

Further, the certificate order “stated clearly that the specific route for the Patriot Project extension would be determined at a later date, after all surveys and environmental studies were completed.” *Id.* Route realignment resulted from various reasons: to “move the pipeline farther away from residences . . . [to] improve the engineering or environmental design. . . to follow the edge of a cleared field, to follow property lines, or avoid sensitive areas.” *Id.* at P 26, JA 98. Most were done in response to “requests of landowners,” while others “involve changes in stream crossing locations to comply with permits issued by” state resource agencies. *Id.*

Contrary to Petitioner’s aggregation of the total length of all individual route realignments in an effort to show they constitute a major change, *see id.* at P 20, JA 96 (noting Petitioner’s claim that “taken as a whole” the realignments total “more than 16 miles in length”), the Commission found the individual changes “are relatively minor and do not adversely affect the environment. None of the route adjustments involve new landowners, changes in the character of the land involved, or sensitive environmental resources.” *Id.* at P 27, JA 99. Based on those findings, the Commission concluded staff approval of the route realignments was “appropriate because they did not involve any new environmental issues or impacts. . . [and] all required consultations with other federal and state agencies were conducted and completed, and [] any necessary approvals or permits were



obtained.” *Id.* at P 30, JA 100. Those conclusions supported the holding that East Tennessee fully complied with all conditions in the certificate. *Id.*

Petitioner made two HDD claims: one related to the New River and the other to Reed Creek. Petitioner asked that the New River HDD be declared “a failure” based on the approved HDD contingency plan, and that any “further construction of the Patriot Extension [be stayed] pending relocation of the HDD.” October 27 Order at PP 31-32, JA 100. The Commission found Petitioner “misconstrued” the purpose of the plan, which was to “limit[] the ability of the pipeline to declare failure unilaterally so that it can employ a different crossing method or move to a new location.” *Id.* at P 35, JA 101. As such, the plan did not “mandate failure under certain circumstances,” but allows East Tennessee to take a different approach only if the criteria are met and a new plan is submitted to and approved by the Commission. *Id.* The plan gave East Tennessee the option, taken here, of continuing despite initial setbacks, which was approved because it limited “further damage to the environment from moving to a new location.” *Id.*

No traction was given to Petitioner’s claims that the Commission relied on unverified statements that the New River HDD had been successfully completed. The Commission received weekly reports, as required by the certificate, concerning the progress and difficulties encountered. *Id.* at P 36, JA 102. In addition, FERC Staff inspected the HDD on several occasions to assure that the

certificate conditions were satisfied as did “[t]hird party compliance inspectors under the sole direction of the Commission.” *Id.* Further, state officials “contacted by Commission staff expressed satisfaction with the overall HDD operations and the cleanup of the drilling mud.” *Id.*

All those efforts, not unverified statements, “independently confirm[ed] that the HDD drilling has been successfully completed and the pipeline properly tested and installed. The areas where drilling mud seeped to the surface have been cleaned and seeded. Restoration of disturbed areas is progressing well, and will continue to be monitored.” *Id.* at P 37, JA 102. Thus, there was no basis to declare the HDD a failure.

Petitioner challenged a proposed change to the siting of the Reed Creek HDD on grounds that “East Tennessee has not properly shown that the FWS and the Virginia SHPO have concurred in the project site changes.” *Id.* at P 38, JA 103. Petitioner’s challenge rested on the fact that the SHPO concurrence letter was submitted “as privileged material not subject to public release.” *Id.* That claim was rejected because Petitioner could have made a Freedom of Information Act request to obtain the privileged data, and because the non-privileged, pertinent part of the SHPO letter stated, ““construction and use of Access Road S1 Alternate [S]-7 Alternate] will have no effect upon known archeological resources.”” *Id.* at P 40, JA 104. Nor was there any need for further FWS concurrence, as “the additional

workspace and the new alternate access road are with the area surveyed for the Patriot Project Extension and already considered by the FWS prior to issuance of the FWS Biological Opinion.” *Id.* at P 41, JA 104.

## **2. The February 18 Order**

The February 18 Order denies Petitioner’s request for rehearing of a November 14, 2003 letter order approving East Tennessee’s request “to begin service on portions of its Patriot Project.” February 18 Order at P 1, JA 117. Petitioner asserted that East Tennessee’s request was defective for not including a certificate that showed service to all parties in the certificate proceeding, and that the November 14 letter order was defective for not being signed by the Director of OEP, but by his designee. *Id.* at P 5, JA 117. Petitioner also “repeat[ed] earlier arguments” that the actual route was not the one approved in the certificate, that the procedures subsequent to the certificate order were inappropriate *ex parte* communications, and that the New River HDD was not successfully completed “to warrant placing the project in service.” *Id.* at P 6.

Those claims were “virtually the same contentions” as those rejected in the October 27 Order, and they were rejected again for the same reasons as given in that Order. *Id.* at P 8, JA 118. Petitioner also raised for the first time its Max Meadow claim, *id.* at P 7, which the Commission found to be untimely, *id.* at P 9,

as well as unsubstantiated, *id.* at P 10. *See also Nat'l Comm.*, 373 F.3 at 1331-32 (dismissing Max Meadow claim).

Petitioner claims that the November 14 letter order was invalid “because it is not actually signed by the Director of OEP, but rather by his deputy and designee, lacks merit.” February 18 Order at P 11, JA 118. The certificate order explicitly “delegated authority to the IEP Director to determine the point at which East Tennessee’s compliance with conditions adopted by the Commission as part of the November 2002 certificate was sufficient to permit gas service through the new pipeline.” *Id.* at P 12, citing 101 FERC ¶ 61,188 (2002), Condition 9. In accordance “with usual and longstanding practice, the Director, in turn, assigned the matter, as his designee, to the Division Director with direct daily responsibility over environmental compliance matters.” *Id.* The Division Director relied on staff inspections in granting permission to begin operations, “subject to continued monitoring and completion of ROW restoration.” *Id.* The Commission approved that designation, and adopted the letter order as its own. *Id.*

The petitions for review followed the various orders issued in this matter, and were consolidated by order of November 23, 2004.

### **SUMMARY OF ARGUMENT**

Petitioner lacks standing because it has failed to show that any of its members are aggrieved by the specific orders being challenged here. Petitioner

challenges what it terms substantial relocations of the proposed pipeline from the route approved in the certificate order. To show standing, therefore, it must show that it or its members are affected by the relocation (realignments) approved by the challenged orders. Yet, the affidavits submitted fail to make that showing; instead, they assert a general interest in “the enjoyment of the recreational experience in the New River and the New River Trail State Park in the area that will be impacted by the proposed project.”

That injury merely copies the injury claimed by Petitioner in its earlier appeal (No. 03-1111) challenging certification of the entire project. While that injury may have sufficed to show standing to challenge approval of the entire project, it does not suffice to demonstrate standing to challenge the specific realignments at issue here. In particular, none of Petitioner’s affiants claim to an injury related, and traceable, to the specific realignments approved in the challenged orders.

Under the arbitrary and capricious standard of review applicable here, the Court considers whether FERC has considered the relevant factors and whether it has made a clear error of judgment. FERC’s factual findings are conclusive if supported by substantial evidence.

Petitioner asserts *ex parte* and due process violations because East Tennessee did not serve its construction compliance filings on all parties to the

certificate proceeding. But, as the Commission explained, the requirement that all parties be served, as well as the party status of intervenors, ends when a rehearing order has issued and the time for judicial review has expired. As both events had occurred in the project certification proceeding, East Tennessee was no longer obligated to serve all parties to that proceeding with its compliance filings. Further, the Commission found no due process problem because the filings were served on those parties within the area affected by the construction activity at issue, were sent to public libraries in the affected areas, and were available on FERC's web site. As Petitioner pointed to no issue that it was unable to raise due to lack of information, and the materials publicly available, its claims were unsubstantiated.

In an effort to pump up its claim as to the scope of realignments, Petitioner aggregated the lengths of each to reach a total footage number (85,000) that appears substantial. The Commission reasonably rejected Petitioner's aggregation, finding that the individual realignments resulted from various reasons, and thus should be considered separately. For the most part, however, the changes, not unexpectedly, responded to individual landowners' requests, after access was granted, to move the route to another portion of their properties.

The Commission anticipated that changes to the certificated route would be needed as the pipeline gained access to property and the actual construction commenced. That anticipation was reflected in those conditions found in the

certificate order that had to be satisfied prior to a segment being constructed. The certificate order, in accordance with FERC regulations, delegated authority to review such changes and to modify the certificate conditions, as appropriate, to FERC staff. Staff through its own visits to the sites, interaction with state and federal resource agency officials, and reports from independent inspectors assured compliance with certificate conditions prior to approving construction of individual segments.

The certificate order delegated authority to grant approval upon compliance with the certificate conditions to the Director of FERC's OEP, who, in turn, delegated the authority to the Division Director. Besides being expressly noted in the certificate order, the delegation was consistent with FERC regulations, which allow a Director to delegate the authority to either a deputy or head of a division or official of comparable authority. The Director's delegation of authority not only followed the regulations, but also placed the person with direct daily supervision over environmental compliance matters in charge of assuring construction and operation was not to begin until compliance was achieved.

## **ARGUMENT**

### **I. PETITIONER LACKS STANDING**

In accordance with this Court's Order of December 15, 2004 that the parties address the standing issue on brief, the Commission submits that Petitioner has

failed to show that it or its members are injured by the construction compliance matters at issue here. In particular, none of the affidavits submitted with Petitioner's brief allege that the affiant (or any member of the Committee) was affected, let alone injured, by any of the realignments that were the subject of the FERC Orders being challenged. Indeed, five of the eight affidavits submitted here are merely copies of the affidavits submitted in Petitioner's prior appeal challenging approval of the entire project.<sup>1</sup> The subjects of the instant petitions are, however, very limited and specifically identified realignments that affect only a small portion of the entire Project. Petitioner's failure to show that it or its members are injured by those specific realignments means that it lacks standing.

NGA § 19(b), 15 U.S.C. § 717r(b), limits judicial review to parties "aggrieved by an order issued by the Commission." Petitioner asserts that the challenged Orders here meant that "the project as approved by the Certificate Order was substantially relocated in those post-certificate proceedings." Br. 23-24. Thus, to challenge the instant orders, Petitioner or its members must be aggrieved by the relocation (*i.e.*, realignments), not by the approval of the project in the certificate proceeding.

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<sup>1</sup> Compare Exhibits 1-5 to Petitioner's Brief here *with* Exhibits 1-5 submitted with Petitioners' Brief in No. 03-1111 (filed February 12, 2004). In the instant matter, Mr. Gallimore submitted two affidavits (Exhibits 4 and 6).



To be aggrieved, a party must establish Article III constitutional standing by showing, “at a minimum, injury in fact to a protected interest.” *Panhandle Eastern Pipe Line Co. v. FERC*, 198 F.3d 266, 268 (D.C. Cir. 1999). To show injury in fact, a party must show “an invasion of legally protected interests that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)(internal citations and quotations omitted). Second, the injury has to be “fairly . . . trace[able] to the challenged action of the defendant.” *Id.*

Petitioner fails on both these criteria as its affidavits do not show that the affiants (or any member of Petitioner) are affected by the “relocation” approved in the challenged Orders. Petitioner contends that the affidavits “sufficiently establish” injury in fact by the “interests expressed in the enjoyment of the recreational experience in the New River and the New River Trail State Park in the area that will be impacted by the proposed project.” Br. 5. That is exactly the same injury alleged in the No. 03-1111 appeal. *Compare* Petitioners’ Brief in No. 03-1111 at 4 (filed February 12, 2004). Likewise, the three new affidavits (Br. Exhibits 6-8) do not allege that the affiants are affected by any of the realignments approved in the challenged Orders.

While the injury proffered in the No. 03-1111 appeal may have been sufficiently particularized to demonstrate standing for that appeal, it is not

particularized or fairly traceable to the Orders challenged here, which dealt with specific realignments that have not been alleged to affect any protected interest of the affiants (or other member of Petitioner). Unless the affiants show that they would have standing on their own right to challenge the realignments, which they could do only by showing one of the realignments affected their property, Petitioner lacks standing. As the affidavits have not made that required showing, the affiants, and thus Petitioner, have failed to establish the necessary “aggrievement” in the form of injury in fact required to file petitions for review of the challenged orders under NGA § 19(b). Accordingly, the petitions should be dismissed.

## **II. STANDARD OF REVIEW**

The Court reviews Commission orders under the arbitrary and capricious standard set out in 5 U.S.C. § 706(2)(A). *Nat’l Comm.* 373 F.3d at 1327. Under that standard, a “court considers, in this regard, both ‘whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” *Id.*, citing *ExxonMobil Gas Marketing Co. v. FERC*, 297 F.3d 1071, 1083 (D.C.Cir. 2002). The “same standard applies to” challenges under the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4332(2)(c). *Nat’ Comm.*, 373 F.3d at 1327. In the NEPA context, that standard places on an agency “the obligation to consider every significant aspect of the environmental

impact of a proposed action.” *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 553 (1978). To do this, an agency must “take a ‘hard look’ at the environmental consequences before taking a major action.” *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983)(citation omitted). FERC’s factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b).

### **III. NO SERVICE OR EX PARTE VIOLATIONS OCCURRED**

Petitioner asserts that the June 5 and 24, 2003 letter orders, JA 74 and 77, are “fatally deficient procedurally because of the *ex parte* nature of the proceedings and communications producing the said order.” Br. 25; *see* Br. 26 (making same claim as to July 15, 2003 letter order); *see also* Br. 36-38 (arguing issuance of July 2 Order was erroneous legally and factually). Contrary to those allegations, FERC’s rules do not require that service be provided to all parties to a proceeding after, as here, the proceeding has been completed. Further, FERC’s rules indicate that *ex parte* prohibitions no longer apply after a final FERC order has been issued. October 27 Order, PP 15-18, JA 95-96.

Thus, Petitioner’s claim that papers related to East Tennessee’s construction compliance should have been served on all parties to the certificate application proceeding is without merit; service on all parties was no longer required after the certificate proceeding had been completed. *Id.* at P 17. A proceeding is completed

and the end of “the party status of intervenors” occurs “after a rehearing order has been issued and the time for judicial review has expired.” *Id.* at n. 6 (noting also that the applicable language in the Federal Power Act and the NGA are “identical” on this point). Here, the rehearing order in the certificate proceeding issued on February 27, 2003, and the matter was on judicial review. *See Nat’l Comm.*, 373 F.3d at 1326-27 (procedural history).<sup>2</sup>

Once the certificate proceeding had been completed, East Tennessee was no longer obliged to serve copies of its subsequent compliance papers with all parties. As a result, there was “nothing improper in regarding the compliance process[, which . . .] followed longstanding practices [FERC] employs in every certificate it grants under the NGA.” October 27 Order at P 17, JA 96. The same result occurs under FERC’s *ex parte* rules. “The Commission *ex parte* rules, however, do not apply to the construction compliance process that occurs after the Commission certifies a project and the proceeding has ended.” *Id.* at P 18; *see also* February 18 Order at P 8, JA 118 (same) FERC’s *ex parte* rules specify that the prohibitions against such communications do not remain in force once “[a] final Commission decision or other final order disposing of the merits of the proceeding is issued, or

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<sup>2</sup> Under NGA § 19(c), 15 U.S.C. § 717r(c), neither the filing for rehearing nor of a petition for review serves to stay of FERC’s order, absent an order either by FERC or the Court granting a stay. Petitioner sought a stay of the certificate application orders, but it was denied by the Commission. *Nat’l Comm.*, 373 F.3d at 1327.

when applicable, after the time for seeking rehearing of a final Commission decision, or other final order disposing of the merits, expires.”18 C.F.R. §2201(d)(2)(i)(2004), cited October 27 Order at P 18 n. 7, JA 96.

In any event, the Commission found that parties with an interest in the specific segments being constructed had received notice. From a practical standpoint, there was no need to require that the “nearly two hundred parties” in the certificate proceeding receive notice of every compliance matter, as “a number of parties [are] situated a considerable distance from the actual location of the particular construction activity that may have no interest in that specific activity.” July 2 Order at P 6, JA 82. Further, as some compliance documents “are voluminous,” requiring they be served on the over 200 parties “would constitute a significant burden on the pipeline.” *Id.* East Tennessee placed copies of all documents in area public libraries and offered to make copies of all documents upon written request by a party. *Id.*

Finally, the Commission noted “all materials that are available for public inspection are posted on the Commission’s website,” [www.ferc.gov](http://www.ferc.gov). *Id.* The Commission reasonably concluded, based on those factors, that “all parties interested in compliance activities related to the Patriot Project have reasonable access to filings with the Commission and sufficient notice of Commission actions.” *Id.* The validity of that conclusion is demonstrated by the fact that

Petitioner has not pointed to any arguments that it was unable to present regarding compliance matters, nor has it suggested that its arguments were not addressed in the challenged orders.<sup>3</sup>

In sum, Petitioner's claim that FERC's rules regarding service in a proceeding or its *ex parte* rules were violated as to the construction compliance matter (Br. 26-27) is wrong. No rules were violated because a final order had issued in the certificate proceeding, thus terminating application of both sets of rules. Further, as a practical matter, parties who were interested in the compliance filings could obtain information from readily-available sources, and have not identified any argument that they were unable to present due to alleged lack of notice. Accordingly, Petitioner's contentions should be denied.

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<sup>3</sup> Petitioner proffers certain examples of what it considers nullification of the certificate and NEPA processes by not requiring service. Br. 27-29. One of those examples involves Reed Creek HDD, *id.* at 28-29, which apparently Petitioner believes was issued too quickly to give full consideration to Petitioner's protest. But, as explained in the October 27 Order at PP 39-41, JA 103-04, Petitioner's protest claimed that the Virginia SHPO and FWS had not concurred in the proposed change. *Id.* at P 39. There was no need for extended examination of either claim: the publicly available portion of the SHPO letter stated, in part: "We have determined, therefore, that construction and use of [the proposed modification of Reed Creek HDD] will no effect upon known archaeological resources." *Id.* at P 40. Likewise, no further examination was needed for Petitioner's FWS claim because the proposed modification had "already [been] considered by the FWS prior to issuance of the FWS Biological Opinion." *Id.* at P 41.

#### **IV. THE REALIGNMENTS WERE NOT SIGNIFICANT CHANGES**

Petitioner contends FERC “OEP improperly approved significant relocations of a substantial portion of the Patriot Extension. OEP did not have the delegated authority under the terms of the Certificate Order to authorize relocations of the project. If the said Certificate Order is construed to have delegated such authority, such delegation ... is without statutory or regulatory authority.” Br. 34; *see* Br. 31-34 (developing argument). All aspects of the contention are invalid: the realignments were neither significant nor substantial; the Certificate Order explicitly delegated authority to OEP to authorize such realignments in appropriate circumstances; and, the Commission has statutory and regulatory authority to delegate.

##### **A. The Certificate Order Specifically Delegated Authority to the Director**

Turning first to the Certificate Order, several conditions appended to the Order, require East Tennessee to file changes to its original plan for approval by the Director of OEP. *See, e.g.*, Conditions 2, 8-9, 11-12, 16, 19, 22-26, 28-30, 33, 34, 38-40, 42, 45-49, 51, 53, 56-57, 59-60, and 67-68, JA 42-59 (requiring “review and written approval by the Director of OEP” prior to action by East Tennessee). Inclusion of those conditions in the Order resoundingly refutes Petitioner’s contention that “OEP did not have the delegated authority under the terms of the

Certificate Order to authorize relocation.” Br. 34. Of particular note is Condition 2 (JA 42), which states in part: “The Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project. This authority shall allow: . . .[t]he modification of conditions of this Order.”

Nor was it unexpected that modifications to the Certificate Order would be needed given the size and complexity of the Project. Indeed, contrary to Petitioner’s current claim that the Certificate Order “process did finally identify a facility location,” Br. 32, it had previously argued that sequencing, segmentation, and omissions prevented a clear picture of the facilities location. *See, e.g., Nat’l Comm.*, 373 F.3 at 1327 (quoting Petitioner’s claim that “the DEIS was also ‘so incomplete and inadequate in important areas as to preclude meaningful analysis or comment’”). The Court rejected that claim, in part, on the basis that the Certificate Order included “conditions that had to be satisfied before the certificate could be ‘effectuated.’” *Id.* at 1328 (citation omitted).

FERC Staff, through the Director of OEP, was delegated authority to assure that those conditions were satisfied before construction was commenced. “Commission staff reviewed all the route adjustments request by East Tennessee and approved them as appropriate because they did not involve and new environmental issues or impacts. Similarly, [FERC was] satisfied that staff made



certain that all required consultations with other federal and state agencies were conducted and completed, and that any necessary approvals and permits were obtained.” October 27 Order at P 30, JA 100. That conclusion answers Petitioner’s claim (Br. 34) “OEP improperly approved significant relocations,” *see* Br. 38-39 (same); such changes were examined for compliance with all requirements and approved only where those requirements were met.

### **B. The Realignments Were Minor, Not Substantial**

Further, the Commission rejected Petitioner’s aggregation of the length of all individual realignments (*see* Br. 32 (tabulating all realignments as “total[ing] in excess of 85,000 feet, or more than 16 miles”)) as showing the changes were significant. “In charging that the route realignments constitute an amendment to the application, [Petitioner] merely adds numbers to reach its conclusion.” October 27 Order at P 27, JA 99. As each realignment resulted from factors peculiar to it, *see id.* at P 26, JA 98 (noting “a variety of reasons for the various realignments”), the Commission treated them separately, and concluded “for the size of this project, the number of route adjustments and the distances involved are neither unexpected nor unusual.” *Id.* at P 27; *see also id.* at P 25, JA 98 (indicating the Commission “routinely approves adjustments to the certificate route after the pipeline obtains all the necessary consultations, clearances, permits, and landowner concurrences”).

### **C. The Director Properly Delegated Authority to His Designee**

Lastly, Petitioner's assertion that any delegation in the Certificate Order is "without statutory or regulatory authority," Br. 34; *see* Br. 38 (same), was found to be lacking. First, the assertion is an improper collateral attack on the Certificate Order, which clearly and repeatedly delegated authority to the Director of OEP, and thus should be dismissed. On the merits, FERC regulations, 18 C.F.R. § 375.301 *et seq.* (2004), "set forth the authorities that the Commission has delegated to staff officials," § 375.301(a), thus providing the legal basis on which such delegations are made. Section 375.301(b) "permits an official to further delegate those functions to a designee of such official." That fully defeats Petitioner's contention (Br. 38) the November 14 Order was not "signed by the officer authorized by the Certificate Order to authorize commencement of service, and was therefore improperly issued." *See* February 18 Order at P 12, JA 118 (noting "usual and longstanding practice [of] the Director, in turn, assign[ing] the matter to his designee, to the Division Director with direct daily responsibility over environmental compliance matters").

While Petitioner raises the specter that "under FERC policy, a project such as a [major] project . . . could be placed in service by any employee of FERC by a process of sequential delegations through the organization," Br. 40, the governing rule limits the persons that can be delegated such authority. Section 375.301(b)

defines “designee” to “mean the deputy of such official [to whom authority is directly delegated], the head of a division, or a comparable official.” That language precludes realization of Petitioner’s premise that “any employee” could be designated. Here, the designee who signed the November 17 letter order was a “Division Director with direct daily responsibility over environmental compliance matters,” February 18 Order at P 12, JA 118, in compliance with the rule’s definition. Thus, and contrary to Petitioner’s suggestion (Br. 40), no adverse “public policy and safety implications” arise from application of the designation rule here. Rather, the designee was not only of appropriate rank, but also a staff official with expertise and experience to address the environmental matters involved.

## CONCLUSION

For the reasons stated, the Commission submits that the petitions for review should be dismissed, or, if not dismissed, the challenged Orders should be upheld in all respects, and the petitions denied.

Respectfully submitted,

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