

ORAL ARGUMENT IS SCHEDULED FOR MAY 14, 2009

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

Nos. 08-1131 and 08-1156 (Consolidated)

**LATHA ANDERSON, *ET AL.*, AND
MARATHON LNG MARKETING LLC,
PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**CYNTHIA A. MARLETTE
GENERAL COUNSEL**

**ROBERT H. SOLOMON
SOLICITOR**

**CAROL J. BANTA
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426**

**JANUARY 21, 2009
FINAL BRIEF: MARCH 12, 2009**

CIRCUIT RULE 28(A)(1) CERTIFICATE

A. Parties and Amici

To counsel's knowledge, the parties before this Court are as stated in the Brief of Petitioner Marathon LNG Marketing LLC. In addition to those parties, the following were parties and intervenors before the Federal Energy Regulatory Commission in Docket Nos. CP06-470, CP06-471, CP06-472, CP06-473, and CP06-474:

Alabama Gas Corporation
Alabama Municipal Distributors Group
Atlanta Gas Light Company and Chattanooga Gas Company
Atmos Energy Corporation
Austell Gas System
BP Energy Company
Blythe Energy, LLC
BP Energy Company
BG LNG Services, LLC
Carolina Gas Transmission Corporation
ConocoPhillips Company
Coral Energy Resources, L.P.
Board of Water, Light and Sinking Fund Commissioners of the City of
Dalton, Georgia
ExxonMobil Gas & Power Marketing Company
JEA
Municipal Gas Authority of Georgia
Patriot's Energy Group
Peoples Gas System, a Division of Tampa Electric Company
Progress Energy Carolinas, Inc. d/b/a Carolina Power and Light Company
Progress Energy Florida, Inc. d/b/a Florida Power Corporation
QTL Elba LLC
SCANA Energy Marketing, Inc. and South Carolina Electric & Gas
Company (Jointly)
Statoil Natural Gas LLC
Southeast Alabama Gas District
Southern Cities
Southern Company Services, Inc.
Transcontinental Gas Pipe Line Corporation

B. Rulings Under Review

1. Order Issuing Certificates, Authorizing Abandonments, Granting Authorization, and Denying Rehearing, *Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company*, Docket Nos. CP06-470, *et al.*, 120 FERC ¶ 61,258 (2007), R. 242, JA 1; and
2. Order Denying Rehearing and Granting Reconsideration, *Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company*, Docket Nos. CP06-470, *et al.*, 122 FERC ¶ 61,137 (2008), R. 304, JA 71.

C. Related Cases

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

Carol J. Banta
Attorney

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GLOSSARY

Certificate Order	Order Issuing Certificates, Authorizing Abandonments, Granting Authorization, and Denying Rehearing, <i>Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company</i> , Docket Nos. CP06-470, <i>et al.</i> , 120 FERC ¶ 61,258 (2007), R. 242, JA 1
Commission or FERC	Federal Energy Regulatory Commission
Draft EIS	Draft Environmental Impact Statement (issued Mar. 30, 2007), R. 131, JA 384
Elba Express	Elba Express Company, LLC
EPAAct 2005	Energy Policy Act of 2005, Pub. L. 109-58, 199 Stat. 594 (2005)
FERC Orders	Collectively, the Certificate Order and Rehearing Order under review
Final EIS	Final Environmental Impact Statement, (issued Aug. 3, 2007), R. 219, JA 716
Landowners	Petitioners Latha Anderson, <i>et al.</i>
L.Br.	Opening brief of Petitioner Landowners
LNG	liquefied natural gas
LNG-1 tariff	Existing rate schedule for firm transportation at Elba Island LNG import terminal
LNG-3 tariff	Proposed rate schedule for service at Elba Island terminal expansion
Marathon	Petitioner Marathon LNG Marketing LLC

GLOSSARY

M.Br.	Opening brief of Petitioner Marathon
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Policy Statement	<i>Certification of New Interstate Gas Pipeline Facilities</i> , 88 FERC ¶ 61,227 (1999)
Preliminary Determination	Preliminary Determination of Non-Environmental Issues, <i>Elba Express Company, L.L.C. and Southern Natural Gas Company</i> , Docket Nos. CP06-471, <i>et al.</i> , 119 FERC ¶ 61,015 (2007), R. 137, JA 499
Rehearing Order	Order Denying Rehearing and Granting Reconsideration, <i>Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company</i> , Docket Nos. CP06-470, <i>et al.</i> , 122 FERC ¶ 61,137 (2008), R. 304, JA 71
Transco	Transcontinental Gas Pipe Line Corporation, which operates interstate natural gas pipeline facilities that serve markets along the eastern seaboard

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PETITIONERS,**

v.

**FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.**

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

**BRIEF OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Assuming jurisdiction, whether the Federal Energy Regulatory Commission (“Commission” or “FERC”) properly approved a tariff for expanded terminal service at a liquefied natural gas import terminal and reasonably determined that the terminal expansion would not be subsidized by existing customers. [Marathon’s Appeal]
2. Whether the Commission properly approved, in the public interest, after a comprehensive review, construction of a pipeline to transport additional

supplies of natural gas to growing markets on the eastern seaboard, and adequately considered and addressed the objections of affected landowners. [Landowners' Appeal]

COUNTERSTATEMENT OF JURISDICTION

The Court lacks jurisdiction to consider the appeal of Petitioner Marathon LNG Marketing LLC (“Marathon”). In addition to satisfying the requirements of Section 19(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b), for judicial review of FERC rulings, a petitioner must satisfy the requirements of Article III of the United States Constitution. As set forth more fully in Part I.A.1 of the Argument, *infra*, Marathon lacks standing to object to the Commission’s approval of a tariff under which Marathon is not a customer. In addition, as set forth in Part I.A.2, Marathon’s arguments about subsidization of the terminal expansion by existing customers are not yet ripe for review because those existing customers’ rates were not addressed in this proceeding. Indeed, the Commission is addressing nonspeculative concerns about subsidization in a separate, ongoing case.

STATUTORY AND REGULATORY PROVISIONS

The pertinent statutes and regulations are contained in the Addendum to this brief.

INTRODUCTION

These consolidated appeals arise from the Commission’s orders authorizing the expansion of terminal facilities used to import liquefied natural gas (“LNG”) and the construction of a pipeline to transport natural gas supplies from that terminal to customers along the eastern seaboard. *Southern LNG, Inc., et al.*, Docket Nos. CP06-470, *et al.*, 120 FERC ¶ 61,258 (2007) (“Certificate Order”), R. 242, JA 1, *reh’g denied*, 122 FERC ¶ 61,137 (2008) (“Rehearing Order”), R. 304, JA 71.¹ In those orders, the Commission considered the proposed terminal expansion under NGA § 3 and the related pipeline project under NGA § 7. 15 U.S.C. §§ 717b, 717f.

Petitioner Marathon LNG Marketing LLC (“Marathon”), which claims standing based on a contractual relationship with one of the existing shipper-customers of the LNG terminal, challenges the Commission’s approval of the terminal expansion and of the tariff for expansion services. Marathon argues that the Commission exceeded its statutory authority under NGA § 3 by accepting that tariff and failed to ensure that the costs of the expansion would not be subsidized by existing customers.

¹ “R.” refers to a record item. “JA” refers to the Joint Appendix page number. “P” refers to the internal paragraph number within a FERC order.

In addition, a group of affected landowners (collectively, “Landowners”)² challenges the Commission’s approval of the new gas pipeline extending from the Elba Island terminal to interconnections with the interstate pipeline system operated by Transcontinental Gas Pipe Line Corporation (“Transco”). The Landowners contend that the Commission failed to weigh the benefits and costs of the proposed pipeline construction and failed adequately to consider alternative routes or the possibility of no construction.

STATEMENT OF FACTS

I. Statutory And Regulatory Background

Under NGA § 3, 15 U.S.C. § 717b, the Commission has exclusive jurisdiction to authorize natural gas imports. Under that section, “no person shall . . . import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so.” *Id.* § 717b(a); *see Distrigas*

² The Petitioner Landowners are Latha Anderson; Joseph W. Bennett, Jr.; Lincoln H. Bounds; Adelle G. Dehil; Dennis G. Dehil; Estate of Kay Johnston; Marion and Dorothy McHugh; Carol Phillips; William W. Robinson; R. Almond Standard; Richard and Virginia Thomas; and Marcus O. Tucker. (Several individuals who were named in the Landowners’ pleadings before the Commission are not listed in the Petitioner Landowners’ Brief: Francis D. Barnett, Mark and Dena Daniel; Bob and Belle Guin; Douglas M. Nelson; Melody M. Thornton.)

The Landowners filed their motion to intervene, comments on the environmental impact statement, request for rehearing, and other materials in the underlying FERC proceeding as a group. Because other affected landowners who are not before this Court on appeal did participate in the FERC proceeding, the FERC Orders referred to the Petitioner Landowners collectively as “Anderson.”

Corp. v. FERC, 495 F.2d 1057 (D.C. Cir. 1974). NGA § 3 further provides that “[t]he Commission shall issue such order upon application, unless, after opportunity for hearing, it finds that the proposed . . . importation will not be consistent with the public interest.” 15 U.S.C. § 717b(a); *see Wash. Gas Light Co. v. FERC*, 532 F.3d 928, 930 (D.C. Cir. 2008). The Commission also has the exclusive authority to approve or deny an application for the construction or expansion of an LNG terminal. 15 U.S.C. § 717b(e)(1).

Under NGA § 7(c)(1)(A), 15 U.S.C. § 717f(c)(1)(A), the Commission also has authority to approve construction of an interstate natural gas pipeline. *See, e.g., Consol. Edison Co. of N.Y., Inc. v. FERC*, 315 F.3d 316, 319 (D.C. Cir. 2003) (“Any pipeline seeking to build or to expand its facilities must first apply for a certificate of public convenience and necessity from FERC.”); *see also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (FERC is the guardian of the public interest and has a wide range of discretionary authority in determining whether certificates shall be granted).

In 1999, the Commission established its policy for certifying new pipeline construction. *Certification of New Interstate Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (“Policy Statement”). The Commission sought to balance anticipated growth in demand for natural gas against concerns about overbuilding and burdens on existing captive customers. *Id.* at 61,737.

The Commission set forth its analytical approach for future project applications. The threshold question is whether the project can proceed without subsidization by existing customers — if it cannot, the Commission will deny the application. *Id.* at 61,745; *see also Transcontinental Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 919 (D.C. Cir. 2008) (“*Transco*”) (“The [Policy S]tatement announces the Commission’s general goal of eliminating the subsidization of new customers by existing customers.”). This threshold requirement “helps to address all of the interests that could be adversely affected”:

Existing customers of the expanding pipeline should not have to subsidize a project that does not serve them. Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace. Existing pipelines should not have to compete against new entrants into their markets whose projects receive a financial subsidy (via rolled-in rates), and neither pipeline’s captive customers should have to shoulder the costs of unused capacity that results from competing projects that are not financially viable. This is the only condition that uniformly serves to avoid adverse effects on all of the relevant interests and therefore should be a test for all proposed expansion projects by existing pipelines. It will be the predicate for the rest of the evaluation of a new project by an existing pipeline.

88 FERC at 61,746.

If a project satisfies that nonsubsidization test, the Commission then determines “whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers,

or landowners and communities affected by the route of the new pipeline.” *Id.* at 61,747. If there are residual adverse effects after the pipeline has made efforts to minimize them,

then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered.

Id. at 61,745. *Cf. Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1325 (D.C. Cir. 2004) (“*New River*”) (noting FERC’s policy of “evaluating non-environmental aspects of a proposed project before the environmental ones”).

In conducting that economic analysis, the Commission will consider all relevant factors reflecting on the need for the project, including precedent agreements. 88 FERC at 61,747; *see also id.* at 61,748 (“contracts or precedent agreements for the capacity . . . would constitute significant evidence of demand for the project”). Among the types of public benefits an applicant may show are access to new supplies and provision of competitive alternatives. *Id.*; *New River*, 373 F.3d at 1325.

In weighing public benefits against adverse impacts, the Commission applies a sliding scale: “The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.” 88 FERC at

61,749. With regard to landowners' interests, the Commission provided examples of public benefits that could counterbalance the need to acquire right-of-way by use of eminent domain:

It may not be possible to acquire all the necessary right-of-way by negotiation. However, the company might minimize the effect of the project on landowners by acquiring as much right-of-way as possible. In that case, the applicant may be called upon to present some evidence of market demand, but under this sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation. For example, if an applicant had *precedent agreements with multiple parties for most of the new capacity*, that would be strong evidence of market demand and potential public benefits that *could outweigh the inability to negotiate right-of-way agreements with some landowners*. Similarly, *a project to attach major new gas supplies to the interstate grid would have benefits that may outweigh the lack of some right-of-way agreements*. A showing of significant public benefit would outweigh the modest use of federal eminent domain authority in this example.

Id. (emphases added).

Generally, the Commission considers this economic balancing test before conducting an environmental analysis. *See id.* ("The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners."); *cf., e.g., Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1319 (10th Cir. 2004) (noting FERC had issued preliminary determination finding that, subject to completion of environmental review, project's benefits outweighed potential adverse effects). If the subsequent environmental analysis indicates that an alternative route would be preferable, the

Commission will reopen the balancing of the public benefits against adverse effects to take into account the adverse effects on landowners who would be affected by the changed route. 88 FERC at 61,749.

II. The Commission Proceedings And Orders

A. Applications For LNG Terminal Expansion And Pipeline Construction

The instant case began when several affiliated entities concurrently filed applications under Sections 3 and 7 of the Natural Gas Act and the Commission's implementing regulations for authorizations to expand a liquefied natural gas import terminal and to construct pipeline facilities to move re-vaporized LNG to downstream markets on the eastern seaboard.

Existing LNG Terminal. Southern LNG, Inc. operates a terminal for receiving imports of liquefied natural gas on Elba Island, near Savannah, Georgia. The Federal Power Commission first authorized the construction and operation of the terminal facility in 1972. *Southern Energy Co.*, 47 FPC 1624 (1972).

Operations commenced in 1978, but diminished market demand led to its operation on standby mode from 1982 to 2000. In a series of orders from 1999 to 2001, FERC authorized the recommissioning and expansion of the facility; a further expansion was authorized in 2002 and 2003 and placed into service in early 2006. Certificate Order at P 3, JA 2.

LNG Terminal Expansion. Southern LNG filed an application pursuant to NGA § 3, in FERC Docket No. CP06-470, to expand the storage capacity and vaporization capacity of the Elba Island import terminal. Southern LNG proposed to increase its storage capacity, which was 7.3 billion cubic feet, by an additional 8.44 billion (divided equally in two phases, projected to be placed into service in June 2010 and December 2012, respectively). Certificate Order at PP 4-5, JA 2-3. Southern LNG also proposed to increase its vaporization capacity from the existing firm sendout rate of 806 million cubic feet per day, adding 900 million per day (405 million in the first phase and 495 million in the second). *Id.* Southern LNG further sought to modify the terminal unloading docks. *Id.* at P 4.³

The entire firm capacity of both phases of the expansion was already subscribed under agreements with two shippers, Shell NA LNG LLC (“Shell”) and BG LNG Services, LLV (“BG”) (collectively, “Shippers”). *Id.* at P 6, JA 3.⁴ Southern LNG proposed to provide service for the expansion under a new Rate

³ In its application, Southern LNG also sought approval under NGA § 7(b), 15 U.S.C. § 717f(b), to abandon certain unused facilities at a dock, separate from the expansion. *See* Certificate Order at P 5, JA 3.

⁴ The same two Shippers also are the only existing firm customers of Southern LNG at the Elba Island terminal. *See* Application For Abandonment And Authorization To Expand Liquefied Natural Gas Import Terminal at 8, R. 1, JA 94, 101. Petitioner Marathon asserts in its Brief (at 5-6) that it has a right to deliver LNG to the existing terminal under a contract with BG.

Schedule LNG-3. *Id.* The new tariff established terms and conditions for the expanded service, consistent with Southern LNG's existing open-access tariffs, and set incremental, cost-based rates for the expansion. *Id.* at P 56, JA 19. Southern LNG also had entered into negotiated rate agreements with the Shippers. *Id.* at P 60, JA 20.

Pipeline Construction. Elba Express Company, LLC (Southern LNG's affiliate) filed an application in FERC Docket Nos. CP06-471, -472, and -473 to construct and operate a new pipeline extending approximately 188 miles, from Port Wentworth, Georgia to interconnections with Transco's pipeline system on both sides of the Savannah River, in Hart County, Georgia and Anderson County, South Carolina. The first segment, 42 inches in diameter, would extend approximately 105 miles to Wrens, Georgia, where it would interconnect with the interstate system operated by Elba Express's parent, Southern Natural Gas Company ("Southern"). *See* Certificate Order at P 9, JA 4. This segment would be built within Southern's existing right of way. *Id.* at P 125, JA 39. The second segment would be 42 and 36 inches in diameter and extend approximately 83.1 miles from Wrens to the interconnections with Transco; most of that length would require greenfield construction in a new right-of-way. *Id.* at PP 9, 125, JA 4, 39.⁵ A map

⁵ The Certificate Order describes these pipeline segments as 115 miles and 74 miles, respectively. This apparent inconsistency is explained by the fact that the (continued...)

of the proposed pipeline is included in the Addendum to this brief at A10. *See also infra* p. 18.

Those facilities, together with certain existing pipeline capacity that Elba Express would acquire from Southern (to transport gas from the Elba Island terminal to Port Wentworth), would allow Elba Express to provide up to 945 million cubic feet per day of transportation capacity from the Elba Island LNG terminal to interconnections with Transco's interstate pipeline facilities.

Certificate Order at P 10, JA 4. In a second phase, Elba Express proposed to construct a compressor station to provide an additional 230 million cubic feet per day of transportation capacity. *Id.* at P 11, JA 4-5. The projected in-service dates for the two phases were the same as for the two phases of the LNG terminal expansion. *Id.*

Elba Express entered into precedent agreements for long-term firm transportation service for the entire capacity of both phases with the same Shippers (Shell and BG). *Id.* at P 12, JA 5.

first approximately 10 miles of the Wrens-to-Transco pipe will, like the longer, collocated segment, consist of 42-inch pipe, while the remaining 74 miles will consist of 36-inch pipe. *See* Final Environmental Impact Statement at 2-7, R. 219, JA 775. Therefore, the 42-inch segment and the 36-inch segment described in the Commission's Orders do not correspond precisely to the Port Wentworth-to-Wrens and Wrens-to-Transco segments. In any event, the exact lengths of the segments are not material to the issues on appeal.

Transfers of Pipeline Interests. In FERC Docket No. CP06-474, Southern, the parent of both Southern LNG and Elba Express, sought approval to transfer an interest in certain of its pipelines to Elba Express and to acquire an interest in certain of Elba Express's proposed facilities. Certificate Order at PP 7-8, JA 3-4. Though the Commission addressed all issues in the related dockets in the same orders, Southern's application is not at issue in these consolidated appeals.

The Commission consolidated the proceedings on all of the applications. Numerous parties filed motions to intervene in the proceeding. *See Elba Express Company, L.L.C. and Southern Natural Gas Company*, Docket Nos. CP06-471, *et al.*, 119 FERC ¶ 61,015, Appendix A (2007), R. 137, JA 499, 523-24. Several parties, including the group of Petitioner Landowners, filed such motions after the date for intervention. *Id.*

B. Preliminary Determination

On April 4, 2007, the Commission issued its Preliminary Determination on Non-Environmental Issues, *Elba Express Company, L.L.C. and Southern Natural Gas Company*, Docket Nos. CP06-471, *et al.*, 119 FERC ¶ 61,015 (2007) ("Preliminary Determination"), R. 137, JA 499.

Among other procedural matters, the Commission granted the late motions to intervene, including that of the Petitioner Landowners. Preliminary

Determination at P 16 & Appendix A (listing timely and untimely interventions), JA 504, 523-24.

The Commission noted that its Preliminary Determination was limited to addressing the pipeline-related applications of Elba Express and Southern, leaving issues concerning Southern LNG's proposed terminal expansion for a later order. *See id.* at PP 5, 16, JA 500, 504. In particular, the Commission clarified that it would not yet address Marathon's objections to Southern LNG's rate design of the proposed LNG-3 tariff. *Id.* at P 16 n.9 (“[W]e are not making a preliminary determination on the non-environmental issues associated with Southern LNG’s proposal to expand its LNG terminal at this time. We will consider all issues related to that proposal in a final order in this proceeding.”), JA 504.

Turning to the substantive analysis, the Commission followed the guidance set forth in its earlier Policy Statement on evaluating proposals for new construction. *See* Preliminary Determination at P 18 n.10, JA 504; *see supra* pp. 5-9 (discussing Policy Statement). The Commission determined that Elba Express's proposed pipeline satisfied the “threshold requirement” that the pipeline must be prepared to support the project financially without subsidization from existing customers; indeed, Elba Express had no existing pipeline facilities or customers. Preliminary Determination at P 20, JA 505. For the same reason, the proposed construction would have no adverse effects on existing services. *Id.* at P 21,

JA 505. The proposal would not adversely affect existing pipelines and their captive customers because it was “designed to meet incremental demand with incremental supplies.” *Id.* No pipelines or customers had protested Elba Express’s proposal. *Id.* at P 22, JA 505.

Most important for purposes of this appeal, the Commission found that:

. . . Elba Express has made efforts to minimize impacts on landowners and communities affected by its project. Specifically, Elba Express proposes to acquire an undivided ownership interest in Southern [Natural Gas Company]’s Twin 30s pipelines which will obviate the need to construct pipeline facilities in sensitive areas. Indeed, Elba Express proposes to locate its facilities for a significant portion of its proposed route in, or adjacent to, existing utility right-of-ways.

Id.

The Commission also considered the need for the proposed pipeline, as demonstrated by its full subscription by the Shippers and the enhancement of natural gas supplies available to serve customers on the eastern seaboard:

Elba Express has identified a need for its project by the execution of long-term agreements for the entire capacity of both phases of the pipeline project. Elba Express’ project will benefit existing pipelines and their customers by providing additional access to LNG supplies from Southern LNG’s Elba Island terminal. In particular, the proposed interconnections between Elba Express and Transco will provide customers along the eastern seaboard access to Elba Island supplies.

Id. at P 23, JA 506.⁶

⁶ The Commission went on to consider issues that are not before this Court on (continued...)

Accordingly, the Commission determined, subject to completion of the environmental review, that the proposed construction satisfied the criteria for certification:

For the reasons discussed above, we reach a preliminary determination, subject to completion of our environmental review and the fulfillment of all conditions specified in this order, that the benefits of Elba Express' and Southern's proposed projects will outweigh any potential adverse effects, consistent with our policy statement on new facilities, and that the proposed facilities, abandonments, and acquisitions are required and permitted by the public convenience and necessity, subject to the conditions identified below and in the body of this order.

Id. at P 67, JA 519. The Commission noted that FERC Staff was conducting an independent environmental analysis that would culminate in recommendations to the Commission. *Id.* at P 65, JA 519.

Another party, Shell, sought rehearing of the Preliminary Determination on issues that are not before this Court. R. 147. Neither the Landowners nor Marathon sought rehearing of the Preliminary Determination.

C. Environmental Impact Statement

As the Commission noted in its Preliminary Determination, FERC Staff, in cooperation with the U.S. Coast Guard and the U.S. Army Corps of Engineers,

appeal, including the proposed rates and terms of Elba Express's tariff for the pipeline project, and the acquisition by Elba Express and abandonment by Southern Natural Gas Company of certain interests in the latter's existing pipelines. *Id.* at PP 24-65, JA 506-19.

prepared an environmental impact statement to comply with the requirements of the National Environmental Policy Act of 1969 (“NEPA”), and the Commission’s implementing regulations, 18 C.F.R. § 380. The environmental impact statement covered both the proposed LNG terminal expansion and the proposed pipeline construction.

The Commission issued its Draft Environmental Impact Statement (“Draft EIS”) on March 30, 2007. R. 131. Several dozen parties filed written comments in response; numerous parties (including some of the Landowners and their counsel) also participated in public meetings. Of relevance here, the Landowners submitted three comment filings. R. 170 (Comments) (filed May 29, 2007), JA 549; R. 176 (Supplemental Comments) (filed May 29, 2007), JA 629; R. 178 (Second Supplemental Comments) (filed May 30, 2007), JA 634; R. 206-211 (DVDs and CD containing various supporting materials) (filed July 12, 2007).⁷

On August 3, 2007, the Commission issued its Final Environmental Impact Statement (“Final EIS”). R. 219, JA 716. The Commission revised its analysis and responded to points raised by various commenters. *See, e.g., id.* §§ 3.3.1, 3.3.2, JA 813-22. In Section 6 of the Final EIS, FERC Staff responded

⁷ The Landowners also filed a motion requesting that the Commission hold a hearing, which raised the same arguments as its comments. R. 216, JA 694. The Commission addressed those arguments in its Certificate Order (*see infra*).

specifically, page-by-page, to the Landowners' comments on the Draft EIS. *See id.* at 6-45 to -75 (responding to Comments), JA 863-93; *id.* at 6-76 to -79 (responding to Supplemental Comments), JA 894-97; *id.* at 6-80 to -93 (responding to Second Supplemental Comments), JA 898-911.

Though the environmental study also reviewed the effects of the Elba Island terminal expansion, only the analysis of the Elba Express pipeline is relevant to this appeal. Much of the proposed pipeline route, the 105-mile segment from Port Wentworth to Wrens, Georgia, would be collocated on existing rights-of-way; therefore, FERC Staff found it would have less environmental impact than any of the alternative routes. Final EIS at 3-20, JA 817; *cf. id.* at 2-2 (Figure 2.0-1, showing proposed pipeline route), JA 770 (also included in Addendum to this brief at A10). Because the 83-mile portion, called the Northern Segment, would primarily involve greenfield construction on a new right-of-way from Wrens to the Transco interconnections, the Landowners and other commenters requested that FERC Staff consider alternatives that would follow existing utility rights-of-way. *Id.* The Final EIS described three alternative routes, designated as Alternatives A, B, and C, that would follow existing corridors and would meet the project objectives of interconnecting with the Transco system in Zones 4 and 5. *See* Final EIS at 3-16 to -22, JA 813-19; *id.* at 3-19 (Figure 3.3-1, showing Alternative A), JA 816 (also in Addendum at A11); *id.* at 3-23 (Figure 3.3-2, showing Alternatives

B and C), JA 820 (also in Addendum at A12). The Final EIS also considered three route alternatives that would be partially collocated in existing utility corridors. *Id.* at 3-22 to -25, JA 819-22. The analysis concluded that none of the alternatives would provide a significant environmental advantage over the proposed Northern Segment. Final EIS at 5-13, JA 861.

D. Certificate Order

On September 20, 2007, the Commission issued its Order Issuing Certificates, Authorizing Abandonments, Granting Authorization, and Denying Rehearing,⁸ *Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company*, Docket Nos. CP06-470, *et al.*, 120 FERC ¶ 61,258 (2007) (“Certificate Order”), R. 242, JA 1. The Certificate Order addressed a number of issues raised in the various dockets, most of which are not at issue in this appeal.

Of relevance here, the Commission evaluated Southern LNG’s application under NGA § 3 and determined that, subject to certain safety and environmental conditions, the Elba Island terminal expansion was consistent with the public interest. Certificate Order at PP 51-53, JA 17-19. As it had indicated in the Preliminary Determination, the Commission addressed Marathon’s challenges to

⁸ The denial of rehearing in the title refers to issues raised by Shell on rehearing of the Preliminary Determination, which are not before this Court on appeal.

Southern LNG's proposed rate design for the terminal expansion. The Commission accepted Southern LNG's proposed LNG-3 tariff for expansion services, over Marathon's objections that the Commission lacked statutory authority to do so and that the proposed incremental LNG-3 rates would result in subsidization of the expansion by existing terminal customers. *Id.* at PP 54-67, JA 19-23. The Commission explained that it did not read NGA § 3(e)(3)(B) as precluding it from approving such a tariff when proposed by the applicant, as opposed to mandating such a tariff on its own initiative. *Id.* at P 52, 67, JA 18, 22-23. The Commission also concluded that the expansion would not be subsidized by customers on the existing terminal. *Id.* at P 64-66, JA 21-22.

The Certificate Order also resolved several tariff issues that are not raised in this appeal. The Commission rejected certain changes to the existing LNG-1 and LNG-2 rate schedules, under which Southern LNG provides firm (LNG-1) and interruptible (LNG-2) transportation at the existing Elba Island terminal. In particular, in response to Marathon's objection that Southern LNG could not modify certain terms of the LNG-1 tariff (such as adding force majeure provisions and a new storage charge), the Commission agreed with Marathon and rejected those changes. Certificate Order at PP 68-75, JA 23-25.

The Commission also addressed the Landowners' objections to Elba Express's proposed pipeline construction. The Commission noted that the

Landowners had not sought rehearing of the Preliminary Determination, that FERC Staff had answered the Landowners' points at length in the Final EIS, and that the Landowners raised nothing new before the Commission. Certificate Order at P 128, JA 40. Nevertheless, the Commission explained that it had previously concluded that Elba Express demonstrated the need for the project and had found that the public benefits, including the rate savings and commercial flexibility provided by the proposed interconnections with Transco's interstate system, outweighed the adverse impacts. *Id.* at PP 141-43, JA 44-45. The Commission also reviewed the environmental analysis and agreed with FERC Staff's conclusion that none of the proposed alternative routes would provide a significant environmental advantage. *Id.* at PP 129-39, JA 40-44.

The Landowners and Marathon, among other parties, filed timely requests for rehearing. R. 255 (Landowners), JA 912; R. 257 (Marathon), JA 943.

E. Rehearing Order

On February 19, 2008, the Commission issued its Order Denying Rehearing and Granting Reconsideration, *Southern LNG, Inc., Elba Express Company, LLC, and Southern Natural Gas Company*, Docket Nos. CP06-470, *et al.*, 122 FERC ¶ 61,137 (2008) ("Rehearing Order"), R. 304, JA 71. With regard to the LNG-3 rate schedule for expansion services, the Commission explained that, although the statute precludes the Commission from conditioning certification of an LNG

terminal on rate regulation, it does not bar the Commission from approving a tariff that the LNG terminal operator has elected to adopt. *Id.* at PP 11-19, JA 74-77.

The Commission also reaffirmed its finding that Southern LNG's adoption of an incremental expansion rate did not result in subsidization by the existing customers, and that requiring Southern LNG to maintain separate books and records for the expansion would ensure that the Commission can protect existing customers from subsidization in any future rate case. *Id.* at PP 21-26, JA 78-80.

In addition, the Commission reaffirmed its determinations that the Elba Express pipeline proposal was required by the public convenience and necessity and would be environmentally preferable to alternative routes. *Id.* at PP 50-65, JA 87-93. The Commission again responded to the Landowners' arguments, finding that they raised no new issues. *See id.*

These petitions by Marathon and the Landowners followed.

SUMMARY OF ARGUMENT

The Commission properly granted the related applications to expand the LNG import terminal and to construct a pipeline to transport the imported gas to markets along the eastern seaboard.

1. Marathon's Objections Regarding The LNG Terminal Expansion

First, Marathon lacks standing to challenge the Commission's approval of the LNG-3 tariff. Marathon, at best an indirect customer under the LNG-1 tariff, does not claim that it would take any service (either directly or through its transactions with BG) under the LNG-3 tariff and thus cannot show any cognizable injury resulting from the Commission's approval. Nevertheless, the Commission properly held that its approval of the tariff proposed by Southern LNG did not exceed its statutory authority under NGA § 3 because the Commission did not require rate regulation as a condition of certification.

Second, Marathon's argument regarding potential subsidization of the LNG terminal expansion is not ripe, as the rates of existing customers were not raised and no future roll-in of costs was proposed or considered. Even assuming jurisdiction, however, the Commission determined that approving incremental rates for the expansion would protect existing customers from subsidization until a future rate case. The Commission reasonably determined that the LNG terminal expansion would not be subsidized by customers of the existing terminal, and

appropriately required Southern LNG to keep separate accounts for the costs of the existing terminal and the expansion to guard against any future subsidization.

2. Landowners' Objections Regarding The Proposed Pipeline

Much of the Landowners' argument on appeal broadly questions the purpose and benefits of the project, though the Landowners wholly ignore the Commission's analysis (unchallenged below) of those benefits in its Preliminary Determination. Notwithstanding the Landowners' contrary view, the Commission reasonably determined that the need for and benefits of the proposed pipeline outweighed the adverse impacts, based on the long-term commitment of the Shippers for the entire firm capacity of the Elba Express project and the planned interconnections to make additional supplies of natural gas available to markets along the eastern seaboard.

The Commission also reasonably found, based on its environmental review, that construction and operation of the project was not likely to result in significant adverse environmental impact, and that each possible alternative route would have a greater adverse impact than the proposed route. The challenged FERC Orders, together with the Final EIS, demonstrate that the Commission not only took the requisite "hard look" at the environmental consequences of the project but also carefully considered and properly rejected the Landowners' objections.

ARGUMENT

I. THE COMMISSION PROPERLY APPROVED THE LNG TERMINAL EXPANSION [MARATHON'S APPEAL]

A. This Court Lacks Jurisdiction To Consider Marathon's Challenges

1. Marathon Lacks Standing To Challenge Approval Of The LNG-3 Tariff

Much of Marathon's argument on appeal concerns the scope of the Commission's authority under NGA § 3(e) to accept a new LNG-3 tariff for services provided on the LNG terminal expansion. *See, e.g.*, M.Br. 21-25. Specifically, Marathon argues that the Commission exceeded its statutory authority by approving that tariff, which was submitted voluntarily by Southern LNG in order to establish terms and conditions for service on the expansion,⁹ because NGA § 3(e) would preclude the Commission from imposing such regulation as a condition of certificate approval. M.Br. 21-25. But Marathon has no standing to make that argument.

To obtain judicial review of a FERC order, a party must meet the requirements of Article III standing. *See, e.g., Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005). The "irreducible constitutional

⁹ Southern LNG stated that it chose to offer tariffed service as a result of a "collaborative approach" with the Shippers to avoid subsidization, degradation and undue discrimination issues. Answer of Southern LNG Inc. at 4 (filed Feb. 9, 2007), R. 110, JA 374, 377.

minimum” for standing requires the petitioner to have suffered (1) an “injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical,” (2) that has a “causal connection” with the challenged agency action, and (3) that likely “will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (internal citations and quotation marks omitted); *see also, e.g., Bennett v. Spear*, 520 U.S. 154, 162 (1997).

Marathon, however, never explains how it has any interest that will be affected by the LNG-3 tariff. Marathon’s sole asserted basis for its standing is that it pays for service at the existing LNG terminal — indirectly, as costs charged to BG by Southern LNG and reimbursed to BG by Marathon under a contract between BG and Marathon — under the *LNG-1* tariff. M.Br. 5-6. Even assuming that its asserted contractual obligation to reimburse BG affords Marathon standing with respect to the LNG-1 tariff, Marathon has offered *no* plausible basis for its standing to challenge the Commission’s approval of the LNG-3 tariff, or to object to any term or condition of that tariff.¹⁰ Marathon does not claim that it will receive any service or incur any costs under the LNG-3 tariff. *Cf. Panatronic USA*

¹⁰ As noted *supra* at p. 20, the Commission rejected Southern LNG’s proposed changes to the LNG-1 tariff, agreeing with Marathon that the terms of that tariff could not be changed in this proceeding. Certificate Order at PP 68-75, JA 23-25.

v. AT&T Corp., 287 F.3d 840, 845 (9th Cir. 2002) (holding party that was not customer under tariff had suffered no cognizable injury and lacked standing to invoke terms of tariff). *Contra, e.g., Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005) (addressing statutory challenge brought by pipeline in tariff dispute with its customer) (cited in M.Br. 23-24 and discussed at pp.38-39, *infra*). Accordingly, Marathon fails to meet both the injury and causation requirements for standing to challenge the approval of the LNG-3 tariff.

Marathon also fails the redressability prong. Marathon contends that its standing is based on the potential subsidization of the expansion by LNG-1 customers. M.Br. 6. But if this Court agreed with Marathon's statutory argument and vacated the LNG-3 tariff, Marathon's concern about subsidization would not be redressed. Marathon recognizes that the Commission has exclusive authority to approve the construction and operation of the terminal expansion (M.Br. 4), but insists that the Commission exceeded its authority by approving the LNG-3 tariff (M.Br. 3). Stripping the approval of that tariff from the Commission's orders below, however, would not affect the services received or rates paid by any customer under the existing LNG-1 tariff. Nor would it void the Commission's approval under NGA § 3 of the construction and operation of the terminal expansion.

To the extent that Marathon argues that the Commission failed to ensure that the LNG terminal expansion would not be subsidized by customers under the LNG-1 tariff, that is an entirely separate issue (as to which Marathon faces a different jurisdictional problem, as discussed in the next section). As explained more fully in Part I.D, *infra*, Marathon’s concerns about subsidization center (as they must) on the rates, terms, and conditions of the LNG-1 tariff, not on the approval or even the existence of the LNG-3 tariff.

Nevertheless, as discussed in Part I.C, *infra*, Marathon’s statutory challenge to the Commission’s approval of the LNG-3 tariff lacks merit.

2. Marathon’s Subsidization Arguments Are Not Yet Ripe For Review

Marathon’s subsidization argument also fails to meet the requirements of Article III. As the Commission explained below, Marathon’s concern that customers of the existing terminal may subsidize costs of the LNG terminal expansion is “speculative,” unless and until Southern LNG proposes such a rate design in a future case. Certificate Order at P 66, JA 22.¹¹

¹¹ Nevertheless, as discussed more fully in Part I.D *infra*, the Commission imposed measures, including recordkeeping requirements, to ensure against cost-shifting. *See* Rehearing Order at PP 25-26, JA 79-80; *see also* Certificate Order at P 66 (requiring Southern LNG to maintain its accounts for existing and expansion facilities in accordance with FERC’s regulations governing incremental expansions), JA 22.

This Court finds an issue unripe for review when “an injury has not yet materialized” and there is no showing that a “delay of adjudication would inflict hardship.” *Ala. Mun. Distribs. Group v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002). This lack of immediacy also can be viewed as a failure of standing. *See id.* at 472 (ripeness and standing “overlap significantly”; “The contingencies that stand between the orders here and any injury to petitioners tend both to show the injury’s lack of imminence and to render their claim unripe.”); *Wis. Pub. Power Inc. v. FERC*, 493 F.3d 239, 267-68 (D.C. Cir. 2007) (holding that FERC rationale that might govern in future proceeding did not create standing).

Before the Commission, Marathon expressed concern that Southern LNG, in a future rate case, might propose a rate design that could result in subsidization of the incremental services by existing customers. *See, e.g.*, Motion For Order Rejecting Proposed Tariff Changes, Denying Request For Authorization And Scheduling Hearing at 10-11 (filed Feb. 2, 2007), R. 107, JA 362, 371-72. But the Commission noted that Southern LNG had not requested approval for, and the Commission was not considering in this certificate proceeding, any proposal for rolled-in treatment. Certificate Order at P 66, JA 22; Rehearing Order at P 25, JA 79-80. In requiring Southern LNG to maintain separate accounts for the expansion, the Commission made clear that “customers can question the proposed rate treatment when Southern LNG files a rate case.” *Id.* at P 26, JA 80.

Therefore, Marathon’s appeal should be dismissed as unripe based on the holding in *Alabama Municipal*. In that case, this Court declined to review FERC orders that certificated new pipeline facilities with discount rates, where the petitioners argued that their own rates might be affected (due to FERC’s practice of making discount adjustments to throughput in calculating rates). The Court concluded that the effect, if any, that the certificate orders would have on the petitioners’ rates would be decided in a future rate case; “[w]hat that precise effect will be, no one can now say. The injury has not yet materialized nor has the factual record related to that injury been established.” 312 F.3d at 473; *cf. Toca Producers v. FERC*, 411 F.3d 262, 266-67 (D.C. Cir. 2005) (finding appeal unripe where issue might be resolved in separate rate case).

Similarly, in *Wisconsin Public Power*, this Court held that transmission customers lacked standing to challenge orders that approved charges to transmission providers, because the customers would not suffer any injury unless and until the providers subsequently sought to pass through those charges to customers. 493 F.3d at 268. Indeed, even though the providers had *in fact* sought such a pass-through in a subsequent FERC proceeding (which had come to a conclusion before the Court decided *Wisconsin Public Power*), the Court held that the petitioners nevertheless did not have standing for purposes of the existing appeal. *Id.* at 296 (“The fact that the Commission approved a pass-through of [the

charges] . . . in orders not currently before us does not alter our standing analysis.”). Likewise, Marathon would have no standing to bring this appeal even if the Commission had opined about a future LNG-1 rate case.

The Commission has subsequently demonstrated that, true to its word, it will address Marathon’s concerns about subsidization in an appropriate case. In November 2008, Southern LNG filed a negotiated rate agreement under which it would allow BG to use the expanded Elba Island dock facilities before the expanded storage and vaporization facilities are placed into service. Under the proposed agreement, BG would receive services under the LNG-1 tariff, but would also pay an additional monthly reservation charge derived from the cost of service for the expanded dock facilities. *See Southern LNG, Inc. Negotiated Rate Agreement*, 125 FERC ¶ 61,395 at P 3 (2008). Marathon intervened and protested, contending that the agreement violated the LNG-1 tariff and FERC’s incremental pricing policy and circumvented the statutory bar on subsidization in NGA § 3. *See id.* at PP 5-9.

In a letter order issued on December 31, 2008, the Commission recognized Marathon’s concern and directed Southern LNG to explain why the agreement would not result in subsidization:

The Commission agrees with Marathon that the instant negotiated rate agreement appears to allow Southern LNG to provide service to BG LNG under Rate Schedule LNG-1, while using expanded docking facilities associated with the Elba III Expansion, which were

certificated for use with Rate Schedule LNG-3. Accordingly, the instant negotiated rate agreement may conflict with Commission policy, . . . Southern LNG’s tariff, the Commission’s [Certificate Order] . . . , and section 3 of the NGA as raised by Marathon in its protest.

125 FERC ¶ 61,395 at P 11 (internal citation omitted) (emphasis added). The Commission ordered Southern LNG to make a filing with the Commission within 20 days responding fully to Marathon’s protest, including “an explanation of why the Commission’s policy against negotiating terms and conditions of service is not violated and *demonstrating why the use of the expanded docking facilities by BG LNG is not being subsidized by the LNG-[1¹²] customers.*” *Id.* (emphasis added). (Southern LNG’s response is due at the same time as the Commission’s brief in this appeal.) The Commission’s action in that subsequent proceeding shows that the Commission will address nonspeculative concerns about subsidization; thus, this Court should not adjudicate Marathon’s unripe claims in this case.

¹² The letter order refers to subsidization by LNG-3 customers, but other parts of the same order, the context, and Marathon’s protest make clear that the intended reference was to LNG-1 customers. *See, e.g., id.* at P 8 (“Marathon contends that, through this agreement, Southern LNG circumvents . . . Section 3 of the Natural Gas Act, which prohibits the subsidization of expansion capacity by existing customers, by using the Commission’s negotiated rate program to shift costs from the Rate Schedule LNG-3 expansion to the existing Rate Schedule LNG-1 customers.”).

B. Standard Of Review

The Court reviews FERC orders under the Administrative Procedure Act's arbitrary and capricious standard. *See, e.g., Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). A court must satisfy itself that the agency "articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 15 U.S.C. § 717r(b).

The Commission's decisions regarding rate issues are entitled to broad deference, because of "the breadth and complexity of the Commission's responsibilities." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also, e.g., Mo. Pub. Serv. Comm'n v. FERC*, 215 F.3d 1, 3 (D.C. Cir. 2000).

The two-step *Chevron* analysis applies to the Commission's interpretation of the Natural Gas Act. *See, e.g., Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1284-85 (D.C. Cir. 2003). If Congress has "directly spoken to the precise question at issue" and its intent is clear, "that is the end of the matter." *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842 (1984). If the statute is silent or ambiguous as to the question, the Court gives deference to the

Commission’s interpretation if it is a “permissible construction of the statute.” *Id.* at 843.

C. The Commission Properly Accepted Southern LNG’s Proposed LNG-3 Tariff

Together with its application under NGA § 3 for approval of the LNG terminal expansion, Southern LNG submitted the proposed LNG-3 tariff setting terms and conditions for service on the expansion. The Shippers that had entered into long-term agreements for the entire firm capacity of the expansion did not object to the proposed tariff; indeed, Southern LNG stated that the filing resulted from a collaborative approach with the Shippers. *See supra* note 9.

Marathon contends that the Commission had no authority under the NGA to approve the tariff that Southern LNG proposed. Marathon argues that, because the NGA prohibits the Commission from forcing Southern LNG to offer tariffed service as a condition of receiving authorization for the expansion, the Commission had no authority to accept the tariff proposed by Southern LNG on its own initiative. *See* M.Br. 23-24. But even assuming that Marathon has standing to challenge the approval of a tariff for rates that it will not pay, for services that it will not receive, the Commission’s acceptance of the LNG-3 tariff was within its statutory authority.

The Commission began its analysis by examining the statute’s grant of certificating authority. As amended by the Energy Policy Act of 2005, Pub. L.

109-58, 199 Stat. 594 (2005) (“EPAAct 2005”), NGA § 3(e)(1) affirms that the

Commission has:

exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal. Except as specifically provided in this chapter, nothing in this chapter is intended to affect otherwise applicable law related to any federal agency’s authorities or responsibilities related to LNG terminals.

15 U.S.C. § 717b(e)(1), *cited in* Rehearing Order at P 11, JA 74. Whereas the first sentence places certification of LNG terminals under the Commission’s exclusive authority, the second sentence preserves “any federal agency’s” existing authorities related to LNG terminals, absent any express removal of specific powers. The Commission properly read that reservation of authority to include its own. *See* Rehearing Order at P 11 (“Thus, any limitation on the Commission’s existing authority to approve and condition LNG applications must be ‘specifically provided’ by the language of EPAAct 2005.”), JA 74.

Marathon argues that none of the Commission’s existing authority was preserved by the second sentence of NGA § 3(e)(1) because “[t]he language is intended to leave intact the authority of *other* federal agencies.” M.Br. 23 (emphasis added). But Marathon’s interpretation of the statute depends on the insertion of an essential, limiting word — “*other*” — that Congress did not include. *Cf. Palestine Info. Office v. Shultz*, 853 F.2d 932; 937-38 (D.C. Cir. 1988) (Congress could have added limiting language but did not; “For this court to add

this condition on its own would be to abjure the basic principle of statutory construction that words are ordinarily to be given their ‘plain meaning.’”). Congress’s actual language, referring to “*any* federal agency’s authorities,” defies such limitation. *See Salinas v. United States*, 522 U.S. 52, 57 (1997) (“The word ‘any’ . . . undercuts the attempt to impose [a] narrowing construction.”); *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006) (“read naturally, the word ‘any’ has an expansive meaning”).

Turning to the specific limitations provided in EPAct 2005, the provision relevant to this case bars the Commission from conditioning its approval on the imposition of rate regulation. Though the Commission is generally authorized by NGA § 3(e)(3)(A), 15 U.S.C. § 717b(e)(3)(A), to approve an LNG application “with such modifications and upon such terms and conditions as the Commission find[s] necessary and appropriate,” the next subsection provides that (until 2015) the Commission “*shall not . . . condition* an order on . . . any regulation of the rates, charges, terms, or conditions of service of the LNG terminal” NGA § 3(e)(3)(B)(ii)(II), 15 U.S.C. § 717b(e)(3)(B)(ii)(II) (emphasis added).

Here, Southern LNG proposed a new tariff for the terminal expansion, setting incremental cost-based rates for expansion services. Certificate Order at

P 56, JA 19.¹³ The Commission previously accepted a similar proposal in another post-EPA 2005 case. *See Trunkline LNG Co.*, 117 FERC ¶ 61,339 at P 20 (2006) (granting authority, at applicant’s request, to provide enhanced LNG terminal services at cost-based rates under open-access tariff), *cited in* Certificate Order at P 52 n.48, JA 18.

Marathon, however, contends that EPA 2005 stripped the Commission of authority to approve a tariff proposed by an applicant. M.Br. 23. The Commission disagreed, finding that Marathon’s interpretation turns on “a tortured reading of the word ‘condition’”:

Southern LNG has selected and proposed what the Commission has approved, *i.e.*, to expand its LNG terminal and provide expanded tariffed service under continuing and limited Commission review. Where an applicant seeks to establish and implement a business plan based on and incorporating the body of regulatory law provided by existing Commission policies, only a tortured reading of the word “condition” can make the statute’s prohibition applicable.

Rehearing Order at P 13, JA 75. Moreover, Marathon’s “very broad[]” construction of “condition” defies the broad reservation in NGA § 3(e)(1) of an agency’s otherwise applicable authority “[e]xcept as specifically provided,” which indicates that a specific prohibition should be construed narrowly. *See id.* at P 13,

¹³ Southern LNG stated, however, that the Shippers had entered into negotiated rate agreements, which the Commission declined to review in this certificate proceeding but directed Southern LNG to file separately at a later time. Certificate Order at PP 76-77, JA 25-26 Rehearing Order at P 25 & n.24, JA 80.

JA 75. *Cf., e.g., Vaughn v. Rosen*, 523 F.2d 1136, 1149 n.8 (D.C. Cir. 1975) (Leventhal, J., concurring) (noting that phrase “except as specifically stated” indicates “[s]trict construction” of exceptions).

Were the Commission to *require* an applicant seeking LNG terminal authority to comply with Part 154 of FERC’s regulations (requiring tariff filings under NGA § 4), the statutory prohibition would apply. *See* Rehearing Order at P 14, JA 75-76. “However, the Commission has not required traditional rate and service regulation as a condition of approval. Indeed, . . . our policy has been to respect to the maximum extent possible the commercial arrangements reached between LNG terminal operators and their customers.” *Id.* & n.10 (citing *Hackberry LNG Terminal L.L.C.*, 101 FERC ¶ 61,294 (2002)), JA 75-76. The Commission followed that policy here — the terminal operator’s proposed tariff was the result of a “collaborative approach” with its only customers (*see supra* note 9), and only Marathon, a third party that will not even receive expansion service, seeks to upset that arrangement. *Cf.* Rehearing Order at P 17 & n.12 (citing Southern LNG’s argument that EAct 2005 neither prohibits an applicant from offering tariffed service to expansion customers nor precludes the Commission from reviewing proposed changes to such a tariff), JA 76.

The Commission’s interpretation of its statutory authority does not, as Marathon contends (M.Br. 23-24), run afoul of this Court’s holding in *Columbia*

Gas. In that case, the Commission tried to compel a pipeline’s compliance with a tariff provision regarding installation of meters on gathering facilities; the Commission’s sole claim to jurisdiction was that the pipeline had voluntarily filed the tariff, and the filed rate doctrine empowered the Commission to enforce the tariff. 404 F.3d at 461-62. Section 1(b) of the NGA (15 U.S.C. § 717(b)), however, expressly excluded gathering from the provisions of NGA, including the very sections from which the filed rate doctrine derives (§§ 4 and 5, 15 U.S.C. §§ 717c, 717d). 404 F.3d at 462 (gathering and production “are precisely the activities that the NGA excludes from FERC’s purview”). Thus, *Columbia Gas* held that the Commission may not accept, let alone try to enforce, a tariff provision that covers non-jurisdictional activity. *Id.* at 463; *see also* Rehearing Order at P 18, JA 77.

Here, by contrast, EPAAct 2005 did not similarly exclude rate regulation from the Commission’s jurisdiction over LNG services — it only barred the Commission from “conditioning” the certification of an LNG terminal on the applicant’s submission to rate regulation. Accordingly, the Commission properly concluded that, by accepting a tariff that Southern LNG chose for its own reasons to file, it was “not conditioning [its] approval in contravention of the terms of the statute” (Rehearing Order at P 17, JA 76):

We interpret the statute to preclude the Commission from requiring any particular rate, term or condition of service on new or expanded

LNG terminal facilities. In other words, the proponent of the LNG terminal may voluntarily propose to offer services under our open-access transportation program.

Id. at P 19, JA 77. In this case, Southern LNG specifically requested, at its own initiative and in cooperation with its customers, approval for an open-access tariff, and the Commission acted within its statutory authority to grant such approval.

See id.

D. The Commission Reasonably Determined That The LNG Terminal Expansion Would Not Be Subsidized By Existing Customers

As amended by EAct 2005, NGA § 3(e)(4) provides that:

An order issued for an LNG terminal that also offers service to customers on an open access basis shall not result in subsidization of expansion capacity by existing customers, degradation of service to existing customers, or undue discrimination against existing customers as to their terms or conditions of service at the facility

15 U.S.C. § 717b(e)(4). Marathon contends that the FERC Orders contravene the statute because LNG-3 customers will use the existing facilities that are supported by the LNG-1 customers' rates, so that the proposed cost of service for LNG-3, based on the incremental costs of the expansion, is too low. M.Br. 28-29.

Therefore, Marathon argues that the Commission was required to undertake a full examination of the cost of service for the terminal expansion, and to allocate costs between the existing and expansion service before granting certification.

M.Br. 37-38.

Just as Marathon's arguments about statutory interpretation concern the wrong tariff — *i.e.*, the LNG-3 tariff, rather than the LNG-1 tariff under which Marathon indirectly receives service — its subsidization arguments likewise miss their mark. Again, Marathon incorrectly focuses on the rate design for LNG-3 expansion service rather than on the proper allocation of costs in a future LNG-1 rate proceeding.

Marathon relies on the provision in NGA § 3(e)(4) barring subsidization of expansion capacity (M.Br. 37), but concerns about subsidization are neither new or unique to the context of LNG expansions. Well before EPCRA 2005 introduced § 3(e)(4), the Commission established a policy for pipeline certification cases that made a top priority of avoiding subsidization of expansion projects by existing customers. *See Transco*, 518 F.3d at 919 (discussing Policy Statement adopted in 1999); *supra* p. 6. Indeed, the Commission addressed this issue at length in its Policy Statement, which identified subsidization as a key concern because it would send improper price signals, inducing overbuilding and inefficient investment. *See* 88 FERC at 61,745-46; Certificate Order at P 65, JA 21-22. Therefore, the Commission established as a threshold requirement for certification that a project be financially viable without burdening existing customers. *See* 88 FERC at 61,745-46. The Commission generally requires applicants to adopt incremental

rates for expansion services, rather than roll expansion costs into the existing rate base:

Commission-approved incremental rate design requires that only incremental costs be reflected in the incremental cost of service and does not require existing shared facility or common costs to be reallocated to new incremental services.[] . . . *Existing customers are not paying for anything more than what was necessary to render their service during the course of the initial rate period.*

Certificate Order at P 65 (footnote omitted) (emphasis added), JA 22; *see id.* n.54 (Commission has never required assignment of existing facility costs to expansion customers) (citing cases), JA 22. *Cf. Transco*, 518 F.3d 921-22 (affirming FERC’s decision to impose incremental rates on pipeline expansion to avoid subsidization).

Applying those principles to this case, the Commission reasonably found, consistent with its policy and based on its experience with expansion costs and incremental rate design, that “[t]he protections afforded existing customers by an incremental rate design are sufficient in the circumstances to protect Marathon’s interests.” Certificate Order at P 66, JA 22.

Marathon objects that the Policy Statement and FERC precedents concerning incremental rate design are inapposite because, unlike a pipeline expansion, the LNG expansion service here is deregulated pursuant to the EPAct 2005 revision of NGA § 3. M.Br. 29-31. Marathon worries that the Commission will be unable to modify the LNG-3 rates in the future to reallocate costs — that is,

to allocate some of the costs of the existing facilities to the expansion service rates, to the extent that LNG-3 services share those existing facilities. *See* M.Br. 32-33.

Marathon, however, misunderstands the Commission's reference to the Policy Statement. The Commission was focused, not on the rates to be paid by LNG-3 expansion customers, but on the interests of existing customers such as (arguably, only via a contractual relationship with BG) Marathon:

The Commission was citing the . . . Policy Statement for the standards used to evaluate *existing customers'* rates in situations involving new services and facilities. In this case the existing rates are provided under Rate Schedules LNG-1 and LNG-2, both rate schedules being subject to the statutory, regulatory and policy requirements of NGA sections 4 and 5. [The anti-subsidization provision in NGA § 3(e)(4)] did nothing to change any of those requirements, and the Commission applied the appropriate standard of review for *existing services*.

Rehearing Order at P 24 (emphases added), JA 79. Therefore, any difference between the Commission's authority over pipeline expansions under NGA § 7 and its authority over LNG terminal expansions under NGA § 3 is not relevant to the protection of existing customers under the existing LNG-1 tariff.

Moreover, the Commission recognized that it *could not* modify the jurisdictional LNG-1 tariff in this certificate proceeding. Certificate Order at P 65 n.55 ("Existing customers' rates cannot be changed outside of proceedings under

either NGA section 4 or 5.”), JA 22.¹⁴ The Commission emphasized the distinction between the LNG-3 tariff that it accepted for the expansion and the existing tariffs that were not at issue, noting that, in a separate section of the Certificate Order, it had agreed with Marathon and rejected Southern LNG’s proposed changes to the LNG-1 and LNG-2 tariffs. Rehearing Order at P 25 & n.19 (citing Certificate Order at PP 73-75, JA 25), JA 79; *see supra* p. 20. *Cf. N. Natural Gas Co. v. FERC*, 827 F.2d 779, 795 (D.C. Cir. 1987) (holding Commission could not, in certificate proceeding, reach out to adjust previously-approved rates for other services that are not part of certification proceeding).

Conversely, regardless of whether the Commission can modify cost allocation and rates on a post-EPAAct 2005 LNG terminal expansion, the Commission certainly can adjust the jurisdictional rates of customers at the existing terminal, in an appropriate case under NGA § 4 or § 5, as necessary to prevent those customers from subsidizing service on the expansion. This is completely consistent with the Supreme Court’s statement, on which Marathon

¹⁴ This directly refutes Marathon’s claim that the FERC Orders did “not even mention NGA Section 5’s complaint procedure as a possible means” of adjusting the LNG-1 rates. M.Br. 32. Also, Marathon itself neglects to mention that the LNG-1 rates are subject, until 2010, to a moratorium (under a FERC-approved rate settlement) that precludes customers on the existing Elba Island terminal from participating in any effort to modify those rates under NGA § 5. *See* Certificate Order at P 61 & n.50, JA 20.

relies (M.Br. 28), that “the Commission must make a separation of the regulated and unregulated business when i[t] fixes the interstate wholesale rates of a company whose activities embrace both” — that is, *when it considers the jurisdictional rates*, such as the existing LNG-1 and LNG-2 tariffs for the Elba Island terminal. *Panhandle E. Pipe Line Co. v. FERC*, 324 U.S. 635, 641-42 (1945).

In this certificate case, however, as discussed *supra* in Part I.A.2, Southern LNG did not seek approval of any future rate design, and the Commission found Marathon’s concern about future treatment of LNG-1 rates “speculative.” Certificate Order at P 66, JA 22. Nevertheless, to preserve transparency and guard against any potential subsidization a future rate case, the Commission required Southern LNG to maintain its accounts for the expansion facilities in accordance with FERC’s regulations for incremental expansions. *Id.*; *see also* Rehearing Order at P 25 n.20 (Southern LNG must maintain its accounts “in such a manner to facilitate review of incremental facilities and services in future rate proceedings”), JA 79. The Commission concluded that these measures would “provid[e] the tools necessary” to protect existing customers in the future by ensuring that Southern LNG does not shift expansion costs to them. Rehearing Order at P 23, JA 79. Accordingly, the Commission properly found, as required by NGA § 3(e)(4), that

approval of the Elba Island terminal expansion would not result in subsidization of expansion capacity by existing customers.

Finally, having found that LNG-1 rates were not being changed and that any reallocation of costs could be addressed in a future proceeding concerning those rates, the Commission reasonably concluded that an evidentiary trial-type hearing was not warranted. Certificate Order at P 66, JA 22. *See Ala. Power Co. v. FERC*, 993 F.2d 1557, 1565 (D.C. Cir. 1993) (FERC need not conduct hearing if issues may be adequately resolved on written record); *see also Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (legal and policy disputes do not warrant hearing); *cf. Mich. Pub. Power Agency v. FERC*, 963 F.2d 1574, 1579 (D.C. Cir. 1992) (agencies accorded substantial deference in ordering their proceedings).

II. THE COMMISSION PROPERLY APPROVED CONSTRUCTION OF THE ELBA EXPRESS PIPELINE [LANDOWNERS' APPEAL]

A. Standard Of Review

As set forth in Section I.B, *supra*, the Court reviews FERC orders under the arbitrary and capricious standard. The Commission's factual findings are conclusive if supported by substantial evidence. NGA § 19(b), 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.” *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 395 (D.C. Cir. 2008) (quoting *FPL*

Energy Me. Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002)).

Substantial evidence means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation marks and citation omitted); *accord Consol. Oil & Gas, Inc. v. FERC*, 806 F.2d 275, 279 (D.C. Cir. 1986). If the evidence is susceptible of more than one rational interpretation, the Court must uphold the agency’s findings. *See Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *accord, Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 368 (D.C. Cir. 2003) (“The question we must answer . . . is not whether record evidence supports [petitioner]’s version of events, but whether it supports FERC’s.”). *See also Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) (Commission’s “conclusions on conflicting engineering and economic issues” must be upheld “so long as its judgment is reasonable and based on the evidence”) (citing *City of Cleveland v. FPC*, 525 F.2d 845, 849 n.36 (D.C. Cir. 1976)).

Under NEPA, the Court’s role is “simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 97-98 (1983); *accord, New River*, 373 F.3d at 1327. The purpose of reviewing the environmental impact statement is to

“ensure that the agency took a ‘hard look’ at the environmental consequences of its decision to go forward with the project.” *Id.* (citations omitted).

Here, although the Landowners purport to challenge the Commission’s compliance with NEPA in conducting its environmental review of the proposed pipeline, most of their arguments center more generally on the Commission’s evaluation of the benefits and the adverse effects of the project. Fundamentally, the Landowners dispute the need for and benefits of the pipeline, and disagree with the Commission’s finding that the exercise of eminent domain is warranted. The Commission, however, thoroughly considered the public benefits and adverse impacts and concluded that the Landowners’ objections were meritless in any event, as were the Landowners’ various criticisms of the Commission’s environmental analysis.

B. The Commission Reasonably Determined That The Public Benefits Of The Project Outweighed The Adverse Impacts

The Landowners contend that the Commission failed to balance the purpose and benefits of the Elba Express pipeline against the adverse impacts. *See* L.Br. 13-15. The Landowners, however, wholly ignore the Commission’s Preliminary Determination (*see supra* pp. 13-16) — which, in accordance with the Policy Statement (*see supra* pp. 5-9), conducted that very balancing analysis.

1. Project Need And Public Benefits

In the Preliminary Determination, the Commission found that Elba Express had demonstrated a need for the pipeline project. First, the Shippers' full subscription, under long-term agreements, of the entire firm capacity of both phases of pipeline construction showed not only that the project was financially viable but also that there was market demand for increased supplies of natural gas. Preliminary Determination at P 23, JA 506; *see also id.* at P 21 ("the project is designed to meet incremental demand with incremental supplies"). *Cf. Transcontinental Gas Pipe Line Corp.*, 91 FERC ¶ 61,180 at 61,647 (2000) (similarly finding that shippers' subscription of 100% of project capacity demonstrated need for project); *New River*, 373 F.3d at 1325 (noting Commission had found ample market demand based on contracts for 87% of capacity).

The Commission also singled out the public benefit of the proposed interconnections between Elba Express's pipeline and Transco's interstate system, which "will provide customers along the eastern seaboard access to Elba Island supplies." Preliminary Determination at P 23, JA 506; *accord*, Rehearing Order at P 56, JA 89; Certificate Order at P 141, JA 44. *See also id.* at P 142 ("The record evidence in support of the Commission's prior finding of need for this project is substantial."), JA 44-45; *e.g.*, Final EIS at 3-2 ("The demand for energy in the U.S. is predicted to increase and domestic natural gas supplies are declining, especially

Gulf Coast sources on which both Transco and Southern rely.”), JA 799; *id.* at 3-4 (“The identified markets include three existing gas-fired electric power plants (Effingham, McIntosh, and Rainey) in Georgia, and the Georgia and South Carolina interstate natural gas markets.”), JA 801.

Moreover, the Commission found that the design of the proposed pipeline to interconnect with Transco’s system in two separate rate zones would benefit customers by minimizing costs: “The availability to such customers of rate savings resulting from interconnections between Elba Express and Transco in both Rate Zones 4 and 5 is not an insignificant aspect of the proposal, in terms of making available reasonably priced gas supplies.” Certificate Order at P 141, JA 44; *id.* at P 142 (“The availability of two interconnections with Transco, in its two rate zones, will make such [incremental] supplies all the more commercially attractive.”), JA 45.¹⁵ This is so because “[n]atural gas transportation rates increase as gas moves through one zone into an adjacent zone on its path to a

¹⁵ The Landowners seize upon evidence that Transco’s long-term firm capacity in Zone 4 is fully subscribed, to argue that the Zone 4 interconnection would not provide benefits. *See* L.Br. 6, 23. Full subscription of firm capacity would not, however, preclude the Shippers from delivering incremental supplies to Zone 4 in response to customer demand. *See* Certificate Order at P 142 (“The markets will respond according to their needs, and Transco’s pipeline capacity will be made available pursuant to such market demand and in accord with service contracts written and executed to be responsive to such changing need.”), JA 44-45.

customer.” Rehearing Order at P 62, JA 91; *see also* Certificate Order at P 139, JA 43-44.

The Commission has considered the financial impact of rate zones in other cases. For example, in *Transco*, the Commission approved a pipeline as designed, even where the environmental review favored an alternate route, because the alternative route would interconnect with Transco in a different rate zone than the proposed route, thereby imposing significant additional costs. *Transco*, 91 FERC ¶ 61,180 at 61,652. “Weighing the significant economic benefits [the applicant] will realize by receiving gas from Transco in Georgia against the financial disadvantage of taking gas in South Carolina, and considering the evidence presented demonstrating the need for additional gas supplies to meet additional market demand, we find it appropriate to approve [the] proposal.” *Id.*, cited in Certificate Order at P 141 n.73, JA 44.

In this case, the Commission also found a public benefit in the flexibility that the proposed interconnections in two rate zones would provide to meet different market needs:

The shippers on the Elba Express system will be able to offer incremental supplies that may be attractive to markets for differing reasons. Some markets may need more competitively priced supplies, others may need replacement supplies, while others may simply need more, incremental sources. The markets will respond according to their needs, and Transco’s pipeline capacity will be made available pursuant to such market demand

Certificate Order at P 142, JA 44; *see* Response of Elba Express to FERC Environmental Data Request No. 23(b) (filed June 22, 2007) (“[O]ne of the primary objectives of the Elba Express project is to provide interstate pipeline capacity between the Elba LNG Terminal and the diverse markets in [Southern Natural Gas Company] Zone 2, Transco Zone 4, and Transco Zone 5. This is a primary project objective because in order to attract incremental global LNG supplies into the southeastern region, the LNG supplier must maintain its flexibility to deliver any of its gas to any of these markets”), R. 197, JA 672.

Accordingly, if the Elba Express pipeline interconnected with Transco only in Zone 5, as the Landowners seem to advocate (*see, e.g.*, L.Br. 23), the additional supplies would be more costly for customers in Zone 4, if available at all, so that the project would benefit fewer customers. *Cf.* Final EIS at 3-8 (“the incremental transportation charge associated with such an arrangement would be inconsistent with the Project objectives”), JA 805. Though the Landowners portray the cost savings of the proposed route and interconnections as a windfall for the foreign-based Shippers (L.Br. 17, 25), the Commission emphasized the benefit to the ultimate customers, finding that the proposal to interconnect with Transco in two rate zones “operates to the benefit of natural gas customers in both such zones. . . . By using interconnections in both Transco rate Zones 4 and 5, customers located in

or obtaining access to gas in those zones will pay less for such service, which is good news for all affected natural gas markets.” Rehearing Order at P 62, JA 91.

2. Balance Of Benefits And Adverse Impacts

Against those benefits, the only adverse effects to be balanced were to the Landowners. There was no adverse impact on existing customers, as Elba Express had none. Preliminary Determination at P 21, JA 505. Nor would the proposed pipeline adversely effect existing pipelines or their captive customers, because it was designed to meet incremental demand with incremental supplies. *Id.* Indeed, no pipelines or their customers protested Elba Express’s proposal. *Id.* at P 22, JA 505.

Furthermore, the Commission found that Elba Express “has made efforts to minimize impacts on landowners and communities affected by its project.” *Id.* Specifically, Elba Express proposed to acquire an interest from Southern in existing pipelines that would allow it to transport gas on 13.25-mile pipelines from the Elba Island terminal to Port Wentworth, Georgia, without any new construction, avoiding the need to build new facilities in sensitive areas. *Id.* at PP 10, 22, JA 502, 505-06. In addition, the new pipeline would be located “for a significant portion of its route in, or adjacent to, existing utility right of ways.” *Id.* at P 22, JA 506; *see supra* p. 11 (describing 105-mile pipeline segment collocated in existing right-of-way).

For those reasons, the Commission reasonably determined that the need for the project, as demonstrated by the Shippers' subscription of the entire capacity, and the public benefits of providing access to LNG supplies to markets along the eastern seaboard, outweighed the adverse impacts on landowners. Preliminary Determination at P 23, JA 506; Certificate Order at P 143, JA 45; Rehearing Order at P 56, JA 89. Thus, the Commission concluded that, subject to completion of the environmental analysis, the pipeline project was "required by the public convenience and necessity." Preliminary Determination at P 23, JA 506; *see also* Certificate Order at P 143, JA 45.

The Commission's balancing was entirely consistent with the guidance in the Policy Statement, in which the Commission had specified "precedent agreements with multiple parties for most of the new capacity" (here, agreements with the Shippers for *all* of the pipeline's firm capacity) and "attach[ment of] major new gas supplies to the interstate grid" as public benefits from pipeline construction. Such benefits could outweigh the adverse impact on landowners in cases where the pipeline could not obtain all necessary right-of-way through negotiation and would rely on eminent domain for part of the route. 88 FERC at 61,749.

3. Landowners Failed To Object To Economic Analysis

On appeal, the Landowners continue to disregard the Commission's economic findings (*see* L.Br. 17-23), which they did not challenge when the Commission issued its Preliminary Determination.¹⁶ Even after the Commission relied on its prior analysis in the Preliminary Determination in answering the Landowners' objections in both the Certificate Order (at PP 141-43, JA 44-45) and the Rehearing Order (at PP 53-57, JA 88-89), the Landowners still conspicuously ignore that earlier order and its key findings.

The Commission followed its established policy, under which it begins with the balancing analysis — “essentially an economic test” — before considering environmental impacts. Policy Statement, 88 FERC at 61,745. “Only when the benefits outweigh the adverse effects *on economic interests* will the Commission then proceed to complete the environmental analysis where other interests are considered.” *Id.* (emphasis added). The Commission has made clear that the adverse effects of eminent domain are part of that preliminary economic determination: “The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the

¹⁶ At that time, the Landowners were already engaged in the FERC proceeding; indeed, the Commission granted their untimely intervention in the Preliminary Determination itself. *See supra* pp. 13-14.

property rights of landowners.” *Id.* at 61,749; *see also id.* at 61,746 (threshold showing of need for project serves landowners’ interests, because they “should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace”).

If the project satisfies the economic balancing test, the Commission proceeds with the environmental review, which may include *other* concerns of landowners. *See id.* at 61,749 (under Policy Statement, “[t]he other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns[,] will continue to be taken into account in the environmental analysis”); *cf. id.* at 61,748 (“Traditionally, the interests of the landowners and the surrounding community have been considered synonymous with the environmental impacts of a project; however, these interests can be distinct. *Landowner property rights issues are different in character from other environmental issues* considered under the National Environmental Policy Act of 1969 (NEPA).”) (emphasis added).

Accordingly, in the Certificate Order, the Commission responded to the Landowners’ objections by noting that it had properly conducted the economic analysis before proceeding with the environmental analysis. Certificate Order at P 143, JA 45; *see also* Rehearing Order at P 53 (“In the Preliminary Determination, the Commission conducted its economic inquiry based on the record before us.”), JA 88; *id.* at P 57 (“We conducted the economic analysis

required by the Certificate Policy Statement based on the issues raised by intervenors, issued the appropriate Preliminary Determination on April 4, 2007, and the work of environmental analysis proceeded.”), JA 89.

The Landowners had failed to raise any of their concerns at that stage of the proceeding. “No further economic impact issues were raised by intervenors, including Anderson, requiring analysis [in the Preliminary Determination].” Rehearing Order at P 55, JA 89. Moreover, “Anderson has neither sought rehearing of the [Preliminary Determination] *nor offered any good reason why further evidentiary analysis is appropriate.*” Certificate Order at P 143 (emphasis added), JA 45.

Therefore, the Landowners failed to dispute the benefits of the pipeline, raise any economic impact issues, or challenge the Commission’s conclusions that the adverse effect on their property rights was outweighed by public benefits. The Commission properly found that their belated objections raised no new issues and thus were both too little and too late.

C. The Commission Took The Requisite “Hard Look” At Adverse Environmental Effects

Having balanced the economic factors in the Preliminary Determination, the Commission, in the Certificate Order, fulfilled its obligation under NEPA to take a “hard look” at the environmental consequences of approving the Elba Express

pipeline.¹⁷ The Commission reviewed the Final EIS prepared by FERC Staff in conjunction with other federal agencies and found that it “conducted a close and penetrating analysis of a number of alternative paths in which the proposed pipeline might be located. The consistent and well-supported conclusions have been that each possible alternative route would cause more environmental degradation.” Certificate Order at P 143, JA 45. *Cf. id.* at P 137 (“Elba Express’s pipeline route would be environmentally preferable to the alternatives.”), JA 43; *id.* n.69 (“Staff’s analysis clearly documents that greater environmental impacts would result from construction of the alternatives.”); Rehearing Order at P 59 (concluding that the route proposed by Elba Express was “the least environmentally intrusive option), JA 90.¹⁸

¹⁷ The Draft EIS and Final EIS analyzed the environmental impacts of the LNG terminal expansion as well as the pipeline, and the Commission reviewed the findings in the Orders on appeal, but the Landowners direct their challenges only to the pipeline project. No party has challenged the Commission’s environmental review as to the terminal expansion.

¹⁸ The Landowners assert that the Draft EIS contained “alternatives that were environmentally superior to the Northern Segment” but were eliminated from the Final EIS. L.Br. 25. The Draft EIS itself shows otherwise. *See* Draft EIS at 5-10 (“None of the alternatives examined would reduce environmental impact or provide a significant environmental advantage over the proposed route.”); *id.* at 3-20 (finding that alternative routes fully collocated with existing pipelines would require substantial construction and create “associated environmental impacts, which would greatly exceed those proposed by the Project”), JA 484. In addition, FERC Staff disagreed with the Landowners on this point. *See* Final EIS at 6-55 (cross-referencing responses at 6-50 and -52, JA 868, 870), JA 873.

The Commission also found that FERC Staff had fully analyzed and answered the Landowners' comments in the Final EIS, and the Landowners had not presented anything new to the Commission. Certificate Order at P 128, JA 40; *see* Final EIS at 6-45 to 6-93 (responding, page-by-page, to all three sets of comments submitted by Landowners regarding Draft EIS), JA 863-911. Though the Landowners filed a motion requesting that the Commission hold a hearing to take evidence on the Elba Express pipeline, their motion reiterated the substance of their comments on the Draft EIS. Certificate Order at P 128, JA 40. In fact, even in their rehearing request, the Landowners' arguments about alternative routes simply recycled those same comments. Rehearing Order at P 59 n.54, JA 90. Nevertheless, the Commission addressed the Landowners' arguments at length. *See* Certificate Order at PP 128-46, JA 40-46; Rehearing Order at PP 58-64, JA 90-92.

1. Route Alternatives

Route Alternative A. FERC Staff developed Alternative A as an alternative to the entire pipeline proposed by Elba Express. Its southern segment would be similar to Elba Express's, collocated with Southern's system from Port Wentworth to Wrens. Instead of the proposed Northern Segment, separate Western and Eastern Legs would follow existing pipeline rights of way to interconnect with Transco in Zones 4 and 5, respectively. *See* Final EIS at 3-19

(Figure 3.3-1), JA 816 (Addendum at A11). But collocating the Western and Eastern Legs with existing pipelines (the Eastern Leg would loop Southern's system part of the way and South Carolina Pipeline Corporation's system the rest; the Western Leg would loop several segments of Southern's system), rather than building the proposed Northern Segment on a new right-of-way, would result in twice the length of pipeline and require more than twice the horsepower of compression. Certificate Order at P 132, JA 41-42. It also would require substantially more acres of temporary construction right-of-way and permanent right-of-way. *Id.* For those reasons, the Commission reasonably concluded that Alternative A would have a much greater impact on land use, vegetation, air quality, and other resources than the proposed project. *Id.*; *see also* Final EIS at 3-18 ("Because we identified no significant impacts associated with construction of the Northern Segment . . . that this [Alternative A] would avoid, the proposed pipeline would be environmentally preferable to the alternative."), JA 815. *Cf.* *New River*, 373 F.3d at 1333 (holding FERC adequately considered route alternatives that it found would have increased environmental or other impacts).

The Landowners baldly assert that Alternative A had "a clear advantage" over the Northern Segment (L.Br. 4) and claim that Alternative A, described in the Draft EIS, was "completely removed" from the Final EIS (L.Br. 3). (The Landowners do not explain these claims further in the Argument section of their

Brief.) The Commission, however, refuted the Landowners' arguments, explaining that FERC Staff had revised the discussion of Alternative A in the Final EIS "because of newly available and more accurate information, derived from a complete hydraulic simulation," which showed that the western leg would require more pipeline length and more compression than the Draft EIS had described. Rehearing Order at PP 58-59 & n.53 (citing Final EIS at 3-17 n.4, 6-52 to -53, JA 814, 871-71), JA 90. The Commission noted that the Landowners did not challenge the accuracy of those revised projections, and thus "offers no rebuttal to the comparative environmental impact analysis provided by the [Final EIS] of the proposed route versus the alternatives." *Id.* at P 59, JA 90.

Route Alternative B. Alternatives B and C focused only on alternatives to the Northern Segment of the pipeline proposed by Elba Express. Alternative B consists of the Eastern Leg portion of Alternative A, which in that scenario was designed to deliver gas only to Transco Zone 5 in South Carolina. *See* Final EIS at 3-23 (Figure 3.3-2), JA 820 (Addendum at A12). Therefore, for this alternative to meet the project objectives of interconnecting with Transco in both Zones 4 and 5, the Eastern Leg would have to be extended for about 57.3 miles along Transco's right-of-way to the Georgia side of the Savannah River. Certificate Order at PP 133-34, JA 42. This would require more than twice the length of pipeline as the Northern Segment, almost four times as many acres of temporary

construction right-of-way and substantially more permanent right-of-way. *Id.* at P 134, JA 42. It also would require 8,000 horsepower of compression, whereas no horsepower was associated with the Northern Segment. *Id.* Alternative B would cross areas similar to those crossed by the proposed Northern Segment, and, although it would follow existing pipeline corridors, it would have to be constructed on a new right-of-way adjacent to existing rights-of-way. *Id.* “[S]uch construction would simply shift impacts from one group of landowners and communities to another group of landowners and communities.” *Id.* *Cf. New River*, 373 F.3d at 1331-32 (holding FERC adequately considered route alternatives, where it described them in detail and explained why they were not recommended).

On appeal, the Landowners argue that the Commission found Alternative B to impact more acres based upon an “improper[]” calculation that it would require an additional 40 feet of right-of-way, in contrast to the 20 to 30 feet used in Alternative A, but that the need for the additional 40 feet was not explained in the Draft EIS or the record. L.Br. 4, 24. The Landowners never raised this objection before the Commission, either in their comments or, more important, in their rehearing request. *See* NGA 19(b), 15 U.S.C. § 717r(b) (issues not raised before FERC are jurisdictionally barred on appeal); *see also Intermountain Mun. Gas Agency*, 326 F.3d at 1285. Nevertheless, based on the descriptions of Alternatives

A and B, the difference is that Alternative B required the creation of an entirely new right-of-way alongside Transco's existing corridor (necessary to provide an interconnection in Zone 4), in contrast to the collocated looping of Southern's own existing pipelines in Alternative A:

Overall, this [Alternative B] would require about 232.3 miles of new pipeline constructed parallel to the systems of Southern, [South Carolina Pipeline Corporation], and Transco Although this alternative would follow existing pipeline corridors, it would be constructed . . . on a new [right-of-way] along existing [rights-of-way] (not overlapping [South Carolina Pipeline Corporation's] system [right-of-way] as was the case in [Alternative A])

Final EIS at 3-21 (emphases in original), JA 818.

Route Alternative C. Alternative C is, in effect, the mirror image of Alternative B. Alternative C consists of the Western Leg portion of Alternative A, which in that scenario was designed to deliver gas only to Transco Zone 4 in Georgia. Certificate Order at PP 133, 134, JA 42; *see* Final EIS at 3-19 (Figure 3.3-1), JA 816 (Addendum at A12). Therefore, in order to interconnect in Zone 5 as well, the Western Leg would have to be extended across the Savannah River into South Carolina. Certificate Order at P 135, JA 42. Also, as with Alternative B, much of the length would be constructed parallel to, but separate from, existing pipelines (Southern's and Transco's), so that it would require more than three times the length of pipeline and substantially more acres of temporary and

permanent rights-of-way compared to the Northern Segment, plus additional compression. *Id.* at 135-36, JA 42-43.

The Landowners argue that FERC Staff and Elba Express “manipulated” the alternative routes to demonstrate that the proposed Northern Segment was the only feasible route. L.Br. 24. The Commission, however, rejected that allegation as baseless, and the Landowners offered nothing to rebut that finding. Certificate Order at PP 129, 138 (“No evidence has been attempted or identified indicating any manipulation of staff’s analysis. . . . To assert that project requirements have been imposed for the purpose of favoring one route over another is baseless and erroneous.”), JA 40, 43.

At bottom, the Landowners’ objections to the environmental analysis stem again from their belief that Elba Express’s proposal to interconnect with Transco in two rate zones was unnecessary. *See, e.g.*, L.Br. 24-26, 29. Their principal criticism of the route alternatives is that the impacts were inflated by extending the routes to include interconnections in both Transco rate zones. L.Br. 24-25.

As discussed above, however, the Commission had previously determined that the pipeline’s interconnections in different rate zones provided significant public benefits in cost savings to customers and flexibility to introduce additional imported gas supplies based on the particular needs in several markets. *See*

Rehearing Order at P 62, JA 91-92; *supra* Part II.B.1.¹⁹ For those reasons, the Commission had already found that the pipeline as proposed was required by the public convenience and necessity.

Moreover, it was appropriate for the Commission to consider Elba Express's objectives in proposing the pipeline with flexibility to deliver imported gas from Elba Island to various markets. *See New River*, 373 F.3d at 1332 (holding that it is the prerogative of the pipeline applicant to determine the project's goals); *Fuel Safe Wash.*, 389 F.3d at 1324 (FERC reviews the applicant's particular project, and it is appropriate for the FERC to give substantial weight to the goals of that project). Here, the Commission noted that "[p]ipeline routes are generally selected as a result of several factors, including market demands, terrain to be crossed, engineering, environmental impact, cost, etc." Certificate Order at P 139, JA 43.

¹⁹ The Final EIS made the same point: "By providing interconnections to both Transco Zones 4 and 5, customers in each zone receive natural gas at the lowest transportation rate possible rather than paying an additional transportation fee for gas delivered in an adjacent zone and then transported across zone boundaries." *Id.* at 6-50, JA 868, *cited in* Certificate Order at P 139 n.70, JA 43.

The Final EIS also identified additional benefits that the pipeline project would provide to the States of Georgia and South Carolina and to the overall southeastern United States. *See* Final EIS at 4-134 to -135 (discussing impact of tax revenues and construction expenditures), JA 844-45; *id.* at 6-47 (noting tax revenues), JA 865. Though the Commission did take note of these additional benefits described in the Final EIS (*see* Certificate Order at P 139 & n.71, JA 44), the Landowners wrongly suggest they were the *only* benefits the Commission weighed in favor of the project. *See* L.Br. 21.

The Commission recognized that Elba Express designed the pipeline route to be responsive to the market requirements of the Shippers and their customers. *Id.* (citing Final EIS at 6-50); *see also* Final EIS at 3-20 (“[I]nterconnections with both Transco Zones 4 and 5 were specified by the project shippers, not Southern LNG, [Elba Express], or Southern. [Elba Express]’s proposal is based upon meeting the requirements of the project shippers and their customers.”). The planned interconnections were not merely a desirable feature, but “one of the project[’]s specific objectives and therefore part of the proposed action” Final EIS at 6-48 (emphases omitted), JA 866.

2. No Action Alternative

Finally, the Landowners contend that the No Action Alternative was not adequately analyzed, as required by NEPA. L.Br. 27-28. The Final EIS determined that, if Elba Express’s proposal were withdrawn or significantly delayed, the LNG supplies that were proposed to be imported to the Elba Island terminal would be marketed elsewhere, including to markets in other countries. Final EIS at 3-2, JA 799. FERC Staff found, and the Commission agreed, “that this concept [does not] require[] the support of studies or reports.” Certificate Order at P 145, JA 46; Final EIS at 6-57, JA 875. For example, the Final EIS discussed two existing import terminals, in Maryland and Louisiana, that had

recently been expanded to receive additional LNG supplies. Certificate Order at P 146 (citing Final EIS at 3-4 to 3-5, JA 801-02), JA 46.

The Commission further concluded that, given the “clear need” for additional natural gas supplies to be made available in the affected markets, selection of the No Action Alternative would not be appropriate in this proceeding. Certificate Order at P 145, JA 46; *see also id.* at P 122 (No Action Alternative “would deny the power plant customers and other markets in Georgia and South Carolina access to additional supplies of natural gas made available by importation of LNG”), JA 39; Final EIS at 3-2 (“The demand for energy in the U.S. is predicted to increase and domestic natural gas supplies are declining, especially Gulf Coast sources on which both Transco and Southern rely. As a result, natural gas customers in [these markets] may have fewer and potentially more expensive options for obtaining natural gas supplies in the near future.”), JA 799; *id.* at 3-5 to -7 (no other existing LNG facility is close enough to deliver imported LNG directly to the southeastern and eastern U.S. markets), JA 802-04. *Cf. Fuel Safe Wash.*, 389 F.3d at 1326 (holding FERC adequately considered alternatives in case where it rejected no action alternative because need for pipeline would not be fulfilled); *New River*, 373 F.3d at 1331-32 (holding FERC adequately considered no-action alternative).

Indeed, responding to that need was “a fundamental reason” for the Commission’s approval of the pipeline as required by the public convenience and necessity. Rehearing Order at P 64, JA 92. Furthermore, the Landowners present “no reason, beyond [their] broad and unsupported claim of insufficiency, why that consistent analysis is flawed.” *Id.* Nor have they done so on appeal.

CONCLUSION

For the reasons stated, Marathon's petition should be dismissed for lack of jurisdiction, or, in the alternative, denied on the merits. The Landowners' petition should be denied and the challenged FERC Orders should be affirmed in all respects.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Robert H. Solomon
Solicitor

Carol J. Banta
Attorney

Federal Energy Regulatory
Commission
Washington, DC 20426
Tel.: (202) 502-6433
Fax: (202) 273-0901

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