UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC	**)**	**Docket No. CP16-9-012**
Maritimes & Northeast Pipeline, LLC	**)**	

INITIAL BRIEF OF THE ELECTRIC POWER SUPPLY ASSOCIATION

In accordance with the February 18, 2021 order of the Federal Energy Regulatory Commission (the "Commission" or "FERC") in the above-captioned proceeding,[1] the Electric Power Supply Association ("EPSA")[2] respectfully submits this initial brief on the questions posed in the February 18 Order. For the reasons set forth herein, EPSA urges the Commission to acknowledge that it lacks the authority to grant the relief contemplated by the February 18 Order and to terminate this sub-docket without further action.

EPSA's members make large capital investments in electric generation facilities in reliance on certificates of public convenience and necessity issued pursuant to Section 7(c) of the Natural Gas Act (the "NGA"),[3] including the certificate at issue here, and EPSA is, therefore, profoundly concerned about the suggestion in the February 18 Order that the Commission might, as Commissioner Christie put it, "retroactively chang[e] the rules long after the fact: long after construction was begun and long after investors

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1 *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (the "February 18 Order").

2 EPSA is the national trade association representing competitive power suppliers in the U.S. EPSA members provide reliable and competitively priced electricity from environmentally responsible facilities using a diverse mix of fuels and technologies. EPSA seeks to bring the benefits of competition to all power customers. This pleading represents the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue. EPSA has separately moved to intervene in this proceeding. *See* (doc-less) Motion to Intervene of Electric Power Supply Association, Docket No. CP16-9-012 (filed Mar. 11, 2021).

3 15 U.S.C. § 717f(c) (2018).

committed significant funds . . . ."[4] More broadly, EPSA shares Commissioner Danly's concern that, in "manufactur[ing] what is essentially an end-run around the statutory process for rehearing and judicial review," the February 18 Order is "dangerous and disruptive" and raises the specter of future "surprise attacks on long-final orders."[5] Especially when one accounts for the fact that the same statutory process governs rehearing and judicial review of orders issued under the Federal Power Act (the "FPA"),[6] this aspect of the order has profound and troubling implications for participants in all Commission proceedings and investors that rely on the finality of Commission orders. Moreover, as Commissioner Christie warns, the "[c]ampaigns of unending legal warfare" that the February 18 Order invites will be used against other "infrastructure projects, including those the majority may well want to promote."[7]

I. COMMUNICATIONS

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[4] February 18 Order, 174 FERC ¶ 61,126, Christie Dissenting Statement at P 1 (Christie, Comm'r, dissenting) (the "Christie Dissent").

[5] *Id.*, Danly Dissenting Statement at P 32 (Danly, Comm'r, dissenting) (the "Danly Dissent").

[6] *Compare* 15 U.S.C. § 717r (2018) (rehearing and judicial review of orders under the NGA) *with* 16 U.S.C. § 825*l* (2018) (rehearing and judicial review of orders under the FPA). *See also Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (noting the "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes").

[7] Christie Dissent at P 7.

II. BACKGROUND

In a January 25, 2017 order, the Commission issued a certificate of public convenience and necessity pursuant to Section 7(c) of the NGA[8] to Algonquin Gas Transmission, LLC ("Algonquin") and Maritimes & Northeast Pipeline, LLC (together with Algonquin, "Applicants"), authorizing the construction and operation of pipeline and compression facilities comprising the so-called "Atlantic Bridge Project," including Algonquin's then-proposed Weymouth Compressor Station in Massachusetts.[9] The Commission considered and addressed comments on the Environmental Assessment for the Atlantic Bridge Project, "[t]he vast majority of [which we]re associated with the proposed Weymouth Compressor Station site," including concerns about "socioeconomics and environmental justice[,] cultural resources[,] air quality and noise[,] reliability and safety . . . ."[10] The Certificate Order contained various environmental conditions, including the following condition ("Environmental Condition 10"): "The Applicants must receive written authorization from [Staff] before commencing service on each discrete facility of the Project. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily."[11]

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8 15 U.S.C. § 717f(c) (2018).

9 *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017) (the "Certificate Order").

10 *Id.* at P 54.

11 *Id.*, Appendix B, Condition (10).

In a December 13, 2017 order, the Commission denied requests for rehearing of the Certificate Order.[12] Among other things, the Commission expressly found that it had "adequately addressed public safety concerns and concluded that the Weymouth Compressor Station would not result in a significant increase in risk to the nearby public."[13] The Commission emphasized that the Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") "is the agency charged with administering the national regulatory program to ensure the safe transportation of natural gas and other hazardous materials by pipeline," and stated that it could "appropriately rely on PHMSA's expertise and historical incident data in concluding that the Atlantic Bridge Project will not significantly increase the risk to human safety."[14]

In an unpublished decision issued December 27, 2018, the U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") affirmed the Certificate Order.[15] With respect to allegations that the Commission "ignored certain safety risks," the D.C. Circuit found that the Commission "considered each risk that the challengers identify" and that the Commission was entitled to assume that Applicants' commitments to "comply with certain federal safety regulations" were made in good faith.[16]

On September 24, 2020, Commission Staff issued a letter order granting Applicants' request, submitted in compliance with Environmental Condition 10, to

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12 *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255 (2017) (the "Certificate Rehearing Order").

13 *Id.* at P 27 (footnote omitted).

14 *Id.* (footnote omitted).

15 *Town of Weymouth, Massachusetts v. FERC*, No. 17-1135, 2018 WL 6921213 (D.C. Cir. Dec. 27, 2018) (unpublished opinion) ("*Weymouth*").

16 *Id.*, *1 (citation omitted).

commence operation of the Weymouth Compressor Station and certain other portions of the Atlantic Bridge Project.[17] Staff granted the request based on its findings that Applicants had "adequately stabilized areas disturbed by construction and that restoration is proceeding satisfactorily."[18]

In the February 18 Order, the Commission stated that a number of parties "filed a timely joint request for rehearing of the [Letter] Order," and that "the Commission has also received numerous other pleadings expressing safety concerns regarding the operation of the project."[19] The Commission concluded that "the concerns raised regarding the operation of the project warrant further consideration" and asked for briefing on certain issues relating to the Weymouth Compressor Station.[20] Commissioners Danly and Christie dissented to the February 18 Order.

III. ARGUMENT

EPSA addresses the specific questions posed in the February 18 Order below.[21] For the reasons set forth herein, EPSA urges the Commission to acknowledge the finality of the Certificate Order and the limits on its powers more generally and to terminate this sub-docket without further action.

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17 *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-000 (Sept. 24, 2020) (unreported) (the "Letter Order").

18 *Id.*

19 February 18 Order, 174 FERC ¶ 61,126 at P 1.

20 *Id.* at P 2.

21 The quotations in subheadings A, B, C and D are the questions posed in the February 18 Order.

A. *"In light of the concerns expressed regarding public safety, is it consistent with the Commission's responsibilities under the [NGA] to allow the Weymouth Compressor Station to enter and remain in service?"*

Given the limits on the Commission's authority under the NGA, it is entirely consistent with the Commission's statutory responsibilities to allow the Weymouth Compressor Station to remain in service, and, indeed, it would be wholly inconsistent with the Commission's statutory responsibilities to do otherwise at this stage. As Commissioner Danly observed, "[t]he Commission, as a mere creature of statute, can only act pursuant to law by which Congress ha[s] delegated its authority," and the Commission's "business . . . must be conducted within the bounds of that delegation."[22] As discussed in more detail below, the Commission lacks the statutory authority to modify an order, like the Certificate Order, that is final and no longer subject to judicial review, and likewise lacks jurisdiction to exercise powers that Congress has vested in other agencies.

1. The Commission Cannot Lawfully Modify the Certificate Order

While it is not clear precisely what sort of modifications the Commission has in mind, it is clear that, in questioning whether it should "allow the Weymouth Compressor Station to enter and remain in service,"[23] the February 18 Order contemplates modifications to the Certificate Order as it relates to that facility. In fact, as Commissioner

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[22] Danly Dissent at P 23 (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Atlantic City Elec Co. v. FERC*, 295 F.3d 1 (D.C. Cir. 2002) ("*Atlantic City*")). *See also CAB v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) ("[T]he fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." (citations omitted)).

[23] February 18 Order, 174 FERC ¶ 61,126 at P 2.

Christie stated, the February 18 Order "literally invites opponents of the project to re-litigate the core question of whether the project should even have been built"[24] – the very issue already litigated and decided in the Certificate Order.[25] The Commission has no statutory authority to reopen that issue, because the Certificate Order is final and not subject to further rehearing or judicial review.[26]

In accordance with Section 19 of the NGA,[27] aggrieved parties had the opportunity first to seek rehearing and then to seek judicial review of the Certificate Order, and they availed themselves of those opportunities. The rehearing and review process concluded over two years ago, when the D.C. Circuit denied petitions for review of the Certificate Order[28] and the petitioners elected not to pursue further appeals.[29] In fact, ***the Commission's*** power to modify or set aside the Certificate Order terminated even earlier, when the administrative record was filed with the D.C. Circuit on August 3, 2018, because Section 19(a) of the NGA clearly provides that the Commission is only free to do so "[u]ntil the record in [the] proceeding shall have been filed in a court of appeals . . . ."[30]

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24 Christie Dissent at P 3.

25 *See* Certificate Order, 158 FERC ¶ 61,061, Ordering Para. (A) ("A certificate of public convenience and necessity is issued authorizing Algonquin and Maritimes to construct and operate the Atlantic Bridge Project, as described in this order and in their application.").

26 *See* February 18 Order, 174 FERC ¶ 61,126 at P 24 (explaining that the NGA does not authorize the Commission "to unilaterally revisit final certificate orders").

27 15 U.S.C. § 717r (2018).

28 *See Weymouth*, No. 17-1135.

29 *See Town of Weymouth, Massachusetts v. FERC*, No. 17-1135, Mandate (D.C. Cir. Feb. 21, 2019).

30 15 U.S.C. § 717r(a) (2018). *See also Allegheny Def. Project v. FERC*, 964 F.3d 1, 16-17 (D.C. Cir. 2020) (explaining "that, even after a petition for judicial review is filed, the Commission retains the authority to 'modify or set aside, in whole or in part' the underlying order or findings . . . until the administrative record is filed in court"); *Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 368 (5th Cir. 1990) (stating that "[t]his provision gives the Commission the

To be sure, as indicated in the February 18 Order, various parties sought rehearing of the Letter Order.[31] But even assuming *arguendo* that the Letter Order is not itself final and non-appealable,[32] that does not reopen the door that closed on August 3, 2018, with the filing of the record with the D.C. Circuit, for the Commission to revisit the terms and conditions of the certificate issued over four years ago. The scope of any action that the Commission may take on rehearing or reconsideration of the Letter Order obviously cannot be broader than the scope of the action Staff was authorized to take in the first instance.[33] And the only issue before Staff when it issued the Letter Order was whether Applicants had complied with Environmental Condition 10, and, specifically, whether

power to correct an order 'until such time as the record on appeal has been filed with a court of appeals or the time for filing a petition for judicial review has expired'" (quoting *Pan American Petroleum Corp. v. FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963))).

[31] February 18 Order, 174 FERC ¶ 61,126 at P 1.

[32] Rehearing of the Letter Order was denied by operation of law on November 23, 2020, *see Algonquin Gas Transmission, LLC*, 173 FERC ¶ 62,097 (2020), and no party filed a petition for review within the 60-period prescribed by Section 19 of the NGA, 16 U.S.C. § 717r (2018) (*i.e.*, by January 22, 2021). As a result, the Letter Order may be deemed to be final and non-appealable. *See* Request for Rehearing of Algonquin Gas Transmission at 37-39, Docket No. CP16-9-014 (filed Mar. 19, 2021). In any case, the Certificate Order is indisputably final and non-appealable, and, as discussed below, rehearing of the Letter Order does not provide a vehicle for revisiting matters decided in the Certificate Order.

[33] *See*, *e.g.*, *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,034 at P 83 (2020) (rejecting arguments as "beyond the scope of rehearing of the [underlying o]rder"); *Northern Me. Indep. Sys. Admin., Inc.*, 161 FERC ¶ 61,270 at P 3 (2017) (rejecting arguments in a request for rehearing of a delegated letter order that did not relate to "errors in the delegated letter order" as "beyond the scope of rehearing"); *Kinetica Deepwater Express, LLC*, 161 FERC ¶ 61,019 at P 38 (2017) (denying request for rehearing "because it raises new issues that are beyond the scope"); *ITC Midwest LLC v. American Transmission Co., LLC*, 152 FERC P 61,155 at P 16 (2015) (rejecting a request for rehearing as "beyond the scope of the underlying order"); *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line LLC*, 136 FERC ¶ 61,083 at P 8 (2011) (denying "requested clarification/rehearing as outside the scope of the [underlying o]rder"); *California Indep. Sys. Operator Corp.*, 129 FERC ¶ 61,241 at P 35 (2009) (rejecting requests for rehearing that went to issues broader than those addressed in the prior order as "beyond the scope"); *El Paso Natural Gas Co.*, 128 FERC ¶ 61,205 at P 12 (2009) (rejecting request for rehearing as "beyond the scope").

"rehabilitation and restoration of the right-of-way and other areas affect by the Project [was] proceeding satisfactorily."[34] That condition in no way empowered Staff to consider – or the Commission itself to consider on rehearing – "public safety" or "air emission" concerns[35] of the sort that prompted the February 18 Order. As the Commission explained in denying rehearing of other letter orders issued pursuant to similar sub-delegations to Staff in the Certificate Order, Staff's role "is not to reexamine the Commission's conclusions; rather, it is to ensure that the Commission's conditions have been met . . . ."[36] That being the case, the Commission properly denied requests for rehearing of those letters that sought to do precisely what the Commission's February 18 Order appears to contemplate – revisiting the certification to construct and operate certain pipeline facilities – as "impermissible collateral attacks [on] the Certificate Order."[37] Such action was in perfect accord with other Commission precedent rejecting similar attempts to reopen certificate orders through requests for rehearing of Staff orders on compliance with environmental conditions.[38]

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34 Certificate Order, 158 FERC ¶ 61,061, App. B, Environmental Condition 10.

35 February 18 Order, 174 FERC ¶ 61,126 at P 2.

36 *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at P 18 (2017). *See also Algonquin Gas Transmission, LLC*, 171 FERC ¶ 61,148 at P 24 (2020) (the "May 2020 Order") (same).

37 May 2020 Order, 171 FERC ¶ 61,148 at P 12 (footnote omitted).

38 *See Tennessee Gas Pipeline Co., L.L.C.,* 162 FERC ¶ 61,013 at P 37 (emphasizing that such Staff orders address "compliance with the Certificate Order" and that "[a]ny grievances about the Certificate Order should have been raised in a timely request for rehearing of that order" (footnote omitted)), *on reh'g*, 165 FERC ¶ 61,170 (2018); *Transcontinental Gas Pipeline Co., LLC*, 162 FERC ¶ 61,192 at P 20 (2018) (stating that "a party on rehearing of [a] notice to proceed may only challenge the applicants compliance with the Certificate Order, specifically the [applicable] environmental conditions" and that broader challenges "are outside the scope of this rehearing and are belated challenges to the Certificate Order . . . [that] should have been raised in a timely request for rehearing of that order" (footnote omitted)).

Nor is there anything in Section 7 of the NGA[39] – or any other provision of the FPA, for that matter[40] – that authorizes the Commission to revoke or modify a certificate of public convenience and necessity. Under Section 7(c), a natural gas company must obtain from the Commission a certificate of public convenience and necessity before constructing or operating interstate pipeline or storage facilities, and, under Section 7(b), the natural gas company must obtain Commission approval before abandoning those facilities. That's it. Section 7 makes no provision for the Commission to revoke or modify final certificates, and the Supreme Court has held in analogous circumstances that certificates of public convenience and necessity are "not subject to revocation in whole or in part ***except as specifically authorized by Congress***." [41] As Commissioner Danly

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[39] 15 U.S.C. § 717f (2018).

[40] As indicated in the Danly Dissent, "many are quick to turn to NGA Section 16 when all else has failed," but this provision "does not represent an independent grant of authority," and its "use . . . must be 'consistent with the authority delegated to [the Commission] by Congress.'" Danly Dissent at P 25 (quoting *Verso Corp. v. FERC*, 898 F.3d 1, 7 (D.C. Cir. 2018)). *See also*, *e.g.*, *New York Pub. Serv. Comm'n v. FERC*, 866 F.2d 487, 492 (D.C. Cir. 1989) ("[T]he Commission's auxiliary power under § 16 [is] limited to cases where 'the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.'" (quoting *Northern Natural Gas Co. v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986))); *American Smelting & Ref. Co. v. FPC*, 494 F.2d 925, 933 (D.C. Cir. 1974) ("[S]ection 16 does not itself grant independent powers but merely provides for implementation of the core sections of the [NGA]."); *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1257 (D.C. Cir. 1973) ("Section 16, which uses a broad generality of 'necessary or appropriate' that is not rooted in a function, cannot enlarge the choice of permissible procedures beyond those that may fairly be implied from the substantive sections [of the NGA] and the functions there defined."); *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972) (finding that Section 16 of the NGA and the analogous Section 309 of the FPA "merely augment existing powers conferred upon the agency by Congress" and "do not confer independent authority to act").

[41] *United States v. Seatrain Lines*, 329 U.S. 424, 432-33 (1947) (emphasis added). *See also Hirschey v. FERC*, 701 F.2d 215, 219 (D.C. Cir. 1983) ("*Hirschey*") (finding the Commission "acted without statutory authorization in vacating petitioner's exemption" from the hydroelectric licensing requirements of the FPA). *See also International Paper Co. v. FERC*, 737 F.2d 1159, 1163 (D.C. Cir. 1984) (same). Further to Commissioner Danly's point about Section 16 of the NGA, *see supra* note 40, *Hirschey* confirms clear that the analogous Section 309 of the FPA "does not

explained, the Commission itself has "always doubted" its ability to revoke a certificate absent a violation of its terms,[42] and there is no hint in the February 18 Order that the Commission has any concerns about compliance with the terms of the certificate for the Atlantic Bridge Project.

2. The Actions Contemplated by the February 18 Order Involve Matters Properly Subject to Other Agencies' Jurisdiction

Even if the constraints on Commission action described above could be brushed aside as mere procedural niceties (and they cannot be), the fact remains that the actions apparently contemplated by the February 18 Order involve matters outside the scope of the Commission's responsibilities and authority under the NGA. The Commission's question of whether allowing the Weymouth Compressor Station to remain in service is "consistent with the Commission's responsibilities" given "concerns expressed regarding public safety"[43] answers itself when read in light of the Commission's past acknowledgements that "PHMSA, not the Commission, has jurisdiction for promulgating and enforcing pipeline safety standards."[44] Indeed, the Commission expressly

empower FERC to vacate final and nonreviewable license exemptions." *Hirschey*, 701 F.2d at 218.

[42] Danly Dissent at P 24 (citing *Trunkline LNG Co.*, 22 FERC ¶ 61,245 at 61,442 (1983)). As a practical matter, the Commission would still have ample means of enforcing compliance with the terms of certificates even if revocation were not among the sanctions for non-compliance. *See* 15 U.S.C. § 717t-1 (2018) (authorizing the Commission to impose civil penalties of up to $1 million per day per violation for violations of the NGA or "any rule, regulation, restriction, condition, or order made or imposed by the Commission" thereunder). *See also Tres Palacios LLC*, 174 FERC ¶ 61,060 (2021) (approving settlement under which pipeline agreed to pay civil penalties for alleged certificate violation); *Algonquin Gas Transmission, LLC*, 166 FERC ¶ 61,012 (2019) (same).

[43] February 18 Order, 174 FERC ¶ 61,126 at P 2.

[44] *Hamilton v. El Paso Nat. Gas Co.*, 141 FERC ¶ 61,229 at P 18 (2012) (citations omitted). *See also Millennium Pipeline Co., L.L.C.*, 157 FERC ¶ 61,096 at P 106 (2016) (finding that a disagreement about certain safety standards "is more appropriately addressed to PHMSA, the

acknowledged PHMSA's jurisdiction over safety standards applicable to the Weymouth Compressor Station in the Certificate Order and again in the Certificate Rehearing Order.[45]

To the extent the February 18 Order is also prompted by alleged "changes in the Weymouth Compressor Station's projected air emissions,"[46] those concerns are likewise beyond the Commission's jurisdiction. As Commissioner Danly explains, "Congress expressly delegated . . . to the U.S. Environmental Protection Agency (EPA) the authority to regulate air emissions."[47] Consistent with that delegation, the Certificate Order relied on Applicants' obligation to comply with the Clean Air Act (the "CAA") and recognized that "EPA has delegated authority to the Massachusetts [Department of Environmental Protection (the "Massachusetts DEP")] to administer the CAA in Massachusetts."[48]

That the Commission might inject itself into matters outside its jurisdiction is all the more puzzling given that the agencies with jurisdiction over these matters, PHMSA and Massachusetts DEP, "appear satisfied that Algonquin is complying with their regulations

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agency having jurisdiction over gas pipeline safety"), *on reh'g*, 161 FERC ¶ 61,194 (2017); *Millennium Pipeline Co., L.L.C.*, 145 FERC ¶ 61,007 at P 88 (2013) (noting that PHMSA "has jurisdiction over pipeline safety"); *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,008 at P 16 (2012) ("[PHMSA] has jurisdiction over pipeline safety, not the Commission."); Danly Dissent at P 31 ("Congress expressly delegated to the Secretary of the Department of Transportation the authority to regulate pipeline safety . . . ." (footnote omitted)).

[45] Certificate Order, 158 FERC ¶ 61,061 at P 183 (noting that PHMSA "is responsible for prescribing pipeline safety standards"); Certificate Rehearing Order, 161 FERC ¶ 61,255 at P 136 ("[W]e note again that PHMSA is the agency charged with developing safety regulations for the design and operation of natural gas pipeline facilities and enforces compliance with these regulations.").

[46] February 18 Order, 174 FERC ¶ 61,126 at P 2.

[47] Danly Dissent at P 31 (footnotes omitted).

[48] Certificate Order, 158 FERC ¶ 61,061 at P 198.

and requirements."[49] Focusing on the safety concerns that apparently prompted the February 18 Order, Commissioner Christie notes that this matter "is no longer under this Commission's jurisdiction, but is rather under that of another federal agency," and that the federal agency with jurisdiction, PHMSA, "has already investigated and given the compressor facility a temporary green light to operate."[50] As he observes, this only serves "[t]o compound the Kafkaesque quality of the Commission's action . . . ."[51]

B. ***"Should the Commission reconsider the current operation of the Weymouth Compressor Station in light of any changed circumstances since the project was authorized? For example, are there changes in the Weymouth Compressor Station's projected air emissions impacts or public safety impacts the Commission should consider? We encourage parties to address how any such changes affect the surrounding communities, including environmental justice communities."***

As discussed above in Section III.A, the Commission simply does not have the statutory authority to modify the Certificate Order, much less to do so in order to address public safety or air emissions concerns. Importantly, there are agencies with the statutory power to address any such concerns, PHMSA and the Massachusetts DEP, and neither of these agencies appears to share the concerns that animate the February 18 Order.

It also bears emphasis that the Commission did, in fact, consider the impacts of the Weymouth Compressor Station on surrounding communities, including environmental justice communities, when it issued the Certificate Order.[52] In its unanimous order on rehearing, the Commission confirmed that it had taken the "hard look" at environmental

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49 Danly Dissent at P 30.

50 Christie Dissent at P 4 (footnotes omitted).

51 *Id.*

52 *See* Certificate Order, 158 FERC ¶ 61,061 at PP 185-89.

justice issues required under the National Environmental Policy Act ("NEPA")[53] and detailed the factors underlying its conclusion that "the Atlantic Bridge Project will not result in any disproportionately high or adverse environmental or human health impacts on minority or low-income communities."[54] On review, the D.C. Circuit agreed that the Commission had fulfilled its NEPA obligations in general and as regards environmental justice communities in particular, finding that the Commission "reasonably concluded that the project would not disproportionately affect environmental-justice communities around Weymouth because the compressor station's effects would be similar to those experienced by non-environmental-justice communities surrounding the three existing stations being expanded by the project."[55] As discussed above, the Commission cannot revisit its Certificate Order findings now.

C. *"Are there any additional mitigation measures the Commission should impose in response to air emissions or public safety concerns?"*

The threshold question is whether the Commission can lawfully impose "additional mitigation measures . . . in response to air emissions or public safety concerns,"[56] and, as discussed above in Section III.A, the answer to that question is unequivocally "no." Even making the counterfactual assumption that the Commission had the statutory authority to modify the Certificate Order, however, doing so would be exceedingly bad public policy for all the reasons set forth below in Section III.D and in the Danly and Christie Dissents.

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53 Certificate Rehearing Order, 161 FERC ¶ 61,255 at P 93.

54 *Id.* at P 95. *See also id.* at PP 91-99.

55 *Weymouth*, No. 17-1135, 2018 WL 6921213, *2 (citation omitted).

56 February 18 Order, 174 FERC ¶ 61,126 at P 2.

D. *"What would the consequences be if the Commission were to stay or reverse the [Letter] Order?"*

At the outset, it is distressing that the Commission, as a "creature of statute," is apparently considering actions that so clearly exceed the "authorities conferred upon it by Congress."[57] That suggestion, in and of itself, has serious and detrimental consequences inasmuch as it violates fundamental principles of due process undermines regulatory certainty,[58] and that harm will be exacerbated immeasurably if the Commission takes the next step down this improvident path and attempts to stay or reverse the Letter Order. Commissioner Christie got it exactly right when he stated:

> Fairness and due process in the regulatory consideration of project certification applications means litigating all relevant issues during the original proceeding, providing for robust public participation, and then issuing a decision well-grounded in law and fact. Then out of fairness to all concerned, the regulatory body should stand behind its decision. Today's decision violates this basic standard.[59]

The "basic standard" of fairness and due process described by Commissioner Christie is reflected in the statutory constraints on the Commission's powers to reopen final and non-appealable orders and certificates, as is a recognition of the vital importance of regulatory certainty to achieving the underlying purposes of the statutes. The Supreme Court has made clear that "the principal purpose of [the FPA and the NGA] was to

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57 *Atlantic City*, 295 F.3d at 8 (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001))).

58 *See* Danly Dissent at P 27 ("Issuing an order that appears to revisit final, unappealable certificate orders impairs regulatory certainty and arrogates to the Commission authority it does not have."); Christie Dissent at P 1 ("Today's capricious action violates the most basic standards of regulatory due process and regulatory finality . . . .").

59 Christie Dissent at P 5.

encourage the orderly development of electricity and natural gas at reasonable prices."[60] Regulatory certainty is integral to achieving this purpose. As the D.C. Circuit found in rejecting an attempt to revoke an exemption from the FPA's hydroelectric licensing requirements: "There is a strong interest in repose under any regime of legal rules. And particularly in this context — given the expense of developing hydroelectric projects — applicants, other potential investors and lending institutions must be able confidently to rely on the predictability of the FERC's procedural rules."[61]

Importantly, the need for regulatory certainty does not end with the regulated entity or its investors; customers likewise need to be able to rely on Commission orders. Where certificate orders are concerned, generation developers, including EPSA's members, invest billions of dollars in reliance on the finality of Commission orders certificating natural gas pipeline facilities needed to deliver fuel for their facilities,[62] and such investment will be chilled just as surely as that in the pipelines themselves if certificate orders are subject to perpetual reopening. That is undoubtedly a big part of the reason why the Commission has respected the statutory constraints on its powers in this regard

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60 *National Ass'n for the Advancement of Colored People v. FPC*, 425 U.S. 662, 669-70 (1976) (citations omitted).

61 *Hirschey v. FERC*, 701 F.2d at 220. *See also*, *e.g.*, *FPA Section 203 Supplemental Policy Statement*, 120 FERC ¶ 61,060 at P 57 (2007) (recognizing the need for "greater regulatory certainty in undertaking utility investments"); *American Elec. Power Serv. Corp.*, 116 FERC ¶ 61,059 at P 26 (2006) (acknowledging "the regulatory certainty that is important in supporting large new investments"), *on reh'g*, 118 FERC ¶ 61,041 (2007).

62 *Cf. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956) ("By preserving the integrity of contracts, [the NGA] permits the stability of supply arrangements which all agree is essential to the health of the natural gas industry. Conversion by consumers, particularly industrial users, to the use of natural gas may frequently require substantial investments which the consumer would be unwilling to make without long-term commitments from the distributor, and the distributor can hardly make such commitments if its supply contracts are subject to unilateral change by the natural gas company whenever its interests so dictate.").

and has not, in the 83 years since the NGA was enacted, previously attempted to revoke a certificate of public convenience and necessity where the certificate holder was complying with its terms.[63]

The proposition that a certificated, operable and operating element of the natural gas delivery system could be pulled out of service merely because the Commission is having second thoughts about matters decided years ago also has potentially serious electric reliability and market design implications. This is particularly true in New England, where the Commission has already expressed concern about "fuel security issues . . . which could result in a violation of mandatory reliability standards."[64] In large part, these concerns arise from the fact that "[s]ince 2000, the region's resource mix transitioned very quickly to natural gas-fired generation, but has not seen a commensurate investment in natural gas infrastructure to support the regional need for gas."[65] From a market design perspective, these concerns have led to the implementation of a series of out-of-market mechanisms intended to preserve reliability.[66] While certain

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63 *See* Danly Dissent at P 24 ("Absent a violation of [the certificate] conditions, once the certificate issues and becomes final, the Commission has never revisited a certificate order . . . ."); *Trunkline LNG Co.*, 22 FERC ¶ 63,028 at 65,137 (1983) (Wagner, Chief Administrative Law Judge) ("Neither this Commission nor [its predecessor] has ever revoked a certificate or authorization in an ongoing project under Section 3 or Section 7 of the [NGA] where the holder remained in compliance with the terms and conditions of the authorization. There has never even been a claim during these nearly 50 years since the [NGA] became law that such power existed.").

64 *ISO New England Inc.*, 164 FERC ¶ 61,003 at P 55 (2018).

65 *Id.*, Concurring Statement, *1 (LaFleur, Commissioner, concurring). *See also ISO New England Inc.*, 171 FERC ¶ 61,235, Dissenting Statement at P 2 (2020) ("*ISO New England*") (Glick, Comm'r, dissenting) ("I agree that New England has a fuel security issue. During a handful of especially cold winter days when gas demand for residential and commercial heating peaks, the region's natural gas transportation capacity can become constrained, potentially limiting the natural gas supply available to the gas-fired power plants that would otherwise help power the grid.").

66 *See*, *e.g.*, *ISO New England Inc.*, 144 FERC ¶ 61,204 (2013) (accepting "Winter Reliability Program" for 2013/2014), *on reh'g*, 147 FERC 61,026 (2014), *rev'd in part sub nom. TransCanada*

of these mechanisms are clearly necessary, there is no question that reliance on out-of-market mechanisms is decidedly sub-optimal.

The idea that the Commission would be so open to, in Commissioner Christie's words, "retroactively changing the rules long after the fact"[67] has troubling implications that extend far beyond the pipeline certification context. As Commissioner Danly puts it, the February 18 Order "disregards the principles of final judgement upon which all litigants rely, and violates the specific statutory procedures devised by Congress to render and challenge final orders."[68] That should be a matter of profound concern for all participants in Commission proceedings and, in particular, for entities, like EPSA's members, that make substantial investments in reliance on the finality of Commission orders. And it should be a matter of profound concern for consumers as well, because, as Commission Christie observed, the result will be that needed infrastructure projects will be "harder to finance or, at the very least, more expensive to finance due to the increased risk created by this specter of uncertainty."[69]

Indeed, as also noted by Commissioner Christie, there is every reason to expect that the sort of after-the-fact challenges:

> enabled by [the February 18 O]rder . . . will not be limited to natural gas projects, even though they are today's primary

Power Mktg. Ltd. v. FERC, 811 F.3d 1 (D.C. Cir. 2015); *ISO New England Inc.*, 152 FERC ¶ 61,190 (2015) (accepting "Winter Reliability Programs" for 2015/2016, 2016/2017 and 2017/2018), *on reh'g*, 154 FERC ¶ 61,133 (2016); *ISO New England, Inc.*, 165 FERC ¶ 61,202 at PP 82-88 (2018) (approving form of fuel-security cost-of-service agreement); *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267 (2018) (accepting fuel-security cost-of-service agreement for two generation units), *on reh'g*, 172 FERC ¶ 61,044 (2020); *ISO New England*, 171 FERC ¶ 61,235 (accepting "Inventoried Energy Program" for 2023/2024 and 2024/2025).

67 Christie Dissent at P 1.

68 Danly Dissent at P 32.

69 Christie Dissent at P 6.

> target. Campaigns of unending legal warfare may well be used one day against other types of infrastructure projects, including those the majority may well want to promote.[70]

As an initial matter, EPSA understands the current Commission's heightened sensitivity to environmental matters, including concerns about impacts on environmental justice communities.[71] It would be concerned, however, to the extent that the February 18 Order is "target[ing]"[72] natural gas as a fuel or otherwise reflects a retreat from the Commission's longstanding commitment to fuel neutrality.[73] Regardless of the motives underlying the February 18 Order, however, the bad precedent it sets will threaten all investments made in reliance on the finality of all Commission orders. For example, if the Commission is free to reopen final and non-appealable orders years after the fact, what assurance will investors in transmission lines built to deliver wind-powered generation have that the orders granting rate incentives will not be reopened by a future Commission less concerned with facilitating renewables development?

Regulated entities and, indeed, all stakeholders bear the risk that changes in the composition of the Commission will lead to changes in the Commission's policy priorities, and that, subject to compliance with the requirements of the applicable statute and the Administrative Procedures Act,[74] today's Commission may depart from the policies of

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70 *Id.* at P 7.

71 *See, e.g.*, *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 174 FERC ¶ 61,125 at P 6 (2021).

72 Christie Dissent at P 6.

73 *See, e.g.*, *Calpine Corp. v. PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,035 at P 57 (2020) (discussing the Commission's "bedrock principle of resource neutrality"); *ISO New England Inc.*, 162 FERC ¶ 61,205 at P 26 (2018) ("We reiterate that the Commission's policies are fuel-neutral.").

74 5 U.S.C. §§ 551, *et seq.* (2018).

yesterday's Commission, just as tomorrow's Commission will not be irrevocably bound by the policies of today's.[75] But that does not mean that today's Commission can reach back in time and seek to impose its policy preferences retroactively by reopening long final orders. And today's Commission should not want that to be the rule, as it would cast serious doubt on the finality of its own orders and undermine their ability to advance the desired policy objectives.

[75] *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009) (rejecting the proposition that "every agency action representing a policy change must be justified by reasons more substantial than those required to adopt a policy in the first instance," but explaining that an agency must still "display awareness that it *is* changing position," reconcile its new position with "factual findings" underlying the prior policy, and account for "serious reliance interests").

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, EPSA urges the Commission (1) to acknowledge the finality of the Certificate Order and, more broadly, the limits on its authority to grant the relief contemplated by the February 18 Order, and (2) to terminate this sub-docket without further action.

Respectfully submitted,

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Dated: April 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, D.C., this 5th day of April, 2021.

/s/ Stephanie S. Lim
Stephanie S. Lim