

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

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

**REQUEST FOR REHEARING OF
ALGONQUIN GAS TRANSMISSION, LLC**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ Algonquin Gas Transmission, LLC (“Algonquin”) hereby respectfully requests rehearing of the Order Establishing Briefing issued in the captioned proceeding on February 18, 2021 (“February 18 Order”).² In the February 18 Order, the Commission established briefing procedures regarding the operation of the Weymouth Compressor Station and the order authorizing Algonquin to place the Weymouth Compressor Station into service (“Authorization Order”).³ The Commission lacks authority under the Natural Gas Act (“NGA”)⁴ to reopen the Order Issuing Certificate and Authorizing Abandonment issued on January 25, 2017 in Docket No. CP16-9-000 (“Certificate Order”) or the Authorization Order,⁵ as contemplated in the February 18 Order. Moreover, the February 18 Order contradicts well-established FERC precedent and case law with retroactive effect and without regard for the hundreds of millions of dollars that Algonquin invested in reliance on the Commission’s final orders. The February 18 Order will have a profoundly destabilizing effect not only on natural gas

¹ 18 C.F.R. § 385.713 (2020).

² *Algonquin Gas Transmission, LLC, et al.*, 174 FERC ¶ 61,126 (2021).

³ *Algonquin Gas Transmission, LLC, et al.*, Docket No. CP16-9-000, at 1 (Sept. 24, 2020) (delegated order).

⁴ 15 U.S.C. §§ 717-717z (2018).

⁵ *Algonquin Gas Transmission, LLC, et al.*, 158 FERC ¶ 61,061 (2017) (“Certificate Order”). Chairman Bay, Commissioner LaFleur, and Commissioner Honorable unanimously approved the certificate.

infrastructure developers, but on the hundreds of millions of Americans who rely on that infrastructure and every other industry that is subject to the Commission's jurisdiction.

In support of its request for rehearing, Algonquin shows as follows:

I.
EXECUTIVE SUMMARY

Over four years ago the Commission issued the Certificate Order authorizing Algonquin to construct and operate the Weymouth Compressor Station as part of the Atlantic Bridge Project ("Atlantic Bridge Project," "Atlantic Bridge" or "Project").⁶ The Commission denied requests for rehearing of that order, and the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") upheld the Commission's actions in full. Algonquin sought, and obtained, the Commission's approval to construct and eventually place those facilities into service. Algonquin did so, investing hundreds of millions of dollars, and ultimately placed the Weymouth Compressor Station into service, providing much-needed transportation capacity to meet growing demand for natural gas in New England and the Maritime Provinces of Canada.

After allowing a further rehearing request of the in-service authorization to be deemed denied by operation of law (which became final when opponents did not appeal), the Commission *sua sponte* abruptly issued the February 18 Order, requesting briefing on a number of issues, including whether the Commission should revoke Algonquin's authorization to operate the Weymouth Compressor Station. The uncertainty created by the February 18 Order immediately and materially impacted Algonquin, the viability of the Project, and residential consumers, manufacturers, generators, and commercial businesses that rely on reliable, reasonably priced supplies of natural gas. The February 18 Order is

⁶ Citations for the material in the Executive Summary are included in the remainder of this pleading.

an unlawful and erroneous departure from the Commission’s well-established precedent and case law. Under the NGA and judicial precedent, the Commission has no authority to take the action contemplated in the February 18 Order. Moreover, the February 18 Order is contrary to the purposes of the NGA, the Commission’s mission, and administrative finality and regulatory certainty.

The Certificate Order has been final and nonreviewable for years. The questions posed by the February 18 Order are only relevant to the question of whether the Commission should vacate or attach additional mitigation measures to the Certificate Order.⁷ The Commission has no authority to do so. Moreover, the Commission’s purported concerns regarding “public safety,” “air emissions,” and “environmental justice communities” associated with the Weymouth Compressor Station’s operations have been exhaustively reviewed by the Commission and the D.C. Circuit upheld the Commission’s determinations, denying several consolidated petitions for review of the Certificate Order. Public safety aspects of the Project were also reviewed and addressed by the Pipeline and Hazardous Materials Safety Administration (“PHMSA”),⁸ and air emissions and environmental justice concerns were reviewed by the Massachusetts Department of Environmental Protection (“Massachusetts DEP”) as part of its proceedings for the Air Quality Plan Approval for the Weymouth Compressor Station (“Air Permit”), which review was upheld on appeal at the U.S. Court of Appeals for the First Circuit (“First

⁷ The February 18 Order does not allege any violation of the terms of the Certificate Order.

⁸ By letter dated January 22, 2021, PHMSA authorized Algonquin to operate the Weymouth Compressor Station without any pressure restriction.

Circuit”) with one exception that the Massachusetts DEP addressed in remand proceedings.⁹

In *Hirschey v. FERC*, the D.C. Circuit concluded that an approval became “final and nonreviewable” once the deadline for filing a rehearing petition had passed and, therefore, the Commission lacked the authority to issue a subsequent order to vacate an approval granted under the Federal Power Act. The court explained that “applicants, other potential investors and lending institutions must be able confidently to rely on the predictability of the [the Commission’s] procedural rules.” In *International Paper Co. v. FERC*, the D.C. Circuit reaffirmed *Hirschey*, concluding again that the Commission lacks authority to vacate a final, nonreviewable authorization. The Federal Power Act and the NGA are materially indistinguishable in pertinent part and, therefore, the holdings of *Hirschey* and *International Paper* apply to the instant matter.

Hirschey and *International Paper* are in accord with case law in other contexts recognizing that both law and policy require protecting legitimate reliance interests against unjustifiable agency shifts. In *U.S. v. Seatrail Lines, Inc.*, the Supreme Court held that the Interstate Commerce Commission cannot reopen a final, nonreviewable certificate proceeding to execute new policy priorities. In *Civil Aeronautics Board v. Delta Air Lines, Inc.*, the Supreme Court refused to allow the Civil Aeronautics Board to bypass statutorily specified procedural requirements before altering certificates of public convenience and necessity for airline routes, protecting airline company investments in facilities, operations, and personnel. In addition, the D.C. Circuit held in *Chapman v. El Paso Natural Gas Co.*

⁹ As discussed herein, the First Circuit remanded the issue of whether the proposed natural gas fired turbine was the Best Available Control Technology (“BACT”) to limit nitrogen oxide emissions from the Weymouth Compressor Station, which the Massachusetts DEP confirmed was the BACT in remand proceedings.

that the Secretary of the Interior could not add to the requirements for rights-of-way for a natural gas pipeline set forth in an earlier agency decision. Simply put, the February 18 Order rests on the apparent position that the Commission has general authority to reopen a final and nonreviewable certificate proceeding to consider whether the Commission should vacate or attach additional mitigation measures to the Certificate Order. That proposition is profoundly mistaken. Nothing in the NGA authorizes the Commission to revoke a final, nonreviewable certificate order and decades of settled case law confirm that the Commission has no such authority.

Nor does the October 2020 joint request for rehearing of the Authorization Order justify the February 18 Order. The Commission issued the Authorization Order after making the only inquiry contemplated in Environmental Condition No. 10 of the Certificate Order: *i.e.*, whether rehabilitation and restoration of the right-of-way and other areas affected by the Project were proceeding satisfactorily. Even assuming the Commission has authority to grant a months-belated rehearing with respect to the Authorization Order, the questions posed by the February 18 Order are irrelevant to the Authorization Order. Instead, they are relevant only to the inquiry that the Commission addressed and resolved in the Certificate Order. In any event, the October 2020 rehearing request was deemed denied by operation of law due to the Commission's inaction. No party chose to petition for judicial review of the Authorization Order within the statutory 60-day period following its issuance. Therefore, the Authorization Order is now final and nonreviewable, and the Commission lacks authority to vacate or attach conditions to it.

The February 18 Order is also arbitrary and capricious on numerous grounds. First, the February 18 Order departs, without any explanation, from longstanding precedent

previously supported on a bipartisan basis over many decades, providing that the Commission rejects challenges to certificate orders raised in subsequent compliance proceedings. The sole inquiry in granting a notice to proceed or authorization to commence service is whether the applicant has complied with the conditions of the certificate order: here, the only question is whether Algonquin complied with Environmental Condition No. 10 of the Certificate Order. Nor could the Commission plausibly claim that it intended to allow the Director of the Office of Energy Projects (“OEP”) to consider additional factors in deciding an in-service request, as such contention is contrary to the text of the Certificate Order and well-established precedent. For similar reasons, Environmental Condition No. 2 of the Certificate Order does not authorize the Commission to revisit the findings of the Certificate Order. Commission precedent provides that the text of Environmental Condition No. 2 is intended to ensure compliance with existing requirements of the Certificate Order and the National Environmental Policy Act (“NEPA”) and not to reevaluate environmental effects whose nature and magnitude were accurately foreseen and considered in the Certificate Order.

Second, the February 18 Order frustrates the purpose of the NGA and the Commission’s mission statement. As the Supreme Court long ago explained, the statutory purpose of the NGA is to ensure that the public has access to “plentiful” supplies of natural gas at reasonable prices. The Commission has provided that its mission is to assist consumers in obtaining reliable, efficient and sustainable energy services at reasonable costs. The February 18 Order directly impedes these goals. The order also undermines the market’s need for administrative finality and regulatory certainty. The Commission has stated that parties should be able to rely on the finality of its orders; however, the

February 18 Order eviscerates such certainty by reopening a proceeding over four years after the Commission issued the Certificate Order, and after the capital was invested in reliance on that order and the facilities were constructed and placed into service.

Third, in issuing the February 18 Order, the Commission departs from 80 years of precedent supporting, defending, and enforcing its certificate orders. The Commission also allows for the first time, as part of a ministerial action, the re-litigation of issues previously addressed in a certificate order. This departure is particularly egregious, considering the reliance interests of Algonquin, its shippers, and end-users of natural gas in the finality of the Certificate Order and the Authorization Order.

Fourth, the February 18 Order reopens the record to seek briefing on purported concerns surrounding “projected air emissions impacts” and “public safety impacts.” However, once the Certificate Order is no longer subject to rehearing or appeal, the Commission had no authority to consider air emissions or pipeline safety absent a violation of the order itself. Congress conferred regulatory authority on these matters to the Environmental Protection Agency (“EPA”) (with delegation here to the Massachusetts DEP) and to PHMSA, respectively. The Commission’s concerns have been reviewed and addressed by these agencies. The February 18 Order represents an unlawful arrogation of authority to the Commission that is duplicative and statutorily improper.

Fifth, the February 18 Order departs from well-established precedent that the Commission does not permit requests for rehearing of ministerial actions because the purpose of such orders is to ensure that the Commission’s conditions have been met, not to reexamine the Commission’s conclusions underlying a certificate order. The Director of OEP’s inquiry when determining whether to permit Algonquin to commence service

was limited to one question: whether Algonquin had complied with Environmental Condition No. 10 of the Certificate Order. The Authorization Order was an objectively ministerial action and, pursuant to Commission precedent, not subject to rehearing on grounds other than whether Algonquin complied with the relevant condition. Nevertheless, the February 18 Order relies on a joint rehearing request and “numerous other pleadings” in response to this ministerial action to erroneously reopen the record.

Sixth, the February 18 Order refers to “numerous other pleadings” filed outside of the 30-day statutory period established in Section 19(a) of the NGA, suggesting (without supporting authority) that those pleadings could justify the re-opening of the Certificate Order or Authorization Order. In that regard, the February 18 Order is an impermissible waiver of the statutory deadline for rehearing requests. The Commission has consistently held that it lacks statutory authority to waive or extend the 30-day period under Section 19(a) and the Commission does not permit supplements or amendments to rehearing requests after the 30-day period. However, by referencing the numerous out-of-time pleadings and requesting that parties supplement their pleadings with briefing, the Commission erroneously ignores the statutory deadline and departs from its well-established precedent without any explanation, effectively and inappropriately creating an open-ended and indefinite opportunity for project opponents to seek rehearing long after the statutory 30 days. Even assuming that (1) the Authorization Order was not final, (2) the issues for which the Commission requested briefing in the February 18 Order were germane to the Authorization Order, and (3) findings on those issues could form the basis for granting rehearing of a ministerial order, the Commission would nonetheless violate its long-standing precedent of not permitting novel arguments raised for the first

time on rehearing if, as the February 18 Order contemplates, it were to consider issues that were not raised prior to its issuance of the Authorization Order.

The errors in the February 18 Order cannot find safe harbor in the Commission's precedent allowing for reopening the record or reconsideration of Commission orders only in certain, narrow circumstances. The Commission is authorized to reopen the record upon a showing of "extraordinary circumstances" and only (1) during the time between the closing of the evidentiary record and the issuance of a Commission order, or (2) on rehearing. That precedent does not support the February 18 Order. The purported concerns raised in the February 18 Order do not satisfy the "extraordinary circumstances" requirement. In addition, because the Certificate Order and Authorization Order are final and nonreviewable, there is no basis for the Commission to now reopen the record or grant reconsideration of the orders.

II. **SPECIFICATIONS OF ERROR**

1. The Commission erred in the February 18 Order by reopening the record in Docket No. CP16-9 after the Certificate Order became final and no longer subject to rehearing or appeal. The Commission has no authority to reopen the record because the Commission denied requests for rehearing of the Certificate Order years ago and the D.C. Circuit subsequently acquired jurisdiction over the Certificate Order and denied petitions for review challenging it. Reopening the record relied upon by this Commission in issuing the Certificate Order violates long-standing precedent limiting agencies' authority to reconsider licensing decisions, especially where, as here, significant investments have been made in reliance on those decisions.
2. The Commission erred in the February 18 Order because it has no authority to amend (or consider whether to amend) the Certificate Order to impose additional conditions because the Certificate Order is final and no longer subject to rehearing or appeal. Nothing in the NGA authorizes the Commission to reconsider a final certificate order to impose additional conditions or to revoke a final certificate order in these circumstances.
3. The Commission erred in the February 18 Order by failing to provide any basis in law for its action.
4. The Commission erred in the February 18 Order by asserting authority to modify or revoke the Authorization Order. That is so for two independent reasons. First, the issues raised in the February 18 Order are irrelevant to the sole inquiry at the service-authorization stage, *i.e.*, whether rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily. Second, the Authorization Order is final and no longer subject to rehearing or appeal. The request for rehearing of the Authorization Order has been denied by operation of law because the Commission did not take one of the actions specified in NGA section 19(a) within 30 days of the filing of such rehearing request, and no party timely sought review of the Authorization Order in a court of appeals of the United States by the deadline set forth in NGA section 19(b).
5. The Commission erred in the February 18 Order because the order departs from long-standing Commission precedent, without reasoned explanation, by re-opening the record underlying a final certificate order that is no longer subject to rehearing or appeal.

6. The Commission erred in the February 18 Order by departing from its long-standing precedent of supporting, defending, and enforcing certificate orders without reasoned explanation. In the over 80-plus year history of the NGA, the Commission has never reopened a record after a certificate order was final and non-appealable with the intent of determining whether the certificated project remained in the public convenience and necessity or whether the Commission should implement additional environmental conditions in a final and nonreviewable certificate order.
7. The February 18 Order unlawfully places its legal authority to reopen the record on matters regulated by other federal agencies. The February 18 Order is concerned with “projected air emissions impacts” and “public safety impacts”; however, in addressing such concerns by establishing briefing, the Commission arrogates authority to itself that Congress provided to the EPA and the Department of Transportation (“DOT”).
8. The February 18 Order erred by inviting additional briefing on topics that have already been fully and exhaustively addressed by the Commission, the D.C. Circuit, the Massachusetts DEP, the First Circuit, and DOT/PHMSA, in their respective reviews of the Weymouth Compressor Station.
9. The Commission erred in the February 18 Order by impairing administrative finality and regulatory certainty. The Commission has provided that parties should be able to rely on the finality of certificate orders. The February 18 Order hinders such reliance. Without finality of certificate orders, project sponsors will struggle to obtain private financing, which will hinder infrastructure development, and, in turn, diminish the reliability of the nation’s energy network.
10. The Commission erred in the February 18 Order by reopening the record to consider whether to amend the Certificate Order to modify Environmental Condition No. 10. Environmental Condition No. 10 conditions the authorization to place the Weymouth Compressor Station into service only on “a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.” The topics raised in the February 18 Order are unrelated to that narrow inquiry.
11. The Commission erred in the February 18 Order because the order departs from long-standing Commission precedent, without reasoned explanation, by asserting the authority to impose additional conditions or inviting re-litigation of the findings of

certificate orders in subsequent ministerial orders addressing compliance with certificate conditions.

12. The Commission erred in the February 18 Order by impermissibly waiving the 30-day statutory deadline for filing rehearing requests, by permitting and considering supplements to rehearing requests, and by requesting additional information regarding the Authorization Order.

III. **STATEMENT OF ISSUES**

1. Whether the February 18 Order is arbitrary and capricious because it unlawfully reopens the record in Docket No. CP16-9 because the Commission has no authority to vacate, or attach additional mitigation measures to, the Certificate Order after it became final and no longer subject to rehearing or appeal. As a matter of law, “the Commission—like any administrative agency—has no power to act ‘unless and until Congress confers power upon it.’” *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at P 23 (2020) (quoting *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 374 (1986)); *see also, e.g., Atl. City Elec Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.” (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in original)). “It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise” in the February 18 Order. *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004). The Commission cannot satisfy that burden. Section 7 of the NGA only provides the Commission authority to issue a certificate or deny applications to construct facilities, and to attach reasonable terms and conditions to the certificate as the public convenience and necessity may require. 15 U.S.C. § 717f(e). It is well established that “the Commission may not use its [Section] 7 conditioning power to do indirectly (1) things that it can do only by satisfying specific safeguards not contained in [Section] 7(e),” or (2) “things that it cannot do at all.” *Am. Gas Ass’n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990); *accord Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 647 (D.C. Cir. 2010). In the Federal Power Act (“FPA”) context, the D.C. Circuit has expressly held that the Commission cannot vacate licensing exemptions under the FPA after they have become final under the statutory provisions and time periods governing rehearing and judicial review. *See International Paper Co. v. FERC*, 737 F.2d 1159 (D.C. Cir. 1984); *Hirschey v. FERC*, 701 F.2d 215 (D.C. Cir. 1983). The relevant sections of the FPA and NGA are materially indistinguishable and, therefore, apply

to the Commission's actions in the February 18 Order. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (noting that because the FPA and the NGA “are in all material respects substantially identical,” courts “follow [an] established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes” (citation omitted)).

2. Whether the Commission erred in suggesting that the request for rehearing of the Authorization Order might justify the February 18 Order. The issues raised in the February 18 Order are irrelevant to the sole inquiry at the service-authorization stage, *i.e.*, whether rehabilitation and restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily. In any event, the Authorization Order is now final and no longer subject to rehearing or appeal, so the Commission can neither vacate it nor attach additional conditions to it. The request for rehearing of the Authorization Order was denied by operation of law under 15 U.S.C. § 717r(a) because the Commission failed to act on the request within 30 days. *See* 18 C.F.R. § 385.713(f) (“Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request *is denied*.”) (emphasis added)). No party filed a petition for judicial review of the Authorization Order within 60 days of the date on which the joint request for rehearing was deemed denied by operation of law. 15 U.S.C. § 717r(b). Therefore, “the time for filing a petition for judicial review has expired.” *Hirschey*, 701 F.2d at 218 (emphasis omitted) (quoting *Pan Am. Petroleum Corp. v. Fed. Power Comm’n*, 322 F.2d 999, 1004 (D.C. Cir. 1963)). Accordingly, the Commission has “no authority” to stay, reverse, or attach additional mitigation measures to the Authorization Order. *Id.*; *accord International Paper*, 737 F.2d at 1162-66.
3. Whether the Commission erred in the February 18 Order by failing to provide any basis in law for its action. “It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise” in the February 18 Order. *Cal. Indep. Sys. Operator Corp.*, 372 F.3d at 398.
4. Whether the February 18 Order is arbitrary and capricious because it reconsiders the final and nonreviewable Certificate Order by seeking to consider imposing additional conditions on, or vacating, the authorization to commence service of any portion of the Atlantic Bridge Project. The Commission has consistently held that it is not proper to challenge the underlying certificate order in a compliance proceeding. *Algonquin Gas Transmission, LLC*, 171 FERC ¶ 61,148, at P 12 (2020) (finding that challenges of the certificate order determination of need in a compliance proceeding are

impermissible); *Transcontinental Gas Pipe Line Co., LLC*, 162 FERC ¶ 61,192, at P 20 (2018) (finding that attacks on the adequacy of the environmental review in the EIS in a compliance proceeding are an impermissible collateral attack on the Certificate Order); *Arlington Storage Co., LLC*, 151 FERC ¶ 61,160, at P 20 (2015). The Commission has also held that it will not entertain requests for rehearing in such proceedings that involve ministerial actions. *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 (2018) (notice rejecting request for rehearing of notice to proceed because the scope of rehearing of ministerial actions is narrow); *Arlington Storage Co.*, 149 FERC at 62,011 (“[T]he Commission generally does not entertain requests for rehearing of ministerial actions such as the notice to proceed.”); *see also Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287, at P 18 (2017); *Aguirre Offshore GasPort, LLC*, 155 FERC ¶ 61,139, at P 45 (2016) (finding that future orders will rule upon compliance with certificate conditions, and that such orders will only be subject to rehearing to the extent the order constitutes substantive decisions, and not ministerial actions). The only issue in a compliance proceeding, such as one addressing a notice to proceed or authorization to commence service, is whether the applicant has complied with the certificate order. *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 37 (finding that the only issues in a notice to proceed with construction request are whether the applicant complied with the certificate order and holding that challenges related to the Commission’s compliance with NEPA, NGA, and NHPA are within the scope of the certificate order itself); *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at P 18 (“The purpose of the Director of OEP’s review of a request for notice to proceed . . . is to ensure that the Commission’s conditions have been met []. This has been the Commission’s longstanding practice of having the Director of OEP . . . verify that certificate conditions have been met before issuing . . . authorizations related to the construction and operation of a Commission-certificated natural gas project.”). Under the plain language of Environmental Condition No. 10 of the Certificate Order, there is only one prerequisite for obtaining an in-service authorization: “[R]ehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.” Certificate Order, App. B at Environmental Condition No. 10. The Authorization Order properly found that Algonquin was “in compliance with Environmental Condition 10” because it had “adequately stabilized areas disturbed by construction” and “restoration [was] proceeding satisfactorily.” Authorization Order at 1. The February 18 Order improperly departs from this well-established precedent without any reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,

515 (2009) (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.” (emphasis in original)); *id.* (“[A]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”); *New England Power Generators Ass’n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding “that FERC did not engage in the reasoned decision making required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*” (emphasis added)).

5. Whether the February 18 Order is arbitrary and capricious because it departs without reasoned explanation from the Commission’s long-standing precedent of supporting, defending, and enforcing certificate orders. The Commission has never claimed to have the authority to revoke a certificate or authorization of a Section 7 project where the certificate holder remained in compliance with the terms and conditions of their authorization. *See Trunkline LNG Co.*, 22 FERC ¶ 63,028, at 65,137 (1983) (“Neither this Commission nor the Economic Regulatory Administration has ever revoked a certificate or authorization in an ongoing project under Section 3 or Section 7 of the Natural Gas Act 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 Natural Gas Act became law that such power existed.”); *see also* February 18 Order at P 26 n.40 (Danly, Comm’r, dissenting) (“To my knowledge, the Commission has never reopened a record of a final order that was affirmed on appeal.”). The February 18 Order broke from this decades-long precedent without any explanation in so doing. *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515 (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position.”) (emphasis in original); *id.* (“[A]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”); *New England Power Generators Ass’n, Inc.*, 881 F.3d at 211 (finding “that FERC did not engage in the reasoned decision making required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*”) (emphasis added).
6. Whether the February 18 Order is arbitrary and capricious because it frustrates the purpose and framework of the NGA. The ultimate purpose of the NGA was to ensure that the public has access to natural gas because such access is in the public interest. 15 U.S.C. § 717(a) (“As disclosed in reports of the Federal Trade Commission

[(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public *is affected with a public interest*, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*.” (emphasis added)). Moreover, the Supreme Court has stated that the purpose of the NGA is to “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.” *Nat’l Ass’n for Advancement of Colored People v. Fed. Power Comm’n*, 425 U.S. 662, 670 (1976) (“NAACP”).

7. Whether the February 18 Order is arbitrary and capricious because it unlawfully arrogates authority to itself in a manner contrary to Congress’s decision to confer regulatory authority on these matters to other agencies. The February 18 Order is concerned with “projected air emissions impacts” and “public safety impacts”; however, in addressing such concerns by establishing briefing, the Commission arrogates authority to itself in a manner contrary to Congress’s decision to confer regulatory authority on these matters to the EPA (with delegation here to Massachusetts DEP) and the DOT, respectively. *Wyoming v. U.S. Dep’t of Interior*, No. 2:16-CV-0285_SWS, 2020 WL 7641067, at *9 (Oct. 8, 2020) (providing that the “protection of air quality. . . is expressly within the ‘substantive field’ of the EPA”); 49 U.S.C. § 60102(a)(2) (providing that pipeline safety enforcement is within the authority of the DOT).
8. Whether the February 18 Order is arbitrary and capricious because it impairs administrative finality and regulatory certainty. The Commission has previously provided that parties should be able to rely on the finality of the Commission’s orders. *See Hirschey*, 701 F.2d at 219-20; *Pac. Gas Transmission Co.*, 46 FERC ¶ 61,072 (1989) (grant of intervention out of time would disrupt the proceedings and prejudice those who rely on the finality of orders); *see also Sea Robin Pipeline Co.*, 92 FERC ¶61,217, at 61,710 (2000) (“The Commission's general policy is to refrain from granting a stay of its orders, in order to assure definiteness and finality in Commission proceedings”); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 16 (“accepting [additional] evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality”); *Williams Nat. Gas Co.*, 54 FERC ¶ 61,190, at 61,572 (1991) (denying a motion to intervene by a party whose property was being condemned by the use of eminent domain, when the motion was filed nearly a year after the project sponsor received its certificate authorization to construct, operate, and abandon certain facilities and to operate a

buffer zone to a storage field). In furtherance of these purposes, the NGA reflects Congress's intent that parties be able to rely on the finality of certificates authorizing construction and operation of facilities, once the period for seeking rehearing and appeal has elapsed.

9. Whether the February 18 Order is arbitrary and capricious because it relies on pleadings submitted after the statutory rehearing period in violation of NGA Section 19(a). *See Boston Gas Co. v. FERC*, 575 F.2d 975, 978 (1st Cir. 1978) (rejecting argument that the Commission has discretion to waive the 30-day deadline); *see also Cameron LNG, LLC*, 148 FERC ¶ 61,237, at P 19 (2014) (denying request for rehearing because “[i]t is clear that the Commission cannot waive the 30-day statutory deadline for filing requests for rehearing”); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 13 (2016) (denying request for rehearing because “[t]he Commission cannot waive the 30-day statutory deadline for filing requests for rehearing”). Moreover, Commission precedent provides that it does not permit supplements to rehearing requests. *Tennessee Gas Pipeline Co., LLC*, 163 FERC ¶ 61,190, at P 11 (2018) (“[P]arties are not permitted to supplement their rehearing requests after the thirty-day period imposed by NGA section 19(a) has expired”); *Pub. Util. Dist. No. 1 of Klickitat Cty, Wash.*, 155 FERC ¶ 61,056, at P 6 n.8 (2016) (observing that “the Commission does not allow parties to supplement their rehearing requests after the 30-day period has run”); *City of Banning, Cal.*, 148 FERC ¶ 61,199, at P 16 n.18 (2014) (“We do not permit supplements or amendments to requests for rehearing filed, as is the case here, more than 30 days after the date of the order at issue.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 515 (“[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.”) (emphasis in original); *id.* (“[A]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”); *New England Power Generators Ass’n, Inc.*, 881 F.3d at 211 (finding “that FERC did not engage in the reasoned decision making required by the Administrative Procedure Act” because it “failed to respond to the substantial arguments put forward by Petitioners and *failed to square its decision with its past precedent*”) (emphasis added).

IV. BACKGROUND

On February 20, 2015, FERC Staff began its pre-filing review of the Project in Docket No. PF15-12-000. On October 22, 2015, Algonquin and Maritimes & Northeast

Pipeline, L.L.C. filed an application pursuant to NGA section 7(c) requesting a certificate of public convenience and necessity for the construction and operation of the Project. On May 2, 2016, the FERC Staff issued the Environmental Assessment (“EA”) for the Project, which concluded “that the impacts associated with this project can be mitigated to support a finding of no significant impact.”¹⁰ On January 25, 2017, the Commission issued Algonquin a certificate authorizing the construction and operation of the Atlantic Bridge Project, including the Weymouth Compressor Station.¹¹ Multiple parties filed requests for rehearing of the Certificate Order which were denied by the Commission in its order dated December 13, 2017 (“2017 Rehearing Order”).¹² The Commission considered and rejected arguments in the 2017 Rehearing Order regarding alleged safety risks related to the Weymouth Compressor Station, the effects of blowdowns, and environmental justice.¹³ On December 27, 2018, the D.C. Circuit affirmed the Certificate Order after considering the Commission’s conclusions regarding the impacts of the Project on safety and environmental justice.¹⁴

In January 2019, the Massachusetts DEP, the Massachusetts Department of Health, and the Metropolitan Area Planning Council issued a health impact assessment (“HIA”) entitled “Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth, MA.”¹⁵ The HIA studied health and environmental justice impacts of the Weymouth Compressor Station.¹⁶ The HIA “predicted no substantial changes in health

¹⁰ Certificate Order at P 70.

¹¹ *Id.*

¹² *Algonquin Gas Transmission, LLC, et al.*, 161 FERC ¶ 61,255 (2017).

¹³ *Id.* at PP 27-28, 32, 91-99, 132, and 134-39.

¹⁴ *Town of Weymouth, Mass.*, No. 17-1135, 2018 WL 6921213 at *1-2 (D.C. Cir. Dec. 27, 2018).

¹⁵ MASS. DEP’T. OF HEALTH, *Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth, MA* (Jan. 2019), <https://www.mass.gov/doc/health-impact-assessment-weymouth-proposed-natural-gas-compressor-station-final-report/download>.

¹⁶ *See id.* at 35-36, 59, 63-108.

from direct exposures from the station itself with the exception of estimated sound levels during construction.”¹⁷ On August 26, 2019, the Massachusetts DEP issued a Non-Major Comprehensive Air Quality Plan Approval (“Air Quality Plan Approval”) for the Weymouth Compressor Station.¹⁸ The Air Quality Plan Approval found that the Massachusetts Environmental Justice Policy was inapplicable to the Weymouth Compressor Station project because the anticipated emissions would not exceed the emission thresholds to trigger the policy.¹⁹ On June 3, 2020, the First Circuit rejected all but one of a “slew of arguments” challenging the Massachusetts DEP’s Air Quality Plan Approval, including challenges to its assessment of environmental justice, and remanded on one limited issue, for the Massachusetts DEP to explain why an electric motor was not the best available control technology to limit nitrogen oxide emissions from the Weymouth Compressor Station.²⁰ On January 19, 2021, the Massachusetts DEP’s Commissioner issued a Final Decision After Remand affirming the Air Permit for the Weymouth Compressor Station.

On September 16, 2020, as supplemented on September 22, 2020, Algonquin submitted a request to place the remainder of the Atlantic Bridge Project facilities, including the Weymouth Compressor Station, into service.²¹ On September 24, 2020, the Director of OEP issued the Authorization Order, authorizing Algonquin to place the Weymouth Compressor Station into service.²² On October 23, 2020, the Fore River

¹⁷ *Id.* at 156.

¹⁸ MASS DEP, *Air Quality Approval Plan* (Aug. 26, 2019), <https://www.mass.gov/doc/air-quality-plan-approval-august-2019/download>.

¹⁹ *Id.* at 12-13.

²⁰ *Town of Weymouth v. Mass. Dep’t of Env’tl. Prot.*, 961 F.3d 34, 38, 54-55 (1st Cir. 2020), *amended*, 973 F.3d 143 (1st Cir. 2020).

²¹ Request to Place Facilities In-Service of Algonquin Gas Transmission, LLC, Docket No. CP16-9-000 (Sept. 16, 2020).

²² *See supra* note 3.

Residents Against the Compressor Station, the City of Quincy, Massachusetts, Weymouth Councilor Rebecca Haugh, Michael Hayden, and Food and Water Watch filed a joint request for rehearing of the Authorization Order.²³ The rehearing request was deemed denied by operation of law on November 23, 2020.²⁴ No party filed a petition for judicial review of the Authorization Order within 60 days of November 23, 2020.²⁵

On January 25, 2021, Algonquin notified the Commission that the authorized facilities had been placed into service on the same day.²⁶ Despite the exhaustiveness and finality of the record, weeks later the Commission issued the February 18 Order in response to “numerous other pleadings expressing safety concerns regarding the operation of the project.”²⁷ In so doing, the Commission sought briefing on a number of matters including whether to allow the Weymouth Compressor Station to remain in service.

²³ Request for Rehearing of the Commission’s In-Service Authorization, Docket No. CP16-9-011 (Oct. 23, 2020). The rehearing request claimed that the Commission was required to undertake a novel assessment based on two shutdowns that occurred during the commissioning of the Weymouth Compressor Station. Commissioning of the compressor station involves testing, tuning, and calibrating the station’s turbine and ancillary equipment to identify any potential issues before the station begins normal operations. The first shutdown occurred while Algonquin was performing commissioning activities at the station on September 11, 2020, when the station experienced a gasket failure. In keeping with protocol, Algonquin initiated the controlled venting of natural gas through the emergency shutdown stack to maintain a safe worksite. During the second shutdown, which occurred on September 30, 2020, the emergency shutdown system operated as designed and safely isolated the station and vented the natural gas in a controlled manner in a location where it would not create a hazard, in accordance with PHMSA’s regulatory requirements. As Algonquin explained in its answer to the rehearing request, because PHMSA is the agency responsible for investigating and ensuring compliance with safety requirements, the Commission did not err by declining opponents’ requests that it conduct a novel analysis prior to issuing the Authorization Order. *See* Motion for Leave to Answer and Answer of Algonquin Gas Transmission, LLC, Docket No. CP16-9-011 (Nov. 9, 2020); *see also* 18 C.F.R. § 385.713(f).

²⁴ *Algonquin Gas Transmission, LLC, et al.*, 173 FERC ¶ 62,097 (2020).

²⁵ *See* 15 U.S.C. § 717r(b).

²⁶ Notice of Commencement of Service, Docket No. CP16-9-000 (Jan. 25, 2021).

²⁷ February 18 Order at P 1.

V.
REQUEST FOR REHEARING

A. **The Commission erred by effectively reopening the Certificate Order, which has been final and nonreviewable for years.**

The February 18 Order effectively, and erroneously, reopens the Certificate Order, which for years has been final and nonreviewable (*i.e.*, no longer subject to rehearing or appeal). The issues raised in the February 18 Order would only be relevant to the question of whether the Commission should vacate or attach additional mitigation measures to the Atlantic Bridge certificate. The Commission, however, has no authority to take such an action because the Commission years ago denied requests for rehearing of the Certificate Order,²⁸ and the D.C. Circuit subsequently acquired exclusive jurisdiction and denied petitions for review challenging that order.²⁹ Therefore, no basis exists for the Commission to seek briefing on the issues raised in the February 18 Order. Indeed, as explained below,³⁰ the February 18 Order is unprecedented in the over 80-year history of the NGA.

1. **The questions posed in the February 18 Order effectively reopen the Certificate Order.**

The February 18 Order effectively reopens the Certificate Order by raising and inviting re-litigation of issues that the Commission—and, on appeal, the D.C. Circuit—thoroughly considered in the context of that order. The February 18 Order mentions purported concerns regarding “public safety,” “air emissions,” and “environmental justice communities” associated with the Weymouth Compressor Station’s operation. The

²⁸ *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,255 (Dec. 13, 2017) (“Rehearing Order”).

²⁹ *See Town of Weymouth*, 2018 WL 6921213.

³⁰ *See infra* Section V.D.

Commission, however, fully evaluated all of those issues during the certificate proceeding, first in the EA,³¹ then in the Certificate Order,³² and once again in its Rehearing Order.³³

On the issue of safety, after “an exhaustive review,” the Commission “concluded that the Weymouth Compressor Station would not significantly increase the safety risk in the surrounding communities.”³⁴ The Commission noted that the “Pipeline and Hazardous Materials Safety Administration (PHMSA) is responsible for prescribing pipeline safety standards” and that “Algonquin has committed to complying with PHMSA regulations.”³⁵ Explaining that “the Commission may appropriately rely on PHMSA’s expertise and historical incident data,” the Commission concluded that “the Weymouth Compressor Station would not result in a significant increase in risk to the nearby public.”³⁶

Regarding air emissions, the Commission gave careful consideration to the emissions associated with construction and operation of the Weymouth Compressor Station, including a range of air pollutants (including nitrogen oxides, carbon monoxide, volatile organic compounds, sulfur dioxide, and particulate matter), and specifically addressed emissions associated with station blowdowns.³⁷ The Commission noted that “air

³¹ See EA 1-13, 1-23 to -24, 2-112 to -23, 2-143 (safety); *id.* at 2-86 to -99, 2-139 to -41 (air emissions); *id.* at 2-75 to -80, 2-138 (environmental justice).

³² See Certificate Order at PP 128-29, 183, 225-38 (2017) (safety); *id.* at PP 113, 189, 194-216 (air emissions); *id.* at PP 111-14, 185-89 (environmental justice).

³³ Rehearing Order at PP 27-28, 134-39, 144 (2017) (safety); *id.* at PP 100-12 (air emissions); *id.* at PP 91-99 (environmental justice).

³⁴ *Id.* at P 144.

³⁵ Certificate Order at PP 183, 228; *accord id.* at P 230 (“Algonquin has committed to design, install, inspect, test, construct, operate, replace, and maintain the facility in accordance with PHMSA safety standards.”); Rehearing Order at P 136 (“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,” and Algonquin has “committed to complying with applicable PHMSA regulations”).

³⁶ Rehearing Order at P 27; *see also id.* at P135 (“[T]he risk of an incident is low.”). PHMSA remains actively involved in overseeing Algonquin’s compliance with the pipeline safety regulations that it administers. *See* February 18 Order at PP 10, 13-14, 30 (Danly, Comm’r, dissenting) (discussing PHMSA’s issuance and resolution of a Corrective Action Order in response to two emergency shutdowns during the Weymouth Compressor Station’s commissioning phase, and PHMSA’s subsequent approval of Algonquin’s request to return the facilities to service).

³⁷ EA 2-87 to 2-99; *accord* February 18 Order at PP 6, 9 (Danly, Comm’r, dissenting).

dispersion modeling performed for the Weymouth Compressor Station demonstrates that the emissions from the station, when combined with existing background air quality, will not violate the [Environmental Protection Agency’s national ambient air quality standards (‘NAAQS’)], which are protective of human health and the environment.”³⁸ As further confirmation that the Weymouth Compressor Station’s air emissions would not present health risks, the Commission cited a health risk assessment it had recently performed for hazardous-air-pollutant emissions from compressor stations in the New Market Project, a separate natural gas infrastructure project subject to its own certificate proceeding involving much larger compression facilities.³⁹ The New Market Project study employed “overly-conservative assumptions (e.g., assuming that impacted individuals will be exposed to maximum concentrations at the property line from full-capacity facility operations for 24 hours per day, 350 days per year), and uncertainty factors to overestimate risks.”⁴⁰ Based on the study, the Commission determined that the New Market Project compressor stations did not present any significant health concerns.⁴¹ In the Atlantic Bridge certificate proceeding, the Commission explained that hazardous-air-pollutant emissions from compressor stations in the New Market Project study were “significantly greater” (more than ten times larger) than the Weymouth Compressor Station’s anticipated emissions of such pollutants.⁴² Therefore, the Commission determined that the New

³⁸ Certificate Order at P 197; *see also* Rehearing Order at P 103 (Weymouth Compressor Station’s emissions “would be within the levels established by EPA to be protective of human health”).

³⁹ *See* Certificate Order at P 205-09; *see also* *Dominion Transmission, Inc.*, New Market Project: Environmental Assessment, Docket No. CP14-497, at 87-89, App. B (Oct. 2015), <http://bit.ly/2nUsKQm>; *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016) (order granting certificate of public convenience and necessity for New Market Project).

⁴⁰ Certificate Order at P 208.

⁴¹ *Id.*

⁴² Rehearing Order at P 107; *see also* Certificate Order at PP 206-07 (noting that the Weymouth Compressor Station’s combined hazardous-air-pollutant emissions are just 3.2% of the Clean Air Act major-source threshold, while one of the New Market Project compressor stations emits 37% of that threshold).

Market Project study further demonstrated that the Weymouth Compressor Station would not present any significant health risks.⁴³ In sum, given its extensive analysis, the Commission reasonably concluded that “air impacts from operation of the [Weymouth] compressor station and blowdown events have been adequately addressed.”⁴⁴

As for environmental justice, the Commission emphasized “the numerous opportunities provided for community involvement” in the review of the Atlantic Bridge certificate application.⁴⁵ It also noted that Algonquin sought to facilitate the participation of environmental justice communities in that proceeding by translating documents providing information about the Project into Spanish, Mandarin, and Cantonese.⁴⁶ In addition, the Commission found that the “impacts on Environmental Justice communities near the Weymouth Compressor Station would be similar to those experienced by ... non-Environmental Justice communities near the existing Stony Point, Chaplin, and Oxford Compressor Stations to be modified as part of the Atlantic Bridge Project.”⁴⁷ Accordingly, the Commission concluded 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.”⁴⁸

⁴³ Certificate Order at P 209.

⁴⁴ *Id.* at P 198. The Massachusetts DEP has also exhaustively analyzed the Weymouth Compressor Station’s air emissions in issuing an air permit for the station. See *Town of Weymouth v. Mass. Dep’t of Env’tl. Prot.*, 961 F.3d 34 (1st Cir.), *modified on reh’g*, 973 F.3d 143 (1st Cir. 2020) (per curiam); see also MASS DEP, *Final Decision After Remand*, (Jan. 19, 2021), <https://bit.ly/2OhOP8y> (adopting Recommended Final Decision After Remand); MASS DEP, *Recommended Final Decision After Remand*, (Jan. 11, 2021) <https://bit.ly/3051oqq> (reaffirming Algonquin’s air permit following a remand from the First Circuit); see also *supra* Section IV (discussing HIA for Weymouth Compressor Station and air-permit proceedings before the Massachusetts DEP).

⁴⁵ Certificate Order at P 188.

⁴⁶ *Id.*

⁴⁷ Rehearing Order at P 94.

⁴⁸ Certificate Order at P 187; *accord* Rehearing Order at P 95.

On appeal, the D.C. Circuit upheld the Commission’s determinations, denying several consolidated petitions for review of the Certificate Order.⁴⁹ The court rejected the petitioners’ contention that the Commission “ignored certain safety risks,” finding that the Commission “considered each risk that the challengers identify,” and holding that the Commission was entitled to rely on Algonquin’s good-faith “assertions that [it] would comply with [PHMSA’s] safety regulations.”⁵⁰ The court also concluded that the Commission complied with its obligations to consider environmental effects under NEPA.⁵¹ And the court held 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.”⁵²

In sum, the issues raised in the February 18 Order were all thoroughly evaluated by the Commission and the D.C. Circuit in the context of the certificate proceeding. The order thus effectively, and erroneously, reopens the Certificate Order.

2. The Commission lacks authority to reopen the Certificate Order because it is now final and nonreviewable.

The Commission lacks authority to do what the February 18 Order effectively accomplishes—reopen the Certificate Order. The Commission has in the past seriously (and correctly) questioned whether it has the “authority to revoke, suspend, or adversely modify a certificate once issued, absent a breach or violation of the terms and conditions

⁴⁹ *Town of Weymouth*, 2018 WL 6921213.

⁵⁰ *Id.* at *1.

⁵¹ *Id.* at *2.

⁵² *Id.*

of the certificate itself.”⁵³ The Commission’s expression of doubt on this point is well founded. Settled precedent makes clear that the Commission cannot vacate or attach additional mitigation measures to the Atlantic Bridge certificate because it is a final order, which was upheld on appeal in December 2018 and for which the statutory periods for rehearing and appeal long ago expired.⁵⁴

In an analogous context, the D.C. Circuit has expressly held that the Commission lacks statutory authority to vacate licensing exemptions under the FPA after they have become final under that statute’s materially indistinguishable statutory provisions and time periods governing rehearing and judicial review.⁵⁵ In *Hirshey*, a proponent of a small hydroelectric project applied to the Commission for an exemption from the FPA’s licensing requirements for hydroelectric projects.⁵⁶ Under Commission regulations, the exemption application was deemed to have been approved when the Commission failed to take any action on the application within 120 days of the Commission’s acceptance of the application for filing.⁵⁷ No petition for rehearing of the deemed exemption approval was filed within the 30-day period for filing such a petition.⁵⁸ Because “judicial review is unavailable on FERC orders [under the Federal Power Act] that have not first been

⁵³ *Trunkline LNG Co.*, 22 FERC ¶ 61,245, at 61,442 (1983), *reh’g denied*, 40 FERC ¶ 61,048 (1987). In *Trunkline*, the Commission recognized that even if it had the “authority to revoke or modify a certificate where”—as in Algonquin’s case—“substantial sums have been expended and operations are underway in accordance with the terms and conditions of the certificate,” the exercise of any such authority “would be an extraordinary step” requiring “a compelling showing of a fundamental shift of a long-term nature in the basic premises on which the certificate was issued.” *Id.* Furthermore, “the Commission would be obligated to revoke or modify the certificate in a manner that would leave investors in the project in substantially the same position they would have been had the Commission not revoked or modified the certificate.” *Id.* at 61,442 n.5.

⁵⁴ *See Town of Weymouth*, 2018 WL 6921213, at *1; *see also* 15 U.S.C. § 717r(a)-(b) (party seeking judicial review of Commission order must first request rehearing of the order within 30 days, and then must petition for judicial review within 60 days of the Commission’s order on the rehearing request).

⁵⁵ *See International Paper*, 737 F.2d 1159; *Hirshey*, 701 F.2d 215.

⁵⁶ 701 F.2d at 217.

⁵⁷ *Id.*

⁵⁸ *Id.*

presented to the Commission by petition for rehearing,”⁵⁹ the D.C. Circuit concluded that the approval became “final and nonreviewable” once the deadline for filing a rehearing petition had passed.⁶⁰ The court thus held that the Commission lacked the authority to issue a subsequent order purporting to vacate the approval.⁶¹ The D.C. Circuit “reverse[d]” the Commission’s “order vacating [the] license exemption” and “remanded to the [Commission] with instructions to reinstate the license exemption.”⁶²

In doing so, the court rejected the Commission’s contention that it was authorized to vacate the license exemption under 16 U.S.C. § 825l(a), which provides: “Until the record in a proceeding shall have been filed in a court of appeals, ... the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.” The court explained “that, under [§ 825l(a)], the Commission only has the ‘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.*’”⁶³ Noting that the “time for judicial review in this case [had] expired on ... the final date for filing a petition for rehearing,” the court held that § 825l(a) “provides no authority for the [Commission’s] action in this case.”⁶⁴

The court also rejected the Commission’s reliance on 16 U.S.C. § 825h, which provides that the “Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may

⁵⁹ *Id.* at 217 n.2 (citing 16 U.S.C. § 825l).

⁶⁰ *Id.* at 217-20.

⁶¹ *Id.*

⁶² *Id.* at 220.

⁶³ *Hirschey*, 701 F.2d at 217-18 (quoting *Pan Am.*, 322 F.2d at 1004).

⁶⁴ *Id.* at 218.

find necessary or appropriate to carry out the provisions of this chapter.” The court explained that once a license exemption has been “finally granted and the time fixed for rehearing it has passed,” the exemption “is not subject to revocation in whole or in part except as *specifically* authorized by Congress.”⁶⁵ Because the Federal Power Act did not expressly authorize vacating the license exemption in *Hirschey*, the court concluded that “the Commission was without authority to revoke ... [the exemption].”⁶⁶

Finally, the court emphasized that there is a particularly “strong interest in repose” with respect to the substantial infrastructure projects over which the Commission has jurisdiction.⁶⁷ Given “the expense of developing” such projects, the court explained, “applicants, other potential investors and lending institutions must be able confidently to rely on the predictability of the [the Commission’s] procedural rules.”⁶⁸

The D.C. Circuit reaffirmed *Hirschey* in *International Paper*, reaching the same holding regarding the Commission’s lack of authority to vacate final, nonreviewable license exemptions on facts similar to *Hirschey*.⁶⁹

Because the relevant sections of the FPA and the NGA are materially indistinguishable,⁷⁰ the holdings of *Hirschey* and *International Paper* apply to Algonquin’s case.⁷¹ The facts of this case are materially indistinguishable from those that led the D.C.

⁶⁵ *Id.* (quoting *United States v. Seatrains Lines*, 329 U.S. 424, 432-33 (1947)).

⁶⁶ *Id.* (quoting *Seatrains Lines*, 329 U.S. at 433).

⁶⁷ *Id.* at 220.

⁶⁸ *Id.* The Commission expressed similar concerns in *Trunkline*. It recognized that “[m]assive investments must be and are made to construct facilities in reliance on the conditions and permanence for the prescribed term of the certificates issued by the Commission.” *Trunkline*, 22 FERC ¶ 61,245 at 61,442. “Without such security, businessmen and investment institutions would not enter into such projects nor lend the necessary funds to make the projects possible.” *Id.*

⁶⁹ See *International Paper*, 737 F.2d at 1162-66.

⁷⁰ Compare 16 U.S.C. § 825h, and *id.* § 825l(a)-(b), with 15 U.S.C. § 717o, and *id.* § 717r(a)-(b).

⁷¹ See *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (noting that because the FPA and the NGA “are in all material respects substantially identical,” courts “follow [an] established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes”) (citation omitted).

Circuit to reject the Commission’s attempted vacatur in *Hirshey* and *International Paper*. As explained above,⁷² the February 18 Order effectively reopens the Certificate Order by calling for further briefing regarding issues thoroughly evaluated and conclusively resolved in the certificate proceeding. The Certificate Order, however, is now final and nonreviewable. On December 14, 2017, when the Commission filed the certified index to the administrative record in the D.C. Circuit appeal of the Certificate Order,⁷³ the Commission lost authority to “modify or set aside” the Certificate Order,⁷⁴ and the D.C. Circuit acquired “exclusive” jurisdiction “to affirm, modify, or set aside [the] order.”⁷⁵ On December 27, 2018, the D.C. Circuit denied in all respects the several consolidated petitions for review challenging the Certificate Order.⁷⁶ The petitioners did not file a timely petition for rehearing⁷⁷ or petition for a writ of certiorari⁷⁸ challenging the D.C. Circuit’s decision. Furthermore, both the 30-day period for requesting that the Commission rehear its January 25, 2017 Certificate Order⁷⁹ and the 60-day period for petitioning for judicial review following the Commission’s December 13, 2017 Rehearing Order⁸⁰ expired years ago.

⁷² See *supra* Section V.A.1.

⁷³ Certified Index to the Record, *Town of Weymouth*, 2018 WL 6921213.

⁷⁴ 15 U.S.C. § 717r(a).

⁷⁵ *Id.* § 717r(b).

⁷⁶ See *Town of Weymouth*, 2018 WL 6921213, at *1; see also 15 U.S.C. § 717r(b) (“The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, [the] order of the Commission, *shall be final*, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.” (emphasis added)); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 289 (D.C. Cir. 1971) (“[W]here Congress has withheld administrative reconsideration of agency orders that became final for lack of appeal, there is no basis for inserting such reconsideration for an agency order that became final by virtue of a judicial affirmance, at least in the absence of unconscionable injustice, like fraud on the tribunal.”).

⁷⁷ See Fed. R. App. P. 35(c), 40(a)(1) (requiring a rehearing petition to be filed within 45 days of the court of appeals’ judgment in a civil case where a U.S. agency is a party); D.C. Cir. R. 35(a) (same).

⁷⁸ See Sup. Ct. R. 13.1 (requiring certiorari petition to be filed within 90 days of court of appeals’ judgment).

⁷⁹ See 15 U.S.C. § 717r(a)

⁸⁰ See *id.* § 717r(b).

Nothing in the NGA “specifically authorize[s]” the Commission to revoke the final, nonreviewable Certificate Order.⁸¹ Therefore, *Hirschey* and *International Paper* preclude the Commission from staying, vacating, or attaching additional mitigation measures to the Certificate Order. Those, however, are precisely the actions that the February 18 Order contemplates. The order is thus unlawful.

The need for rehearing of the February 18 Order is particularly acute because that order severely threatens the investment-backed “interest in repose” recognized in *Hirschey*.⁸² Here, as in *Hirschey*, “applicants, other potential investors and lending institutions”⁸³ cannot make the substantial investments required to construct and operate significant infrastructure projects such as the Atlantic Bridge Project if the Commission orders authorizing those projects are forever subject to reconsideration based on “unending litigation and collateral attacks” by project opponents,⁸⁴ or changes in Commission policy priorities.⁸⁵ The uncertainty created by the February 18 Order thus undermines the Natural

⁸¹ *Hirschey*, 701 F.2d at 218 (quoting *Seatrains Lines*, 329 U.S. at 432-33). The absence of any such express grant of authority is particularly telling in contrast to the Natural Gas Act’s detailed provisions governing the Commission’s authority over the rates charged for the use of operating natural-gas facilities. See 15 U.S.C. §§ 717c, 717d. Those provisions indicate that if Congress had intended to grant the Commission general authority to revoke or modify final, nonreviewable certificate orders based on factors evaluated during the certificate proceeding, Congress would have done so expressly. Cf. *Russello v. United States*, 464 U.S. 16, 23 (1983) (“[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion [of statutory language].” (citation omitted)). Further demonstrating that Congress did not intend to grant the Commission authority to attach additional conditions to Section 7 certificates after their issuance, Congress consciously chose not to include in Section 7 “broader” language from the Motor Carrier Act authorizing the responsible agency to attach conditions to motor-carrier certificates “at the time of issuance[] and from time to time thereafter.” *Natural Gas Act Amendments: Hearings Before the H. Comm. on Interstate and Foreign Commerce on H.R. 5249*, 77th Cong. 20 (1941) (statement of Commissioner Manly) (emphasis added) (quoting 49 U.S.C. § 308 (1940)); see also *Trunkline*, 22 FERC ¶ 61,245 at 61,445 (statement of Commissioner Sousa) (contrasting language of Motor Carrier Act with Section 7).

⁸² *Hirschey*, 701 F.2d at 220.

⁸³ *Id.*

⁸⁴ February 18 Order at P 7 (Christie, Comm’r, dissenting).

⁸⁵ Congress’s intent to guard against the uncertainty that would result from sudden shifts in Commission policy stemming from changes in presidential administrations is reflected in Congress’s decision to establish the Commission as an “independent,” multimember agency in which not more than three Commissioners may be members of the same political party, and in which the Commissioners hold fixed, five-year terms and

Gas Act's "principal purpose" of "encourag[ing] the orderly development of plentiful supplies of ... natural gas at reasonable prices."⁸⁶

The result compelled by *Hirschey* and *International Paper* accords with case law in other contexts recognizing that "adjudicatory revocations of adjudicatory grants" warrant "special scrutiny" to "protect legitimate reliance interests from unjustifiable agency shifts in direction."⁸⁷ For example, in *United States v. Seatrains Lines, Inc.*,⁸⁸ the Supreme Court held that the Interstate Commerce Commission lacked authority to modify a shipper's certificate of public convenience and necessity.⁸⁹ Here, as in *Seatrains Lines*, the Commission cannot reopen final, nonreviewable certificate proceedings "to execute ... new policy" priorities.⁹⁰

Similarly, in *Civil Aeronautics Board v. Delta Air Lines, Inc.*,⁹¹ the Supreme Court refused to allow the Civil Aeronautics Board to bypass statutorily specified procedural requirements before altering certificates of public convenience and necessity for airline routes.⁹² Recognizing that "Congress was vitally concerned" with "providing assurance to the carrier that its investment in operations would be protected insofar as reasonably

"may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 42 U.S.C. § 7171(a), (b)(1).

⁸⁶ *NAACP*, 425 U.S. at 669-70.

⁸⁷ *Natural Res. Def. Council, Inc. v. Thomas*, 838 F.2d 1224, 1250 (D.C. Cir. 1988). "A Commission proceeding pursuant to section 7(c) of the [Natural Gas Act] regarding an application for a certificate of public convenience and necessity is an adjudication under the Administrative Procedure Act." *Algonquin LNG, Inc.*, 61 FERC ¶ 61,292, at 62,110 (1992) (citing *Attorney General's Manual on the Administrative Procedure Act* 16 (1947)).

⁸⁸ 329 U.S. 424 (1947).

⁸⁹ *Id.* at 428-33.

⁹⁰ *Id.* at 429.

⁹¹ 367 U.S. 316 (1961).

⁹² *Id.* at 324-25. While the Federal Aviation Act of 1958, the act at issue in *Delta Air Lines*, contained a provision authorizing the Civil Aeronautics Board to alter or revoke certificates if certain requirements were satisfied, *see id.* at 323, the Natural Gas Act contains no such provision, further demonstrating that Congress did not intend to grant the Commission general authority to revoke or attach additional mitigation measures to certificates issued under Section 7 of that Act.

possible,” the Court concluded that any “uncertainties over the Board’s power to alter effective certificates” should “be resolved in favor of the certificated carrier.”⁹³ Similarly here, given the massive up-front investments required to construct and operate new natural gas pipeline facilities (for which cost recovery occurs over many years, only beginning once the facilities have entered service), any uncertainties that might assertedly exist regarding the Commission’s authority to reopen a final, nonreviewable certificate proceeding should be resolved against the Commission.

This case also closely resembles *Chapman v. El Paso Natural Gas Co.*⁹⁴ There, the D.C. Circuit held that the Secretary of the Interior could not add to the requirements for rights-of-way for a natural gas pipeline set forth in an earlier agency decision.⁹⁵ Here, as in *Chapman*, the Commission’s certificate “decision may not be repudiated for the sole purpose of applying some quirk or change in administrative policy, particularly where, as here, considerable funds have been expended in justifiable reliance upon the earlier” agency action.⁹⁶

In sum, the Commission’s apparent position here that it has general authority to reopen certificate determinations “at any time, however remote,” is “inconsistent with all rules of administrative and judicial procedure.”⁹⁷ “The general interest of repose gains dominance” where, as here, an administrative order has become “final” because it “is no longer subject to [a judicial] appeal” and “no administrative reconsideration [of the order]

⁹³ *Id.* at 325.

⁹⁴ 204 F.2d 46 (D.C. Cir. 1953).

⁹⁵ *Id.* at 48-49, 52-54.

⁹⁶ *Id.* at 53-54.

⁹⁷ *United States v. Kopf*, 379 F.2d 8, 13 (8th Cir. 1967) (rejecting government’s effort to alter final crop-yield determination).

is permitted by the regulatory statute.”⁹⁸ Because the “power[] of reconsideration” that the Commission appears to assert in the February 18 Order lacks “a solid foundation in the language” of the NGA—indeed, it lacks *any* such foundation—it must be rejected.⁹⁹ The Commission “is bound to respect the governance of [the] final administrative decision” in the certificate proceeding, especially considering the significant “investments [that have been] made in reliance” on the Certificate Order.¹⁰⁰

B. The request for rehearing of the Authorization Order does not justify the February 18 Order.

The February 18 Order suggests that the questions presented in that order might be relevant to the Commission’s consideration of the request for rehearing of the Commission’s September 24, 2020 Authorization Order. The request for rehearing of the Authorization Order, however, does not justify the February 18 Order for at least two alternative, independent reasons. First, the February 18 Order addresses issues that are irrelevant to the sole inquiry at the service-authorization stage—*i.e.*, whether “rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.”¹⁰¹ Second, the Authorization Order is now final and nonreviewable, so the Commission cannot vacate it or attach conditions to it.

1. The questions posed in the February 18 Order are irrelevant at the service-authorization stage.

Even assuming the Commission still has authority to grant rehearing with respect to the Authorization Order,¹⁰² the Commission would nonetheless have lacked the authority

⁹⁸ *Greater Boston Television*, 463 F.2d at 282, 291 (refusing to recall appellate mandate to allow agency to consider whether to reopen licensing proceeding in light of new evidence).

⁹⁹ *Delta Air Lines*, 367 U.S. at 334; *see also id.* at 333-34 (“[S]upervising agencies desiring to change existing certificates must follow the procedures ‘specifically authorized’ by Congress and cannot rely on their own notions of implied powers in the enabling act.” (quoting *Seatrains Lines*, 329 U.S. at 432-33)).

¹⁰⁰ *Greater Boston Television*, 463 F.2d at 289, 291.

¹⁰¹ Certificate Order, App. B at Env’tl. Condition 10.

¹⁰² *But see infra* Section V.B.2 (arguing that the Commission no longer has such authority).

to issue the February 18 Order. Under the Atlantic Bridge Certificate Order, the scope of the Commission’s inquiry at the service-authorization stage is limited to one narrow question: Are rehabilitation and restoration of the right-of-way and other areas affected by the Project proceeding satisfactorily?¹⁰³ Because the questions presented in the February 18 Order range far beyond that narrow inquiry, the Commission lacked any authority to issue that order.

“[T]he Commission—like any administrative agency—has no power to act ‘unless and until Congress confers power upon it.’”¹⁰⁴ “It is therefore incumbent upon FERC to demonstrate that some statute confers upon it the power it purported to exercise” in the February 18 Order.¹⁰⁵ The Commission cannot satisfy that burden.

Section 7(e) of the NGA only provides the Commission authority to issue a certificate or deny applications to construct facilities, and to attach reasonable terms and conditions to the certificate as the public convenience and necessity may require.¹⁰⁶ Therefore, the authority to commence construction and operate jurisdictional natural gas facilities is contained within the certificate order, including the conditions imposed upon such construction and operation under Section 7(e).

The NGA does not by its own terms require the recipient of a certificate of public convenience and necessity to seek further authorization from the Commission before placing the certificated facilities into service. Indeed, under Section 7(c)(1)(A), the only

¹⁰³ See Certificate Order, App. B at Env'tl. Condition 10.

¹⁰⁴ *PennEast Pipeline Co.*, 170 FERC ¶ 61,064, at P 23 (2020) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)), *reh'g denied*, 171 FERC ¶ 61,135 (2020); see also, e.g., *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (“As a federal agency, FERC is a ‘creature of statute,’ having ‘no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.” (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001))).

¹⁰⁵ *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 398 (D.C. Cir. 2004).

¹⁰⁶ 15 U.S.C. § 717f(e).

requirement to operate a natural gas facility subject to the Commission’s jurisdiction is that there be “in force with respect to [the] natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such ... operations.”¹⁰⁷

To the extent that a natural gas company may be required to obtain authorization from the Commission before placing certificated facilities into service, it must be because the Commission made the requirement to seek such authorization a condition of the certificate. It is well established that “the Commission may not use its § 7 conditioning power to do indirectly (1) things that it can do only by satisfying specific safeguards not contained in § 7(e),” or (2) “things that it cannot do at all.”¹⁰⁸ *A fortiori*, the Commission cannot exercise authority that is neither conferred by the text of the NGA nor reserved to the Commission in a valid condition of the certificate. Because the NGA does not directly address service authorizations, the certificate necessarily governs, and delimits, the scope of any inquiry required before a certificated facility is placed into service. Therefore, as the Commission has expressly recognized in the analogous context of notices to proceed with construction activities, the “purpose of requiring a written request for authorization” to place a certificated facility into service “is *not* to reexamine the underlying Commission order”; rather, it is to ensure that any requirements for placing the facility into service specified in the certificate have been satisfied.¹⁰⁹

¹⁰⁷ 15 U.S.C. § 717f(c)(1)(A).

¹⁰⁸ *Am. Gas Ass’n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990); accord *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 647 (D.C. Cir. 2010).

¹⁰⁹ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 Fed. Reg. 40,113, 40,114 (July 6, 2020) (emphasis added), *reh’g granted on other grounds*, Order No. 871-A, 86 Fed. Reg. 7643 (Feb. 1, 2021); see also, e.g., *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287, at P 18 (2017) (“The purpose of the Director of OEP’s review of a request for notice to proceed is not to reexamine the Commission’s conclusions [in the certificate order]; rather it is to ensure that the Commission’s conditions have been met before authorizing construction activities.”); *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 37 (“At issue in a notice to proceed with construction is the applicant’s compliance with the Certificate Order Challenges regarding the Commission’s compliance with [statutory

Here, the relevant condition of the Atlantic Bridge certificate is Environmental Condition No. 10, which provides: “The Applicants must receive written authorization from the Director of OEP 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.”

Under the plain language of Environmental Condition No. 10, there is only one prerequisite for obtaining an in-service authorization: “[R]ehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.” Any other issues are irrelevant.

The inquiry’s limited scope is confirmed by the Authorization Order. That order found that Algonquin was “in compliance with Environmental Condition 10” because it had “adequately stabilized areas disturbed by construction” and “restoration [was] proceeding satisfactorily.”¹¹⁰ The order did not suggest that any other inquiry might even potentially be relevant to the question of whether to grant the in-service request.

Further confirming that an in-service authorization involves a narrow inquiry that is ministerial in nature, the certificate delegates the authority to grant an in-service authorization to the Commission’s Director of OEP.¹¹¹ If the Commission had intended for the certificate to reserve broader authority to deny in-service requests based on more

requirements] are outside the scope of this rehearing and are belated challenges to the Certificate Order.”), *pet. for review dismissed sub nom.*, 949 F.3d 8 (D.C. Cir. 2020).

¹¹⁰ Letter from Rich McGuire, FERC, to Chris Harvey, Algonquin (Sept. 24, 2020).

¹¹¹ Certificate Order, App. B at Env’tl. Condition 10.

general policy concerns, then surely the certificate would have called for a vote of the Commissioners on in-service requests.¹¹²

The questions posed in the February 18 Order are irrelevant to the in-service criterion set out in the certificate. None of those questions even address whether rehabilitation and restoration activities are proceeding satisfactorily. Instead, they raise issues regarding “public safety,” “air emissions,” and “environmental justice communities.” As explained above,¹¹³ those issues were addressed and resolved in the context of the Certificate Order proceedings and other subsequent proceedings, and the Certificate Order has been final and nonreviewable for years. The issues have no bearing on the narrow service-authorization inquiry into rehabilitation and restoration activities that is specified in the certificate. Therefore, the request for rehearing of the Authorization Order provides no justification for the February 18 Order.¹¹⁴

2. The Commission cannot vacate or attach conditions to the Authorization Order because it is final and nonreviewable.

The request for rehearing of the Authorization Order does not justify the February 18 Order for a separate, independent reason: The Authorization Order is now final and nonreviewable, so the Commission can neither vacate it nor attach conditions to it.

¹¹² See *Algonquin Gas Transmission*, 161 FERC ¶ 61,287 at P 18 (noting “the Commission’s longstanding practice of having the Director of OEP (or his designees), not the Commission itself, verify that certificate conditions have been met before issuing notices to proceed with construction or granting other authorizations related to the construction and operation of a Commission-certificated natural gas project,” and explaining that the Commission Staff exercising this authority cannot “reexamine the Commission’s conclusions” in the certificate order); See also *infra* Section V.C.

¹¹³ See *supra* Section V.A.

¹¹⁴ This conclusion is bolstered by the Commission’s decision to assign the February 18 Order a new subdocket number, thus “distinguish[ing] it from the rehearing proceeding.” February 18 Order at P 17 (Danly, Comm’r, dissenting).

Although a timely request for rehearing of the Authorization Order was filed on October 23, 2020, that request was denied by operation of law on Monday, November 23, 2020, because the Commission did not act on the rehearing request—*i.e.*, it did not “grant or deny rehearing or ... abrogate or modify” the Authorization Order—within 30 days after the rehearing request was filed.¹¹⁵ The Commission acknowledged the deemed denial by operation of law under 15 U.S.C. § 717r(a) and 18 C.F.R. § 385.713 in a notice issued on November 23, 2020.¹¹⁶

No party filed a petition for judicial review of the Authorization Order within 60 days of November 23, as required by 15 U.S.C. § 717r(b). Although the Commission’s November 23 deemed-denial notice indicated that the Commission would address the Authorization Order rehearing request “in a future order” in accordance with 15 U.S.C. § 717r(a),¹¹⁷ the Commission failed to issue such an order before “the time for filing a petition for judicial review ha[d] expired.”¹¹⁸ Accordingly, under a straightforward application of *Hirschey* and *International Paper*,¹¹⁹ the Commission now has “no authority” to issue an order vacating or attaching mitigation measures to the Authorization

¹¹⁵ 15 U.S.C. § 717r(a); *see also* *Allegheny Def. Project v. FERC*, 964 F.3d 1, 4-5, 13 (D.C. Cir. 2020) (explaining that § 717r(a) specifies “four ways in which the Commission can act upon [an] application for rehearing,” and that “[i]f the Commission fails to take any of those actions ‘within thirty days after it is filed,’ the ‘application may be deemed to have been denied’” (quoting 15 U.S.C. § 717r(a))). The Commission’s regulations unambiguously provide that “[u]nless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request *is denied*.” 18 C.F.R. § 385.713(f) (emphasis added); *see also* *Texas-Ohio Gas Co. v. Fed. Power Comm’n*, 207 F.2d 615, 617 (D.C. Cir. 1953) (noting Commission might adopt “a published regulation of general applicability ... stating that on the thirtieth day after the filing of an application for rehearing the application shall be deemed denied, with the same force and effect as if a formal order had been entered”). Although 30 days after the October 23, 2020 filing of the rehearing request was Sunday, November 22, 2020, 18 C.F.R. § 385.2007(a)(2) extended the deemed-denial date to Monday, November 23, 2020, the next business day.

¹¹⁶ *See* *Algonquin Gas Transmission, LLC*, 173 FERC ¶ 62,097 (2020).

¹¹⁷ *Id.*

¹¹⁸ *Hirschey*, 701 F.2d at 218 (emphasis omitted) (quoting *Pan Am.*, 322 F.2d at 1004).

¹¹⁹ *See supra* Section V.A.2 (discussing *Hirschey* and *International Paper*).

Order.¹²⁰ The request for rehearing of the Authorization Order thus cannot justify the February 18 Order because the Commission no longer has the authority to grant that rehearing request.

C. **The February 18 Order is arbitrary and capricious because it reconsiders the final and nonreviewable Certificate Order to consider imposing additional conditions on, or vacating, the authorization to commence service of any portion of the Atlantic Bridge Project.**

The February 18 Order is arbitrary and capricious because it effectively reopens the final and nonreviewable Certificate Order to consider imposing additional conditions on, or vacating, the Authorization Order. The Commission has consistently rejected challenges to certificate orders raised in subsequent compliance proceedings.¹²¹ The Commission has not deviated from that position even where challenging parties have claimed changed circumstances.¹²²

Notwithstanding such policy, the Commission, in the February 18 Order, considers challenges to the Certificate Order in response to a request for rehearing of the Authorization Order and other pleadings unrelated to any compliance filing. The four questions posed by the Commission address whether and how the Commission should revisit findings regarding emissions, safety, environmental justice and placing the Weymouth Compression Station into service, which were all addressed in the Certificate Order and/or the EA for the Project. By not rejecting these collateral attacks and, instead, seeking briefing on whether and how it should reconsider the Certificate Order, the

¹²⁰ *Hirschey*, 701 F.2d at 218 (addressing 16 U.S.C. § 825l(a), which is materially indistinguishable from 15 U.S.C. § 717r(a)); *accord International Paper*, 737 F.2d at 1162-66.

¹²¹ *See, e.g., Algonquin Gas Transmission, LLC*, 171 FERC ¶ 61,148, at P 12 (2020) (finding that challenges of the certificate order finding of need in a compliance proceeding are impermissible); *Transcontinental Gas Pipeline Co., LLC*, 162 FERC ¶ 61,192, at P 20 (2018) (finding that attacks on the adequacy of the environmental review in the EIS in a compliance proceeding are an impermissible collateral attack of the Certificate Order); *see also supra* note 109.

¹²² *See Algonquin Gas Transmission, LLC*, 171 FERC ¶ 61,148 at PP 25-26.

Commission’s February 18 Order departs from longstanding precedent without any explanation.¹²³

The Commission also departs from its longstanding precedent that the only issue in post-certificate compliance proceedings, such as an authorization to commence service, is whether the applicant has complied with the certificate order requirement for such request.¹²⁴ Under the plain language of Environmental Condition No. 10 of the Certificate Order, there is only one condition for obtaining an in-service authorization: “[R]ehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.”¹²⁵ The Authorization Order properly found that Algonquin was “in compliance with Environmental Condition 10” because it had “adequately stabilized areas disturbed by construction” and “restoration [was] proceeding satisfactorily.”¹²⁶ The identical or nearly identical condition has been included in certificates authorizing construction of facilities for at least the past three decades and no instance exists [of which Algonquin is aware] where the Director of OEP has applied any standard other than whether restoration and rehabilitation were proceeding satisfactorily. Similarly, Algonquin is unaware of any instance where the Commission attempted to revoke the delegation of authority to the Director of OEP to make this determination.

¹²³ See *id.* at P 13 (stating that issues resolved in the Certificate Order and upheld on appeal “cannot be relitigated”).

¹²⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 37 (finding that the only issues in a notice to proceed with construction request are whether the applicant complied with the certificate order and holding that challenges related to the Commission’s compliance with NEPA, NGA, and NHPA are within the scope of the certificate order itself).

¹²⁵ Certificate Order, App. B at Env’tl. Condition No. 10.

¹²⁶ Authorization Order at 1.

It also would be arbitrary and capricious for the Commission to now claim it had, contrary to well-established precedent,¹²⁷ intended to allow the Director of OEP to consider additional factors. The Commission has often described the Director's role in approving compliance filings as involving ministerial actions.¹²⁸

Environmental Condition No. 2 of the Certificate Order also does not provide authority to revisit the findings in the Certificate Order regarding the environmental resources addressed in the February 18 Order. The text of Environmental Condition No. 2 must be interpreted in light of longstanding Commission precedent limiting the scope of the same language. For example, in prior challenges to the language of Environmental Condition No. 2, the Commission gave the language a narrow reading, as only intended to ensure compliance with the requirements of the Certificate Order and NEPA and “not to reevaluate environmental effects whose nature and magnitude were accurately foreseen and considered in the Certificate Order.”¹²⁹ Environmental Condition No. 2 is not intended to give the Director of OEP authority to take unrelated actions throughout the life of the project.¹³⁰ Indeed, the Commission could not plausibly claim that it intended to allow the Director of OEP to revisit the findings of the Certificate Order. As such, Environmental Condition No. 2 does not authorize the Commission to reopen final certificates, re-open

¹²⁷ See, e.g., *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at P 18 (“The purpose of the Director of OEP’s review of a request for notice to proceed is not to reexamine the Commission’s conclusion; rather it is to ensure that the Commission’s conditions have been met before authorizing construction activities. This has been the Commission’s longstanding practice of having the Director of OEP (or his designees), not the Commission itself, verify that certificate conditions have been met before issuing notices to proceed with construction or granting other authorizations related to the construction and operation of a Commission-certificated natural gas project.”).

¹²⁸ See *supra* Section V.G.

¹²⁹ See *Texas Eastern Transmission Corp*, 73 FERC ¶ 61,012 (1995) (stating that “Condition 2 is intended to give the Director authority to enforce the terms and condition of the certificate order [and to] ensure that Texas Eastern’s [sic] complies with the environmental conditions and, if necessary, to modify these conditions to ensure [NEPA] compliance”).

¹³⁰ See *id.*

the fundamental NGA balancing inquiry, or impose new conditions that are inconsistent with the Certificate Order or the underlying NEPA analysis as proposed in the February 18 Order.

D. The February 18 Order is arbitrary and capricious because it departs from the Commission's long-standing precedent of supporting, defending, and enforcing certificate orders.

The Commission's issuance of the February 18 Order abruptly and without acknowledgement or explanation departs from 80 years of precedent respecting and enforcing the finality of its orders.¹³¹ The February 18 Order also allows for the first time, as part of a ministerial action and related compliance filing, the re-litigation of issues previously addressed in a certificate order.¹³² Courts are reasonably skeptical of such efforts by agencies to "exert novel and extensive power" under "long-extant statutes."¹³³

The Chief Administrative Law Judge explained nearly forty years ago in *Trunkline LNG Co.*¹³⁴ that:

[n]either this Commission nor the Economic Regulatory Administration 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.¹³⁵

¹³¹ See *Trunkline LNG Co.*, 22 FERC ¶ 63,028, at 65,137 (1983); February 18 Order at P 26 n.40 (Danly, Comm'r, dissenting) (To my knowledge, the Commission has never reopened a record of a final order that was affirmed on appeal.); see also *infra* Section V.F (regarding the February 18 Order's impairment of administrative finality and regulatory certainty).

¹³² See *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 (notice rejecting request for rehearing of notice to proceed because request constitutes an impermissible collateral attack on the Certificate Order); see also *Arlington Storage Co.*, 149 FERC ¶ 61,158 (same).

¹³³ *Chamber of Commerce of United States of Am. v. U.S. Dep't of Labor*, 885 F.3d 360, 387 (5th Cir. 2018); see also *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (rejecting agency's "claim[ed] . . . discover[y] in a long-extant statute [of] an unheralded power" that "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization").

¹³⁴ 22 FERC ¶ 63,028 (1983).

¹³⁵ *Id.* at 65,137.

That is because, he explained, “neither Section 3 nor Section 7 of the [NGA] have any provision authorizing revocation, suspension, or adverse modification of a Section 7 certificate or Section 3 authorization in the absence of a breach or violation of the terms of the certificate” and “Section 16 [of the NGA] cannot be used to grant such authority.”¹³⁶ The Commission’s practice and understanding has continued untouched until the February 18 Order. Commissioner Danly aptly observed in his dissent to the February 18 Order that “[t]o [his] knowledge, the Commission has never reopened a record of a final order that was affirmed on appeal.”¹³⁷ However, the February 18 Order unlawfully reopened the record in this proceeding and in so doing departed from decades of precedent supporting the finality of the Commission’s orders.

The Commission’s departure from its decades-old precedent is particularly inappropriate here, where Algonquin and its shippers—and the industry as a whole—relied on the Commission’s consistent practice when entering into commercial relationships and making massive capital investments to develop, construct, and place into service the infrastructure assets at issue here.¹³⁸ The February 18 Order whipsaws Algonquin and other interested parties, ignoring the massive reliance interests and abandoning key principles of finality established through decades of Commission practice.¹³⁹ The

¹³⁶ *Id.*

¹³⁷ February 18 Order at P 26 n.40 (Danly, Comm’r, dissenting).

¹³⁸ *See, e.g.*, Gary Kruse, ARBOIQ, *FERC Inquiry Puts at Least \$27 Billion in Pipeline Projects at Risk* (Mar. 11, 2021), available at <https://www.goarbo.com/blog/ferc-inquiry-puts-at-least-27-billion-in-pipeline-projects-at-risk> (identifying projects approved after the Certificate Order involving \$27 billion in investment affected by re-opening authority Commission is asserting here, and concluding that “‘all’ of the industry may very well be imperiled by this order”); *More Green Blackouts Ahead*, WALL STREET JOURNAL (Feb. 23, 2021) (quoting Commissioner Danly’s statements that Weymouth inquiry is “unlawful,” “impairs regulatory certainty[,] and arrogates to the Commission authority it does not have”).

¹³⁹ *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (“[A]n agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.”); *accord Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913-15 (2020).

February 18 Order is arbitrary and capricious because it does not provide a reasoned explanation for the Commission's abrupt departure from such long-standing practice.¹⁴⁰

E. The February 18 Order is arbitrary and capricious because it unlawfully arrogates authority to the Commission in a manner contrary to Congress's delegation of regulatory authority.

The February 18 Order raises concerns surrounding “projected air emissions impacts” and “public safety impacts”; however, Congress conferred regulatory authority on these matters to the EPA (with delegation here to Massachusetts DEP) and to PHMSA, respectively.¹⁴¹ Should any issues related to air emissions or public safety arise after a project is certificated, the EPA, through its delegated state agency, and PHMSA will investigate and determine the appropriate corrective action. Reopening the Commission's record to examine such impacts would improperly encroach upon and duplicate the review conducted by these agencies, improperly arrogating to the Commission statutory authority that Congress has not provided.

Here, the Commission arbitrarily and capriciously seeks additional briefing on issues that have already been addressed exhaustively by itself, those agencies and the courts. Prior to Commission Staff's authorization to commence construction of the Weymouth Compressor Station, the Massachusetts DEP and PHMSA conducted thorough reviews of the air and safety impacts related to the compressor station as required by each agency's well-established regulatory programs. Congress, through the Clean Air Act, created an all-encompassing regulatory program related to interstate air emissions, which

¹⁴⁰ See *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015) (“[T]he [Administrative Procedure Act] requires an agency to provide more substantial justification . . . when [it deviates from a] prior policy [that] has engendered serious reliance interests It would be arbitrary and capricious to ignore such matters.” (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009))).

¹⁴¹ *Wyoming v. U.S. Dep't of Interior*, No. 2:16-CV-0285-SWS, 2020 WL 7641067, at *9 (Oct. 8, 2020) (providing that the “protection of air quality. . . is expressly within the ‘substantive field’ of the EPA”); 49 U.S.C. § 60102(a)(2) (2018) (providing that pipeline safety enforcement is within the authority of the DOT).

is supervised by the EPA and delegated to the Massachusetts DEP for the Project.¹⁴² As discussed above,¹⁴³ the Massachusetts DEP, as the expert state agency charged with enforcing and administering the Clean Air Act, issued the Air Permit for the Weymouth Compressor Station, which was affirmed on appeal at the First Circuit as to all air issues except for the question of whether the proposed natural gas fired turbine was the BACT to limit nitrogen oxide emissions from the Weymouth Compressor Station.¹⁴⁴ Following additional proceedings, including a multi-day evidentiary adjudicatory hearing with live witness testimony and exhaustive briefing, the Presiding Officer of the Massachusetts DEP issued a Recommended Final Decision After Remand finding that an electric motor driven turbine is not BACT and recommending that the Air Permit be affirmed on remand. On January 19, 2021, the Massachusetts DEP's Commissioner issued a Final Decision After Remand affirming the Air Permit for the Weymouth Compressor Station.

Similarly, as the Commission acknowledges, 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 the Commission “may appropriately rely on PHMSA’s expertise.”¹⁴⁵ PHMSA, pursuant to the authority granted by Congress in the Hazardous Liquid Pipeline Safety Act,¹⁴⁶ recently reviewed the two shutdowns that occurred during commissioning of the Weymouth Compressor Station and issued a

¹⁴² See *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 419 (2011).

¹⁴³ See *supra* Section III.

¹⁴⁴ *Town of Weymouth v. Mass Dep’t of Env’tl Prot.*, 961 F.3d 34, 54-55 (1st Cir. 2020), *amended*, 973 F.3d 143 (1st Cir. 2020).

¹⁴⁵ *Algonquin Gas Transmission, LLC, et al.*, 161 FERC ¶ 61,255, at P 27 (2017) (citing *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 203 (2016) (“the Commission is entitled to rely on an agency’s expertise”)); see also *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004) (holding that the FCC did not improperly delegate its duties under NEPA by crediting outside expert standard-setting organizations and other government agencies with a specific expertise).

¹⁴⁶ 49 U.S.C. § 60112.

Corrective Action Order. The Corrective Action Order, as amended, directed Algonquin not to operate the compressor station until it was authorized to do so and to develop a Restart Plan.¹⁴⁷ Based on the Restart Plan, as well as an investigation conducted by an independent contractor, PHMSA authorized Algonquin to resume operating the Weymouth Compressor Station at 80% of full operating pressure,¹⁴⁸ and subsequently approved operation at full operating pressure.¹⁴⁹

The Commission's reopening of the record to investigate air emissions or public safety concerns related to the Weymouth Compressor Station is duplicative and statutorily improper. The Commission has already considered emissions and public safety in the EA, the Certificate Order and the 2017 Rehearing Order. The Massachusetts DEP and PHMSA under authority granted by Congress have taken the appropriate actions to establish the air emissions and public safety requirements, respectively, applicable to the Weymouth Compressor Station and have determined, in their expert judgment, that Algonquin may operate the Weymouth Compressor Station subject to and in compliance with those requirements. The reliance on PHMSA to enforce the safe operation of the Weymouth Compressor Station was upheld by the D.C. Circuit,¹⁵⁰ and the findings of the Massachusetts DEP in granting the Air Permit are subject to review in the First Circuit. By improperly expanding the Commission's jurisdiction into areas conferred on other

¹⁴⁷ PHMSA, *Corrective Action Order* (Oct. 1, 2020), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-10/12020014CAO_Corrective%20Action%20Order_10012020-Algonquin%20Gas%20Transmission.pdf.

¹⁴⁸ PHMSA, *Letter Approving Restart Plan* (Nov. 25, 2020), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2020-11/12020014CAO_PHMSA%20Approval%20of%20Weymouth%20Restart%20Plan_11252020.pdf.

¹⁴⁹ PHMSA, *Letter Approving Enbridge Allowing Temporary Removal of Pressure Restriction at Weymouth Compressor Station* at 1 (Jan. 22, 2021), https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/2021-01/12020014CAO_Region%20Response%20to%20Corrective%20Action%20Item%205_01222021.pdf.

¹⁵⁰ See *Town of Weymouth*, 2018 WL 6921213, at *1.

regulatory agencies, the February 18 Order invites other administrative agencies to follow suit, seeking to usurp the Commission’s regulatory review of issues squarely within its jurisdiction, such as the evaluation of project need. Accordingly, the Commission’s arrogation of authority to review concerns related to air emissions and public safety is arbitrary and capricious.

F. The February 18 Order is arbitrary and capricious because it frustrates the purpose of the NGA and the Commission’s mission, and it impairs administrative finality and regulatory certainty.

In enacting the NGA, Congress made a specific finding that access to natural gas is in the public interest.¹⁵¹ In that statute, Congress determined that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest,”¹⁵² and the Supreme Court long ago confirmed that the purpose of the NGA is to “encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”¹⁵³ Therefore, the ultimate purpose of the NGA is to ensure that the public has access to natural gas. In fact, even the Commission’s mission statement is to “assist consumers in obtaining reliable, efficient and sustainable energy services at reasonable cost through appropriate regulatory and market means.”¹⁵⁴

The February 18 Order frustrates the purpose of the NGA and contradicts the Commission’s mission statement. The February 18 Order unlawfully reopens a proceeding

¹⁵¹ See 15 U.S.C. § 717f. In addition, Section 1 of the NGA provides the reason for the enactment of the NGA. NGA section 1(a) states, “[a]s disclosed in reports of the Federal Trade Commission [(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is *affected with a public interest*, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*.” 15 U.S.C. § 717(a) (emphasis added).

¹⁵² 15 U.S.C. § 717(a).

¹⁵³ *NAACP*, 425 U.S. at 670.

¹⁵⁴ FED. ENERGY REGULATORY COMM’N, *Strategic Plan: FY 2018-2022* at viii, (Sept. 2018), <https://www.ferc.gov/sites/default/files/2020-04/FY-2018-FY-2022-strat-plan.pdf>.

years after a final certificate had been issued and, in so doing, injects uncertainty and unpredictability in the Commission’s regulation of interstate natural gas pipelines and other infrastructure. The uncertainty created by the February 18 Order is most conspicuous where the Commission requests briefing on the consequences of reversing the Authorization Order.¹⁵⁵ That uncertainty and unpredictability *discourages* the orderly development of supplies of natural gas in direct contradiction to the purpose of the NGA. Moreover, it hinders consumers attempting to obtain reliable, efficient and sustainable energy services in direct contradiction to the Commission’s mission statement.

The February 18 Order also impairs administrative finality. Courts and this Commission have previously provided that parties should be able to rely on the finality of the Commission’s orders.¹⁵⁶ In *Williams Natural Gas Company*¹⁵⁷ the Commission denied a landowner’s motion to intervene in which the landowner sought “to have the Commission revoke a substantial portion of the [certificate authorization].”¹⁵⁸ In that proceeding, the landowner—an oil and gas company which owned land that the Williams Natural Gas Company (“Williams”) sought to acquire by eminent domain—filed an untimely motion to intervene nearly a year after the Commission certificated Williams’ project.¹⁵⁹ The

¹⁵⁵ February 18 Order at P 2.

¹⁵⁶ See *Hirschey*, 701 F.2d at 219-20 (“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”). Investors in natural gas pipeline projects should have the same confidence in the finality of the Commission’s orders and rules. See also *Pac. Gas Transmission Co.*, 46 FERC ¶ 61,072 (1989) (grant of intervention out of time would disrupt the proceedings and prejudice those who rely on the finality of orders); *Portland Gen. Elec. Co., LLC*, 151 FERC ¶ 61,223, at P 42 (2015) (“Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.”) (emphasis added).

¹⁵⁷ 54 FERC ¶ 61,190 (1991).

¹⁵⁸ *Id.* at 61,570.

¹⁵⁹ *Id.*

Commission held that the motion should be denied because “Williams should be able to rely on the finality of the [Commission] order.”¹⁶⁰

Here, the Commission has unlawfully reopened the record over four years after the Commission issued Algonquin the Certificate Order authorizing the construction and operation of the Weymouth Compressor Station.¹⁶¹ If a pipeline company should be able to rely on the finality of its certificate issued less than a year before a party sought to intervene and partially revoke that order, certainly Algonquin must be able to rely on the finality of its Certificate Order issued over four years ago. Reliance interests are by no means limited to Algonquin or even pipeline developers more generally. Natural gas consumers, manufacturers, generators, and commercial businesses make long-term capital investments to secure reasonably priced supplies of natural gas based on the finality of the Commission’s administrative process. Those capital investments (e.g., construction of power generation facilities to be supplied by a natural gas pipeline, or expansion of natural gas service to additional customers for heating or cooking) can be substantial in their own right, running to hundreds of millions or even billions of dollars. The February 18 Order questions the finality of the Commission’s administrative process and thereby threatens the viability of a reasonably priced supply of natural gas for the millions of residential consumers, schools, hospitals, manufacturers, electric generators and commercial businesses that currently rely on natural gas. The February 18 Order is, therefore, arbitrary and capricious because it frustrates the purpose of the NGA and the Commission’s mission, and it impairs administrative finality and regulatory certainty.¹⁶² To avoid imminent and

¹⁶⁰ *Id.* at 61,572.

¹⁶¹ *See supra* note 9.

¹⁶² *See Sea Robin Pipeline Co.*, 92 FERC ¶61,217, at 61,710 (2000) (“The Commission’s general policy is to refrain from granting a stay of its orders, in order to assure definiteness and finality in Commission

irreparable harm to regulated industry, shippers, and end-users of gas, the Commission should vacate the February 18 Order, and confirm that it will adhere to statutory limitations on its authority and its own longstanding precedent, respecting the finality of Commission orders.

G. The February 18 Order is arbitrary and capricious because it departs without reasoned explanation from Commission precedent that the Commission does not entertain requests for rehearing of ministerial actions.

The Commission does not permit requests for rehearing of ministerial actions because the purpose of such orders is to ensure that the Commission's conditions have been met, not to reexamine the Commission's conclusions underlying the certificate order.¹⁶³ By contrast, the "proper recourse" for a party wishing to reexamine the Commission's substantive conclusions is to file a timely request for rehearing.¹⁶⁴ The time to seek such rehearing of Algonquin's Certificate Order has long passed and the Commission's acquiescence to rehearing of the Authorization Order, a ministerial action, is arbitrary and capricious.

The Commission has explained that the issuance of a notice to proceed is ministerial because notices to proceed deal only with verifying that the applicant is compliant with an environmental condition in the underlying certificate order.¹⁶⁵ The Commission has also provided that delegated orders issued by the Director of OEP regarding a certificate holder's compliance with conditions stemming from an opinion issued by the National

proceedings"); *see also* *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 16 ("accepting [additional] evidence at the rehearing stage disrupts the administrative process by inhibiting the Commission's ability to resolve issues with finality").

¹⁶³ *See* *Algonquin Gas Transmission, LLC*, 161 FERC ¶ 61,287 at P 18; *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 22.

¹⁶⁴ *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 2 & n.40.

¹⁶⁵ *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 at P 37.

Marine Fisheries Service would be a ministerial action.¹⁶⁶ Here, as explained above,¹⁶⁷ the Authorization Order concerned only one inquiry: whether Algonquin had complied with Environmental Condition No. 10 of the Certificate Order.¹⁶⁸ Therefore, the Authorization Order is a ministerial action not subject to rehearing on grounds unrelated to that inquiry.

By considering the joint rehearing request and the comments filed well after the issuance of the Authorization Order, and by permitting briefing on four questions unrelated to Environmental Condition No. 10, the Commission erroneously reopened the proceeding following a ministerial action. In so doing, the Commission arbitrarily and capriciously departed from well-established precedent without any reasoned explanation.

H. The February 18 Order is arbitrary and capricious because it relies on pleadings submitted after the 30-day statutory rehearing deadline in violation of Section 19(a) of the NGA, fails to provide a reasoned explanation for its departure from long-standing precedent prohibiting supplements to rehearing requests, and considers novel arguments after the issuance of the Authorization Order.

Section 19(a) of the NGA provides that any person aggrieved by an order issued by the Commission “may apply for rehearing within thirty days after the issuance of such order.”¹⁶⁹ The Commission has consistently held that it lacks authority to waive or extend that statutory 30-day deadline.¹⁷⁰ The Commission has also routinely held that it “do[es] not permit supplements or amendments to requests for rehearing filed . . . more than 30

¹⁶⁶ *Aguirre Offshore GasPort, LLC*, 155 FERC ¶ 61,139, at P 45 (2016) (citing *Bradwood Landing LLC*, 126 FERC ¶ 61,035, at P 36 (2009)).

¹⁶⁷ See *supra* Section V.C.

¹⁶⁸ See Authorization Order at 1.

¹⁶⁹ 15 U.S.C. § 717r(a).

¹⁷⁰ See *Boston Gas Co. v. FERC*, 575 F.2d 975, 978 (1st Cir. 1978) (rejecting argument that the Commission has discretion to waive the 30-day deadline); see also *Cameron LNG, LLC*, 148 FERC ¶ 61,237, at P 19 (2014) (denying request for rehearing because “[i]t is clear that the Commission cannot waive the 30-day statutory deadline for filing requests for rehearing”); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 13 (denying request for rehearing because “[t]he Commission cannot waive the 30-day statutory deadline for filing requests for rehearing”).

days after the date of the order at issue.”¹⁷¹ Moreover, new evidence may not be introduced for the first time on rehearing, since such practice would “frustrate needed administrative finality.”¹⁷²

Although the Commission captioned the February 18 Order an “Order Establishing Briefing,”¹⁷³ the Commission stated that it issued the order in response to (i) the joint rehearing request filed on October 23, 2020, and (ii) “numerous other pleadings expressing safety concerns regarding the operation of the project” filed since the issuance of the Authorization Order.¹⁷⁴ Except for the joint rehearing request filed on October 23, 2020, which was deemed denied by operation of law,¹⁷⁵ the remaining correspondence, pleadings, and comments were all filed on the docket after the 30-day deadline for requests for rehearing. In fact, other than one correspondence,¹⁷⁶ the remainder were filed more than 60 days after the Commission issued the Authorization Order and after the request for rehearing was deemed denied. Therefore, even if the Commission could consider such filings in response to a ministerial action,¹⁷⁷ the Commission’s explicit reliance on “numerous other pleadings” filed “[s]ince the issuance of the Authorization Order” is an

¹⁷¹ *City of Banning, Cal.*, 148 FERC ¶ 61,199, at P 16 n.18 (2014); *see also Tennessee Gas Pipeline Co., LLC*, 163 FERC ¶ 61,190 at P 11 (“[P]arties are not permitted to supplement their rehearing requests after the thirty-day period imposed by NGA section 19(a) has expired”); *Pub. Util. Dist. No. 1 of Klickitat Cty, Wash.*, 155 FERC ¶ 61,056, at P 6 n.8 (2016) (observing that “the Commission does not allow parties to supplement their rehearing requests after the 30-day period has run”).

¹⁷² *Portland Gen. Elec. Co., LLC*, 151 FERC ¶ 61,223 at P 42 (“Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.”)

¹⁷³ *See* February 18 Order at P 18 (Danly, Comm’r, dissenting) (stating that the Commission has not issued an order captioned “Order Establishing Briefing” in the last 10 years).

¹⁷⁴ *Id.* at P 1.

¹⁷⁵ *Algonquin Gas Transmission, LLC, et al.*, 173 FERC ¶ 62,097 (2020).

¹⁷⁶ Letter of U.S. Senator Edward J. Markey, Docket No. CP16-9-000 (Nov. 19, 2020).

¹⁷⁷ *See supra* Section V.G.

impermissible waiver of the 30-day statutory deadline in violation of Section 19(a) of the NGA.¹⁷⁸

The Commission cannot avail itself of an argument that the “numerous other pleadings” were merely supplements because Commission precedent establishes that the Commission does not permit supplements filed after the 30-day statutory deadline.¹⁷⁹ If the Commission seeks safe harbor in such a technicality it would do so in divergence from its established precedent. The February 18 Order also seeks briefing on several matters raised in the pleadings referenced by the Commission, *i.e.*, the Commission is requesting that parties supplement their prior pleadings with positions on the topics fashioned by the Commission.¹⁸⁰ In so doing, the Commission also deviates here from its well-established precedent of prohibiting supplements to rehearing requests.¹⁸¹

Even assuming that (1) the Authorization Order was not final, (2) the issues for which the Commission requested briefing in the February 18 Order were germane to the Authorization Order, and (3) findings on those issues could form the basis for granting rehearing of a ministerial order, the Commission would nonetheless violate its long-standing precedent of not permitting novel arguments raised for the first time on rehearing if, as the February 18 Order contemplates, it were to consider issues that were not raised prior to its issuance of the Authorization Order.¹⁸² Accordingly, in addition to the other timing, finality, and germaneness defects discussed above, the February 18 Order is arbitrary and capricious because it violates Section 19(a) of the NGA by relying on

¹⁷⁸ See February 18 Order at P 1.

¹⁷⁹ See *supra* note 171.

¹⁸⁰ See February 18 Order at P 2.

¹⁸¹ See *supra* note 171.

¹⁸² See *Gulf South Pipeline Co., LLC*, 173 FERC ¶ 61,067, at P 8 (2020); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 250 (2016); *PaTu Wind Farm, LLC v. Portland Gen. Elec. Co., LLC*, 151 FERC ¶ 61,223, at P 42 (2015); *S. Shore Energy, LLC*, 168 FERC ¶ 61,118, at P 12 & n.39 (2019).

“numerous other pleadings” filed well after the issuance of the Authorization Order and the 30-day statutory deadline. The Commission mistakenly departs from such long-standing precedent without any reasoned explanation.

I. The errors in the February 18 Order cannot find safe harbor in Commission precedent on reopening the record and reconsideration.

Although Commission precedent allows for reopening the record or reconsideration of Commission orders in certain circumstances, that precedent does not support the February 18 Order. Commission precedent does not authorize reopening the record of a Commission order that is no longer subject to rehearing or appeal. Instead, Commission precedent authorizes reopening the record only (1) during the time between the closing of the evidentiary record and the issuance of a Commission order,¹⁸³ or (2) on rehearing.¹⁸⁴ As explained above,¹⁸⁵ the Commission cannot reopen the record of the certificate proceeding here because the Certificate Order is no longer subject to rehearing or appeal.

Furthermore, even if this proceeding was at an earlier stage where reopening is supported by precedent, reopening the record requires a showing of “extraordinary circumstances”—*i.e.*, a change in circumstances that is not “just material,” but that also “goes to the very heart of the case.”¹⁸⁶ That demanding standard reflects “the need for finality in the administrative process.”¹⁸⁷ Accordingly, it cannot be satisfied by the purported general concerns regarding “public safety,” “air emissions,” and “environmental

¹⁸³ See *Cal. Indep. Sys. Operator Corp.*, 121 FERC ¶ 61,193, at PP 11-12, 14-15 (2007), *clarification on other grounds granted*, 122 FERC ¶ 61,004 (2008); *Gulf States Utils. Co. v. S. Co. Servs., Inc.*, 43 FERC ¶ 61,003, at 61,024 (1988), *reh'g denied*, 43 FERC ¶ 61,394 (1988), *aff'd sub nom.*, *Gulf States Utils. Co. v. FERC*, 886 F.2d 442 (D.C. Cir. 1989).

¹⁸⁴ See *Millennium Pipeline Co., L.L.C.*, 142 FERC ¶ 61,077, at PP 8-9 (2013); *CMS Midland Inc.*, 56 FERC ¶ 61,177, at 61,623-25 (1991), *pet. for review denied sub nom.*, *Michigan Mun. Coop. Grp. v. FERC*, 990 F.2d 1377 (D.C. Cir. 1993).

¹⁸⁵ See *supra* Section V.A.2.

¹⁸⁶ *CMS Midland, Inc.*, 56 FERCat 61,624.

¹⁸⁷ *Id.*

justice” expressed in the February 18 Order because the Commission thoroughly evaluated those issues in issuing the Certificate Order.¹⁸⁸

Commission precedent regarding reconsideration of Commission orders also does not support the February 18 Order. “The purpose of reconsideration is to provide an aggrieved party with an opportunity to alert the Commission to a situation where it may not have fully grasped the facts presented on rehearing.”¹⁸⁹ Accordingly, a request for reconsideration must be filed promptly after the Commission issues an order denying rehearing. For example, in *Trans-Appalachian Pipeline, Inc.*,¹⁹⁰ the Commission denied a request for reconsideration of issues resolved in a rehearing order issued two-and-a-half years before the reconsideration request was filed.¹⁹¹ The Commission concluded that reconsideration “would be inappropriate in view of the length of time that has passed since the Commission addressed the[] issues on rehearing and the record in this proceeding was closed.”¹⁹² Reconsideration would be even more untimely here than it was in *Trans-Appalachian*: more than three years separated the February 18 Order and the Commission’s December 13, 2017 denial of rehearing in the certificate proceeding.

Because the Authorization Order is now final and nonreviewable, the Commission also cannot grant reconsideration of the November 23, 2020 deemed denial of the request for rehearing of the Authorization Order.¹⁹³ But even if the Commission could reconsider that deemed denial, the scope of the Commission’s review with respect to the Authorization

¹⁸⁸ See *supra* Section V.A.1.

¹⁸⁹ *Clifton Power Corp.*, 94 FERC ¶ 61,346, at 62,277 (2001).

¹⁹⁰ 54 FERC ¶ 61,197 (1991).

¹⁹¹ *Id.* at 61,591.

¹⁹² *Id.*

¹⁹³ See *Hirschey*, 701 F.2d at 218 (“[T]he Commission only has the ‘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 Am.*, 322 F.2d at 1004)); see also *supra* Section V.B.2.

Order would still be limited to the narrow question of whether rehabilitation and restoration activities are proceeding satisfactorily.¹⁹⁴ Because the issues raised in the February 18 Order—as well as in the “other pleadings” cited in that order—do not address rehabilitation and restoration activities, they provide no basis for reconsideration.

VI. **CONCLUSION**

For the foregoing reasons, Algonquin respectfully requests that the Commission grant rehearing of the February 18 Order and terminate the briefing process in Docket No. CP16-9-012.

Respectfully submitted,

/s/ P. Martin Teague

P. Martin Teague

Vice President US Gas Law

Texas Eastern Transmission, LP

P.O. Box 1642

Houston, Texas 77251-1642

Anita R. Wilson

Jeremy C. Marwell

Andrew N. Beach

Joshua S. Johnson

Vinson & Elkins L.L.P.

2200 Pennsylvania Avenue, NW

Suite 500 West

Washington, D.C. 20037

Attorneys for

Algonquin Gas Transmission, LLC

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¹⁹⁴ Certificate Order, App. B at Env'tl. Condition 10; *see also supra* Section V.B.1.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in these proceedings.

Dated at Washington, District of Columbia, this 19th day of March, 2021.

/s/ Abigail M. Meredith

Abigail M. Meredith