

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

**Constitution Pipeline LLC**

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**Docket CP13-499**

**HOLLERAN LANDOWNERS' PETITION TO RESCIND CERTIFICATE FOR  
CONSTITUTION PIPELINE AS NON-JURISDICTIONAL AND INCONSISTENT  
WITH PUBLIC CONVENIENCE AND OPPOSITION TO EXTENSION OF TIME**

The Federal Energy Regulatory Commission (Commission) must deny Constitution Pipeline LLC's (Constitution) second request to extend the deadline to complete construction of the Constitution Pipeline and place the project in service by December 2, 2020 -- four years after the initial deadline established in the certificate authorizing the project. *Constitution Pipeline Co. LLC et. al.*, 149 FERC ¶ 61,199 (2014)(Certificate Order), *aff'd on rehearing*, 154 FERC ¶61,046 (2016). Now that Constitution has exhausted its appeals of the New York State Department of Conservation's (NYSDEC) denial of a Section 401 water quality certificate for the pipeline, the project is no longer jurisdictional because it cannot be "constructed and operated" or "transport gas in interstate commerce" and therefore, the Commission must rescind the certificate. Rescission is also justified because as a result of the NYSDEC's denial of the Section 401 water quality certificate, the project no longer serves the public convenience. Finally, even if the Commission will not rescind the certificate, Constitution is not entitled to a second extension, having failed to demonstrate good cause to support its request.

This Petition for Rescission and Opposition are filed pursuant to Rule 385.207 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.207 by Catherine Holleran, Michael and Maryann Zeffer, Patricia Glover and Dustin Webster (collectively Landowners), intervenors who own a 23-acre tract of land in New Milford, Pennsylvania that lies directly in

the path of the Constitution Pipeline where Constitution felled approximately 558 trees two years ago<sup>1</sup> to make way for its pipeline that has not and cannot be built. As such, the Landowners are aggrieved by this proceeding and have standing to file this Petition and Opposition.<sup>2</sup>

### **BACKGROUND**

On December 2, 2014, the Commission issued a certificate of convenience and necessity to Constitution to construct and operate a 124-mile long, 30-inch diameter interstate pipeline and related facilities extending from two receipt points in Susquehanna County, Pennsylvania to a proposed interconnection in Schoharie County, New York. *See* Certificate, 149 FERC ¶ 61,199, at P 1. Roughly 80 percent of the pipeline or 98 miles would be located in New York. *Id.* As a condition of the Certificate, Constitution was required to put the project facilities in service within 24 months of the date of the Certificate, *i.e.* December 2, 2016. *See* Certificate, Ordering Para. E. 1.

The Certificate was not the only authorization required for the project. The pipeline would cross over 250 waterways, Certificate at P 77, necessitating water quality certificates under Section 401 of the Clean Water Act from both Pennsylvania and New York.<sup>3</sup> *See Constitution Pipeline*, 868 F.3d at 90; *see also* 15 U.S.C. §717b(d) (preserving applicability of Section 401 to projects under the Natural Gas Act). Constitution timely initiated the Section 401

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<sup>1</sup> An account of the tree-felling on the Landowners' property along with video footage may be found at online at <http://wesa.fm/post/conflicting-decisions-pipelines-frustrate-industry-and-landowners#stream/0>.

<sup>2</sup> Some of the Landowners are Intervenor in this proceeding; those who are not seek intervention now and satisfy the requirements of Rule 214.

<sup>3</sup> Constitution applied for and obtained a Section 401 water quality certificate from Pennsylvania for the 20-plus-mile segment of pipeline that runs through the state. 44 Pa. Bull. 6287 (Oct. 4, 2014).

process in both states, but New York had not acted on Constitution's application by the time FERC granted the certificate. Thus, the Certificate also contained a provision prohibiting Constitution from commencing project construction until it received all other required federal permits. *See* Certificate, App. at P 8. FERC described the conditioned certificate granted to Constitution as an "incipient authorization without current force or effect." *Constitution Pipeline LLC*, Order Denying Rehearing, 154 FERC ¶ 61,046, at P 62 (2016).

On April 22, 2016, the NYSDEC denied Constitution's application for a Section 401 water quality certificate. On July 22, 2016, Constitution asked the Director of the Office of Energy Projects (Director) to extend the in-service deadline in the Certificate by two years or until December 2, 2016. In support of its request, Constitution asserted that additional time was needed to pursue judicial review of the NYSDEC decision denying the Section 401 water quality certificate and still put the project in service. Just two business days later, the Director granted the request before any impacted parties could raise an objection, a ruling that the Commission affirmed on rehearing. *Constitution Pipeline*, Order Denying Rehearing 157 FERC ¶61,145 (2016).

Constitution has now exhausted all of its remedies that served as the *raison d'être* for its earlier extension request. In August 2017, the Second Circuit upheld the NYSDEC's Section 401 denial, and the Supreme Court declined Constitution's petition for certiorari review. *See Constitution Pipeline Co., LLC v. New York State Dep't of Envtl. Conservation*, 868 F.3d 87 (2d. Cir. 2017), *cert. denied* 2018 U.S. LEXIS 2726 (Apr. 30, 2018). Meanwhile, in October 2017, Constitution belatedly sought a waiver of the Section 401 requirement from the Commission which rejected Constitution's request. *Constitution Pipeline LLC*, CP18-5 (Declaratory Order

Denying Waiver), 162 FERC ¶61,014 (2018). Constitution petitioned for rehearing of the Commission decision, but the Commission rarely reverses itself on rehearing, particularly in cases involving pipeline certificates.

On June 25, 2018, Constitution filed a second request for an extension of the in-service date, this time until December 2, 2020. Constitution offered the same justification as it had the first time around: difficulties in obtaining permits. *See* Constitution Request for Extension, (June 25, 2018) at 2. Trouble is, Constitution’s past justification no longer works under the present facts because Constitution already received a final and definitive decision on its Section 401 certificate -- albeit not the result it had hoped for. At this point, Constitution has run out of options. Without the Section 401 permit, Constitution cannot build the project authorized by the Certificate.

## ARGUMENT

### **I. The Commission Must Rescind the Certificate Because The Project Is No Longer Jurisdictional.**

The Natural Gas Act and concomitantly, the Commission’s jurisdiction applies only to matters relating to the “transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use.” Section 1(b), Natural Gas Act, 15 U.S.C. §717(b). Section 7 of the Natural Gas Act authorizes the Commission to issue certificates which are required “for the construction or extension of any facilities...” for “transportation or sale of natural gas, subject to the jurisdiction of the Commission.” Section 7f(b), 15 U.S.C. §717f(b). But the Commission has no power under Section 7 to award certificates for facilities that are purely intrastate projects or function as gathering facilities and do not transport gas interstate.

*See e.g., EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989)(finding no certificate required for pipeline that serves production and gathering function), *Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1255 (D.C. Cir. 1999)(observing that intra-state pipelines are not subject to Commission jurisdiction). So strictly does the Commission guard its jurisdiction that it has frequently rescinded certificates of public convenience and necessity based on a jurisdictional finding that the facilities and services once authorized under certificates were actually exempt gathering or other non-jurisdictional facilities not subject to the Commission's NGA authority. *Amerada Hess Corporation et al.*, 52 FERC P61,268, at p. 62,027 and p. 62,030 (1990); *Gasdel Pipeline System, Inc.*, 86 FERC P61,251, at p. 61,908 (1999); *CNG Transmission Corp.*, 82 FERC P61,262, at p. 62,032 (1998); *Garden Banks Gas Pipeline, LLC*, 78 FERC P61,066, at p. 61,243 (1997)(vacating certificate orders, not pregranting abandonment authority, is appropriate Commission course if jurisdictional facilities found to be gathering) ; *Greeley Gas Company*, 75 FERC P61,015, at p. 61,053 (1996)(service area determination under NGA section 7(f) resulting in vacating 7(c) certificate) ; *Pacific Offshore Pipeline Company*, 64 FERC P61,167, at p. 62,510 (1993); and *Pelican Interstate Gas System*, 61 FERC P61,025, at p. 61,129 (1992).

Rescission is warranted for similar reasons here. The Commission's jurisdiction is limited to a grant of certificates for the "construction and operation" of an interstate gas facility. But this particular Certificate no longer authorizes construction and operation -- nor can it, because NYSDEC denied the Section 401 certificate without which the project cannot be built. *See* 33 U.S.C. §1341(a)(requiring an applicant for federal license to obtain water quality certificate prior to undertaking activity that will impact waterways). Accordingly, as in the cases

involving rescission of certificates for non-jurisdictional facilities, the Commission must find that the unbuildable Constitution project is no longer jurisdictional and rescind the certificate.

**II. Rescission is Justified Because the Project No Longer Serves the Public Convenience and Necessity Since The Certificate Violates The Natural Gas Act and the Clean Water Act.**

The completion deadlines in Commission certificate orders are set to ensure that the findings supporting the public convenience and necessity order do not go stale with the passage of time. *Arlington Storage Co., LLC*, 155 FERC ¶61,165 at P.8 (2016). Thus, in acting on a extension request, the Commission must consider whether the project will continue to serve the public convenience and necessity. The Commission found that the pipeline continued to serve the public interest in granting Constitution’s first extensions request back in 2016. *See Constitution Pipeline*, 157 FERC ¶61,145 at P. 13. But today, the pipeline is no longer consistent with the public necessity and convenience as discussed below.

**A. Natural Gas Act Violations**

In determining whether a project will satisfy the “public convenience and necessity” under Section 7 of the Natural Gas Act, the Commission must evaluate “whether the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission...” 15 U.S.C. §717f(e), *see also Oklahoma Nat Gas v Fed. Power Comm’n.*, 256 F.2d 634 (1958)(finding that ability to provide proposed service is component of public convenience and necessity).

When Constitution sought its first extension two years ago, it was at least possible that Constitution might “do the acts and perform the services” proposed by its pipeline application

since the Second Circuit might have overturned the NYSDEC Section 401 denial. But now, the Commission need not speculate about how Constitution's story ends. Constitution has exhausted all remedies and the NYSDEC Section 401 denial remains intact and prohibits Constitution from constructing the project and therefore, it cannot "do the acts and perform the services" as required for a finding of public convenience and necessity under Section 7 of the Natural Gas Act. Accordingly, the Commission must vacate the certificate as it no longer serves the public convenience and necessity.

**B. The Certificate Violates The Clean Water Act**

Section 717b(d) of the Natural Gas Act states that:

Nothing in this Act affects the rights of States under--

- (1) the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.);
- (2) the Clean Air Act (42 U.S.C. 7401 et seq.); or
- (3) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.).

In *Constitution Pipeline v. Seggos*, 868 F.3d 87, 100 (2nd. Cir. 2017), the Second Circuit ruled that the Clean Water Act, as preserved by the Natural Gas Act "entitled NYSDEC to conduct its own review of the Constitution Project's likely effects on New York waterbodies." Section 401 of the Clean Water Act further provides that "[n]o license or permit shall be granted if [Section 401] certification has been denied by the State." 33 U.S.C. §1341(a)(1). Section 401 has been characterized as "a statutory scheme whereby a single state agency effectively vetoes an energy pipeline that has secured approval from a host of other federal and state agencies." *Constitution Pipeline*, 868 F.3d at 101, citing *Islander East II*, 525 F.3d 141, 164 (2nd. Cir. 2008) accord *Keating v. FERC*, 927 F.2d 616, 622, 288 U.S. App. D.C. 344 (D.C. Cir. 1991) ("Through [the §401 certification] requirement, Congress intended that the

states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." (emphasis added)).

New York refused to certify that the pipeline can be built in compliance with applicable state water quality standards. By granting Constitution's extension request in the aftermath of the NYSDEC's Section 401 denial, the Commission would revive a project that Congress itself empowered the state to block and that the Clean Water Act itself prohibits. ("No license or permit shall be issued if a [401] certificate is denied.") Constitution's continuation of the project violates the Clean Water Act and is therefore incompatible with the public convenience and necessity (*See City of Pittsburgh v. Federal Power Commission* 237 F.2d 741, 754 (DC Cir 1956)(holding that "congressional expression of...national policy" has bearing upon whether a certificate is required by the public convenience and necessity)). The Commission must rescind the certificate and deny Constitution's extension request.

### **III. Constitution Did Not Demonstrate Good Cause for an Extension Or That An Extension Will Enable It To Complete the Project.**

#### **A. Constitution Did Not Satisfy the Factors Justifying an Extension.**

The Commission may grant an extension of a construction deadline upon a showing of good cause which may be demonstrated by showing that the project sponsor made good faith efforts to meet its deadline but encountered unforeseeable circumstances. *Constitution Pipeline*, 157 FERC ¶ 61,145, P. 10 (2016), *citing Arlington Storage Co, LLC*, 155 FERC ¶61,165 at \*2 (2016) (granting extension to allow company additional time to obtain permits). But good cause alone does not warrant a grant of an extension. The Commission also considers whether a company "can demonstrate credible prospects for the project's completion" within the extra time. On several occasions, the Commission denied extension requests when the project

sponsor could not demonstrate the viability of the project. *See Chestnut Ridge Storage LLC*, 139 FERC ¶61,139, P. 10, (2012); *Questar Pipeline Company*, 65 FERC P61,037 (1993) (denying extension and rescinding certificate because pipeline could not establish a target construction commencement date). Finally, the Commission will examine whether an extension will create continuing uncertainty for and harm to surrounding landowners. *Chestnut Ridge Storage LLC*, 139 FERC ¶61,139, P. 14.

Applying these factors, the Commission must deny Constitution's extension request. First, Constitution did not show good cause for a second extension of time. Constitution makes vague references to "laboring diligently" with NYSDEC to obtain a permit and pursuing judicial remedies, but without any specifics, it is impossible to determine whether these were the same activities that Constitution undertook under the first extension or whether they represent new efforts that would warrant a second extension. In any event, Constitution's "generalized statements...without further explanation, do[es] not constitute good cause..." *Algonquin Gas Transmission*, 162 FERC P63,023 at P. 3 (2018).

Second, Constitution failed to show that it can credibly complete the project approved by the certificate within the extra time frame...or ever, for that matter given the NYSDEC denial of the Section 401 certificate. Constitution has not presented a schedule for moving forward with the project or a plan for how it intends to build the project without a Section 401 permit. *Questar Pipeline Company*, 65 FERC P61,037 (rescinding certificate upon finding project non-viable due in part to company's failure to provide construction schedule).

Moreover, the Commission already provided Constitution more time to obtain permits. In granting Constitution's first extension request, the Commission determined that Constitution

deserved additional time to pursue its statutory right to appeal the New York permits. *Constitution Pipeline*, 157 FERC ¶61,145 at P. 12. But now, Constitution has exhausted its judicial remedies and has no further recourse for obtaining a Section 401 permit for the project approved in the Certificate.

Finally, a second extension of time will prevent the Landowners and other property owners along the pipeline from “pursuing activities that could be incompatible with the project’s construction or operation.” *See Chestnut Ridge Storage LLC*, 139 FERC ¶61149 at P. 10. Granting Constitution a second extension of time leaves the Landowners and other property owners in perpetual limbo, deprived of full use of their property to hold a place for a project that cannot be built.

**B. The Commission’s Earlier Grants of Extensions of Time Are Distinguishable**

In affirming Constitution’s first request for an extension of time on rehearing, the Commission cited several cases where it had likewise granted extensions of time to applicants due to delays in obtaining required permits. *Constitution Pipeline*, 157 FERC ¶61,145 at n.13. All of these cases are distinguishable from Constitution’s situation because they involve projects where a permit was merely delayed, not definitively denied. In those cases, the Commission reasonably determined that the extra time would move the project forward -- for example, by enabling the applicant to work cooperatively with applicable agencies to obtain a permit *See Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (stating that providing “time for project sponsor to cooperate with state and local agencies...can be an appropriate basis for granting an extension of time.”) or to file a suit under Section 717r(d) of the Natural Gas Act to compel the state to act on a pending permit application. *See* Docket No. CP13-502, Letter Order

(August 2, 2016). No extension of time will allow Constitution to move its pipeline forward because without a Section 401 permit, the project cannot be built.

### **CONCLUSION**

For the foregoing reasons, the Landowners ask the Commission to rescind Constitution's Certificate effective immediately. Constitution's project no longer satisfies the jurisdictional requirements for a certificate which authorize only projects that unlike the Constitution Pipeline, can be "constructed and operated." Nor is Constitution's project consistent with the public convenience and necessity because Constitution cannot "carry out the proposed service" as required by Section 7 of the Natural Gas Act. Further, granting an extension of the Certificate would nullify New York's right under the Clean Water Act to block the project which likewise is contrary to the public interest.

Even if the Commission does not rescind the Certificate, it must reject Constitution's second extension request. Since December 2014, the Landowners' property has been encumbered by a project which it is now clear, will never be built. Granting an extension of the Certificate is not only runs counter to Commission precedent and the public necessity and convenience, but violates the Landowners' constitutional rights by perpetuating a taking of property that will not serve a public use.

Accordingly, the Commission must RESCIND Constitution's Certificate and DENY Constitution's request for an extension of time.

Respectfully submitted,

*/s/ Carolyn Elefant*

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Carolyn Elefant  
LAW OFFICES OF CAROLYN ELEFANT PLLC  
1440 G Street, NW 8th Floor  
Washington D.C. 20005  
(202) 297-6100 | carolyn@carolynelefant.com

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