

178 FERC ¶ 61,030  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
James P. Danly, Allison Clements,  
Mark C. Christie, and Willie L. Phillips.

Adelphia Gateway, LLC

Docket No. CP18-46-004

ORDER GRANTING REQUEST FOR EXTENSION OF TIME

(Issued January 20, 2022)

1. On November 1, 2021, Adelphia Gateway, LLC (Adelphia) filed a motion requesting an 18-month extension of time,<sup>1</sup> until June 20, 2023, to construct and place into service the facilities authorized by the Commission in its December 20, 2019 order issuing certificates.<sup>2</sup> For the reasons discussed below, the extension request is granted.

**I. Background**

2. On December 20, 2019, the Commission issued an order authorizing Adelphia to acquire, construct, and operate the proposed Adelphia Gateway Project, which is divided into the North and South Zones. The project includes the purchase and repurposing of an existing interstate pipeline system in Pennsylvania owned by Interstate Energy Company, LLC (the North Zone) and the construction of new pipeline laterals, compressors, and related facilities in Delaware and Pennsylvania (South Zone).<sup>3</sup> The Certificate Order required Adelphia to make the project available for service by December 20, 2021.<sup>4</sup>

3. The purchased facilities that comprise the North Zone are: an approximately 84.2-mile-long, 18-inch-diameter mainline extending from the Marcus Hook Industrial Complex in Delaware County, Pennsylvania, to the Martins Creek Terminal in Northampton County, Pennsylvania; an approximately 4.4-mile-long, 20-inch-diameter

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<sup>1</sup> Adelphia Nov. 1, 2021 Request for Extension of Time (Request for Extension of Time).

<sup>2</sup> *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (Certificate Order).

<sup>3</sup> *See id.* PP 4-6.

<sup>4</sup> *Id.* at ordering para (B)(1).

mainline originating in Northampton County, Pennsylvania, and terminating at the Martins Creek Terminal; and four meter stations and appurtenant facilities.<sup>5</sup> Adelphia placed the North Zone facilities into service in January 2020.

4. The South Zone project facilities, to be constructed and integrated with the purchased facilities, include: a 5,625-horsepower (hp) compressor station in Delaware County, Pennsylvania (Marcus Hook Compressor Station); a 5,625-hp compressor station in Bucks County, Pennsylvania (Quakertown Compressor Station); an approximately 0.3-mile-long, 16-inch-diameter lateral extending from the Marcus Hook Compressor Station to an existing meter station owned by Delmarva Power and Light Company in New Castle County, Delaware (Parkway Lateral);<sup>6</sup> an approximately 4.4-mile-long, 16-inch-diameter lateral extending from the Marcus Hook Compressor Station to interconnections with Transcontinental Gas Pipe Line Company (Transco) and the PECO Energy Company (PECO) in Delaware County, Pennsylvania (Tilghman Lateral);<sup>7</sup> and five meter stations and other appurtenant facilities.<sup>8</sup> Adelphia started construction on the South Zone facilities in October, 2020, and to date has completed construction of the Tilghman Lateral Phase 1 facilities<sup>9</sup> and 60% of the mainline valves.<sup>10</sup> Adelphia reports that it has made significant progress towards completing construction of the Tilghman Lateral Phase 2 facilities, the Parkway Lateral, and the Quakertown Compressor Station.<sup>11</sup> Adelphia expects that many of its South Zone facilities will be available for service as early as this winter heating season.<sup>12</sup>

5. On November 1, 2021, Adelphia requested an 18-month extension of time to complete construction and place the remaining portions of the project into service, due to

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<sup>5</sup> *Id.* P 4.

<sup>6</sup> The Parkway Lateral will also interconnect with two interstate natural gas pipelines owned by Columbia Gas Transmission and Texas Eastern Transmission Company, LP.

<sup>7</sup> The Tilghman Lateral will also interconnect with the Monroe Refinery.

<sup>8</sup> Certificate Order, 169 FERC ¶ 61,220 at P 6.

<sup>9</sup> There is ongoing restoration on the Tilghman Lateral Phase 1 facilities.

<sup>10</sup> Request for Extension of Time at 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 4.

delays in the receipt of state environmental permits and other delays caused by the COVID-19 pandemic.<sup>13</sup> Adelphia states that it has made significant progress towards constructing the project,<sup>14</sup> but explains that, despite this progress, the COVID-19 pandemic caused delays, including necessitating pauses to construction activity due to pandemic protocols.<sup>15</sup> In addition, Adelphia notes that the pandemic's continuing impacts on the supply chain have caused delays in the procurement and delivery of equipment and material.<sup>16</sup> Adelphia expects to obtain the delayed materials by late 2022 and therefore requests an extension of time through June 20, 2023, to ensure sufficient time for the completion of the remaining facilities.<sup>17</sup>

## II. Procedural Issues

### A. Notice, Interventions, and Comments

6. Notice of Adelphia's Request for Extension of Time was issued on November 3, 2021, and published in the *Federal Register* on November 9, 2021, with interventions, comments, and protests due on November 18, 2021.<sup>18</sup> With respect to interventions, the notice stated that only motions to intervene from entities that were party to the underlying proceeding would be accepted.<sup>19</sup>

7. Deborah Kratzner filed timely comments. Delaware Riverkeeper Network (Riverkeeper), Clifford Cole, Arianne Elinich, Christine Shelly, Todd Shelly, Brian Weirback, and Kathy Weirback filed timely motions to intervene and comments

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<sup>13</sup> Request for Extension of Time at 2-3.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 4 n.15.

<sup>18</sup> 86 Fed. Reg. 62,166 (Nov. 9, 2021).

<sup>19</sup> Notice at 1 (citing *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 39 (2020)).

opposing the extension. Each of these movants was a party to the underlying certificate proceeding.<sup>20</sup>

8. Pamela West, who was not a party to the underlying proceeding, filed a timely motion to intervene and comments opposing the extension. Sara Welsh, Francis Welsh, Anthony Orr, and Shirley Mann filed late motions to intervene and comments in the extension of time proceeding using a form postcard. All of the postcards were postmarked with a date prior to the November 18<sup>th</sup> intervention deadline but were not received by the Office of the Secretary until after the intervention deadline.<sup>21</sup> Sara Welsh, Francis Welsh, and Anthony Orr were parties in the underlying certificate proceeding; Shirley Mann was not.

9. In *Algonquin Gas Transmission, LLC*,<sup>22</sup> the Commission noted that it is not required to solicit public input before acting upon a certificate-holder's request for an extension of time,<sup>23</sup> and that nothing in the Commission's regulations suggests that an opportunity for notice and comment is required. The Commission further announced that only interventions from entities that were party to the underlying proceeding would be accepted in such cases.<sup>24</sup> Since *Algonquin*, in extension of time cases, we have applied the *Algonquin* policy to either: reject motions to intervene filed by persons who were not a party to the certificate proceeding,<sup>25</sup> or, where the movant simultaneously filed both a timely motion to intervene in the extension of time proceeding coupled with a late-filed motion to intervene in the underlying certificate proceeding, the Commission considered the late motion under the Rule 214 criteria.<sup>26</sup> In this later scenario, we ultimately denied

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<sup>20</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's rules of Practice and Procedure. *See* 18 C.F.R. § 385.214(c) (2021).

<sup>21</sup> These intervention postcards were received by the Commission on November 22, 2021. The filings are untimely, as "[a]ny document is considered filed, if in paper form, on the date stamped by the Secretary." 18 C.F.R. § 385.2001(a)(2) (2021).

<sup>22</sup> 170 FERC ¶ 61,144 (2020).

<sup>23</sup> *Id.* at P 38 (citing *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 23 (2018)).

<sup>24</sup> *Id.* at P 39.

<sup>25</sup> *See, Midship Pipeline Co., LLC*, 173 FERC ¶ 61,255, at P 5 (2020) (rejecting the motions to intervene of individuals who were not party to the underlying proceeding).

<sup>26</sup> *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026, at P 7, *order denying*

the late motions to intervene and accordingly denied the timely motions to intervene in the extension of time proceeding because the movants were not parties to the underlying certificate proceeding.<sup>27</sup> We subsequently explained that:

Our policy articulated in *Algonquin* upholds the Commission's prior determinations that extensions of time are administrative matters or interlocutory decisions for which intervention and rehearing do not lie – it did not create a new class of pre-and post-certificate regulations. In *Algonquin*, the Commission decided that the interests at stake in an extension of time proceeding justify a new opportunity for the parties to the underlying certificate proceeding to again seek intervenor status; however, these interests do not justify the same opportunity for other entities.<sup>28</sup>

10. Upon reconsideration, we recognize that extension of time proceedings—which in many instances can occur years after the Commission's initial decision—may raise important questions for landowners and other stakeholders, including the potential of changed circumstances from the underlying proceeding. To ensure that any interested parties are not denied the right to raise issues that may have arisen since the issuance of the certificate, we set aside the *Algonquin* policy described above. The Commission will accept timely motions to intervene in extension of time proceedings from any person, including those that were not party to the underlying proceeding. We believe that requests to extend deadlines established in certificate proceedings have public interest implications, and accordingly the policy shift we announce here will better ensure that any parties affected by these sorts of projects have an opportunity to vindicate their interests. Entities who did not intervene in the initial proceeding but whose interests may have changed since that time or were not affected by it (such as entities that moved into the project area after the initial proceeding was concluded), should have the opportunity to be heard and have the ability to challenge our decisions on such matters. However, a person who is permitted to intervene in an extension of time proceeding despite not having intervened in the initial proceeding may not relitigate the Commission's decision to issue a certificate, including whether the Commission properly found the project to be in the public convenience and necessity.<sup>29</sup> Untimely motions to intervene in the

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*rehearing*, 173 FERC P 61,222, at P 8 (2020).

<sup>27</sup> *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026 at P 7.

<sup>28</sup> *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,222, at P 8 (2020).

<sup>29</sup> See, e.g., *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144 at P 40 (noting that in extension of time proceedings the Commission will not consider arguments that

extension of time proceeding will continue to be analyzed under the Commission's Rule 214 criteria for late-filed motions, as discussed below.

11. Here, Pamela West filed a timely motion to intervene in the extension of time proceeding but was not a party to the underlying certificate proceeding. Thus, for the reasons explained above, Pamela West's motion to intervene is granted.

12. With respect to the late-filed motions to intervene filed by Anthony Orr, Francis Welsh, Sara Welsh, and Shirley Mann, because these individuals made a good faith effort to timely intervene by mailing their motions prior to the deadline, their intervention will not delay or disrupt the proceeding or unfairly prejudice any parties, and because as individuals and landowners near the pipeline route they have a direct interest in this proceeding, their motions to intervene out-of-time are granted.<sup>30</sup>

### **B. Adequacy of Notice**

13. Commenters also argue that the Commission failed to give adequate notice of the opportunity to comment on the company's request.<sup>31</sup> They claim that 15 days is inadequate to file comments because: many impacted landowners lack internet and the COVID-19 pandemic has prevented of them from accessing the public library's

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re-litigate the issuance of the certificate order); *Tenn. Gas Pipeline Co., LLC*, 162 FERC ¶ 61,013, at P 37 (2018) (rejecting arguments on rehearing of a notice to proceed that challenge the adequacy of the Commission's environmental review in the certificate proceeding); *Arlington Storage Co., LLC*, 151 FERC ¶ 61,160, at P 20 (2015) (rejecting as a collateral attack an argument in a request for rehearing of a notice to proceed with construction that challenged the proposed location and geology of the proposed storage caverns as unsuitable for gas storage operations, which argument was addressed in the certificate order authorizing the storage caverns).

<sup>30</sup> Movants for late intervention are required to "show good cause why the time limitation should be waived." 18 C.F.R. § 385.214(b)(3) (2021). They should also provide justification by reference to the other factors set forth in Rule 214(d) of the Commission's Rules and Regulations, 18 C.F.R. § 385.214(d)(ii)-(iv) (2021), which factors include the potential disruption caused by such late intervention, whether the movant's interest is not adequately represented by other parties, and any prejudice to existing parties.

<sup>31</sup> See, e.g., Christine Shelly November 11, 2021 Comments and Arianne Elinich November 8, 2021 Motion to Intervene.

computers;<sup>32</sup> many individuals who are not subscribed to the docket may not have learned of the opportunity to comment;<sup>33</sup> and the project has changed since the certificate issuance and the Commission should grant intervenors additional time to address those changes.<sup>34</sup>

14. We find that the public notice provided adequate opportunity for public participation. Although the Commission is not required to solicit public input before acting upon a request for an extension of time,<sup>35</sup> in *Algonquin*, the Commission, acknowledging the importance of public involvement and transparency in its decision-making processes, directed the Office of the Secretary and Office of Energy Projects to: (1) notice all requests for extensions of time to complete construction of Natural Gas Act facilities within seven calendar days of receiving the request; and (2) establish a 15 calendar day intervention and comment period deadline. The issues raised by commenters do not justify extending the comment period.

### III. Discussion

15. The completion date specified in a certificate order provides what the Commission believes—based on its assessment of circumstances relevant to the specific project—to be a reasonable period of time for the project sponsor to complete construction and make the project available for service.<sup>36</sup> However, construction deadlines may be extended for good cause.<sup>37</sup> “Good cause” can be shown by a project sponsor demonstrating that it

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<sup>32</sup> Christine Shelly November 11, 2021 Comments.

<sup>33</sup> Arianne Elinich November 8, 2021 Motion to Intervene.

<sup>34</sup> Pamela West November 15, 2021 Comments.

<sup>35</sup> *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144 at P 38 (*Algonquin*) (citing *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 23 (2018)); see also *Transcontinental Gas Pipe Line Company, LLC*, CITE, at P 7 (2021).

<sup>36</sup> *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 9 (2018) (citing *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165, at P 8 (2016)).

<sup>37</sup> 18 C.F.R. § 385.2008(a) (2021) (allowing the relevant decisional authority to extend for good cause the time by which any person is required or allowed to act under any statute rule or order).

made good faith efforts to meet its deadline but encountered circumstances beyond its control.<sup>38</sup> We consider extension requests on a case-by-case basis.<sup>39</sup>

16. Some commenters raise arguments seeking to relitigate the issuance of the Certificate Order.<sup>40</sup> The Commission has made clear it will not consider arguments that relitigate the Certificate Order, including whether the Commission properly found the project to be in the public convenience and necessity.<sup>41</sup> Commenters make arguments attacking the certificate itself, including that the Commission did not properly account for public safety,<sup>42</sup> that the air pollution from the project is at unacceptable levels,<sup>43</sup> and that there is no public need for the project.<sup>44</sup> These are improper collateral attacks on the Certificate Order and need not be considered further.

17. Additionally, commenters argue that: (1) good cause for an extension does not exist because the delays Adelpia face were self-incurred; and (2) circumstances have changed such that the environmental findings underlying the Commission's determinations in the certificate proceeding are no longer valid and the Commission must undertake additional analysis to satisfy the requirements of the National Environmental Policy Act (NEPA). These comments are discussed below.

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<sup>38</sup> See, e.g., *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149, at P 11 (2012) (denying request for extension of time).

<sup>39</sup> See *id.* at P 8.

<sup>40</sup> See, e.g., Arianne Elinich November 8, 2021 Motion to Intervene (arguing that the project is unneeded); Pamela West November 15, 2021 Comments (stating that the project should not have been approved); Kathy Weirback November 17, 2021 Motion to Intervene (arguing that the Commission should deny the requested extension due to the environmental impacts of the project).

<sup>41</sup> *Algonquin*, 170 FERC ¶ 61,144 at P 40; *Mountain Valley Pipeline Co.*, 173 FERC ¶ 61,026 at P 19; see also March 22, 2021 Notice of Transco's Request for Extension of Time.

<sup>42</sup> Shirley Mann November 22, 2021 Motion to Intervene.

<sup>43</sup> Kathy Weirback November 17, 2021 Motion to Intervene (arguing that the Commission should deny the requested extension due to the environmental impacts of the project).

<sup>44</sup> Arianne Elinich November 8, 2021 Motion to Intervene.

**A. Good Cause Exists for Granting an Extension of Time.**

18. Numerous commenters argue, without further explanation, that Adelphia's delays are due to the company's choice of subcontractor for the Quakertown Compressor Station.<sup>45</sup> They argue Adelphia's choice to shut down work on the compressor station was not required by the Commission and therefore Adelphia's delays cannot be for good cause.<sup>46</sup>

19. As discussed above, Adelphia states that circumstances outside its control have led to delays in construction.<sup>47</sup> It highlights the impacts of the COVID-19 pandemic on its ability to obtain the necessary state environmental permits due to the pandemic's disruption of state agencies.<sup>48</sup> Adelphia also notes that the COVID-19 pandemic caused closures, delays, and adaptations to construction activities.<sup>49</sup> Finally, Adelphia claims that it faces delays in procurement and delivery of equipment and materials due to COVID-19 impacts on the supply chain.<sup>50</sup>

20. The Commission has previously found that providing more time for a project applicant due to permitting delays can be an appropriate basis for granting an extension of time.<sup>51</sup> Delays in receipt of required state permits has caused Adelphia to face

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<sup>45</sup> See, e.g., Clifford Cole November 15, 2021 Comments and Pamela West November 15, 2021 Comments.

<sup>46</sup> Pamela West November 15, 2021 Comments.

<sup>47</sup> Request for Extension of Time at 2-3.

<sup>48</sup> *Id.* at 3 (claiming that Adelphia received final permits from the Pennsylvania Department of Environmental Protection months after the anticipated date).

<sup>49</sup> *Id.* (stating that Adelphia "had to cease construction activities on numerous occasions as a result of pandemic-related protocols.").

<sup>50</sup> *Id.*

<sup>51</sup> *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,138 (2020) (granting a two-year extension of time to complete construction due to a need to obtain new permits); *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 (granting a further two-year extension of time to accommodate the applicant's efforts to obtain a permit from NYSDEC); *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (granting a two-year extension of time to accommodate a project applicant's efforts to obtain a permit from NYSDEC). See also *Perryville Gas Storage LLC*, Docket Nos. CP09-418-000, et al. (Oct. 12, 2016) (delegated order) (granting two-year extension of time to complete construction to

construction delays. Adelphia has continued to construct the portions of the project for which it has approvals.<sup>52</sup> Additionally, Adelphia faces continued difficulty sourcing materials due to the COVID-19 pandemic's impact on the supply chain. Such difficulties, paired with Adelphia's continued commitment to the project, allow us to conclude that Adelphia has demonstrated good cause exists to grant an 18-month extension to complete construction of the project and make it available for service.

**B. The Certificate Order's Environmental Analysis Remains Valid**

21. Riverkeeper argues that the Commission must complete a supplemental analysis under NEPA prior to issuing an extension of time.<sup>53</sup> Specifically, Riverkeeper claims that the decision to grant an extension of time is a major federal action significantly affecting the quality of the human environment and "new information and legal requirements concerning evaluation of climate change effects" were not considered in the Certificate Order.<sup>54</sup>

22. Riverkeeper states that it is not seeking to re-litigate the prior findings in the Certificate Order but rather that "the Commission must comply with NEPA by evaluating the environmental effects that would be caused by [the Commission's] decision to extend the construction deadline."<sup>55</sup> Riverkeeper argues that the Commission's decision to approve the extension in and of itself would cause direct and indirect environmental effects.<sup>56</sup> Further, Riverkeeper argues that the Commission's recent decision on

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accommodate delays in obtaining a permit from the Louisiana Department of Natural Resources); *Columbia Gas Transmission, LLC*, Docket No. CP13-8-000 (Sept. 30, 2015) (delegated order) (granting pipeline project two-year extension of time to complete construction due to delays in obtaining waterbody crossing permits); *Bobcat Gas Storage*, Docket Nos. CP09-19-000 et al. (Mar. 25, 2015) (delegated order) (granting a two-year extension of time because applicant had not yet obtained required permit from a state agency).

<sup>52</sup> See Adelphia Gateway's Weekly Status Report No. 45 (filed November 9, 2021).

<sup>53</sup> See, e.g., Riverkeeper November 18, 2021 Comments at 4.

<sup>54</sup> *Id.* at 5.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

greenhouse gas in *Northern Natural Gas*,<sup>57</sup> the recent submission of a new Nationally Determined Contribution under the Paris Agreement, and recent D.C. Circuit decisions regarding the social cost of greenhouse gases<sup>58</sup> are specific changes of fact or law that have occurred since the issuance of the Certificate Order, and thus necessitate a supplemental environmental analysis.<sup>59</sup>

23. We recognize that environmental impacts are subject to change, and thus the validity of an order's conclusions and environmental conditions may not be sustained indefinitely. Approval of a request for extension of time is an administrative action and is not considered to be a major Federal action significantly affecting the quality of the human environment.<sup>60</sup> Granting a request for an extension of time to complete an approved action does not constitute the substantial changes to the proposed action envisioned in the NEPA regulations nor does it constitute a new approval of the specific project in question.<sup>61</sup>

24. The commenters assert that there are changes of fact or law that would lead the Commission to reconsider its prior findings for the project. The legal issues raised can be considered by the court of appeals in its review of our certificate orders, but are not germane here. The Commission generally will grant an extension of time if the movant files for an extension of time within a timeframe during which the environmental findings underlying the Commission's authorization can be expected to remain valid.<sup>62</sup> We have

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<sup>57</sup> *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021).

<sup>58</sup> Riverkeeper November 18, 2021 Comments at 6-7 (citing *Vecinos para el Bienestar de la Comunidad Costera v. F.E.R.C.*, 6 F.4th 1321, 1329 (D.C. Cir. 2021)).

<sup>59</sup> *Id.* at 7.

<sup>60</sup> *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, at P 22 (2019) (holding that an extension of time to comply with a license requirement to commence and complete construction by a certain date, that involves no construction or changes to the project development, is an administrative action appropriately categorically excluded from further NEPA review), *aff'd sub nom. Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044 (9th Cir. July 28, 2021); *see also ANR Pipeline Co.*, 98 FERC ¶ 61,067, 61,179 (2002) (acting on request for an extension of time is a matter of administrative discretion).

<sup>61</sup> *Cf.* 40 C.F.R. § 1508.1(q) (2021) (defining major Federal actions).

<sup>62</sup> *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 9; 18 C.F.R. § 385.2008(a) (2021).

previously found that environmental findings remain valid within the 18-month extension period requested here.<sup>63</sup> There has been no showing that the environmental effects of the project have changed since the issuance of the Certificate Order.<sup>64</sup> Therefore, we do not find it necessary to prepare a supplemental environmental analysis.

25. In view of the above, we grant Adelpia's request for an 18-month extension of time to complete construction and place into service the Adelpia Gateway Project.

26. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the motion and exhibits thereto, and upon consideration of the record.

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<sup>63</sup> See, e.g., *Const. Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 16 (concluding that a second two-year extension of time is appropriate and that the environmental findings in the authorization will remain valid even after six years).

<sup>64</sup> See 40 C.F.R. § 1502.9(d)(1) (stating that agencies “[s]hall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and: (i) [t]he agency makes substantial changes to the proposed action that are relevant to environmental concerns; or (ii) [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”).

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The Commission orders:

Adelphia Gateway, LLC, is granted an extension of time to June 20, 2023, to construct the facilities and make available for service the Adelphia Gateway Project.

By the Commission. Commissioner Danly is concurring in part and dissenting in part with a separate statement attached.

Commissioner Christie is concurring in part and dissenting in part with a separate statement attached.

( S E A L )

Debbie-Anne A. Reese,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Adelphia Gateway, LLC

Docket No. CP18-46-004

(Issued January 20, 2022)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in the Commission's decision to grant Adelphia Gateway, LLC's (Adelphia) request for an 18-month extension of time to construct and place into service the facilities authorized by the Commission in its December 20, 2019 order issuing certificates.<sup>1</sup> I dissent from the Commission's decision to depart from and set aside the intervention policy declared in *Algonquin Gas Transmission, LLC*.<sup>2</sup> Further, I dissent from the Commission's repeated suggestions that it has the legal authority to revisit the determinations made in certificate proceedings after the certificate orders have become final and unappealable.

2. In setting aside its prior policy, the Commission has changed how it will handle interventions when reviewing requests for extensions of time in our certificate proceedings. Now, the Commission will allow intervention by litigants who were not parties to the underlying certificate proceeding.<sup>3</sup> Of course, the Commission has discretion to formulate procedures,<sup>4</sup> and in this case the Commission appears to have satisfied its obligations under the Administrative Procedure Act in announcing its

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<sup>1</sup> *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019).

<sup>2</sup> 170 FERC ¶ 61,144, at P 39 (2020) (*Algonquin*) ("Only interventions from entities that were party to the underlying proceeding will be accepted.").

<sup>3</sup> *See Adelphia Gateway, LLC*, 178 FERC ¶ 61,030, at P 10 (2022) (*Adelphia*).

<sup>4</sup> *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."); *Cal. Trout v. FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009) ("So long as an agency's procedural rules do not afford petitioners less protection than the minimum mandated by the Administrative Procedure Act . . . and the Constitution, we are not free to 'improperly intrude[] into the agency's decisionmaking process' and second-guess its administrative tradeoffs.") (citation omitted).

departure from *Algonquin* and explaining its reasons.<sup>5</sup> Even so, I support the continuation of the Commission's prior policy and I dissent because I believe this order represents an unwise and unnecessary exercise of our discretion to formulate procedural rules.

3. *First*, I understand that there may be a number of reasons why individuals may not have intervened in an initial certificate proceeding.<sup>6</sup> Nonetheless, courts have “recognized that “[a]gencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions.”<sup>7</sup> And that is exactly what the Commission did in *Algonquin*. The Commission has also imposed, and courts have upheld, limitations to intervention in hydroelectric post-licensing proceedings.<sup>8</sup> I have supported limitations on the grant of interventions in extension of time proceedings based on whether the individual or entity was an intervenor in the underlying proceeding.<sup>9</sup> I continue to support reasonable

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<sup>5</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (recognizing that an agency must provide a “reasoned explanation for its action,” which “would ordinarily demand that it display awareness that it *is* changing position”) (emphasis in original); *id.* (explaining that an agency “need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”) (emphasis removed); see also *Adelphia*, 178 FERC ¶ 61,030 at P 10 (recognizing the Commission's departure from prior policy and explaining its reasons for such departure).

<sup>6</sup> For example, my colleagues submit that “entities that moved into the project area after the initial proceeding was concluded” may not have intervened in the initial proceeding but may have an interest participating in or challenging the Commission's decisions in extension of time proceedings. *Adelphia*, 178 FERC ¶ 61,030 at P 10.

<sup>7</sup> *Nat'l Parks Conservation Ass'n v. FERC*, 6 F.4th 1044, 1052 (9th Cir. 2021) (quoting *Cal. Trout v. FERC*, 572 F.3d at 1007).

<sup>8</sup> See, e.g., *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, at PP 14-17 (2019) (explaining that “the Commission will permit post-licensing intervention in certain limited circumstances”), *aff'd sub nom. Nat'l Parks Conservation Ass'n*, 6 F.4th 1044; see also *Nat'l Parks Conservation Ass'n*, 6 F.4th 1044, 1051 (finding that the Commission “may properly limit intervention in post-licensing proceedings”); *id.* at 1052 (explaining that the Commission's decision to “[l]imit[] automatic intervention in post-licensing matters where the licensee seeks only a deadline extension prevents relitigation of substantive issues already decided in the original licensing proceeding”).

<sup>9</sup> See, e.g., *Midship Pipeline Co., LLC*, 173 FERC ¶ 61,255, at P 5 & n.16 (2020)

limitations on granting intervention in both extension of time proceedings and hydroelectric post-licensing proceedings.

4. *Second*, the Commission reaffirms in today's order that "the Commission's decision to issue a certificate" and "whether the Commission properly found the project to be in the public convenience and necessity" may not be relitigated in extension of time proceedings.<sup>10</sup> While superficially reassuring, I am still concerned about the continued erosion of intervention policies that further administrative efficiency.<sup>11</sup> My colleagues justify today's change in policy, in part, based on their view that "[e]ntities who did not intervene in the initial proceeding but whose interests may have changed since that time or were not affected by it . . . should have the *opportunity to be heard* and have *the ability to challenge our decisions* on such matters."<sup>12</sup> To the extent to which the Commission's order suggests that the *Algonquin* policy hindered participation in our proceedings, I disagree.

5. The *Algonquin* policy *provided* an opportunity to be heard. Specifically, the Commission directed the Office of the Secretary and Office of Energy Projects "to notice all requests for extension of time to complete construction for [Natural Gas Act] facilities within 7 calendar days of receiving the request."<sup>13</sup> The Commission instructed staff that "[e]ach notice *shall* establish a 15 calendar day intervention and comment period deadline."<sup>14</sup> Though *Algonquin* clarified that the Commission would not consider reply comments or answers,<sup>15</sup> the Commission committed to "address all arguments relating to

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(applying *Algonquin* policy); *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026, at P 7 & nn.11, 16, *order addressing arguments raised on reh'g*, 173 FERC ¶ 61,222, at PP 6-8 (2020) (same).

<sup>10</sup> *Adelphia*, 178 FERC ¶ 61,030 at P 10.

<sup>11</sup> *See Kern & Tule Hydro LLC*, 174 FERC ¶ 61,081 (2021) (Danly, Comm'r, dissenting) (disagreeing with the Commission's decision to depart from its policy for interventions in post-licensing proceedings without explanation).

<sup>12</sup> *Adelphia*, 178 FERC ¶ 61,030 at P 10 (emphasis added).

<sup>13</sup> *Algonquin*, 170 FERC ¶ 61,144 at P 39.

<sup>14</sup> *Id.*

<sup>15</sup> The Commission's policy that it would not consider reply comments or answers in extension of time proceedings remains in place and is applied in another order issued concurrently with this order. *See Delfin LNG LLC*, 178 FERC ¶ 61,031, at P 8 (2022) (*Delfin*) (applying *Algonquin Gas Transmission, LLC* to support its decision to not consider an answer filed by the certificate holder). I pause to note that it is puzzling that

whether the applicant has demonstrated there is good cause to grant the extension.”<sup>16</sup> Thus, the Commission (1) required a comment period in extension of time proceedings on a going-forward basis and (2) committed to address comments filed by the comment deadline that raised arguments regarding the request for extension of time. The effect of today’s order will simply be to provide more opportunities to challenge our decisions in certificate proceedings, thereby denying certainty and finality to project applicants, needlessly increasing projects’ litigation risk, and increasing the cost of financing.<sup>17</sup> To erase any doubt: parties already had the opportunity to be heard under *Algonquin*. Allowing intervention accomplishes only one goal—to confer full party status on late-coming litigants who, because of their party status, will be entitled to petition for review before the appellate courts. This change in policy amounts to little more than a pretextual invitation to additional litigation.

6. Finally, I would like to take a moment to highlight a sentence in today’s order: “We recognize that environmental impacts are subject to change, and thus *the validity of an order’s conclusions and environmental conditions may not be sustained indefinitely.*”<sup>18</sup> Similar language has been included in prior orders, including one that I voted for.<sup>19</sup> I disagree, however, with the continued use of this language in our orders

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the Commission in the instant order underscores the importance of participation in extension of time proceedings on the part of “any parties affected by these sorts of projects” but then wants to continue to restrict certain filings, such as an answer filed by the certificate holder in another order voted on at the January 2022 Commission meeting. *Compare Adelpia*, 178 FERC ¶ 61,030 at P 10 (“We believe that requests to extend deadlines established in certificate proceedings have public interest implications, and accordingly the policy shift we announce here will better ensure that any parties affected by these sorts of projects have an opportunity to vindicate their interests.”), *with Delfin*, 178 FERC ¶ 61,031 at P 8 (“In *Algonquin Gas Transmission, LLC*, the Commission barred both reply comments and answers in extension of time proceedings. Accordingly, Delfin’s answer will not be considered.”) (citation omitted).

<sup>16</sup> *Algonquin*, 170 FERC ¶ 61,144 at P 40.

<sup>17</sup> I voted for an order that stated that “the Commission’s prior determinations that extensions of time are administrative matters or interlocutory decisions for which intervention and rehearing do not lie.” *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,222 at P 8 (citing *Algonquin*, 170 FERC ¶ 61,144 at P 38 n.106). After further consideration, I am not convinced that extensions of time are interlocutory decisions.

<sup>18</sup> *Adelpia*, 178 FERC ¶ 61,030 at P 16 (emphasis added).

<sup>19</sup> *See, e.g., Transcon. Gas Pipe Line Co., LLC*, 175 FERC ¶ 61,148, at P 17

and the Commission's suggestion that "an order's conclusions and environmental conditions may not be sustained indefinitely."<sup>20</sup> To suggest that an order's conclusions, which include its public convenience and necessity determination, may not be sustained indefinitely reinforces the Commission's prior misguided view in *Algonquin Gas Transmission, LLC* that it may revisit determinations made in final, unappealable certificate orders.<sup>21</sup> In that proceeding,<sup>22</sup> in the face of more than 80 years of contrary precedent, the Commission reopened the record of a judicially-final certificate order without even an *attempt* to offer a statutory basis for its action.<sup>23</sup> To be clear: the Commission lacks authority to revisit its public convenience and necessity determinations once the order making those findings is final. Besides which, the implication that our public convenience and necessity determinations could be "unsustainable" appears to contradict the Commission's affirmation in the instant order that "it will not consider arguments that relitigate the Certificate Order, including whether the Commission properly found the project to be in the public convenience and necessity."<sup>24</sup>

For these reasons, I respectfully concur in part and dissent in part.

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James P. Danly  
Commissioner

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(2021).

<sup>20</sup> *Adelphia*, 178 FERC ¶ 61,030 at P 23 (emphasis added); *see also id.* P 16 ("These are improper collateral attacks on the Certificate Order and need not be considered further.").

<sup>21</sup> *See generally Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Danly, Comm'r, dissenting).

<sup>22</sup> The Commission, in an order issued concurrently with this one, terminates the Order Establishing Briefing. *See Algonquin Gas Transmission, LLC*, 178 FERC ¶ 61,029 (2022).

<sup>23</sup> *Cf. U.S. v. Seatrains Lines, Inc.*, 329 U.S. 424 (1947) (affirming district court's holding that the Interstate Commerce Commission had exceeded its statutory authority in reopening the proceeding and altering the certificate).

<sup>24</sup> *Adelphia*, 178 FERC ¶ 61,030 at P 16.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Adelphia Gateway, LLC

Docket No. CP18-46-004

(Issued January 20, 2022)

CHRISTIE, Commissioner, *concurring in part and dissenting in part*:

1. I concur in granting the extension of time Adelphia requested to complete the construction of a project this Commission has already found is needed to serve the public.
2. I strongly dissent from that part of the order announcing a new procedural rule that allows essentially unlimited late intervention by *new* parties every time a holder of a certificate of public convenience and necessity (CPCN) simply seeks more time to complete a needed project.<sup>1</sup> The certain effect (whatever the purpose) of this new rule will be to facilitate even more unending litigation against the gas facilities needed to provide the public with the energy needed to keep the lights on and homes heated during cold winters. It will undeniably drive up the legal costs associated with building gas facilities, creating yet another disincentive to the construction of vitally needed infrastructure.
3. I acknowledge that today's order tells late intervenors in extension request proceedings that they "may not relitigate the Commission's decision to issue a certificate."<sup>2</sup> *Easier said than done*. Late intervenors can raise any issues they want, including challenging the original CPCN's need determination or demanding new environmental reviews. And the D.C. Circuit has shown that it is quite willing to overturn CPCN decisions of this Commission not on the merits but for alleged failures to explain decisions adequately under the Administrative Procedure Act (APA).<sup>3</sup> Allowing

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<sup>1</sup> *Adelphia Gateway, LLC*, 178 FERC ¶ 61,030, at P 10 (2022).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (remanding certificate order without vacatur due, *inter alia*, to deficiencies under the APA in the Commission's NEPA analyses of greenhouse gas emissions and environmental justice issues); and *Env'tl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) (vacating and remanding certificate order due to failure to adequately satisfy the Commission's APA obligation to engage in reasoned decision-making).

unlimited late intervention in extension requests clearly sets the stage for more such remands, or at least the need for CPCN holders to spend yet more time and money defending the inevitable appeals of extension orders.

4. This order's blank check for late interventions is not a legal standard, but a legal weapon. And as I said in my dissent to the Commission's *Algonquin* order of last February:

Mark Twain said the art of prophecy is very difficult, especially with respect to the future; however, I suspect that the use of the legal weapons of unending litigation and collateral attacks against infrastructure projects long after they have been approved, as is enabled by today's order, will not be limited to natural gas projects, even though they are today's primary target. Campaigns of unending legal warfare may well be used one day against other types of infrastructure projects, including those the majority may well want to promote.<sup>4</sup>

5. Finally, there is simply no need for this policy reversal. The policy adopted in the earlier *Algonquin* case created a new opportunity for parties to the underlying certificate proceedings to be heard on requests for extensions of time.<sup>5</sup> Prior to that decision there was no opportunity for anyone to intervene in a certificate-holder's extension request.<sup>6</sup> I

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<sup>4</sup> *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (Christie, Comm'r, dissenting at P 7) (available at <https://www.ferc.gov/news-events/news/item-c-4-commissioner-mark-c-christie-dissent-regarding-algonquin-gas-transmission>). See also Peter Behr and Miranda Willson, *Details emerge about DOE, FERC grid plans for clean energy*, ENERGY WIRE, POLITICOPRO.COM (Jan. 13, 2022).

<sup>5</sup> *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144, at P 39 (2020) (“[t]o ensure that the Commission acting as a whole act on [extension] requests that may be contested, and further increase transparency and durability of Commission orders, going forward the Office of the Secretary and Office of Energy Projects are directed to notice all requests for extension of time to complete construction for NGA facilities within 7 calendar days of receiving the request. Each notice shall establish a 15 calendar day intervention and comment period deadline.”)

<sup>6</sup> *Id.* P 38 (“the Commission is not required to solicit public input before acting upon a certificate-holder's request for an extension of time, and nothing in the Commission's regulations suggests that an opportunity for notice and comment is

acknowledge that there could be truly unusual circumstances that would support allowing late intervention by a new party. I believe our rules are already adequate to address such unusual situations, but if others disagree, the rules could be amended, using a general rulemaking in which all affected persons and organizations would have the opportunity to comment on such a major procedural issue, as they have not had in this individual case with limited participation.

For these reasons, I concur in part and dissent in part.

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Mark C. Christie  
Commissioner

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required.”) (citations omitted).

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