

US FERC review of Tennessee's Northeast Project violated NEPA: DC Circuit ruling

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A federal court on Friday found that the US Federal Energy Regulatory Commission's environmental assessment of Tennessee Gas Pipeline's Northeast Project was deficient because it failed to consider the cumulative impacts of three closely related projects to upgrade the same pipeline.

The DC Circuit Court of Appeals found that "FERC impermissibly segmented the environmental review in violation of" the National Environmental Policy Act and remanded the case to the commission for further consideration.

"When FERC was reviewing the Northeast Project application, it was undeniably aware that the previous and following projects were also under construction or review, and that each phase of the development fit with the others like puzzle pieces to complete an entirely new pipeline," the court said. Judge Harry Edwards wrote the opinion.

New Jersey Sierra Club Director Jeff Tittel said in a statement Friday that "this court ruling sends a clear message to FERC that you cannot ignore the environment."

"This is an important decision in the battle against fracking and [a] gas pipeline that cuts through the middle of our communities and [environmentally] sensitive areas," he added. "This will be used nationally to ensure that pipelines have to pass environmental scrutiny."

A FERC spokeswoman said Friday that the commission does not comment on court cases.

Larry Pierce, a spokesman for Kinder Morgan, Tennessee's parent company, said the company is reviewing the court's opinion and generally does not comment on pending litigation.

"However, whether the completed expansion projects are considered individually, as FERC did, or cumulatively, we do not expect any change in the ultimate conclusion that there was no significant environmental impact resulting from the projects," Pierce said in an email Friday.

FERC in May 2012 issued a certificate of public convenience and necessity to Tennessee for the Northeast Project, authorizing construction of five pipeline loop segments totaling more than 40

miles of 30-inch-diameter pipe in Pennsylvania and New Jersey. The project also included adding 22,310 horsepower of compression at two existing compressor stations in Pennsylvania.

The \$500 million project was placed into service in November, adding 636,000 Dt/d of capacity to Tennessee's 300 Line System for high-demand markets in the Northeast.

The Delaware Riverkeeper Network, New Jersey Highlands Coalition and Sierra Club's New Jersey chapter petitioned the court to review FERC's order approving the project after the commission denied their request for rehearing.

The environmental groups argued in comments to FERC during the review of the project that it was clear that Tennessee's Northeast Project and others already underway or pending FERC review "are all part of a larger development plan ... of the same pipeline" and Tennessee "must not be allowed to circumvent heightened environmental scrutiny by segmenting their upgrades in such a way," court documents said.

Tennessee began four upgrade projects on the eastern leg of the 300 Line System between 2010 and 2013, the third of which being the Northeast Project, that together added capacity to almost 200 miles of continuous pipeline.

The environmental groups said the projects posed concerns related to habitat fragmentation, hydrology impacts to wetlands and groundwater, and deforestation.

"The Northeast Project alone cleared 265 acres of forest and impacted 50 acres of wetlands, and ... the four projects together permanently deforested 628 acres," the groups claimed in court documents.

FERC, however, contended that each project was a stand-alone project that would provide gas to different customers during different time frames, court documents said. The commission completed an environmental assessment in November 2011 that did not consider the other projects in its recommendation of a finding of no significant impact.

The three-judge panel ruled that "FERC's position cannot be squared with the record, which shows that by May 2012, when FERC issued the certificate for the Northeast Project, it was clear that the entire Eastern Leg was included in a complete overhaul and upgrade that was physically, functionally, and financially connected and interdependent."

"Given the self-evident interrelatedness of the projects as well as their temporal overlap, the Commission was obliged to consider the other three ... Tennessee Gas pipeline projects when it conducted its NEPA review of the Northeast Project," the court said.

Further, the court said that FERC's NEPA review of the Northeast Project violated the segmentation rule, which was upheld by the Supreme Court in 1976, as an agency is prohibited from dividing "connected, cumulative, or similar federal actions into separate projects and thereby [failing] to address the true scope and impact of the activities that should be under consideration."

Judge Laurence Silberman concurred with the Friday ruling, while Judge Janice Rogers Brown concurred in part, agreeing with the judgment but arguing that the cumulative impacts issue was a stronger ground to base the decision on than the segmentation issue.

--*Jasmin Melvin*, jasmin.melvin@platts.com

--*Edited by Annie Siebert*, ann.siebert@platts.com

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