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Recent D.C. Circuit Decisions Shed Light on FERC Review of Natural Gas Certificate Applications

Recent decisions from the U.S. Court of Appeals for the D.C. Circuit (the Court) address challenges of Federal Energy Regulatory Commission (FERC or the Commission) decisions to grant certificate applications for the construction and operation of different interstate gas facilities. The Court's recent decisions in *Food & Water Watch v. FERC* (*Food & Water*),^[1] *New Jersey Conservation Foundation et al. v. FERC* (*NJ Conservation*),^[2] *Healthy Gulf v. FERC* (*Healthy Gulf*),^[3] and *Alabama Municipal Distributors Group et al. v. FERC* (*Alabama*)^[4] provide additional insight into the level of review expected of the Commission by the Court in cases challenging the Commission's approval of applications to construct interstate gas facilities. While the Court's decisions in *Food & Water*, *Alabama*, and *Healthy Gulf* center on the environmental analysis that FERC is required to perform under the National Environmental Policy Act (NEPA), one of the central themes of the Court's analysis in *NJ Conservation* is the Commission's consideration of evidence pointing to whether the interstate facility was needed in the first place.

In the Court's July *NJ Conservation* decision, the dispute centered on not only the environmental analysis but also the market need analysis FERC used to authorize Transcontinental Gas Pipe Line Company, LLC's (Transco) proposed pipeline.^[5] The Court disagreed with FERC's market need determination, vacated the decision and remanded the matter to FERC. Under Section 7 of the Natural Gas Act (NGA), FERC can approve the construction and operation of an interstate gas pipeline "if a project's public benefits (such as meeting unserved market demand) outweigh its adverse effects (such as deleterious environmental impact on the surrounding community)."^[6] FERC first assesses the project's market need and then weighs the public benefits against the project's adverse impacts.^[7]

In this case, FERC accepted Transco's claims regarding the need for the project, citing precedent agreements with eight shippers, and dismissed two New Jersey agencies' market analyses showing no additional capacity was needed in the area. FERC reasoned that the project's capacity was necessary so local distribution companies could access off-system supply sources during extreme weather events and other times of variability.^[8] However, the Court found that FERC failed to justify the uncertainty of future demand^[9] and criticized FERC for preferring Transco's "unsubstantiated" and "limited" study over the New Jersey agencies' studies. While the Court acknowledged that "[p]recedent agreements are 'always...important evidence of demand for a project[.]'" it emphasized that precedent agreements do not override evidence demonstrating insufficient need for a pipeline.^[10] Further, the Court found that FERC could not properly evaluate market need without considering the impacts of New Jersey's energy efficiency program on demand forecasts.^[11]

With respect to FERC's review under NEPA, in each of the recent cases the Court evaluated FERC's environmental reviews. While the finding of whether FERC acted arbitrarily in reaching certain conclusions on a project's environmental impacts varied in each case, the Court's reasoning for its decisions remained the same – namely, that FERC must reasonably explain its analyses and decision.

All of these cases concerned several pertinent issues surrounding FERC's review of greenhouse gas (GHG) emissions. The Petitioners' focus in *NJ Conservation*, *Food & Water*, *Healthy Gulf* and *Alabama* ranged from the methods FERC uses to determine GHG significance, such as the Social Cost of Carbon, to FERC's ability to accurately quantify upstream and downstream emissions and whether FERC is obligated to determine GHG significance under its *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* (GHG Policy Statement).^[12] The Court also evaluated FERC's analysis of the cumulative effects associated with a project's nitrogen dioxide emissions in *Healthy Gulf*. The issues in these cases were not *what* FERC determined in its environmental reviews but rather whether FERC *adequately explained* these determinations based on the record before it.

Viewed together, these cases indicate that FERC will need to provide more-comprehensive evaluations of the entire record when considering certificate applications. *NJ Conservation*, in particular, could significantly impact natural gas companies seeking regulatory approval for NGA Section 7 projects, as they may need to provide more rigorous mitigation plans and substantial evidence beyond simply providing precedent agreements to demonstrate need. Additionally, the Court's focus on GHG analysis in all four decisions, coupled with the fact that the Commission is now comprised of five Commissioners and has a Democratic majority, could cause FERC to revisit the currently dormant GHG Policy Statement, which would provide more stringent guidance for FERC's environmental evaluations under NEPA.

Please contact Day Pitney attorneys for further information on the Court's holdings in these cases and FERC's analysis of natural gas certificate applications.

^[1] 104 F.4th 336 (D.C. Cir. 2024).

^[2] No. 23-1064 (D.C. Cir. 2024).

^[3] 107 F.4th 1033 (D.C. Cir. 2024).

^[4] 100 F.4th 207 (D.C. Cir. 2024).

^[5] No. 23-1064 at 3.

^[6] *Id.* at 27-28 (quoting *City of Oberlin*, 937 F.3d 599, 602 (D.C. Cir. 2019)).

^[7] *Id.* at 1-2. As part of the second step, FERC will "evaluate all factors bearing on the public interest." *Atl. Refin. Co. v. Pub. Serv. Comm'n of NY*, 360 U.S. 378, 391 (1959).

^[8] *NJ Conservation*, No. 23-1064 at 21-22.

^[9] *Id.*

^[10] *Id.* at 24.

^[11] *Id.* at 27; compare *Food & Water*, where the Court found that a climate-driven New York statute did not undercut FERC's finding that the Project was needed because in addition to referencing the applicant's precedent agreements, FERC relied on an instance where a New York utility was forced to refuse service to new customers during a natural gas shortage as evidence of market need for additional capacity.

^[12] See *Healthy Gulf v. FERC*; *Ala. Mun. Distributions Grp. v. FERC*.

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