

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

Tennessee Gas Pipeline Company, L.L.C. Connecticut Expansion Project	) ) ) ) )	Docket No. CP14-529
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**MASSACHUSETTS PIPELINE AWARENESS NETWORK'S REQUEST  
FOR REHEARING OF NOTICE TO PROCEED**

The Massachusetts PipeLine Awareness Network (“MassPLAN”) is a party to this proceeding, as set forth in the March 11, 2016 Order Issuing Certificate, 154 FERC ¶ 61,191 (“Certificate Order”) issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”). MassPLAN hereby submits, on behalf of itself and its members,<sup>1</sup> this request (the “Request”) for rehearing of the Notice to Proceed with Tree Clearing and Construction (“NTP”) for the Connecticut Expansion Project (the “Project”), which was granted to Tennessee Gas Pipeline Company, L.L.C. (“TGP” or the “Company”) by a member of the staff (the “Staff”) of FERC's Office of Energy Projects (“OEP”) on April 12, 2017. This rehearing request is timely filed within thirty days of the NTP, pursuant to 18 C.F.R. § 385.1902(a) and 18 C.F.R. § 385.713, Rule 713 of the Commission’s Rules of Practice and Procedure.

**I. CONCISE STATEMENT OF ERROR**

The issuance of the NTP was an *ultra vires* act, beyond Staff’s delegated authority under the Natural Gas Act (the “NGA”) and FERC regulations and orders, when numerous contested matters remain in this proceeding. Further errors in the issuance of the NTP are as follows: the Commission's failure to involve the public in section 106 consultations or otherwise fully comply with the requirements of the National Historic Preservation Act (the “NHPA”) and its

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<sup>1</sup> The MassPLAN members joining in this Request and the accompanying motion for stay include the Berkshire Environmental Action Team, Inc., the Nolumbeka Project, Inc., StopNED, No Fracked Gas in Mass, North Quabbin Energy, and the Nashoba Conservation Trust, a Massachusetts land trust.

implementing regulations prior to the issuance of the NTP; the Commission's failure, prior to the issuance of the NTP, to reevaluate Project need based on new data concerning the Project shippers' capacity requirements during the period subsequent to the issuance of the Certificate Order, in violation of the NGA and FERC regulations and orders; and the Commission's failure to conduct a supplemental environmental review, prior to the issuance of the NTP, as required pursuant to the National Environmental Policy Act ("NEPA") and its implementing regulations, in light of (a) the new information regarding Project need, (b) impacts to cultural resources sacred to area tribes that were discovered after the Certificate Order for this Project was issued, and (c) the new availability of an alternative route in Connecticut that would avoid the most vigorously opposed part of this Project, in Massachusetts. This alternative route has already been evaluated by the Company and was chosen for another TGP project that was cancelled after the Certificate Order for this Project was issued, thus rendering it newly available for this Project.

## **II. STATEMENT OF RELEVANT FACTS**

### **The Project**

On July 31, 2014, TGP filed an abbreviated application for the Project with the Commission, seeking a Certificate of Public Convenience and Necessity to construct, modify, and operate a natural gas transmission pipeline and related facilities along its existing 200 Line system in New York and Massachusetts, and along its existing 300 Line system in Connecticut. TGP proposes to construct and operate three pipeline loops, totaling 13.42 miles in length, on its existing 200 and 300 Lines: (1) the New York Loop, a 1.35-mile-long, 36-inch-diameter loop on the 200 Line near Bethlehem, New York; (2) the Massachusetts Loop, a 3.81-mile-long, 36-inch-diameter loop on the 200 Line near the Town of Sandisfield, Massachusetts; and (3) the

Connecticut Loop, an 8.26-mile-long, 24-inch-diameter loop on the 300 Line, which will extend from Compressor Station 262 in Agawam, Massachusetts, to the East Granby Meter Station near Suffield and East Granby, Connecticut. The Project also includes proposed modifications at an existing compressor station, and certain appurtenant facilities.

### **Procedural History**

The Commission issued an environmental assessment for the Project (the “EA”) on October 23, 2015, concluding that “the impacts associated with this Project could be sufficiently mitigated to support a finding of no significant impact.”<sup>2</sup> The Commission issued its Certificate Order for the Project on March 11, 2016.<sup>3</sup> Two timely requests for rehearing of the Certificate Order were filed, questioning Project need and the adequacy of the environmental review and alternatives analysis, among other issues. The Commission issued a tolling order<sup>4</sup> on May 9, 2016, rather than acting on the merits of the rehearing requests or allowing them to be deemed denied by operation of law. As of the present filing, the Commission has not acted on the merits of either request for rehearing of the Certificate Order.

### **MassPLAN**

MassPLAN is an unincorporated coalition of organizations and groups, allied to pursue safe and sustainable energy infrastructure in the Commonwealth of Massachusetts. MassPLAN seeks to ensure that energy needs will be met by taking greater advantage of demand management and appropriately scaled and sited energy infrastructure. MassPLAN timely

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2 Environmental Assessment for the Connecticut Expansion Project, October 23, 2015, p. 4, Accession No. 20151023-4001, *available at* <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14022358>.

3 Certificate Order, March 11, 2016, Accession No. 20160311-3032 *available at* [https://elibrary.ferc.gov/idmws/file\\_list.asp?document\\_id=14438101](https://elibrary.ferc.gov/idmws/file_list.asp?document_id=14438101).

4 Order Granting Rehearings for Further Consideration, May 9, 2016, Accession No. 20160509-3010, *available at* <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14242810>.

intervened in this proceeding<sup>5</sup> and filed initial comments with the Commission on September 3, 2014,<sup>6</sup> as well as additional comments prior to the Commission's issuance on March 11, 2016 of the Certificate Order.<sup>7</sup> MassPLAN's motion to intervene was unopposed.

Among concerns raised by MassPLAN and its members in filings with the Commission: the offensive siting of the Project in Otis State Forest in Sandisfield – public conservation land protected from development under the Massachusetts constitution<sup>8</sup> – when viable alternatives exist; threats of destruction, along the Massachusetts Loop, of historical artifacts of religious and cultural significance to regional Native American tribes; the fact that the Project would not serve Massachusetts but would be partially sited in the state; and the fact that the need for the Project in Connecticut is subject to ongoing dispute, evolving state energy policy, and founded on precedent agreements that were conditionally approved based on what have proved to be inaccurate forecasts that significantly overstated demand.

### **NED Project and Lack of Need**

Throughout 2015, contemporaneous with this proceeding, the Commission was also reviewing TGP's proposed Northeast Energy Direct Project (the “NED Project”), under Docket No. PF14-22 and then Docket No. CP16-21. The NED Project would have had components in five states, including a loop in Connecticut immediately to the south of this Project's Connecticut

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5 MassPLAN Motion To Intervene, September 3, 2014, Accession No. 20140903-5118, *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20140903-5118](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20140903-5118).

6 MassPLAN Initial Comments, September 3, 2014, Accession No. 20140903-5213, *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20140903-5123](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20140903-5123).

7 See MassPLAN comments from July 1, 2015, Accession No. 20150701-5350, *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20150701-5353](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20150701-5353).

8 Under Article 97 (“Article 97”) of the Articles of Amendments to the Constitution of the Commonwealth of Massachusetts, public conservation land such as the land in Otis State Forest that would be clearcut for the Project is intended to be permanently protected from development. Article 97 requires an affirmative two-thirds vote of each chamber of the state legislature for any change of use of public conservation land. The Certificate Order did not clearly protect this constitutional process, and ultimately TGP took easements through Otis State Forest through an eminent domain proceeding.

Loop. On April 20, 2016, TGP suspended its NED Project, and on May 23, 2016, the Company formally withdrew its certificate application for the NED Project, citing lack of sufficient capacity contracts to justify that project.<sup>9</sup>

At the same time, the Connecticut local distribution companies (the “LDCs”) that are the shippers for *this* Project were falling short of their projected oil-to-gas conversion figures.<sup>10</sup> The precedent agreements for this project were approved pursuant to the LDCs' expansion plans, which were a key component of Connecticut's 2013 comprehensive energy strategy.<sup>11</sup> The state of Connecticut anticipated issuing a draft of its second three-year comprehensive energy strategy by the fall of 2016.<sup>12</sup> No draft has been issued as of this filing, and the role of gas in the state's energy policy going forward has been the subject of considerable debate. Meanwhile, the LDCs continue to fall short of the conversion projections that formed the justification for the precedent agreements and this Project.<sup>13</sup>

### **Ceremonial Stone Landscapes and Lack of Public Involvement**

At the end of 2015, Section 106 Consultation meeting notes (regarding a December 8-10, 2015 meeting) appeared on the FERC docket for the Project stating, “Based on the walkthrough of the Massachusetts loop, it was determined that survey was needed for the entire loop. Tennessee Gas will coordinate with the participant tribes to work out the survey protocol and

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9 See TGP May 23, 2016 submittal in FERC Docket No. CP16-21, Accession No. 20160523-5079, *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20160523-5079](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20160523-5079).

10 See Comments of Pipe Line Awareness Network for the Northeast, Inc. February 29, 2016, Accession No. 20160229-5155, *available at* [http://elibrary.ferc.gov/idmws/file\\_list.asp?accession\\_num=20160229-5155](http://elibrary.ferc.gov/idmws/file_list.asp?accession_num=20160229-5155).

11 See *generally* MassPLAN's Answer in Opposition To Requests for NTP, April 7, 2017, Accession No. 20170407-5121, *available at* <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14553976>.

12 *Id.*

13 See MassPLAN Comments of February 1, 2017, Accession No. 20170201-5270, *available at* <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14481094>.

schedule.”<sup>14</sup> The public was not aware, until the fall of 2016, that ceremonial stone landscape (“CSL”) surveying had not been conducted according to tribal protocols prior to the issuance of the Certificate Order. This only started to become evident to the public when an entry on the Project’s FERC docket indicated that several tribes in the region had submitted a technical report<sup>15</sup> for a CSL survey (the “CSL Survey”). No information about the CSL Survey was made public other than a notation on the docket that a confidential report had been filed.

On December 29, 2016, more than nine months after the Certificate Order was issued, OEP issued a “Notification of Adverse Effect for the Connecticut Expansion Project” pursuant to NHPA regulations (the “Adverse Effect Notification”).<sup>16</sup> The Adverse Effect Notification states, “The finding involves multiple ceremonial stone landscape features in Berkshire County, Massachusetts” and references confidential enclosures that have not been made available to the public.<sup>17</sup> The specific existence of dozens of CSL features threatened by the Project only became known to the public when the Narragansett Indian Tribe’s Historic Preservation Office (“NITHPO”) filed its January 30, 2017 letter, indicating that 73 CSL features had been identified along the route in Sandisfield and TGP had no intention of avoiding the destruction of a full one third of them.<sup>18</sup> FERC did not make any provisions for public involvement pursuant to NHPA and its implementing regulations following this revelation, despite numerous comments on the

14 Section 106 Consultation Meeting Notes, Accession No. 20151228-4005, docketed December 28, 2015, available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14082894>.

15 The October 3, 2016 docket entry, Accession No. 20161003-4003, reads, “Mohegan, Wampanoag of Gay Head (Aquinnah) et al submits Technical Report: Sandisfield Ceremonial Stone Landscape Survey for the Connecticut Expansion Project et al under CP14-529.” This docket entry is available, on a privileged basis only, at [http://elibrary.FERC.gov/idmws/file\\_list.asp?accession\\_num=20161003-4003](http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20161003-4003).

16 OEP Notification of Adverse Effect for the Connecticut Expansion Project, December 29, 2016, Accession No. 20161229-3019, available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14454485>.

17 *Id.*, p. 1.

18 See NITHPO Letter, January 30, 2017, Accession No. 20170103-4006, available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14457258>.

docket expressing concern about this newly revealed threat to sacred tribal sites and an important part of our regional history and national heritage.

### **FERC's Lack of Quorum and the NTP**

On February 3, 2017, the effective date of the resignation of former Commission Chair Norman Bay, the Commission ceased to have the quorum necessary to conduct business. The Commission issued an extensive *Order Delegating Further Authority to Staff in Absence of Quorum*, 158 FERC ¶ 61,135 (Feb. 3, 2017) (the “February Delegation Order”).<sup>19</sup> The February Delegation Order delegated to staff the authority to take certain actions, which supplemented previous delegating orders and regulations. These orders do not address notices to proceed, although the Certificate Order specifies that the Company must receive written notice from the director of OEP prior to beginning any construction activities for the Project. On April 12, 2017, Danny Laffoon, Gas Branch 1 Division Chief of the Commission's Division of Gas (Environmental and Engineering) within the OEP, granted TGP a notice to proceed with tree felling and construction of the Project.

On April 18, 2017, U.S. Senators Elizabeth Warren and Edward Markey sent a letter to the Commission's Acting Chair LaFleur, requesting the revocation of the NTP until “such time as the Federal Energy Regulatory Commission (FERC) has a reconstituted quorum and can act on pending requests for rehearing regarding this pipeline[.]”<sup>20</sup> The Senators further stated, “A rehearing should be heard, thereby granting a conclusion to the regulatory process, before any irreversible action, including tree clearing in Otis State Forest, is taken[.]”<sup>21</sup>

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19 The *February Delegation Order* is available at <https://www.ferc.gov/CalendarFiles/20170203110327-AD17-10-000.pdf>, accompanied by errata notice at <https://www.ferc.gov/media/news-releases/2017/2017-1/AD17-10-000-errata-notice.pdf>.

20 Warren and Markey Letter, April 18, 2017, p. 1, Accession No. 20170421-0006, available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14566997>.

21 *Id.*, p. 2.

### **III. STATEMENT OF ISSUES**

- 1. Did OEP Staff exceed its delegated authority, in violation of the Natural Gas Act and the regulations governing the Commission, when Mr. Laffoon granted the NTP for a Project in which contested matters remain unresolved and the Commission lacked quorum to resolve them?**

Yes. The totality of the regulatory scheme and the Commission orders make clear that Mr. Laffoon's issuance of an NTP, when numerous contested matters remain unresolved, was an *ultra vires* act and therefore without legal effect. Only the Commission has the authority to resolve contested matters, and here, where Staff issued an NTP while the Commission lacks quorum to conduct business and resolve contested matters, the NTP is therefore void.

*Precedent: Amgen Inc. v. Smith*, 357 F.3d 103 (D.C. Cir. 2004).

- 2. Did the Commission fully comply with the applicable procedures prescribed by the implementing regulations of the National Historic Preservation Act prior to granting the NTP?**

No. The Commission failed to comply with NHPA and its implementing regulations, including 36 C.F.R. § 800.1(c) and 36 C.F.R. §§ 800.6(a)(2) - (5). Of particular relevance to MassPLAN, there was no opportunity for public involvement in the section 106 consultation process, as required under 36 C.F.R. §§ 800.6(a)(4). NITHPO, MassPLAN, and members of the public raised concerns on the docket when it became clear that there were procedural problems that would result in harm to historically important cultural resources, but there was no response on the docket from the Commission to these concerns. *Precedent: Comm. for the Pres. of the Seattle FRB Bldg. v. FRB of San Francisco*, No. C08-1700RSL, 2010 U.S. Dist. LEXIS 26084 (W.D. Wash. March 19, 2010); *Reytblatt v. United States NRC*, 323 U.S. App. D.C. 101, 105 F.3d 715 (D.C. Cir. 1997); *Penobscot Indian Nation v. United States HUD*, 539 F. Supp. 2d 40 (D.D.C. 2008).



**3. Did the Commission violate the Natural Gas Act and its own policies and regulations by failing to reexamine Project need prior to the issuance of the NTP, when new data demonstrates that LDC demand forecasts were overstated, and the state order conditionally approving those precedent agreements requires adjustments to ensure that new capacity reflects actual demand?**

Yes. The question of Project need and Connecticut's reduced gas requirements was raised prior to the issuance of the Certificate Order and in a request for rehearing of the Certificate Order. New data concerning the period *after* the Certificate Order was issued confirms that the actual need for new capacity, based on oil-to-gas conversions, is significantly lower than was projected when the precedent agreements were approved. The order from the Connecticut Public Utilities Regulatory Authority (the "PURA Order") conditionally approving the precedent agreements unequivocally requires that adjustments be made to prevent overbuild of capacity. Therefore, an NTP for the originally certified capacity amount is not warranted under the PURA Order that provided the basis for the Certificate Order. *Precedent: 1000 Friends of Wisconsin v. U.S. Department of Transportation*, Case No. 11-0545, (E.D. Wis. May 22, 2015); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011); *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (2005).

**4. Did the Commission comply with NEPA and its implementing regulations when it failed, prior to the issuance of the NTP, to conduct a supplemental environmental review in light of significant new circumstances and information relevant to environmental concerns?**

No. Early on in the Commission's review process, members of MassPLAN had raised the issue of the NED Connecticut Loop as a practical alternative to this Project's Massachusetts Loop. The cancellation of the NED Project, after the Certificate Order for this Project, rendered the NED Connecticut Loop a much more tangible alternative that the Commission should have considered as part of a supplemental environmental review prior to the issuance of an NTP, particularly given the revelation, after the Certificate Order was issued, that sites of religious and

cultural significance to area tribes would be destroyed by the Massachusetts Loop and new data had been compiled concerning reduced Project need. *Precedent: 1000 Friends of Wisconsin v. U.S. Department of Transportation*, Case No. 11-0545, (E.D. Wis. May 22, 2015); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011); *Idaho v. I.C.C.*, 35 F.3d 585 (D.C. Cir. 1994).

#### **IV. ARGUMENT**

##### **1. Staff's Issuance of an NTP in a Proceeding with Outstanding Contested Matters Was an *Ultra Vires* Act Without Legal Force under the Natural Gas Act, the Regulations Governing the Commission, or Any Other Authority**

The NTP was issued by Staff under highly unusual circumstances, when the Commission lacked quorum to resolve contested matters, and while several contested matters in this proceeding remain unresolved. Even if OEP had some degree of authority to issue an NTP pursuant to the Certificate Order, nothing in the Certificate Order, the Natural Gas Act or the regulations governing the Commission, 15 U.S.C. § 717 et seq. and 18 C.F.R. Chapter I, respectively, nor the Commission's delegation orders, indicates that Staff may issue an NTP when contested matters are unresolved by the Commission. Indeed, a careful reading of the February Delegation Order dictates to the contrary. Under these circumstances, OEP exceeded its delegated authority, and the NTP must be declared a nullity.

Prior to the effective date of former Chairman Bay's resignation, FERC delegated certain decision-making authorities to Staff in its February Delegation Order, and authorized the continuation of existing delegations. None of these orders or regulations vest in staff the authority to grant a notice to proceed.

The Certificate Order contains multiple conditions requiring the Company to obtain written notification from the Director of OEP that activities for the Project can begin. However,

nothing in the Certificate Order gives the Director of OEP or his Staff the authority to issue an NTP when there are ongoing contested matters in the proceeding.

The general regulation governing delegations to OEP makes seven references to *uncontested* matters for which the OEP is granted delegated authority. *See* 18 C.F.R. § 375.308. Similarly, in the February Delegation Order, at II(D), (E), delegation authority is explicitly contingent upon the issue being uncontested. The clear implication is that the Commission itself is the sole arbiter of disputes, such as those in the instant case, arising under Natural Gas Act proceedings. Therefore, during this period when the Commission lacks quorum, Staff with delegated authority cannot issue orders in Natural Gas Act proceedings where matters remain in dispute. In this proceeding, TGP made various requests for an NTP for this Project, and they have all been contested.<sup>22</sup> Thus, OEP lacks the authority to issue an NTP for either tree cutting or further construction of the Project. While “judicial review of allegedly ultra vires agency action is favored” when no remedy is available from the agency, *Amgen Inc. v. Smith*, 357 F.3d 103, 113 (D.C. Cir. 2004), here the Commission should declare the NTP void.

Even if the Commission had itself issued the NTP, however, the NTP was issued in error, for the reasons set forth below.

## **2. The Commission Failed to Comply with Procedural Requirements of the NHPA and Its Implementing Regulations**

Pursuant to the NHPA and its implementing regulations, the Commission is required to “complete the section 106 process ... 'prior to the issuance of any license.’” 36 C.F.R. § 800.1(c). However, the Adverse Effect Notification was issued more than nine months after the Certificate Order was issued – clearly indicating that a “license” (the Certificate Order) was issued prior to

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<sup>22</sup> *See* submittals at the following docket accession numbers: 20160324-5012, 20160325-5059, 20160331-5111, 20170130-5067, 20170206-5091, 20170216-5058, 20170216-5176, 20170327-5121, 20170405-5091, 20170407-5121, and 20170410-5045.

the completion of the section 106 process. The NITHPO, the Nolumbeka Project, and MassPLAN have all asserted a continued interest in seeing that ceremonial stone landscape features along the proposed route are protected, rather than dismantled or bulldozed for construction, or damaged by tree felling activities.<sup>23</sup>

As set forth in the NITHPO's April 12, 2017 Answer in Opposition, the Commission failed to consult with the tribes after the CSL Survey report was filed,<sup>24</sup> as required under 36 C.F.R. § 800.5(d)(2) (“If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to 800.6.”). The NITHPO's answer in opposition to the NTP specifies: “FERC did not consult with NITHPO after the report on CSLs was filed, and therefore did not comply with 36 C.F.R. § 800.6(a). What FERC did do was to tell NITHPO (and the other tribes) ... what TGP was going to do.”<sup>25</sup>

Under 36 C.F.R. § 800.1(c), the Commission is prohibited from authorizing any work that could “restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.” *Id.* If the NTP is allowed to stand and tree felling and construction activities begin, the “subsequent consideration of alternatives” will be irrevocably “restricted”.

Moreover, MassPLAN and the general public were never notified by the Commission of any opportunity for public involvement to resolve adverse effects, in direct violation of the Commission's obligations under 36 C.F.R. § 800.6(a)(4). *See Comm. for the Pres. of the Seattle FRB Bldg. v. FRB of San Francisco*, No. C08-1700RSL, 2010 U.S. Dist. LEXIS 26084, \*14

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23 *See generally* NITHPO Letter, January 30, 2017; Nolumbeka Project Letter, January 12, 2017, Accession No. 20170112-5107 available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14465172>; MassPLAN January 30, 2017 Answer in Opposition, p. 3. Accession No. 20170130-5209, available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14477194>.

24 NITHPO Answer in Opposition, April 12, 2017, p. 8, Accession No. 20170412-5079, available at <https://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14557111>.

25 NITHPO Answer in Opposition, April 12, 2017, p. 8.

(W.D. Wash. March 19, 2010) (noting of § 800.6(a)(4) that an “agency is specifically required to seek the public's views on resolving adverse effects of the undertaking”). *See also Reytblatt v. United States NRC*, 323 U.S. App. D.C. 101, 105 F.3d 715, 722 (D.C. Cir. 1997) (agency “need not address every comment, but it must respond in a reasoned manner to those that raise significant problems.”). *Cf. Penobscot Indian Nation v. United States HUD*, 539 F. Supp. 2d 40, 50-51 (D.D.C. 2008) (“The [D.C. Circuit] has not required a particularly robust showing of prejudice in notice-and-comment cases, holding that ‘an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure.’”)

**3. The Commission Violated the Natural Gas Act and Its Own Policies By Failing To Reexamine Its Finding of Project Need When Presented with New Information About LDC Demand Forecasts and Anticipated Regulatory Action in Connecticut**

Public necessity (*i.e.*, project need) should be at the heart of all decisions under the Natural Gas Act concerning certification and construction of natural gas infrastructure. See 15 U.S.C. § 717f. Here, the changed realities in the Connecticut energy landscape render the Commission's findings of “need” for this Project outdated and erroneous.

The Project’s precedent agreements were *conditionally* approved three and a half years ago by the Connecticut Public Utilities Regulatory Authority (“PURA”).<sup>26</sup> At that time, Connecticut was embarking on a three-year comprehensive energy strategy (“CES”), with gas expansion as a major component.<sup>27</sup> The precedent agreements’ approval was premised on what have proved to be inaccurate forecasts submitted by the Project shipper LDCs. Demand for gas

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<sup>26</sup> See November 22, 2013 order in Docket No. 13-06-02, *PURA Investigation of Connecticut's Local Distribution Companies' Proposed Expansion Plans to Comply with Connecticut's Comprehensive Energy Strategy* (“PURA Order”), p. 25 (available at <http://www.dpuc.state.ct.us/zzdockcurr.nsf/8e6fc37a54110e3e852576190052b64d/aa2f0bb497ab610b85257c2b006c2342>).

<sup>27</sup> See MassPLAN's Answer in Opposition To Requests for NTP, April 7, 2017.

has not increased as predicted, and the role of natural gas in the next iteration of the CES is still an open question. A draft of the new CES is anticipated imminently. When PURA conditionally approved the precedent agreements back in November of 2013, it expressed concerns about relying on the aggressive demand forecasts.<sup>28</sup> The PURA Order therefore **requires** that the Project shipper LDCs revisit the contracts in the event that demand projections prove substantively inaccurate:

[T]he Authority will direct the Companies to examine whether the proposed capacity plan is still fully needed to meet the expected increase in the design peak day demand. ***If the full amount of the capacity plan is no longer needed*** to meet the [utilities] expected design peak day demands or if the timetable for need has changed, the ***Companies shall submit a modified capacity plan*** for the Authority's approval.<sup>29</sup>

With oil-to-gas conversion efforts of the Connecticut utilities continuing to fall significantly short of projections, downsizing of the above-mentioned capacity plan is anticipated. Because the purpose of this Project is to fulfill the “capacity plan,” logic dictates that the scope of Project need will be reduced as the state regulatory process plays out over the next few months. *See 1000 Friends of Wisconsin v. U.S. Department of Transportation*, Case No. 11-0545 (E.D. Wis. May 22, 2015) (finding no need for major highway in light of agency's reliance on outdated demographic information). *See also PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (2005) (remanding Commission decision for failure to meaningfully respond to objections raised by party to proceeding); *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (“[a]n agency's 'failure to respond meaningfully' to objections raised by a party renders its decision arbitrary and capricious.”).

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<sup>28</sup> *See id.*; *see also MassPLAN Answer in Opposition to Requests for Notice to Proceed*, April 7, 2017.

<sup>29</sup> PURA Order, p. 25 (emphasis added).

The Commission's own policy statement governing review of the Project provides:

Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects.

*FERC Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities*, Docket No. PL99-3-000, 88 FERC ¶ 61,227 (Sept. 15, 1999) (the “Certificate Policy Statement”), p. 23. Here, where precedent agreements were conditionally approved based on demand projections that have proved incorrect after the Certificate Order was issued, the entire foundation for the Project is crumbling.

It is highly improbable that all three loops of the Project are now “necessary” under any rational standard, and issuance of an NTP under these changed circumstances, in light of the “residual adverse effects” described herein, is a violation of the Natural Gas Act, the Certificate Policy Statement, and the regulations governing the Commission.

#### **4. The Commission Failed to Supplement Its Environmental Review of the Project When Faced with Significant New Circumstances and Information Relevant to Environmental Concerns, in Violation of NEPA and Its Implementing Regulations**

In accordance with NEPA, 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, 40 C.F.R. Parts 1500-08, an agency must prepare a supplemental environmental analysis when “[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). In the instant case, over the objection of multiple parties advocating for the preparation of a full environmental impact statement, OEP released an EA in October of 2015, stating that “the impacts associated with this Project could be sufficiently mitigated to support a finding of no significant impact.”<sup>30</sup>

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<sup>30</sup> EA, p. 4.

In evaluating whether the Project would “significantly” impact the environment, the Commission was and remains obligated to consider the “intensity” of impacts, including, “Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27 (b)(3). As the Certificate Order states, “CEQ regulations require an EA to include a brief discussion of the need for the proposal, alternatives to the proposal, and the environmental impacts of the alternatives.”<sup>31</sup>

The NTP was issued more than 18 months after the EA without further environmental review, despite significant new circumstances and information bearing on the need for the Project, its impacts on cultural resources, and Project alternatives, all of which came to light *after* the Certificate Order was issued. As further detailed below, the lack of supplemental environmental analysis prior to the issuance of the NTP constitutes a violation of NEPA and its implementing regulations.

**(a) *The CSL Survey Report Constitutes Significant New Information Relevant to Environmental Concerns***

As discussed in IV.2 above, the CSL Survey report was filed with the Commission in October of 2016, nearly a year after the issuance of the EA. Pursuant to NEPA and its implementing regulations, the Commission was and is required to prepare environmental review documents “concurrently with and integrated with environmental impact analyses and related surveys and studies” required by the National Historic Preservation Act (40 CFR 1502.25(a)). However, the CSL Survey was conducted months after the Certificate Order was issued, and the report on the study was completed nearly a year after the EA was issued. The findings of the CSL Survey alone triggered the requirements of supplemental analysis pursuant to 40 C.F.R. §

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<sup>31</sup> Certificate Order, para. 70, at p. 23.



1502.9(c)(1)(ii), but instead, FERC's Staff issued the NTP, in violation of NEPA and its implementing regulations.

**(b) *With the Cancellation of the NED Project, a More Appropriate Alternative Route Became Available After the Certificate Order Was Issued***

An alternatives analysis is the “heart” of NEPA review, and the Commission's failure to supplement its alternatives analysis after the cancellation of the Company's NED Project constitutes a violation of NEPA and its implementing regulations. *See* 40 C.F.R. § 1502.14, 40 C.F.R. § 1502.9(c)(1)(ii).

Throughout the review process, members of MassPLAN urged the Commission and other regulatory agencies to consider a variety of alternatives. One alternative to the Massachusetts Loop raised during the Commission's review was a loop that was immediately south to the Project's Connecticut Loop that was simultaneously under review as part of the Company's NED Project.<sup>32</sup> This alternative was not acknowledged in the EA or the Certificate Order. The EA did state that the NED Project would serve a different purpose from the instant Project. However, approximately six weeks after the Certificate was issued, the Company suspended the NED Project, and in May of 2016, the Company cancelled the NED Project altogether. This cancellation freed up the NED Connecticut Loop for use as part of the Connecticut Expansion.

The Commission previously wrote off the Connecticut NED Loop as a viable alternative to this Project's Massachusetts Loop because NED was still on the table. Given the passage of time, change of circumstances, the fact that the project was designed to serve Connecticut, and the impacts of the Massachusetts Loop to sensitive environmental and cultural resources, this

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<sup>32</sup> *See, e.g.*, October 29, 2014 Transcript of Scoping Hearing, comments of Jane Winn of Berkshire Environmental Action Team, Inc., p. 30, lines 10-17 (“For example, in Kinder Morgan[']s proposal for the [N]ortheast [E]nergy [D]irect pipeline, they[']re showing a loop in Connecticut that[']s just south of the Agawam to Connecticut loop shown in the Connecticut Expansion. There[']s no reason that we can see why this south of Agawa[m] Connecticut loop is not an alternative to placing a loop in Sandisfield. Importantly, the south of Agawa[m] Connecticut loop is all in Connecticut.”)

alternative route – already evaluated and chosen by the Company as a viable new loop – should be under consideration if the Project is to be constructed.

Given that the Project was designed to serve Connecticut utilities, if those utilities still need the Project at all, this alternative Connecticut routing option should be considered, rather than impacting Massachusetts conservation land and historically important and sacred cultural sites, in violation of NHPA, NEPA, and their implementing regulations, and unnecessarily preempting the Massachusetts constitution. *Cf. Idaho v. I.C.C.*, 35 F.3d 585 (D.C. Cir. 1994) (finding that agency failed to take a hard look at impacts when it deferred to findings in other permits); *1000 Friends of Wisconsin v. U.S. Department of Transportation*, Case No. 11-0545 (E.D. Wis. May 22, 2015) (finding that agency relied on outdated information and therefore more benign alternatives should have been considered); *see also PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d at 208.

**(c) *Reduced Project Need Necessitates a Reexamination of the Scope of the Project***

As discussed in Part IV.4 above, the data on the ground in Connecticut show that demand forecasts provided by the LDCs to secure approval of the Project precedent agreements have, with the passage of time, proved to be overblown. Because the PURA Order requires a reevaluation of the “capacity plan” embodied in the precedent agreements, and because the heavy reliance on gas in the 2013 CES is being rethought by Connecticut decision makers who are in the midst of drafting a new CES, a reopening of the Connecticut proceeding to reduce the volume of the precedent agreements is likely to be undertaken soon. By failing to address this new and highly significant information pertaining to reduced Project need before the issuance of an NTP, the Commission violated NEPA and its implementing regulations. *See 1000 Friends of Wisconsin*.

## **V. COMMUNICATIONS**

Communication and correspondence regarding this proceeding should be served upon:

Kathryn R. Eiseman, Director  
Massachusetts PipeLine Awareness Network  
17 Packard Road  
Cummington, MA 01026  
info@massplan.org  
(413) 320-0747

## **VI. CONCLUSION**

For the reasons set forth herein, MassPLAN and its members respectfully request that the Commission grant this request for rehearing and rescission of the NTP, or issue an order declaring that the NTP is void and without legal effect.

Respectfully submitted,



Kathryn R. Eiseman, Director  
Massachusetts PipeLine Awareness Network  
17 Packard Road  
Cummington, MA 01026  
info@massplan.org  
(413) 320-0747

April 24, 2017

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

_____ )	
Tennessee Gas Pipeline Company, L.L.C. )	Docket No. CP14-529
Connecticut Expansion Project )	
_____ )	

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the Massachusetts PipeLine Awareness Network's Request for Rehearing of the Notice To Proceed upon all parties listed on the official service list compiled by the Secretary for this proceeding, and upon additional individuals at the following email addresses:

- cheryl.lafleur@ferc.gov
- colette.honorable@ferc.gov
- danny.laffoon@ferc.gov
- terry.turpin@ferc.gov
- elaine.baum@ferc.gov
- rich.mcguire@ferc.gov
- eric.howard@ferc.gov
- jacqueline.holmes@ferc.gov
- kenneth.yu@ferc.gov
- rnelson@achp.gov
- matthew.beaton@state.ma.us
- matthew.ireland@state.ma.us
- martin.suuberg@state.ma.us
- leo.roy@state.ma.us

Dated this 24th day of April, 2017.



Kathryn R. Eiseman, Director  
 Massachusetts PipeLine Awareness Network  
 17 Packard Road  
 Cummington, MA 01026  
 info@massplan.org  
 (413) 320-0747

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