

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

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Tennessee Gas Pipeline Company, L.L.C. )  
Connecticut Expansion Project )  
\_\_\_\_\_ )

Docket No. CP14-529

**MASSACHUSETTS PIPELINE AWARENESS NETWORK'S  
MOTION TO STAY NOTICE TO PROCEED**

Pursuant to Rule 212 of the Rules of Practice and Procedure for the Federal Energy Regulatory Commission (the “Commission”), 18 C.F.R. § 385.212, the Massachusetts PipeLine Awareness Network (“MassPLAN”) hereby moves, on behalf of itself and its members,<sup>1</sup> for a stay of the Notice to Proceed with Tree Clearing and Construction (“NTP”) granted to Tennessee Gas Pipeline Company, L.L.C. (“TGP” or the “Company”) by Commission staff on April 12, 2017 for the above-captioned Connecticut Expansion Project (the “Project”), and for a stay of all tree felling, and all preparatory activity for tree felling and construction of the Project.

On April 25, 2017, MassPLAN filed a request (the “Request”) for rehearing of the NTP on several grounds, set forth in detail in the Request, which is incorporated herein by reference. In sum, the rehearing Request is based on multiple legal errors by Staff and the Commission, including the fact that 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, as set forth in detail in the Request, 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 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

<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.

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.

### **STANDARD FOR STAY**

Pursuant to the Administrative Procedure Act, the Commission has the authority to stay its actions, including the actions of its staff, when “justice so requires.” 5 U.S.C. § 705. The four factors to be considered are as follows: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009).

#### **1. MassPLAN Is Likely to Succeed on the Merits**

MassPLAN has raised several issues in the rehearing Request. As set forth in the Request, the lack of authority for staff to issue an NTP is evident, where contested matters remain unresolved, as in the instant case. It is also indisputable that the Commission failed to comply with NHPA and its implementing regulations because an NTP was issued even though no process for public involvement had been undertaken, as required under 36 C.F.R. § 800.6(a) (4), to address the adverse effects to historically important cultural resources that were acknowledged by the Commission. Moreover, there is now a demonstrable lack of need for this Project and accordingly, the underlying precedent agreements may be revised or rescinded.

Finally, there is an alternative route that became available upon the cancellation of the Company's Northeast Energy Direct project and that would avoid any impacts to the vigorously defended natural resources as well as newly identified cultural resources. All of these factors warrant consideration. Accordingly, there is a strong likelihood of success on the merits because the NTP was issued without the Commission first supplementing its environmental review, in violation of the National Environmental Policy Act (“NEPA”) and its implementing regulations, as well as being issued in violation of NHPA and its implementing regulations, and of the Natural Gas Act and regulations and policy statements governing the Commission.

## **2. Imminent Irreparable Harm to MassPLAN and Its Members**

Regarding the second factor, it is commonsense to the public at large that the bulldozing of historic sites sacred to the indigenous peoples of this area and clearcutting of mature forest in “permanently protected” public land constitutes an irreparable harm. It would be an irreparable harm specifically to MassPLAN, which exists to promote sustainable and appropriately scaled and sited energy infrastructure, as well as our coalition members, including the Berkshire Environmental Action Team, Inc., for which being a “watchdog for the environment of Berkshire County” is a primary organizational purpose, and the Nolumbeka Project, Inc., whose mission is in part “to protect and preserve sites sacred to, and of historic value to, the Native Americans/ American Indians of New England.” Additionally, if clearcutting occurs in conservation land, in abrogation of the public trust and the protections afforded by Article 97 (“Article 97”) of the Articles of Amendment to the Constitution of the Commonwealth of Massachusetts, the visceral damage to land trusts such as the Nashoba Conservation Trust will be irreparable.<sup>2</sup> *See*

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<sup>2</sup> While the easements through Article 97 land in Otis State Forest have already been taken through an eminent domain proceeding, the decision allowing the taking was made by a lower court state judge and has no binding precedential value. Actual damage to conservation land, with images circulated in the media of trees being felled, will make the impact of the taking far more palpable to the land conservation community.

comments of the Attorney General of Massachusetts<sup>3</sup> (raising concerns about “the potentially detrimental, long-term effects on governmental and private entities' ability to acquire and hold Article 97 land in trust for conservation purposes if such permanent, constitutional protections are subject to dissolution to accommodate a private pipeline project.”).

**3. No substantial injury to other parties from the stay; benefit to most parties from stay**

As for the third factor, most of the parties to the proceeding would also benefit from a stay. The parties that have requested rehearing of the Certificate Order also sought a stay at that time, to preserve the status quo. The Narragansett Indian Tribe Historic Preservation Office has also sought to intervene in the proceeding and protect the cultural resources threatened by the Project. Most of the intervenors and individuals filing public comments have sought to prevent construction and tree felling. The Company, meanwhile, will not be harmed significantly by a Stay of the NTP. Any short-term delay to TGP’s schedule that would result from the grant of a stay would not outweigh the permanent damages that would occur absent a stay. *See Citizen’s Alert Regarding the Env’t v. U.S. Dep’t. of Justice*, No. 95-1702 (GK), 1995 WL 748246, \*11 (D.D.C. Apr. 15, 1995) (finding that potential loss of revenue, jobs, and monetary investment that would be caused by project delay did not outweigh “permanent destruction of environmental values that, once lost, may never again be replicated”).

**4. The public interest lies with granting the stay**

The public interest weighs heavily in favor of preventing irreparable harm to the environment and the historically significant ceremonial stone landscapes that would be destroyed if tree felling and construction activities were allowed to proceed. MassPLAN's Request for

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<sup>3</sup> Massachusetts Attorney General's Comments on Environmental Assessment, November 16, 2015, Accession No. 20151116-5189, p. 2, available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14046338>.

rehearing is partially based on harm to the public that would arise if the Project were allowed to proceed without proper adherence to the public involvement requirement set forth in the NHPA regulations. Staying the NTP to allow time for re-sizing the capacity contracts to match actual natural gas demand, as prescribed in the order issued by Connecticut's Public Utilities Regulatory Authority conditionally approving the contracts, is in the interest of Connecticut ratepayers. The public interest in the Commonwealth of Massachusetts also lies in preventing an industrial development project in land that was set aside for “permanent” protection from development just one decade ago, at significant expense to the Commonwealth – particularly when alternatives have become available and Project need is newly in question.

### **JUSTICE REQUIRES GRANTING A STAY**

In sum, justice requires granting MassPLAN’s request for a stay of the NTP. Without a stay of the NTP, MassPLAN and its members may be left without an adequate remedy at law to address their injuries. As U.S. Senators Elizabeth Warren and Edward Markey stated in their recent letter to Acting Commission Chair LaFleur:

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 by Tennessee Gas. The people of Western Massachusetts deserve nothing less.<sup>4</sup>

To allow tree felling and construction activities to continue while the rehearing requests remains pending would contravene NEPA’s and NHPA’s purposes, and deprive MassPLAN and its members of the chance to obtain a full remedy under the law. Because MassPLAN seeks to compel the Commission to follow federal laws designed to protect natural and cultural resources, and because granting a stay pending review of the NTP on rehearing would in fact preserve would in fact preserve these resources, justice requires that the stay be granted.

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<sup>4</sup> 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>.

**CONCLUSION**

For the foregoing reasons, MassPLAN and its members respectfully request that this motion to stay the NTP, and to stay tree felling, and all preparatory activity for tree felling and construction of the Project, be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'K. Eiseman', with a long horizontal flourish extending to the right.

Kathryn R. Eiseman, Director  
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April 24, 2017

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

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Tennessee Gas Pipeline Company, L.L.C. )	Docket No. CP14-529
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the Massachusetts PipeLine Awareness Network's Motion to Stay 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
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Dated this 24th day of April, 2017.



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