

January 30, 2017

Kimberly Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street NE  
Washington D.C. 20426

Re: Connecticut Expansion Project Docket No. CP14-529  
Request for Action on Pending Rehearing Request and  
Opposition to TGP Request to Proceed With Tree Felling

Dear Ms. Bose,

My law firm represents the Sandisfield Taxpayers Opposing the Pipeline (S.T.O.P.) in the above-captioned proceeding. We write (1) to oppose Tennessee Gas Pipeline's (TGP) renewed request to commence tree felling in advance of receipt of all federal permits as required by Condition 9 of the Certificate issued on March 11, 2016, *Tennessee Gas Pipeline*, 154 FERC ¶ 61,191(2016) ("Certificate Order") (2) to urge the Commission to immediately rule on S.T.O.P.'s request for rehearing filed on April 11, 2016 or in the alternative to stay the proceeding. With Chairman Norman Bay's resignation effective as of February 3, 2017, the Commission will no longer have a quorum to act on S.T.O.P.'s rehearing request, which will leave S.T.O.P. without the ability to seek judicial review before the project moves forward. Discussion follows.

## **I. Background**

Given that this proceeding has gone on for several years, we provide some background. S.T.O.P. is comprised of a group of landowners and taxpayers who live or own property in Sandisfield, Massachusetts, one of the communities crossed by the pipeline. Many of S.T.O.P.'s members own property that will either be acquired by Tennessee Gas to construct and operate the Connecticut Expansion Project or will otherwise be affected by project construction. Most of these properties are heavily wooded, and will necessitate felling of trees to make way for the pipeline. S.T.O.P. and its members have participated extensively in this proceeding, filing numerous comments in opposition to the project.

On March 11, 2016, the Commission, over S.T.O.P.'s objections, issued a certificate to TGP for the Connecticut Expansion Project. As relevant here, Condition 9 of the Certificate states:

Prior to receiving written authorization from the Director of OEP to commence construction of any project facilities, Tennessee shall file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

On March 22, 2016, TGP requested a notice to proceed with tree-felling even though it failed to obtain a Section 401 water quality certificate from the Massachusetts Department of Environmental Protection (DEP) which is a prerequisite to commencing construction, which includes tree-felling, under Condition 9 of the Certificate. On March 23, 2016, S.T.O.P. filed a notice of intent to sue both TGP and the Commission under the Clean Water Act, arguing that the Commission's issuance of the Certificate Order prior to a grant of a Section 401 water quality certificate violated the Clean Water Act. Two days later, on March 25, 2016, S.T.O.P. filed an opposition to TGP's request, arguing that proceeding with tree-felling prior to issuance of a Section 401 water quality certificate would violate both the Clean Water Act and Condition 9 of the certificate. Finally, on April 16, 2016, S.T.O.P. filed a timely rehearing request of the Certificate Order.

Apparently, the Commission took seriously S.T.O.P.'s Notice of Intent to Sue and its objections to TGP's request for a notice to proceed because TGP's request was never granted. The Massachusetts DEP issued a water quality certificate for the project in June 2016, however, the certificate was appealed to both Massachusetts DEP's Office of Appeals and Dispute Resolution and also the United States Court of Appeals for the First Circuit.<sup>1</sup> Under Massachusetts DEP regulations, an appeal stays the effectiveness of the water quality certificate and as such, it is not considered a final federal authorization for purposes of compliance with Condition 9.

In its renewed request to commence tree-felling filed on January 27, 2017, TGP contends that the Massachusetts water quality certificate is valid - indeed, somewhat deceptively, TGP omits any reference to the outstanding appeals from

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<sup>1</sup> See *Berkshire County News*, online at [http://www.masslive.com/news/index.ssf/2016/10/berkshire\\_county\\_natural\\_gas\\_p.h.tml](http://www.masslive.com/news/index.ssf/2016/10/berkshire_county_natural_gas_p.h.tml) (summarizing status of proceedings).

its letter. TGP also argues that it must be granted authorization to commence tree felling by February 8, 2017 to place the project in service by November 17, 2017.

Meanwhile, the Commission has yet to rule on S.T.O.P.'s pending rehearing request. S.T.O.P. challenged the Certificate Order on multiple grounds including lack of project need, the project's subsidization by captive ratepayers in violation of the Commission's Certificate Policy Statement and adverse and irreparable impacts to the environment, safety and property values in Sandisfield and availability of less damaging alternatives.

Finally, there is one last relevant development of note. Last week, following the announcement that Commissioner LaFleur will become acting Chair of the Commission, Chairman Norman Bay submitted his resignation from the Commission, effective February 3, 2017. With Chairman Bay's departure, only two Commissioners remain. As a result - and as the United States Court of Appeals determined this past October 2016<sup>2</sup> - two Commissioners are not a quorum, and therefore, until a third Commissioner joins, the Commission cannot act.

## **II. The Commission Must Deny TGP's Request to Proceed**

Condition 9 prohibits TGP from commencing construction without valid federal authorizations. The Section 401 water quality certificate has been stayed by Massachusetts DEP pending resolution of the outstanding appeals and therefore, the prerequisite in Condition 9 for commencement of construction have not yet been met.

Tree-felling constitutes commencement of construction. The United States Environmental Protection Agency ("EPA") is the agency charged with overseeing the implementation of the CWA, and it has promulgated criteria for determining whether a new source has commenced construction.<sup>3</sup> Specifically, construction of a new source has commenced if the owner or operator of said source has: "(i) Begun, or caused to begin as part of a continuous on-site construction program: (A) Any placement, assembly, or installation of facilities or equipment; or (B) Significant site preparation work including clearing, excavation or removal of existing buildings, structures, or facilities which is necessary for the placement,

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<sup>2</sup> See *Public Citizen v. FERC*, Docket No. 14-1244 (D.C. Cir. October 2016).

<sup>3</sup> See 40 C.F.R. § 122.29(b)(4) (emphasis added); see also EPA 2012 Construction General Permit (CGP), Appendix A (Definitions and Acronyms).

assembly, or installation of new source facilities or equipment; or (ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time." *Id.*

Because TGP has not satisfied Condition 9, the Commission must deny its request to move forward with tree-felling.

### **III. The Commission Must Immediately Act on S.T.O.P.'s Pending Rehearing Request.**

Clearly, S.T.O.P.'s Rehearing Request has significant merit. That is the only way to explain the fact that the Commission has been reviewing the request for ten months now, after having acted on rehearing requests that were filed later than the S.T.O.P. request.<sup>4</sup> If we are correct and the Commission views S.T.O.P.'s Rehearing Request as meritorious, it should GRANT the request for rehearing and vacate the Certificate before Chairman Bay departs the Commission. Alternatively, if the Commission is not yet prepared to issue an order granting the request for rehearing outright, it should find that S.T.O.P. is likely to succeed on the merits, and STAY the proceeding - along with all activity, including tree-felling - under the certificate.

Although S.T.O.P. believes that it is entitled to prevail on its petition for rehearing, it is imperative that the Commission rule on the pending rehearing petition before Chairman Bay departs the Commission -- irrespective of the eventual ruling. As noted earlier, after February 3, the Commission will no longer have a quorum and will not be able to rule on S.T.O.P.'s petition. Thus, S.T.O.P. will remain in long-term limbo - without any recourse to prevent TGP from commencing construction if the Commission allows it to do so but unable to seek judicial review without a final Commission decision on rehearing.

Given the current political climate, the nomination process for a successor to the Commission could be stalled for many months. Indeed, even in a best case scenario, the nomination process takes time. First, the President must appoint a

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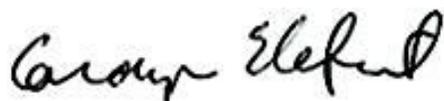
<sup>4</sup> Although at one time, action on a rehearing case could take as long as a year, this changed in February 2016 when the Commission created a special rehearing unit in the Solicitors' Office to expedite resolution of rehearing requests. *See RTO Insider*, online at <https://www.rtoinsider.com/ferc-rehearing-unit-22246/>. Since then, it has been unusual for rehearing requests to linger as long as the one filed by S.T.O.P.

nominee who is presented to the Senate Energy Committee for a hearing, after which the Committee must make a recommendation to the full Senate which must vote. Once the nominee ascends to the Commission, he or she must then review the entire record in order to participate in a decision. All told, even in a best case scenario, it may be at least four months before the Commission has a quorum and is ready to rule on S.T.O.P.'s rehearing request; a worst case scenario could be far longer.

In this context, it would be particularly unfair to grant TGP's request to proceed without concomitant action on S.T.O.P.'s rehearing request. Moreover, failure to act on S.T.O.P.'s rehearing request before February 3, 2017 will deprive S.T.O.P. of their due process rights as aggrieved parties to seek judicial review.

Accordingly, for the reasons set forth in this letter, the Commission must deny TGP's request to proceed and should immediately GRANT S.T.O.P.'s Rehearing Request and vacate the Certificate Order or grant a stay of all activity pending resolution of S.T.O.P.'s Rehearing Request. Should the Commission fail to take action on S.T.O.P.'s Rehearing Request -- which has been pending for ten months now -- before February 3, 2017 and instead, leave S.T.O.P. in limbo while a successor is chosen for the Commission -- S.T.O.P. will explore other legal remedies to protect its members' property and due process rights as well as the environmental health and safety of the broader community.

Respectfully submitted,

A handwritten signature in black ink that reads "Carolyn Elefant". The signature is written in a cursive, flowing style.

Carolyn Elefant