UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.	**)**	**Docket No. CP14-529-000**

ANSWER OF TENNESSEE GAS PIPELINE COMPANY, L.L.C. TO MASSACHUSETTS PIPELINE AWARENESS NETWORK'S MOTION TO STAY AND REQUEST FOR REHEARING

Over a year ago the Federal Energy Regulatory Commission ("Commission" or "FERC") found that Tennessee Gas Pipeline Company, L.L.C.'s ("Tennessee") Connecticut Expansion Project ("Project") was required by the public convenience and necessity and issued a certificate authorizing the construction and operation of the Project.[1] The Commission made this determination based on findings that: (i) the Project is fully subscribed for its entire capacity by three New England local distribution companies ("LDCs"); (ii) there are no adverse impacts on Tennessee's existing customers or other pipelines or their captive customers; and (iii) Tennessee's Project minimizes impacts on landowners and surrounding communities to the greatest extent possible by co-locating the Project with existing pipeline rights-of-way. After nearly 20 months of review, including a comprehensive environmental review that included the preparation of a 136-page (excluding appendices) Environmental Assessment ("EA")[2] the Commission issued the Certificate Order authorizing Tennessee to construct and operate three pipeline loops totaling 13.42 miles in length, in New York, Massachusetts, and Connecticut. As relevant here, the Massachusetts Loop is a 3.81-mile-long, 36-inch diameter loop on the 200 Line near the Town of Sandisfield, Massachusetts.

[1] *Tenn. Gas Pipeline Co.*. 154 FERC ¶ 61,191 (2016) ("Certificate Order").
[2] Tennessee Gas Pipeline Co., L.L.C., Environmental Assessment (issued Oct. 23, 2015) ("EA").

On April 12, 2017, after reviewing Tennessee's Implementation Plan and supplemental filings demonstrating that Tennessee had received all applicable authorizations required under federal law, Commission staff properly granted Tennessee's requests to proceed with tree clearing and full construction activities associated with the Project.[3] Massachusetts Pipeline Awareness Network ("MassPLAN") filed a Motion to Stay the Notice to Proceed and a separate Request for Rehearing of the Notice to Proceed on April 24, 2017.[4] In addition, prior to the issuance of the Notice to Proceed, the Narragansett Indian Tribal Historic Preservation Office ("NITHPO") raised arguments similar to MassPLAN's in an Answer in Opposition to Tennessee's Two Requests for Notices to Proceed filed on April 12, 2017.[5] As explained below, MassPLAN's Motion to Stay and Request for Rehearing and NITHPO's Answer lack merit and should be denied.

Pursuant to Rules 212 and 213 of the Commission's Rules of Practice and Procedure,[6] Tennessee respectfully moves to answer the rehearing request and requests the Commission accept this Answer to the MassPLAN's Motion to Stay and Request for Rehearing and to NITHPO's Answer.

MOTION TO ANSWER

Under the Commission's Rules of Practice and Procedure, Tennessee has the right to answer MassPLAN's Motion to Stay.[7] Although the Commission's procedural rules

[3] Tennessee Gas Pipeline Co., Notice to Proceed with Tree Clearing and Construction (Apr. 12, 2017) ("Notice to Proceed").
[4] Massachusetts Pipeline Awareness Network's Motion to Stay Notice to Proceed (Apr. 24, 2017) ("Motion to Stay"); Massachusetts Pipeline Awareness Network's Request for Rehearing of Notice to Proceed (Apr. 24, 2017) ("Request for Rehearing").
[5] The Narragansett Indian Tribal Preservation Office Answer in Opposition to Tennessee Gas Pipeline Co., L.L.C.'s Two Requests for Notice to Proceed (Apr. 12, 2017) ("NITHPO's Answer").
[6] 18 C.F.R. §§ 385.212 & 385.213 (2016).
[7] *Id*. § 385.212(a)(3).

generally do not allow for answers to rehearing requests,[8] the Commission may, for good cause, permit such an answer. The Commission has accepted answers for good cause when an answer will facilitate the decisional process or aid in the explication of issues. The Commission has explained it will accept answers to requests for rehearing in order to "assist[] in our decision-making process."[9] Because MassPLAN has introduced new arguments the Commission should accept Tennessee's Answer to ensure a complete and accurate record. Tennessee requests that the Commission (1) accept Tennessee's Answer, and (2) reject MassPLAN's Rehearing Request.

ANSWER

I. The Commission Should Deny MassPLAN's Motion to Stay

MassPLAN's Motion to Stay fails to satisfy the high legal standard mandated by the Administrative Procedure Act ("APA") for granting a stay.[10] Pursuant to Section 705 of the APA, the Commission can only grant a stay when "justice so requires."[11] In deciding whether justice requires a stay, the Commission considers the following factors: "(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest."[12] "If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay, [the Commission] need not examine the other

[8] *Id*. §§ 385.213(a)(2) & 385.713(d)(1).
[9] *Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 1 n.3 (2014), *pet. for review denied, Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015); *see also, Algonquin Gas Transmission Co.*, 83 FERC ¶ 61,200, at p. 61,893 n.2 (1998) (accepting an answer in order to ensure "a complete and accurate record"), *order amending certificate*, 94 FERC ¶ 61,183 (2001); *Transwestern Pipeline Co.*, 50 FERC ¶ 61,211, at p. 61,672 n.5 (1990) (citing *Buckeye Pipe Line Co., L.P.*, 45 FERC ¶ 61,046 (1988)).
[10] 5 U.S.C. §§ 500-596 (2012).
[11] *See Columbia Gas Transmission, LLC*, 146 FERC ¶ 61,116, at P 56 (2014) (citing 5 U.S.C. § 705); *pet. for review denied sub nom., Gunpowder Riverkeeper v. FERC*, 807 F.3d 267 (D.C. Cir. 2015).
[12] *Tenn. Gas Pipeline Co.*, 154 FERC ¶ 61,263, at P 4 (2016) (internal citation omitted); *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,103, at P 17 (2011); *Dominion Cove Point, LNG, LP*, 126 FERC ¶ 61,238, at P 16 (2009).

factors."[13] The Commission's "general policy is to refrain from granting stays [of its orders] in order to assure definiteness and finality in Commission proceedings."[14]

The key requirement is a showing of "irreparable harm." The "injury must be both *certain* and *great*, actual and not theoretical."[15] The movant must "substantiate the claim that irreparable injury is 'likely' to occur."[16] The mere possibility of irreparable harm is insufficient. MassPLAN "must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future."[17] MassPLAN has not met its burden.

A. MassPLAN Has Not Demonstrated It Will Be Irreparably Harmed if a Stay Is Not Granted.

The Motion to Stay alleges irreparable harm resulting from the "clearcutting of mature forest in 'permanently protected' public land" and in "conservation land."[18] However, the Commission has found already in this proceeding that such tree cutting does not rise to the level of irreparable harm as grounds for issuing a stay of the Certificate Order.[19]

In March of 2016, the group Sandisfield Taxpayers Opposed to the Pipeline ("STOP") filed a Motion for a Stay of the Certificate Order raising similar issues relating to tree clearing that MassPLAN now repeats.[20] The Commission denied STOP's Motion,

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[13] *Dominion*, 126 FERC ¶ 61,238 at P 16.
[14] *Tenn.*, 154 FERC ¶ 61,263 at P 4 n.4 ("Ensuring definiteness and finality in our proceedings also is important to the Commission.").
[15] *Ruby Pipeline*, 134 FERC ¶ 61,103 at P 18 (quoting *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).
[16] *Id.*; *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008).
[17] *Id.*
[18] Motion to Stay at 3.
[19] *Tenn.*, 154 FERC ¶ 61,263 at P 5. *See also, Del. Riverkeeper Network v. U.S. Army Corp of Engineers*, No. 17-1506 (3rd Cir. Mar. 21, 2017) (finding that impacts to wetlands did raise the level of irreparable because the impacts were short term in nature and would be mitigated).
[20] *See* Sandisfield Taxpayers Opposing the Pipeline, Motion for Stay of Order Issuing Certificate (Mar. 17, 2016).

noting specifically with respect to tree clearing, that the EA "concluded that tree clearing would have long-term impacts, but that such impacts would not be significant as mature trees would eventually re-establish themselves."[21] The Commission observed that "the entirety of the Massachusetts Loop will be within or directly adjacent to existing pipeline rights-of-way, which will reduce the amount of required tree clearing," and that following construction, "trees and shrubs would be allowed to grow within the temporary construction rights-of-way."[22] The Commission further explained that it has previously denied stays in circumstances similar to those alleged by STOP—and now by MassPLAN—where requests for stays were "premised on claims that tree cutting would cause irreparable harm."[23] The Commission also observed that courts have denied requests for stays based on similar alleged harm.[24] MassPLAN has offered no argument different than STOP in the previous stay request; a request that the Commission already denied.

Neither does MassPLAN's wholly inaccurate claim that the Commission failed to address the adverse effects of the Project on "important cultural resources"[25] rise to the level of irreparable harm. MassPLAN's hyperbolic allegation that Tennessee is "bulldozing" historic sites is wrong. Tennessee spent months working with the participating tribes, the Advisory Council on Historic Preservation ("ACHP"), and the

[21] *Tenn.*, 154 FERC ¶ 61,263 at P 5; *see also* Certificate Order at P 135 (noting that "the EA found that impacts on forest lands would be long-term, but not significant as it would take about 20 years for mature trees to re-establish") (internal citations omitted).
[22] *Id.*
[23] *Id*. at P 10 (citing *Enable Gas Transmission, LLC*, 153 FERC ¶ 61,055, at P 119 (2015), and *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 15 (2012)).
[24] *Id*. (citing *Catskill Mountainkeeper, Inc. v. FERC*, No. 16-345 (2d. Cir. Feb. 24, 2016) (denying stay of tree clearing activity); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (denying stay of tree clearing and construction of a 40-mile pipeline); *Coal. for Responsible Growth and Res. Conservation v. FERC*, No. 12-566, Order Denying Motion for Stay (2d. Cir. Feb. 28, 2012) (denying stay concerning clearing of 200,000 mature trees for a 39-mile greenfield natural gas pipeline)).
[25] Motion to Stay at 2.

Commission developing a plan to avoid, protect, minimize, and mitigate impacts to the features identified by tribes as ceremonial stone landscapes ("CSLs"). Through these significant efforts and at additional cost to Tennessee, the large majority of the features identified as CSLs in the Project area will be protected in place and avoided. For the features that Tennessee is unable to avoid for safety or other concerns, Tennessee will photo document and record the location and alignment of the features, remove the stones to a safe location during construction, and then return the stones to their original location. This process will preserve the stones for replacement and restoration into the same alignment post-construction.

During construction, the stones will be marked and fenced to avoid any inadvertent disturbance. After construction is completed, Tennessee will use appropriate construction equipment and hand labor to restore the stone features, in the same manner that Tennessee is restoring the stone walls impacted by the Project. Tennessee is implementing these measures consistent with the Ceremonial Stone Landscapes Avoidance, Minimization, and Mitigation Plan ("Treatment Plan")[26] that Tennessee implemented, in consultation with the Commission, the Advisory Council on Historic Preservation ("ACHP"), and participating tribes and pursuant to Memorandum of Agreement ("MOA") executed by the Commission and ACHP. Execution of the MOA demonstrates completion of the National Historic Preservation Act ("NHPA") Section 106 consultation process.[27]

[26] Tennessee Gas Pipeline Company, L.L.C., Connecticut Expansion Project, Supplemental Filing (Mar. 6, 2017) (filing *Treatment Plan for the Massachusetts Loop: Avoidance, Minimization and Mitigation* with FERC).

[27] 54 U.S.C. § 306108. *See* 36 C.F.R. § 800.6(c) ("A memorandum of agreement executed and implemented pursuant to this section evidences the agency official's compliance with section 106.")

MassPLAN has not provided any evidence—beyond unsupported assertions—that it will suffer irreparable harm, or that the alleged harm is both certain and great. Therefore, MassPLAN has not met its burden to demonstrate, "*by a clear showing*," that it would suffer irreparable harm warranting the "extraordinary and drastic remedy" of injunctive relief.[28]

B. Tennessee and Its Customers Will Suffer Substantial Harm if Construction of the Project Is Delayed Further.

Tennessee and its customers, on the other hand, will be harmed by a delay if a stay were granted. The construction schedule for the Project, which has already been delayed for more than a year, has been crafted to comply with various environmental permits and clearances that allow only limited time windows to perform certain critical construction activities. At this time, work preparing the site for construction activities has already commenced, consistent with Tennessee's authorizations. Any delay would have serious repercussions.

Tennessee must complete tree-clearing activities as soon as possible—but no later than May 31, 2017—in order to be able to place the Project in-service by the revised in-service date of November 1, 2017, as the Project's original in-service date of November 1, 2016 was already delayed.[29] Ensuring completion of tree-clearing by the May 31st deadline will also allow Tennessee to cut trees in a manner that maximizes protection of migratory bird habitat and meets federal permitting requirements.[30] Tennessee's Project shippers—all New England LDCs—are relying on the revised November 1, 2017 in-

[28] *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (citation omitted).
[29] Tennessee Gas Pipeline Company, L.L.C., Connecticut Expansion Project, Supplemental Filing (Jan. 27, 2017) (filing *Renewal of Request for Partial Notice to Proceed with Tree Felling* with FERC).
[30] *See* Tennessee Gas Pipeline Company, L.L.C., Connecticut Expansion Project, Request for Partial Notice to Proceed with Tree Clearing (Apr. 6, 2017).

service date to meet increased demands for natural gas during the 2017-2018 winter heating season. If a stay is granted, Tennessee may not be able to have the new natural gas transportation capacity ready for service in time to meet the shippers' contracted-for demand. Tennessee also risks losing substantial money and incurring significant increased construction costs if it fails to meet the November 1, 2017 in-service date, which is the type of economic harm to be considered in the balance of equitable interests.[31] Therefore, the balance of harms weighs heavily against granting the requested relief to MassPLAN as a stay would substantially harm Tennessee and its customers.

C. A Stay Would Be Contrary to the Public Interest.

Further delay in the construction schedule resulting from a stay would not only impose enormous costs on Tennessee; it would further delay, beyond the year already incurred, completion of a Project that is needed by producers and consumers in the natural gas marketplace. Indeed, in granting Tennessee a certificate of public convenience and necessity, the Commission already has found the Project to be in the public interest.[32] Thus, by definition, a stay will delay the benefits the Commission has already found will result from construction and operation of the Project.

D. MassPLAN Is Not Likely To Succeed on the Merits.

MassPLAN argues that it is likely to succeed on the merits of its separately filed Request for Rehearing. As demonstrated below, MassPLAN's arguments amount to little more than unsupported allegations, do not counter the overwhelming supportive evidence in the record and it is not likely to succeed on the merits.

[31] *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010).
[32] Certificate Order at PP 12, 17.

II. The Commission Should Deny MassPLAN's Request for Rehearing.

A. Commission Staff Has Proper Delegated Authority to Issue the Notice to Proceed Even in the Absence of a Quorum.

The Director of the Office of Energy Project ("Director") did not exceed his delegated authority by granting the Notice to Proceed in the absence of a quorum. Under the Department of Energy Organization Act of 1977, the Commission has authority to delegate actions to its staff.[33] The Director's authority to issue the Notice to Proceed is derived from the Commission's Certificate Order and the Commission's regulations governing delegations to the Director in Section 375.308 of the Commission's regulations, which were all issued when the Commission had a quorum.[34] The Certificate Order was issued on March 11, 2016 when there were four members of the Commission, which constitutes a quorum to transact regular business.[35] Such proper delegations continue even in the absence of a quorum, which is the case now.[36] Pursuant to authority delegated in the Certificate Order, the Director has the authority to act on the Notice to Proceed, even where the Commission lacks a quorum to act itself.[37]

The Certificate Order properly delegated to the Director both broad and specific authority to oversee the implementation of the environmental aspects of the order.

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[33] 41 U.S.C. § 7171(f) (authorizing the Commission "to establish such procedural and administrative rules as are necessary to the exercise of its functions"). *See also*, Delegation of the Commission's Authority to the Director of the Office of Electric Power Regulation, Order No. 132, 46 Fed. Reg. 14,119 (Feb. 26, 1981) (citing 41 U.S.C. § 7171(f) as authority to delegate functions to staff).

[34] 18 C.F.R. § 375.308. Delegations to the Director of the Office of Pipeline and Producer Regulation, the predecessor to the Office of Energy Projects, were originally made in Order No. 147 in 1981. *See* Delegation of the Commission's Authority to the Directors of Office of Electric Power Regulation, Office of the Chief Accountant, and Office of Pipeline Regulation and Producer Regulation, 46 Fed. Reg. 29,700 (June 3, 1981).

[35] *See* 42 U.S.C. § 7171(e) ("a quorum for the transaction of business shall consist of at least three members present").

[36] *See Frankl v. HTH Corp*., 650 F.3d 1334, 1354 (9th Cir. 2011) (holding that nothing in the National Labor Relations Board's quorum requirement would cause the board delegate's authority to take a delegated action to lapse after the board's membership fell below a quorum).

[37] Certificate Order, Environmental Condition No. 2.

Environmental Condition No. 2 to the Certificate Order gives the Director "delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project" allowing the Director to "modif[y] . . . conditions of the order" and "design and implement[ ] . . . additional measures deemed necessary (including stop-work authority) to assure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from project construction and operation."[38] In addition, throughout the Environmental Conditions, the Director is authorized to take specific actions to ensure compliance with the terms of the Certificate Order. For example, Environmental Condition No. 9 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).[39]

These delegations, therefore, authorize the Director to act on Tennessee's requests for Notices to Proceed. Such delegations were properly made when the Commission had a quorum and are still in effect today.

Furthermore, the Commission has delegated other specific powers to its office directors, including the Director, through regulation. The Commission's general delegations to the Director are in Section 375.308 of the Commission's regulations.[40] However, despite MassPLAN's arguments to the contrary, the Director has the authority to take actions on both *uncontested* and *contested* matters. While the regulations in

[38] *Id*.
[39] Certificate Order, Environmental Condition No. 9.
[40] 18 C.R. § 375.308.

certain places like Section 375.308(v)[41] do delegate to the Director the authority to take action on certain *uncontested* matters, the regulations also authorize the Director to take certain actions, whether there is a protest or not. Notably, Section 375.308(x) of the Commission's regulations allow the Director to, without qualification, "(7) [t]ake whatever steps are necessary to ensure the protection of all environmental resources during the construction or operation of natural gas facilities, including authority to design and implement additional or alternative measures and stop work authority."[42] Therefore, the Director has the proper delegated authority—and that delegation remains in effect even in the absence of a quorum—to issue Tennessee's Notice to Proceed in this proceeding.

B. The Commission Has Properly Completed the Consultation Process under Section 106 of the NHPA.

MassPLAN incorrectly asserts the Commission failed to comply with the procedural requirements of the NHPA, arguing that the Commission was required to complete the Section 106 process prior to issuance of the certificate.[43] In addition, MassPLAN cites NITHPO's Answer arguing that the Commission failed to consult with NITHPO.[44] As explained above and in Tennessee's previous Answer opposing NITHPO's late motion to intervene,[45] the Commission properly completed the Section 106 tribal consultation process, which included fully consulting with NITHPO. This consultation involved numerous in-person meetings, countless telephone calls, a full survey and report of CSLs identified on the Massachusetts Loop, and ultimately

[41] 18 C.F.R. § 375.308(v).
[42] 18 C.F.R. § 375.308(x). Commission staff's letter order granting Tennessee's Notice to Proceed denotes to this specific section. *See* Notice to Proceed at 1.
[43] Request for Rehearing at 11 (citing 36 C.F.R. § 800.1(c)).
[44] *Id.* at 12.
[45] Answer of Tennessee Gas Pipeline Co., L.L.C. to Motion to Intervene Out-of-Time of Narragansett Indian Tribal Historic Preservation Office (Apr. 12, 2017).

culminated in a Memorandum of Agreement ("MOA") between the Commission and the ACHP and the development and implementation of a Ceremonial Stone Landscapes Avoidance, Minimization, and Mitigation Plan ("Treatment Plan").

Section 106 of the NHPA requires Federal agencies conducting an "undertaking,"[46] to "take into account the effect of the undertaking on any historic property"[47] and to "afford the [ACHP] . . . a reasonable opportunity to comment with regard to such undertaking."[48] ACHP regulations establish that Section 106 requires the federal action agency to make a "reasonable and good faith effort" to identify historic properties and engage relevant stakeholders in preservation considerations.[49]

Here, under Section 106, the Commission ensured that the tribes were provided a reasonable opportunity to "identify its concerns," to "advise," to "articulate," and to "participate."[50] Consistent with the purpose and structure of the entire NHPA, Section 106 requires the Commission only to consider potential effects of the undertaking on tribal cultural and historic properties.[51] Tribal interests need not control or dictate an agency's determination or a project's outcome.[52]

The issuance of the Certificate Order conditioned upon completion of the Section 106 process prior to allowing construction of the approved facilities, constitutes

[46] 54 U.S.C. § 308108. "Undertaking" is defined as including actions "requiring a Federal permit, license, or approval. 36 C.F.R. § 800.16(y).
[47] 54 U.S.C. § 306108 ("historic property" is defined in 54 U.S.C. § 300308 as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register.")
[48] 54 U.S.C. § 306108.
[49] 36 C.F.R. § 800.4(b)(1).
[50] 36 C.F.R. § 800.2(c)(2)(ii)(A).
[51] 36 C.F.R. § 800.4.
[52] *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, at 168 (1st Cir. 2003) ("But consultation is not the same thing as control over a project.").

compliance with Section 106 of the NHPA.[53] The Commission has consistently conditioned the issuance of certificates of public convenience and necessity on completion of the Section 106 process.[54] In the Certificate Order, Commission explained that it "will not authorize construction of the project until the applicable and required federal authorizations are received, as required by Environmental Condition 9 of this order" including, among other things, "National Historic Preservation Act section 106 consultations."[55] The Commission explained that "[t]his approach is consistent with the Commission's broad conditioning powers under section 7 of the [Natural Gas Act]."[56] In addition to Environmental Condition No. 9, Environmental Condition No. 26 explicitly requires that "[p]rior to construction" Tennessee file with the Commission outstanding cultural resources surveys and treatment plans, allow the ACHP to "comment if historic properties would be adversely affected[,]" and ensure that Commission staff reviews and the Director "approve[] all cultural resources reports and plans, and notif[y] Tennessee" regarding the implementation of treatment plans and whether construction may proceed.[57] And that is exactly what happened in this case.

The Commission conducted a robust and thorough Section 106 consultation with NITHPO and other interested tribes. This was clearly demonstrated in the detailed timeline appended as Attachment A to Tennessee's Answer in to Motion to Intervene

[53] *See City of Grapevine, Tex. v. Dep't of Transp*., 17 F.3d 1502, 1509 (D.C. Cir. 1994) (holding that while it was "desirable for the § 106 process to occur as early as possible in a project's planning stage," approval conditioned upon completion of the Section 106 process was valid because the "[Federal Aviation Administration] did not approv[e] the expenditure of any Federal funds for the runway." (internal quotations removed)).
[54] *See Paiute Pipeline Co*., 151 FERC ¶ 61,132, at P 69 (2015); *Transcon. Gas Pipe Line Co., LLC*, 148 FERC ¶ 61,110, at P 71 (2014); *Sierrita Gas Pipeline, LLC,* 147 FERC ¶ 61192, at P 139 (2014).
[55] Certificate Order at P 34.
[56] *Id*. The Commission is referring to 15 U.S.C. § 717f(e) ("The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.").
[57] Certificate Order, Environmental Condition No. 26.

Out-of-Time of NITHPO, filed on April 12, 2017.[58] The Commission gave NITHPO and the other participating tribes ample opportunities to participate in the consultation process—and NITHPO did consult—regarding the effects of the Project. Under these circumstances, it is simply wrong to suggest, that the Commission's Section 106 consultation was a "breach[] [of] fiduciary duty through unconscionable delay," as argued by NIHTPO.[59] As demonstrated in the timeline, Tennessee made a concerted effort to ensure Tennessee and Commission staff heard the concerns of the tribes and incorporated their input into the Project plan, to the greatest extent possible.

Tennessee started informing interested tribes about the Project as early as September 2013.[60] Tennessee then sent project notification letters to federally-recognized Indian tribes, state-recognized tribes, and several Indian organizations in September 2014 as part of its information sharing responsibilities as the Project applicant. Commission staff sent consultation letters to tribes, including the NITHPO, the Mohegan Tribe, the Mashantucket (Western) Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), and the Stockbridge-Munsee Community ("Stockbridge"), formally initiating consultation with the tribes more than a year before the Certificate Order was issued.[61]

As demonstrated in the timeline, delays in setting up an in-person meeting persisted until December of 2015. At that meeting, the tribes in attendance expressed interest surveying a portion of the Project area in Massachusetts in the Town of Sandisfield for potential CSLs. After much negotiation and delay, agreements between

[58] Answer of Tennessee Gas Pipeline Co., L.L.C. to Motion to Intervene Out-of-Time of Narragansett Indian Tribal Historic Preservation Office, Attachment A (Apr. 12, 2017).
[59] NITHPO's Answer at 6-8.
[60] *See* Letter from Charlene Dwin Vaughn, ACHP to J. Rich McGuire, FERC, at 2(Jan. 27, 2017).
[61] *Id.*

Tennessee and the tribes to conduct the survey were executed in late August 2016. The CSL survey was finally conduced in September and a report detailing the survey findings was submitted by the tribes to the Commission on October 1, 2016 ("Survey Report").[62]

After the Survey Report was filed, Tennessee worked with its construction contractor to devise methods to avoid, protect, and minimize construction impacts on the features identified in the Survey Report. On November 30, 2016 the Stockbridge filed a letter with the Commission stating the Stockbridge "supports an approach of avoidance wherever possible and in this case, Stockbridge feels that replacing the stone features back in their initial position after construction constitutes wherever possible would also constitute avoidance."[63]

In December 2016, Tennessee, Commission staff, ACHP (via teleconference), the NITHPO, the Mohegan Tribe, the Mashantucket (Western) Pequot Tribe, the Wampanoag Tribe of Gay Head (Aquinnah), and Stockbridge met on the Pequot reservation to discuss the process for completing consultation and to review and comment on Tennessee's draft Treatment Plan to avoid the majority of the identified features and remove and replace the limited number of features that could not be avoided. NITHPO, the Mohegan Tribe, the Mashantucket (Western) Pequot Tribe, the Stockbridge-Munsee Community all commented on the draft Treatment Plan.

On December 29, 2016, the Commission sent a letter to ACHP requesting the ACHP's participation in the resolution of adverse effects on historic properties by being a

[62] Technical Report: Sandisfield Ceremonial Stone Landscape Survey for the Connecticut Expansion Project (Oct. 3, 2016).
[63] Mitigation Supported by Stockbridge-Munsee Community for Adverse Impacts of the Connecticut Expansion Project to Cultural Resources, at 2 (Nov. 30, 2016).

signatory to an MOA.[64] Days later, NITHPO commented again and reiterated its position that all identified features should be avoided.[65] In subsequent drafts of the Treatment Plan, Tennessee incorporated the comments of Commission staff, the ACHP, and the Stockbridge-Munsee Community fully into the Treatment Plan and the comments of the other tribes, to the greatest extent possible. All submitted comments were considered in this process, although not all comments could be incorporated fully. The Treatment Plan, therefore, incorporated appropriate mitigation to resolve those adverse effects.

ACHP officially notified the Commission that it intended to enter the Section 106 consultation in order to finalize an MOA "that includes a balance between project needs and historic preservation values." [66] As ACHP notes in that letter, while the Commission must consult in an attempt to reach a consensus, "consensus cannot always be achieved and the federal agency ultimately decides on the specifics of the resolution of adverse effects, after taking into account all the issues expressed by consulting parties during the negotiation of a mitigation plan."[67] Soon after the Commission distributed a draft MOA, NITHPO commented on the draft MOA stating that the proposal to remove and replace a number of identified stone features amounted to sacrilege and destruction. ACHP executed the MOA on February 24, 2017, completing the NHPA Section 106 process.

The MOA required Tennessee to complete and file the Treatment Plan with the Commission. Tennessee signed the MOA as a concurring party, and each of the five

[64] Letter from J. Rich McGuire, Director, Division of Gas-Environmental and Engineering, FERC to Reid Nelson, Director, Office of Federal Agency Programs, Advisory Council on Historic Preservation (Dec. 29, 2016).
[65] NITHPO, Response to – Notification of Adverse Effects for the Connecticut Expansion Project (Jan. 3, 2017).
[66] Letter from Charlene Dwin Vaughn, ACHP to J. Rich McGuire, FERC, at 3, FERC (Jan. 27, 2017). ACHP notified the Commission that it would participate in consultation to develop the MOA on February 8, 2017. Letter from John M. Fowler, Executive Director, ACHP to Acting Chairman Cheryl LeFleur, FERC (Feb. 8, 2017).
[67] *Id*.

consulting tribes were invited to sign as invited signatories. In the meantime, Tennessee continued to accept comments on its Treatment Plan from tribes, the Commission, and ACHP, and filed a final Treatment Plan on March 6, 2017 with the Commission, which was accepted on March 7, 2017.[68] As demonstrated by this timeline of events, NITHPO had multiple opportunities to consult on the resolution of adverse effects, and actually did so, in spite of is arguments to the contrary. The facts here belie NITHPO's position.

Neither is NITHPO a required signatory to the MOA, as argued in NITHPO's Answer.[69] While NITHPO has the right under the ACHP regulations to consult on possible historic properties of significance to the Narragansett off of tribal lands,[70] having such a right does not necessarily mean that NITHPO is a required signatory. 36 C.F.R. § 800.6(c)(1)(ii) states "[t]he agency official, the SHPO/THPO, and the Council are the signatories to a memorandum of agreement executed pursuant to paragraph (b)(2) of this section." However, this section is inapplicable to NITHPO in this context as the Project is not located on tribal lands. ACHP regulations define "Tribal Historic Preservation Officer" (or "THPO") as "the tribal official appointed by the tribe's chief governing authority or designated by a tribal ordinance or preservation program who has assumed the responsibilities of the [State Historic Preservation Officer] for purposes of section 106 compliance on *tribal lands*."[71] "Tribal lands" are defined as "all lands within the exterior

[68] Commission staff accepted the Treatment Plan as final on March 7, 2017.
[69] NITHPO's Answer at 10-11.
[70] 36 C.F.R. § 800.2(c)(2)(ii). NITHPO incorrectly cites 36 C.F.R. § 800.2(c)(1)(ii), which applies only to "undertakings on tribal lands." That is not the case here.
[71] 36 C.F.R. § 800.16(w) (emphasis added).

boundaries of any Indian reservation and all dependent Indian communities"[72] Because there are no tribal lands affected by the Project, NITHPO is not a required signatory.[73]

ACHP guidance also makes clear that a federal agency is not required to invite a relevant tribe to sign or concur with the MOA when the federal undertaking occurs off of tribal lands and that refusal by the invited tribe to sign or concur does not invalidate the MOA.[74] In any event, NITHPO was invited to be a signatory to the MOA under 18 C.F.R. § 800.6(c)(2)(ii), which states the "agency official may invite an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties."[75] The fact that NITHPO has so far declined that invitation does not invalidate the MOA. The Commission, therefore, properly conducted and concluded the Section 106 process for the Project.

C. The Project Is Required by the Public Convenience and Necessity.

MassPLAN asserts that "the Commission's findings of 'need' for [the] Project outdated and erroneous"[76] arguing essentially that the Project shippers—all LDCs—relied on inaccurate forecasting of natural gas demand, and that these LDCs are required by the Connecticut Public Utilities Regulatory Authority to "revisit the [Project's] contracts in the event that demand projections prove substantively inaccurate."[77] MassPLAN concludes that "logic dictates that the scope of Project need will be reduced

[72] *Id.* § 800.16(x).
[73] *See PacifiCorp*, 133 FERC ¶ 61,232, at P 121 n.137 (2010) (noting that a tribes signature is not required on an MOA to complete consultation with respect to a hydropower project license that is not located on tribal lands), *clarified on reh'g*, 135 FERC ¶ 61,064 (2011).
[74] Consultation with Indian Tribes in the Section 106 Review Process: A Handbook, ACHP, at 26 (Dec. 2012), available at http://www.achp.gov/docs/consultation-indian-tribe-handbook.pdf.
[75] 18 C.F.R. § 800.6(c)(2)(ii).
[76] Request for Rehearing at 13.
[77] Request for Rehearing at 14.

as the state regulatory process plays out over the next few months."[78] In fact, the Commission's finding of need is not altered by MassPLAN's arguments, as the shippers are still contracted for the capacity supporting the Project.

In the Certificate Order, the Commission explained that Tennessee has entered into long-term precedent agreements with LDCs "for all of the capacity to be created by the project."[79] The Commission considers precedent agreements such as these to be "significant evidence of need or demand for a project,"[80] and therefore appropriately found that the public convenience and necessity thus requires approval of the Project. Nothing alleged by MassPLAN changes the fact that Tennessee has valid, enforceable contracts with three LDCs whose residential and commercial customers need the natural gas that will be transported by the Project facilities. These long-term precedent agreements underpinning the Commission's finding of need have not changed—the LDCs are still relying on Tennessee to meet demand for natural gas by the winter heating season.

MassPLAN's arguments essentially boil down to an impermissible collateral attack on the Commission's finding of Project need in the Certificate Order. MassPLAN's arguments regarding Project need have nothing to do with the Commission's issuance of the Notice to Proceed, but instead solely relate to the

[78] Request for Rehearing at 14.
[79] Certificate Order at P 17.
[80] *Arlington Storage Co.*, 128 FERC ¶ 61,261, at P 8 (2009); *see also Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 23 (2015) (long-term commitments for capacity "constitute strong evidence that there is market demand for the project."), *reh'g denied*, 154 FERC ¶ 61,048 (2016), *order amending certificate*, 157 FERC ¶ 61,011 (2016).

Commission's finding in the Certificate Order. As such, MassPLAN's request for rehearing of the Notice to Proceed on these grounds is improper, and should be denied.[81]

D. A Supplemental Environmental Assessment Is Not Required.

MassPLAN incorrectly asserts that the National Environmental Policy Act ("NEPA") requires the Commission to prepare a supplemental environmental review prior to issuance of the Notice to Proceed because of the Survey Report and withdrawal of Tennessee's Northeast Energy Direct Project application from consideration before the Commission.[82] Neither event rises to the level of "significant new circumstances or information" warranting preparation of supplemental environmental review.[83]

The Council on Environmental Quality ("CEQ") regulations implementing NEPA provide that an agency shall prepare supplemental draft Environmental Impact Statement if: "(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[84] This regulation, by its very terms, only applies in the context of the preparation of an Environmental Impact Statement, not an EA which was prepared here.

Even if the regulation applied (which it does not), neither of these specified conditions is present in this case. Neither the Commission nor Tennessee made a substantial change to the Project. Although the survey was conducted after issuance of the EA and Certificate Order, as explained above, the Certificate Order was conditioned

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[82] MassPLAN also argues that "reduced project need" requires additional environmental review. Request for Rehearing at 18. However, as explained above, arguments relating to Project are speculative and constitute and impermissible collateral attack on the Certificate Order's findings with respect to need.
[83] 40 C.F.R. § 1502.9(c)(1)(ii).
[84] 40 C.F.R. § 1502.9(c)(1)(i)-(ii).

upon completion of the Section 106 process. The Section 106 process is now complete. By virtue of the signing of the MOA, which includes the implementation of the Treatment Plan, the issues regarding the impacts of the Project on historic properties have been resolved. The Director took that into account when issuing the Notice to Proceed. Therefore, there are no "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," as contemplated in the regulations.[85] Thus, there is no basis to warrant a revised or supplemental EA, prior to issuance of the Notice to Proceed.

[85] 40 C.F.R. § 1502.9(c)(ii).

CONCLUSION

MassPLAN has failed to demonstrate that it will suffer irreparable harm if a stay is not granted, that Tennessee will not suffer substantial harm, that a stay is in the public interest, and that it is likely to succeed on the merits of its Request for Rehearing. For the foregoing reasons, Tennessee respectfully requests that the Commission deny MassPLAN's Motion to Stay and Request for Rehearing.

Respectfully submitted,

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Dated: May 5, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in this proceeding.

Dated at Washington, DC this 5th day of May 2017.

/s/ Judy M. Zamora
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