United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1135 **September Term, 2018**

FILED ON: DECEMBER 27, 2018

THE TOWN OF WEYMOUTH, MASSACHUSETTS, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

MICHAEL H. HAYDEN, ESQUIRE, ET AL.,
INTERVENORS

Consolidated with 17-1139, 17-1176, 17-1220, 18-1039, 18-1042

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, and TATEL and MILLETT, *Circuit Judges*.

J U D G M E N T

This case was considered on the record from the Federal Energy Regulatory Commission (FERC), and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petitions for review be denied.

Two natural-gas pipeline companies -- Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline, L.L.C. -- proposed upgrades to their New England systems. Those upgrades entailed replacing existing pipeline, modifying certain facilities, and building a new compressor station in Weymouth, Massachusetts. Accordingly, the pipeline companies applied to FERC for a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(c). *See* Certificate Order

¶¶ 1, 3-9. The Town of Weymouth and several environmental groups (the petitioners) opposed granting the certificate. FERC issued the certificate and thereafter denied requests for rehearing. Both before and after FERC denied rehearing, the petitioners sought review in this court, and local property owners moved to intervene.

We have jurisdiction to review the submissions that the petitioners filed with this court after FERC denied rehearing. 15 U.S.C. § 717r(b). Accordingly, we need not address whether FERC's tolling orders rendered their earlier petitions incurably premature. Moreover, contrary to petitioners' contention, FERC's rehearing order is properly before us. The Natural Gas Act, 15 U.S.C. § 717r(a), permits FERC to "modify or set aside, in whole or in part, any finding or order made or issued by it" until the time that "the record in a proceeding shall have been filed in a court of appeals." Here, FERC issued its rehearing order a day before it filed the administrative record with this court. Finally, although the intervenors also sought rehearing before the agency, they did not submit a petition for review in this court. We exercise our discretion to decline to consider their separate arguments. *See E. Ky. Power Coop., Inc. v. FERC*, 489 F.3d 1299, 1305 (D.C. Cir. 2007).

The petitioners contend that FERC violated the NGA by approving a project that does not serve the public convenience and necessity. The project fails to do so, they say, because FERC ignored certain safety risks. In its environmental assessment (EA), however, FERC considered each risk that the challengers identify. *See* EA 2-120 to -121 (nearby infrastructure); EA 2-3 (flood zone); EA 2-120 (Spectra). And, although the challengers argue that FERC impermissibly relied on the pipeline companies' assertions that they would comply with certain federal safety regulations, FERC was entitled, "[a]bsent evidence to the contrary," to "assume . . . that [the companies] will exercise good faith." *Murray Energy Corp. v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011). The petitioners also contend that the project does not serve the public convenience and necessity because roughly half its gas is slated for export to Canada. But given that much of the gas will be used for domestic consumption, petitioners have not identified why granting the certificate in this case would not still advance the public convenience and necessity, even if a portion of the gas is ultimately diverted for export. *Cf.* 15 U.S.C. § 717b(c) (providing that, in the context of export authorizations under section 3(a) of the NGA, "exportation of natural gas to a nation with which there is in effect a free trade agreement" -- as is the case for Canada -- is "consistent with the public interest").

In addition to violating the NGA, the petitioners contend that FERC violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*. It did so, they say, by inadequately considering five types of environmental effects: coal ash, noise, traffic, greenhouse-gas emissions, and the project's effects on environmental-justice communities. But FERC both reviewed Algonquin's procedures for dealing with unexpected coal-ash

contamination and ensured that construction would comply with relevant state environmental policies. *See* Certificate Order ¶¶ 128-29. FERC also thoroughly considered the noise that would be emitted by the Weymouth compressor station. *See* EA 2-101 to -104, -108 to -112. As for traffic, although Algonquin moved its proposed construction staging area after FERC completed its initial analysis, FERC reasonably concluded that the reasons for its finding that the original staging area would be unlikely to significantly affect traffic remained true of the new staging area as well. *See* Rehearing Order ¶¶ 85-88. And, contrary to the petitioners' assertions, FERC both quantified the project's expected greenhouse-gas emissions and discussed how the project would interact with Massachusetts's climate-change goals. *See* Certificate Order ¶¶ 118-21. FERC also reasonably concluded that the project would not disproportionately affect environmental-justice communities around Weymouth because the compressor station's effects would be similar to those experienced by non-environmental-justice communities surrounding the three existing stations being expanded by the project. *See* Rehearing Order ¶¶ 94-95.

The petitioners further contend that NEPA required FERC to prepare an environmental impact statement (EIS) rather than just an EA. But the petitioners' "evidence is simply insufficient to question the agency's analysis." *See Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003). Although the petitioners argue that FERC's own best practices document requires an EIS for the project, in fact the project is not the type that FERC regulations suggest warrants an EIS: "the construction, replacement, or abandonment of compression, processing, or interconnecting facilities" calls for an EA rather than an EIS. 18 C.F.R. § 380.5(b)(1).

Finally, the petitioners contend that FERC violated the Coastal Zone Management Act , which provides that a federal permit "to conduct an activity . . . affecting . . . the coastal zone" shall not be granted "until the state . . . has concurred with the applicant's certification." 16 U.S.C. § 1456(c)(3)(A). But FERC's certificate order allows Algonquin to begin construction only after obtaining approval from Massachusetts. Accordingly, it does not authorize the "activity" to which petitioners objected before FERC until after the state "has concurred." *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017).

Pursuant to D.C. Circuit Rule 36(d), this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any

timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk