

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Algonquin Gas Transmission, LLC)	Docket No. CP16-9-012
Maritimes and Northeast Pipeline, L.L.C.)	
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)	

**INITIAL BRIEF OF CONSERVATION LAW FOUNDATION, ACADIA CENTER,
NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, AND SUSTAINABLE
FERC PROJECT**

Conservation Law Foundation, Acadia Center, Natural Resources Defense Council, Sierra Club, and Sustainable FERC Project respectfully submit this brief in response to the Federal Energy Regulatory Commission’s (Commission) February 18, 2021 order establishing briefing in the above-referenced proceeding (Briefing Order).¹ This proceeding relates to the Weymouth Compressor Station in Massachusetts (Compressor Station), which is part of the greater Atlantic Bridge Project. On October 23, 2020, various parties requested rehearing of the Commission’s September 24, 2020 order authorizing the Compressor Station to be placed into service (Authorization Order).² In the Briefing Order, the Commission stated that the concerns raised in the rehearing request “warrant further consideration by the Commission” and “set the matter for paper briefings.”³

In this brief, we address the second of the four questions the Commission posed:

Should the Commission reconsider the current operation of the Weymouth Compressor Station in light of any changed circumstances since the project was authorized? For example, are there changes in the Weymouth Compressor Station’s projected air emissions impacts or public safety impacts the Commission

¹ *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (Feb. 18, 2021) [hereinafter Briefing Order].
² *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-000, Accession No. 20200924-3034, at 1 (Sept. 24, 2020) [hereinafter Authorization Order].
³ Briefing Order, *supra* note 1, at P2.

should consider? We encourage parties to address how any such changes affect the surrounding communities, including environmental justice communities.⁴ As discussed below, the Commission has the legal authority to reconsider the Compressor Station's current operation based on changed circumstances since the project was authorized, and should exercise that authority in light of, among other things, two unplanned emergency shutdowns at the station that resulted in a significant amount of natural gas being vented to the surrounding area. These two blowdowns negatively impacted local air quality, threatened public safety, and harmed the health and well-being of residents in the area, including two environmental justice populations located near the Compressor Station that are already subject to numerous environmental harms. Given the unacceptable threat to public health and safety the continued operation of the Compressor Station poses, the Commission should rescind the portions of the Commission's January 25, 2017 certificate of public convenience and necessity authorizing the Atlantic Bridge project that pertain to the Compressor Station (Certificate)⁵ and rescind the Authorization Order.

I. THE COMMISSION CAN AND SHOULD RECONSIDER THE CURRENT OPERATION OF THE WEYMOUTH COMPRESSOR STATION IN LIGHT OF CHANGED CIRCUMSTANCES SINCE THE PROJECT WAS AUTHORIZED.

A. The Commission has Clear Authority to Reconsider the Current Operation of the Weymouth Compressor Station.

The Commission has the legal authority under the Natural Gas Act (NGA) to reconsider operation of the Compressor Station. First, the Commission has the authority to modify or set aside the Authorization Order pursuant to 15 U.S.C. § 717r(a). Second, the Commission has the authority to modify or rescind both the Authorization Order and the Certificate pursuant to 15 U.S.C. § 717o.

⁴ *Id.*

⁵ *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (Jan. 25, 2017) [hereinafter Certificate].

1. The Commission has Authority to Modify or Set Aside the Authorization Order Pursuant to 15 U.S.C. § 717r(a).

The NGA authorizes any party to file a request for rehearing to a Commission order within thirty days after the order is issued.⁶ The Commission “shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing.”⁷ If the Commission does not act upon a request for rehearing within thirty days after it is filed, the request “may be deemed to have been denied.”⁸ If the Commission acts on a request for rehearing, an aggrieved party may seek judicial review of the Commission’s decision within sixty days after the order is issued.⁹ Likewise, if the Commission does *not* act on a request for rehearing within thirty days after it is filed, the request is “deemed denied” and a party may also seek judicial review.¹⁰

The NGA provides the Commission with broad authority to revisit its findings and orders until the record in the proceeding is filed with the appropriate court of appeals.¹¹ Until such record is filed, the Commission “*may at any time . . . modify or set aside, in whole or in part, any finding or order* made or issued by it.”¹² Thus, a “deemed denial” does not tie the Commission’s hands on addressing the issues raised in a request for rehearing or the underlying order: even after thirty days have passed, the Commission may modify or abrogate the challenged order, or take other actions in the proceeding. The Commission previously has exercised its authority to

⁶ 15 U.S.C. § 717r(a).

⁷ *Id.*

⁸ *Id.*; *see also* 18 C.F.R. § 385.713(f) (“Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.”).

⁹ 15 U.S.C. § 717r(b).

¹⁰ *Allegheny Def. Project v. FERC*, 964 F.3d 1, 13 (D.C. Cir. 2020) (en banc).

¹¹ *See* 15 U.S.C. § 717r(a).

¹² *Id.* (emphasis added).

“modify or set aside” a challenged order even once the initial time for a rehearing party to seek judicial review has expired.¹³

On September 24, 2020, the Commission authorized Algonquin Gas Transmission¹⁴ (Algonquin) to place the Compressor Station into service.¹⁵ Aggrieved parties filed a timely request for rehearing of the Authorization Order on October 23, 2020. The Commission did not act on the request for rehearing until November 23, 2020, when the Commission issued a notice titled, “Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration.”¹⁶ In this notice, the Commission noted the expiration of the thirty-day review window, but also stated that the rehearing request “will be addressed in a future order.”¹⁷ The Commission expressly cited its authority under 15 U.S.C. § 717r(a) to “modify or set aside its above-cited order [the Authorization Order], in whole or in part.”¹⁸

The parties who filed the request for rehearing could have sought judicial review within sixty days after this “deemed denial” was issued.¹⁹ They chose not to appeal, instead deciding to wait until the Commission issues a decision addressing the merits of the request. Importantly, their decision not to appeal the “deemed denial” did *not* foreclose the Commission’s ability to

¹³ See, e.g., *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 2222-A, 174 FERC ¶ 61,197 (Mar. 18, 2021), at PP4-5 (setting aside part of Order 2222 pursuant to 16 U.S.C. § 8251(a), the Federal Power Act equivalent to 15 U.S.C. § 717r(a)) [hereinafter Order 2222-A].

¹⁴ Algonquin Gas Transmission is a subsidiary of Spectra Energy (now known as Enbridge Inc.) and an operator of the Weymouth Compressor Station.

¹⁵ Authorization Order, at 1.

¹⁶ *Algonquin Gas Transmission, LLC*, 173 FERC ¶ 62,097 (Nov. 23, 2020).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Allegheny Def. Project v. FERC*, 964 F.3d 1, 13 (D.C. Cir. 2020).

modify or set aside the Authorization Order,²⁰ or their right to challenge any future modification order in court at a later date.²¹

At a public meeting held January 19, 2021, the Commission voted on a draft decision to deny the merits of the October 23, 2020 request for rehearing. The draft merits denial was not approved. In voting against the draft merits denial, Commissioner (now Chairman) Glick noted: “We still have the duty to ensure that it would be in the public interest to place the project in service. And [that] . . . require[s] further consideration.”²² Chairman Glick mentioned concerns regarding “the two blowdowns that occurred at the site” and explained that the Commission’s responsibility to consider the public interest “is even greater in a situation such as this when the project is located in environmental justice communities . . . [that are] regularly subjected to heavy amounts of pollution and have a higher rate of cancer, asthma, and other diseases.”²³

For the reasons described in Section I.B, the Commission should exercise its authority under 15 U.S.C. § 717r(a) to set aside the Authorization Order.

2. The Commission has the Authority to Modify or Rescind the Certificate and Authorization Orders Pursuant to 15 U.S.C. § 717o.

In addition to the Commission’s authority to “modify or set aside” a challenged order, the Commission has broad authority under NGA Section 16 “to *perform any and all acts*, and to

²⁰ See, e.g., Order 2222-A, *supra* note 13.

²¹ For example, the parties could choose to seek administrative rehearing of the modification order and then, pursuant to *Allegheny Defense Project*, seek an appellate challenge after the initial thirty-day review window has expired. Recent case law also supports that, in some cases, a party may immediately file a petition for review with the court of appeals once the Commission acts on the merits of a request for rehearing, thereby allowing the rehearing party to skip a second administrative phase. See *New York State Dep’t of Env’t Conservation v. FERC*, No. 19-1610-AG, 2021 WL 1096358, at *4 (2d Cir. Mar. 23, 2021) (Aggrieved parties may “either proceed to federal court after the expiration of the 30-day window [i.e., after a “deemed denial”] or wait until the Commission’s order denying rehearing”).

²² January 19, 2021 Commission Meeting Transcript, at 25:12-16, <https://www.ferc.gov/media/transcript-01-21-2021>.

²³ *Id.* at 25:15-16, 25:18-24.

prescribe, issue, make, *amend, and rescind* such orders, rules, and regulations as it may find necessary or appropriate” to fulfill its responsibilities under the Act.²⁴ This provision authorizes the Commission to modify, rescind, or otherwise revisit both the Authorization Order and the Certificate for the Compressor Station.

The Commission has historically rescinded, revoked, or otherwise revisited a final certificate order when the certificate holder has violated a condition in the certificate. This authority can be inferred from Section 7(e), which authorizes the Commission to attach conditions to a certificate.²⁵ As the Third Circuit reasoned, “Simple logic would seem to indicate that the power to attach conditions to a certificate includes the power to revoke the certificate for failure to satisfy the conditions.”²⁶ The court held in *Public Utilities Commission. v. FPC* that NGA Section 7(e)²⁷ implicitly authorizes the Commission to revoke a certificate if conditions are not met.²⁸ The court further held that Section 16,²⁹ which authorizes the Commission to amend or rescind its orders, explicitly authorizes such a revocation if a term of the certificate is violated.³⁰ The court wrote that, in such a situation, it is settled that “[the Commission] has the power to suspend or revoke a certificate holder’s certificate.”³¹

No court has yet determined whether Section 16 authorizes the Commission to revoke a certificate in the absence of a violation. However, in *Trunkline LNG Co. & Trunkline Gas Co.*

²⁴ 15 U.S.C. § 717o (emphasis added).

²⁵ 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.”).

²⁶ *Pub. Utilities Comm’n. v. FPC.*, 205 F.2d 116, 120 (3d Cir. 1953).

²⁷ 15 U.S.C. § 717f(e).

²⁸ *Pub. Utilities Comm’n.*, 205 F.2d at 120.

²⁹ 15 U.S.C. § 717o.

³⁰ *Pub. Utilities Comm’n.*, 205 F.2d at 120-21.

³¹ *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 633 F. Supp. 2d 1151, 1166 (D. Nev. 2007); *see also Enron Power Mktg., Inc. et al.*, 103 FERC ¶ 61343, 62305 (2003) (terminating blanket certificate, pursuant to Section 16, due to market price manipulation); *Indicated Shippers*, 55 FERC ¶ 61130, 61414 (1991) (“Our remedial authority includes the authority to modify or even revoke a certificate.”).

Ass'n of Businesses Advocating Tariff Equity, the Commission concluded that it could exercise such authority if there is “a compelling showing of a *fundamental shift* of a *long-term nature* in the *basic premises* on which the certificate was issued.”³²

Under *Trunkline*, the Commission could reasonably revoke a certificate in the absence of a violation if key underlying assumptions, such as environmental or economic conditions, have fundamentally changed since the time of issuance and are no longer applicable. This is consistent with prior case law recognizing that the Commission can modify orders based on changed circumstances if necessary to serve the public interest.

For example, the Commission has “recognize[d] that environmental impacts are subject to change, and that the validity of [its] conclusions and environmental conditions cannot be sustained indefinitely.”³³ The Commission’s decisions are not set in stone: rather, the Commission “has a continuing duty to consider the consequences of actions it has taken in ongoing proceedings, and to make adjustments it considers to be in the public interest.”³⁴

The Commission has authority to modify, rescind, or otherwise revisit both the Authorization Order and the Certificate for the Compressor Station under NGA Section 16. Current case law demonstrates that the Commission can modify, rescind, or otherwise revisit the Certificate if: (1) the certificate holder has violated a condition of the certificate, or (2) there has

³² *Trunkline LNG Co. & Trunkline Gas Co. Ass'n of Businesses Advocating Tariff Equity*, 22 FERC ¶ 61,245, 61,442 (Feb. 28, 1983) (emphasis added).

³³ *Arlington Storage Co., LLC*, 155 FERC ¶ 61,165 (May 16, 2016) (addressing the continued relevance of five-year-old environmental assessment but ultimately declining to reconsider prior findings of public convenience and necessity as not “warranted by any changes in condition of fact or of law”).

³⁴ *Gen. Motors Corp. v. FERC*, 607 F.2d 330, 334 (10th Cir. 1979); see also *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968) (“Nor may [FERC’s] order properly be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances.”).

been a fundamental, long-term shift in the basic premises under which the certificate was issued. These circumstances are discussed *infra* at Sections I.B.3 and I.B.4.

B. The Commission Should Rescind the Authority to Operate the Compressor Station Because the Public Safety Impacts of the Emergency Shutdowns Violate Condition Two of the Certificate and are a Fundamental Shift of a Long-term Nature in the Basic Premises on Which the Certificate was Issued.

After a mere six months in operation, the Compressor Station has already experienced two unplanned emergency shutdowns less than three weeks apart. On September 11, 2020, there was a gasket failure that triggered the manual activation of its emergency shutdown system. It vented 169,000 standard cubic feet (scf) of natural gas and 35 pounds of Volatile Organic Compounds (VOCs).³⁵ Less than 20 days later, on September 30, 2020, there was a second emergency shutdown, resulting in the release of approximately 195,000 scf of natural gas, including 27 pounds of VOCs.³⁶ Alarming, the cause of this second shutdown was never conclusively determined.

These emergency shutdowns present a threat to public health, safety, and the environment and are both a violation of Condition Two of the Certificate³⁷ and a “fundamental shift of a long-term nature in the basic premises on which the certificate was issued.”³⁸ That these emergency shutdowns occurred in densely populated environmental justice communities,³⁹ less than three

³⁵ U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA), *Corrective Action Order*, October 1, 2020 at 1 [hereinafter *PHMSA Corrective Action Order*].

³⁶ *Id.*

³⁷ Condition Two of the Certificate states that “the Director of OEP has delegated authority to take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the Project. This authority shall allow: a. the modification of conditions of this Order; and b. the design and implementation of any additional measures deemed necessary (including stop-work authority) to ensure continued compliance with the intent of the environmental conditions as well as the avoidance or mitigation of adverse environmental impact resulting from construction and operation of the Project.” Certificate, *supra* note 5, at P253, app. B.

³⁸ *Trunkline*, 22 FERC at 61,442.

³⁹ FERC Docket No. CP16-9-000, *Atlantic Bridge Project Environmental Assessment 2-78 to 2-79* (2016) [hereinafter *EA*].

weeks apart, and that the cause of the second shutdown is still unknown, amplifies the harms suffered and increases the likelihood of future and catastrophic harm to both the public and the environment.

1. The Emergency Shutdowns Negatively Impact Air Quality, Human Health, and the Environment, and Present a Threat to Public Safety.

In the aftermath of the emergency shutdowns, the Pipeline and Hazardous Materials Safety Administration (PHMSA) investigated the events and issued a Corrective Action Order, finding that in light of the shutdowns, the Compressor Station is and would be hazardous to life, property, or the environment and that it was likely to cause serious harm to the surrounding communities:

The release of large quantities of pressurized natural gas in a heavily populated area carries a substantial risk of fire, explosion, and personal injury or death and releases harmful methane into the environment...Weymouth, MA is a heavily populated suburb outside of Boston, MA. The compressor station is in a high consequence area, and is located near Fore River Bridge, a heavily trafficked commuter road.⁴⁰

The emergency shutdowns have negatively impacted air quality, human health, and the environment in the surrounding communities by releasing harmful VOCs, including methane.⁴¹ VOCs have been linked to numerous adverse health outcomes, including respiratory diseases and cancer, as well as damage to the liver, kidney, and central nervous system.⁴² Methane is a potent greenhouse gas that contributes to climate change, increases ground-level ozone (smog), aggravates asthma, and can cause permanent lung damage and other serious health effects.⁴³

⁴⁰ PHMSA Corrective Action Order at 1-2.

⁴¹ *Id.* at 2.

⁴² *Volatile Organic Compounds' Impact on Indoor Air Quality*, U.S. EPA, https://www.epa.gov/indoor-air-quality-iaq/volatile-organic-compounds-impact-indoor-air-quality#Health_Effects (last updated Feb. 10, 2021).

⁴³ Erica Gies, *Landfills Have a Huge Greenhouse Gas Problem. Here's What We Can Do About It*, ENSIA (Oct. 26, 2016), <https://ensia.com/features/methane-landfills/>.

Moreover, the emergency shutdowns are a threat to public safety. Two shutdowns occurring less than three weeks apart demonstrate the substantial safety risks associated with operating the Compressor Station. A future shutdown is not only possible, but seems highly probable and “carries a substantial risk of fire, explosion, and personal injury or death.”⁴⁴ The Commission itself acknowledged in its Environmental Assessment (EA) for the Atlantic Bridge Project that the Compressor Station is in a High Consequence Area, defined as areas “where a gas pipeline accident could do considerable harm to people and their property.”⁴⁵ The threat to public safety is further amplified because the safety plan for the Compressor Station does not address the neighboring city and town of Quincy and Braintree, despite the fact that the facility borders these towns and its residents would be impacted by any future incidents.⁴⁶

2. The Emergency Shutdowns Raise Significant Environmental Justice Concerns.

The serious harms caused by the emergency shutdowns have specifically and significantly impacted two environmental justice communities located within 1.25 miles of the Compressor Station—Quincy Point and Germantown. Quincy Point and Germantown are considered environmental justice populations based on income and population demographics.⁴⁷ Residents are in the bottom quartile for income and the top quartile for percent non-white population in the state (26% Asian, 7% African-American and 4.5% Latino/a/x).⁴⁸ For decades,

⁴⁴ *PHMSA Corrective Action Order* at 2.

⁴⁵ *EA* at 2-115.

⁴⁶ *Weymouth Town Council Support of the Order Issuing Briefing and Concerns about Air Quality and Public Safety*, March 15, 2021.

⁴⁷ *EA* at 2-78, 2-79. These neighborhoods are also designated as environmental justice populations according to the Massachusetts Executive Office of Energy and Environmental Affairs Environmental Justice Policy. Massachusetts Executive Office of Energy and Environmental Affairs, *Environmental Justice Policy* 3 (2017); *see also* Massachusetts Environmental Justice Viewer, http://maps.massgis.state.ma.us/map_ol/ej.php.

⁴⁸ Letter to FERC from Greater Boston Chapter of Physicians for Social Responsibility (January 25, 2021), <https://gbpsr.org/wp-content/uploads/sites/11/2019/08/ferc-letter.pdf>.

low income, immigrant, and communities of color across Massachusetts, including residents of Quincy Point and Germantown, have been forced to shoulder a disproportionate share of environmental burdens.⁴⁹ Decisions to site environmental hazards in these communities, without adequately considering the cumulative environmental and health impacts, have created neighborhoods burdened by heavy air pollution from power plants, congested freeways, and industrial activity. And as the current COVID-19 crisis has made clear, these environmental injustices have profound consequences that extend far beyond the direct effects of pollution and contamination. Environmental justice communities have been among the hardest hit by the virus—in great part because of the cumulative environmental and public health burdens they have borne and continue to bear.⁵⁰

For decades, numerous heavy industrial uses have been sited in Quincy Point and Germantown and in close proximity to residential neighborhoods, including gas and oil storage tanks, a regional hazardous waste processing facility, a biofuel processing facility, a fertilizer processing and pelletizing plant, two municipal power plants, one of the largest gas and oil fired power generating plants in Massachusetts, a metering and regulating station, a regional sewage pumping station, and various water-dependent industrial uses.⁵¹ Quincy Point and Germantown are also part of a Designated Port Area that sees heavy traffic by ocean vessels, fuel tanker

⁴⁹ Daniel R. Faber & Eric J. Krieg, *Unequal Exposure to Ecological Hazards 2005: Environmental Injustices in the Commonwealth of Massachusetts*, Northeastern Environmental Justice Research Collaborative, at 47, Table 6C (2005) (documenting that Quincy is one of the most extensively overburdened communities in Massachusetts), available at <https://www.issuelab.org/resources/2980/2980.pdf>.

⁵⁰ Office of Massachusetts Attorney General Maura Healey, *COVID-19's Unequal Effects in Massachusetts: Remediating the Legacy of Environmental Injustice & Building Climate Resilience*, available at <https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download>.

⁵¹ Greater Boston Physicians for Social Responsibility, *A Comprehensive Assessment of the Potential Human Health Impacts of a Proposed "Natural" Gas Compressor Station in Weymouth, Massachusetts*, September 24, 2020 at 7.

vessels, tugs, ferries, freight diesel locomotives, rail tank cars, and more than 30,000 vehicles crossing the Fore River Bridge each day resulting in air pollution and associated public health impacts.⁵²

The devastating impact of the continued operation of the Compressor Station on these environmental justice populations, particularly in light of the recent emergency shutdowns, cannot be overstated. Due in part to the many environmental injustices they face, residents of Quincy Point and Germantown experience far worse health outcomes than neighboring communities, including higher rates of cancer, pediatric asthma, and respiratory and heart diseases.⁵³ For example, the lung cancer rates in these communities are *39% higher* than Massachusetts as a whole.⁵⁴ In short, Quincy Point and Germantown residents have been forced to bear far more than their fair share, in the form of diminished health and quality of life, for any benefits that may result from the disproportionate number of industrial and energy facilities that have been sited in their communities. Allowing the continued operation of a compressor station that has a history of emergency shutdowns that have resulted in the venting of numerous dangerous pollutants would only exacerbate the disproportionate environmental harm that has been imposed on these communities.

At no point during the approval process have the impacts of the Compressor Station on these environmental justice populations been adequately considered.⁵⁵ When the Commission

⁵² *Id.*

⁵³ Metropolitan Area Planning Council, *Health Impact Assessment of a Proposed Natural Gas Compressor Station in Weymouth, MA*, available at http://foreriverhia.wpengine.com/wp-content/uploads/2019/01/Final-Report_20190104.pdf.

⁵⁴ *Id.*

⁵⁵ For years, concerns have been raised about the insufficient outreach and engagement with Quincy Point and Germantown residents regarding the Compressor Station, specifically residents with limited English proficiency. For example, the Civic Education Alliance in Braintree has written on behalf of Chinese immigrant residents who were unable to participate in the project approval process because of inadequate

discussed the Compressor Station at its January 19, 2021 meeting, Chairman Glick explicitly acknowledged the Commission’s failures to adequately consider environmental justice and concluded that it has greater responsibility to ensure it is in the public interest to allow a project to operate when it is located in an environmental justice population.⁵⁶ Chairman Glick explained that the Commission has a duty to take environmental justice into consideration during its National Environmental Policy Act review and to “assess whether the impacts on these communities can be eliminated or mitigated.”⁵⁷ Further, since the Commission issued the Certificate and Authorization Order, President Biden has issued an Order to Protect Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which further requires the Commission to advance environmental justice.⁵⁸

In light of these new environmental justice requirements, past environmental justice failures, and recent emergency shutdowns, the Commission must engage in a broad stakeholder process to incorporate the new directive, apply such directive to the Compressor Station, and accurately determine the impacts on the affected environmental justice communities. As discussed below, until such actions are taken, operation of the Compressor Station must be suspended.

3. The Emergency Shutdowns Violate Condition Two of the Certificate, Giving the Commission the Authority to Modify or Rescind the Certificate and Authorization Order.

As discussed in Section I.A.2, the Commission has the authority to modify or rescind a certificate for any facility that violates a condition of the facility’s certificate. The Commission

outreach and no interpretation or translation services. Letter to FERC from the Civic Education Alliance (March 30, 2021).

⁵⁶ January 19, 2021 Commission Meeting Transcript, at 25:17-20, <https://www.ferc.gov/media/transcript-01-21-2021>.

⁵⁷ *Id.* at 26:18-21.

⁵⁸ Executive Order 13990, 86 FR 7037 (January 25, 2021).

has stated: “We believe there can be *no* question that the Commission has the authority to revoke a certificate for violation of its terms or where the parties refuse to uphold the terms of the original contract on which the certificate was predicated.”⁵⁹

In this case, the record supports that continued operation of the Compressor Station would constitute a violation of Condition Two of the Certificate. Condition Two states:

The Director of [the Office of Energy Projects (OEP)] has delegated authority to take *whatever steps are necessary to ensure the protection of all environmental resources* during construction and operation of the Project. This authority shall allow: a. the modification of conditions of this Order; and b. the design and implementation of *any additional measures deemed necessary* (including stop-work authority) *to ensure continued compliance with the intent of the environmental conditions* as well as the *avoidance or mitigation of adverse environmental impact* resulting from construction and operation of the Project.⁶⁰

The purpose of this condition is to affirm the Commission’s and the OEP Director’s authority to protect against adverse environmental impacts and to ensure continued compliance with the intent of all construction and mitigation measures contained within the Certificate (which itself cites to mitigation measures discussed in the EA⁶¹). Accordingly, if the intent of the environmental conditions is violated, or adverse environmental impacts occur as a result of the operation of the Compressor Station, the Director of OEP can take “any additional measures,” including “stop-work authority,” to stop those consequences from occurring. Given that Condition Two expressly applies during both “construction and operation of the Project,”⁶² and that the OEP Director may stop construction due to environmental risks, it similarly follows that Condition Two empowers the OEP Director to revoke operating authority for the same reasons.

⁵⁹ *Trunkline LNG Co. & Trunkline Gas Co. Ass’n of Businesses Advocating Tariff Equity*, 22 FERC ¶ 61,245, 61,444 (Feb. 28, 1983); *see also Midship Pipeline Co., LLC*, 174 FERC ¶ 61,220, at P2 (Chairman Glick, concurring) (“[W]e cannot forget that while a certificate of public convenience and necessity provides the holder with significant rights and privileges, it also imposes on the holder concomitant responsibilities, including the responsibility to satisfy every condition in the certificate.”).

⁶⁰ Certificate, *supra* note 5, at P253, app. B (emphasis added).

⁶¹ *Id.* at PP149, 156, 204, 217.

⁶² *Id.* at P253, app. B.

Condition Two has been violated because operation of the Compressor Station has caused adverse environmental impacts that the Certificate conditions and the mitigation measures contained in the EA were intended to prevent. The Compressor Station already has had two emergency blowdowns that have resulted in the facility venting 444,000 cubic feet of methane into the air and 35 pounds of VOCs, among other pollutants. These emissions have adversely impacted air quality, human health, and the environment, and threaten public safety in a way that was not anticipated by the Commission at the time of Certificate issuance. To the contrary, the Commission thought that the Certificate conditions and the mitigation measures imposed in the EA would minimize the risk and occurrence of a blowdown to such an extent as to avoid a significant environmental impact, writing in the Certificate: “The EA states that blowdown events occur infrequently and for short durations (1-to-5 minutes). It is unclear how many blowdowns may occur each year; however, the conditions warranting a blowdown occur infrequently.”⁶³ The EA repeatedly states that it found the Atlantic Bridge Project to have no significant environmental impacts in part because its recommended safeguards would ostensibly result in blowdowns occurring rarely, thereby also lessening the public health risks associated with the Compressor Station’s operation.⁶⁴ The mitigation measures currently in place, however, have failed to appropriately protect against blowdowns and the environmental, health, and safety risks they cause. Thus, the emergency blowdowns have violated the intent of the Certificate’s

⁶³ *Id.* at P223.

⁶⁴ The EA describes several methods that would be employed to reduce blowdowns, including “utilizing pump-down techniques to lower gas pressure before maintenance, conducting annual emergency shutdown systems tests with blowdown isolation valves closed, scheduling multiple maintenance activities concurrently, and utilizing ‘hot taps’ when making new connections to the pipeline system.” *EA* at 2-96. The EA concludes that as a result of these safeguards and other environmental protection measures, “[T]he cancer and non-cancer health risks of short-term and long-term exposures to all constituents of natural gas during combustion, venting, or a full station blowdown event would be below established benchmarks (i.e., are safe) to protect the general population and sensitive subgroups” and, as a result, “the health risks from operation of the Project facilities would not be significant.” *Id.* at 2-98.

conditions and the EA's mitigation measures. For this reason, the OEP Director should rescind the portion of the Certificate that authorized the Compressor Station.

Additionally, even in the absence of an explicit violation, the Commission may still modify or rescind a certificate, or portions thereof, when an operator implicitly violates a certificate. For example, in *Enron Power Marketing, Inc. & Enron Energy Services, Inc.*, the Commission revoked Enron's certificate authorizing it to sell electricity in the wholesale market because, through manipulation of the energy market, Enron violated the terms of the certificate: "This case does not turn on whether a certificate may be revoked without a violation, but rather on acts taken by the certificate holder in violation of its obligation under the certificate."⁶⁵ The Commission never pointed to an explicit provision of the certificate that Enron violated. Instead, the Commission held that Enron violated its certificate because the Commission "has the authority under the NGA to revoke a blanket marketing certificate authorization as it applies to particular persons who have engaged in misconduct contrary to the Commission's fundamental purpose in granting the blanket marketing certificate."⁶⁶ The Commission essentially concluded that it has authority to revoke a certificate if the holder of that certificate violates the essence or purpose of the certificate, even if it did not violate an explicit term or condition of the certificate. This position was endorsed by the U.S. District Court for the District of Nevada in the case of *In re Western States Wholesale Natural Gas Antitrust Litigation*, where the court, citing an opinion by the Commission, wrote, "FERC's issuance 'of certificate authority to make jurisdictional

⁶⁵ *Enron Power Mktg., Inc. & Enron Energy Servs.*, 103 FERC ¶ 61,343, 62,304-05 (June 25, 2003) [hereinafter *Enron*].

⁶⁶ *Id.*

sales of natural gas *implicitly* prohibited acts which would manipulate the competitive market for natural gas.”⁶⁷ The court then went on to approvingly cite *Enron*.⁶⁸

If the Commission were to find that the Compressor Station’s emergency shutdowns do not explicitly violate Condition Two, it should find that those shutdowns implicitly violated Condition Two. While the facts of *Enron* and the Compressor Station are distinct, the core concept—that the Commission may revoke a certificate even for actions or circumstances that do not necessarily violate a designated condition of the certificate but are inconsistent with the fundamental purpose of the certificate—equally applies. The Certificate at issue here states that the Director of OEP has the authority to take “any additional measures deemed necessary” to avoid adverse environmental impacts or a violation of the intent of the Certificate’s environmental conditions. While it could be argued that this does not directly state that such actions constitute a violation of the Certificate, it clearly shows that the Commission intended adverse environmental impacts or a violation of the intent of the EA mitigation measures to be avoided. If the Commission had the authority to revoke Enron’s certificate for violating the “purpose” of the certificate even when no condition expressly stated what the purpose of the certificate was, then it must have the authority to revoke the Certificate here where one of the conditions clearly states a major purpose of the Certificate and that purpose has been violated. Thus, the Commission would be well within its legal authority to modify the Certificate to remove authorization for the Compressor Station.

As noted above, this also would not require complete revocation of the Certificate, as the Commission clearly has the authority to modify or revoke aspects of a certificate as an

⁶⁷ *In re W. States Wholesale Nat. Gas Antitrust Litig.*, 633 F. Supp. 2d 1151, 1164 (D. Nev. 2007) (emphasis added) (citing *In re Amendments to Blanket Sales Certificates*, 107 FERC ¶ 61,174 (May 19, 2014), at P12).

⁶⁸ *Id.*

intermediate step. In *Enron*, the Commission wrote, “The Commission has discretion to implement remedies when it finds conduct that has violated its policies or regulations. The agency is at its zenith in fashioning such remedies.”⁶⁹ The Commission has modified certificates in the past due to violations rather than revoking them entirely.⁷⁰ Likewise, if the Commission so chooses, it could remove only the authorization with respect to the Compressor Station and not the overall Atlantic Bridge Project.

4. The Emergency Shutdowns are a Fundamental Shift of a Long-term Nature in the Basic Premises on Which the Certificate was Issued, Giving the Commission the Authority to Modify or Rescind the Certificate.

As discussed *supra* in Section I.A.2, the Commission has the authority to revoke a certificate even in the absence of a violation if there is “a compelling showing of a fundamental shift of a long-term nature in the basic premises on which the certificate was issued.”⁷¹ In issuing the Certificate in 2017, the Commission relied on assumptions that the Compressor Station could operate safely. However, the unplanned emergency shutdowns that occurred less than three weeks apart, in the station’s first month of operation, demonstrate a fundamental, long-term shift in these basic public health and safety assumptions and justify the Commission in modifying or rescinding the Certificate as it pertains to the Compressor Station.

This fundamental shift is heightened by the fact that the EA did not adequately consider the public health and safety impacts of the Compressor Station, particularly given its location in a densely populated urban area with two environmental justice communities.⁷² The EA found

⁶⁹ *Enron*, 103 FERC at 62,305.

⁷⁰ *See, e.g., Indicated Shippers*, 61 FERC ¶ 61,038, 61,195 (Oct. 7, 1992) (modifying rather than revoking the certificate upon finding a violation of the certificate terms).

⁷¹ *Trunkline LNG Co. & Trunkline Gas Co. Ass’n of Businesses Advocating Tariff Equity*, 22 FERC ¶ 61,245, 61,442 (Feb. 28, 1983).

⁷² Since the Certificate was issued, additional environmental and health impact assessments have been done by various entities, including the State. These assessments demonstrate that the potential magnitude

“that the proposed project would increase the risk to public safety *slightly*, but this effect would *not be significant*, and it would *not result in a cumulative operational or public safety hazard*.”⁷³

This basic premise is no longer tenable in light of the two unplanned emergency shutdowns, which present a serious safety risk to the neighboring communities and which were not anticipated in the EA. The temporal proximity of the two shutdowns is concerning not only because of the cumulative impacts (large releases of gas and VOCs within a short time span), but also because these multiple failures suggest that additional emergency shutdowns are likely to occur.

The COVID-19 pandemic, which has disproportionately impacted people living in environmental justice populations such as Quincy Point and Germantown, is another changed circumstance that further bolsters the need for FERC to reconsider the Compressor Station’s continued operation. The demonstrated inability of the certificate holders to safely operate the station is particularly concerning in light of the fact that residents of the impacted environmental justice populations are already at higher risk for severe cases of COVID-19 due in part to their exposure to poor air quality and numerous industrial and polluting facilities in the area.⁷⁴ The unplanned releases of gas and VOCs impair local air quality and further heighten the risk of COVID-19 for area residents.

of the harm caused by the two emergency shutdowns, and any future shutdowns, is far greater than what was projected in the Atlantic Bridge Project’s EA. For example, an independent evaluation conducted by Public Health by Design determined that the State’s Health Impact Assessment did not have complete and accurate air quality data because existing background levels of air pollution were not adequately taken into consideration. Public Health By Design, *HIA Evaluation Report* (September 2020) at 19. The Commission should take this new health and safety data into consideration when determining whether changed circumstances mandate modification or revocation of the Authorization Order.

⁷³ EA at 2-143 (emphasis added).

⁷⁴ Office of Massachusetts Attorney General Maura Healey, *COVID-19’s Unequal Effects in Massachusetts: Remediating the Legacy of Environmental Injustice & Building Climate Resilience*, available at <https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download>.

In short, the Compressor Station’s two emergency shutdowns, occurring less than three weeks apart, demonstrate that the continued operation of the Compressor Station poses a significant threat to the health and safety of neighboring communities. PHMSA stated as much in the Corrective Action Order it issued following the shutdowns when it found that “continued operation of the Station without corrective measures is or would be hazardous to life, property, or the environment, and that failure to issue this Order expeditiously would result in the likelihood of serious harm.”⁷⁵ Although PHMSA has since authorized the station to resume operations after the certificate holders implemented corrective measures, the likelihood of future releases still poses a significant health and safety threat to impacted communities.

The Commission plainly miscalculated the public health and safety risks of operating the Compressor Station in a densely populated urban area that already faces significant health burdens from numerous other polluting industries in the area. These cumulative public health and safety risks were not adequately considered during the Commission’s approval process, and the Certificate was based on the faulty premise that the station could operate safely without posing a threat to the neighboring communities. The two unplanned emergency shutdowns have exposed the serious public health and safety risks that the Compressor Station poses to the community and constitute a “fundamental shift of a long-term nature” in the basic health and safety premises on which the Commission’s decision relied. The Commission therefore has authority to modify or rescind the Certificate insofar as it pertains to operation of the Compressor Station.

II. CONCLUSION

Thank you for the opportunity to submit this brief in response to the Commission’s February 18, 2021 Briefing Order. In light of the two emergency shutdowns and other changed

⁷⁵ *PHMSA Corrective Action Order* at 3.

circumstances, the continued operation of the Compressor Station presents an unacceptable threat to public health and safety. Therefore, the signatories respectfully request that the Commission use its authority to rescind the Certificate as it pertains to the Compressor Station and rescind the Compressor Station's Authorization Order.

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Respectfully submitted,

For Conservation Law Foundation, Inc.:

Erica Kyzmir-McKeon
Staff Attorney
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
ekyzmir-mckeon@clf.org
(617) 850-1763

Shannon Ione Laun
Staff Attorney
Conservation Law Foundation
62 Summer Street
Boston, MA 02110
slaun@clf.org
(475) 261-9538

For Natural Resources Defense Council:

Gillian Giannetti
Senior Attorney
Natural Resources Defense Council
1152 15th Street, NW
Suite 300
Washington, DC 20005
ggiannetti@nrdc.org
(202) 717-8350

For Sustainable FERC Project:

John Moore
Director
Sustainable FERC Project
20 N. Wacker Drive
Suite 1600
Chicago, IL 60201
jmoore@nrdc.org
(312) 651-7927

For Sierra Club:

Ankit Jain
Associate Attorney
Sierra Club
50 F Street NW
Washington, D.C. 20001
ankit.jain@sierraclub.org
(571) 435-5914

For Acadia Center:

Deborah Donovan
Massachusetts Director and Senior Policy Advocate
Acadia Center
8 Summer Street
Rockport, ME 04856
ddonovan@acadiacenter.org
(617) 742-0054 ext 103