

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

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| Jordan Cove Energy Project, L.P. |) | Docket No. CP13-483-000 |
| |) | |
| Pacific Connector Gas Pipeline, LP |) | Docket No. CP13-492-000 |

**REQUEST FOR REHEARING
OF STATE OF WYOMING AND
WYOMING PIPELINE AUTHORITY**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), 18 C.F.R. § 385.713 (2015), and Section 19(a) of the Natural Gas Act, (“NGA”), 15 U.S.C. § 717r(a) (2012), the State of Wyoming and the Wyoming Pipeline Authority (“WPA”) (collectively “Wyoming”) submit this request for rehearing of the Commission’s March 11, 2016, Order in the above-captioned proceeding.¹

I. INTRODUCTION

On May 21, 2013, in Docket No. CP13-483-000, Jordan Cove Energy Project, L.P. (“Jordan Cove”) filed an application under section 3 of the NGA and Parts 153 and 380 of the Commission’s regulations to site, construct, and operate a liquefied natural gas (“LNG”) export terminal and associated facilities (“Jordan Cove LNG Terminal” or “LNG Terminal”) on the North Spit of Coos Bay in Coos County, Oregon.

On June 6, 2013, in Docket No. CP13-492-000, Pacific Connector Gas Pipeline, LP (“Pacific Connector”) filed an application under NGA section 7(c) and Part 157 of the Commission’s regulations for a certificate of public convenience and necessity to construct and operate an approximately 232-mile-long, 36-inch-diameter interstate natural gas pipeline originating near Malin, in Klamath County, Oregon, and terminating at the Jordan Cove LNG

¹ *Jordan Cove Energy Project, L.P. and Pacific Connector Gas Pipeline, LP*, 154 FERC ¶ 61,190 (2016) (“March 11 Order”).

Terminal. Pacific Connector has proposed to transport natural gas to the Jordan Cove LNG Terminal for processing, liquefaction, and export.²

In the March 11 Order the Commission denied Pacific Connector's and Jordan Cove's applications.

With respect to Pacific Connector, the Commission found that Pacific Connector presented little or no evidence of need for the pipeline because Pacific Connector had not entered into any precedent agreements for its project, or conducted an open season. The Commission refused to issue a certificate that would allow Pacific Connector to proceed with eminent domain proceedings in the absence of a demonstrated need for the pipeline.³

With respect to Jordan Cove, the Commission's basis for the rejection was related to environmental impacts rather than considerations bearing on the exercise of eminent domain. In this regard, the Commission viewed the Jordan Cove LNG Terminal and the Pacific Connector Pipeline as two segments of a single, integrated project. The Commission found that, without a pipeline connecting the LNG terminal to a source of gas supply to be liquefied and exported, the proposed Jordan Cove LNG Terminal cannot provide any benefit to the public to counterbalance any of the impacts that would be associated with construction of the LNG terminal facilities.⁴

II. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c)(2) of the Commission's Rules of Practice and Procedure,⁵ Wyoming requests rehearing with respect to the following issues:

² Pacific Connector also requested a blanket certificate under subpart F of Part 157 of the Commission's regulations to perform certain routine construction, operation, and abandonment activities, as well as a blanket certificate under subpart G of Part 284 of the Commission's regulations to provide open-access transportation services.

³ March 11 Order, 154 FERC ¶ 61,190 at PP 40-42.

⁴ Id. at PP 43-46.

⁵ 18 C.F.R. § 385.713(c)(2) (2015).

1. The Commission acted arbitrarily and capriciously, abused its discretion, and exceeded its statutory authority by ignoring substantial evidence in the record of public benefits sufficient to offset the burdens of the grant of certificate authorization to Pacific Connector.

Meyersville Citizens for a Rural Community, Inc. v. FERC, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *Missouri Public Service Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

2. The Commission abused its discretion in rejecting the Pacific Connector certificate application rather than directing Pacific Connector, within a time certain, to provide substantial evidence of contracted demand or evidence of at least some negotiated right-of-way easements for portions of the pipeline route crossing private lands in order to satisfy the balancing test under the Commission's *Certificate Policy Statement*.

Williston Basin Inter. Pipeline Co. v. FERC, 165 F.3d 54, 65 (D.C. Cir. 1999); *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995); *National Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980); *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989); *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1998); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41-42 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971).

3. The Commission violated Pacific Connector's due process rights to fair notice of the Commission's proposed termination action in advance of the Commission's determination to reject the Section 7(c) application.

Shell Oil Co. v. FERC, 707 F.2d 230, 235-36 (5th Cir. 1983); *Gates & Fox Co. v. Occupational Safety & Health Review*, 790 F.2d 154, 156 (D.C. Cir. 1986); *Williston Basin Inter. Pipeline Co. v. FERC*, 165 F.3d 54, 63 (D.C. Cir. 1999); *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4, (1974)); *Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981); *United Gas*

Pipe Line Co. v. FERC, 597 F.2d 581, 586-87 (5th Cir. 1979).

4. The Commission abused its discretion and acted arbitrarily and capriciously in rejecting the Jordan Cove NGA Section 3 application to site, construct, and operate an LNG export terminal based solely on the denial of the Pacific Connector Section 7(c) application.

Minisink Residents for Environmental Preservation and Safety v. FERC, 762 F.3d 97, 105 (D.C. Cir. 2014); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75-76 (D.C. Cir. 2004); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000). *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010); *Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185-186 (D.C. Cir. 1997); *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002).

III. ARGUMENT

A. **THE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY, ABUSED ITS DISCRETION, AND EXCEEDED ITS STATUTORY AUTHORITY BY IGNORING SUBSTANTIAL EVIDENCE IN THE RECORD OF PUBLIC BENEFITS SUFFICIENT TO OFFSET THE BURDENS OF THE GRANT OF CERTIFICATE AUTHORIZATION TO PACIFIC CONNECTOR.**

The Commission is required to give proper and sufficient consideration to relevant evidence.⁶ Its factual findings must be supported by “substantial evidence” or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁷ An agency must “engage the arguments raised before it” in order to satisfy the requirements of reasoned decisionmaking.⁸ In *Missouri Public Service Comm’n v. FERC*,⁹ the court held that FERC must “articulate the critical facts upon which it relies,” and when it “finds it necessary to make predictions or extrapolations from the record, it must fully explain the assumptions it relied on to

⁶ *Meyersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015); *K N Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992).

⁷ *Meyersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d at 1309 (quoting *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010) (internal quotation marks omitted)).

⁸ *K N Energy, Inc. v. FERC*, 968 F.2d 1295 (D.C. Cir. 1992).

⁹ *Missouri Public Service Comm’n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003).

resolve unknowns and the public policies behind those assumptions.”¹⁰ “Normally, an agency rule would be arbitrary and capricious if the agency has . . . failed to consider an important aspect of the problem.”¹¹ An order that fails to consider relevant factors is arbitrary and capricious.¹²

1. The Commission Ignored Substantial Evidence Of Public Benefits.

In the Commission’s March 11 Order, citing the *Certificate Policy Statement*¹³ the Commission states that an applicant may rely on a variety of relevant factors to demonstrate need rather than requiring evidence that a specific percentage of the proposed capacity is subscribed under long-term precedent or service agreements. Among those relevant factors, is the beneficial economic impact that a project may have both locally and within the state(s) the project traverses.¹⁴ Here, substantial evidence of public benefit exists to support directly the Pacific Connector certificate application, and indirectly the Jordan Cove certificate application.¹⁵ The Commission failed to consider this evidence of public benefit adequately. Lest there be any doubt concerning that evidence, below Wyoming documents the substantial public interest benefits associated with providing an additional market for Wyoming natural gas production.

According to data from the Energy Information Administration (“EIA”), as of the end of 2015, Wyoming ranked fifth among the states in natural gas production, in line and in order

¹⁰ *Id.* (quoting *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979)).

¹¹ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted).

¹² *Missouri Pub. Svc. Comm’n*, 337 F.3d at 1076.

¹³ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000) (“*Certificate Policy Statement*”).

¹⁴ March 11 Order, 154 FERC ¶ 61,190 at P 36.

¹⁵ *E.g.*, “State Of Wyoming’s Motion To Intervene And Comments On Draft Environmental Impact Statement,” Docket Nos. CP13-483-000 and CP13-492-000 (Feb. 12, 2015); “Motion To Intervene And Comments On Draft EIS Of The Wyoming Pipeline Authority,” Docket Nos. CP13-483-000 and CP13-492-000 (Feb. 12, 2015).

behind Texas, Pennsylvania, Oklahoma and Louisiana.¹⁶ In addition, according to EIA data, over 95% of all marketed natural gas production in Wyoming moves out-of-state to market.¹⁷

For the State of Wyoming, taxes and royalties from State Lands and Wyoming's share of federal mineral royalties make up a substantial portion of the funds available to the State of Wyoming for State and local government programs.¹⁸ Over the last ten years, the income from taxes and royalties on natural gas have ranged from 30 % to 60 % of the total funds available to State and local governmental entities in Wyoming.¹⁹ While royalties collected from land owned by the State and leased for natural gas production provided over \$42 million in income in 2015 to the Office of State Lands and Investments, this amount represents a drop of over 60% since 2008 when royalty collections from State lands for natural gas and related hydrocarbons provided over \$107 million dollars to the State.²⁰ In Wyoming, roughly 90% of the income from royalties on State lands goes to funding school construction and operations and, thus, schools have borne the brunt of the impact from these reductions.²¹ Therefore, enhancing the ability of natural gas produced in Wyoming to compete in international markets represents a significant public benefit not adequately taken into account in the Commission's March 11 Order.

In addition to the direct fiscal impact of natural gas production on State revenues, natural gas and oil extraction and related activities have accounted for between 8.3% and 9.8% of

¹⁶ Energy Information Administration: *Natural Gas Gross Withdrawals and Production*: http://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_VGM_mmcf_m.htm.

¹⁷ Energy Information Administration: *Natural Gas Gross Withdrawals and Production by End Use*: http://www.eia.gov/dnav/ng/ng_cons_sum_dc_u_nus_m.htm.

¹⁸ State of Wyoming, Department of Administration and Information, Economic Analysis Division.

¹⁹ *Id.*

²⁰ *Id.*

²¹ State of Wyoming, Office of State Lands and Investments.

statewide non-farm employment over the last ten years.²²

In sum, the economic wellbeing of the State of Wyoming and its roughly 580,000 residents is significantly affected by the volume of natural gas produced in the state, the price of natural gas produced and the availability of access to markets in which to compete for the sale of natural gas produced in Wyoming. The Commission failed to consider this significant public benefit adequately in the Commission's application of its *Certificate Policy Statement* in the March 11 Order. The Commission's failure to do so was arbitrary and capricious.²³

2. Jordan Cove And Pacific Connector Are Essential To The Health Of The Wyoming Economy.

The Commission has consistently supported the infrastructure expansions required to provide and preserve access to markets for natural gas produced in Wyoming. The history of support by the Commission includes expansion of capacity to move gas west from Wyoming, such as the Kern River Gas Transmission Company expansion in 2003 (Docket CP01-422) and the approval of Ruby Pipeline, L.L.C. in 2009 (Docket CP09-54). As a result of these projects, and when added to the capacity of Northwest Pipeline LLC, the total capacity to move gas to the west from Wyoming is approximately 4.3 Bcf per day.²⁴

The Commission also supported infrastructure expansions to move Wyoming natural gas to the east through projects including the approvals of a Trailblazer Pipeline LLC ("Trailblazer") expansion in 2001 (Docket CP01-64), Cheyenne Plains Gas Pipeline L.L.C. ("Cheyenne Plains")

²² State of Wyoming, Department of Administration and Information, Economic Analysis Division.

²³ *Meyersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *Missouri Public Service Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

²⁴ Kern River Gas Transmission Company, Informational Postings, Operationally Available Capacity, <http://services.kernrivergas.com/portal/>; Ruby Pipeline, L.L. C, Informational Postings, Operationally Available Capacity, <http://pipeline2.kindermorgan.com/Capacity/OpAvailSegment.aspx?code=RUBY>; Northwest Pipeline LLC, Informational Postings, Operationally Available Capacity, http://www.northwest.williams.com/NWP_Portal/CapacityResultsScrollable.action.

in 2004 and its expansion in 2007 (Dockets CP03-301 et.al. and CP07-128), the Rockies Express Pipeline LLC (“Rockies Express”) in 2007 (Docket CP06-354), Bison Pipeline, LLC (“Bison”) in 2010 (Docket CP09-161). As a result of these projects and capacity to move gas through to the Midwest on Colorado Interstate Gas, the total capacity to move gas to Midwestern and Eastern markets is approximately 4.3 Bcf per day.²⁵

This balanced combination of eastbound and westbound pipeline capacity served Wyoming well until the growth of production in the eastern United States and particularly in Pennsylvania, West Virginia and Ohio. According to EIA data, combined production from those three states has gone from 3.4 Bcf per day in December of 2010 to nearly 21.0 Bcf per day in December of 2015.²⁶ The total production of those three states has risen from 56% of Wyoming production in December of 2010 to 448% of Wyoming production in December 2016.²⁷

The impact of the production growth in those three states has been profound. The need for capacity to move gas from those states to markets spawned a variety of pipeline expansion proposals. The pipeline project that most directly affects Wyoming is the collection of modifications and expansions on Rockies Express Pipeline to reverse the flow on the eastern third of the Rockies Express Pipeline to an east to west regime. This engendered three realities for production in Wyoming.

²⁵ Trailblazer Pipeline Company, Informational Postings, Operationally Available Capacity, <http://pipeline.tallgrassenergyip.com/Pages/Segment.aspx?pipeline=403&type=OA>; Cheyenne Plains Gas Pipeline, L.L.C., Informational Postings, Operationally Available Capacity, <http://ebb.cigco.com/ebbmasterpage/Capacity/OperAvailAutoTable.aspx?code=CP&name=Operationally%20Available%20Capacity&status=Cap&sParam8=S>; Rockies Express Pipeline LLC, Informational Postings, Operationally Available Capacity, <http://pipeline.tallgrassenergyip.com/Pages/Segment.aspx?pipeline=501&type=OA>; Bison Pipeline LLC, Informational Postings, Operationally Available Capacity, <http://www.bisonpipelinellc.com>; Colorado Interstate Gas Company, L.L.C., Informational Postings, Operationally Available Capacity, <http://pipeline2.kindermorgan.com/Capacity/OpAvailSegment.aspx?code=CIG>.

²⁶ Energy Information Administration: *Natural Gas Gross Withdrawals and Production*: http://www.eia.gov/dnav/ng/ng_prod_sum_a_EPG0_VGM_mmcf_m.htm.

²⁷ *Id.*

First, the likelihood of Wyoming gas flowing into markets in Pennsylvania, Ohio and beyond is unlikely for the foreseeable future. Second, the substantial flow of gas from Pennsylvania and Ohio into the Midwest will diminish the role of Wyoming natural gas in the service of Midwestern markets. Third, the flow of gas westward from Pennsylvania and Ohio has led to volatility in the flow of gas eastward from Wyoming on such pipelines as Bison, Trailblazer, Cheyenne Plains, and Rockies Express.

As an example of the diminishment of flow out of the Rocky Mountain region and principally from Wyoming to the Midwest, according to Platts Bentek, the average daily eastbound flow for the twelve months ending June 2011 was 4.6 billion cubic feet per day. In contrast, for the twelve months ending February 2016, the average daily eastbound flow had fallen to under 3.4 billion cubic feet per day, a 26% reduction. The deterioration in total flow has been accompanied by an even more dramatic increase in the volatility of those flows. For the twelve months ending June 2011, the greatest deviation of the average daily flow in any one of those twelve months to the average daily flow in all of those twelve months was 8%. For the twelve months ending February 2016, the greatest deviation of the average daily flow in any one of those twelve months to the average daily flow in all of those twelve months was 43%, with five of the remaining eleven months in that same interval showing deviations to the average that were in excess of 20%.

The inescapable impact of growth in natural gas production in the eastern U.S. forces more of the natural gas produced in Wyoming to flow westbound instead. The ability to market natural gas from Wyoming to the west is a function of capacity for Wyoming produced gas to reach western markets, the availability of other competing supplies to reach western markets, and the size of western markets. The related applications of Jordan Cove and Pacific Connector go to the heart of the third variable. With the existing loss of share of Midwest and eastern markets

occasioned by the growth of eastern production, Wyoming becomes ever more reliant on the size of western markets.

Under these conditions, Jordan Cove and Pacific Connector represent an important and unique opportunity for increased natural gas production in Wyoming, and potentially an important market stabilization opportunity as well. These opportunities are directly the product of Jordan Cove and Pacific Connector making international markets accessible to Wyoming-produced natural gas for the first time. This significant public benefit was not adequately addressed in the March 11 Order, and the Commission's failure to do so was arbitrary and capricious.²⁸

3. The Commission Misapplied Its “Benefits Test” Under The *Policy Statement*.

The Commission improperly conflated the “benefits” test under the *Certificate Policy Statement* with a showing of “need” in order to demonstrate benefits. The two are not and should not be synonymous, yet that is the manner in which these factors are treated in the March 11 Order. In doing so, the Commission ignored not only the evidence of substantial public benefits in the record from the WPA and the State of Wyoming, but additional evidence of public benefits from, among others, Ninth District State Representative Caddy Hanen McKeown and Douglas County Commissioner Susan Morgan.

As previously indicated, the public benefits of Jordan Cove and Pacific Connector include increased employment in Wyoming along with increased tax and royalty income to the State of Wyoming and its local governments, none of which were adequately taken into account by the Commission in the application of its *Certificate Policy Statement* in the March 11 Order.

²⁸ *Meyersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *Missouri Public Service Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

The Commission's balancing of benefits was therefore fatally flawed and not supported by substantial evidence.²⁹ By ignoring public benefits in the record, the March 11 Order is arbitrary and capricious and an abuse of discretion.³⁰

B. THE COMMISSION ABUSED ITS DISCRETION IN REJECTING THE PACIFIC CONNECTOR CERTIFICATE APPLICATION RATHER THAN REQUIRING PACIFIC CONNECTOR TO PROVIDE SUBSTANTIAL EVIDENCE TO SATISFY THE BALANCING TEST UNDER THE COMMISSION'S CERTIFICATE POLICY STATEMENT.

Wyoming recognizes that any approval of the Jordan Cove and Pacific Connector applications must pass the test of public benefits that exceed adverse impacts.

Wyoming asks the Commission to recognize the inherently more difficult nature of international negotiations for energy products, especially given the recent extreme volatility in domestic natural gas markets and international LNG markets, and allow the project applicants additional time to develop a record to potentially support a finding of public benefits in excess of adverse impact by reopening the record in these dockets for a specified period of time in which the project applicants can demonstrate public benefits through the execution of agreements with customers for the projects.

The Commission previously granted generous additional time for a project proponent to procure market support. On May 19, 2016, in Docket CP06-19-000, *et.al.*, the Commission granted Windy Hill Gas Storage, LLC ("Windy Hill") a certificate to construct and operate a gas

²⁹ *Washington Gas Light Co. v. FERC*, 532 F.3d 928, 932-33 (D.C. Cir. 2008); *see also Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1104 (D.C. Cir. 2012) (the Commission "jumped the rails" by ignoring record evidence in violation of its statutory requirements).

³⁰ *Meyersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015); *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 704 (D.C. Cir. 2010); *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1303 (D.C. Cir. 1992); *Missouri Public Service Comm'n v. FERC*, 337 F.3d 1066, 1070 (D.C. Cir. 2003); *Columbia Gas Transmission Corp. v. FERC*, 628 F.2d 578, 593 (D.C. Cir. 1979); *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983).

storage facility in eastern Colorado.³¹ Over the course of the following years, Windy Hill requested and the Commission granted successive extensions of time in which to complete the project. In each request, Windy Hill indicated that sufficient market support to proceed with construction was being sought by Windy Hill. Ultimately, on July 6, 2015, nearly nine years after the certificate was granted to Windy Hill, the Commission vacated the certificate for lack of progress. If nearly nine years is permissible for a certificated project to seek market support, it is reasonable that a project with the international marketing complexity of Jordan Cove and the related Pacific Connector Gas Pipeline receive more than thirty-four months to demonstrate market support during the application phase of a project.

Equally compelling is the matter involving LNG Development Company, LLC (“Oregon LNG”) in Docket Nos. CP09-6-000 and CP09-7-000. Oregon LNG filed its certificate application for an import-only LNG facility and appurtenant interconnected pipeline facilities in October 2008. This LNG project is the only pending LNG project on the west coast of the continental United States and is designed as a receiving terminal for import purposes with subsequent re-gasification and transportation onto intrastate and interstate pipelines, including Northwest Pipeline Company. At present, the Commission staff has yet to issue its final Environmental Impact Statement on the project. Accordingly, if an import only LNG project has been pending before the Commission for nearly eight years, the Commission has abused its discretion and acted arbitrarily and capriciously in denying Pacific Connector’s certificate application at less than three years, without affording it additional time to obtain the necessary precedent agreements.

While the public benefits balancing test gives the Commission much latitude, the Commission must recognize the inherent complexities surrounding the Jordan Cove project. The

³¹ *Windy Hill Gas Storage, LLC*, 115 FERC ¶ 61,218 (2006).

Commission should not treat this project as a run-of-the-mill request for approval. Instead, the Commission should take proper note of the project's unique characteristics, which involve both a greenfield pipeline and LNG export facility, and the project's critical reliance on international commitments. These complexities mandate greater, not less, flexibility than the Commission accorded in this instance.

While the circumstances and timing of the post-certificate order relief granted to Windy Hill are admittedly different from the pre-certificate status of the Jordan Cove and Pacific Connector applications, the Commission is obligated to articulate a principled rationale for its dramatically different treatment of Jordan Cove and Pacific Connector as contrasted to Windy Hill.³² In other words, “[r]easoned decisionmaking requires treating like cases alike.”³³ Courts insist that the Commission must offer a rational explanation when faced with similar cases and it changes direction.³⁴ Here, the failure to provide adequate time for Jordan Cove and Pacific Connector to finalize the commercial contractual arrangements that also bedeviled Windy Hill rendered the Commission's decision arbitrary, capricious and an abuse of discretion.³⁵

As explained further below, the Commission could have imposed less drastic remedies (including appropriate conditioning). The Commission's recourse to the drastic remedy of denial of the certificates was arbitrary, capricious and an abuse of discretion.

The State of Wyoming and the WPA request that the Commission grant rehearing in this docket for the purpose of allowing the applicants additional time to demonstrate the public

³² See *Williston Basin Inter. Pipeline Co. v. FERC*, 165 F.3d 54, 65 (D.C. Cir. 1999); *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995) (“It is . . . elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent.”); *National Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980) (same).

³³ *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989).

³⁴ *Colo. Interstate Gas Co. v. FERC*, 850 F.2d 769, 774 (D.C. Cir. 1998); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 41-42, 103 S.Ct. 2856, 2865-66 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1971).

³⁵ *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989).

benefits of the projects, or to issue the certificates with appropriate conditioning language.

C. THE COMMISSION VIOLATED PACIFIC CONNECTOR'S DUE PROCESS RIGHTS TO FAIR NOTICE OF THE COMMISSION'S PROPOSED TERMINATION ACTION IN ADVANCE OF THE COMMISSION'S DETERMINATION TO REJECT THE SECTION 7(c) APPLICATION.

When a new principle is established in individual adjudication, due process requires that affected parties be allowed to challenge the basis of the rule.³⁶ In this proceeding, the Commission's reliance on lack of precedent agreements and other indicia of "expressions of interest" in the Pacific Connector³⁷ as the grounds for dismissing the project applications is a classic example of application of "secret law" frowned upon by the Court of Appeals.³⁸ In *Williston Basin Inter. Pipeline Co. v. FERC*,³⁹ the Court of Appeals for the D.C. Circuit stated the well-established rule that:

[a] party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.⁴⁰

Here the Commission imposed an undisclosed time limit on the period during which the Applicants would be permitted to demonstrate precedent agreements or other indicia of "expressions of interest" in the Pacific Connector project before **both** applications would be denied. In doing so, the Commission failed to provide "fair warning" of its planned action and, accordingly, its denial of the certificate applications was arbitrary, capricious, an abuse of

³⁶ *Shell Oil Co. v. FERC*, 707 F.2d 230, 235-36 (5th Cir. 1983).

³⁷ March 11 Order at P 39.

³⁸ *See, e.g., Gates & Fox Co. v. Occupational Safety & Health Review*, 790 F.2d 154, 156 (D.C. Cir. 1986) (fair notice required of the conduct the government demands).

³⁹ *Williston Basin Inter. Pipeline Co. v. FERC*, 165 F.3d 54 (D.C. Cir. 1999).

⁴⁰ *Id.* at 63 (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288 n. 4, (1974)); *see also Hatch v. FERC*, 654 F.2d 825, 835 (D.C. Cir. 1981) (same); *United Gas Pipe Line Co. v. FERC*, 597 F.2d 581, 586-87 (5th Cir. 1979) ("The law will not tolerate . . . after-the-fact, in fact retroactive, imposition of standards").

discretion and exceeded the agency's statutory authority.⁴¹

In this regard, the Commission's reliance on *Turtle Bayou Gas Storage Company, LLC*⁴² is seriously misplaced. In *Turtle Bayou*, the applicant sought a certificate of public convenience and necessity for a gas storage project which would require the use of eminent domain authority "to obtain virtually all of the property rights needed for the project from unwilling property owners."⁴³ Such is most certainly not the case here. In this case, just 54 out of 630, or 8.6%, of the landowners by number and *substantially less by right-of-way distance* objected to the proposed project. Indeed, the Commission's operating assumption in the March 11 Order, that substantial sections of the Pacific Connector right-of-way would have to be obtained by recourse to eminent domain, is not supported by substantial evidence in the record.

The Commission has a history of exercising flexibility in application of the *Policy Statement*, for example by conditioning certificates upon execution of firm service agreements before commencement of construction.⁴⁴ A similar approach would have been more appropriate in this case than outright denial of the applications. Indeed, the Commission could have conditioned the certificate for Pacific Connector on the acquisition of some stated (substantial) amount of right-of-way through negotiation with private landowners *before Pacific Connector could commence construction*, thereby effectively limiting Pacific Connector's utilization of eminent domain.

The point is that other, less drastic remedies were available to the Commission, and the Commission's recourse to the drastic remedy of denial of the certificates was arbitrary,

⁴¹ *Id.*

⁴² *Turtle Bayou Gas Storage Company, LLC*, 135 FERC ¶ 61,233 (2011).

⁴³ *Turtle Bayou Gas Storage Company, LLC*, Order Denying Request For Rehearing Or Reconsideration, 139 FERC ¶ 61,033 at P 15 (2012).

⁴⁴ *E.g., Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283 at PP (2014); *Cameron LNG, LLC*, 147 FERC ¶ 61,230 at Ordering para. M (2014).

capricious and an abuse of discretion. More so when it is recognized that this action followed completion of a detailed Environmental Impact Statement which concluded that, properly conditioned, the project would have no major adverse environmental effects.

D. THE COMMISSION ABUSED ITS DISCRETION AND ACTED ARBITRARILY AND CAPRICIOUSLY IN REJECTING THE JORDAN COVE NGA SECTION 3 APPLICATION TO SITE, CONSTRUCT, AND OPERATE AN LNG EXPORT TERMINAL BASED ON THE DENIAL OF THE PACIFIC CONNECTOR SECTION 7(c) APPLICATION.

The Commission's orders, including those approving certificate applications, are reviewed under the familiar arbitrary and capricious standard.⁴⁵ The Commission is required to assure "that the Commission's decisionmaking is reasoned, principled, and based upon the record."⁴⁶ The Commission's order must be based on a consideration of the relevant factors and cannot be based on an error of judgment.⁴⁷

In this regard we note that the Commission's application of its *Certificate Policy Statement* to LNG export facilities under NGA Section 3 has differed from the application of the *Certificate Policy Statement* to pipeline certificate applications under NGA Section 7(c). Among other things, the Commission generally does not require the same showing of "need" for LNG export facilities as it requires for interstate pipeline certificates under NGA Section 7(c). For example, in *Sabine Pass Liquefaction Expansion, LLC*, the Commission noted the lack of precedent agreements and the absence of firm contracts, yet issued the certificate anyway.⁴⁸

In this case, the Commission's determination respecting Jordan Cove's NGA Section 3

⁴⁵ *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); *B&J Oil & Gas v. FERC*, 353 F.3d 71, 75-76 (D.C. Cir. 2004); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000).

⁴⁶ *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010); see also *Penn. Office of Consumer Advocate v. FERC*, 131 F.3d 182, 185-186 (D.C. Cir. 1997).

⁴⁷ *ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071, 1083 (D.C. Cir. 2002).

⁴⁸ *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,012 at PP 16 and 41 n.43 (2015).

application was impermissibly influenced by factors improperly relied upon as the basis for rejection of Pacific Connector's NGA Section 7(c) certificate application. Because the Commission's rejection of Pacific Connector's application was arbitrary, capricious, an abuse of discretion and in excess of the agency's statutory authority, the rejection of Jordan Cove's application is similarly afflicted and must be reversed.

IV. CONCLUSION

For the reasons set forth above, the Commission should grant rehearing, reverse its denial of the requested applications, and provide Pacific Connector fair notice of the period of time during which Pacific Connector must demonstrate need for the pipeline through precedent agreements or other indicia of interest.

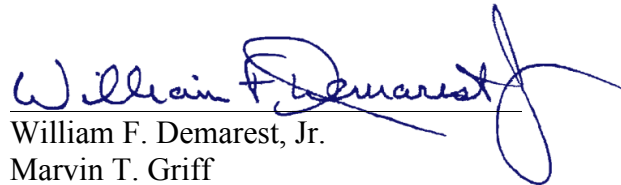
Respectfully submitted,

STATE OF WYOMING

/s/ James Kaste
James Kaste
Deputy Attorney General
Office of Wyoming Attorney General
2320 Capitol Avenue
Cheyenne, Wyoming 82002

Attorney for Intervenor State of Wyoming

WYOMING PIPELINE AUTHORITY


William F. Demarest, Jr.
Marvin T. Griff
Demetrios Pulas, Jr.
HUSCH BLACKWELL LLP
750 17th Street, N.W., Suite 900
Washington, D.C. 20006

Attorneys for Wyoming Pipeline Authority

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 Secretary in these proceedings.

Dated at Washington, D.C., this 11th day of April 2016.

Jesse Jacobs

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