

***national fuel***Sarah J. Mugel
Vice President, General Counsel and Secretary

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October 16, 2020

*Via electronic filing*The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426Re: National Fuel Gas Supply Corporation, and
Empire Pipeline, Inc.
Docket No. CP15-115-000 *et al.*
Northern Access Project
Request for Extension of Time

Dear Secretary Bose:

On February 3, 2017, the Federal Energy Regulatory Commission (“Commission”) granted National Fuel Gas Supply Corporation (“National Fuel”) and Empire Pipeline, Inc. (“Empire”) (together “Applicants”) a certificate of public convenience and necessity for their Northern Access 2016 Project (“Project”) pursuant to sections 7(b) and 7(c) of the Natural Gas Act (“NGA”) and Part 157 of the Commission’s regulations.¹ The Project consists of approximately 99 miles of new pipeline, primarily 24-inches in diameter, to be constructed in McKean County, Pennsylvania, and Allegany, Cattaraugus, Erie, and Niagara Counties, New York, a new compressor station along Empire’s system in Niagara County, New York, and additional compression at National Fuel’s existing Porterville Compressor Station in Erie County, New York, as well as new pipeline interconnects and various auxiliary and appurtenant facilities. Ordering Paragraph (C)(1) initially required Applicants to complete the authorized construction of the Project facilities and make them available for service within 24 months from the date of the Certificate Order, *i.e.*, by February 3, 2019.² In January 2019, the Commission granted Applicants’ request for a three year extension, until February 3, 2022, to complete construction of the Project and enter the Project facilities into service.³ As a result of

¹ *National Fuel Gas Supply Corp. et al.*, 158 FERC 61,145 (2017) (“Certificate Order”), *order on reh’g and motion for waiver determination under Section 401 of the Clean Water Act*, 164 FERC 61,084 (2018) (“Rehearing Order”).

² Certificate Order at Ordering Paragraph (C)(1).

³ Letter Order to National Fuel Gas Supply Corp. and Empire Pipeline, Inc., Docket No. CP15-115-000 (issued Jan.

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ongoing legal and regulatory delays, Applicants now request an additional extension of time until December 1, 2024 to complete construction of the Project and enter service, consistent with Commission precedent.

Commission regulations do not establish a particular time period to complete construction of an authorized natural gas facility.⁴ The Commission's regulations, however, provide for extensions of time to comply with conditions set forth in its orders for good cause, upon a motion made before the expiration of the period prescribed or previously extended,⁵ and delegate authority over such requests to the Director of the Office of Energy Projects.⁶ The Commission has granted extensions of time in situations when a project sponsor has demonstrated that it has made a good faith effort to meet a certificate order's deadline, but has encountered unforeseeable circumstances, such as difficulties in obtaining permits.⁷ The Commission has also permitted pipelines to obtain multiple extensions of time when an initial extension was insufficient.⁸ An extension of time, such as the one requested, is appropriate, and as the Commission stated in *Algonquin*,⁹ when reviewing requests for an extension, it will not reconsider the Commission's underlying finding that the project remains required by the public convenience and necessity where, as here, the certificate holder files "within a timeframe during which the environmental and other public interest findings underlying the Commission's authorization can be expected to remain valid."¹⁰ Nor is a review of environmental conditions required absent "substantial changes in the proposed action that are relevant to environmental concerns 'or where there are' significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"¹¹, neither of which exists here. Pursuant to Rule 2008 and the revised procedures announced in *Algonquin*¹², Applicants request an extension of time, until December 1, 2024, to complete construction of the Project and enter the Project facilities into service, consistent with Commission precedent.¹³

31, 2019) ("National Fuel Letter Order").

⁴ 18 C.F.R. § 157.20(b) (2018); *see also*, *Constitution Pipeline Co., LLC*, 165 FERC 161,081 at P 9 (2018).

⁵ 18 C.F.R. § 385.2008.

⁶ *Id.* § 375.308(c)(4).

⁷ *Northwest Pipeline, LLC*, 171 FERC ¶ 61,077 at P 14 (2020); *Constitution*, 165 FERC ¶ 61,081, at PP 9, 25; *see also* Letter Order to Pine Prairie Energy Center, LLC, Docket No. CP11-1-000 (issued Apr. 21, 2020) ("Pine Prairie Letter Order").

⁸ *Constitution*, 165 FERC ¶ 61,081 at P 2; *Northwest Pipeline*, 171 FERC ¶ 61,077 at P 13; *see also* Pine Prairie Letter Order.

⁹ *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144 at P 15 (2020).

¹⁰*Id.*

¹¹*Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026 at P 21 (2020) (citing the Council on Environmental Quality's regulations).

¹² *See Algonquin*, 170 FERC ¶ 61,144.

¹³ *E.g.*, *Northwest Pipeline*, 171 FERC ¶ 61,077 at P 10; *Algonquin*, 170 FERC ¶ 61,144 at P 15 and 32; *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,138 at P 7 (2020); *Constitution*, 165 FERC ¶ 61,081, at P 9, *reh'g*, 169 FERC ¶ 61,102 at P 19 (2019).

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Good cause exists to grant Applicants' requested extension of time, which is required due to reasons outside of Applicants' control. The Certificate Order requires Applicants to obtain "all applicable authorizations required under federal law (or evidence of waiver thereof) as a condition of initiating construction and commencing service."¹⁴ In its initial extension request, Applicants described the challenges they faced in obtaining a Water Quality Certification ("WQC") issued pursuant to Section 401 of the Clean Water Act ("CWA").¹⁵ As noted in that request, the New York State Department of Environmental Conservation ("NYSDEC") purposefully delayed CWA Section 401 authorization for the Project, and purported to deny the authorization in April 2017.¹⁶ Applicants have diligently pursued legal action with respect to the WQC in federal courts and before the Commission, including arguing that the NYSDEC waived its authority to issue a WQC by failing to timely act on the WQC application.¹⁷

On August 6, 2018, the Commission's Rehearing Order affirmatively found that the NYSDEC has waived its authority to authorize a WQC under CWA Section 401. In April 2019, the Commission denied NYSDEC's rehearing request and request for stay of the August 2018 Rehearing Order and waiver finding.¹⁸ Thereafter, the NYSDEC appealed the Commission's WQC waiver finding to the U.S. Second Circuit Court of Appeals ("Second Circuit"), and the matter remains pending. Although the date for a decision from the Second Circuit remains uncertain, Applicants expect a minimum of twelve months – but likely more – to resolve the pending legal action related to the WQC, and any related appeals. This legal delay, combined with the expected timeframe for necessary material procurement, and construction of the Project facilities, necessitates an extension beyond February 2022 for Applicants to place the Project facilities in service.

To date, NYSDEC's actions alone have caused a delay to the Project lasting over 3 years, between the dates of the Certificate Order and this extension request. As result of the previously described legal proceedings, Applicants anticipate that they will not be in a position to file for a notice to proceed until early 2022, the granting of which would facilitate Applicants' commencement of material procurement activities for long-lead items, such as large-diameter pipe and compression. A further extension of time is necessary because Applicants do not anticipate commencement of Project construction – tied to the delivery of these long-lead time materials – until mid-2023, and further expect construction to occur over of a period of at least 12 months based on the magnitude of the Project. Consistent with Applicants' general practice on previous projects, Applicants initially began to procure materials in advance of construction to avoid construction delays. In light of New York's actions with respect to the Project, however, Applicants prudently

¹⁴ Certificate Order at Appendix B, Env'tl Condition No. 10.

¹⁵ 33 U.S.C. § 1341 (2012).

¹⁶ Rehearing Order at P 35.

¹⁷ 33 U.S.C. § 1341(a)(1).

¹⁸ *National Fuel Gas Supply Corp. et al., order denying rehearing*, 167 FERC ¶ 61,007 (2019) ("Order Denying Rehearing").

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halted all material procurement in an effort to avoid additional costly expenditures. Applicants have been waiting to receive appropriate authorizations before continuing with necessary purchases. An extension will permit Applicants to meet a revised target in-service date of late 2024.

The Project remains fully subscribed by an anchor shipper committed to fifteen year precedent agreements. And, Applicants remain committed to constructing the Project and placing it into service to meet the market's continued need. Moreover, the extension will have no rate impact on National Fuel or Empire's existing ratepayers. The Project's anchor shipper will pay an incremental recourse rate on National Fuel and a cost-of-service based discounted recourse rate on Empire. Since obtaining the Certificate Order, Applicants have remained vigilant in monitoring environmental clearances, including renewing clearances when necessary.¹⁹ Additionally, Applicants will bring to the Commission's attention any substantial changes in the proposed action that are relevant to environmental concerns or significant new circumstances relevant to environmental concerns that would bear on the proposed action or its impacts, in any requested notices to proceed.

For the reasons set forth above, Applicants submit that there is good cause for an extension of time to construct the Project.²⁰ Accordingly, Applicants hereby request that the Director of the Office of Energy Projects, pursuant to the delegated authority in Section 375.308(w)(4) of the Commission's regulations, grant Applicants an extension of time until December 1, 2024, for Applicants to complete the authorized construction of the Project facilities and make the facilities available for service.

Applicants are e-filing this request in accordance with the Commission's Order No. 703, Filing Via the Internet guidelines, issued in Docket No. RM07-16-000 on November 15, 2007. Pursuant to § 385.2010 of the Commission's regulations, a copy of this letter is being served to each person whose name appears on the official service list for this proceeding. A copy of this letter is also being provided to the Commission's Office of Energy Projects.

Respectfully,

/s/Sarah J. Mugal

Sarah J. Mugal

Vice President and General Counsel

National Fuel Gas Supply Corporation

¹⁹ For example, since obtaining an extension of the Certificate Order from the Commission, Applicants continued to prosecute their applications for necessary permits under Section 404 of the CWA, and have since obtained such permits from the respective districts of the U.S. Army Corps of Engineers.

²⁰ To the extent necessary, Applicants also seek waiver of Rules 212 and 2001 of the Commission's Rules of Practice and Procedure, 18 C.F.R §§ 385.212 and 385.2001, to provide this letter in lieu of a formal motion, consistent with the format used by other pipelines' requests for extension of time.

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 this proceeding.

Dated at Williamsville, New York this 16th day of October, 2020.

/s/ Matthew Luzi

Matthew Luzi

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