



**National Fuel**<sup>®</sup>

**Supply Corporation**

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January 28, 2022

*Via electronic filing*

Honorable Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

Re: National Fuel Gas Supply Corporation and Empire Pipeline, Inc.  
Docket Nos. 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” or “FERC”) issued National Fuel Gas Supply Corporation (“National Fuel”) and Empire Pipeline, Inc. (“Empire”) (together, “Certificate Holders”) authorization and certificates of public convenience and necessity for the Northern Access Project (“Project”) pursuant to Sections 7(b) and 7(c) of the Natural Gas Act (“NGA”) and Part 157 of the Commission’s regulations.<sup>1</sup> 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.

Per ordering Paragraph (C)(1), the Certificate Order was conditioned upon the Certificate Holders completing the authorized construction of the Project facilities and making them available for service within 24 months from the date of the Certificate Order, *i.e.*, by February 3, 2019.<sup>2</sup> Meeting that deadline proved impossible given delays in obtaining other federal permits, specifically the Clean Water Act (“CWA”) Section 401 Water Quality Certification (“WQC”) from the New York State Department of Environmental Conservation (“NYSDEC”) and the CWA Section 404 permit from the U.S. Army Corps of Engineers (“Corps”). In January

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<sup>1</sup> *Nat’l Fuel Gas Supply Corp.*, 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”), *order denying reh’g*, 167 FERC ¶ 61,007 (2019) (“Order Denying Rehearing”), *pet. for review denied sub nom., N.Y. State Dep’t of Env’t Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021).

<sup>2</sup> Certificate Order at Ordering Paragraph (C)(1).

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2019, the Commission granted Certificate Holders' request for a three-year extension, until February 3, 2022 (the "Certificate Extension"), to complete construction of the Project and enter the Project facilities into service, acknowledging project delays due to actions by NYSDEC.<sup>3</sup> Since receipt of the Certificate Extension, these legal delays have persisted, despite the best efforts of the Certificate Holders. As a result, Certificate Holders now request an additional extension of time until December 31, 2024, to complete construction of the Project and place the facilities in service, consistent with Commission precedent.

Commission regulations do not establish a particular time period to complete construction of an authorized natural gas facility.<sup>4</sup> 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,<sup>5</sup> and delegate authority over such requests to the Director of the Office of Energy Projects.<sup>6</sup> 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 obstacles, such as difficulties in obtaining non-FERC permits and authorizations.<sup>7</sup> The Commission has also permitted pipelines to obtain multiple extensions of time when an initial extension was insufficient.<sup>8</sup> Pursuant to Rule 2008 and the revised procedures announced in *Algonquin*,<sup>9</sup> Certificate Holders request an extension of time, until December 31, 2024, to complete construction of the Project and enter the Project facilities into service, consistent with Commission precedent.<sup>10</sup>

Good cause exists to grant Certificate Holders' requested extension of time, which is required due to reasons outside of Certificate Holders' control. The Certificate Order requires Certificate Holders to obtain "all applicable authorizations required under federal law (or

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<sup>3</sup> National Fuel Gas Supply Corp. and Empire Pipeline, Inc., Letter Order, Docket No. CP15-115-000, at 1-2 (issued Jan. 31, 2019) (granting extension of time and noting the "Water Quality Certification and the wetland and waterbody crossing permits issued under sections 401 and 404 of the Clean Water Act, respectively, have been delayed by legal actions taken by the . . . [NYSDEC]" and that "Applicants do not anticipate commencement of Project construction until early 2021 due to New York's continued legal actions.") (internal citation omitted).

<sup>4</sup> See 18 C.F.R. § 157.20(b) (2021); see also *Delfin LNG LLC*, 178 FERC ¶ 61,031, at P 8 (2022); *Constitution Pipeline Co.*, 165 FERC ¶ 61,081, at P 9 (2018), *reh'g denied*, 169 FERC ¶ 61,102 (2019).

<sup>5</sup> 18 C.F.R. § 385.2008.

<sup>6</sup> *Id.* § 375.308(c)(4).

<sup>7</sup> *Nw. Pipeline LLC*, 171 FERC ¶ 61,077, at P 14 (2020); *Constitution*, 165 FERC ¶ 61,081 at PP 9, 25; see also *Pine Prairie Energy Center, LLC*, Letter Order, Docket No. CP11-1-000, at 2 (issued Apr. 21, 2020) ("Pine Prairie Letter Order").

<sup>8</sup> *Constitution*, 165 FERC ¶ 61,081 at P 19; *Nw. Pipeline*, 171 FERC ¶ 61,077 at P 13; see also *Pine Prairie Letter Order* at 1; *Delfin LNG*, 178 FERC ¶ 61,031 at PP 2-3 (granting third extension of time).

<sup>9</sup> *Algonquin Gas Transmission, LLC*, 170 FERC ¶ 61,144 (2020).

<sup>10</sup> *E.g.*, *Nw. Pipeline*, 171 FERC ¶ 61,077 at P 10; *Algonquin*, 170 FERC ¶ 61,144 at PP 15 and 32; *PennEast Pipeline Co.*, 170 FERC ¶ 61,138, at P 7 (2020); *Constitution*, 165 FERC ¶ 61,081 at P 9, *reh'g denied*, 169 FERC ¶ 61,102 at P 19.

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evidence of waiver thereof)” as a condition of initiating construction and commencing service.<sup>11</sup> In its previous extension request, Certificate Holders described the challenges they faced in obtaining a CWA Section 401 WQC from NYSDEC.<sup>12</sup> As noted in that request, NYSDEC intentionally delayed CWA Section 401 authorization for the Project, and attempted to deny the authorization in April 2017, beyond the time allowed.<sup>13</sup> Since the attempted denial, Certificate Holders have diligently pursued legal action with respect to the WQC in federal courts and before the Commission, including repeatedly demonstrating that NYSDEC waived its authority to issue a WQC by failing to act on Certificate Holders’ WQC application in a timely manner.<sup>14</sup>

Litigation over the Certificate Holders’ WQC and the Commission’s finding of waiver continued long after the Commission issued the Certificate Extension. In April 2019, two months after Certificate Holders received the Certificate Extension, the Commission denied NYSDEC’s rehearing request and request for stay of the August 2018 Rehearing Order and waiver finding.<sup>15</sup> Thereafter, NYSDEC appealed the Commission’s WQC waiver finding to the U.S. Court of Appeals for the Second Circuit (“Second Circuit”) in May 2019. After almost two years of additional litigation, the Second Circuit upheld FERC’s waiver determination in March 2021.<sup>16</sup> On August 20, 2021, NYSDEC’s time for filing a petition for *certiorari* with the U.S. Supreme Court expired, leaving Certificate Holders with a final and non-appealable determination of WQC waiver for the New York portion of the Project.<sup>17</sup> The lengthy legal delay, combined with the expected timeframe for necessary material procurement, and construction of the Project facilities, necessitates an extension beyond February 2022 for Certificate Holders to place the Project facilities into service.

To date, NYSDEC’s actions alone have caused a delay to the Project lasting over four years. Due to the length of these permitting delays, Certificate Holders also anticipate the need to refresh various environmental clearances and permitting processes, many of which were placed on hold pending resolution of the status of NYSDEC’s waiver of the WQC. As a result, Certificate Holders are not currently in a position to file for a notice to proceed, the granting of which would facilitate Certificate Holders’ commencement of material procurement activities for long-lead items, such as large-diameter pipe and compression.<sup>18</sup> Further, upon receipt of

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<sup>11</sup> Certificate Order at App. B, Env’t Condition No. 10.

<sup>12</sup> National Fuel Gas Supply Corp. and Empire Pipeline, Inc., Request for Extension of Time, Docket No. CP15-115-000, at 2-3 (filed Nov. 26, 2018); *see also* 33 U.S.C. § 1341.

<sup>13</sup> *See* Rehearing Order at P 35.

<sup>14</sup> 33 U.S.C. § 1341(a)(1).

<sup>15</sup> Order Denying Rehearing, 167 FERC ¶ 61,007.

<sup>16</sup> 991 F.3d 439.

<sup>17</sup> On January 26, 2017, the Pennsylvania Department of Environmental Protection issued the WQC for the Pennsylvania portion of the Project.

<sup>18</sup> Consistent with Certificate Holders’ general practice on previous projects, Certificate Holders initially began to procure materials in advance of construction to avoid construction delays. In light of NYSDEC’s actions with respect to the Project, however, Certificate Holders prudently halted all material procurement in an effort to avoid additional costly expenditures.

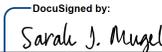
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these materials, which Certificate Holders currently expect to have a nine to twelve month lead-time, construction of the Project is anticipated to take approximately twelve months. As such, an extension of time until December 31, 2024 is necessary.

Moreover, the extension will have no rate impact on National Fuel or Empire's existing ratepayers, and the Project remains fully subscribed under fifteen-year precedent agreements.<sup>19</sup> 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, Certificate Holders have remained vigilant in monitoring environmental clearances, and prior to requesting a notice to proceed with construction, will update applicable clearances and approvals, as needed, in compliance with the certificate order for the Project.<sup>20</sup> Additionally, if necessary, Certificate Holders will bring to the Commission's attention any substantial changes in the approved Project 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, Certificate Holders submit that there is good cause for an extension of time to construct the Project.<sup>21</sup> Accordingly, Certificate Holders respectfully request 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 Certificate Holders an extension of time until December 31, 2024, for Certificate Holders to complete the authorized construction of the Project facilities and make the facilities available for service.

Respectfully,

DocuSigned by:  
  
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Sarah J. Mugel  
Vice President and General Counsel  
National Fuel Gas Supply Corporation

cc: Terry Turpin, FERC  
John Wood, FERC  
Pamela Romano, FERC  
Rich McGuire, FERC  
Nancy Fox Fernandez, Project Manager, FERC

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<sup>19</sup> Certificate Order at PP 26-27.

<sup>20</sup> For example, since obtaining the 2019 Certificate Extension, Applicants continued to prosecute their applications for necessary permits under Section 404 of the CWA, and have since obtained such permits from the respective Corps' districts. *See Delfin LNG*, 178 FERC ¶ 61,031, at PP 10-11.

<sup>21</sup> 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 28<sup>th</sup> day of January, 2022.

DocuSigned by:

*Matthew Luzi*

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