

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

Algonquin Gas Transmission, LLC)

Docket No. CP14-96-000

**REQUEST FOR REHEARING
OF THE CITY OF BOSTON DELEGATION**

Pursuant to Section 717r(a) of Natural Gas Act¹ and Rule 713 of the Federal Energy Regulatory Commission (FERC or Commission) Rules of Practice and Procedure,² the City of Boston Delegation (Boston)³ hereby requests rehearing and rescission on the Commission's March 3, 2015 Order (Order) issuing a certificate of public convenience and necessity and approving abandonment (Certificate) to Algonquin Gas Transmission, LLC (Algonquin) to construct and operate the proposed Algonquin Incremental Market Project (AIM Project). Boston seeks rehearing and rescission of the Commission's Order because it is contrary to the requirements of the Natural Gas Act (NGA), the Commission's own stated policy,⁴ and the Clean Water Act (CWA).⁵

The Commission was required to evaluate the impacts on public safety in the City of Boston resulting from the AIM Project. It diminished and disregarded the manifest safety

¹ 15 U.S.C. § 717f(c).

² 18 C.F.R. § 385.713.

³ The City of Boston Delegation includes: United States Congressman Stephen F. Lynch, Mayor of The City of Boston Martin J. Walsh, Boston City Councilor Matt O'Malley, Boston City Councilor Michelle Wu, Boston City Councilor Michael Flaherty, Boston City Councilor Ayanna Pressley, Boston City Councilor Stephen J. Murphy, Massachusetts State Representative Edward F. Coppinger, and Massachusetts State Senator Michael Rush.

⁴ 15 U.S.C. §§ 717 *et seq.*

⁵ 33 U.S.C. §§ 1251 *et seq.*

impacts based on factual determinations it made that were not supported by substantial evidence. In its apparent rush to issue the Certificate, it violated the CWA, which required it to wait until Massachusetts, Connecticut and New York exercise their regulatory authority and jurisdiction to certify that the AIM Project will not violate the water quality standards of each State.

1. STATEMENT OF RELEVANT FACTS

On February 28, 2014, Algonquin⁶ filed an application pursuant to Section 7(c) of the NGA and Part 157 of the Commission's regulations⁷ for authorization to construct and operate its AIM Project in New York, Connecticut, Rhode Island, and Massachusetts. Prior to that, at various times between 2010 and 2013, Algonquin held open seasons for the AIM Project to solicit bids for additional service and for the release of existing firm transportation entitlements. As a result of the open seasons, Algonquin executed precedent agreements with eight local distribution companies and two municipal utilities (collectively, the Project Shippers).⁸

Algonquin states that the AIM Project will enable it to provide 342,000 dekatherms (Dth) per day of firm transportation service from its existing recipient points in Ramapo, New York, to various city gate delivery points in Connecticut, Rhode Island, and Massachusetts.⁹

Algonquin proposes to construct, install, and operate, approximately 37.4 miles of pipeline and related facilities in New York, Connecticut, and Massachusetts.¹⁰ Among other

⁶ Algonquin is a Delaware limited liability company and an indirect, wholly-owned subsidiary of Spectra Energy Partners, LP. *Order*, p. 1.

⁷ 18 C.F.R. Pt. 157.

⁸ The Project Shippers are Bay State Gas Company; Boston Gas Company; Colonial Gas Company; Connecticut Natural Gas Corporation; Middleborough Gas and Electric; The Narragansett Electric Company; Norwich Public Utilities; NSTAR Gas Company; The Southern Connecticut Gas Company, and Yankee Gas Services Company.

⁹ *Order*, p.1.

¹⁰ *Id.*, p. 2

things, Algonquin proposes to install approximately 4.1 miles of 16-inch-diameter high pressure pipeline and approximately 0.8 miles of 24-inch-diameter high pressure pipeline off its existing I-4 System Lateral in Norfolk and Suffolk Counties, Massachusetts (West Roxbury Lateral or WRL).¹¹ Algonquin also proposes to construct a new meter station at milepost (MP) 4.2 of the proposed WRL within the City of Boston, to deliver natural gas to Boston Gas Company in Suffolk County, Massachusetts (West Roxbury Meter Station).¹²

These aspects of the AIM Project, which are to be located in the City of Boston, are noteworthy and materially distinct from the rest of the project. While much of the AIM Project will involve replacing existing pipelines, looping of existing pipelines, and modifying existing meter stations, the WRL and West Roxbury Meter Station components of the project contemplate *new* installations and construction.¹³ And while much of the AIM Project will be in non-residential areas, the WRL will not. Indeed, the majority of the residences that are in the path of the AIM Project route are on the WRL.¹⁴ Similarly, the West Roxbury Meter Station “would be bounded by residential properties to the north, south and west and there is a residence immediately adjacent to the proposed facility. . . .”¹⁵ The WRL “would primarily be placed within streets in the vicinity of residential and commercial areas” and all of it, including the

¹¹ *Id.*

¹² *Id.* p. 4.

¹³ *Id.*, pp. 2-4.

¹⁴ *Id.*, p. 27.

¹⁵ *Final Environmental Impact Statement (FEIS)* (elibrary.ferc.gov/idmws/file_list.asp?document_id=14293917 accession 20150123-4001), 4-174. All subsequent citations to papers in the elibrary docket for docket no. CP14-96-000 appear herein as “Accession _____.”

location of the West Roxbury Meter Station, would have an explosion impact radius of over three hundred feet.¹⁶

Consequently, all of the WRL, including all of that portion of the WRL high pressure gas pipeline planned for the City of Boston, as well as the West Roxbury Meter Station, will be located in “high consequence areas (HCA),”¹⁷ which are areas “where a gas pipeline accident could do considerable harm to people and their property”¹⁸

As the Commission knows, gas pipeline accidents do happen. During the 20 year period from 1994 through 2013, at least 1,237 “significant incidents” involving gas leaks causing death, personal injury requiring hospitalization, or property damage of more than \$115,000 (in 2014 dollars) were reported around the country.¹⁹ Outside forces including natural forces and earth movement accounted for 34.5% of these significant gas leak incidents. Pipeline material, weld or equipment failure were responsible for an additional 24.5%.²⁰

Complicating the safety issues raised by the AIM Project to be installed in West Roxbury is the fact, that the proposed route of the WRL and the West Roxbury Meter Station abuts the West Roxbury Crushed Stone Quarry (“Quarry”), which employs blasting operations.²¹

One year ago, notice of Algonquin’s application was published in the *Federal Register* (79 Fed. Reg. 15,987). Numerous timely and late motions to intervene were filed. The Commission granted Boston’s late motion to intervene.²²

¹⁶ FEIS, 4-275 and 4-279 to 4-280.

¹⁷ *Id.*, 4-266 to 4-268.

¹⁸ *Id.*, 4-267.

¹⁹ *Id.*, 2-272.

²⁰ *Id.*

²¹ *Order*, p, 22.

²² *Id.*, p. 53, 55.

The Commission received numerous comments and protests filed by individuals and entities.²³ Hundreds of comments and protests raised various concerns over the impact of the AIM Project on the communities through which it would travel.²⁴ Many of these “questioned the safety of the proposed project.”²⁵

Prior to the issuance of the Order and Certificate, Boston repeatedly wrote to the Commission to raise the alarm about the locations of the WRL and West Roxbury Meter Station.²⁶ These written communications consistently and vehemently opposed the proposed route of the WRL and the proposed location of the West Roxbury Meter Station.²⁷ And this opposition was focused exclusively on the issue of public safety.²⁸ In response, the Commission assured Boston that its decisions about the AIM Project would be based on a careful review of the safety issues relating to the project.²⁹

On January 23, 2015, the Commission issued its Final Environmental Impact Statement (FEIS) on the AIM Project.³⁰

Since the proposed facilities would be used to transport natural gas in interstate commerce and the facilities to be abandoned have been used to transport natural gas in interstate commerce subject to the jurisdiction of the Commission, the proposed abandonment, construction, and operation of the facilities are subject to subsections (b), (c), and (e) of section 7

²³ *Id.*, p. 6.

²⁴ *Id.*

²⁵ *Id.*, 36.

²⁶ Accession 20140924-5070; Accession 20141007-0068; Accession 20141017-0039; Accession 20141107-0006; Accession 20141121-0011; Accession 2015023-0051.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Accession 20141205-0018

³⁰ Accession 20150123-4001

of the NGA,³¹ which frame the Commission’s obligations in its regulatory review of Algonquin’s application of the AIM Project.

In its Order, the Commission reasonably concluded that the AIM Project will enable Algonquin to provide 342,000 Dth per day of firm service to the Project Shippers’ delivery points to accommodate increasing demand in the New England region.³² However, the Commission also concluded, without adequate evidentiary support, that Algonquin had taken steps to minimize any adverse impacts on landowners and surrounding communities.³³ In its short discussion titled “Safety” in the Order, the Commission deflected the concerns over safety by stating that the project’s facilities will be designed, constructed, operated and maintained to meet or exceed the U.S. Department of Transportation’s Minimum Federal Safety Standards and that the “majority of the project will replace existing, aged pipeline with new pipeline in the same locations and will not increase the risk to the nearby public.”³⁴ The Commission’s second point has no application to the new WRL and new West Roxbury Meter Station.³⁵ The public in the West Roxbury community will face an increased risk.³⁶ In the very limited fashion in which the Commission considered that increased risk, it brushed it aside based on deeply flawed fact finding that was arbitrary, capricious and unsupported by substantial evidence.

³¹ *Order*, p. 7: 15 U.S.C. § 717f(b), (c) and (e).

³² *Id.*, p. 8.

³³ *Id.*, p. 9.

³⁴ *Id.*, p. 36.

³⁵ *Id.*, pp. 2-4.

³⁶ *FEIS*, 4-266 to 4-268, 4-275 and 4-279 to 4-280.

2. ISSUES PRESENTED

Issue 1: Under federal law, the Commission's own stated policy, and its promise to Boston, the Commission was required to make its determinations concerning the alternatives to the proposed WRL route and location of the West Roxbury Meter Station based on substantial evidence. Here, the findings concerning those alternatives were arbitrary and capricious and without the support of substantial evidence. Did the Commission violate the Natural Gas Act, 15 U.S.C. § 717 *et seq.*?

Issue 2: Under Section 401 of the Clean Water Act, 33 U.S.C. §§ 1341(a)(1), the Commission lacks the legal authority to issue a certificate for a gas pipeline project until each affected State certifies that the project would not violate that State's water quality standards. Here, the Commission issued the Certificate for the AIM Project before Massachusetts, Connecticut and New York had each certified that the AIM Project will not violate its respective water quality standards. Did the Commission violate Section 401 of the Clean Water Act?

3. ARGUMENT

A. The Commission erred and violated the Natural Gas Act by making arbitrary, capacious and factually unsupported findings underpinning its rejection of the alternatives to Algonquin's proposed route for the WRL and location of the West Roxbury Meter Station.

(1) The Commission promised Boston that it would meet its obligation to exercise its regulatory decision making concerning the AIM Project based on a careful review of the safety issues.

When reviewing an application for the construction and operation of a natural gas pipeline, the Commission has a fundamental duty and obligation: to determine whether the proposed project qualifies for a certificate of public convenience and necessity under Section

7(c) of the NGA, 15 U.S.C. § 717f(c). Such a determination must be made upon substantial evidence and not in an arbitrary or capricious manner.³⁷

The AIM Project includes the installation of a *new* gas pipeline through the densely populated neighborhood of West Roxbury in the City of Boston and the construction of a *new* meter station in that same neighborhood and across the street from a Quarry where blasting operations take place.³⁸

The public in the West Roxbury Community will face an increased risk.³⁹ One might reasonably anticipate that the elected representatives of Boston would be extremely concerned about the potential hazards and safety issues implicated by such a plan. And, indeed, they were. Boston repeatedly voiced its public safety concerns to the Commission.⁴⁰ For example, in his September 26, 2014 letter to the Commission, Mayor Walsh stated:

I share the concerns of the community and of other public officials about the impact that the proposed compressor pump station will have on the area. This station would be sited near an active quarry in West Roxbury. The dangers of natural gas are amplified by the proximity to a quarry where blasting occurs. The quarry abuts a densely populated area which in addition to residential neighborhoods includes the Deutsches Altenheim assisted care and nursing facility and Roxbury Latin School.⁴¹

On October 24, 2014, Mayor Walsh again raised concerns and objections over the siting of WRL and new West Roxbury Meter Station:

³⁷ *Missouri Public Service Commission v. FERC*, 215 F. 3d 1,7 (D.C. Cir. 2000) (Natural Gas Act has a “requirement of substantial evidence for facts found by the Commission”); *Louisiana Ass’n of Independent Producers and Royalty Owners, v. FERC*, 958 F.2d 1101, 1115 (D.C. Cir. 1992) (same); 5 U.S.C. § 706(2)(A), (E), and (F).

³⁸ *Order*, pp. 2-4, 22, 27.

³⁹ *FEIS*, 4-266 to 4-268, 4-275, and 4-279 to 4-280.

⁴⁰ Accession 20140924-5070; Accession 20141007-0068; Accession 20141017-0039; Accession 20141107-0006; Accession 20141121-0011; Accession 2015023-0051.

⁴¹ Accession 20141007-0068.

At a recent community meeting I held in West Roxbury sponsored by the local representatives and attended by United States Congressman Stephen F. Lynch, many issues were brought to our attention that warrant consideration as the process moves forward. Of particular concern is the danger that the proposed route of the high pressure gas pipeline presents to the densely settled residential homes in the area. Of further concern is the decision to locate the Metering and Regulating station in an area of residential homes and adjacent to an active stone quarry that engages in significant ongoing blasting activity.

As proposed, the current route which runs along Grove Street to the M&R Station at Grove and Centre Streets across the quarry is troubling. According to many of the longtime residents of the homes in the area, they regularly experience shaking and rattling with each blast from the quarry, raising legitimate worry that this is not an optimal or safe location for a high pressure gas line. While I understand the need to supply natural gas to this area, I agree with my neighbors and must oppose the current configuration based on the quality of life and public safety concerns generated by the current iteration of this project.⁴²

In its December 2, 2014 response,⁴³ the Commission advised Boston that its “staff is preparing the final EIS, which will address all the comments received during the draft EIS comment period, including those regarding alternative [routes and locations for the proposed WRL and metering station], safety, and the quarry’s blasting operations.” Moreover, the Commission promised Boston that its “decision on whether to authorize this project will be based on *a careful review of the safety, security and environmental issues relating to this project* and will be rooted in the law, facts and science.”⁴⁴

⁴² Accession 20141107-0006.

⁴³ Accession 20141205-0018.

⁴⁴ *Id.* (emphasis added).

(2) **When deciding whether a gas pipeline project is required by the public convenience, the Commission's stated policy is to consider the effects of the project on all affected interests, including the safety of the surrounding communities.**

The Commission's express commitment to Boston to base its decision on a careful review of the safety issues was firmly rooted in the Commission's own articulation of its regulatory obligations under Section 7(c) of the NGA, 15 U.S.C. § 717f(c). In the Order, the Commission specifically invoked its Certificate Policy Statement.⁴⁵ Its stated policy is that in "deciding whether a proposal is *required* by the public convenience, the commission will consider the effects of the project on *all* affected interests"⁴⁶ The Commission has long recognized that the "major interests that may be adversely affected" include "the interests of landowners and surrounding communities."⁴⁷ As they are here, those "interests may be represented by state or local agencies."⁴⁸

And the pertinent interests of surrounding communities that the Commission is required, and has promised, to consider and take into account are not limited to the environmental impacts of a project.⁴⁹ Indeed, they include all potential adverse impacts, including noise, and even "esthetic concerns."⁵⁰ Plainly, safety is something that must be taken into account. That is no doubt the reason that the Commission promised Boston that its exercise of its regulatory decision

⁴⁵ *Order*, p. 7.

⁴⁶ *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), p. 23 (emphasis added).

⁴⁷ *Id.*

⁴⁸ *Id.*, p. 24

⁴⁹ *Id.*, pp. 24 and 27.

⁵⁰ *Id.*

making authority would be “based on a careful review” of the safety issues inherent in the AIM Project.⁵¹

Here, the Commission broke that promise and violated its own policy, which instructs:

The more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact. The objective is for the applicant to develop whatever records is necessary, and for the Commission to impose whatever conditions are necessary, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests.⁵²

As detailed below, the Commission failed to impose the conditions necessary so that the benefits to the public outweighed the adverse impact on the surrounding community of West Roxbury.

(3) Algonquin could not, or refused to, answer the West Roxbury community’s legitimate questions about the safety of the project.

The ill-conceived plan to route the WRL within feet of, and to construct the West Roxbury Meter Station across the street from, the active Quarry is fraught with serious public safety ramifications. Neither Algonquin nor the Commission has been able to defend this plan with anything other than evasion and unsupportable factual assertions and conclusions.

Evidence of this is abundant.

One need not look further than Algonquin’s answers to the safety questions posed by the West Roxbury Saves Energy group (WSRE), which were comically non-responsive.⁵³ Here is an example (WSRE’s Questions 1 and 2 in bold; Algonquin’s so-called answer in italics):

⁵¹ Accession 20141205-0018.

⁵² *Certificate Policy Statement*, p. 26.

⁵³ Accession 20141124-5114.

- 1. If an explosion happened along any point in the five-mile pipeline, what would the blast radius be? How many residents and homes would be affected by the blast and the ensuing fires?**
- 2. If an explosion happened at the M&R Station, what would the blast radius be? How many residents and homes would be affected by the blast and the ensuing fires?**

Safety is Algonquin's top priority in the construction, operation and maintenance of its facilities. According to National Transportation Safety Board statistics, the interstate natural gas pipeline system is the safest energy delivery system in the nation. The pipeline and the meter and regulator station are designed, constructed and operated to meet or exceed the safety requirements exclusively governed by the U.S. Department of Transportation ("U.S. DOT").

It is important to note that in the Draft Environmental Impact Statement issued on August 6th, the FERC concluded that Algonquin's implementation of the safety measures which are reflected in its filing would ensure public safety and the integrity of its proposed facilities.

The U.S. DOT is responsible for establishing the requirements and oversight of the operation and maintenance of interstate natural gas pipelines. In that capacity, regional U.S. DOT representatives perform periodic inspections of Algonquin as the pipeline operator by reviewing its records, operating and maintenance procedures and facilities to ensure that Algonquin's operating practices meet or exceed U.S. DOT regulations.

A pipeline rupture or similar occurrence at the meter and regulator station is highly unlikely. In fact, the U.S. DOT design and operating criteria are developed specifically to avoid those types of events. Algonquin and the pipeline industry in general make every effort to avoid and prevent such occurrences. Algonquin works with local authorities and the Dig Safe Program to educate third parties about the necessary communications when a contractor needs to perform construction on and around the pipeline right-of-way or in the general vicinity of the meter and regulator station. Additional detail concerning the strong focus which Algonquin brings to the construction, operation and maintenance of its facilities was included within Resource Report 11 as filed with Algonquin's application at the FERC; a copy of

Resource Report 11 is included as an attachment to these responses.

Algonquin has safely operated pipelines in Massachusetts and the region for over sixty years. The safe operation of the Algonquin pipeline system is due to procedures and specifications that incorporate multiple layers of safety into the design, materials procurement, construction and operation as described more fully in the General Pipeline Safety Information section included with these responses.⁵⁴

In five paragraphs of self-congratulatory evasiveness, Algonquin never answers WRSE's questions about the blast radius of an explosion on the WRL or at the West Roxbury Meter Station. Algonquin surely knows that the blast radius is over three hundred feet.⁵⁵ The fact that Algonquin refused to answer candidly these questions bespeaks an unacceptable disregard for the safety concerns of the surrounding community.

As detailed below, the Commission too failed to address the safety concerns based on the actual facts presented to it.

(4) The Commission's misplaced reliance on the GZA Report was arbitrary and capricious and unsupported by substantial evidence.

One might reasonably question the wisdom of locating a new high pressure gas pipeline and meter station next to a Quarry that uses explosions to crack bedrock. To address that issue, Algonquin and the Commission rely exclusively on the report of GZA GeoEnvironmental, Inc. ("GZA").⁵⁶ In the FEIS, the Commission inaccurately states that GZA "concluded. . . that ground vibrations from blasting at the quarry would not be disruptive or damaging to the M&R

⁵⁴ *Id.*

⁵⁵ *FEIS*, 4-279 to 4-280.

⁵⁶ *Id.*, 4-5 to 4-6; *Order*, P. 22.

Station” and “would not damage the proposed pipeline.”⁵⁷ That erroneous finding appears in the Order as well.⁵⁸

In fact, GZA’s conclusions were far more tentative. GZA concluded only that:

Ground vibrations from future blasting at the Quarry are therefore *not anticipated* to be disruptive or damaging to the proposed pipeline and M&R station.

* * *

Based on our evaluation, the nearby Quarry blasting is *not anticipated* to have a significant negative impact on the operation of the proposed West Roxbury Lateral metering and regulating (M&R) station and pipeline.⁵⁹

This expert opinion falls well short of supporting the Commission’s finding that the Quarry operations will not damage the West Roxbury Meter Station or adjacent pipeline. GZA, Algonquin’s hired expert witness, was not prepared to assert that and did not assert that. To say merely that a bad outcome is “not anticipated” is a meaningless opinion. No doubt most, or all, of the 1,237 “significant [gas pipeline] incidents” between 1994 and 2003 involving death, serious personal injury or substantial property damages⁶⁰ were “not anticipated.”

In addition, the GZA analysis suffers from a significant defect. While much of the report is devoted to irrelevant issues, *e.g.*, flying rocks, GZA performed no analysis of the cumulative effect of blasting operations on the pipeline or Meter Station. Perhaps one blast might not cause the pipeline to rupture or experience a weld failure. But what is the cumulative effect of dozens or hundreds of blasts over a period of years? GZA did not answer that question. Perhaps that is

⁵⁷ FEIS 4-5 to 4-6.

⁵⁸ Order, p. 22 (the “final EIS finds that blasting at the quarry will not damage the proposed pipeline”).

⁵⁹ GZA Report (Accession 20140331-5443), p. 4 (emphasis added).

⁶⁰ FEIS, 2-272.

why it did not opine that the blasting operations would not damage the pipeline or West Roxbury Meter Station.

In its discussion in the FEIS concerning the GZA Report and GZA's analysis, the Commission states:

In addition, it should be noted that existing pipelines currently operate in Grove Street between the quarry and the proposed AIM Project facilities. The existing pipelines consist of two water pipelines and a natural gas distribution pipeline. The closest of these three existing utilities to the quarry is a 12-inch-diameter water pipeline, which ranges in distance between approximately 10 and 20 feet from the quarry property line. We have found no evidence that these existing pipelines have been impacted by blasting at the quarry.⁶¹

These assertions reemerge in the Order, also wedged into a discussion of GZA's opinions:

Therefore, the final EIS finds that blasting at the quarry will not damage the proposed pipeline. The final EIS's conclusion is corroborated by its finding that there is no evidence the two water pipelines and one natural gas distribution pipeline that operate along Grove Street between the quarry and the proposed project have been impacted by blasting at the quarry.⁶²

Here again, the Commission has made findings unsupported by the evidence. To be sure, the GZA Report does state that there are "multiple existing utilities beneath Grove Street, including a water main line and a sanitary sewer line both of which are closer to the Quarry property line than the proposed gas pipeline in this area."⁶³ However, the report makes no specific mention of an existing gas line. And while the report discusses at some length the proximity of the water line to the Quarry, it never reports any facts or offers any opinions as to

⁶¹ *FEIS*, 4-6.

⁶² *Order*, p.22

⁶³ *GZA Report* (Accession 20140331-5443), p. 12.

the effect of the blasting at the Quarry on the condition of that water line.⁶⁴ Similarly, it has nothing to say about the effect upon the condition of the existing gas line.⁶⁵ Ultimately, GZA concedes that the “age, *condition*, depth, and material of the existing utilities are not known.”⁶⁶

(5) The Commission rejected the alternative for the West Roxbury Meter Station in an arbitrary and capricious manner and without the support of substantial evidence.

The Commission received numerous requests that it evaluate an alternative site for the West Roxbury Meter Station, which alternative was located on “residential land at the intersection of Centre and Alaric Street.”⁶⁷ The entirety of the Commission’s evaluation of that site is as follows:

The alternative site is located on residential land at the intersection of Centre Street and Alaric Street. Use of the site would require the purchase and demolition of an existing residence to provide sufficient space for the M&R facility. Construction at this site would also result in significant traffic impacts along Centre and Alaric Streets due to the limited space available for construction.⁶⁸

For these “reasons” and its misplaced reliance on the GZA Report, *see Argument Section 3A(4) supra*, the Commission found that the alternative site was not “technically feasible or environmental [sic] preferable to the proposed site.”⁶⁹

There was no basis for the Commission’s finding that the alternative site was not “technically feasible.” The fact that Algonquin would have to purchase an “existing residence” and demolish it, does not render the site “technically” unfeasible. Algonquin has the financial

⁶⁴ *Id.*, pp. 12, 17-18.

⁶⁵ *Id.*

⁶⁶ *Id.*, p. 12 (emphasis added).

⁶⁷ *FEIS*, 3-55.

⁶⁸ *Id.*

⁶⁹ *Id.*

resource to buy a house. If it does not, it should not (and would not) be authorized to complete a project with a price tag approaching one billion dollars.⁷⁰ If it lacks the “technical” skill to knock down a single residence, it should not (and would not) be trusted with a massive, multistate construction project.⁷¹

Similarly, the notion that the alternative site is not “technically feasible or environmental[ly] preferable” because of potential traffic impact is wholly unsupportable. The WRL will be constructed under streets in the City of Boston, and this “[i]n-street construction will affect traffic in the project area along” the WRL.⁷² Moreover, the Commission found that two intersections on the proposed WRL route “could experience significant adverse traffic impacts as a result of [its] construction.”⁷³ By “could” the Commission actually means “will.” It concedes that “lengthy delays *will* occur on the northbound Centre Street [West Roxbury] approach to the intersection” of Centre and Spring Streets and that there “*will* be temporary, but significant” traffic impacts at that intersection.⁷⁴

These traffic impacts on Centre Street were deemed acceptable to the Commission, because Algonquin will use police details and adjustments to its construction schedule to mitigate the lengthy delays.⁷⁵ Surely, Algonquin could use these same techniques to mitigate traffic impacts at other locations such as the alternative location for the West Roxbury Meter Station. Plainly, traffic issues resulting from construction of a meter station at Centre and Alaric

⁷⁰ *Order*, p. 4.

⁷¹ *Id.*, pp. 2-4.

⁷² *Id.*, p. 32.

⁷³ *Id.*

⁷⁴ *Id.* at 33 (emphasis added).

⁷⁵ *Id.*

Streets was an insufficient basis to find that alternative location not “technically feasible on environmental[ly] preferable.”

The analysis of the alternative site for the West Roxbury Meter Station is so thin and its findings so unsupported by the record that the Commission chose not to mention it in its Order. Its flawed analysis and erroneous findings, set forth in the FEIS, are arbitrary, capricious and unsupported by substantial evidence.⁷⁶ Accordingly, the Commission should rescind the Order.

(6) The Commission rejected the alternative route for the WLR in an arbitrary and capricious manner and without the support of substantial evidence.

In a manner similar to its flawed analysis of the alternative for the West Roxbury Meter Station, the Commission erred in its determination concerning the WLR alternative route through the City of Boston.⁷⁷

The Commission was presented with two alternative routes for the WLR. One in the Towns of Westwood and Dedham;⁷⁸ and one originating in Dedham and extending into and terminating in the City of Boston.⁷⁹ This Request For Rehearing is focused on the latter.

In its Order, the Commission says simply that “[f]or various reasons discussed in detail in section 3.5 of the final EIS, these alternatives were not selected over the proposed route.”⁸⁰ The FEIS includes Table 3.5.1-2 (set forth below), which compares the WRL route alternative for the

⁷⁶ *Missouri Public Service Commission*, 215 F. 3d at 7; *Louisiana Ass'n of Independent Producers and Royalty Owners*, 958 F.2d at 1115; 5 U.S.C. § 706(2)(A), (E), and (F).

⁷⁷ *Order*, p.45, *FEIS*, 3-25 to 3-26.

⁷⁸ *FEIS*, 3-27 to 3-29.

⁷⁹ *Id.*, 3-25 to 3-26.

⁸⁰ *Order*, p. 45, *citing FEIS*, 3-20 to 3-52.

City of Boston with the proposed route:

TABLE 3.5.1-2 ⁸¹			
Comparison of the West Roxbury Lateral Alternative Route to the Correspondence Segment of the Proposed Route for the AIM Project			
Environmental/Engineering Factor	Unit	Proposed Route	Alternative Route
Length (MPs 3.0 to 5.0)	miles	2.0	2.1
Construction within roadway	miles	1.8	1.3
Number of residences within 50 feet	number	161	83
Number of residences within 100 feet	number	185	132
Wetland crossings	feet	0	0
Waterbody crossings	number	1	1
Road crossings	number	24	19

^a Includes residential housing complexes. Each contiguous building was counted as a single residence.

As shown in its table and acknowledged by the Commission, the alternative route would require 0.5 mile less construction within roadways and cross five fewer roads.⁸² Both routes would avoid wetlands and cross the same number of waterbodies.⁸³ Most significantly, the alternative route would pass within 50 and 100 feet of far fewer residences than Algonquin's proposed route.⁸⁴ Yet, the Commission inexplicably determined that the "West Roxbury Lateral

⁸¹ FEIS, 3-25.

⁸² *Id.*, 3-25.

⁸³ *Id.*

⁸⁴ *Id.*

Alternative Route would not be preferable to or provide a significant environmental advantage over the proposed route.”⁸⁵

The Commission’s principal justification for that determination is its finding that “the proposed route would avoid the residential area along Belle Avenue and result in fewer impacts on homes and neighborhoods,” and that “more of the alternative route would pass through residential neighborhoods.”⁸⁶ These findings do not survive scrutiny.

Figure 3.5.1-2 of the FEIS is a map comparing the proposed and alternative routes.⁸⁷ It shows that the factual assertion that “more of the alternative route would pass through residential neighborhoods,”⁸⁸ is indisputably erroneous. Nearly the entirety of the proposed route passes through residential neighborhoods.⁸⁹ By comparison, a substantial portion of the alternative route travels through commercial and industrial areas, particularly that portion that starts at MP 3.0.⁹⁰

The facile argument that the “proposed route would avoid the residential area along Belle Avenue,”⁹¹ is the thinnest of reeds upon which the Commission rests its determination. While it is no doubt true, it ignores the fact that the alternative route would avoid the residential areas on Centre Street and elsewhere. And nowhere mentioned in its analysis of the alternative versus proposed routes is the unquestionable fact that the alternative route would avoid the Quarry, which is, and has been, Boston’s primary safety concern and objection.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, 3-26.

⁸⁸ *Id.*, 3-25 to 3-26.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*, 3-25

In further support of its conclusion, the Commission asserts that “the proposed route ... primarily would be constructed along and within more established roadways (e.g., Washington, Grove, and Centre Streets) and in parking lots of commercial and industrial properties.”⁹² Here again, the Commission’s map, Figure 3.5.1-2, belies this assertion. It clearly shows that far more of the alternative route is in parking lots of commercial and industrial properties than is the case with the proposed route.⁹³ Similarly, the suggestion that the proposed route is more along and within “more established roadways” is plainly wrong. While Belle Avenue is less “established” than Washington Street, the substantial majority of the alternative route is along and in the established roadways of Spring Street, Baker Street, and the VFW Parkway (also known as State Route 1).⁹⁴

Lastly, the Commission also seeks to support its decision, by noting that “[d]uring the initial stakeholder outreach, public officials representing the City of Boston expressed concern to Algonquin regarding the alternative route because of its proximity to residential neighborhoods.”⁹⁵ Here again, the notion that the alternative route has a greater proximity to residential neighborhoods is a canard. Moreover, if the Commission was moved by the concerns of elected officials representing the City of Boston, it would have heeded their repeated written exhortations to avoid the Quarry.⁹⁶ Boston did not receive deference to its safety concerns. It also did not receive the benefit of fact finding by the Commission that was supported by substantial evidence. On the contrary, the findings of the Commission concerning the WRL

⁹² *Id.*

⁹³ *Id.*, 3-26

⁹⁴ *Id.*, 3-25 to 3-26.

⁹⁵ *Id.*, 3-25.

⁹⁶ Accession 20140924-5070; Accession 20141007-0068; Accession 20141017-0039; Accession 20141107-0006; Accession 20141121-0011; Accession 2015023-0051.

alternative route were arbitrary and capricious. On review, the Commission relies on no actual facts to support its determination that the alternative route “would not be preferable” to Algonquin’s proposed route.

Contrary to its promise to Boston, that determination was not “based on a careful review of the safety” issues and was not “rooted in the law, facts and science.” Now, the Commission can keep its promise to Boston and meet its obligations under the NGA only by rescinding the Order.⁹⁷

B. The Commission violated the Clean Water Act by issuing the Certificate before Massachusetts, Connecticut and New York certified that the AIM Project would not violate those states’ water quality standards.

(1) The Commission violated clear and unambiguous federal law set forth in Clean Water Act.

The Commission acted in direct contravention with federal law when it issued the Certificate before the Massachusetts Department of Environmental Protection (MADEP), the Connecticut Department of Energy and Environmental Protection (CTDEEP), and the New York State Department of Environmental Conservation (NYSDEC) had certified that the project would not violate each State’s respective water quality standards. Pursuant to the CWA, the Commission may not authorize a project prior to the issuance of a State Water Quality Certification (WQC). Section 401 of the CWA plainly directs that “no [federal] license or permit shall be granted until the certification required by this section has been granted or waived.”⁹⁸ The statute’s language is clear and unambiguous, and gives each State the authority to block or

⁹⁷ *Missouri Public Service Commission*, 215 F. 3d at 7; *Louisiana Ass’n of Independent Producers and Royalty Owners*, 958 F.2d at 1115; 5 U.S.C. § 706(2)(A), (E), and (F).

⁹⁸ 33 U.S.C. § 1341(a)(1); *see also PUD No. 1 of Jefferson Cnty v. Wash. Dept. of Ecology*, 511 U.S. 700, 707, 114 S. Ct. 1900, 1907 (1994) (noting that Section 401 “requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters”).

condition federal projects that it determines will violate State water quality standards.⁹⁹ The States' role is particularly important in the AIM Project, which affects 102 surface waterbodies, 52.5 acres of wetland and 1948 square feet of vernal pool habitat.¹⁰⁰

While the Commission has authority to impose conditions on its certificates, that power does not extend to overriding an explicit statutory mandate. The statuses of Algonquin's applications for water quality certification in Massachusetts, Connecticut and New York remain open, awaiting State action.¹⁰¹ The Commission therefore indisputably violated Section 401 of the CWA, despite its own knowledge of the requirement and comments raising that requirement filed during the public comment period.¹⁰² One public comment stated:

A comprehensive and proper Water Quality Certificate is necessary to provide NYSDEC and USEPA [the United States Environmental Protection Agency] with the necessary regulatory and enforcement tools to avoid environment impacts witnessed in construction and maintenance of other pipelines in the past ... The law prohibits [the Commission] from issuing the certificate approval for [Algonquin's] pipelines until the [CWA] requirements are met.¹⁰³

The Commission responded:

As demonstrated in the EIS, it is impractical, and sometimes impossible, to complete studies and develop plans to mitigate potential adverse aspects of a project in advance of issuing a final order. This can be because many post-authorization conditions require site-specific plans and surveys that cannot be completed until the applicant is able to employ eminent down to gain access to previously inaccessible land parcels ... We stress that this order's authorization is subject to Algonquin's compliance with numerous

⁹⁹ See *State of N.C. v. FERC*, 112 F.3d 1175, 1183 (D.C. Cir. 1997), *cert. denied*, 522 U.S. 1108, 118 S. Ct. 1037 (1998) (concluding that "congressional intent underlying Section 401(a)(1) of CWA is clear and unambiguous"); *City of Tacoma v. FERC*, 460 F.3d 53, 67 (D.C. Cir. 2006).

¹⁰⁰ *Order*, p. 24-25.

¹⁰¹ See *FEIS*, 1-8, 1-10, 1-11 for the respective statuses of Algonquin's applications to New York, Connecticut and Massachusetts.

¹⁰² 149 FERC ¶ 61,199 (2014); *Letter from John Louis Parker, Esq.* (Accession 20150123-5286).

¹⁰³ *Letter from John Louis Parker, Esq.* (Accession 20150123-5286), p. 3

specific conditions. Consequently, we find no need to delay issuing our decision, given that our authorizations are conditioned to preclude the applicants from commencing construction until all necessary permits and approvals under federal law are granted, including water quality certificates under the [CWA].¹⁰⁴

The fact that the Commission conditioned the authorization of the Certificate on future receipt of the required WQCs does not cure the Commission's violation of the CWA.¹⁰⁵ The unequivocal language of the CWA prohibits the granting of *any* license or permit prior to the issuance of a State WQC.¹⁰⁶ The statute makes no exceptions for licenses or permits that are conditioned on the subsequent grant of a WQC. Moreover, it is entirely unreasonable to allow some activities authorized under the Certificate to proceed, including an eminent domain proceeding, when the AIM Project could be prohibited from moving forward if Massachusetts, New York, or Connecticut refuse to issue the WQC.

(2) The Commission's issuance of the Certificate is incompatible with Congressional intent and design.

More fundamentally, the Commission's issuance of even a conditional license is wholly incompatible with the Congressional design and intent of the CWA, which assigns the States the role of primary regulator under the statute.¹⁰⁷ Section 401 allows States to condition issuance of a WQC on measures designed to ensure compliance with effluent limitations and other State regulations; each State's conditions, in turn, are required to "become a condition of any Federal

¹⁰⁴ *Order*, p. 49.

¹⁰⁵ *Id.*, p. 61.

¹⁰⁶ 33 U.S.C. § 1341(a)(1).

¹⁰⁷ *Id.* § 1251(b) (declaring "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution"); *see also D.C. v. Schramm*, 631 F.2d 854, 860 (D.C. Cir. 1980) (noting that "[i]n considering the [CWA], Congress carefully constructed a legislative scheme that imposed major responsibility for control of water pollution on the states").

license or permit subject to the provisions of this section.”¹⁰⁸ Moreover, the United States Supreme Court long ago recognized that the “NGA ‘was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry.’”¹⁰⁹ And it instructed that “[n]either state nor federal regulatory body was to encroach upon the jurisdiction of the other.”¹¹⁰ The Commission’s premature issuance of the Certificate entirely subverts each State’s ability and prerogative to satisfy Congress’s intent and design of the governing statutory scheme.

Moreover, the very terms outlined in the Certificate directly conflict with the CWA by subjugating the States’ roles to that of the Commission. The Certificate provides that “[a]ny state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this [C]ertificate.”¹¹¹ This turns the statutory scheme on its head. “The [CWA] gives a primary role to states to block … local water projects … [the Commission’s] role [under Section 401] is limited to awaiting, and then deferring to, the final decision of the state.”¹¹²

(3) A court will not give the Commission *Chevron* deference on water quality issues.

Rest assured that a court will not give *Chevron* deference¹¹³ to the Commission on water quality issues, as it is MADEP, CTDEEP, and NYSDEC that are authorized to decide whether Massachusetts, Connecticut, or New York water quality standards, respectively, might be

¹⁰⁸ 33 U.S.C. § 1341(d).

¹⁰⁹ *Northwest Central Pipeline v. State Corp. Commission*, 489 U.S. 493, 512, 109 S. Ct. 1262, 1275 (1989); quoting *FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 69 S. Ct. 1251, 1260 (1949).

¹¹⁰ *Id.*

¹¹¹ *Order*, p. 51.

¹¹² *City of Tacoma*, 460 F.3d at 67 (citation and internal quotation marks omitted).

¹¹³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782-83 (1984).

violated.¹¹⁴ Any statements in the FEIS about the purported lack of impacts on water resources, and the mitigating effects of best management practices, have little relevance to this rehearing, or subsequent appeal.

(4) The NGA requires that the Order be rescinded.

The Commission violated federal law by expropriating for itself a purported right to issue the Certificate prior to necessary State action. The NGA mandates that the Commission “comply with applicable schedules established by Federal law.”¹¹⁵ One of those laws is the CWA, which expressly states that a WQC must be obtained before any federal license is issued.¹¹⁶ Consequently, the March 3, 2015 Order violates applicable law and must be rescinded.

4. COMMUNICATIONS

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5. CONCLUSION

The Commission had a fundamental obligation to Boston and the public at large to access and address the safety issues presented by the AIM Project and to make its determinations with

¹¹⁴ *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 296-97 (D.C. Cir. 2003).

¹¹⁵ 15 U.S.C. § 717n(c)(1)(B).

¹¹⁶ Cf. *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996), *cert. denied*, *Indicated Expansion Shippers v. FERC*, 520 U.S. 1204, 117 S. Ct. 1568 (1997) (concluding that the Commission cannot use its conditioning authority under the NGA to “do indirectly what it could not do directly, that is, intercede in a matter that the Congress reserved to the State”).

respect to those safety issues based on substantial evidence. It failed to do so and thereby failed to meet the requirements of the Natural Gas Act.

In performing its regulatory role, the Commission is not at liberty to violate federal law. It has violated the Clean Water Act and, by extension, the Natural Gas Act.

Boston respectfully requests that the Commission grant this request for rehearing and rescission of the Order.

Respectfully submitted this 2nd day of April, 2015.

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Document Content(s)

City Of Boston Delegation's Request For Rehearing.PDF.....1-27