UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Revisions to Auxiliary Installations,	**)**	
Replacement Facilities, and	**)**	**Docket No. RM12-11-000**
Siting and Maintenance Regulations	**)**	

REQUEST FOR REHEARING
AND
REQUEST FOR CLARIFICATION OR, IN THE ALTERNATIVE, REHEARING
OF
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

December 23, 2013

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I. PRELIMINARY STATEMENT

Pursuant to Section 19 of the Natural Gas Act ("NGA")[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),[2] the Interstate Natural Gas Association of America ("INGAA") submits this request for rehearing and request for clarification or, in the alternative, rehearing.

This proceeding was initiated by INGAA when it filed its April 2, 2012 Petition Requesting The Commission Adhere to its Existing Rules, Regulations and Procedures ("April 2012 Petition").[3] Through informal meetings with members of the interstate natural gas pipeline

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1 15 U.S.C. § 717r (2012).

2 18 C.F.R. § 385.713 (2013).

3 Petition Requesting the Commission Adhere to its Existing Rules, Regulations and Procedures, Docket No. RM12-11-000 (Apr. 2, 2012).

industry, Commission Staff began to promote a change to Section 2.55(a) of the Commission's regulations, which deals with auxiliary installations.[4] The Staff's change to Section 2.55(a) dismissed the fundamental holding of the Commission order promulgating Section 2.55(a), that auxiliary installations are not jurisdictional facilities as contemplated in Section 7 of the NGA. *Filing of Application For Certificates of Public Convenience and Necessity*, Order No. 148, 14 Fed. Reg. 681 (Feb. 16, 1949) ("Order No. 148"). The Staff also added an implied right of way limitation to the definition of auxiliary installations even though no such limitation exists in the language of the regulation. This change meant that any installations outside of an existing right of way or temporarily using ground outside of previously used workspace could not qualify under Section 2.55(a). The Staff's position harmed the pipeline industry by eliminating the historical, routine and justified practice of making certain of these auxiliary installations outside of existing rights-of-way for safety, security and other important purposes ancillary to the provision of interstate pipeline transportation services. When the Staff persisted in its newly adopted and erroneous modification of Section 2.55(a), INGAA filed its petition.

Among other things, INGAA's April 2012 petition asked the Commission to affirm that Section 2.55(a) did not have an implied right of way limitation and to affirm that it would not seek to enforce the change recently adopted by Commission Staff. On December 20, 2012, the Commission responded to INGAA's petition in this docket by issuing a Notice of Proposed Rulemaking entitled "Revisions to the Auxiliary Installations, Replacement Facilities, and Siting

[4] 18 C.F.R. § 2.55(a) (2013).

and Maintenance Regulations."[5] The December 2012 NOPR denied INGAA the relief it requested in its April 2012 petition, wrongly declaring that the change to Section 2.55(a) being promoted by its Staff always had been the Commission's rule.

Although claiming that it was making no change to the meaning of Section 2.55(a), the December 2012 NOPR proposed revisions to the language of the Commission's regulations to state that all activities related to the construction of auxiliary installations must take place within a company's certificated right of way using previously approved work spaces. The Commission also proposed to add landowner notification requirements for auxiliary installations, replacement facilities and other activities performed within the right of way. The Commission acknowledged that these notification requirements were a change to its regulations.

INGAA responded to the December 2012 NOPR in two ways. On January 22, 2013, INGAA timely filed its request for rehearing from the December 2012 NOPR's denial of the relief that INGAA had requested in its April 2012 Petition. INGAA, on behalf of its members, was an aggrieved party. The December 2012 NOPR immediately denied INGAA members the right previously afforded them under historical and proper regulatory construction to install auxiliary installations outside of existing rights-of-way and work space under Section 2.55(a) and imposed an obligation on pipelines to obtain certificate authorization prior to making certain auxiliary installations. As to these matters, the December 2012 NOPR was a final agency order. On March 5, 2013, INGAA also filed comments on the December 2012 NOPR.

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[5] *Revisions to the Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,696 (2012) ("December 2012 NOPR" or "NOPR").

On November 22, 2013, the Commission issued a final rule in this proceeding, *Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations,* Order No. 790, 145 FERC ¶ 61,154 (2013) ("Final Rule"). In the Final Rule, the Commission persists in its erroneous ruling regarding Section 2.55(a) and persists as well in a fiction that its new ruling does not change what had been the plain and universal understanding of that provision for approximately 60 years until the December 2012 NOPR. The Commission refuses to acknowledge that its previous orders expressly held that auxiliary installations were not jurisdictional facilities under the NGA. The Final Rule ignores, misapprehends or disparages past precedent to achieve, through expediency, a desired result that is so sweeping that it could not be achieved, even through lawful notice and comment rulemaking. "It has become axiomatic that an agency is bound by its own regulations." *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). "The fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate'" *Id*. "[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). For all of these reasons, the Final Rule is unlawful.

In addition to unlawfully converting an entire class of exempt, non-jurisdictional auxiliary installations into jurisdictional NGA facilities, the Commission, without referencing a record of abuse, without identifying any material threat to the Commission's statutory obligations, and without providing any premise based on relevant facts, extends regulatory limitations to these installations that in the past have applied only to separate and distinct replacement activities. This is the same infirm approach that resulted in the D.C. Circuit striking

down the Commission's expanded standards of conduct regulations in *National Fuel Gas Supply Corporation v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) ("*National Fuel")*. The Commission's Final Rule is arbitrary and capricious. It is not the product of reasoned decision making.

II. STATEMENT OF ISSUES AND ERRORS

Pursuant to Rule 713 of the Commission's Rule of Practice and Procedure, INGAA provides the following statement of issues and errors.

1. In the Final Rule, the Commission finds that auxiliary installations and replacement projects under Section 2.55 and maintenance activities under Section 380.15 are smaller, require less time, and are less disruptive than activities performed under blanket authorization. Under the Commission's blanket authorization regulations, a landowner may waive the landowner notification requirement as long as the notice has been provided. The Commission should clarify that the landowner also may waive the landowner notification requirement under Sections 2.55 and 380.15 as long as the notice has been provided. In the alternative, the Commission should grant rehearing on this point.
2. Under the Commission's blanket authorization regulations, there are exemptions from landowner notification requirements for activities done for safety, DOT compliance, environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company. The Commission should clarify that the same exemptions apply to the landowner notification requirement under Sections 2.55 and 380.15. In the alternative, the Commission should grant rehearing on this point.
3. If the Commission does not include express exemptions from landowner notification requirements comparable to those exemptions found in the Commission's blanket

authorization regulations, then the Commission should clarify that any unforeseen or unplanned maintenance activities required by DOT, including repairs conducted in accordance with 49 C.F.R. § 192.933(d)(1), are not subject to the landowner notification requirements of Sections 2.55 and 380.15.

4. In the Final Rule, the Commission defines "affected landowners" at Sections 2.55(c) and 380.15(c) as those "directly affected (i.e., crossed or used) by the proposed activity including all rights-of-way, facility sites (including compressor stations, well sites, and all above-ground facilities), access roads, pipe and contractor yards, and temporary work space." The Commission should clarify or, in the alternative, grant rehearing that the five day landowner notification is only required for landowners whose property has a ground disturbance and that such notification is not required for activities that result in a ground disturbance located entirely within the fence line of an existing, aboveground facility site.
5. The Commission should clarify or, in the alternative, grant rehearing that landowner notification requirements do not apply to "one-call obligations" established by state, regional or local law and directed at utilities, typically requiring utilities to mark facilities prior to digs or excavations.
6. In the Final Rule, the Commission holds that all auxiliary installations are jurisdictional under the NGA. But the Commission previously has held otherwise, finding that auxiliary installations were not jurisdictional. In Order No. 148, the Commission expressly held that auxiliary installations were not "facilities" under the NGA. The NGA gives the Commission jurisdiction over facilities used for the transportation of natural gas. In Order No. 148, the Commission held that "auxiliary installations" were not "facilities" for the transportation of natural gas, but only auxiliary or appurtenant to such

facilities and "only for the purpose of obtaining more efficient or more economical operation of authorized transmission facilities." As part of the Order No. 148 rulemaking, the Commission identified a non-exclusive list of installations that were not facilities within the meaning of the statute. Later, in Order No. 603, the Commission confirmed its holding in Order No. 148, referring to Section 2.55(a) auxiliary installations as exempt and non-jurisdictional. *Revision of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act*, Order No. 603, FERC Stats. & Regs. ¶ 31,073, at 30,781-82 (1999), *on reh'g*, Order No. 603-A, FERC Stats. & Regs. ¶ 31,081 (1999), *on reh'g*, Order No. 603-B, FERC Stats. & Regs. ¶ 31,094 (2000); 15 U.S.C. § 717f(c)(1)(A) (2012). The Commission's treatment of these prior, contrary holdings in the Final Rule is arbitrary, capricious, and unreasoned. The Final Rule erred when it held that auxiliary installations are jurisdictional facilities within the meaning of the NGA.

7. At footnote 39 of the Final Rule, the Commission holds that a pipeline's corporate headquarters building is not a natural gas facility that requires certification under the NGA. Consistent with INGAA's position set out in this request for rehearing, the Commission should find that auxiliary installations are non-jurisdictional. If the Commission continues to hold that some auxiliary installations are jurisdictional facilities, the Commission should clarify the analysis it is using to determine that some buildings, such as corporate headquarters, and presumably some other installations, activities and structures, are non-jurisdictional. The Commission should explain how factors such as function and remoteness or proximity to rights of way that contain clearly jurisdictional facilities, such as a pipeline, are used in the Commission's analysis. For

example, a communications tower built at a location distant from a pipeline's rights of way would seem to be more like a headquarters building, with a general function only tangential to natural gas transportation and a location remote from archetypical pipeline facilities, which clearly are jurisdictional under the NGA. Failure to elaborate on its analysis and provide necessary clarity for the industry is a separate error in the Final Rule, from which clarification or, in the alternative, rehearing is sought.

8. In the Final Rule, the Commission makes the same error it made when its rulemaking to expand the Commission's standards of conduct regulations was reversed and vacated in *National Fuel*. In *National Fuel*, the Commission had extended its standards of conduct regulations beyond Marketing Affiliates to capture a new broad category of affiliates, Energy Affiliates. The Commission based this expansion on a record of abuse involving Marketing Affiliates, providing no evidence of abuse by Energy Affiliates, no recognizable theoretical threat posed by these affiliates and no other factual basis for its expanded regulations. The Commission makes the same error here. In addition to lacking authority at this time to enforce a right of way limitation on non-jurisdictional installations, the Commission has attempted to support an expansion of these limitations to auxiliary installations through arguments based on a different pipeline activity, the replacement of facilities. These two activities are materially different and historically have been treated differently by the Commission. Its attempt now to conflate auxiliary installations and the activity of replacing jurisdictional facilities is reminiscent of the Commission's treatment of Energy Affiliates and Marketing Affiliates in the standards of conduct context. The Commission's actions are similar and they are similarly infirm.

9. The Commission erred by characterizing its action in the Final Rule as a clarification

when the Commission's action changed Section 2.55(a). *See Sprint Corp. v. FCC*, 315 F.3d 369, 374-376 (D.C. Cir. 2003). Converting non-jurisdictional auxiliary installations into jurisdictional facilities and implying a right of way and work space limitation in Section 2.55(a) is a rulemaking without proper notice and comment that violates the Administrative Procedure Act. 5 U.S.C. § 553 (2012); *City of Idaho Falls v. FERC*, 629 F.3d 222 (D.C. Cir. 2011); *Fina Oil and Chemical Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003). "It has become axiomatic that an agency is bound by its own regulations." *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979). "The fact that a regulation as written does not provide FERC a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate'" *Id*. "The requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

10. The Commission erred by finding that auxiliary installations are subject to the Commission's jurisdiction under the NGA even though auxiliary installations are excluded from the definition of "facilities," and therefore, are exempt from the NGA, as the Commission previously has found. *Filing of Application For Certificates of Public Convenience and Necessity*, Order No. 148, 14 Fed. Reg. 681 (Feb. 16, 1949); Order No. 603 at 30,781-82; 15 U.S.C. § 717f(c)(1)(A) (2012). The Federal Power Commission found that "auxiliary installations" were not "facilities" for the transportation of natural gas, but only auxiliary or appurtenant to such facilities and "only for the purpose of obtaining more efficient or more economical operation of authorized transmission facilities." *Filing of Application For Certificates of Public Convenience and Necessity*,

Order No. 148, 14 Fed. Reg. 681 (Feb. 16, 1949). These installations, therefore, are not jurisdictional under the NGA. 15 U.S.C. § 717f(c)(1)(A) (2012). *Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983); *Farmers Union Central Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984); *Exxon Mobil Corp. v. FERC*, 315 F.3d 306 (D.C. Cir. 2003); *Columbia Broadcasting Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954).

11. The Commission erred by finding that auxiliary installations are subject to the Commission's jurisdiction under the NGA without explaining its departure from the express and directly contrary holding in Commission Order No. 603, which treats auxiliary installations as exempt and non-jurisdictional. Order No. 603 at 30,781-82. In the Final Rule, the Commission ignored these determinations in Order No. 603. The Commission also erred when it ignored its prior express determination that auxiliary installations are non-jurisdictional and its confirmation that this was the holding of Order No. 603. *CNG Transmission Corp*., 87 FERC ¶ 61,324 at 62,259 n.7 (1999) ("In addition, [Order No. 603] amends Section 2.55(a) to specifically identify pig launchers as non-jurisdictional auxiliary equipment."), *reh'g denied*, 89 FERC ¶ 61,047 (1999). *Motor Vehicle Mfrs. Assn. of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983); *Farmers Union Central Exch., Inc. v. FERC*, 734 F.2d 1486 (D.C. Cir. 1984); *Michigan Public Power Agency v. FERC*, 405 F.3d 8, 13-16 (D.C. Cir. 2005); *Columbia Broadcasting Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971); *Melody Music, Inc. v. F.C.C.*, 345 F.2d 730, 733 (D.C. Cir. 1965); *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966); *Secretary of Agriculture v. United States*, 347 U.S. 645, 653

(1954).

12. The Commission erred by finding that Order No. 603 did not intend to permit auxiliary installations outside of previously approved boundaries when, in Order Nos. 603 and 603-A, the Commission limited Section 2.55(b) replacement of facilities to existing rights-of-way and workspaces, but did not create such limitations for Section 2.55(a) auxiliary installations. The Commission offers the idea that this different treatment of these two separate activities was because the Commission was not aware at the time that pipelines were using Section 2.55(a) to undertake installations outside of existing rights-of-way and therefore had no reason to amend Section 2.55(a) language in the same way it was amending Section 2.55(b). This statement is not correct and this misapprehension by the Commission undermines the validity of the Final Rule. When the Commission issued Order Nos. 603 and 603-A in 1999, it knew, as did its Staff, that pipelines were making auxiliary installations outside existing rights-of-way and workspaces. *See,* Letter from Kevin P. Madden, Director, Office of Pipeline Regulation (Dec. 16, 1997), available at eLibrary Accession No. 19971223-0120; Letter from Kevin P. Madden, Director Office of Pipeline Regulation (Apr. 3, 1998), available at eLibrary Accession No. 19980408-0242; *Trunkline Gas Co.*, Docket No. CP84-394-000, at 1 (May 25, 1984) (unpublished delegated letter order), available at eLibrary Accession No. 19840601-0118 and included as Attachment D to INGAA's Request for Rehearing, Docket No. RM12-11-000 (Jan. 22, 2013). The Commission did make other changes to the language of 2.55(a) in those orders. Order No. 603 at 30,782; *compare* 18 C.F.R. § 2.55(a) *with* 18 C.F.R. § 255(b).
13. The Commission erred because it failed to provide a record of abuse, a material threat to the Commission's statutory obligations, or any factual premise that justifies the

imposition of a right of way and work space limitation on auxiliary installations. An agency must assert a basis for its action that reflects reasoned decision making, as required by the Administrative Procedure Act. *National Fuel*, 468 F.3d at 840-45; *see also Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1145 (D.C. Cir. 1992). The Commission must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). If the Commission "chooses to rely solely on a theoretical threat, it will need to explain how the potential danger" justifies its costly action. *National Fuel*, 468 F.3d at 844. The Commission does not engage in reasoned decision making when it (a) fails to consider that state and other federal environmental laws apply to auxiliary installations and have provided satisfactory environmental oversight for years and (b) fails to acknowledge in the Final Rule that National Environmental Policy Act ("NEPA") obligations relating to jurisdictional activities do not provide a reasoned basis for exercising direct, statutory authority over non-jurisdictional activities which then would require certificate as well as abandonment authorization.

14. The Commission previously has held that it has "to balance the burden on pipelines of [a] . . . requirement with the potential benefits of that requirement." *Revisions to Regulations Governing NGPA Section 311 Construction and Replacement of Facilities*, Order No. 544, FERC Stats. & Regs. ¶ 30,951 at 30,687 (1992), *on reh'g*, Order No. 544-A, FERC Stats. & Regs. ¶ 30,983 (1993); *see also*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011). The Final Rule attempts to evade this analysis here by erroneously

claiming that it is making no change to its treatment of auxiliary installations. The Final Rule does change the Commission's regulations to make auxiliary installations jurisdictional facilities and to impose new right of way and workspace limitations on those installations. The Commission is obligated to weigh the burdens and benefits of its actions in the Final Rule. It unlawfully has failed to perform its obligation.

15. The Commission erred because it ignored its obligation to calculate the burden on the pipeline industry in a manner that is not arbitrary or capricious, and then to weigh the benefit of the Final Rule against that burden. Instead of establishing a rational and fact-based methodology for calculating a reasoned estimate that reflects actual burdens and costs, the Commission proposes new numbers that still are speculative and again underestimate the costs of the new requirements.

16. The Commission erred by not considering the President's Executive Orders requesting that agencies avoid burdensome regulations that provide only modest benefits and by not explaining how a new right of way and work space limitation is consistent with such Executive Orders. *See Bldg. & Const. Trades Dept. v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002); *Sierra Club v. Costle*, 657 F.2d 298, 406 n.524 (D.C. Cir. 1981); *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012). Failure to consider the President's Executive Orders provides further support that the Final Rule is arbitrary, capricious and not reasoned decision making. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011); *see also*, Exec. Order No. 13211 66 Fed. Reg. 28,355 (May 22, 2001) (requiring a Statement of Energy Effects when undertaking significant energy action).

17. The Commission erred by not considering reasonable alternatives to its chosen policy and

by not giving a reasoned explanation for its rejection of such alternatives. For example, there are 10 types of auxiliary installations expressly listed in Section 2.55(a). The Final Rule sweeps all of these installations into NGA jurisdiction without an analysis of each type of installation to determine whether a particular installation should no longer be considered only appurtenant to jurisdictional facilities and, if so, whether a right of way limitation should apply to that type of facility. *American Gas Assoc. v. FERC*, 593 F.3d 14, 19-20 (D.C. Cir. 2010); *Laclede Gas Co. v. FERC*, 873 F2d 1494, 1498 (D.C. Cir. 1989); *American Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227 (D.C. Cir. 2008).

18. The Commission erred when it treated INGAA's January 22, 2013 request for rehearing as a set of comments. Final Rule at footnote 19. The December 2012 NOPR was a final agency order denying INGAA the relief it had requested in its April 2012 Petition. INGAA, on behalf of its members, was an aggrieved party, and that NOPR was a final agency order because (a) it denied the pipeline industry the previously existing right to install auxiliary installations outside of existing rights-of-way and work space under Section 2.55(a), and (b) it imposed an obligation on pipelines to obtain certificate authorization prior to making certain auxiliary installations. *City of Tacoma v. FERC*, 331 F.3d 106, 113 (D.C. Cir. 2003); *Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235 (D.C. Cir. 1980); *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Miss. Valley Gas Co. v. FERC*, 68 F.3d 503, 508-09 (D.C. Cir. 1995). The Commission previously treated INGAA's January 22, 2013 pleading as a request for rehearing. On February 20, 2013, the Commission granted INGAA's request for rehearing for further consideration. In that order the Commission stated, "[i]n the absence of Commission action within 30 days from the date the rehearing request was filed, the request for

rehearing . . . would be deemed denied."

III. DISCUSSION

A. INGAA Requests Clarification Of The New Landowner Notification Provisions.

The Commission amended its regulations to provide for advance landowner notification for auxiliary installations and replacement projects under Section 2.55 and for maintenance activities under Section 380.15.[6] The Commission recognized that activities under Sections 2.55 and 380.15 were "likely to be smaller, take a shorter period of time to accomplish, and be less disruptive than blanket certificate projects," and therefore, the Commission proposed to create a "more limited" landowner notification requirement for activities performed under Sections 2.55 and 380.15.[7] The Commission permits landowners to waive the landowner notification requirement, as long as the notice has been provided, for activities performed under blanket authorization.[8] In light of the Commission's determination that activities under Sections 2.55 and 380.15 should have a more limited landowner notification requirement, the Commission should clarify that landowners may waive the five day landowner notification requirement, as long as notice has been provided, consistent with the waiver provision under the blanket certificate regulation. Accordingly, INGAA respectfully requests that the Commission revise Sections 2.55(c) and 380.15(c) to include that: "A landowner may waive the five day prior notice requirement in writing as long as the notice has been provided."

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[6] *See* Final Rule at P 54

[7] *Id*. at P 56.

[8] *See* 18 C.F.R. § 157.203(d)(1) (2013).

Similarly, the Commission should clarify that it intends for the exemptions identified in Section 157.203 (i.e., exemptions for activities done for safety, DOT compliance, environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company) also to apply to activities performed under Sections 2.55 and 380.15. Again, this clarification is consistent with the Commission's finding that activities under Sections 2.55 and 380.15 are more limited than blanket activities. Accordingly, the Commission should delete the phrase, "For an activity required to respond to an emergency, the five day prior notice period does not apply," in Sections 2.55(c) and 380.15(c), and include in both sections in its place the following regulatory text consistent with Section 157.203: "No landowner notice under this section is required for activities done for safety, DOT compliance, environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company." If the Commission does not include the express exemption from landowner notification requirements comparable to those exemptions found in the Commission's blanket authorization regulations, then the Commission should clarify that any unforeseen or unplanned maintenance activities required by DOT, including repairs conducted in accordance with 49 C.F.R. § 192.933(d)(1), are not subject to the landowner notification requirements of Sections 2.55 and 380.15.

In connection with its new landowner notification requirements, the Commission defines "affected landowners" at Sections 2.55(c) and 380.15(c) as those "directly affected (i.e., crossed or used) by the proposed activity including all rights-of-way, facility sites (including compressor stations, well sites, and all above-ground facilities), access roads, pipe and contractor yards, and temporary work space." Consistent with its determination that it would only require landowner notification of activities that result in a ground disturbance, the Commission should amend this

definition to clarify that the five day landowner notification applies only to landowners whose property will have a ground disturbance resulting from the proposed activity. INGAA further requests clarification that the five day prior landowner notification to affected landowners is not required for activities that result in ground disturbance where such disturbance would be located entirely within the fence line of an existing, aboveground facility site.

In addition, the Commission should clarify that landowner notification requirements do not apply to "one-call obligations." One-call obligations are required across the United States, typically by each state or, in some instances, by a county or region of a state as part of their "call before you dig" hotline that directly connects an excavator with its local one call center. The rule varies depending on locality, but in general, a pipeline must respond within 48 to 72 hours of receiving notification that a property owner or third party will be digging. Such response typically requires the pipeline operator to go onto the property in order to mark its facilities so that the pipeline is not damaged. A pipeline operator cannot wait five days to comply with its one-call obligations. The Commission should clarify or, in the alternative, grant rehearing on this point.

The Final Rule again has underestimated the cost of the proposed new landowner notification requirements. The Commission acknowledges that in its previous calculation, it may have underestimated such costs. However, instead of establishing an appropriate methodology for calculating a real-world estimate that reflects actual burdens and costs, the Commission proposes new numbers that still are really just a guess and again underestimate the costs of the

new requirements.[9] The clarifications, if granted, will help alleviate some of the burden imposed by the Final Rule. Nevertheless, the Commission still has an obligation to calculate the burden in a manner that is not arbitrary or capricious, and then to weigh the benefit of the Final Rule against that burden. The Commission has not met this obligation.

INGAA proposes the following modifications to the Commission's regulatory text:

Proposed Revision to Section 2.55 (c):

(c) *Landowner Notification*.

(1) No activity described in paragraphs (a) and (b) of this section that involves ground disturbance is authorized unless a company makes a good faith effort to notify in writing each affected landowner, as noted in the most recent county/city tax records as receiving the tax notice, ~~**whose property will be crossed or used as a result of the proposed activity,**~~ at least five days prior to commencing any activity under this section. ~~**For an activity required to respond to an emergency, the five-day prior notice period does not apply.**~~ **A landowner may waive the five day prior notice requirement in writing as long as the notice has been provided. No landowner notice under this section is required for activities done for safety, DOT compliance, in response to "one-call obligations," or environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company. Moreover, the five day landowner notification to affected landowners is not required for activities that result in ground disturbance where such disturbance would be located entirely within the fence line of an existing, aboveground facility site.** The notification shall include at least: (i) a brief description of the facilities to be constructed or replaced and the effect the activity may have on the landowner's property; (ii) the name and phone number of a company representative who is knowledgeable about the project; and (iii) a description of the Commission's Dispute Resolution Division Helpline, which an affected person may contact to seek an informal resolution of a dispute as explained in section 1b.21(g) of the Commission's regulations and the Dispute Resolution Division Helpline number.

[9] For example, the Commission estimates that the revised cost would be just $2,898,720 per year for all regulated entities and just $17,568 per year for a small entity. Final Rule at PP 86, 91. Estimates like this are meager when compared to the tens of thousands of landowners per pipeline that will need to be tracked and notified under the new rule.

(2) "Affected landowners" include owners of property interests, as noted in the most recent county/city tax records as receiving tax notice, **on** whose property ~~**is directly affected (i.e. crossed or used) by**~~ **there will be ground disturbance resulting from** the proposed activity, including all rights-of-way, facility sites (including compressor stations, well sites, and all above-ground facilities), access roads, pipe and contractor yards, and temporary work space.

Proposed Revision to Section 380.15

(c) *Landowner Notification*.

(1) No maintenance activity that involves ground disturbance is authorized unless a company makes a good faith effort to notify in writing each affected landowner, as noted in the most recent county/city tax records as receiving the tax notice, ~~**whose property will be crossed or used as a result of the proposed activity,**~~ at least five days prior to commencing any activity under this section. ~~**For an activity required to respond to an emergency, the five-day prior notice period does not apply.**~~ **A landowner may waive the five day prior notice requirement in writing as long as the notice has been provided. No landowner notice under this section is required for activities done for safety, DOT compliance, in response to "one-call obligations," or environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company. Moreover, the five day landowner notification to affected landowners is not required for activities that result in ground disturbance where such disturbance would be located entirely within the fence line of an existing, aboveground facility site.** The notification shall include at least: (i) a brief description of the activity and the effect the activity may have on the landowner's property; (ii) the name and phone number of a company representative who is knowledgeable about the project; and (iii) a description of the Commission's Dispute Resolution Division Helpline, which an affected person may contact to seek an informal resolution of a dispute as explained in section 1b.21(g) of the Commission's regulations and the Dispute Resolution Division Helpline number.

(2) "Affected landowners" include owners of property interests, as noted in the most recent county/city tax records as receiving tax notice, **on** whose property ~~**is directly affected (i.e. crossed or used) by**~~ **there will be ground disturbance resulting from** the proposed activity, including all rights-of-way, facility sites (including compressor stations, well sites, and all above-ground facilities), access roads, pipe and contractor yards, and temporary work space.

B. Additional Regulatory Text Is Required To Fix Cross References And Ensure Consistency.

Section 157.206(b)(1) includes the general reference to Section 380.15 for blanket certificates projects. But the Commission's proposed new Section 380.15(c)(1) now includes a

five day landowner notification requirement for maintenance projects and adds a new definition of affected landowners in Section 380.15(c)(2). Blanket certificate projects do not apply to maintenance activities. Accordingly, the cross reference in Section 157.206(b)(1) to Section 380.15 only should apply to Section 380.15(a) and (b). The amended regulation would state:

> The certificate holder shall adopt the requirements set forth in Section 380.15**(a) and (b)** of this chapter for all activities authorized by the blanket certificate and shall issue the relevant portions thereof to construction personnel, with instructions to use them.

In addition, the Commission in Section 2.55(b)(1)(ii) replaced the term "original" with "existing," but did not make similar changes to Appendix A of Part 2. For consistency, the Commission should revise Appendix A of Part 2 to replace the term "original" with the term "existing" consistent with its revised Section 2.55(b)(1)(ii).

In the event that the Commission does not clarify the issues addressed above, INGAA requests rehearing as to these issues.

C. Order Nos. 148 And 603 Hold That Auxiliary Installations Are Non-Jurisdictional And Exempt From The NGA; Order No. 603 Did Not Promulgate A Right Of Way Limitation For Section 2.55(a) Installations When It Did Promulgate Just Such A Limitation For Section 2.55(b) Replacements. The Commission's Treatment Of These Authorities In The Final Rule Is Arbitrary, Capricious And Unreasoned.

The Final Rule states that "[i]t went without saying in 1949, and has largely gone without saying since, that all [S]ection 2.55 facilities are subject to the Commission's jurisdiction."[10] This statement is simply incorrect. What the Commission has said is that Section 2.55(a)

[10] Final Rule at P 13.

installations are non-jurisdictional and the Commission provides no rational justification for contradicting and departing from its past precedent.[11]

In 1949, in Order No. 148, the Commission defined a set of auxiliary installations that are not jurisdictional because they are only auxiliary or appurtenant to jurisdictional facilities and only for the purposes of efficiency and economy;[12] they are "strictly incidental in nature."[13] In Order No. 148, the Commission distinguished between jurisdictional facilities necessary for the transportation of natural gas in interstate commerce and non-jurisdictional installations.

The Commission confirmed the status of non-jurisdictional installations in Order No. 603. In the Order No. 603 Notice of Proposed Rulemaking ("Order No. 603 NOPR"), the Commission proposed that auxiliary installations "installed at the same time and related to newly proposed jurisdictional facilities [did] not qualify for the exemption under [S]ection 2.55(a) (emphasis supplied)" because the exemption was limited to installations designed to improve the operations of "an existing transmission system."[14] Parties to the Order No. 603 NOPR proceeding challenged the suggestion that auxiliary installations could be jurisdictional. For example, El Paso Natural Gas Company, East Tennessee Natural Gas Company, Midwestern Gas Transmission Company, Mojave Pipeline Company, and Tennessee Gas Pipeline Company

[11] *See, e.g.*, Order No. 603 at 30,781-82 (finding auxiliary installations to be nonjurisdictional); Order No. 148, 14 Fed. Reg. at 681.

[12] Order No. 148, 14 Fed. Reg. at 681.

[13] *Revisions to Regulations Governing Certificates for Construction*, FERC Stats. & Regs. ¶ 32,477, at 32,463 (1990)

[14] *Revision of the Commission's Regulations Under the Natural Gas Act*, FERC Stats. & Regs. ¶ 32,535, at 33,523 (1998) (emphasis added) ("Order No. 603 NOPR"). It is worth pointing out that in the very next paragraph, the Commission proposed to revise Section 2.55(b)(1)(ii) to clarify that the section only applied to replacements that involved construction within the certificated right of way. This evinces an intent to propose a right of way requirement only for 2.55(b), but not for 2.55(a).

argued that the Order No. 603 NOPR created two types of auxiliary installations, "facilities installed in connection with new transmission facilities will be considered jurisdictional, but facilities installed on existing transmission facilities will be considered non-jurisdictional."[15] The pipelines stated that this "distinction between certificated and non-jurisdictional 'auxiliary facilities' is unwarranted and will unduly burden pipelines and the Commission."[16] The pipelines further argued that "[t]he proposed Regulation is inconsistent with the Commission's stated objective of making its regulations less cumbersome" and that "the Commission's efforts to streamline the regulatory process will be thwarted if pipelines are required to file Section 7(b) abandonment applications . . . to remove and/or replace certificated 'auxiliary facilities' such as drips, fences, ball valves and telecommunications equipment."[17]

Other commenters raised similar arguments. Koch Gateway Pipeline Company ("Gateway Pipeline") stated that "[t]hrough this proposed revision, the Commission is, without justification, attempting to place minor auxiliary facilities within its jurisdiction."[18] Gateway Pipeline further stated that the result is that "pipelines would have to file with the Commission anytime the pipeline found it necessary to abandon in place or by removal, modification, replacement or rearrangement, auxiliary facilities."[19] Gateway Pipeline continued, "[t]his is an unreasonable burden for which the Commission has not provided justification" and "[t]his proposal interferes with the operational efficiencies of the pipeline because the pipeline would be

[15] Comments of El Paso Energy Corporation Interstate Pipelines at 4, Docket No. RM98-9-000 (Dec. 22, 1998).

[16] *Id*. at 5.

[17] *Id*.

[18] Comments of Koch Gateway Pipeline Company at 6, Docket No. RM-98-000 (Dec. 22, 1998).

[19] *Id*. at 6-7.

required to file an application for activities that are otherwise exempt from the Commission's jurisdiction."[20] Finally, Gateway Pipeline noted that the proposal conflicted with the Commission's stated purpose "to expedite the certificate process."[21]

The Commission agreed with these commenters. In Order No. 603, the Commission recognized that excluding "auxiliary-type facilities constructed in conjunction with new pipeline facilities *from the NGA exemption in Section 2.55(a)*" would "establish dual classifications for similar facilities and would create uncertainty regarding the *nonjurisdictional status of such facilities*."[22] Accordingly the Commission rejected the change that it had proposed in the Order No. 603 NOPR in order to preserve the certainty that all auxiliary installations were non-jurisdictional, whether placed on existing facilities or placed on new facilities. In light of the Commission's duty to conduct an environmental review of non-jurisdictional facilities when they are an integral part of a jurisdictional project,[23] the Commission in Order No. 603 required pipelines to "include a description of the facilities in the environmental report[.]"[24] Significantly, no such description for the Commission was required in advance of installing auxiliary installations on existing facilities, whether made within or outside the existing right of way. Thus, parties in the Order No. 603 NOPR proceeding specifically raised concerns over the Commission's jurisdictional stance in the NOPR with regard to auxiliary installations, and most

[20] *Id.* at 7.

[21] *Id*.

[22] Order No. 603 at 30,781-82 (emphasis added).

[23] *See Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486-A, 53 Fed. Reg. 8176 (Mar. 14, 1988) (The Commission must consider the environmental impact of non-jurisdictional facilities when they are an "integral part of an entire project that includes jurisdictional facilities subject to Commission approval.") (citing *Henry v. FPC*, 513 F.2d 395 (D.C. Cir. 1975); 40 C.F.R. 1508.7 (1987)).

[24] Order No. 603 at 30,782.

critically, the Commission confirmed the non-jurisdictional status of auxiliary installations. The Commission's holding in Order No. 603 is faithful to the determination made in 1949 that auxiliary installations are non-jurisdictional and only appurtenant to jurisdictional facilities.[25]

The Final Rule makes no attempt to deal rationally with the Commission's prior rulings.[26] Its treatment of both Order No. 148 and Order No. 603 is arbitrary and capricious.

1. Order No. 148; The Words Used By The Commission In Promulgating Regulations Regarding The Statutes It Has Been Charged To Administer Do Matter.

The NGA gives the Commission jurisdiction over facilities used for the transportation of natural gas.[27] In Order No. 148, the Commission expressly held that "auxiliary installations" were not "facilities" for the transportation of natural gas, but only auxiliary or appurtenant to such facilities and "only for the purpose of obtaining more efficient or more economical operation of authorized transmission facilities." As part of the Order No. 148 rulemaking, the Commission identified a non-exclusive list of installations that were not NGA facilities.

In the Final Rule, the Commission makes its jurisdictional holding in a brief section at paragraphs 13-16. With respect to its seminal holding in Order No. 148, the Commission simply says that "the Commission's choice of wording in drafting this section" cannot determine jurisdiction. Rather, the Commission finds that it goes "without saying" that auxiliary

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[25] Order No. 148, 14 Fed. Reg. 681.

[26] *See Columbia Broadcasting Sys., Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (finding that a Commission must explain its reasons and do more than enumerate factual differences, if any, between cases; it must explain the relevance of those differences to the purposes of the act under which it operates); *see also, Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965); *Burinskas v. NLRB*, 357 F.2d 822, 827 (D.C. Cir. 1966).

[27] 15 U.S.C. § 717f(c) (2012).

installations are jurisdictional. However, the Commission's contrary holding in Order No. 148 was clear and express. To simply say now that the words of its regulations and prior orders don't matter is not reasoned decision making. Going "without saying" is not reasoning at all. In "glossing over" these precedents with summary conclusions that are directly contrary to its prior Orders, the Commission has, in the words of the court, "crossed the line from the tolerably terse to the intolerably mute."[28]

The capricious nature of the Final Rule is highlighted by consideration of the Commission's statement in footnote 39, where the Commission acknowledges that some construction projects undertaken by pipelines are not jurisdictional under the NGA. There the Commission correctly holds, using words, that a pipeline's "new corporate headquarters building is not a 'natural gas facility' which requires certification under the NGA."[29] The Final Rule provides no explanation as to why this is so, however. There is no analysis as to why headquarters buildings, some of which contain pipeline control rooms to manage system operations, are non-jurisdictional and a communications tower, one of the types of installations set out in Section 2.55(a) and used to send signals to the control room, is jurisdictional. Apparently, it simply goes without saying that a headquarters building is non-jurisdictional.

Actually, the "saying," the reason that such a headquarters building is not jurisdictional is because the building is not used for the transportation of natural gas in interstate commerce within the meaning of Section 7 of the NGA. This is precisely the holding that the Commission

[28] *PG&E Gas Transmission, Northwest Corp. v. FERC*, 315 F.3d 383, 390 (D.C. Cir. 2003) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)).

[29] Final Rule at P 22 n.39.

made in Order No. 148 with respect to auxiliary installations, including each of the types of installations specifically listed in the regulation promulgated by that order, Section 2.55(a).

The Commission's current position that auxiliary installations always have been considered jurisdictional goes hand in hand with its claim that it always has had the right, and always has, placed a right of way limitation on those installations. But this position is impossible in the face of Order No. 148 and the language of Section 2.55(a). Order No. 148 holds that auxiliary installations are not NGA jurisdictional facilities and Section 2.55(a) expressly lists examples of the types of installations that are not jurisdictional natural gas facilities when installed for the purpose of obtaining more efficient or more economical operations. These installations have been excluded from NGA jurisdiction based on their function, not based on geographic location. They are exempt in the same way that the headquarters building identified by the Commission in footnote 39 of the Final Rule is exempt. The Commission's struggle to ignore the plain meaning of Order No. 148 and the regulation it implemented culminates in a surprising summary of its position in paragraph 25 of the Final Rule:

> Moreover, the fact that these types of facilities are specifically listed in section 2.55(a) does not mean that companies can necessarily rely in all instances on section 2.55(a) to install them.

Without analysis of the jurisdictional question, without reference to accepted rules of statutory and regulatory construction, without any acknowledgement that a change is being imposed, the Final Rule simply decrees that the regulation that defines and lists examples of non-jurisdictional auxiliary installations cannot be relied upon for the installation of the items listed.

An unwritten, implied limitation purportedly circumscribes the plain meaning of the regulation. This type of ruling is not reasoned decision making.[30]

2. Order No. 603; The Commission Ignores Express Contrary Prior Holdings And Misapprehends What It Knew And When It Knew It.

The Final Rule makes two errors with respect to the Commission's prior holdings in Order No. 603. First, as set out above, the Commission expressly held in Order No. 603 that Section 2.55(a) auxiliary installations were exempt and non-jurisdictional. Moreover, in a full Commission order issued less than two months after Order No. 603 and relying on that Final Rule, the Commission expressly determined that auxiliary installations are non-jurisdictional.[31] In the Final Rule, the Commission never discusses those holdings, or how it is able now to rule without any explanation that those installations always have been jurisdictional. The Final Rule simply states that "section 2.55 effectively provides not an NGA-exemption, but a type of 'blanket' certificate authority. . . ."[32] The Commission's approach in the Final Rule is inventive, but it is not reasoned decision making. As set out above, the Commission previously has described Section 2.55(a) as an exemption to NGA jurisdiction in Order No. 603 and expressly

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[30] Consistent with INGAA's position set out in the text, the Commission should find that auxiliary installations are non-jurisdictional. If the Commission continues to hold that some auxiliary installations are jurisdictional facilities, the Commission should clarify the analysis it is using to determine that some buildings, such as corporate headquarters, and presumably some other installations, activities and structures, are non-jurisdictional. The Commission should explain how factors such as function and remoteness or proximity to rights-of-way that contain clearly jurisdictional facilities, such as a pipeline, are used in the Commission's analysis. For example, a communications tower built at a location distant from pipeline rights-of-way would seem to be more like a headquarters building, with a general function only tangential to natural gas transportation and a location remote from archetypical pipeline facilities clearly jurisdictional under the NGA. Failure to elaborate on its analysis and provide necessary clarity for the industry is a separate error in the Final Rule.

[31] "In addition, *Final Rule Revising Certificate Regulations* (Order No. 603), 87 FERC ¶61,125 (1999), amends Section 2.55(a) to specifically identify pig launchers as non-jurisdictional auxiliary equipment." *CNG Transmission Corp.*, 87 FERC ¶ 61,324 at 62,259 n.7 (1999) ("*CNG*"), *reh'g denied*, 89 FERC ¶ 61,047 (1999).

[32] Final Rule at P 16.

held that auxiliary installations were non-jurisdictional.[33] In addition, the Commission in *CNG* found that no type of certificate authority, blanket or otherwise, was required for auxiliary installations. "[W]e note that the Commission has previously found that pig launchers are auxiliary facilities not requiring Section 7 certificate authority. Therefore, CNG was not required to ask for or to receive any form of certificate authority prior to constructing the pig launcher."[34]

The Final Rule's second error related to Order No. 603 is debilitating to the Commission's position. A principal argument put forth by INGAA in response to the December 2012 NOPR rested not only on the express holdings in Order No. 603 that auxiliary installations were exempt and non-jurisdictional, but also on the fact that in Order No. 603, the Commission promulgated Section 2.55(b)(1)(ii) which expressly added the right of way and work space limitation to replacements. In the very Order No. 603 rulemaking that added these limitations to replacements of facilities, the Commission also amended the regulatory text of Section 2.55(a) and did <u>not</u> add a right of way or work space limitation to auxiliary installations.

INGAA argued that it did not make sense that the Commission would feel the need to clarify the right of way requirement for replacements of facilities, even though that requirement

[33] Indicative of this is that in Order No. 603 the Commission only required pipelines to include a "list" of the auxiliary installations to be constructed in conjunction with an expansion of jurisdictional facilities in a certificate application as part of the environmental report. If the Commission truly believed at the time that these auxiliary installations were subject to its certificate authority, then a simple description in the environmental report of a certificate application would not have sufficed. A certificate application requires a much more vigorous review of facilities to be certificated as part of an expansion.

[34] *CNG* at 62,258-259.

had been stated recently in *Arkla/NorAm*,[35] but not clarify a similar right of way requirement for auxiliary installations. Moreover, the Commission established in Order No. 603 an Appendix A to guide pipelines in determining the acceptable construction area for replacements. Appendix A states that "[p]ipeline replacements must be within the existing right of way as specified by Section 2.55(b)(1)(ii)."[36] Consistent with the aforementioned differences in the regulatory subsections, Appendix A does not include this statement with respect to Section 2.55(a) auxiliary installations.

Significantly, when the Commission added the right of way and work space limitations to Section 2.55(b) in Order No. 603, the Commission also made a complementary amendment to the regulation defining eligible facilities at 18 C.F.R. § 157.202(b)(2)(i). This additional amendment was to ensure that replacements that did not qualify under Section 2.55(b) because of right of way and work space limitations still could be accomplished under blanket certificate authority instead of a more burdensome full Section 7 certificate filing: "[E]ligible facility includes main line, lateral, and compressor replacements that do not qualify under §2.55(b) of this chapter … because they will not satisfy the location or work space requirements of §2.55(b)."[37] In contrast, the Commission did not add a regulatory provision in Order No. 603 defining auxiliary installations outside the existing right of way as eligible facilities.

The Commission's response to INGAA's argument in the Final Rule is based on a misapprehension of what the Commission knew and when it knew it. The Final Rule is built on

[35] *Arkla Energy Resources Co.*, 67 FERC ¶ 61,173 (1994), *reh'g denied*, *NorAm Gas Transmission Co.*, 70 FERC ¶ 61,030 (1995) ("*Arkla/NorAm*").

[36] 18 C.F.R. pt. 2, app. A (2013).

[37] 93 Fed. Reg. 26,606 (May 14, 1999).

the concept that the Commission always has held the position that Section 2.55(a) installations were jurisdictional facilities and that right of way and work space limitations always applied to these auxiliary installations. Paragraph 32 of the Final Rule states that "[u]ntil relatively recently" the Commission always assumed that the industry held these positions as well. In addition, the Commission stated the following at paragraph 28 of the Final Rule:

> We were not aware, at that time, of companies also relying on section 2.55(a) to go outside previously authorized areas, in that case in order to add auxiliary facilities to existing facilities. Thus, when we issued Order No. 603, we had no reason to lay out our expectations regarding locational requirements as they pertained to auxiliary installations under section 2.55(a), even though we were clarifying those requirements with respect to replacement projects under section 2.55(b).

This statement simply is not correct.

Order Nos. 603 and 603-A were issued in 1999. In 1997, Commission Staff considered a project to install three ground beds to provide cathodic protection for a pipeline. Initially, Commission Staff relied on *Arkla/NorAm* to advise the pipeline that it must file under Section 7 for authorization to construct ground beds outside of the existing right of way.[38] The pipeline responded that while Section 2.55(b) replacements are limited to the original construction right of way, neither the Commission's regulations nor Commission precedent contain any such limitation on Section 2.55(a) activities. In a 1998 letter, Commission Staff agreed, "clarify[ing] that the installation of ground beds to provide cathodic protection for an existing pipeline qualifies as an auxiliary installation" under Section 2.55(a), and therefore, "such installation does

[38] Letter from Kevin P. Madden, Director Office of Pipeline Regulation (Dec. 16, 1997), available at eLibrary Accession No. 19971223-0120.

not require Commission authorization[.]"[39] Indeed, with respect to installations extending beyond existing right of way and work space property interests, the order reminded the pipeline that "eminent domain may not be invoked to acquire property for Section 2.55(a) facilities."[40]

In 1984, a pipeline filed for certificate authorization to construct and operate a "slug catching" installation and related piping on its system.[41] The pipeline explained in its request for certificate authorization that the slug catcher would be on a "proposed ten acre tract (480' x 900')" that was "privately owned" and would be "leased from the present land owner."[42] The Application and exhibits to the filing show that this installation could not be entirely within the existing rights-of-way.[43] The Commission through delegated letter order stated that while the slug catcher is considered essential by the pipeline to ensure efficient operation of its system, "it appears the proposed facility is an auxiliary installation that would increase the efficiency and enhance the flexibility of operation with no apparent change in the capacity of the existing [system]" and "as such is within the definition of Section 2.55 of the Commission's

[39] *See* Letter from Kevin P. Madden, Director Office of Pipeline Regulation at 1 (Apr. 3, 1998), available at eLibrary Accession No. 19980408-0242.

[40] *Id*., the lack of availability of eminent domain is yet another indication that auxiliary installations are non-jurisdictional; *see also*, *Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements*, Order No. 609, FERC Stats. & Regs. ¶ 31,082 at 30,959 (1999) (confirming that an auxiliary installation constructed under Section 2.55(a) is not a facility within Section 7(c) and does not require a certificate), *on reh'g*, Order No. 609-A, FERC Stats. & Regs. ¶ 31,095 (2000).

[41] *See* Request for Proposed Blanket Certificate Activity, Docket No. CP84-394-000 (May 7, 1984), available at eLibrary Accession No. 19840509-0368 and included as Attachment C to INGAA's Request for Rehearing, Docket No. RM12-11-000 (Jan. 22, 2013).

[42] *See id*., Ex. W at 1, 3, and 4.

[43] *Id*.

Regulations."[44] The letter order "concluded the proposed construction and operation of the slug catcher does not require a certificate of public convenience and necessity and therefore the instant application is hereby dismissed."[45] Thus, even though the slug catcher installation fell outside of the existing right of way, the Commission nevertheless dismissed the petition for certificate authority and determined that the proposed installations fell within Section 2.55(a).

The Final Rule discusses these delegated letter orders at paragraphs 34-37. Its treatment of these delegated orders is cursory and unconvincing.[46] Most importantly, the Commission fails to perceive that the existence of these delegated orders entirely undermines the Commission's foundation for its Final Rule. What the 1997 and 1998 delegated letter orders issued by the Director of the Commission's Office of Pipeline Regulation show is that during the time frame immediately preceding and proximate to the Commission noticing and considering the Order No. 603 rulemaking, the Director of the Commission's Office of Pipeline Regulation was fully aware that pipelines were taking the position that Section 2.55(a) did not have a right of way or workspace limitation. Further, a delegated order of the Commission agreed with that position. The Director of the Office of Pipeline Regulation issued the 1998 delegated letter order on April 3, 1998. Less than six months later, on September 30, 1998, the Commission issued its NOPR

[44] *Trunkline Gas Co*., Docket No. CP84-394-000, at 1 (May 25, 1984) (unpublished delegated letter order), available at eLibrary Accession No. 19840601-0118 and included as Attachment D to INGAA's Request for Rehearing, Docket No. RM12-11-000 (Jan. 22, 2013).

[45] *Id*.

[46] In paragraph 35 of the Final Rule, the Commission posits that it is likely that the company placed its ground bed installation in the existing right of way after receiving Staff's initial 1997 letter. This supposition has neither relevance nor basis. After all, the company did file to request modification of the 1997 letter, which it was granted in the 1998 letter. As to the 1984 letter, the Commission hypothesizes in paragraph 36 of the Final Rule, again without basis, that the Staff simply failed to recognize that the installation would be made outside of the existing right of way. It is the industry's experience that the Commission Staff carefully reviews the applications submitted for the Commission's consideration.

that resulted in Order No. 603. In both the NOPR and in Order No. 603, the public was advised that for further information on the rulemaking and the order, it should contact a named senior member of the Office of Pipeline Regulation. Whether the Commission now wants to say that the 1984 and 1998 letters were wrong, it cannot say that its awareness of the industry's position on the meaning of Section 2.55(a) is only recent or that it had no reason to address this aspect of Section 2.55(a) in Order No. 603.

In fact, the recognition in the 1998 delegated letter order that auxiliary installations do not have a right of way limitation and the 1984 delegated letter order dismissing an application for certificate authorization for installations outside of the existing right of way are consistent with the express language of the regulation and statute. They are consistent as well with historical conduct by the industry, the Commission, and the Commission Staff, all relevant evidence of the meaning of Section 2.55(a)—that Section 2.55(a) does not have a right of way or work space limitation. Again, it simply is not credible for the Commission to take the position that, with the 1997 and 1998 delegated letter orders, the 1984 delegated letter order, and the types of installations expressly described in Section 2.55(a) itself all within the public domain, there was no need to expressly amend Section 2.55(a) because the existence of implied right of way and work space limitations in Section 2.55(a) were so clear and well-known.

3. There Are No Issues Related To Environmental Review That Support What The Commission Has Done In The Final Rule.

It appears that the Commission may feel compelled to cling to its legally infirm position that auxiliary installations are jurisdictional in order to ensure that the environmental aspects of auxiliary installations are being considered. The Final Rule is replete with Commission statements that it has a responsibility under NEPA to review auxiliary installations and enforce a

right of way limitation.[47] However, the Commission does not have a NEPA responsibility for non-jurisdictional installations, for which no certificate authorization is required, when those installations are being undertaken separately and not in conjunction with the contemporaneous construction of jurisdictional facilities, for which certificate authorization is required.[48] But the environmental impacts are not ignored. Non-jurisdictional activities still must comply with state and other federal environmental laws, as the Commission itself has recognized elsewhere.[49] That has been true for auxiliary installations for decades. The December 2012 NOPR made this point, but it is ignored in the Final Rule.

Compliance with state and federal environmental laws outside of the Commission's NEPA authority has provided ample oversight for auxiliary installations. These state and other federal environmental laws will apply to pipeline construction of corporate headquarters buildings, and the Commission is content with this arrangement. The Commission does not engage in reasoned decision making when it (a) fails to consider that state and other federal environmental laws apply to auxiliary installations and have provided satisfactory environmental oversight for years and (b) fails to acknowledge in the Final Rule that NEPA obligations relating

[47] See Final Rule at PP 19, 21, 23, 24.

[48] *See National Committee for the New River, Inc. v. FERC*, 373 F.3d 1323, 1334 (D.C. Cir. 2004) ("The requirement to consider the environmental effects of non-jurisdictional facilities will thus arise only where they are built in conjunction with jurisdictional facilities and are an essential part of a major federal action having a significant effect on the environment."); *Algonquin Gas Transmission*, 59 FERC 61,255 at 61,933 (1992) (An agency's discretion to consider environmental impacts of activities must be exercised within the scope of that agency's authority.).

[49] Pipelines building auxiliary installations still must comply with local, state, and federal land use and environmental laws and regulations, minimizing any environmental impact as is consistent with those requirements. *See, e.g., Straight Creek Gathering, L.P.*, 117 FERC ¶ 61,005, at P 23 (2006); December 2012 NOPR at P 5 n.13.

to jurisdictional activities do not provide a reasoned basis for exercising authority over non-jurisdictional activities.[50]

4. The Final Rule Is Not A Clarification. It Is A Change In The Commission's Regulations That Can Be Accomplished, If At All, Only Through Proper Rulemaking Procedures That Deal Rationally And Directly With The Changes Being Made And The Issues Raised.

If the Commission desires to change its regulatory approach to auxiliary installations and modify its prior express holdings in Order Nos. 148 and 603, it must engage in a reasoned analysis to determine which, if any, of the installations that have been considered auxiliary and non-jurisdictional for all of these years should be changed at this time to a jurisdictional status. The Commission never has provided an explanation as to why a particular auxiliary installation now should be considered necessary for the transportation of natural gas in interstate commerce and no longer considered only incidental to necessary facilities. Why should a particular installation be considered to be like a segment of pipe, necessary for transportation service? Alternatively, why shouldn't that installation be viewed more like a non-jurisdictional headquarters building? The Commission has not provided its rationale and no parties have had an opportunity to comment on any such reasoning.

The Commission has not sought comments on, or considered adequately, what material changes affecting the industry could be relevant to a determination that some installations previously determined by the Commission to be non-jurisdictional, if any, now might be found to

[50] Although the Commission has recognized this limitation on its authority elsewhere, *See Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486-A, 53 Fed. Reg. 8176 (Mar. 14, 1988) (While the Commission must consider the environmental impact of non-jurisdictional facilities when they are an "integral part of an entire project," the Commission "does not intend to use the environmental review process to exercise jurisdiction over non-jurisdictional facilities").

be jurisdictional facilities. Likewise, the Commission has not engaged in the required balancing of benefits and burdens necessary to impose new right of way and workspace limitations on facilities over which it does have jurisdiction. From the very start of this controversy, initiated informally by the Staff and continuing through and including the Commission's December 2012 NOPR and the Final Rule, the Commission has refused to acknowledge, and deal properly with, the fact that it is changing its regulations to make auxiliary installations jurisdictional facilities and imposing new right of way and workspace limitations on those installations. The Commission has been arbitrary in its handling of these questions, culminating in the unsupportable position in the Final Rule that the words used by the Commission in promulgating regulations regarding the statute it is charged with administering simply do not matter.

D. Auxiliary Installations Under Section 2.55(a) Are Fundamentally Different From The Replacement Of Facilities Under Section 2.55(b), And The Commission Consistently Has Treated The Two Activities Differently When Promulgating Its Regulations.

Since 1949 when the Federal Power Commission ("FPC") first promulgated Section 2.55, the Commission has revisited conditions applicable to both Section 2.55(a) and (b) in regulatory proceedings. Importantly, while the Commission added a right of way limitation to Section 2.55(b)—first through adjudicatory proceedings[51] and then by formal rulemaking with notice and comment[52]—the Commission has never so limited auxiliary installations constructed pursuant to Section 2.55(a) even when it has had an opportunity to do so.

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[51] *See Arkla/NorAm*.

[52] *Revision of Existing Regulations Under Part 157 and Related Sections of the Commission's Regulations Under the Natural Gas Act*, Order No. 603, FERC Stats. & Regs. ¶ 31,073 (1999), *on reh'g*, Order No. 603-A, FERC Stats. & Regs. ¶ 31,081 (1999), *on reh'g*, Order No. 603-B, FERC Stats. & Regs. ¶ 31,094 (2000).

In *Arkla/NorAm*, the Commission addressed a pipeline that replaced a 91-mile portion of mainline facilities outside of the existing right of way pursuant to Section 2.55(b) at a time when Section 2.55(b) had no express right of way limitation. The circumstance of this 91-mile replacement project led the Commission to determine that Section 2.55(b) means that replacement activities must take place within the existing right of way. The Commission found that replacement facilities, like the facilities Arkla/NorAm replaced, were limited by the terms and locations delineated in the original construction certificate for the facilities being replaced.

In contrast, auxiliary installations do not replace any previously certificated facilities. Examples of the types of installations included in Section 2.55(a) are expressly set out in the regulation.[53] These installations make pipeline operations more efficient and more economical, but the FPC determined that installations are not necessary for the provision of jurisdictional transportation, and found them to be only appurtenant or auxiliary to the facilities that are necessary to provide jurisdictional service. Until the December 2012 NOPR, the Commission never imposed an *Arkla/NorAm*-type right of way requirement for auxiliary installations through an adjudicatory proceeding or rulemaking. Rather, balancing benefits and burdens, the Commission consistently has found that it is reasonable not to apply to auxiliary installations the limitations that the Commission has chosen to apply to replacement activities.[54]

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[53] 18 C.F.R. § 2.55(a)(1).

[54] *See* Order No. 603 at 30,781-82. *See, also, Interim Revisions to Regulations Governing Construction of Facilities Pursuant to NGPA Section 311 and Replacement of Facilities*, Order No. 525, FERC Stats. & Regs. ¶ 30,895, at 31,812 (1990) (noting that auxiliary installations generally involve minor facilities while replacement of facilities may involve the removal and replacement of extensive mainline facilities), *reh'g denied and clarification*, Order No. 525-A, 53 FERC ¶ 61,140 (1990); *Revisions to Regulations Governing NGPA Section 311 Construction and Replacement of Facilities*, Order No. 544, FERC Stats. & Regs. ¶ 30,951 (1992) (considering notice

The Final Rule is a solution in search of a problem, and the Courts view these types of quests with disfavor.[55] The Commission, without referencing a record of abuse, without identifying any material theoretical threat, and without providing any premise based on relevant facts, extends to auxiliary installations regulatory limitations that in the past have applied only to separate and distinct replacement activities. This is the same infirm approach that resulted in the Commission's extended standards of conduct regulations being struck down by the court in *National Fuel*. Arguments supporting the Commission's regulatory approach to replacements do not automatically support the same scale and scope of regulation for auxiliary installations. In the Final Rule, the Commission forthrightly states, "[w]e acknowledge that we are not aware of any section 2.55(a) auxiliary activities outside the authorized right of way approaching the scale of the section 2.55(b) activities outside the right of way that came to light during the *Arkla/NorAm* proceeding."[56] The Commission makes no attempt to analyze the need for expanded regulation for each of the auxiliary installations listed in Section 2.55(a) or for this class of non-jurisdictional installations as a whole. Rather, the Commission simply states its "principal concern as the absence of any review of the environmental impacts of activities

(continued…)

requirement for replacement of facilities, but such notice not considered for auxiliary installations), *reh'g*, Order No. 544-A, FERC Stats. & Regs. ¶ 30,983 (1993).

[55] *See National Fuel Gas Supply Corporation v. FERC*, 468 F.3d 831, 844 (2006) (indicating that FERC must supply a factual basis for its administrative actions or, in the absence of such a basis, explain how potential dangers, unsupported by a record of abuse, justifies costly rules); "After consideration of the relevant matter presented [through notice and comment], the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (2012); *see also, Motor Vehicle Mfrs. Ass'n of U.S, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 56 (1983) (finding that it is arbitrary and capricious for an agency to fail to provide the rational connection between the facts and its judgment); *St. James Hosp. v. Heckler*, 760 F.2d 1460, 1469 (7th Cir. 1985).

[56] Final Rule at P 20.

outside of authorized areas."[57] This concern cannot support the Commission's action because it is not accurate. As discussed above, state and other federal environmental laws apply to all auxiliary installations whether within or outside existing right of way, as the Commission itself has recognized.[58]

The lessons from the Commission's jurisprudence on Section 2.55 are clear. Installations under Section 2.55(a) and replacements of facilities under Section 2.55(b) are intrinsically different concepts. Section 2.55(b) addresses replacements of facilities. The facilities in question, both those being replaced and those doing the replacing once they are in service, are jurisdictional under NGA Section 7. The new replacement facilities once in service assume the certificated position previously occupied by the facilities being replaced. As the Commission has noted, "it is the same pipeline that was already there, but with new . . . facilities instead of old . . . facilities."[59] The new facilities, just like the facilities that they replaced, are required to provide the pipeline's previously certificated jurisdictional service. In addition, as replacements of existing facilities, Section 2.55(b) projects by definition and by their very nature involve an existing right of way. Replacement activity is not limited to a set of auxiliary, appurtenant items, solely for efficiency and economy purposes, with a list of examples providing guidance to the type of installations contemplated. Rather, as in *Arkla/NorAm*, replacement activity can encompass miles and miles of large diameter main line pipe.

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[57] *Id*.

[58] December 2012 NOPR at P 5 n.13; *Straight Creek Gathering, L.P.*, 117 FERC ¶ 61,005 at P 23.

[59] *Revisions to Regulations Governing Certificates for Construction*, FERC Stats. & Regs. ¶ 32,477, at 32,463 (1990).

The Final Rule is founded on the proposition that the Commission should be able to impose a right of way limitation on auxiliary installations because it has imposed this limitation on the replacement of facilities. This is reminiscent of the Commission's argument that it should be able to impose the burdens of standards of conduct regulation on Energy Affiliates because it imposed those burdens on Marketing Affiliates. The arguments are similar and they are similarly infirm.

E. Persisting In Its Position That It Is Not Adopting A Change To Section 2.55(a) Is A Contrivance To Avoid Dealing Directly With The Issues Raised In This Proceeding. The Commission Is Acting Capriciously.

To support its action in this docket the Commission must: (1) overlook its prior, express, contrary holdings in Order Nos. 148 and 603, (2) rely on an environmental concern based on NEPA, a statute enacted approximately 20 years after Section 2.55(a) was promulgated, (3) ignore the applicability of state and other federal environmental laws which the Commission itself previously referenced; (4) disregard a series of formal rulemaking proceedings where it treated Section 2.55(a) differently from Section 2.55(b); and (5) dismiss long standing Staff guidance contrary to the position the Commission now wants to adopt. Treating exempt auxiliary installations as jurisdictional facilities and imposing right of way and work space limitations represent sea changes in how the industry must now address such installations, thereby raising costs, limiting efficiencies, and threatening expedited enhancement of pipeline integrity activities.

The Commission is the agency invested with the responsibility to administer the NGA. Time honored rules of statutory and regulatory construction make it clear that the words the Commission uses in promulgating its regulations and in issuing its orders do matter. Once decreed, the Commission's words cannot be ignored. They either must be followed or changed

in a way that comports with sound administrative law and due process. The costs and benefits of any change must be identified and weighed. Not only is this required by administrative law principles of notice and comment, but it comports with the President's order that agencies avoid burdensome regulations that provide only modest benefits.[60]

The Commission has not fulfilled its obligations and has not dealt with INGAA's arguments in a judicious manner. The Commission's treatment of INGAA's arguments has been cursory and capricious.

1. Rules Of Construction And Plain Meaning Support A Determination That No Right Of Way Or Work Space Limitation Applies To Auxiliary Installations Under Section 2.55(a).

Contrary to the unlawfully expedient approach taken in the Final Rule, the starting point for analyzing the meaning of any regulation is the language of the regulation itself,[61] and the Commission must apply regulations in accordance with their plain meaning.[62] "[I]n the construction of administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions

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[60] Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011). Ignoring Presidential orders is arbitrary. *See Bldg. & Const. Trades Dept. v. Allbaugh*, 295 F.3d 28, 32-33 (D.C. Cir. 2002) (indicating that an agency under the direction of the executive branch must implement the President's policy directives to the extent permitted by law); *Sierra Club v. Costle*, 657 F2d 298, 406 n.524 (D.C. Cir. 1981) (same); *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (same).

[61] *See Caminetti v. U.S.*, 242 U.S. 470 (1917); *Barnhart v. Walton*, 535 U.S. 212 (2002).

[62] *See, e.g.*, *Crown Pacific v. Occupational Safety and Health Review Commission*, 197 F.3d 1036, 1038-39 (9th Cir. 1999) ("A regulation should be construed to give effect to the natural and plain meaning of its words." (quoting *Diamond Roofing Co., Inc. v. Occupational Safety and Health Review Commission,* 528 F.2d 645, 649 (5th. Cir. 1976))); *Bethlehem Steel Corp. v. Occupational Safety and Health Review Commission*, 573 F.2d 157, 160 (3d Cir. 1978) (applying plain meaning of administrative regulation).

superfluous are to be avoided."[63] The Commission's December 2012 NOPR and its Final Rule do not rely on the plain meaning of Section 2.55(a), and they are arbitrary, capricious, and do not constitute reasoned decision making.

a. The Commission Reads Into The Regulatory Text A Limitation That Does Not Exist.

None of the words in Section 2.55(a) plainly mean "limited to the existing right of way or work space."[64] As noted, Section 2.55(b) conversely has an express provision limiting replacements of facilities to the existing right of way and work space. By including modified language in Section 2.55(b) and not including that same language in the adjacent Section 2.55(a), while at the same time modifying other language in Section 2.55(a), an independent and unbiased arbiter simply would not conclude that the Commission intended no difference between the related subsections.[65]

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[63] *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976); *See also Rainsong Company v. FERC*, 151 F.3d 1231, 1234 (9th Cir. 1998).

Section 2.55(a)(1) provides:

> (a) *Auxiliary installations.* (1) Installations (excluding gas compressors) which are merely auxiliary or appurtenant to an authorized or proposed transmission pipeline system and which are installations only for the purpose of obtaining more efficient or more economical operation of the authorized or proposed transmission facilities, such as: Valves; drips; pig launchers/receivers; yard and station piping; cathodic protection equipment; gas cleaning, cooling and dehydration equipment; residual refining equipment; water pumping, treatment and cooling equipment; electrical and communication equipment; and buildings.

18 C.F.R. § 2.55(a).

[64] As discussed in greater detail below, the Commission's holding in the Final Rule on Section 2.55(a) also would eliminate many of the activities expressly provided in the text as examples of auxiliary installations (*e.g.*, "cathodic protection equipment," "electrical and communication equipment," and "pig launchers/receivers") which commonly extend beyond existing rights-of-way.

[65] *See, e.g., Public Service Company of New Mexico*, 17 FERC ¶ 61,123, at 61,244 (1981), *reh'g denied*, 18 FERC ¶ 61,036 (1982), *affirmed*, 21 FERC ¶ 61,215 (1982), *affirmed*, 832 F.2d 1201 (10th Cir. 1987); *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118, at P 14, *reh'g denied*, 115 FERC ¶ 61,303 (2006).

The Commission attempts to gloss over the plain meaning of Sections 2.55(a) and (b) by stating that it has never promulgated a right of way limitation for auxiliary installations because until recently it saw no need to do so. For the reasons discussed previously, this explanation also would not be found credible and is not reasoned decision making. The Commission made it clear in *Arkla/NorAm* that it found Section 2.55(b) to have a right of way limitation. Even after doing so, the Commission, several years later, promulgated Section 2.55(b)(1)(ii) and other complementary provisions, which expressly imposed the right of way and work space limitation on replacement activities. In that same rulemaking, the Commission also amended the regulatory text of Section 2.55(a) and *did not* add a right of way or work space limitation to auxiliary installations.[66] This was the case even though the Commission and its Staff knew at the time that some pipelines were making auxiliary installations outside of existing rights-of-way and workspaces.[67] Moreover, it does not make sense that the Commission would feel the need to clarify the right of way requirement for replacements of facilities when that requirement recently had been stated clearly in *Arkla/NorAm*, but not clarify a similar right of way requirement for auxiliary installations for which no such recent clarifying order existed. This same argument would further mean that the express language in Section 2.55(b) is superfluous, a result that reasoned regulatory construction does not permit.[68]

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[66] *See* Order No. 603 at 30,781-84. Indeed, amendments to both Subsections (a) and (b) were addressed consecutively in the preamble that promulgated the regulation.

[67] *See Trunkline Gas Co*., Docket No. CP84-394-000, at 1 (May 25, 1984) (unpublished delegated letter order), available at eLibrary Accession No. 19840601-0118 and included as Attachment D to INGAA's Request for Rehearing, Docket No. RM12-11-000 (Jan. 22, 2013); Letter from Kevin P. Madden, Director Office of Pipeline Regulation (Apr. 3, 1998), available at eLibrary Accession No. 19980408-0242.

[68] *See, e.g., Public Service Company of New Mexico*, 17 FERC at 61,244; *The Goldman Sachs Group, Inc.*, 114 FERC ¶ 61,118 at P 14.

To maintain its rationalization regarding its disparate treatment of Section 2.55(a) and 2.55(b) in Order No. 603, the Commission must resort to the hypothesis that, prior to the Final Rule, Section 2.55(a) had an implied right of way and work space limitation that is not found in that section's express language, and further hypothesize that the Commission's blanket certificate regulations included an implied additional set of eligible facilities, installations not meeting the implied right of way and work space limitation, that is not found in the express language of those regulations. These fanciful theories divorce the Commission from the reality of its own regulations. The "common sense" reading of these regulations is that there are no such implied limitations in Section 2.55(a) and that the Commission did not alter its definition of eligible facilities in its blanket certificate regulations to include auxiliary installations outside existing rights-of-way because it did not need to do so. Although the Commission continues to maintain that its Final Rule does not represent a regulatory change, the Final Rule now adds in both regulatory sections the express language that the Commission says has been there all along by implication, the language that the Commission promulgated for replacement activities almost 15 years ago. The Commission is being arbitrary and capricious in order to reach a desired result.

b. Implying A Right Of Way Limitation In Section 2.55(a) Eliminates The Ability For Pipelines To Accomplish Under That Provision Many Of The Installations Expressly Identified In That Provision And Is Therefore Arbitrary, Capricious And Plainly Wrong.

Auxiliary installations are accomplished for efficiency, for economy, for security and for safety. Indeed, safety concerns have become more of a driver in recent years as pipelines work to meet Pipeline and Hazardous Materials Safety Administration requirements. Auxiliary installations, such as additional in-line inspection capability, sufficient cathodic protection and communication equipment, all support pipeline safety efforts. Communication installations also

are an important part of securing the nation's vital interstate pipeline system from external risks. Implying a right of way limitation in Section 2.55(a) would have the effect of eliminating the ability of gas pipelines to accomplish under that provision many of the installations expressly identified in that subsection. Section 2.55(a) expressly includes "cathodic protection equipment," "electrical and communication equipment," "pig launchers/receivers, and "buildings" as examples of auxiliary installations. Many types of these named installations extend beyond a pipeline's existing right of way and traditionally require additional work space to install.

For example, cathodic protection commonly involves installing conventional ground beds off the original right of way because for these types of installations there physically may not be enough room within the right of way and the ground bed installation may extend in a perpendicular direction from the pipeline. Commission Staff historically has recognized that cathodic protection equipment could extend beyond a pipeline's existing right of way when it provided guidance to a pipeline on certain ground bed installations.[69] As noted, the Director of the Commission's Office of Pipeline Regulation confirmed by letter that no certificate was required to install the ground beds because they were auxiliary installations, reminding the pipeline that "eminent domain may not be invoked to acquire property for Section 2.55(a) facilities."[70] Commission Staff thus acknowledged that the ground beds installed pursuant to Section 2.55(a) could extend beyond the existing right of way. Deep well ground beds for cathodic protection can be installed on the right of way if the physical conditions are suitable, but

[69] *See* Letter from Kevin P. Madden, Director Office of Pipeline Regulation (Apr. 3, 1998), available at eLibrary Accession No. 19980408-0242.

[70] *Id*.

even when cathodic protection can be installed on the right of way, extra work space typically is needed to facilitate equipment access, auger truck operation, turn arounds, and other temporary activities.

Electrical and communication equipment allow for remote monitoring of pipeline facilities and often decrease the need for physical inspection and frequent vehicle access, thus reducing the overall environmental impact around the pipeline. Installing communication towers typically involves erecting a 40-foot-tall, three-leg tower with associated microwave parabolic dish antennas, and may include a self-contained communications building and backup generation. These installations can take up a 40-foot by 60-foot area that typically would not fit within a pipeline's existing right of way. Similarly, pig launchers and receivers often require space beyond existing rights-of-way when placed at the end of a pipeline or outside of existing above-ground facility lots. These types of installations also frequently require tanks for liquids and separation. Buildings, including those used to house communications and control equipment, supplies, and offices, frequently are located many miles from any jurisdictional pipeline facilities.

Reason does not support a conclusion that, in enacting Section 2.55(a), the Commission meant to exclude listed installations by means of an unstated right of way limitation. Rather, consistent with the NGA, Order No. 148 and Section 2.55(a) define and determine the jurisdictional state of auxiliary installations based on their function, not their geographic location.

As with all auxiliary installations on an existing pipeline that is in service, extra work space may be needed to avoid working or driving directly on top of the active pipeline with

heavy equipment, which could lead to damage to the pipeline and safety concerns. Any additional space required currently can be obtained only under Section 2.55(a) through notification and discussion with landowners because eminent domain is not available.

2. The Final Rule Ignores The Burdens It Imposes; There Are No Benefits.

As the Commission previously has held, it has "to balance the burden on pipelines of [a] . . . requirement with the potential benefits of that requirement."[71] The Final Rule attempts to evade this analysis here by claiming that it is making no change to its treatment of auxiliary installations. This Request for Rehearing demonstrates that this claim is erroneous. The Commission is obligated to weigh the burdens and benefits of its actions in the Final Rule. The Final Rule unlawfully fails to perform this obligation.

No benefit outweighs the burden that the Commission's new limitations on Section 2.55(a) would impose. The new right of way and work space requirements shut down numerous types of auxiliary installations under Section 2.55(a), and the difficulties and costs of installing auxiliary installations crucial to pipeline efficiency and safety are increased. The right of way and work space limitations impose on pipelines the burdens of added time and resources by converting the current highly efficient and effective consultation procedures for completing these projects into a process of obtaining some form of formal NGA Section 7 authorization.

The Final Rule ignores the burdens that its Section 2.55(a) limitations would impose on the pipeline industry, and ultimately, on ratepayers. In practice, pipelines typically review and address environmental and cultural landmark concerns connected to auxiliary installation

[71] Order No. 544 at 30,687; *see also*, Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 14, 2011).

projects through streamlined processes and informal consultation with relevant local, state, and federal agencies. This approach enables pipelines to work closely with the pertinent state and federal agencies to accomplish the installations promptly but in an environmentally and culturally sensitive manner. In many cases there are memorandums of understanding and/or blanket clearances in place that permit pipelines to apply informed judgment as to the nature of the consultation with a particular agency. The Final Rule converts all auxiliary installations outside of existing rights of way and historical workspaces into NGA jurisdictional facility construction that would require certificate authorization and formal agency consultation. The Final Rule does not address this significant new burden on pipelines and on the agencies that would be inundated with new formal requests for action.

Pipelines currently have internal processes for scoping auxiliary installations and working with agencies and those directly affected by these projects. In some instances, a pipeline may negotiate with a landowner for additional rights or access to complete an auxiliary installation. Pipelines make internal environmental assessments to determine the potential impact of a project and have longstanding relationships with local, state and federal agencies that protect environmental and historic resources. Often an internal review coupled with an informal consultation with an outside agency is sufficient for a conclusion to be reached that a routine auxiliary installation would not have a significant impact on such resources.

Imposing a right of way and workspace limitation on auxiliary installations would transform an efficient and effective consultation process which has worked well for decades for auxiliary installations to a formal review and approval process that would require significantly more time and resources from pipeline land personnel, environmental, health and safety ("EHS") personnel, regulatory personnel, and legal personnel. EHS personnel would have additional

obligations to scope workspace verification, draft letters, and track work and compliance reporting. Regulatory and legal personnel also would have additional monitoring, tracking, compliance reporting, and documentation obligations. Mapping employees might be required, where their services previously were not necessary. In addition to these associated costs and additional time, automatic authorization under a pipeline's blanket certificate would require a 45-day notice period for some installations.

Moreover, formal environmental review and approval of the process would commence, with internal environmental compliance staff assessing the project for permitting requirements and developing resource agency consultation letters. Although some Fish and Wildlife Service ("FWS") and State Historic Preservation ("SHP") offices issue "blanket clearance" letters that authorize routine and recurring work that is unlikely to result in significant environmental effects, issuance of such letters is becoming increasingly rare in the experience of INGAA member companies. Failing such a streamlined approach to obtaining applicable clearances, pipeline environmental compliance staff would need to develop and submit detailed resource agency consultation letters requesting resource agency concurrence that the proposed auxiliary installation would result in "no adverse effect" on federally listed species and "no effect" on properties listed in or eligible for listing in the National Register of Historic Places. In some instances, completion of field environmental resource surveys may be necessary to support development of such concurrence requests. Contracting and completing such environmental surveys may take 15 to 30 days or more, and subsequent receipt of resource agency responses generally takes 30 to 60 days or more.

In addition to the burden that such additional formal activity would place on pipelines, the local, state and federal agencies responsible for providing "no adverse effect" or "no effect"

determinations currently are not staffed to handle the additional requests and paperwork that the more formal notification requirements will create. As noted, these agencies currently rely on informal communications and monitoring in order to prioritize their valuable resources. Rather than focusing exclusively on projects that might have a significant impact on environmental or cultural resources, under the Final Rule these agencies will be forced to divert precious staff time and attention to review requests involving low impact auxiliary installations and formally responding to such requests. Only following receipt of applicable resource agency concurrences and expiration of the landowner notification period would the auxiliary installation be released to commence construction. The Final Rule does not address this issue and makes no attempt to justify the additional burden on these agencies. Nor does it factor in the additional costs of delay associated with such burden.

In the event that the FWS or SHP offices are unable to issue a timely "no adverse effect" or "no effect" determination for a project due to staff limitations or other priorities, the auxiliary installation would be unable to be authorized pursuant to the blanket certificate regulations. The company would be forced to develop and file a Section 7(c) application for the project, seeking project-specific certificate authorization. This would be a much more expensive and time consuming endeavor for the companies, as would be the associated Commission review and proceedings, without any explained or proven environmental or historic preservation benefit over the current process.

The Final Rule neither addresses nor weighs any of these significant increases in cost and time. These additional burdens on pipelines and agencies will adversely affect pipelines' ability to address quickly, efficiently, and effectively the important policy priorities of safety, security, and gas-electric coordination. Such activities include replacement of ground beds, rectifiers,

communication devices, installation of pig traps needed for in-line inspection or pipeline cleaning, and installation of valves. The right of way and workspace limitations will have an even greater burdensome effect on pipelines' ability to make auxiliary installations promptly and efficiently on older lines. These lines typically have narrower rights of way and historical workspace areas. The limitations in the Final Rule will fall most heavily on these lines, which can be the focus for installations directed specifically at safety and security considerations.

As jurisdictional facilities, auxiliary installations also now will be required to obtain abandonment authorization whenever these installations are removed. The burden of seeking such abandonment authority similarly is not dealt with by the Final Rule.

The Final Rule's response to these serious concerns is unlawfully superficial. It simply states that if installations can be made within existing right of way and workspace, they can be installed under Section 2.55(a). If the installations would require additional work space or right of way, Section 2.55(a) is not available. As previously discussed, the Commission has determined the jurisdictional status of Section 2.55(a) auxiliary installations based on the function they perform -- not based on whether they are inside or outside existing rights-of-way. Rather, under Order Nos. 148 and 603, these installations are determined not to be for the transportation of natural gas, but only auxiliary or appurtenant to jurisdictional facilities that are necessary for the transportation of natural gas in interstate commerce. Auxiliary installations are only for the purpose of obtaining more efficient or more economical operation of authorized transmission facilities. Certain types of installations are expressly set out in the regulation and there is no express right of way limitation language in Section 2.55(a). The Commission's response is not rational rulemaking. It is arbitrary enforcement of a rule that the Commission desires, but has not yet attempted to promulgate in a lawful manner.

F. The Industry And Commission Have Always Viewed Section 2.55(a) As Having No Right Of Way Limitation And Past Actions By Commission Staff Have Supported This View. This Course Of Conduct By All Interested Parties Is Further Evidence That The Commission Is Unlawfully Changing, Not Clarifying, Section 2.55(a).

For over six decades, the interstate pipeline industry has considered auxiliary installations beyond the right of way to be acceptable. Over that same time period, the Commission has never enforced a right of way limitation on the industry or issued any orders or initiated any rulemakings to restrict auxiliary installations to existing rights-of-way. The 1998 delegated letter order from the Director of the Office of Pipeline Regulation recognizing that auxiliary installations do not have a right of way limitation and the 1984 delegated letter order dismissing an application for certificate authorization for installations outside of the existing right of way are consistent with the express language of the regulation and statute. These delegated orders are consistent as well with historical conduct by the industry, the Commission and the Commission Staff, which are all evidence that the Commission never intended Section 2.55(a) to have a right of way or work space limitation.

To now insist that the Commission has always held auxiliary installations to be jurisdictional facilities and Section 2.55(a) to require auxiliary installations to be built within the right of way is arbitrary and capricious and not the product of reasoned decision making. Having never promulgated nor enforced a right of way requirement for auxiliary installations, the Commission cannot do so now without rigorous analysis of each type of auxiliary installation to determine which, if any, now should be found to be jurisdictional facilities and without providing sufficient justification and an explanation as to why it has changed its position, what harm it is intending to prevent, and why such harm outweighs the benefit of the current and long held understanding of the meaning of Section 2.55(a).

IV. CONCLUSION

The Commission should grant the clarifications requested herein or, in the alternative, grant rehearing. The Commission also should correct the cross-references highlighted in Section III.B of this Request.

On rehearing, the Commission should rescind the Final Rule. The Final Rule wrongly determines that auxiliary installations are jurisdictional facilities and wrongly determines that right of way and workspace limitations apply to auxiliary installations. In addition, the Final Rule constitutes unlawful rulemaking that implements a dramatic shift from the Commission's treatment of auxiliary installations for over sixty years. The Commission should hold that auxiliary installations are exempt from NGA jurisdiction and that no right of way or work space limitations apply to auxiliary installations under Section 2.55(a).

For the foregoing reasons, INGAA respectfully requests that the Commission grant clarification and rehearing of the Final Rule.

Respectfully submitted,

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