

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-1108

September Term, 2018

FILED ON: DECEMBER 27, 2018

DELAWARE RIVERKEEPER NETWORK AND MAYA VAN ROSSUM, THE DELAWARE RIVERKEEPER,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

TENNESSEE GAS PIPELINE COMPANY, LLC,
INTERVENOR

On Petition for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, KATSAS, *Circuit Judge*, and WILLIAMS, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the Federal Energy Regulatory Commission (FERC), and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petition for review be denied.

Tennessee Gas Pipeline Company, L.L.C. (“Tennessee”) applied to FERC for a certificate of public convenience and necessity under section 7(c) of the Natural Gas Act authorizing construction of 12.9 miles of pipeline looping parallel to an existing pipeline system (“the project”). After publishing an Environmental Assessment (EA) containing a finding of no significant impact, FERC issued the certificate in February 2017. Delaware Riverkeeper Network timely requested rehearing, but its request did not address FERC’s decision to omit discussion of an alternative dismissed in Tennessee’s certificate application that would boost Tennessee’s capacity by adding compressor stations to the existing system. While the rehearing request was pending, Delaware Riverkeeper

obtained an internal draft of the EA, which discussed the compression alternative. Delaware Riverkeeper thereafter submitted a Supplement to Rehearing Request, which, for the first time, objected to FERC's omission of the compression alternative. FERC ultimately denied rehearing in February 2018.

This court does not have jurisdiction to review FERC's decision to omit discussion of the compression alternative from the EA because Delaware Riverkeeper did not raise that objection in a petition for rehearing to FERC. 15 U.S.C. § 717r(b). We do have jurisdiction to review Delaware Riverkeeper's objection to FERC's failure to explain why the compression alternative was included in the internal draft but not the final EA because "there is reasonable ground" for Delaware Riverkeeper's delay in making that objection, *id.* § 717r(b), and Delaware Riverkeeper did submit a Supplement to Rehearing Request raising that issue. However, because FERC was required neither to publish its internal draft nor to explain differences between that unpublished draft and the final EA, *see Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 519 (D.C. Cir. 2010), its failure to do so was not arbitrary or capricious, *see Dist. Hosp. Partners, L.P. v. Howell*, 786 F.3d 46, 58 (D.C. Cir. 2015).

Delaware Riverkeeper's argument that FERC improperly segmented its review lacks merit because FERC appropriately regarded Tennessee's application for the project as functionally independent from other projects. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1326-27 (D.C. Cir. 2015). FERC also accounted for cumulative impacts, explaining in an extensive analysis how it determined the project's zone of influence and why it concluded that the impact of previous projects on wetlands and waterbodies, among other ecosystems, was temporary. *See* EA 72-86.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk