UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Interstate Natural Gas Association of America) Docket No. RM12-____-000

PETITION REQUESTING THE COMMISSION ADHERE TO ITS EXISTING RULES, REGULATIONS AND PROCEDURES

I. PRELIMINARY STATEMENT

The Staff of the Federal Energy Regulatory Commission ("FERC" or "Commission") has taken the position in informal conferences with pipelines and in industry meetings that Section 2.55(a) of the Commission's regulations[1] only applies to auxiliary installations in existing rights-of-way and where the original work space is used. Commission Staff's position is that the same right-of-way and work space requirements made expressly applicable to the replacement of facilities under Section 2.55(b) of the Commission's regulations[2] are implied requirements of Section 2.55(a). Through this informal process and the weight of its authority, the Commission Staff is attempting to substantively change the meaning of Section 2.55(a).

Commission Staff's position on the meaning of Section 2.55(a) is substantively wrong, reaching an unreasonable and illogical result in application that undermines historical practices and safety and integrity management; and the method that Commission Staff is using to impose its changed position is procedurally unlawful. The Interstate Natural Gas Association of America ("INGAA") requests that the Commission promptly find that Staff's interpretation is erroneous. Once the Commission acts to correct Staff's recently changed position regarding Section 2.55(a) installations, should the Commission then elect to consider modifications to its

[1] 18 C.F.R. § 2.55(a) (2011).

[2] 18 C.F.R. § 2.55(b) (2011).

regulations, the Commission should do so in accordance with the requirements of notice and comment rulemaking. If any such lawful rulemaking process is initiated, the Commission must affirmatively prohibit Commission Staff from enforcing any new position on Section 2.55(a) until such notice and comment rulemaking is complete and a final rule is lawfully promulgated.

Staff's substantive position is erroneous and its approach to informal rulemaking is unlawful for the following reasons. First, unlike Section 2.55(b) there is no express language in Section 2.55(a) limiting auxiliary installations to existing rights-of-way or work spaces. In support of the Section 2.55(b) limitations, the Commission's regulations also include an appendix, Appendix A,[3] explaining the meaning of the right-of-way and work space limitations contained in Section 2.55(b). By its express terms, Appendix A applies only to Section 2.55(b) replacements. Appendix A does not apply to Section 2.55(a) installations. The express language of Section 2.55(a) lists examples of the auxiliary installations to be completed under that section. The error of Commission Staff's newly adopted position on Section 2.55(a) is demonstrated dramatically by the fact that certain auxiliary installations, such as cathodic protection anode ground beds historically placed perpendicular to the pipeline right-of-way, as well as communication towers and related equipment, could not be accomplished under the very regulation that now expressly lists these activities as permissible auxiliary installations.

Second, an historical study of Section 2.55 and related regulations demonstrates that auxiliary "installations" and replacement "facilities" always have been treated differently by the Commission when it has promulgated its rules and regulations. As discussed below more fully, Staff also consistently has recognized this fundamental distinction.

Third, under the Administrative Procedure Act ("APA"), all new substantive rules must

[3] 18 C.F.R. pt. 2, app. A (2011).

be implemented through notice and comment rulemaking procedures, and under both the APA and the currently effective Executive Orders dealing with the promulgation of agency regulations, a new regulatory approach that will impose more time, more expense and more administrative burdens on industry activities designed to enhance efficiency and economy, as auxiliary installations by definition are designed to do, require public participation:

> Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).[4]

On behalf of its membership, INGAA disagrees with the Staff's new position. Moreover, Commission Staff's approach to promulgating its new position leaves the industry lacking effective recourse and apprehensive of the substantial and diverse costs associated with defending against enforcement actions based on the Staff's current position.

This resulting situation is capricious and arbitrary under the Commission's traditional standards of fair and firm regulation, echoed by the President in his Executive Orders describing good government practice, and reinforced by the Courts in their review of Commission rulemaking:

> We agree that "the Commission's broad responsibilities . . . demand a generous construction of its statutory authority," but we do not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations. 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."[5]

---

[4] Exec. Order No. 13,579, 76 Fed. Reg. 41,587, § 1(a) (July 11, 2011).

[5] *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (1979) (quoting *FPC v. Louisiana Power & Light Co.*, 204 U.S. 621, 642 (1972) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)) (citations omitted).

INGAA asks the Commission to rectify this situation. Pursuant to Section 385.207(a)(4) of the Commission's Rules of Practice and Procedure,[6] INGAA respectfully requests that the Commission repudiate informal amendments of its regulations and definitively reaffirm that under the plain reading of Section 2.55(a) no right-of-way or work space limitations apply to auxiliary installations.

If the Commission wishes to consider whether Section 2.55(a) should be limited in the way Commission Staff is now attempting unlawfully to require, the Commission may only add these limitations through notice and comment rulemaking in compliance with the letter and the spirit of the President's Executive Orders, and the specific requirements of the APA.

Without delay, the Commission should act to correct the unsettled situation that currently impedes the efficient and effective completion of auxiliary installations. As it has done in other rulemaking contexts, the Commission should state that it will not seek to enforce any change to Section 2.55(a) until it has completed any rulemaking process it might initiate.

II. IDENTITY AND INTEREST OF INGAA

INGAA is a trade organization representing the majority of U.S. interstate natural gas pipeline companies. INGAA's members operate approximately 200,000 miles of interstate natural gas pipelines. Since 1949, these interstate pipelines have relied on Section 2.55(a) of the Commission's regulations for auxiliary installations. INGAA has an interest in ensuring that its members may continue to employ the beneficial application of Section 2.55(a) when making auxiliary installations. INGAA also has an interest in ensuring that the Commission adhere to notice and comment rulemaking requirements before seeking changes to or imposing new interpretations to existing regulations that are at direct odds with decades-long historical

[6] 18 C.F.R. § 385.207(a)(4) (2011).

practices by the agency. If the Commission desires to consider changes to Section 2.55(a), INGAA has an interest in ensuring that the process used by the Commission lawfully ensures that INGAA and its members will have the opportunity to provide comments in aid of the Commission reaching a decision that is rationally based and is neither arbitrary nor capricious.

III. COMMUNICATIONS

All communications regarding this matter should be addressed to:

Joan Dreskin
General Counsel
Interstate Natural Gas
Association of America
20 F Street, N.W.
Suite 450
Washington, D.C. 20001
jdreskin@ingaa.org
(202) 216-5928

IV. THE COMMISSION SHOULD REJECT STAFF'S NEWLY ADOPTED POSITION THAT SECTION 2.55(a) IMPLICITLY INCLUDES RIGHT-OF-WAY AND WORK SPACE LIMITATIONS ON AUXILIARY INSTALLATIONS

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

Section 2.55 provides that the Commission will interpret the word "facilities" under section 7(c) of the Natural Gas Act ("NGA") to exclude "auxiliary installations" and certain "replacement[s] of facilities." Section 2.55(b) of the Commission's regulations defines the meaning of "replacement of facilities," and states that such replacements "will be located in the same right-of-way or on the same site as the facilities being replaced, and will be constructed using the temporary work space used to construct the original facility."[7] In contrast, Section

[7] 18 C.F.R. § 2.55(b)(1)(ii).

2.55(a) does not limit auxiliary installations to the existing right-of-way or the same work space used to construct the facilities to which the installations relate.[8] 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. While the Commission added a right-of-way limitation to Section 2.55(b)—first through adjudicatory proceedings and then by formal rulemaking with notice and comment—the Commission has never so limited auxiliary installations constructed pursuant to Section 2.55(a).

The distinction between auxiliary installations under Section 2.55(a) and the replacement of facilities under Section 2.55(b)—a distinction that the Commission consistently has identified and applied over more than twenty years of considering this question—is that auxiliary installations by their nature are smaller projects with limited environmental or other effects, whereas replacement projects have the potential to be very large with significant impacts. Balancing benefits and burdens, the Commission consistently has found that it is reasonable to free auxiliary installations from the limitations the Commission has chosen to apply to replacement activities.

In 1990, for example, the Commission issued a notice of proposed rulemaking stating that it wanted to ensure appropriate environmental review of construction. One of the regulatory changes it proposed was the elimination of the exemption for replacement facilities in Section 2.55(b).[9] No change was proposed for Section 2.55(a). Explaining this disparate treatment, the Commission stated:

While §2.55 auxiliary installations and taps typically involve minor facilities,

[8] 18 C.F.R. § 2.55(a).

[9] *Revisions to Regulations Governing Certificates for Construction*, FERC Stats. & Regs. ¶ 32,477 (1990) ("Order No. 555 NOPR").

> replacement facilities may be on a large scale. For instance, a pipeline replacement project can involve removal and replacement of hundreds of miles of large diameter pipeline at a cost of tens of millions of dollars.[10]

At the same time that the Commission issued this notice of proposed rulemaking, it promulgated an interim rule, Order No. 525, requiring advance notification for construction under section 311 of the NGPA and for replacements under Section 2.55(b).[11] No such notification was required for installations under Section 2.55(a) because auxiliary installations "generally involve minor facilities; however, replacement of facilities may involve the removal and replacement of extensive mainline facilities."[12]

Ultimately, the Commission determined not to eliminate replacements from Section 2.55(b) in favor of a notification requirement. But the Commission continued the "minor facility" theme in Order No. 544.[13] There, the Commission eliminated the prior notification requirements established in Order No. 525 as they related to "non-extensive" Section 311 pipeline construction and the replacement of facilities under Section 2.55(b) for projects meeting the blanket certificate automatic authorization cost threshold.[14] The Commission's reasons were twofold. First, the Commission found that "the construction or replacement of minor facilities did not present the same potential for serious environmental harm as more extensive projects due, simply, to their

---

[10] Order No. 555 NOPR at 32,463.

[11] *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 (1990), *reh'g denied and clarification*, Order No. 525-A, 53 FERC ¶ 61,140 (1990).

[12] Order No. 525 at 31,812. It is worth noting that the Commission introduced this additional notice requirement to Section 2.55(b) by promulgating a formal interim rule, not through informal declarations by Commission Staff.

[13] *Revisions to Regulations Governing NGPA Section 311 Construction and Replacement of Facilities*, Order No. 544, FERC Stats. & Regs. ¶ 30,951 (1992), *reh'g*, Order No. 544-A, FERC Stats. & Regs. ¶ 30,983 (1993).

[14] Order No. 544 at 30,687.

smaller scale."[15] Second, while the Commission acknowledged that the potential for environmental harm would not be eliminated in smaller section 311 construction and Section 2.55(b) replacement projects, it intended to "balance the burden on pipelines of an advance notification requirement with the potential benefits of that requirement."[16] Consistent with its determination to balance burdens and benefits, at that time the Commission did not require any prior notification for any Section 2.55(a) installations, and Section 2.55(a) was not a part of the rulemaking in Order No. 544.

A case in 1994, *NorAm Gas Transmission*, demonstrated the prescience of the Commission's earlier rulemaking observations concerning the potential size of replacement projects. In that case, the pipeline replaced a 91-mile portion of mainline facilities outside of the existing right-of-way at a time when Section 2.55(b) had no such express right-of-way limitation.[17] The Commission determined that Section 2.55(b) means that replacement facilities must be constructed within the existing right-of-way, finding that such facilities were limited by the terms and locations delineated in the original construction certificate. Following *NorAm*, Commission Staff considered a project to install three ground beds to provide cathodic protection for a pipeline. Initially, Commission Staff relied on *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.[18] 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

---

[15] *Id*.

[16] *Id*.

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

[18] December 16, 1997 Letter from Kevin P. Madden, Director of Pipeline Regulation ("December 16, 1997 Letter"), included as Attachment A to this Petition, and also available at Accession No. 19971223-0120.

precedent contain any such limitation on Section 2.55(a) activities. 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 not require Commission authorization[.]"[19]

Against this background, the Commission in 1999 added the express right-of-way and work space requirement to Section 2.55(b).[20] It is telling that the Commission amended the express language of Section 2.55(b) and even though it was already making other changes to Section 2.55(a) in the same proceeding, it nevertheless chose not to add an express right-of-way or work space limitation to Section 2.55(a). The Commission also added an entire new Appendix A to provide guidance on "what area may be used to construct the *replacement facilit[ies]*" beyond the existing right-of-way.[21] Again, Appendix A makes no mention of auxiliary installations. This silence is not because the Commission simply was not focusing on such installations—the Commission made other modifications to Section 2.55(a) auxiliary installations in the same order and in the section that immediately preceded the section that amended Section 2.55(b).[22]

Significantly, when the Commission added the right-of-way and work space limitation 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

---

[19] *See* April 3, 1998 Letter from Kevin P. Madden, Director Office of Pipeline Regulation, included as Attachment B to this Petition, and also available at Accession No. 19980408-0242.

[20] *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).

[21] 18 C.F.R. pt. 2, app. A (emphasis added).

[22] Order No. 603 at 30,781-82 (adding a notice requirement for auxiliary facilities on newly authorized facilities not yet in service).

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: "[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)."[23]

In Order No. 603, the Commission did not add a section defining auxiliary installations outside the existing right-of-way as eligible facilities and the blanket certificate regulations continue to be devoid of any express provision for "auxiliary installations" to be eligible facilities where such installations are beyond the right-of-way. In a proposed rule addressing landowner notification and categorical exclusions, the Commission initially proposed to allow pipelines to drill observation wells under their blanket certificate authorization.[24] In response to comments, the Commission recalled that it had previously found that observation wells were not facilities within NGA Section 7(c) and could be constructed under Section 2.55(a). Consequently, the Commission withdrew its proposal to include such wells within the ambit of the blanket certificate program.[25]

Thus, the rational basis of Commission Staff's current position is further undermined by considering that under that position comparatively minor auxiliary installations requiring room beyond the existing right-of-way or work space would have to initiate a full blown Section 7(c) application while significantly larger and more impactful replacements would be eligible

---

[23] 18 C.F.R. § 157.202(b)(2)(i), *as amended by* Order No. 603.

[24] *Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements*, Notice of Proposed Rulemaking, FERC Stats. & Regs. ¶ 32,540 at 33,662 (1999).

[25] *Landowner Notification, Expanded Categorical Exclusions, and Other Environmental Filing Requirements*, Order No. 609, FERC Stats. & Regs. ¶ 31,082 at 30,959 (1999), *on reh'g*, Order No. 609-A, FERC Stats. & Regs. ¶ 31,095 (2000), *reh'g rejected*, 91 FERC ¶ 61,278 (2000).

facilities and could proceed under blanket certificate authority. To avoid this unreasonable result, the Staff would have to hypothesize that Section 2.55(a) has an implied right-of-way and work space limitation that is not found in that section's express language and that the Commission's blanket certificate regulations include an implied additional set of eligible facilities that is not found in the express language of those regulations. The reality is that there are no such implied limitations in Section 2.55(a) and that the Commission did not provide for auxiliary installations outside the right-of-way in its blanket certificate definition of eligible facilities because it did not need to do so.[26] As shown by the Commission's treatment of observation wells, auxiliary installations outside the right-of-way may be completed under Section 2.55(a).

This point is underscored in Order No. 603-A where the Commission addresses Sections 2.55(a) and 2.55(b) side-by-side. The Commission justifies limiting replacement facilities under Section 2.55(b) to an existing right-of-way, explaining that pipelines "may use their blanket certificate authority to perform projects involving more extensive work that would need additional work space, including the use of other unrelated rights-of-way."[27] In discussing Section 2.55(a), however, the Commission neither limits auxiliary installations to an existing right-of-way or work space, nor discusses blanket certificate authorization for auxiliary installations that require space outside of the existing right-of-way.[28] Similarly, in Appendix A to Part 2 of the Commission's regulations where the Commission provides guidance for

[26] To illustrate, a pipeline in 2005 was not able to negotiate with landowners for the additional easement it needed to install two pig launchers outside of the existing right-of-way. *Northern Natural Gas Company*, 112 FERC ¶ 61,042 (2005). The pipeline could only obtain the land through eminent domain. Because eminent domain was not available under Section 2.55(a), the pipeline was unable to use that section to make the installations. The pipeline did not proceed under blanket certificate authority, but instead filed an application pursuant to Section 7(c) of the NGA for a certificate of public convenience and necessity authorizing it to construct and operate the pig launchers.

[27] Order No. 603-A at 30,922.

[28] Order No. 603-A at 30,920-921.

determining the acceptable construction area for replacements,[29] there is no equivalent discussion of work space for auxiliary installations.[30]

The Commission consistently has treated auxiliary installations and replacement facilities differently because they *are* different, both quantitatively and qualitatively. There is no reasoned basis why a participant in the relevant rulemaking proceedings described above would have understood that the express changes being made to the Commission's regulations regarding Section 2.55(b) were to apply by implication to Section 2.55(a).

B. Rules Of Construction and Plain Meaning Support A Determination That No Right-of-way Or Work Space Limitations Apply To Auxiliary Installations Under Section 2.55(a).

The starting point for analyzing the meaning of any regulation is the language of the regulation itself,[31] and both Staff and the Commission must apply regulations in accordance with their plain meaning.[32] "[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 superfluous are to be avoided."[33]

---

[29] 18 C.F.R. pt. 2, app. A.

[30] *See also, Guidance on Repairs to Interstate Natural Gas Pipelines Pursuant to FERC Regulations* at 2-3 (July 2005) ("Guidance on Repairs"), http://www.ferc.gov/industries/gas/gen-info/guidance.pdf. In Guidance on Repairs, Commission Staff recognizes that Section 2.55(a) auxiliary installations and 2.55(b) replacements both are exempt from NGA regulations and states that there are no requirements to comply with standard environmental conditions. Staff then notes that "all replacement facilities must be constructed within the same right-of-way, compressor station, or other aboveground facility site as the facility being replaced," but does not similarly limit auxiliary installations to their existing right-of-way.

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

[32] *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).

[33] *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).

Commission Staff's interpretation does not rely on the plain meaning of Section 2.55(a); none of the words in that subsection plainly mean "limited to the existing right-of-way or work space."[34] Moreover, to interpret such a right-of-way and work space requirement in Section 2.55(a) makes the explicit limitation in Section 2.55(b) superfluous. Phrased differently, Staff's interpretation ignores that 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), the Commission intended a difference between the related subsections.[35] In *PSC New Mexico*, the Commission considered Section 2.16 of a previous version of its regulations.[36] The regulation provided for CWIP expenses to be included in rate base for construction of fuel conversion facilities, but was silent on whether such expenses would be included in rate base for other types of construction.[37] The Commission held that, based on the presence of the regulatory language allowing CWIP for conversion facilities and the absence of similar language providing CWIP for other types of facilities construction, "[t]he Commission clearly made a deliberate decision not to allow CWIP in rate base for construction of new coal generation facilities."[38]

---

[34] As discussed in greater detail below, Staff's interpretation 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.

[35] See, *e.g.*, *Public Service Company of New Mexico*, 17 FERC ¶ 61,123, at 61,244 (1981) ("*PSC New Mexico*"), *affirmed*, 21 FERC ¶ 61,215 (1982), *reh'g denied*, 18 FERC ¶ 61,036 (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).

[36] *See* 18 C.F.R. § 2.16 (1981).

[37] *Id*.

[38] *PSC New Mexico* at 61,244. It is worth noting that the Commission recognized in *PSC New Mexico* that it was in the process of "undertaking a review of the policy enunciated" in the order that promulgated Section 2.16, the regulations at issue in the order. *Id*. at 61,253 n.8. Rather than substitute its judgment for the rule as it then existed in the Commission's regulations, the Commission held that a "[c]hange in the existing policy, if any, will not

The Commission's intent to modify only Section 2.55(b) with the right-of-way and work space limitation is even more pronounced. The Subsections (a) and (b) in 2.55 are literally side-by-side in the Federal Code of Regulations—2.55(b) expressly has the limitation and 2.55(a) plainly does not. The very rulemaking that added the right-of-way and work space requirement to Section 2.55(b) also amended the regulatory text of Section 2.55(a) and *did not* add a right-of-way or work space limitation to that provision.[39] Indeed, the amendments to both Subsections (a) and (b) were addressed consecutively in the preamble that promulgated the regulation.[40] Moreover, with regard to work space limitations, the Commission established in this same rulemaking an Appendix A to guide pipelines in determining the acceptable construction area for replacements.[41] Appendix A states that "[p]ipeline replacements must be within the existing right-of-way as specified by Section 2.55(b)(1)(ii)."[42] Consistent with the aforementioned differences in the regulatory subsections, Appendix A does not include any reference to Section 2.55(a) auxiliary installations. Commission Staff cannot simply interpret away these textual and contextual differences between "installations" and "replacement of facilities" without lapsing into unlawful arbitrariness.

(continued…)

be appropriate until completion of that review." *Id*. In other words, the Commission was abiding by the very principle advocated for in this pleading that, prior to amending a regulation, the Commission provide notice and a period for comment.

[39] *See* Order No. 603.

[40] *Id*. at 30,781-84.

[41] Order No. 603 at 30,783-784.

[42] 18 C.F.R. pt. 2, app. A.

C. Implying A Right-Of-Way Limitation In Section 2.55(a) Reaches An Unreasonable And Illogical Result With The Effect Of Eliminating The Ability To Accomplish Many Of The Installations Expressly Identified In That Provision And Is Therefore Arbitrary And Capricious.

Implying a right-of-way limitation in Section 2.55(a) would have the effect of eliminating the ability of gas pipelines to accomplish 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. These installations typically 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.[43] 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, and reminded the pipeline that "eminent domain may not be invoked to acquire property for Section 2.55(a) facilities."[44] Commission Staff thus acknowledged that the ground beds installed pursuant to Section 2.55(a) could extend beyond the existing right-of-way since there would have been no reason for Commission Staff to mention eminent domain for the purpose of acquiring new

[43] *See* April 3, 1998 Letter from Kevin P. Madden, Director Office of Pipeline Regulation, included as Attachment B to this Petition, and also available at Accession No. 19980408-0242.

[44] *Id*.; *see also*, Order No. 609 at 30,959 (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).

property interests. Deep well ground beds for cathodic protection can be installed on the right-of-way if the physical conditions are suitable, but even then, 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 from its certification process only those buildings located on an existing pipeline right-of-way.

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 can be obtained only under Section 2.55(a) through notification and discussion with landowners because eminent domain is not available. But a new right-of-way

requirement would shut down these activities under Section 2.55(a), and the difficulties and costs of installing auxiliary devices crucial to pipeline efficiency and safety would dramatically increase.

D. A "Common Sense" Interpretation Of Section 2.55(a) Would Not Convert The Current Highly Efficient And Effective Process For Completing These Installations Into Section 7 Applications.

When the Commission imposed a right-of-way limitation on Section 2.55(b) replacements in *NorAm,* the Commission asserted that it was applying a "common sense" reading of the regulation. Imposing a right-of-way limitation to Section 2.55(a) at this time cannot be defended as a common sense reading of that provision. Whatever may have been the common sense approach when neither section included such an express requirement, now the Commission has expressly inserted such a requirement in Section 2.55(b) while at the same time *not* inserting the same language in Section 2.55(a). In addition, the Commission has issued Appendix A which addresses the acceptable construction area only for replacements and not for auxiliary installations.[45] The common sense reading of the Commission's actions must be that the added limitations in Section 2.55(b) apply to the potentially extensive facilities being replaced pursuant to that subsection, and does not apply to the minor auxiliary installations under Section 2.55(a). This has been and continues to be the common sense understanding of the industry and until recently also has been the common sense understanding of Commission Staff.

The Commission's consistent treatment of auxiliary installations as minor projects continues to be the reasonable interpretation of Section 2.55(a). Auxiliary installations are accomplished for efficiency, for economy, and for safety. Indeed, safety concerns have become more of a driver in recent years as pipelines work to meet Pipeline and Hazardous Materials

[45] 18 C.F.R. pt. 2, app. A.

Safety Administration requirements. Auxiliary installations, such as additional valves to reduce the length of pipeline segments, additional in-line inspection capability, sufficient cathodic protection and communication equipment, all support pipeline safety efforts. A right-of-way or work space limitation would impose on pipelines a substantial burden of added time and resources by converting the current highly efficient and effective process for completing these projects into NGA Section 7 authorizations. The benefits of implying such a requirement in Section 2.55(a) are difficult to discern given the small amount of space outside an existing right-of-way or work space that typically is associated with auxiliary installations. Moreover, any additional space required can only be obtained under Section 2.55(a) through notification and discussion with landowners because eminent domain is not available. As the Commission has held, it has "to balance the burden on pipelines of [a] requirement with the potential benefits of that requirement."[46] No benefit outweighs the burden that Commission Staff's new interpretation of Section 2.55(a) would impose.[47]

E. "Installations" Under Section 2.55(a) And Replacement Of "Facilities" Under Section 2.55(b) Are Intrinsically Different Concepts.

Section 2.55(b) addresses replacement facilities. The "facilities" in question, both those being replaced and those doing the replacing, are jurisdictional under NGA Section 7. Conceptually, the new replacement facilities 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, reliable facilities instead of old, worn out, potentially

[46] Order No. 544 at 30,687; *see also*, Exec. Order No. 13,579.

[47] Staff's new interpretation of Section 2.55(a) also would pose a significant burden on the Commission because pipelines would have to start to file NGA Section 7 applications for all auxiliary installations that extended beyond their existing right-of-way.

dangerous facilities."[48] The new facilities, 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.

In contrast, Section 2.55(a) addresses "installations," that are not "facilities" within Section 7(c) of the NGA, and therefore do not require a certificate.[49] Rather, the installations are only auxiliary or appurtenant to "facilities" and only for the purposes of efficiency and economy—they are "strictly incidental in nature."[50] Jurisdictional services can be provided without auxiliary installations, and unlike facilities and their replacements, installations are not certificated.[51] Furthermore, as noted above, many auxiliary installations are not, and never have been, located on a pipeline right-of-way. Accordingly, whatever may be the merits of the argument that the replacement of facilities should be governed by the certificate issued for the facilities being replaced, that argument does not automatically apply to installations. Applying the right-of-way and work space limitations to Section 2.55(a) does not flow automatically or reasonably from what the Commission has done with respect to Section 2.55(b), and any attempt by Commission Staff to impose such limitations should be rejected by the Commission.

---

[48] Order No. 555 NOPR at 32,463.

[49] *See* Order No. 609 at 30,959 (citing *Natural Gas Pipeline Co. of America*, 32 FERC ¶ 61,287 (1985)); s*ee also*, Order No. 603 at 30,781-82 (recognizing nonjurisdictional status of Section 2.55(a) auxiliary installations).

[50] Order No. 555 NOPR at 32,463.

[51] Order No. 609 at 30,959.; *see also*, *Natural Gas Pipeline Co. of America*, 32 FERC ¶ 61,287, at 61,663 n.1 ("[o]bservation wells are not facilities within section 7(c) of the Natural Gas Act and therefore do not require [a] certificate").

V. IMPOSITION OF A NEW REGULATORY REQUIREMENT WITHOUT NOTICE AND COMMENT IS PROCEDURALLY UNLAWFUL; IF THE COMMISSION DECIDES TO CONSIDER CHANGES TO SECTION 2.55(a), IT SHOULD FOLLOW THE LAWFUL PROCEDURES REQUIRED BY THE ADMINISTRATIVE PROCEDURE ACT AND THE PRESIDENT'S EXECUTIVE ORDERS

Before an agency adopts a substantive regulation, it must publish a notice of the proposed regulation and provide interested persons an opportunity to comment.[52] New rules that work substantive changes or major legal additions to existing rules or regulations are subject to the APA's notice and comment procedures as legislative rules.[53] Once adopted, an agency is bound by its own regulations.[54] The Commission cannot substantively change such regulations or ignore them simply because the agency later finds the regulations to be inappropriate or inconvenient.[55] Accordingly, any attempt by the Commission or Commission Staff now to impose without notice or comment a right-of-way or work space limitation for Section 2.55(a) activities, especially considering the six decades of reliance by pipelines and practice by the Commission to the contrary, would be arbitrary, capricious, unjust and unreasonable.[56]

By way of example, the U.S. Environmental Protection Agency ("EPA") posted without notice or opportunity for comments a policy statement on its website that injection wells that use diesel fuel as a hydraulic fracturing additive "will be considered Class II wells" by the agency's Underground Injection Control Program. Pursuant to this policy statement, EPA required a permit under the Safe Drinking Water Act. Thus, like the Commission Staff's interpretation of a

[52] 5 U.S.C. § 553 (2006).

[53] *See U.S. Telecom. Ass'n v. FCC*, 400 F.3d 29, 34-35 (D.C. Cir. 2005).

[54] *Panhandle Eastern Pipe Line Company v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) ("It has become axiomatic that an agency is bound by its own regulations").

[55] *Id*.

[56] *See, e.g., Cross-Sound Ferry Services, Inc. v. ICC*, 873 F.2d 395, 398-99 (D.C. Cir. 1989).

right-of-way and work space limitation, the EPA's policy statement effectively established a new legal condition on producers. The Independent Petroleum Association of America and the U.S. Oil and Gas Association filed a lawsuit contending that the language on EPA's website constituted a rulemaking without notice and comment.[57] As a consequence of the suit, the EPA now has agreed that it will use the notice and comment process to issue guidance addressing how its regulations apply to hydraulic fracturing wells that use diesel fuels.[58]

INGAA recognizes that in certain instances, the Commission may issue interpretive rules that are not subject to notice and comment requirements. But the Commission cannot use such interpretive powers to amend a substantive rule.[59] "Interpretive rules" are those which merely clarify or explain existing laws or regulations, while rules that work a change in existing law or policy and are applicable generally rather than to a particular entity in a particular situation are deemed to be "substantive rules," requiring notice and comment.[60] As explained below, Section 2.55(a) is a substantive rule and a right-of-way limitation would be a substantive amendment that would change the general application of the rule.

NGA Section 16 provides that, "[f]or purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters."[61] The Commission issued Section 2.55(a) to exclude auxiliary installations from the meaning of jurisdictional facilities, thereby

---

[57] *See Independent Petroleum Ass'n of America v. EPA*, No. 10-1233 (D.C. Cir. filed Aug. 12, 2010).

[58] Notice of Settlement Agreement, *Independent Petroleum Ass'n of America v. EPA*, No. 10-1233 (D.C. Cir. Feb. 23, 2012).

[59] *Pacific Gas & Elec. V. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).

[60] *See La Casa Del Convaleciente v. Sullivan*, 965 F.2d 1175, 1178 (1st Cir. 1992); *Flaggstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879 (9th Cir. 1992).

[61] 15 U.S.C. § 717o (2006).

creating for pipelines a right to install appurtenant structures such as yard and station piping, cathodic protection equipment, electrical and communication equipment, and buildings without making an NGA Section 7 filing.[62] The regulation was promulgated only after notice and comment with the express intention to "obtain greater uniformity" on matters arising under NGA Section 7(c) and to "avoid the filing and consideration of unnecessary applications" for certificates.[63] Over the course of the subsequent six decades, pipelines have relied on Section 2.55(a) to install auxiliary installations without requesting Commission NGA Section 7(c) authorization and without restricting themselves to existing rights-of-way or work space.

When an agency promulgates a substantive regulation by notice and comment that directly affects the conduct of both the agency personnel and those subject to the regulation, "it may not subsequently repudiate that announced meaning and substitute for it a totally different meaning without proceeding through the notice and comment rulemaking normally required for amendments of a rule."[64] Over the course of six decades, the Commission has not imposed right-of-way or work space limitations on auxiliary installations through a rulemaking, adjudicative proceeding, or otherwise.[65] Adding such limitation now is not a mere interpretation of Section 2.55(a). It is a repudiation of the right that pipelines have enjoyed since 1949 to

---

[62] *See Filing of Applications for Certificates of Public Convenience and Necessity*, Order No. 148, 14 Fed. Reg. 681 (Feb. 16, 1949).

[63] *Filing of Applications for Certificates of Public Convenience and Necessity*, Notice of Proposed Rulemaking, 13 Fed Reg. 6253, 6254 (Oct. 23, 1948).

[64] *National Family Planning and Reproductive Health Association, Inc. v. Sullivan*, 979 F.2d 227, 231 (D.C. Cir. 1992).

[65] *See Natural Gas Companies; Exempt Facilities and Temporary Authorizations*, Order No. 220, 25 Fed. Reg. 2363 (Mar. 19, 1960); *Natural Gas Companies; Exempt Facilities*, Order No. 241, 27 Fed. Reg. 510 (Jan. 18, 1962); Order No. 148; Order No. 525; Order No. 544; Order No. 544-A; Order No. 603; Order No. 603-A; Order No. 609; Order No. 555 NOPR; and *Rights-of-Way Routes and Aboveground Facilities of Natural Gas Companies*, Policy Statement, 34 Fed. Reg. 9348 (June 6, 1969); *see also*, April 3, 1998 Letter from Kevin P. Madden, Director Office of Pipeline Regulation, included as Attachment B to this Petition, and also available at Accession No. 19980408-0242.

construct auxiliary installations that improve efficiency, reliability, and safety without having to file for authorization from the Commission if such installation extends beyond the existing right-of-way or additional work space is required. Such limitations would effectively amend the rights established by Section 2.55(a), adding substantive limitations. This cannot be accomplished through an interpretive rule, much less a Commission Staff pronouncement.[66]

If the Commission decides to consider whether Section 2.55(a) should include a right-of-way or work space limitation, it may do so lawfully only through a formal rulemaking proceeding that would give all interested parties an opportunity to comment. Such a formal rulemaking also would give the Commission an opportunity to test the need for this new regulation against the President's desire for avoiding burdensome regulations that provide only modest benefits.[67]

VI. IF THE COMMISSION DETERMINES TO INVESTIGATE THE NEED FOR LIMITATIONS ON SECTION 2.55(a) ACTIVITIES THROUGH A RULEMAKING, THE COMMISSION SHOULD NOT IMPOSE OR ENFORCE ANY RIGHT-OF-WAY OR WORK SPACE LIMITATION WITH RESPECT TO SECTION 2.55(a) INSTALLATIONS WHILE IT IS CONSIDERING A FINAL RULE

If the Commission decides to institute a rulemaking on this matter, the Commission should not impose or enforce, and should affirmatively state that it will not impose or enforce,

---

[66] *See State of Alaska v. U.S. Dept. of Transportation*, 868 F.2d 441, 445-47 (D.C. Cir. 1989). In addition to rulemaking proceedings the Commission also may establish binding new policy on a case-by-case basis through adjudication, *see e.g.*, *Blue Lake Gas Storage Co.*, 61 FERC ¶ 61,284 (1992), *reh'g denied*, 62 FERC ¶ 61,179 (1993), but there may be situations where its reliance on adjudication would amount to an abuse of discretion or a violation of the APA. *National Labor Relations Board v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267, 294 (1974). This is just such a situation. The Commission should not rely on adjudication to establish a new, broadly applicable and substantive limitation to regulations that long have been published in the Code of Federal Regulations without such limitation. Having added the right-of-way limitation to Section 2.55(b) in a formal rulemaking while at the same time addressing proposed amendments to Section 2.55(a), but not including the right-of-way or work space limitation to that provision, the Commission cannot now through adjudication read into Section 2.55(a) a nonexistent right-of-way limitation.

[67] 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).

any right-of-way or work space limitation with respect to Section 2.55(a) installations while such rulemaking is under consideration. First, INGAA's pleading has demonstrated that no such limitations exist in Section 2.55(a) and enforcing such limitations prior to formal notice and comment period would be unlawful. Second, not enforcing new requirements while the Commission is considering the matter would be consistent with the approach that the Commission has taken in other rulemaking contexts.

For example, the Commission recently issued a notice of inquiry into whether and how holders of firm interstate capacity on Section 311 and Hinshaw natural gas pipelines should be permitted to allow others to make use of their firm interstate capacity, including to what extent buy/sell transactions should be prohibited.[68] The Commission held that it would not "institute any enforcement actions with respect to prior buy/sell transactions involving [S]ection 311 and Hinshaw pipelines" and it granted "a blanket waiver of the prohibition on buy/sell transactions to allow existing and new buy/sell transactions involving [S]ection 311 and Hinshaw pipelines to continue to take place" until further order in the Capacity Transfer NOI proceeding.[69] Recognizing that capacity reassignments can promote more efficient use of firm pipeline capacity, the Commission reasoned that such relief would "avoid disrupting any ongoing relationships established through currently existing buy/sell transactions and also avoid discouraging beneficial new arrangements, while the Commission considers the policy issues raised in this proceeding."[70]

---

[68] *Capacity Transfers on Intrastate Natural Gas Pipelines*, FERC Stats. & Regs. ¶ 35,567 (2010) ("Capacity Transfer NOI").

[69] Capacity Transfer NOI at P 19.

[70] *Id*.; *see also, Puget Sound Energy, Inc.*, 134 FERC ¶ 61,122 (2011) (deferring action on petition for declaratory order on whether locational exchanges of electric power are subject to open access requirements while the Commission solicited comments pursuant to a notice of inquiry on whether such exchanges should be permitted

The Commission has a similar basis for not imposing or enforcing any right-of-way or work space limitation with respect to Section 2.55(a) installations pending consideration of a rule amending the provision. As discussed above, the Commission has not articulated through rulemaking, order, or otherwise an explicit right-of-way or work space limitation on Section 2.55(a) installations and no clear policy prohibiting such installations beyond the right-of-way exists. Allowing pipelines to continue to install auxiliary installations without such limitations is consistent with current practices and would continue to promote the efficiency, economy, and safety benefits that such installations traditionally have generated. It would further avoid disrupting any ongoing activities and/or agreements between pipelines and contractors engaged in constructing installations while the Commission considers the policy issues raised in this petition.

VII. CONCLUSION

For the foregoing reasons, the Commission should definitively reaffirm that no right-of-way or work space limitations apply to auxiliary installations under the plain reading of Section 2.55(a). If the Commission wishes to consider amending Section 2.55(a) to add such limitations for some or all of the installations included under Section 2.55(a), the Commission may do so only through notice and comment rulemaking in compliance with the letter and the spirit of the President's executive orders and the specific requirements of the APA. If a rulemaking is initiated, the Commission should state that it will not seek to enforce any change to Section 2.55(a) until it has completed any rulemaking process it might initiate.

(continued…)

generically or considered on a case-by-case basis); *Locational Exchanges of Wholesale Electric Power*, Notice of Inquiry, Stat. & Reg. ¶ 35,570 (2011).

Respectfully Submitted,

_____

Joan Dreskin
Vice President & General Counsel
Interstate Natural Gas Association of America

Dated: April 2, 2012

ATTACHMENT A

COPY

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF PIPELINE REGULATION

DEC 16 1997

In Reply Refer To:
OPR/DEER/ERC II

Mr. Glen Haas, Director
Certificates & Reporting
Northern Natural Gas Company
P.O. Box 3330
Omaha, NE 68103-0330

Dear Mr. Haas:

I received the enclosed letter dated, October 24, 1997, from the Iowa State Historic Preservation Officer (SHPO) asking the Commission to review a project which Northern Natural Gas Company (Northern) submitted to the SHPO requesting comments under the National Historic Preservation Act. The SHPO inquires whether this project requires a Commission certificate.

The project involves installing three ground beds in Mills County, Iowa to provide cathodic protection for an unprotected pipeline. Northern indicated to the SHPO that installation of the ground beds would take place under 18 CFR 2.55(a) of the Commission's regulations and would not require a certificate. In Northern's July 24, 1997 letter to the SHPO, each ground bed is described as consisting of two trenches, six feet wide by 500 feet long with one being 4 feet deep and the other being 10 feet deep. These trenches would be excavated in new right-of-way and perpendicular to the existing pipeline in agricultural soil which was not previously disturbed by the pipeline construction.

I find that, consistent with the Commission's previous determinations regarding 18 CFR 2.55(b), facilities constructed under section 2.55(a) must be placed within the permanent right-of-way (Arkla Energy Resources Co., 67 FERC ¶ 61,173 (1994), Columbia Gas Transmission Corp., 68 FERC ¶ 61,043 (1994), and NorAm Gas Transmission Co., 70 FERC ¶ 61,030 (1995)). Further, the original and temporary right-of-way and associated work space may be used to perform these installations. Since the installation of the ground beds will take place outside of the scope of the original construction, Northern must file an application under Section 7 of the Natural Gas Act for authorization to construct these ground beds.

If you have any questions regarding this letter, please contact Mr. Richard Hoffmann, (202) 208-0066.

Sincerely,

for

Kevin P. Madden, Director
Office of Pipeline Regulation

Enclosure

cc: Douglas W. Jones, Archaeologist
Community Programs Bureau
State Historical Society of Iowa
600 E. Locust St.
Des Moines, Iowa 50319-0290

Mr. Leo Nichols
Division Environmental Specialist
Northern Natural Gas Company
7055 Vista Drive
Bristol Building
West Des Moines, Iowa 50266

State Historical Society of Iowa

The Historical Division of the Department of Cultural Affairs

October 24, 1997

In reply please refer to:
R&C#: 970765111

Mr. Kevin Madden, Director
Federal Energy Regulatory Commission
825 North Capitol Avenue, NE
Washington, D.C. 20426

RE: FERC - MILLS COUNTY - ENRON NORTHERN NATURAL GAS COMPANY - PHASE I CULTURAL RESOURCES SURVEY FOR PORTIONS OF NORTHERN NATURAL GAS COMPANY'S OAKLAND A-LINE CLASS 11 BONDS PROJECT IN MILLS COUNTY - SECS. 3, 9, & 10, T72N-R43W - SECS. 25 & 34, T73N-R43W - ADDITIONAL INFORMATION

Dear Mr. Madden,

We have been notified by Mr. Leo Nichols (ENRON - Northern Natural Gas Company) per a 10/15/97 telephone discussion that the above referenced project which has been submitted to our office for review does not require a Federal Energy Regulatory Commission certificate as it qualifies under 18 CFR 2.55 as a preventative maintenance project for the currently existing natural gas pipeline. Mr. Nichols also informed our office that there is no other federal involvement in this project, and that this project was provided to our office for comment to maintain a good working relationship between the company and our agency. We assumed that this project was submitted to our office in compliance with 36 CFR Part 800 under Section 106 of the National Historic Preservation Act of 1966 as amended 1992 , and our office has processed this project as such. However, if this is not a federal undertaking, it appears that our office has no statutory authority to provide comments on this project.

We understand that this project has not been submitted to your agency because the company believes it qualifies for exempt status under 18 CFR 2.55. However, we request that your agency review this proposed project and provide our office with a determination as to whether this project qualifies for the exempt status under 18 CFR 2.55. Enclosed is a copy of all of the submitted correspondence to our office from ENRON - Northern Natural Gas Company and their archaeological consultant (Archaeology Laboratory, Augustana College) concerning this project. If this project does not qualify for the exempt status and will require a Federal Energy Regulatory Commission certificate, we would like your agency to provide a determination of the Area of Potential Effect for this proposed project and to review the provided archaeological reports.

If you should have any further questions, please feel free to contact me at the number provided below.

Sincerely,

Douglas W. Jones

Douglas W. Jones, Archaeologist
Community Programs Bureau
(515) 281-4358

Post-it® Fax Note 7671	Date 10/24/97	# of pages ▶ 4
To KEVIN MADDEN	From DOUG JONES	
Co./Dept. FERC	Co. IOWA SHPO	
Phone #	Phone #	
Fax # (202) 208-0353	Fax #	

cc: Leo Nichols, Division Environmental Specialist, ENRON - Northern Natural Gas Company
Peter Winham, Principal Investigator, Archaeology Laboratory, Augustana College
John Steenberg, Environmental Affairs Department, ENRON - Northern NaturalGas Company
Laura Dean, Advisory Council on Historic Preservation
Patricia Ohlerking, Iowa Deputy State Historic Preservation Officer
Tom Morain, Iowa State Historic Preservation Officer

☐ 402 Iowa Avenue
Iowa City, Iowa 52240-1806
(319) 335-3916

☒ 600 E. Locust
Des Moines, Iowa 50319-0290
(515) 281-6412

☐ Montauk
Box 372
Clermont, Iowa 52135-0372
(319) 423-7173

ATTACHMENT B

COPY

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF PIPELINE REGULATION

In Reply Refer To:
OPR/DEER/ERC II

APR - 3 1998

Mr. Glen Hass, Director
Certificates & Reporting
Northern Natural Gas Company
P.O. Box 3330
Omaha, NE 68103-0330

Dear Mr. Hass:

The purpose of this letter is to clarify that the installation of ground beds to provide cathodic protection for an existing pipeline qualifies as an auxiliary installation under 18 CFR 2.55(a). Thus, such installation does not require Commission authorization as indicated in my December 16, 1997 letter.

Where only auxiliary facilities are involved, and not any new pipeline, no certificate is required. However eminent domain may not be invoked to acquire property for Section 2.55(a) facilities. Further, since Section 2.55(a) facilities do not require Commission approval, there is no undertaking pursuant to section 106 of the National Historic Preservation Act. On the other hand, if ground beds to provide cathodic protection are installed in conjunction with the construction of a pipeline authorized under section 7 of the Natural Gas Act, then we would consider the installation of those ground beds as related impacts to the certificated action.

Please confirm in writing that the situation described in your letter of December 29, 1997, did not involve any new construction of pipeline facilities and that you did not rely on eminent domain to acquire the necessary right-of-way.

If you have any questions regarding this letter, please contact Mr. Richard Hoffmann, (202) 208-0066.

Sincerely,

Kevin P. Madden, Director
Office of Pipeline Regulation

980408-0242-2

FERC-DOCKETED
APR - 3 1998

cc: Douglas W. Jones, Archaeologist
Community Programs Bureau
State Historical Society of Iowa
600 E. Locust St.
Des Moines, Iowa 50319-0290

Mr. Leo Nichols
Division Environmental Specialist
Northern Natural Gas Company
7055 Vista Drive
Bristol Building
West Des Moines, Iowa 50266