Instead of 'Hot Summer' for FERC, Commission Lands in Hot Water

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ILLINOIS Democrat Sean Casten rolled out his "Hot FERC Summer" campaign in a speech on the House floor intended to promote the Federal Energy Regulatory Commission's powers with respect to climate change, some boosted through proposed legislation. Meanwhile, the courts are paying attention to FERC and its analysis of need, climate impacts, and environmental justice (or lack thereof). A pair of decisions highlights a new era for the panel, even as the commission shifts priorities under President Biden.

First up, in June, the Court of Appeals for the D.C. Circuit vacated a certificate allowing Spire STL Pipeline to operate a natural gas pipeline outside St. Louis, Missouri. Spire had admitted that there was no new demand for the pipeline. The commission nonetheless relied on a study prepared by a Spire affiliate claiming it would use the new pipeline to determine that the company had shown adequate need. The court found that FERC had failed to assess the probative value of the affiliate's study, ignored concerns that Spire engaged in self-dealing with its affiliate, and failed to balance the claimed need against the adverse environmental effects of the new pipeline.

The D.C. Circuit slaps the commission for failing to assess climate impacts

Because the errors were significant, the court vacated the certificate. But the pipeline is already operational. Spire responded with a flurry of filings, including seeking rehearing (but only on the remedy) and petitioning FERC for emergency relief. At press time, FERC had granted the company a 90-day certificate while it considers Spire's request for a temporary certificate. FERC did not seek rehearing of the court's vacatur, though Commissioner James Danly (airing dirty laundry perhaps) claimed in a dissent that a majority of commissioners (at the time) thought the agency should have sought rehearing.

In the second case, *Vecinos para el Bienestar de la Comunidad Costera*, the same court held that FERC's environmental justice and climate analyses were lacking. Several companies had applied for authorization to construct new liquified natural gas terminals in Cameron County, Texas, to export the fuel. In approving the projects, FERC calculated the additional emissions but claimed it could not determine if the impact was significant because there was no "universally accepted methodology" for that. However, FERC's own regulations direct the commission to evaluate these types of impacts, using "theoretical approaches or research methods generally accepted in the scientific community." And FERC had previously not disputed that the social cost of carbon — a monetary estimate of the damages for each additional ton of greenhouse gas emissions — was a generally accepted method for evaluating the impact of greenhouse gas emissions.

In addition, the commission dismissed petitioners' environmental justice concerns with the projects, claiming that they would not have a disproportionate impact on "minority and low-income populations versus on some other project-affected comparison group" because "all project-affected populations are minority or low-income populations." But a project does not lack a disproportionate impact just because it only affects minority and/or low-income residents. Instead, that is likely proof of disproportionate impact.

In the case of the terminals at issue in *Vecinos,* the court remanded the case to FERC to improve its analysis and did not vacate the orders authorizing the projects. But even if both the pipeline at issue in the Spire case and the natural gas terminals at issue in *Vecinos* continue to operate, the impact of the decisions is sure to be felt beyond these cases. FERC is reexamining its overall policy governing analysis of proposed pipelines. It will want to ensure that it more carefully weighs claimed need against environmental impact as well as the climate and environmental justice effects of those new projects.

Meanwhile, these decisions are also likely to have an impact on other cases pending in the D.C. Circuit. In a Delaware Riverkeeper Network case, argued in September, the court will consider an argument that FERC improperly ignored indirect impacts of the upstream fracking as well as the emissions that would increase due to the use of the gas downstream — and that it again failed to assess the significance of the greenhouse gas emissions.

In another case, FERC had granted a certificate to PennEast Pipeline Company to build a natural gas pipeline through New Jersey and Pennsylvania, but petitioners challenged the certificate arguing that the company's reliance on affiliate agreements (again) to demonstrate need, and the failure to address the significance of the project's greenhouse gas emissions, was arbitrary and capricious. In September, the company announced that the project would not go forward due to the failure to obtain other necessary permits.

Even though Representative Casten has ended his "Hot FERC Summer" campaign (with a Dolly Parton-inspired flourish), the court's analysis of the commission's decisions is likely to stay hot.