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PIPELINES

Project approvals splinter FERC, trigger rare dissent

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FERC Commissioner Cheryl LaFleur. Federal Energy Regulatory Commission

The Federal Energy Regulatory Commission's decision last week to approve two contentious natural gas pipelines featured a rarity for the agency: a dissent.

FERC's newly appointed Chairman Neil Chatterjee and Commissioner Robert Powelson late Friday gave a green light to the Atlantic Coast and Mountain Valley pipelines, two projects that would transport shale gas across Appalachia.

Commissioner Cheryl LaFleur, the lone Democrat on the panel, parted with her colleagues. In a dissenting statement, the former chairwoman wrote that she doesn't believe the proposals are in the public interest.

"Given the environmental impacts and possible superior alternatives, approving these two pipeline projects on this record is not a decision I can support," she wrote.

Dissents are seldom seen in FERC certificate orders for pipelines. LaFleur, who has been on the commission for seven years, previously has issued dissents for a number of electric transmission cases and one natural gas project, a compressor station. She had never dissented on a pipeline certificate until Friday.

In an interview with E&E News, LaFleur said the "difficult" decision was driven by the similarities in the two projects.

"In each case, we have to make a careful decision whether that application is in the public interest," she said. "And the overall record of the two pipelines here and the fact that they're both in the same region definitely influenced my environmental assessment."

Her decision centered on the overlapping goals of the pipelines. Both begin in West Virginia shale fields, cross the Appalachian Mountains and end in East Coast markets — Atlantic Coast in North Carolina and Mountain Valley in Virginia.

Together, they represent 900 miles of new infrastructure moving nearly 3.5 billion cubic feet of natural gas per day.

"Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects," she wrote in the dissent.

LaFleur noted that alternative proposals, including one that would essentially merge the two routes, would decrease impacts on two national forests, the Appalachian Trail and the Blue Ridge Parkway.

She said her colleagues clearly had a different view but respected her position.

"Even though there's not that many public dissents, that's why you have a multimember commission, so you have diversity of thought," she said.

Her Friday statement also raised a larger issue about how FERC weighs the public need for projects. She said the commission should consider broadening its analysis — which typically centers on whether developers can show that the natural gas will be used — to incorporate other factors.

"I didn't dissent strictly on that because I'm very conscious of not kind of changing the legal standard in the middle of the case," she told E&E News. "But I've talked about that a lot in speeches, and I thought it was time to say it in a little more public way."

Debating the public interest

Opponents of the two natural gas pipelines lamented FERC's approval of the projects Friday. Landowner coalitions and environmental groups plan to urge state regulators to deny critical remaining permits for the pipelines.

They'll also press FERC to reconsider its decision and will eventually take the agency to court — potentially aided by LaFleur's dissenting position. A few legal challenges focusing on broader concerns about the pipelines, including the use of eminent domain, are already pending in federal courts.

Carolyn Elefant, a lawyer who is representing landowners in an eminent domain case, said LaFleur's dissent offered a "strong foundation" for a separate National Environmental Policy Act challenge to the pipelines. That's because it illustrates how the commission set aside project alternatives that could have had less significant impacts, she said.

"In a 2-1 decision, that is where LaFleur's dissent is particularly effective because she argued that these options should not have been foreclosed," Elefant said.

LaFleur's position earned quick praise from advocacy groups opposed to the pipelines.

"We applaud Commissioner LaFleur for recognizing what West Virginians, Virginians and North Carolinians already know — these fracked gas pipelines are not in the public interest," Sierra Club Dirty Fuels campaigner Kelly Martin said in a statement.

Southern Environmental Law Center attorney Greg Buppert echoed that sentiment, saying the "unexpected dissent shows that even within FERC, this pipeline is seen as harmful and unnecessary."

"The majority decision does not reflect an understanding of the issues at hand and is clearly not in the public interest," said Lewis Freeman, head of the grass-roots Allegheny-Blue Ridge Alliance. "It calls into serious question the agency's regulatory credibility."

Pipeline backers, of course, celebrated FERC's decision to greenlight their projects. Dominion Energy Inc., which is behind Atlantic Coast, called it "the most significant milestone yet" for the years-in-the-making development.

"The end use of this gas is well established on the public record and is a matter of urgent public necessity," Leslie Hartz, Dominion's vice president for engineering and construction, said in a statement. "Our public utility customers are depending on this infrastructure to generate cleaner electricity, heat homes and power local businesses."

The certificates include a slew of special conditions that will govern pipeline construction.

Pushing for a policy shift

In addition to citing specific concerns about the Atlantic Coast and Mountain Valley pipelines, LaFleur raised a broader issue Friday: Is the agency's longtime policy for weighing the need for proposed pipelines due for a makeover?

The commissioner put a bull's-eye on FERC's Certificate Policy Statement, a 1999 document that lays out how the agency should evaluate the economic need for interstate gas pipelines. The policy directs FERC to consider several factors, including fuel costs, environmental effects, connection of new fuel supply and improved service.

But according to LaFleur, the commission's analysis of public need has become overly focused on precedent agreements — customer commitments that developers often secure during the proposal phase. LaFleur said those agreements should continue to play a role in the analysis but that the commission should look more broadly at other issues, as well.

"I believe that careful consideration of a fuller record could help the Commission better balance environmental issues, including downstream impacts, with the project need and its benefits," she wrote, adding that she would welcome input from industry and people affected by pipelines.

She told E&E News she thought the two Appalachia pipelines presented an opportunity to "get the conversation started."

"The discussion of the needs analysis was not the basis of my dissent, but the fact that I was writing was an opportunity to air those issues," she said.

Former Commissioner Norman Bay raised similar concerns about the policy just before he left the agency earlier this year. In a statement, he urged his colleagues to consider changing how they weigh the need for new gas pipeline infrastructure.

"As important as infrastructure is, it must also occur through processes that continue to promote public participation, transparency, and confidence," he wrote in February.

LaFleur noted in her dissent that a change in FERC's approach would not necessarily lead to more pipelines being rejected but would "provide all parties, including certificate applicants, the opportunity to more broadly debate and consider the need for a proposed project."

So is the issue likely to get any traction within FERC?

"Well, that's up to our colleagues, and they've been really busy with various things since they got there," LaFleur said, adding that she knows "they take their jobs very seriously and think about these things."

"We should always be looking at how to do our work better, how our doctrines have to evolve," she said. "I've had conversations with some of the lawyers who are frequently in our dockets, and I think they will have a lot to contribute to the conversation."