149 FERC ¶ 61,144
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 2, 157, and 380
[Docket No. RM12-11-002; Order No. 790-A]

Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations

(Issued November 20, 2014)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule, order on rehearing and clarification.

SUMMARY: On rehearing, the Federal Energy Regulatory Commission (Commission) reaffirms its basic determinations in Order No. 790 and modifies and clarifies certain aspects of the Final Rule. Order No. 790 amended the Commission's regulations to (1) clarify that auxiliary installations added to existing or proposed interstate transmission facilities under section 2.55 of the Commission's regulations must (a) be located within the authorized right-of-way or site for existing facilities or the right-of-way or site to be used for facilities proposed in a pending application for case-specific certificate authority or in a prior notice filing under the Commission's Part 157 blanket certificate regulations, and (b) use only the same temporary work space that was or will be used to construct the existing or proposed facilities; and (2) codify the common industry practice of notifying landowners prior to coming onto their property to undertake section 2.55 projects, or certain Part 157, Subpart F replacements, or certain section 380.15 maintenance activities.

EFFECTIVE DATE: This rule will become effective **[Insert Date 60 days after publication in the FEDERAL REGISTER].**

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SUPPLEMENTARY INFORMATION:

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Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations — Docket No. RM12-11-002

ORDER NO. 790-A

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Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations — Docket No. RM12-11-002

ORDER NO. 790-A

FINAL RULE
ORDER ON REHEARING AND CLARIFICATION

(Issued November 20, 2014)

1. On November 22, 2013, the Federal Energy Regulatory Commission (Commission) issued a Final Rule in Order No. 790 that amended its regulations, effective February 3, 2014, to: (1) clarify that auxiliary installations added to existing or proposed interstate transmission facilities under section 2.55 of the Commission's regulations[1] must (a) be located within the authorized right-of-way or site for existing facilities or the right-of-way or site to be used for facilities proposed in a pending application for case-specific certificate authority or in a prior notice filing under the Commission's Part 157 blanket certificate regulations, and (b) use only the same temporary work space that was or will be used to construct existing or proposed facilities;

[1] 18 CFR 2.55 (2014).

and (2) codify the common industry practice of notifying landowners prior to coming onto their property to undertake section 2.55 projects, certain Part 157, Subpart F replacements, or certain section 380.15 maintenance activities.[2]

2. The Commission received two requests for rehearing and clarification of the Final Rule, one filed by the Interstate Natural Gas Association of America (INGAA) and the other filed jointly by National Fuel Gas Supply Corporation and Empire Pipeline, Inc. (referred to collectively as "National Fuel"). As discussed below, this order denies the requests for rehearing and grants and denies the requests for clarification.

I. Background

3. Section 7(c)(1)(A) of the Natural Gas Act (NGA) requires a natural gas company to have certificate authorization for the "construction or extension of any facilities."[3] To "avoid the filing and consideration of unnecessary applications for certificates,"[4] i.e., to save the time and expense that would otherwise be expended by companies and the Commission in undertaking a full, formal NGA section 7 certificate proceeding for every modification to a jurisdictional pipeline system, section 2.55 establishes that for the purposes of section 7(c), "the word *facilities* as used therein shall be interpreted to

[2] *Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations*, Order No. 790, 78 FR 72794-801 (Dec. 4, 2013), FERC Stats. & Regs. ¶ 31,351 (2013) (cross-referenced at 145 FERC ¶ 61,154 (2013)).

[3] 15 U.S.C. 717f(c)(1)(A) (2012).

[4] *Filing of Applications for Certificates of Public Convenience and Necessity, Notice of Proposed Rulemaking*, NOPR, 13 FR 6253, at 6254 (October 23, 1948).

exclude" auxiliary and replacement facilities.[5] Thus, while an auxiliary or replacement facility that qualifies for purposes of section 2.55 remains subject to the Commission's NGA jurisdiction, it does not require an individual, facility-specific section 7(c) certificate authorization.

4. Facilities that qualify under section 2.55(a) must be "merely auxiliary or appurtenant to an authorized or proposed pipeline transmission system" and installed "only for the purpose of obtaining more efficient or more economical operation of the authorized or proposed transmission facilities," such as "[v]alves; 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."[6] A company must provide the Commission with at least 30 days prior notice if it plans to rely on section 2.55 to construct auxiliary facilities in conjunction with: (1) a project for which case-specific certificate authority has already been received but which is not yet in service; (2) a proposed project for which a case-specific certificate

[5] 18 CFR 2.55 (2014).

[6] *Id*. 2.55(a)(1). But for the inclusion of pig launchers/receivers in 1999, this list has remained unaltered since section 2.55 was put in place in 1949. Note that if a pipeline company wants to install any facilities specifically named in section 2.55(a)(1), but will not be installing them only for the purpose of obtaining more efficient or more economical operation of existing or proposed interstate transmission facilities, then the company cannot rely on section 2.55(a). *See Algonquin Gas Transmission Company*, 57 FERC ¶ 61,052 (1991); *West Texas Gas, Inc.*, 62 FERC ¶ 61,039 (1993); and *Natural Gas Pipeline Company of America*, 114 FERC ¶ 61,061, at n.4 (2006).

application is pending; or (3) facilities that will be constructed subject to the prior notice provisions of the Part 157, Subpart F blanket certificate regulations.

5. Section 2.55(b) permits companies to replace facilities that are or will soon be physically deteriorated or obsolete, so long as doing so will not result in a reduction or abandonment of service and the replacement facilities will have a substantially equivalent designed delivery capacity.[7] All replacement facilities constructed under section 2.55(b) must be located within the existing facilities' previously authorized right-of-way or on the same site as the facilities being replaced and must be constructed using the same temporary work spaces used to construct the existing facilities.[8] Section 2.55(b) replacement projects can go forward without case-specific or blanket certificate

[7] 18 CFR 2.55(b) (2014).

[8] *Id.* 2.55(b)(ii).

authorization. However, companies must provide the Commission with 30 days prior notice before undertaking more expensive replacement projects.[9]

6. On April 2, 2012, INGAA filed a petition requesting that the Commission clarify that installations of auxiliary facilities under section 2.55(a) are not restricted to the rights-of-way and temporary work spaces used to construct the existing facilities that will be augmented by the auxiliary facilities.[10] INGAA stated that it was seeking such clarification because Commission staff has stated in discussions with pipeline representatives and in industry meetings that companies undertaking section 2.55(a) auxiliary installations to augment existing facilities that are already in service must stay within the right-of-way or site for the existing facilities and restrict construction activities to previously used work spaces. INGAA disagreed with these constraints, arguing that section 2.55(a) activities had not been limited in this way in the past, and that Commission staff's position amounted to rulemaking without the opportunity for notice and comment, contrary to the requirements of the Administrative Procedure Act (APA).[11] Pursuant to section 385.207(a)(4) of the Commission's Rules of Practice and Procedure,

[9] The requirement that a company give at least 30 days prior notice to the Commission before commencing a replacement project applies if the project will exceed the current cost limit for projects automatically authorized under the Part 157 blanket certificate regulations. However, unlike the blanket certificate regulations, section 2.55 places no cost limits on auxiliary installations or replacement projects that qualify under that section.

[10] On May 2, 2012, MidAmerican Energy Pipeline Group (which includes Kern River Gas Transmission Company and Northern Natural Gas Company) filed a motion to intervene and comments in support of INGAA's petition.

[11] 5 U.S.C. 553 (2012).

INGAA requested that the Commission confirm INGAA's view that the siting and work space constraints stated by staff do not apply to section 2.55(a) auxiliary installations.

7. On December 20, 2012, the Commission issued a NOPR proposing to revise section 2.55(a) to clarify that, as with section 2.55(b), all projects must take place within a company's authorized right-of-way or facility site and use only previously approved work spaces. In addition, the NOPR proposed to add a 10-day landowner notification requirement for section 2.55 auxiliary and replacement facilities and for section 380.15 maintenance activities.[12]

8. On November 22, 2013, the Commission issued the Final Rule to revise its regulations to clarify that all section 2.55(a) auxiliary installations added to existing or proposed interstate transmission facilities must be located within the authorized right-of-way or site for the existing or proposed facilities and use only the same temporary work space used to construct the existing or proposed facilities. In addition, the Final Rule adopted regulations to provide a landowner with notice at least five days prior to commencing an auxiliary or replacement project under section 2.55 or a maintenance activity under section 380.15 that causes a ground disturbance on the landowner's property.

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[12] *Revisions to Auxiliary Installations, Replacement Facilities, and Siting and Maintenance Regulations*, NOPR, 78 FR 679, at 683 (Jan. 4, 2013), FERC Stats. & Regs. ¶ 32,696 (2012) (cross-referenced at 141 FERC ¶ 61,228 (2012)). While section 380.15 covers siting, construction, and maintenance, our existing regulations already have notification requirements in place applicable to siting and construction; consequently, the additional prior notice requirement described in the new section 380.15(c) will apply exclusively to maintenance activities.

9. On December 23, 2013, INGAA and National Fuel each filed a request for rehearing of the Final Rule's determination that all auxiliary installations added to existing or proposed interstate transmission facilities must be located within the authorized right-of-way or site for the existing or proposed facilities and use only the same temporary work space used to construct the existing or proposed facilities.

10. In regard to the Final Rule's landowner notification requirements, INGAA and National Fuel request that the Commission clarify that: (1) the landowner notification requirements may be waived with the landowner's consent; (2) the provision that enables companies to waive the landowner notification requirements for "activities required to respond to an emergency" includes activities done for safety, U.S. Department of Transportation (DOT) compliance, or environmental or unplanned maintenance reasons; (3) the landowner notification requirement does not apply when a pipeline company is required on short notice to mark its facilities on a landowner's property because the landowner or a third party will be digging near the pipeline company's facilities; and (4) the landowner notification does not apply to landowners whose property is crossed en route to a proposed ground-disturbing maintenance activity, or to areas located entirely within the fence line of an existing, above-ground facility site.

II. Discussion

A. Section 2.55(a) Auxiliary Facilities

11. The Final Rule revised the Commission's regulations to clarify that all section 2.55(a) auxiliary installations added to existing or proposed interstate

transmission facilities must be located within the authorized right-of-way or site for the existing or proposed facilities and use only the same temporary work space used to construct the existing or proposed facilities.

1. Commission's Jurisdiction

12. INGAA persists in its contention that section 2.55(a) facilities are beyond the Commission's jurisdiction. This is a fundamental misreading of this regulatory provision's intent and application.

13. In 1949, Order No. 148, by "amendment of general rules and regulations governing the filing of applications for certificates of public convenience and necessity under section 7(c),"[13] added section 2.55 to our regulations to permit the construction and operation of auxiliary, replacement, and delivery point facilities without the need to obtain individual certificates for such facilities.[14] INGAA maintains that "[i]n Order No. 148, the Commission distinguished between jurisdictional facilities necessary for the transportation of natural gas in interstate commerce and non-jurisdictional installations."[15] The Commission did not. What the Commission did, as explained in the NOPR prior to Order No. 148, was "to permit natural-gas companies subject to the jurisdiction of the Commission" to add a restricted set of facilities to, and replace parts of, an existing

[13] *Filing of Applications for Certificates of Public Convenience and Necessity*, 14 FR 681 (February 16, 1949).

[14] Section 2.55(c), which describes new delivery points, was subsequently removed by Order No. 148-A, 49 FPC 1046 (1973). Delivery points are now included among the facilities that may be constructed and operated pursuant to blanket certificate authority. *See* 18 CFR 157.211 (2014).

[15] INGAA's Request for Rehearing at 22.

system "without *further* authorization from the Commission … to avoid the filing and consideration of unnecessary applications for certificates."[16] (*Emphasis added.*) Order No. 148 accomplished this by deeming that "[f]or the purposes of section 7(c)," i.e., with respect to the section of the NGA which requires that natural gas companies obtain prior certificate authorization to construct or acquire jurisdictional facilities, "the word 'facilities' as used therein shall be interpreted to exclude" auxiliary, replacement, and delivery point facilities.[17] In other words, to reduce the burden on the industry and to aid our own administrative efficiency, the Commission allowed natural gas companies already holding section 7 certificate authorization for existing natural gas facilities to make limited modifications to those facilities without the need to first obtain separate, additional, case-specific certificate authorization for each modification. In the Final Rule, we compared section 2.55 to our later actions to enable companies to act without first submitting an individual certificate application, stating:

> Section 2.55 is both a precursor and complement to our Part 157 blanket certificate program. By providing non-case-specific certificate authorization for limited classes of facilities, the section 2.55 and blanket certificate regulations permit companies to satisfy the requirements of section 7(c)

[16] 13 FR 6253-54 (October 23, 1948).

[17] 14 FR 681.

> without having to apply for individual case-specific certificates for each and every modification to their systems.[18]

14. Thus, Order No. 148 did not and could not remove jurisdictional facilities from our jurisdiction, but carved out a class of facilities in section 2.55 that could be added onto, or could replace, parts of a larger certificated system without the need for further review because the auxiliary or replacement facilities will be within the same rights-of-way and use the same work spaces that were reviewed by the Commission prior to construction of the existing facilities at that location. In describing the facilities authorized under section 2.55, Order No. 148 did not make any jurisdictional distinction among section 2.55(a) auxiliary installations, section 2.55(b) replacements, and section 2.55(c) delivery points, indicating all section 2.55 facilities share the same jurisdictional status. INGAA acknowledges that 2.55 replacement facilities are subject to our jurisdiction, stating:

> 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. … The new facilities, just like the facilities that they replaced, are required to provide the pipeline's previously certificated jurisdictional service. In

[18] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 16.

> addition, as replacements of existing facilities, Section 2.55(b) projects by definition and by their very nature involve an existing right of way.[19]

15. Section 2.55(a) auxiliary installations, which are limited to facilities that improve the operation of a jurisdictional system, have the same jurisdictional status as the undisputedly jurisdictional replacements. As stated in the Final Rule:

> All section 2.55 facilities are integrated into a larger interstate transmission system and serve no function other than to enable that system to perform its jurisdictional functions more efficiently or economically; just as the larger system is jurisdictional, the component parts of that system, including auxiliary facilities installed pursuant to section 2.55, are jurisdictional as well.[20]

Accordingly, the facilities identified in section 2.55 are permitted to be put in place pursuant to the certificate authorization of the pipeline system that they modify, and are consequently as jurisdictional as, and subject to the same constraints imposed upon, the system that they modify, including siting and workspace constraints.

16. INGAA argues that because Order No. 603 amended section 2.55(b) to explicitly state that replacements must use the same right-of-way and workspaces as the facilities

[19] INGAA's Request for Rehearing at 39.

[20] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 13 (*footnote omitted*).

being replaced, but did not amend section 2.55(a) to state the same with respect to auxiliary facilities, the Commission's intent was to impose these restrictions on replacements alone. INGAA is incorrect in suggesting that it was not until Order No. 603 that the Commission viewed section 2.55 as limiting *all* construction activities under that section to existing, previously studied and approved rights-of-way. The Commission stated in Order No. 603 that "[c]urrent Policy requires that replacement facilities must be placed in the existing ROW"; "we are not allowing additional ROW width under Section 2.55"; and "we will continue to follow Commission policy and limit the pipeline's use of property to construct facilities under Section 2.55 to the existing ROW."[21]

17. The discussion in Order No. 603 made clear that the Commission has always viewed *all* activities under section 2.55 as being limited to existing rights-of-way and facility sites. The Commission focused on section 2.55(b) in Order No. 603 because it was aware that some companies incorrectly viewed that section as providing authorization for them to undertake replacement projects using new, not previously studied rights-of-way, and thereby in theory, swap out large portions of their systems under section 2.55(b) with no limit as to project size and potential impacts.[22] At the time,

[21] *Revision of Existing Regulations Under Part 157 and Related Sections of the commission's Regulations Under the natural Gas Act*, Order No. 603, 64 FR 26572 at 26575; FERC Stats. & Regs. ¶ 31,073 at 30,784-85 (1999).

[22] As discussed in the Final Rule, Order No. 603 was prompted by a company's inappropriate reliance on section 2.55(b) to abandon 91 miles of pipeline and install new, larger-diameter pipeline, portions of which were placed outside the right-of-way of the abandoned pipeline. *See* Order No. 603, FERC Stats. & Regs. ¶ 31,073, at 30,783-84 (1999), and Order No. 790, FERC Stats. & Regs. ¶ 31,351, at P 17 (2013) (citing *Arkla*

the Commission had no intimations of companies similarly relying on section 2.55(a) to place auxiliary installations in greenfield areas. Furthermore, the Commission still assumed that there was no need for companies to go outside existing rights-of-way to install section 2.55(a) facilities that are "merely auxiliary or appurtenant" to and "only for the purpose" of enhancing the operation of a pipeline's other authorized facilities. It has been only relatively recently that Commission staff's discussions with industry representatives and INGAA's petition have made it clear that an explicit statement of siting limitations is also needed in section 2.55(a) to clarify that auxiliary installations also must stay within previously authorized boundaries.

18. Specifically, over the last several years, concerns about potential noncompliance with siting restrictions for auxiliary installations under section 2.55 have been conveyed by industry representatives and landowners to Commission staff. Although the concerns presented have not resulted in an enforcement action, staff has explained the spatial limitations on construction activities under section 2.55(a) in response to inquiries by industry representatives and landowners and in presentations and conversations at public forums. In part, it was these statements by staff that motivated INGAA to submit its petition.

Energy Resources Company, 67 FERC ¶ 61,173 (1994) (*Arkla*), *order on reh'g*, *NorAm Gas Transmission Company*, 70 FERC ¶ 61,030 (1995) (*NorAm*)). Arkla was in the process of changing its name to NorAm at the time the Commission issued its order finding that Arkla's replacement project did not qualify to go forward under section 2.55(b). Thus, Arkla sought rehearing under its new name, NorAm.

19. In addressing space limitations on auxiliary installations under section 2.55(a) in this rulemaking proceeding, we have responded as we did in Order No. 603 when we became aware that companies were improperly relying on section 2.55(b) to construct replacement facilities in new rights-of-way. In this proceeding, we confirmed the position we expressed in Order No. 603 that construction activities under section 2.55 are restricted to projects confined to the footprint of existing facilities or the right-of-way of other facilities proposed in a case-specific certificate application or under the prior notice provisions of the blanket certificate regulations, and revised our regulations to codify this clarification. Again, the fact that we did not take the opportunity in Order No. 603 to insert explanatory language in section 2.55(a) shows only that the focus of the Commission's concern in 1999 was to address the identified issue of replacement facilities being installed outside existing rights-of-way, and was not, as INGAA contends, indicative of a deliberate intent by the Commission to apply spatial limitations to replacement projects but not to auxiliary projects.

20. INGAA relies on *National Fuel Gas Supply Corporation v. FERC*, 468 F.3d 831 (D.C. Cir. 2006) (*National Fuel*) to support its argument. In *National Fuel*, the D.C. Circuit remanded back to the Commission a final rule that extended the Commission's Standards of Conduct regulations, which already applied to pipeline companies' relationships with their marketing affiliates, to also apply to a pipeline company's relationships with their non-marketing affiliates (e.g., affiliated producers, gatherers, and processors). The court found no record evidence of a real problem, and explained that if

the Commission chose on remand to rely solely on a theoretical threat, it would need to explain how the potential danger of improper communications between pipelines and entities other than their marketing affiliates justified the regulatory restrictions on their interactions and why the normal complaint process under NGA section 5 would not suffice.[23]

21. Our action here is not analogous to *National Fuel*, where the Commission sought to extend regulatory restrictions to new entities without documentation of abuse. Here, we are not expanding our regulatory reach based on potential industry activities; instead, we are simply clarifying the existing bounds of the regulatory authority provided by section 2.55(a). Further, whereas the section 5 complaint process can adequately address the economic consequences of unfair competitive practices after the fact, irreparable and unnecessary environmental damage can result from companies' relying on section 2.55 of the regulations to construct new facilities in areas that the Commission has not had an opportunity to environmentally review.

22. INGAA maintains that Order No. 603 describes auxiliary facilities as exempt from the Commission's jurisdiction. In support of its position, INGAA points to *CNG Transmission Corp.*,[24] in which the Commission stated that Order No. 603 "amends Section 2.55(a) to specifically identify pig launchers as non-jurisdictional auxiliary equipment."

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[23] *National Fuel*, 468 F.3d at 845.

[24] 87 FERC ¶ 61,324, at 62,259, n.7, *reh'g denied*, 89 FERC ¶ 61,047 (1999).

23. Order No. 603 admittedly refers to auxiliary facilities in a manner that might be misconstrued as deeming auxiliary facilities to be nonjurisdictional. However, Order No. 603's discussion of auxiliary facilities opens with the statement that "Section 2.55 defines facilities that are excluded from the requirements of section 7(c) of the NGA and may, therefore, be constructed without *additional* certificate authority."[25] No additional certificate authority is needed because section 2.55 can be relied upon to construct qualifying auxiliary and replacement facilities under the umbrella of the company's certificate authority for the facilities being augmented or replaced. Thus, the 'exemption' provided by section 2.55 is not an exemption from NGA jurisdiction, but an exemption from the need to apply for additional case-specific certificate authorization or rely on blanket authorization under NGA section 7 for qualifying activities. The Commission's failure to carefully choose its words in contexts where the jurisdictional status of pig launchers and other auxiliary facilities was not being challenged does not change the fact that all of the facilities addressed by section 2.55 are jurisdictional facilities.

24. INGAA accepts that replacement facilities "assume the certificated position previously occupied by the facilities being replaced," but does not believe auxiliary facilities are subject to any certificate authority, and consequently characterizes section 2.55(a) and section 2.55(b) as representing "intrinsically different concepts."[26] We find no intrinsic difference. The facilities described under section 2.55 serve to enhance the operation or update the facilities of an existing system. Section 2.55(a)

[25] Order No. 603, FERC Stats. & Regs. ¶ 31,073 at 30,781 (*emphasis added*).

[26] INGAA's Request for Rehearing at 39.

auxiliary facilities must serve the purpose of making a system function more efficiently or economically, and section 2.55(b) replacements serve to improve reliability and safety. Thus, conceptually, section 2.55 auxiliary facilities and replacement facilities both serve the same purpose: they constitute relatively modest modifications to a system that do not alter the physical parameters of or services provided by the system.

25. INGAA maintains that in stating that section 2.55(a) auxiliary facilities are jurisdictional, 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."[27] INGAA is correct that when embarking on a new regulatory initiative, we consider various alternatives before we act, and then provide a reasoned explanation for our choice of action. Here, however, in responding to INGAA's petition requesting confirmation of its claim that auxiliary facilities are nonjurisdictional, we were not faced with a choice among policy alternatives; instead, we acted to correct a misunderstanding of the status of section 2.55 facilities by confirming that all such facilities are subject to the Commission's jurisdiction under section 7 of the NGA. Thus, our response did not contemplate potential policy choices, but clarified the existing policy embodied in section 2.55 that provides for the installation of auxiliary and replacement facilities described in that section under the certificate authority that authorized the facilities being enhanced or replaced. This rulemaking proceeding may have served to remind some companies of the existing spatial limitations on the placement of auxiliary and

[27] *Id.* at 13-14.

replacement facilities under section 2.55, but has not added any new additional regulatory restrictions on where facilities may be constructed under section 2.55.[28]

2. Section 2.55 Siting and Construction Limitations

26. On rehearing, INGAA reiterates its argument that Commission staff has been aware companies have been relying on section 2.55 to install auxiliary facilities outside existing rights-of-way in some instances, and that this claimed awareness on staff's part supports INGAA's position that our Final Rule's regulatory revisions to clarify the right-of-way and workplace constraints on auxiliary installations constitutes a "change [to] what had been the plain and universal understanding of that provision for approximately 60 years."[29] In support, INGAA cites two instances in which Commission staff issued a letter order that appears to acquiesce to a company's plans to rely on section 2.55 to install auxiliary facilities outside an established right-of-way.[30] INGAA also claims that based on the cited letter orders issued under delegated authority, members of the Commission's staff were aware, when the Commission issued Order Nos. 603 and 603-A in 1999, that pipelines were making auxiliary installations outside existing rights-of-way and workspaces.[31]

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[28] We have made policy changes to landowner notification requirements in this proceeding; however, these notification changes were made after considering alternatives and providing an explanation for the changes.

[29] INGAA's Request for Rehearing at 4.

[30] INGAA's Request for Rehearing at 32.

[31] *Id*. at 11 and 43.

27. In the situation underlying the first staff letter, a company sought case-specific certificate authorization to add a slug catcher (a facility to remove liquids from a gas stream) to an existing pipeline system.[32] Staff determined no additional certificate authority was needed because the proposed slug catcher "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 Terrebonne System."[33] We reiterate our observation from the Final Rule that although the application for certificate authorization indicated that a portion of the proposed slug catcher would be located outside the existing right-of-way, there is "no indication that the location of the new facilities was taken into account in the one-page, two-paragraph staff letter," and staff's failure to recognize that some of the proposed facilities would be outside of the existing right-of-way appears to have been "an oversight that led to a wrong result, since locating any of the planned new auxiliary facilities outside the existing right-of-way should have disqualified the project for purposes of section 2.55(a)."[34]

28. The second instance concerns staff's response to a proposal to install cathodic protection equipment. In a December 1997 letter, staff responded to a company's description of a new project to add cathodic protection to an existing pipeline by reminding the company that because part of the project would be in a new right-of-way,

[32] *Trunkline Gas Company*, Docket No. CP84-394-000, letter order signed by the Director of the Commission's Office of Pipeline Regulation, dated May 25, 1984; FERC eLibrary Accession No. 19840601-0118.

[33] *Id.*

[34] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 36.

the company could not rely on section 2.55(a), but would have to file a case-specific section 7 certificate application.[35] In an April 1998 letter, staff responded to the same company's description of what appears to be the same project, and finds it may proceed under section 2.55(a).[36] As discussed in the Final Rule, these letters are not necessarily in conflict, because the company may have altered its proposed project in response to the first letter so as to comply with the right-of-way restriction. If not, then as we stated in the NOPR and Final Rule, the April 1998 letter did not reflect Commission policy correctly.[37]

29. INGAA finds our review of these letter orders to be "cursory and unconvincing," and insists "that the existence of these delegated orders entirely undermines the Commission's foundation for its Final Rule,"[38] which INGAA characterizes as a disingenuous claim that the Commission has not been aware that companies have been relying on section 2.55 to install auxiliary facilities outside existing rights-of-way. This characterization is incorrect and is also inconsistent with INGAA's stated motive for

[35] Letter signed by the Director of the Commission's Office of Pipeline Regulations, dated December 16, 1997; FERC eLibrary Accession No. 19971223-0120.

[36] Letter signed by the Director of the Commission's Office of Pipeline Regulation, dated April 3, 1998; FERC eLibrary Accession No. 19980408-0242.

[37] NOPR, FERC Stats. & Regs. ¶ 32,696 at P 11, n.18 and Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 35.

[38] INGAA's Request for Rehearing at 32. INGAA also claims that based on the cited letter orders issued under delegated authority, members of the Commission's staff were aware, when the Commission issued Order Nos. 603 and 603-A in 1999, that companies were making auxiliary installations outside existing rights-of-way and workspaces. *Id*. at 11 and 43.

submitting its petition, which was that members of the Commission's staff were taking the position in discussions with industry representatives that section 2.55(a) only applies to auxiliary facilities installed in existing rights-of-way using previously approved work spaces.[39] Further, while INGAA's petition emphasized that some companies have relied in good faith on the misunderstanding that section 2.55(a) allows auxiliary facilities to be installed in new areas, INGAA's petition did not identify and we are not aware of any specific instances where companies have disregarded the guidance offered by Commission staff.

30. In any event, our review of the two cited letter orders was sufficient to establish that if staff concluded in those situations that the companies could rely on section 2.55(a) to build auxiliary facilities outside the existing rights-of-way, then those particular staff interpretations were in error. While staff makes every effort to accurately reflect the Commission's practice, procedures, policy, and regulatory requirements, staff's statements of opinion and regulatory interpretations, as INGAA and the industry it represents are well aware, are not binding on the Commission. Further, neither of the two unpublished letter orders cited by INGAA explicitly articulates a policy of allowing section 2.55(a) facilities outside an established project boundary or has any other precedential value, and INGAA provides no other evidence to support what it claims is the "plain and universal understanding of [section 2.55(a)]."[40] We are unaware of any other staff opinions or issuances under delegated authority, much less any determinations

[39] INGAA's April 2, 2012 Petition at 1.

[40] INGAA's Request for Rehearing at 4.

by the Commission itself, that provide support for INGAA's assertions that our Final Rule announced a sharp departure from prior Commission policy and imposed, rather than clarified, the spatial constraints on section 2.55(a) facilities.

31. In clarifying the spatial constraint for section 2.55 facilities, we commented in the Final Rule that absent such a constraint, companies could traverse and disturb unexamined areas. Specifically, we explained that our goal is to ensure that the authorization provided by section 2.55 does not inadvertently work to deprive the Commission of the opportunity to conduct an environmental review and impose appropriate mitigation measures in any situation where a company's construction activities may have adverse environmental impacts. Thus, the regulations provide that even when all planned auxiliary facilities can be located entirely within an existing right-of-way, if a company plans to construct the auxiliary facilities in conjunction with other construction activities proposed in a case-specific certificate application or under the blanket certificate regulations' prior notice provisions, the company may not undertake the section 2.55 construction until the auxiliary facilities have been identified and considered by the Commission in its environmental review in the proceeding on the other proposed facilities and the other facilities have been authorized.[41]

32. INGAA replies that independent of the Commission's requirements, companies must comply with environmental laws imposed by other federal and state authorities, and argues that in the past these other environmental laws have provided satisfactory

[41] 18 CFR 2.55(a)(2)(ii) and (iii) (2014). *See* Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 50.

environmental oversight of companies' auxiliary installation projects outside existing rights-of-way.[42] INGAA asserts, therefore, that there is no reason for the Commission to conduct NEPA reviews before companies undertake auxiliary installations involving construction activities that will disturb areas not previously studied by the Commission.

33. We have NEPA responsibilities with respect to construction activities that companies undertake based on Commission-granted authorization, and we cannot waive these responsibilities solely because other agencies may have complementary or overlapping NEPA responsibilities of their own. INGAA objects to what it describes as the Commission's effort to limit the location of "auxiliary installations through arguments based on a different pipeline activity, the replacement of facilities," and asserts that replacement and auxiliary "activities are materially different and historically have been treated differently by the Commission."[43] However, while section 2.55(b) replacement projects are generally of a larger scale than section 2.55(a) auxiliary installations and thus are more likely to involve significant ground disturbance, many activities that can qualify for construction under section 2.55(a), for example, installation of pig launchers/receivers and cathodic protection equipment, can also involve significant ground disturbance, as well as visual, noise, and other impacts. Thus, if a company will need to use new right-of-way or other areas that have not been authorized by the Commission to construct auxiliary facilities, the company cannot proceed with the construction under section 2.55. Rather, the company must proceed under the Part 157

[42] INGAA's Request for Rehearing at 34.

[43] *Id.* at 8.

blanket certificate regulations or, if the project will not qualify under the blanket certificate regulations, then file an application for case-specific certificate authorization. By way of comparison, whereas section 2.55 does not include environmental conditions because it does not provide any authorization for construction activities outside areas that have been or will be subject to the Commission's environmental review, the blanket certificate regulations, which do contemplate such activities, include environmental conditions in section 157.206(b) requiring pipeline companies to comply, prior to commencing construction, with numerous environmental laws enforced by other agencies to ensure that sensitive environmental areas will not be adversely impacted by activities, including activities under the automatic provisions, that will involve ground disturbance or changes to operational air and noise emissions.[44] Section 2.55(a) does not include such specific requirements because we did not contemplate that auxiliary facilities would be located outside of areas that either have been or will be subject to the Commission's environmental study and any appropriate environmental mitigation measures.

34. Section 2.55 and blanket certificate authority embody two different types of certificate authorization. The certificate authority for auxiliary installations under

[44] Sections 157.206(b)(2)(i) – (xii) require that companies planning to undertake construction activities under Part 157 blanket certificate authority obtain, prior to commencing construction, any necessary permits or approvals from and comply with conditions imposed by the agencies charged with specific NEPA responsibilities under the Clean Water Act, Clean Air Act, National Historic Preservation Act, Archeological and Historic Preservation Act, Coastal Zone Management Act, Endangered Species Act, Wild and Scenic Rivers Act, National Wilderness Act, National Parks and Recreation Act, the Magnuson-Stevens Fishery Conservation and Management Act, and executive orders requiring evaluation of the potential effects of actions on floodplains and wetlands.

section 2.55(a), which does not include any specific environmental conditions, derives from either (1) the certificate for the existing facilities to be augmented, and thus the auxiliary facilities can only use areas previously authorized by the Commission for the construction of the existing facilities, or (2) the certificate authority being sought by the company for other new facilities, in which case both the new facilities and the planned auxiliary facilities will be subject to an environmental review by the Commission. While blanket certificate authority can be relied upon to obtain new right-of-way and to use previously undisturbed areas, any blanket certificate construction that would involve ground disturbance or changes to operational air and noise emissions will be subject, as discussed above, to section 157.206(b)'s environmental conditions. In addition, we note that a company's prior notice blanket certificate activities, even those that will be confined entirely to an existing right-of-way previously studied and authorized by the Commission, can be protested by staff based on environmental concerns, thus subjecting the proposal to additional review.[45]

[45] *See, e.g.*, *Northwest Pipeline Corporation*, 68 FERC ¶ 61,336, at 62,345-46 (1994) (Commission staff protested a construction proposal filed under the prior notice provisions, withdrawing the protest after its environmental concerns were addressed); *Williams Natural Gas Company*, 66 FERC ¶ 62,114 (1994) (following staff's protest to Williams' prior notice filing proposing to abandon 19 miles pipeline by removal, the Commission's Director of the Office of Pipeline and Producer Regulation authorized the activity subject to Williams' implementation of certain mitigation measures and environmental conditions); and *Natural Gas Pipeline Company of America*, 64 FERC ¶ 62,041 (1993) (Commission staff protested Natural's prior notice filing proposing to abandon delivery taps, delaying authorization of the abandonment until Natural received a permit from the U.S. Environmental Protection Agency which included conditions addressing the disposal of material potentially contaminated with polychlorinated biphenyls).

35. In practice, we have highlighted the difference in section 2.55 and blanket certificate activities by rejecting companies' reliance on section 2.55(a) to install facilities that do not meet the siting or function requirements, thereby requiring the companies to rely on blanket authorization or case-specific certification for such facilities.[46]

36. In seeking to bolster their position, commenters on the NOPR posited extreme situations, arguing for example, that since the Commission included "buildings" as an example of a 2.55(a) facility, and a new corporate headquarters cannot be constructed entirely within an existing pipeline right-of-way, the Commission could not have intended 2.55(a) facilities to be confined to existing rights-of-way. The Commission responded to this in the Final Rule by noting that a corporate headquarters is not a natural gas facility; thus, such construction does not require any certificate authorization under the NGA.[47] On rehearing, INGAA turns its focus to communication towers, arguing that since they, like office buildings, may be located remotely from the pipeline; we should find that they, too, are exempt from Commission jurisdiction. We do not agree.

37. A communication tower constructed by an interstate pipeline company for the purpose of supporting equipment used to monitor (and possibly control) the pipeline system's operation *is* a natural gas facility subject to our jurisdiction under the NGA. If the tower (or a building, or any facility or equipment which serves exclusively to make a pipeline's operations more efficient or economical) can be installed within an existing (or

[46] *See, e.g.*, *Algonquin Gas Transmission Company*, 57 FERC ¶ 61,052 (1991); *West Texas Gas, Inc.*, 62 FERC ¶ 61,039 (1993); and *Natural Gas Pipeline Company of America*, 114 FERC ¶ 61,061 (2006).

[47] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 22 and n.39.

proposed) authorized area, the company can proceed under section 2.55(a). However, if it will be located outside an authorized area, then that facility must be constructed under either blanket or case-specific certificate authority. Although some of the types of facilities named in section 2.55(a) have evolved significantly since 1949, the function of the named facilities remains the same: they are incidental additions to an interstate transmission system, dependent upon and integrated into that larger system. Further, section 2.55(a) describes qualifying facilities as "[i]nstallations … which are merely auxiliary or appurtenant to an authorized or proposed transmission pipeline system," indicating that section 2.55(a) is only intended to apply to facilities that will be attached to or adjacent to the components of the system they support. When a company is able to construct facilities meeting this description in an area that has been or will be reviewed for environmental purposes by the Commission, then the company may proceed with such construction under section 2.55(a). However, it may be the case in many instances that a company will want or need to locate some of the auxiliary facilities specifically listed in section 2.55(a) – in particular, communication, pig launching/receiving, and cathodic protection equipment – in locations requiring the use of additional rights-of-way, larger easements, or temporary work spaces that have not been included previously in an environmental review performed by the Commission. In those situations, the companies will need to proceed under an alternative form of authorization (i.e., under a blanket or case-specific certificate).[48]

[48] Our discussion here should provide adequate clarification for INGAA, which professes to be puzzled by our statement in the Final Rule that although "types of

38. National Fuel asks whether "improvements such as buildings, roads, and parking lots for central offices, field and other offices, warehouses, [and] equipment yards" can qualify under section 2.55(a).[49] We clarify they can, provided they meet section 2.55's location and function requirements. We note the Final Rule revised the section 157.202 definition of "eligible facility" to specify that auxiliary installations that will not qualify under section 2.55(a) because they will not satisfy that section's location or work space constraints may qualify for authorization under a company's blanket certificate. Companies will need to seek case-specific authorization for auxiliary facilities that are also not eligible for blanket authorization (e.g., facilities that would exceed the cost limits specified in section 157.208(d)).

39. Finally, we note that because section 2.55 facilities are constructed and operated under the certificate authorization for the facilities that they augment or replace, prior authorization under NGA section 7(b) is necessary before a pipeline company can abandon auxiliary and replacement facilities constructed under section 2.55. INGAA complains that we neglected to address the "burden of seeking such abandonment authority."[50] The requirement for prior authorization under section 7(b) to abandon certificated facilities is statutory and cannot be waived by the Commission. Further, while section 157.202(b)(3) of the blanket certificate regulations states that for purposes

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facilities are specifically listed in section 2.55(a) [this] does not mean that companies can necessarily rely in all instances on section 2.55(a) to install them." Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 25.

[49] National Fuel's Request for Rehearing at 6.

[50] *See* INGAA's Request for Rehearing at 51.

of those regulations "'Facility' does not include the items described in section 2.55," we explained in the Final Rule that section 157.202(b)(3) only prevents companies from relying on their Part 157 blanket certificates to undertake activities, i.e., the construction and operation of qualifying auxiliary and replacement facilities, that qualify under section 2.55.[51] We clarify here that section 157.202(b)(3) of the blanket certificate regulations does not preclude a pipeline company from relying on its Part 157 blanket certificate and the abandonment authority provided by section 157.216 to abandon facilities constructed under section 2.55, provided the abandonment activity will meet the applicable environmental conditions and cost limits (i.e., the facilities to be abandoned could be constructed under the blanket certificate regulations' current cost limits, regardless of what the original construction costs may have been). We expect that activities to abandon most auxiliary facilities and many replacement facilities constructed under section 2.55 can satisfy these conditions, and thus enable companies to go forward with abandonments under section 157.216 of the blanket certificate regulations.

3. INGAA's Response to the NOPR

40. INGAA objects to our treating its January 22, 2013 submission in response to the NOPR as a comment on the NOPR rather than as a request for rehearing of the underlying rejection of INGAA's position regarding the scope of authority provided by section 2.55(a).

41. As described in the Final Rule and above, the NOPR was issued in response to INGAA's petition requesting that we "affirm" that installations of auxiliary facilities

[51] *See* Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 46.

under section 2.55(a) are not restricted to the rights-of-way and temporary work spaces used to construct the existing facilities that will be augmented by the auxiliary facilities. We declined to do so, explaining in the NOPR that the Commission has never viewed section 2.55(a) as providing any authorization for pipeline companies to construct auxiliary facilities outside areas subject to environmental review and authorization by the Commission. On January 22, 2013, INGAA file a pleading styled "Request for Rehearing." However, while the Commission's Office of the Secretary issued a tolling order (*Order Granting Rehearing for Further Consideration*) on February 20, 2013, such an order is not dispositive of the procedural posture of the underlying pleading (i.e., issuance of a tolling order in response to a submission styled as a request for rehearing does not constitute a finding by the Commission that rehearing indeed lies on the issues raised in the filing).

42. In this instance, as noted in the Final Rule, the Commission ultimately determined to treat the January 22, 2013 pleading as comments on the NOPR, explaining that the NOPR's clarification of the existing scope of the authority bestowed by section 2.55(a) did not "effect any change [in our regulations]; rather, it articulated existing, long-standing constraints and obligations with respect to auxiliary installations. Because the NOPR does not constitute an instant Final Rule [as alleged by INGAA], we find no cause to consider requests for rehearing in response to the NOPR."[52] The Commission's procedural choice to issue a NOPR in response to INGAA's petition and to treat its

[52] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at n.19.

January 22, 2013 submission as comments rather than as a rehearing request did not deprive INGAA of any due process. Issuance of the NOPR provided INGAA the opportunity to present arguments that the Commission should amend section 2.55(a) to expand the scope of construction that can be done under that section. We also considered and responded to the concerns and arguments presented in INGAA's January 22, 2013 filing in the Final Rule. Further, our issuance of the NOPR provided the notice and comment forum which INGAA urged was required before more rigorous enforcement of the section 2.55(a) locational restrictions. As explained in the Final Rule, we do not intend to look back in order to determine whether installation of auxiliary facilities prior to the effective date of the Final Rule conform to section 2.55(a) siting limitations or pursue any enforcement action with respect to any installations prior to the effective date of the Final Rule that do not conform to section 2.55(a) siting limitations, unless it comes to our attention that remedial environmental measures need to be taken.[53]

4. Compliance with Executive Orders

43. INGAA repeats its claim that our action is inconsistent with Executive Orders directing agencies to avoid unduly burdensome regulations.[54] The impetus behind and function of section 2.55 is to reduce regulatory burdens by providing a means for companies to install facilities without the need to obtain blanket or case-specific certificate authorization and our clarification of its operation imposes no new burden. We acknowledged that some additional burden will be associated with new landowner

[53] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 50.

[54] INGAA's Request for Rehearing at 41.

notification requirements adopted by the Final Rule, but we found that the anticipated benefits justify this new regulation. Further, as discussed below, in response to comments on the landowner notification requirement adopted by the Final Rule, we significantly reduce the number of instances in which companies will be required to contact landowners before entering upon their properties. These revisions will substantially reduce the burden associated with providing prior notification. Finally, as previously observed, the Commission has directed staff to perform an internal assessment of the effectiveness of our regulations, as we are continually seeking to streamline our regulations in order to foster competitive markets, facilitate enhanced competition, and avoid imposing undue burdens on regulated entities or unnecessary costs on those entities or their customers.[55]

B. Landowner Notification

44. The Final Rule adopted regulations requiring companies to notify landowners prior to initiating auxiliary and replacement projects or maintenance activities to give landowners adequate notice (to the extent practicable) of a company entering onto their property in order to avoid potential conflict between landowners and gas companies. Specifically, the Final Rule added a new section 2.55(c) and revised existing section 380.15(c) to require a natural gas company to make a good faith effort to notify landowners at least five days in advance of commencing an auxiliary or replacement project or of any maintenance that will cause ground disturbance. The notice must include: (1) a brief description of the activity to be conducted or facilities to be added or

[55] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 44.

replaced and the expected effects on landowners; (2) the name and phone number of a company representative who is knowledgeable about the project; and (3) a description of the Commission's Dispute Resolution Division Helpline and its phone number, as explained in section 1b.21(g) of the Commission's regulations.

1. Waiver of Five-Day Prior Notice

45. INGAA requests we clarify that so long as a company provides landowners with at least five days advance notice, landowners can waive all or part of the post-notice waiting period. INGAA states that allowance for the waiver would be similar to the landowner notice waiver provision under the blanket certificate regulations, which allows a company that has given a landowner notice of a project to proceed before the end of the required post-notice waiting period, provided the landowner gives written approval to do so.[56]

46. We agree that landowners, once notified, should be allowed to waive any portion of the post-notice waiting period by giving written approval. Accordingly, we will modify sections 2.55(c) and 380.15(c) to permit landowners to waive the post-notice waiting period.

2. Emergency Exemption to Notice Requirement

47. The Final Rule provided that "[f]or activities required to respond to an emergency, the five-day prior notice period does not apply" under sections 2.55 and 380.15,[57]

[56] INGAA's Request for Rehearing at 15 (citing 18 CFR 157.203(d)(1) (2014)). Section 157.203 of the Commission's regulations requires companies to give landowners notice at least 45 days prior to commencing construction under its automatic blanket certificate authority. A landowner may waive the 45-day prior notice requirement in writing so long as notice has been provided.

[57] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 63.

reasoning that companies should not hesitate to undertake immediate action in an emergency situation. However, that any events that do not necessitate immediate access to system facilities would still be subject to a minimum five-day prior notice.[58]

48. INGAA and National Fuel request that we clarify the scope of the emergency exemption provided by sections 2.55(c) and 380.15(c) by revising those sections to be consistent with the language in section 157.203(d)(3) of the blanket certificate regulations.[59] Specifically, section 157.203(d)(3) states that the requirement for prior notification to landowners does not apply when a company needs to initiate construction activities under section 2.55 or maintenance activities under section 380.15 done for safety, DOT compliance, or environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company.[60] We will revise sections 2.55(c) and 380.15(c) as requested. However, the exemption from the requirement for prior notice to landowners is only intended to apply in unforeseen situations where a company needs to take immediate action to correct a sudden incompatibility with DOT safety requirements or to avoid imminent danger or harm to life, property, or the environment. Therefore, while many routine and scheduled activities are safety-related or necessary to maintain or come into compliance with DOT

[58] *Id*.

[59] INGAA's Request for Rehearing at 16 and National Fuel's Request for Rehearing at 3.

[60] 18 CFR 157.203(d)(3) (2014).

regulations, such routine, foreseeable, or scheduled activities are not emergencies, and are not exempt from the requirement for prior notice to landowners.

49. National Fuel asserts that if an emergency activity is exempt from the prior landowner notification requirements under section 2.55(c) or section 380.15(c), there should be no need for a pipeline to rely on and comply with the provisions of Part 284, Subpart I, of the Commission's regulations.[61] We agree and clarify that when companies seek to act under section 2.55 or section 380.15(c), and need to act promptly to respond to an emergency, and are thus unable to provide landowners with at least five days advance notice, then the emergency nature of the action functions as a waiver of the prior notice requirement. Thus, provided that with the exception of prior notice, an emergency response action meets all other section 2.55 or section 380.15(c) requirements, a company may proceed under section 2.55 or section 380.15(c). However, any emergency response action that would not qualify under section 2.55 or section 380.15(c) (e.g., construction which would take place outside previously approved areas), would require a company to proceed under other emergency authority, such as Part 284, Subpart I.

3. Affected Landowners

50. The Final Rule stated that prior notification be provided to "affected landowners," described in sections 2.55(c) and 380.15(c), as property owners that will be "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),

[61] National Fuel's Request for Rehearing at 4.

access roads, pipe and contractor yards, and temporary work space."[62] INGAA and National Fuel request that the Commission clarify that "affected landowners" only include landowners that will be subject to ground disturbance on their properties, and not landowners whose property is merely crossed and not otherwise disturbed.[63]

51. As proposed in the NOPR, section 2.55(c) and 380.15(c) would have required a company to give prior notification to all landowners whose property would be used or crossed. As proposed in the NOPR, sections 2.55(c) and 380.15(c) also would have required a company to give prior notification to owners of abutting properties and the owners of residences within 50 feet.[64] However, in response to comments on the NOPR, the Final Rule revised sections 2.55(c) and 380.15(c) to state that companies are only required to give prior notification to the owners of those properties that are crossed or used when companies perform ground-disturbing activities.[65] In response to INGAA's and National Fuel's comments, we find it is appropriate to further revise sections 2.55(c) and 380.15(c) to specify that companies must provide prior notice only to the owner of property used for a ground-disturbing activity, and not to landowners whose property is crossed en route to the site of that activity.[66]

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[62] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 56.

[63] INGAA's *Request for Rehearing* at 16-17 and National Fuel's Request for Rehearing at 4-5.

[64] NOPR, FERC Stats. & Regs. ¶ 32,696 at P 30.

[65] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 56.

[66] We note that this clarification does not exempt companies from complying with the terms of any existing easement agreements or any applicable state or local laws

52. INGAA and National Fuel also request that the Commission clarify that the five-day prior notice requirement does not apply when the ground-disturbing activity will occur entirely within the fence line of an existing above-ground facility site.[67] In situations where a company's facilities are located inside a fenced area on property that the company does not own but to which it has easement rights, we agree that a requirement of prior notice to the landowner is not necessary if all ground disturbance will be confined to within the fenced area, and we will revise sections 2.55(c)(1) and 380.15(c)(1) accordingly. When any ground disturbance caused by a company's activities to install or replace equipment under section 2.55 or by equipment associated with maintenance activities under section 380.15 is confined inside the company's fenced-in easement areas, e.g., a compressor station or site used for pigging equipment, the activities do not present the same potentially hazardous situations or inconvenience to a landowner as ground-disturbing activities in an unfenced area, e.g., the replacement of pipe under the landowner's driveway. However, even when companies' ground-disturbing activities will be within their fenced-in easement areas, as a matter of courtesy, we encourage companies to give prior notice to landowners to the extent practicable.

4. One-Call Obligations

53. INGAA requests we clarify that the requirement for prior notice to landowners adopted by the Final Rule for activities under sections 2.55 and 380.15 does not apply to

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governing the use of or access to property not within a company's rights-of-way or facility sites.

[67] *Id.*

"One Call" obligations.[68] INGAA states that such programs require companies to mark their facilities within 48 to 72 hours of receiving notification that a landowner or third party will be digging near natural gas facilities to prevent damage. Therefore, INGAA argues that a company cannot wait five days to comply with its "One Call" obligations.[69] We agree that the "One Call" obligations do not fall under the Final Rule's landowner notification requirements. This is because merely marking the location of buried natural gas facilities (typically with flags or spray paint) does not involve a ground disturbance. However, in the event a company's response to a "One Call" request results in ground-disturbing activity to locate, relocate, or isolate any of its facilities,[70] then the exemption provided in the prior notice provisions for emergency activities would apply.

5. Burden Resulting from the Landowner Notification Requirement

54. INGAA claims that we have not met our obligation to estimate the burden of the Final Rule's notification requirement in a way that is not arbitrary or capricious, and then weigh the benefit of the rule against that burden.[71] In this regard, National Fuel states that

[68] The "One Call" program is a service used by public utilities and some private sector companies (*e.g.* oil pipeline and cable television) to provide pre-construction information to contractors or other maintenance workers on the location of underground pipes, cables, and culverts. Similar utility-marking programs go by different names in different regions.

[69] INGAA's Request for Rehearing at 17.

[70] National Fuel notes that "to determine and mark the precise location of its facilities … may require some excavation." National Fuel's Request for Rehearing at 3-4.

[71] INGAA's Request for Rehearing at 17-18.

our use of an estimate based solely on the number of section 2.55(a) auxiliary installation activities performed each year (which, it points out, are construction activities) to derive a reasonable estimate of the number of ground-disturbing activities under section 2.55 and section 380.15 that would require landowner notification, is arbitrary and too low.[72]

55. To estimate the burden of the Final Rule's section 2.55 and section 380.15 landowner notification requirements, Commission staff surveyed nine jurisdictional companies, and based on that sample, estimated that all 165 jurisdictional companies perform approximately 7,605 auxiliary installation projects each year under section 2.55(a), including activities that do not involve ground disturbance.[73] While we recognize that the number of maintenance activities undertaken by a company may far exceed the number of its auxiliary installations, we believe ground-disturbing activities for maintenance purposes under section 380.15, like ground-disturbing activities to install auxiliary facilities under section 2.55(a) and replace facilities under section 2.55(b), are significantly fewer in number than the activities under those sections that do not involve ground disturbance. We also believe that ground-disturbing activities, including ground-disturbing maintenance, generally take advance planning.[74] Further, companies have long been subject to the requirement to give landowners notice of certain planned activities, and therefore presumably already have the information, personnel, and other resources

[72] National Fuel's Request for Rehearing at 6.

[73] Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 77 and n.115.

[74] NOPR, FERC Stats. & Regs. ¶ 32,696 at P 39.

necessary to enable them to satisfy those other, long-standing landowner notification requirements.

56. In view of these considerations, we believe our estimate in the Final Rule of the total number of all companies' annual auxiliary installations under section 2.55(a) that involve ground disturbance was reasonable, and that it also was reasonable to multiply that number by two to estimate the total annual number of activities -- including all auxiliary installations under sections 2.55(a), replacement projects under section 2.55(b), and maintenance activities under section 380.15 -- that will involve ground disturbance and will therefore require prior notice to landowners. Further, we believe the reasonableness of our burden estimate in the Final Rule is also supported by the clarification in this order that ground-disturbing activities are exempt from the prior notice requirement in emergency situations and in situations where all ground disturbances will be confined entirely to areas within the fence line of an existing above-ground facility site.

57. National Fuel states that every year it performs "thousands" of ground-disturbing maintenance activities that will now require landowner notification.[75] National Fuel fears that activities such as maintaining existing access roads and existing erosion control structures will require it to satisfy unduly burdensome landowner notification requirements.[76] We recognize that some activities to maintain existing access roads (e.g., scraping to remove old asphalt and resurfacing) or existing erosion control structures

[75] National Fuel's Request for Rehearing at 6.

[76] *Id.*

(e.g., pushing back soil or rocks that were intended to prevent erosion) may not involve a significant amount of ground disturbance. However, such activities require the use of bulldozers, backhoes, dump trucks and other equipment that can present safety hazards and cause inconvenience to landowners. Therefore, we will not exempt ground-disturbing activities under section 380.15 to maintain existing facilities from the landowner notification requirement.

58. While INGAA and National Fuel insist that we have underestimated the burden that the landowner notification will cause the industry, this assertion assumes that most jurisdictional companies were not already notifying landowners when work is to be performed on their property, whether such notification is required or not.

59. Section 157.6(d)(1) of the regulations requires applicants for case-specific certificate authority for construction projects to notify all landowners that will be affected by the project. Section 157.203(d) of the blanket certificate regulations requires that companies give landowners notice of all projects subject to those regulations' prior notice provisions. Thus, companies likely have a database of landowners dating from the time many of their facilities were originally put in service. As discussed in the Final Rule, we believe most companies maintain and update these databases because, regardless of their size, they need to know (to enhance, replace, and maintain their facilities and to respond to emergencies) precisely where their rights-of-way lie, how to get to their facilities, and how to contact the owners of the properties on which their facilities are located.[77] As also

[77] *See* Order No. 790, FERC Stats. & Regs. ¶ 31,351 at P 79.

discussed in the Final Rule, companies need to periodically update landowner information to be able to comply with DOT's Pipeline and Hazardous Materials Safety Administration's (PHMSA) biennial reporting requirement.[78] Therefore, to identify the landowners to notify, companies will not be starting from scratch, but instead should be able to rely on the landowner records previously compiled to satisfy the Commission's and PHMSA's notification requirements. Since PHMSA's notification requirement is ongoing, a company's efforts to update portions of its landowner database as needed to meet the section 2.55 and section 380.15 notice provisions can be expected to result in a corresponding reduction in the company's efforts necessary to comply with PHMSA's notification requirement.

60. Further, comments on the NOPR call attention to some companies' ongoing community relations programs, which like the required PHMSA report, serve to inform landowners of their plans for construction and maintenance activities in coming months.[79] While these notifications generally do not include specific details regarding the work that may take place on a landowner's property and only provide an approximate time period for when the work will be done, companies nevertheless have to identify landowners to send out these notifications. Companies should be able to use landowner lists developed

[78] *Id*.

[79] *See, e.g.*, Golden Triangle Storage, Inc.'s March 5, 2013 Comments on the NOPR at 4; INGAA's March 5, 2013 Comments on the NOPR at 13-14; MidAmerican Energy Pipeline Group's March 5, 2013 Comments on the NOPR at 4; National Fuel's March 5, 2013 Comments on the NOPR at 4; Southern Star Central Gas Pipeline, Inc.'s March 5, 2013 Comments on the NOPR at 6-7; and WBI Energy Transmission Inc.'s March 5, 2013 Comments on the NOPR at 7.

in connection with community relations programs and in conjunction with compliance with PHMSA requirements as a basis for meeting the prior notice requirements of sections 2.55(c) and 380.15(c). In our burden estimate, we did not attempt to account for lists that companies may have on hand to send information to landowners as part of community relations or PHMSA compliance.

C. Consistency with the Commission's Regulations

61. INGAA requests that the Commission revise certain regulations to ensure regulatory consistency as a result of the Final Rule. INGAA notes that section 157.206(b)(1) of the Commission's regulations for blanket certificate projects includes a general reference to section 380.15[80] and proposes this be revised to specifically refer to sections 380.15(a) and (b). We agree and will revise section 157.206(b)(1) accordingly. This order and the Final Rule reduced the number of landowners to which the NOPR would have required that companies give prior notice for purposes of section 2.55 and section 380.15 activities by modifying the definition of "affected landowners." "Affected landowners" now excludes owners of properties that will need to be crossed but not otherwise disturbed, as well as owners of abutting properties and owners of properties that contain residences within 50 feet of planned work areas where no ground-disturbing work will occur; in contrast the blanket certificate regulations' landowner notification requirement relies on the definition of affected landowners in section 157.6(d)(2) of the regulations, which includes these additional property owners. Further, section 157.203(d)(1) requires at least 45 days prior notice to

[80] INGAA's Request for Rehearing at 19-20.

landowners for automatic blanket projects,[81] while the new landowner notification requirement for section 2.55 and section 380.15 activities requires a minimum of only five days prior notice.[82]

62. INGAA also notes that the Final Rule replaced the NOPR's proposed term "original" in section 2.55(b)(1)(ii) with the term "existing" but did not make similar changes to Appendix A of Part 2. For consistency, INGAA requests that the Commission replace the term "original" with "existing" in Appendix A of Part 2.[83] We agree and will revise Appendix A of Part 2.

III. Information Collection Statement

63. The Paperwork Reduction Act (PRA)[84] requires each federal agency to seek and obtain Office of Management and Budget (OMB) approval before undertaking a collection of information directed to ten or more persons or contained in a rule of general

[81] The requirement in section 157.203(d)(1) for at least 45 days prior notice is separate from the requirement in section 157.205(d)(2) that projects exceeding the automatic cost limit be publically noticed by the Commission at least 60 days in advance, with the project sponsor to notify affected landowners the earlier of (1) three days from when the Commission assigns a docket number to the proposed project or (2) when the project sponsor initiates easement negotiations for the proposed project.

[82] As previously discussed, whereas section 2.55 and section 380.15 of the regulations do not include any specific environmental conditions because activities under those sections are limited to areas subject to environment review by the Commission, an activity cannot go forward under the blanket certificate regulations unless the company has satisfied all of the specific environmental conditions set forth in section 157.206 of the blanket certificate regulations.

[83] INGAA's Request for Rehearing at 20.

[84] 44 U.S.C. 3501-3520 (2012).

applicability.[85] The OMB's regulations implementing the PRA require approval of certain information collection requirements imposed by agency rules.[86]

64. The Commission submitted the Final Rule's information collection statement for landowner notification requirements under sections 2.55, 157.203(d)(3)(i), and 380.15 of the regulations to OMB for its review and approval, and OMB granted approval under OMB Control No. 1902-0128. While this rule clarifies certain aspects of the existing information collection requirements for landowner notification, it does not add to these requirements. Accordingly, a copy of this Final Rule will be sent to OMB for informational purposes only.

IV. Environmental Analysis

65. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant adverse effect on the human environment.[87] The Commission has categorically excluded certain actions from these requirements as not having a significant effect on the human environment.[88] Generally, the regulatory actions taken in this rulemaking proceeding fall within the categorical exclusions in the Commission's regulations for actions that are clarifying,

[85] OMB's regulations at 5 CFR 1320.3(c)(4)(i) (2014) require that "[a]ny recordkeeping, reporting, or disclosure requirement contained in a rule of general applicability is deemed to involve ten or more persons."

[86] 5 CFR 1320 (2014).

[87] *Regulations Implementing the National Environmental Policy Act* of 1969, Order No. 486, 52 FR 47897 (December 17, 1987), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶ 30,783 (1987).

[88] 18 CFR 380.4 (2014).

corrective, or procedural and for information gathering, analysis, and dissemination.[89] Accordingly, an environmental review is not necessary and has not been prepared in connection with this rulemaking.

V. Document Availability

66. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (http://www.ferc.gov) and in FERC's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington, DC 20426.

67. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

68. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

[89] 18 CFR 380.4(a)(1) and (5) (2014).

VI. Effective Date and Congressional Notification

69. These regulations are effective [**insert date 60 days from publication in *Federal Register***]. The Commission has determined that this rule is not a "major rule" as defined in section 351 of the Small Business Regulatory Enforcement Fairness Act of 1996.

List of subjects

18 CFR Part 2

Administrative practice and procedure, and Reporting and recordkeeping requirements.

18 CFR Part 157

Administrative practice and procedure, Natural gas, and Reporting and recordkeeping requirements.

18 CFR Part 380

Environmental impact statements, and Reporting and recordkeeping requirements.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission amends Parts 2, 157, and 380, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 2 – GENERAL POLICY AND INTERPRETATIONS

1. The authority citation for Part 2 continues to read as follows:

Authority: 5 U.S.C. 601; 15 U.S.C. 717-717z, 3301-3432; 16 U.S.C. 792-828c, 2601-2645, 42 U.S.C. 4321-4370h, 7101-7352.

2. Amend § 2.55 by revising paragraph (c) to read as follows:

§ 2.55 Definition of terms used in section 7(c).

* * * * *

(c) * * *

(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 used and subject to ground disturbance as a result of the proposed activity, at least five days prior to commencing any activity under this section. A landowner may waive the five-day prior notice requirement in writing, so long as the notice has been provided. No landowner notice under this section is required: (i) if all ground disturbance will be confined entirely to areas within the fence line of an existing above-ground site of facilities operated by the company; or (ii) for activities done for safety, DOT compliance, or environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company. 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.

(2) "Affected landowners" include owners of interests, as noted in the most recent county/city tax records as receiving tax notice, in properties (including properties subject to rights-of-way and easements for facility sites, compressor stations, well sites, and all above-ground facilities, and access roads, pipe and contractor yards, and temporary work space) that will be directly affected by (i.e., used) and subject to ground disturbance as a result of activity under this section.

3. Amend Appendix A to Part 2 to read as follows:

Appendix A to Part 2--Guidance for Determining the Acceptable Construction Area for Auxiliary and Replacement Facilities

These guidelines shall be followed to determine what area may be used to construct the auxiliary or replacement facility. Specifically, they address what areas, in addition to the permanent right-of-way, may be used.

An auxiliary or replacement facility must be within the existing right-of-way or facility site as specified by § 2.55(a)(1) or § 2.55(b)(1)(ii). Construction activities for the

auxiliary or replacement facility can extend outside the current permanent right-of-way if they are within the temporary and permanent right-of-way and associated work spaces authorized for the construction of the existing installation.

If documentation is not available on the location and width of the temporary and permanent rights-of-way and associated work spaces that were used to construct the existing facility, the company may use the following guidance for the auxiliary installation or replacement, provided the appropriate easements have been obtained:

a. Construction should be limited to no more than a 75–foot–wide right-of-way including the existing permanent right-of-way for large diameter pipeline (pipe greater than 12 inches in diameter) to carry out routine construction. Pipeline 12 inches in diameter and smaller should use no more than a 50–foot–wide right-of-way.

b. The temporary right-of-way (working side) should be on the same side that was used in constructing the existing pipeline.

c. A reasonable amount of additional temporary work space on both sides of roads and interstate highways, railroads, and significant stream crossings and in side-slope areas is allowed. The size should be dependent upon site-specific conditions. Typical work spaces are:

Item	**Typical extra area (width/length)**
Two lane road (bored)	25-50 by 100 feet.
Four lane road (bored)	50 by 100 feet.
Major river (wet cut)	100 by 200 feet.

Intermediate stream (wet cut)	50 by 100 feet.
Single railroad track	25-50 by 100 feet.

d. The auxiliary or replacement facility must be located within the permanent right-of-way or, in the case of nonlinear facilities, the cleared building site. In the case of pipelines this is assumed to be 50 feet wide and centered over the pipeline unless otherwise legally specified.

However, use of the above guidelines for work space size is constrained by the physical evidence in the area. Areas obviously not cleared during the existing construction, as evidenced by stands of mature trees, structures, or other features that exceed the age of the facility being replaced, should not be used for construction of the auxiliary or replacement facility.

If these guidelines cannot be met, the company should consult with the Commission's staff to determine if the exemption afforded by § 2.55 may be used. If the exemption may not be used, construction authorization must be obtained pursuant to another regulation under the Natural Gas Act.

PART 157 – APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PREMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

1. The authority citation for Part 157 continues to read as follows:

Authority: 15 U.S.C. 717-717z.

2. Amend § 157.206 by revising paragraph (b)(1) to read as follows:

§ 157.206 Standard Conditions.

* * * * *

(b) * * *

(1) The certificate holder shall adopt the requirements set forth in § 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.

* * * * *

PART 380 – REGULATIONS IMPLEMENTING THE NATIONAL ENVIRONMENTAL POLICY ACT

1. The authority citation for Part 380 continues to read as follows:

Authority: 42 U.S.C. 4321-4370h, 7101-7352; E.O. 12009, 3 CFR 1978 Comp., p. 142.

2. Amend § 380.15 by revising paragraph (c) to read as follows:

§ 380.15 Siting and maintenance requirements.

* * * * *

(c) * * *

(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 used and subject to ground disturbance as a result of the proposed activity, at least five days prior to commencing any activity under this section. A landowner may waive the five-day prior notice requirement in writing, so long as the notice has been provided. No landowner notice under this section is required: (i) if all ground disturbance will be confined entirely to areas within the fence line of an existing above-ground site of facilities operated by the company; or (ii) for activities done for safety, DOT compliance, or environmental or unplanned maintenance reasons that are not foreseen and that require immediate attention by the company. 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.

(2) "Affected landowners" include owners of interests, as noted in the most recent county/city tax records as receiving tax notice, in properties (including properties subject to rights-of-way and easements for facility sites, compressor stations, well sites, and all above-ground facilities, and access roads, pipe and contractor yards, and temporary work

space) that will be directly affected by (i.e., used) and subject to ground disturbance as a result of activity under this section.

* * * * *