

# Client Alert

Global Transactions Practice Group

May 20, 2016

## FERC Grants Extension of Time for Natural Gas Storage Company to Construct Expansion Facilities Over More Than 250 Comments in Opposition

On May 16, 2016, the Federal Energy Regulatory Commission granted Arlington Storage Company, LLC (Arlington) a two-year extension of time to construct a previously authorized underground natural gas storage expansion project.

*Arlington Storage Co., LLC*, 155 FERC ¶ 61,165. This seemingly routine action is significant because it signals that the Commission is not inclined to entertain opposition to the construction of natural gas infrastructure which continues to be expressed long after FERC has made its environmental determinations and issued an order authorizing project construction. FERC granted Arlington's extension request over often strident objections advanced in more than 250 comments in opposition filed by various individuals and organizations.

On May 15, 2014, FERC authorized Arlington to expand its Seneca Lake Storage Project, located in the Finger Lakes region in Schuyler County, New York, by constructing the Gallery 2 Expansion Project. *Arlington Storage Co., LLC*, 147 FERC ¶ 61,120 (2014) (Certificate Order). The Gallery 2 Expansion Project involves the conversion of two existing salt caverns once used for liquefied petroleum gas storage to natural gas storage service. The Gallery 2 Project will increase the Seneca Lake Storage Project's working gas capacity by a small amount – from 1.45 Bcf to 2.00 Bcf. The Certificate Order required that the authorized facilities be constructed and made available for service on or before May 15, 2016.

For more information, contact:

**James F. Bowe, Jr.**  
+1 202 626 9601  
[jbowe@kslaw.com](mailto:jbowe@kslaw.com)

**William E. Rice**  
+ 1 202 626 9602  
[wrice@kslaw.com](mailto:wrice@kslaw.com)

**King & Spalding**  
**Washington, D.C.**  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4707  
Tel: +1 202 737 0500  
Fax: +1 202 626 3737

[www.kslaw.com](http://www.kslaw.com)

Arlington filed a request for a two-year extension of time to construct the Gallery 2 Expansion Project on January 28, 2016. It explained that it was prepared to commence construction, but had not proceeded with construction because its application for an underground storage permit had not yet been acted on by the New York State Department of Environmental Conservation (New York DEC). Arlington observed that the New York DEC cannot issue this permit until it has received a report from the State Geologist and that the position of State Geologist has been vacant since mid-2013.

Comments opposing Arlington's extension request focused on environmental and safety issues said to be related to salt cavern storage of natural gas in New York's Finger Lakes region. The Commission found that these environmental and safety issues had been fully addressed in the certificate proceeding and concluded that the commenters' arguments addressing such issues constitute an improper collateral attack on the Certificate Order.

FERC routinely grants extensions of time to construct authorized facilities where the applicant can give a good reason for its failure to meet the originally established deadline. As it noted in its May 16 order, "[i]f a certificate holder files for an extension of time within a timeframe during which the environmental

and other public interest findings underlying the Commission's authorization can be expected to remain valid, the Commission generally will grant an extension of time if the movant demonstrates 'good cause.'" According to FERC, "'good cause' can be shown by a project sponsor demonstrating that it made good faith efforts to meet its deadline but encountered unforeseeable circumstances, such as difficulties in obtaining deliveries of needed materials or the discovery of cultural remains on an approved right-of-way." The Commission found that the New York DEC's inaction on Arlington's application for an underground storage permit was such an unforeseeable circumstance, and that Arlington's decision "to attempt to accommodate the processes of the New York DEC" by electing not to commence construction was reasonable.

Project opponents argued that Arlington had failed to make preparations for the commencement of construction or actively pursue an underground storage permit from the New York DEC. They asserted that Arlington therefore had not diligently sought to move forward with the Gallery 2 Expansion Project, as FERC precedent requires. FERC rejected this assertion, concluding instead that the commenters had provided no support for their allegations that Arlington had been less than diligent in its efforts. The Commission stated that it encourages project sponsors to cooperate with state and local agencies, and that providing more time for state and local agencies to act can be an appropriate basis for granting an extension of time. It also observed that Arlington has all property rights required for the Gallery 2 Expansion Project, a circumstance which distinguishes its case from another case in which the Commission had declined to grant a certificate holder an extension of time.

Project opponents argued that natural gas markets have changed since the time of the Certificate Order, and that as a result there is no longer any need for the Gallery 2 Expansion Project. The Commission dismissed this argument, and reiterated its Certificate Order conclusion that, notwithstanding Arlington's lack of precedent agreements, "Arlington has demonstrated sufficient need for the project, given it will have no identifiable adverse impacts on existing customers, other pipelines, landowners, or communities."

Some commenters offered information calling FERC's environmental and safety-related conclusions into question which they claimed had become available after the Certificate Order was issued. While observing that arguments based on this information constitute collateral attacks on the Certificate Order, the Commission nevertheless considered this "new" information. It concluded there were no changes in law or fact that would require reconsideration of its findings in the Certificate Order and related Environmental Assessment. The Commission found that cavern integrity was adequately evaluated in the Gallery 2 Expansion Project Environmental Assessment. Moreover, the Commission noted, the Certificate Order's engineering conditions require Arlington to conduct periodic assessments of cavern integrity. It dismissed a 2014 "quantitative risk analysis" of natural gas storage in Schuylar County as providing no new information specific to the safety of Arlington's project and facilities, and as not undercutting the extensive findings contained in its Environmental Assessment and the Certificate Order.

FERC's order granting Arlington's request for extension of time shows that the Commission is unwilling to reopen previously resolved certificate proceedings in response to continued public opposition. The order – which was issued by the full Commission, not by an office director – is unusual in the extent to which it presents detailed analyses of the justification for the extension request and of the arguments raised in opposition. It signals the Commission's resolve to stand by its environmental and technical analyses even in the face of aggressive and well-organized opposition. It may also suggest that FERC feels some sympathy for natural gas infrastructure developers encountering difficulty in obtaining state authorizations related to FERC-certificated projects.

King & Spalding LLP represented Arlington in the Gallery 2 Expansion Project certificate proceeding and in seeking an extension of time to construct the Project.

\* \* \*

*Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 900 lawyers in 18 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at [www.kslaw.com](http://www.kslaw.com).*

*This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising."*