

ORAL ARGUMENT NOT YET SCHEDULED

NO. 16-1329

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SIERRA CLUB, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

DUKE ENERGY FLORIDA, LLC, *et al.*,

Intervenors.

On Petition for Review of Orders of the Federal Energy Regulatory
Commission, 154 FERC ¶ 61,080 (Feb. 2, 2016) and
156 FERC ¶ 61,160 (Sept. 7, 2016)

PETITIONERS' OPENING BRIEF

Steven D. Caley
GreenLaw
State Bar of Georgia Building
104 Marietta Street, N.W.
Suite 430
Atlanta, Georgia 30303
(404) 659-3122, ext. 222
scaley@greenlaw.org

Elizabeth F. Benson
Sierra Club
2101 Webster Street
Suite 1300
Oakland, California 94612
(415) 977-5723
elly.benson@sierraclub.org

Counsel for Petitioners

**PETITIONERS' CERTIFICATE OF PARTIES, RULINGS,
AND RELATED CASES**

In accordance with D.C. Cir. Rule 28(a)(1), Petitioners submit this certificate of parties, rulings, and related cases.

1. Parties

Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper
Respondent Federal Energy Regulatory Commission

2. Intervenors

Sabal Trail Transmission, LLC
Transcontinental Gas Pipe Line Company, LLC
Florida Southeast Connection, LLC
Florida Power & Light Company
Duke Energy Florida, LLC

3. *Amici Curiae*

Florida Reliability Coordinating Council, Inc.

4. Rule 26.1 Disclosure Statement

Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper are non-profit organizations who have no parent companies, and there are no companies that have a 10 percent or greater ownership interest in them.

Sierra Club is a national non-profit organization dedicated to the protection,

preservation, and enjoyment of the environment. Flint Riverkeeper is a Georgia non-profit organization dedicated to the protection, preservation, and enjoyment of the Flint River and its watershed. Chattahoochee Riverkeeper is a Georgia non-profit organization dedicated to the protection, preservation, and enjoyment of the Chattahoochee River and its watershed.

5. Rulings under review.

Petitioners seek review of two orders issued by the Respondent Federal Energy Regulatory Commission:

a. Order granting certificates of public convenience and necessity authorizing construction and operation of the Southeast Market Pipelines Project (“Project”) to Florida Southeast Connection, LLC (“Florida Southeast”), Transcontinental Gas Pipe Line Company, LLC (“Transco”), and Sabal Trail Transmission, LLC (“Sabal Trail”), *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 (Feb. 2, 2016) (JA____); and

b. Order denying Petitioners’ Request for Rehearing, *Florida Southeast Connection, LLC*, 156 FERC ¶ 61,160 (Sept. 7, 2016) (JA____).

6. Related cases.

This case has not previously been before this Court or any other court and, at this time, undersigned counsel is not aware of any other cases related to this case within the meaning of D.C. Cir. Rule 28(a)(1)(C).¹

¹ On August 17, 2016, Petitioners Sierra Club and Flint Riverkeeper (and a non-party to this case) filed a petition for review in the Eleventh Circuit Court of Appeals challenging permits issued under Section 404 of the Clean Water Act by the U.S. Army Corps of Engineers in connection with the Project. *See Gulf Restoration Network, et al. v. U.S. Army Corps of Eng'rs*, No. 16-15545. That case, however, involved different claims and a different defendant than involved here, and Petitioners subsequently dismissed that case.

TABLE OF CONTENTS

PETITIONERS’ CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES	i
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	vii
GLOSSARY.....	xii
JURISDICTIONAL STATEMENT	1
STATUTES AND REGULATIONS.....	2
STATEMENT OF ISSUES PRESENTED FOR REVIEW	2
STATEMENT OF THE CASE.....	3
I. Procedural History.....	3
II. Statement of Facts.....	4
SUMMARY OF ARGUMENT	8
STANDING	11
STANDARD OF REVIEW	13
ARGUMENT	14
I. FERC’S ANALYSIS OF ENVIRONMENTAL JUSTICE IMPACTS VIOLATED NEPA, CEQ REGULATIONS, AND WAS ARBITRARY AND CAPRICIOUS.....	14
A. NEPA Requires Consideration of Environmental Justice Impacts.....	14
B. Summary of FERC’s Environmental Justice Analysis.....	16
C. FERC’s Finding of No Disproportionate Impact Was Based on Faulty Metrics and Was Arbitrary and Capricious.....	17

1.	FERC failed to compare the impacted population to the general population and other alternatives showing a disparate impact.....	17
2.	FERC failed to consider that environmental justice communities were already subject to adverse impacts from infrastructure and other facilities.	20
3.	Improper identification of environmental justice communities.....	22
4.	Improper reliance on National Ambient Air Quality Standards to find no disparate health impacts on the African-American community.	23
5.	FERC’s finding of no significance does not excuse its arbitrary environmental justice analysis.....	24
II.	FERC’S FAILURE TO CONSIDER THE REASONABLY FORESEEABLE DOWNSTREAM ENVIRONMENTAL EFFECTS OF GREENHOUSE GASES AND CLIMATE CHANGE VIOLATES NEPA, CEQ REGULATIONS, AND IS ARBITRARY AND CAPRICIOUS.	26
A.	FERC Must Consider the Effects of Downstream GHG Emissions on Climate Change and the Environment.	26
B.	FERC Failed to Take a Hard Look at the Project’s Greenhouse Gas Emissions and Climate Impacts.	28
1.	The purpose of the Project is to transport natural gas to several power plants.....	29
2.	FERC had sufficient information to meaningfully evaluate downstream effects.	30
3.	FERC ignored tools available to estimate greenhouse gas emissions.....	33
4.	FERC improperly discounted the Project’s greenhouse gas emissions based on replacement of coal plants with natural gas plants.	35
5.	FERC cannot avoid the downstream effects analysis by citing to future air permitting processes.	36

C. This Case is Distinguished from *EarthReports*.....37

III. FERC’S ALLOWANCE OF A 14% RETURN ON EQUITY
BASED ON A FICTITIOUS CAPITAL STRUCTURE VIOLATES
SECTION 7 OF THE NATURAL GAS ACT.....38

CONCLUSION AND RELIEF REQUESTED43

CERTIFICATE OF COMPLIANCE.....45

CERTIFICATE OF SERVICE46

TABLE OF AUTHORITIES

Cases

<i>Alliance Pipeline, L.P.</i> , 80 FERC ¶ 61,149 (1997).....	43
* <i>Andrus v. Sierra Club</i> , 442 U.S. 347 (1979)	15, 28
* <i>Atlantic Ref. Co. v. Pub. Serv. Comm’n of N.Y.</i> , 360 U.S. 378 (1959).....	11, 38, 39
<i>Baltimore Gas & Elec. Co. v. NRDC</i> , 462 U.S. 87 (1983).....	13
<i>Barnes v. U.S. Dep’t of Transp.</i> , 655 F.3d 1124 (9th Cir. 2011).....	31
<i>Bison Pipeline LLC</i> , 131 FERC ¶ 61,013 (2010)	42
<i>Border Power Plant Working Grp. v. Dep’t of Energy</i> , 260 F. Supp. 2d 997 (S.D. Cal. 2003).....	27
<i>Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n</i> , 449 F.2d 1109 (D.C. Cir. 1971).....	24, 36, 37
<i>City of Davis v. Coleman</i> , 521 F.2d 661 (9th Cir. 1975).....	30, 38
<i>Cmtys. Against Runway Expansion, Inc. v. FAA</i> , 355 F.3d 678 (D.C. Cir. 2004)	16, 20
* <i>Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.</i> , 538 F.3d 1172 (9th Cir. 2008)	27, 35, 37, 38
<i>Del. Riverkeeper Network v. FERC</i> , 753 F.3d 1304 (D.C. Cir. 2014)	13, 14, 32
<i>Department of Transportation v. Public Citizen</i> , 541 U.S. 752 (2004)	38
<i>Discovery Producers Serv. LLC</i> , 78 FERC ¶ 61,194 (1997).....	43
<i>EarthReports, Inc. v. FERC</i> , 828 F.3d 949 (D.C. Cir. 2016)	37

<i>ETC Tiger Pipeline, LLC</i> , 131 FERC ¶ 61,010 (2010)	41
<i>Florida Southeast Connection, LLC</i> , 154 FERC ¶ 61,080 (Feb. 2, 2016)	ix, 1, 3, 4, 7, 8, 23, 30, 31, 39, 40, 42
<i>Florida Southeast Connection, LLC</i> , 156 FERC ¶ 61,160 (Sept. 7, 2016).....	1, 6, 7, 14, 22, 24, 25, 31, 37, 40, 41, 42, 43
<i>Found. on Econ. Trends v. Heckler</i> , 756 F.2d 143 (D.C. Cir. 1985)	13
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs (TOC), Inc.</i> , 528 U.S. 167 (2000).....	12
<i>Georgia Strait Crossing Pipeline LP</i> , 98 FERC ¶ 61,271 (2002)	42
<i>Gulfstream Natural Gas Sys., L.L.C.</i> , 105 FERC ¶ 61,052 (2003)	42
<i>Idaho v. Interstate Commerce Comm’n</i> , 35 F.3d 585 (D.C. Cir. 1994)	36
<i>Ill. Commerce Comm’n v. Interstate Commerce Comm’n</i> , 848 F.2d 1246 (D.C. Cir. 1988).....	34
<i>Kern River Gas Transmission Co.</i> , 50 FERC ¶ 61,069 (1990)	43
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992)	12
<i>Maritimes & Northeast Pipeline, L.L.C.</i> , 76 FERC ¶ 61,124 (1996).....	43
<i>MarkWest Pioneer, L.L.C.</i> , 125 FERC ¶ 61,165 (2008).....	40, 42
* <i>Mid States Coal. for Progress v. Surface Transp. Bd.</i> , 345 F.3d 520 (8th Cir. 2003)	18, 26, 27, 33, 36, 37
<i>Millennium Pipeline Co., L.P.</i> , 100 FERC ¶ 61,277 (2002).....	42
<i>Minisink Residents for Envtl. Pres. and Safety v. FERC</i> , 762 F.3d 97 (D.C. Cir. 2014).....	38
<i>Missouri Interstate Gas, LLC</i> , 100 FERC ¶ 61,312 (2002).....	40

<i>Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.</i> , 463 U.S. 29 (1983).....	14
<i>New York v. Nuclear Regulatory Comm'n</i> , 681 F.3d 471 (D.C. Cir. 2012).....	26
* <i>North Carolina Utilities Commission v. FERC</i> , 42 F.3d 659 (D.C. Cir. 1994)	11, 40
<i>North Carolina v. FAA</i> , 957 F.2d 1125 (4th Cir. 1992)	36
<i>O'Reilly v. Army Corps of Eng'rs</i> , 477 F.3d 225 (5th Cir. 2007)	38
<i>Panhandle Eastern Pipeline Co., LLC</i> , 71 FERC ¶ 61,228 (1995).....	41
<i>Pine Needle LNG Co., LLC</i> , 77 FERC ¶ 61,229 (1996).....	41
<i>Portland Natural Gas Transmission Sys.</i> , 76 FERC ¶ 61,123 (1996).....	43
* <i>Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n</i> , 481 F.2d 1079 (D.C. Cir. 1973).....	26, 32
<i>Sierra Club v. Army Corps of Eng'rs</i> , 803 F.3d 31 (D.C. Cir. 2015).....	37
<i>Sierra Club v. FERC</i> , 827 F.3d 36 (D.C. Cir. 2016)	12
<i>Sierrita Gas Pipeline, LLC</i> , 147 FERC ¶ 61,192 (2014).....	42
<i>Vector Pipeline, L.P.</i> , 85 FERC ¶ 61,083 (1998)	43
<i>WildEarth Guardians v. Jewell</i> , 738 F.3d 298 (D.C. Cir. 2013).....	12
<i>Williams Natural Gas Co.</i> , 77 FERC ¶ 61,277 (1996).....	41
 Statutes	
5 U.S.C. § 706(2)(A).....	43
15 U.S.C. § 717f.....	38

15 U.S.C. § 717r(b).....	1, 2, 33
42 U.S.C. § 4321	15
42 U.S.C. § 4331(c)	15

Regulations

40 C.F.R. § 1502.16	26
* 40 C.F.R. § 1502.22	10
* 40 C.F.R. § 1502.22(b)	34
* 40 C.F.R. § 1502.22(b)(3).....	35
* 40 C.F.R. § 1502.22(b)(4).....	35
* 40 C.F.R. § 1508.7	10, 21, 27, 37
* 40 C.F.R. § 1508.8	9, 15, 26, 28
40 C.F.R. § 1508.8(a).....	10
* 40 C.F.R. § 1508.8(b)	10
40 C.F.R. § 1508.13	25
* 40 C.F.R. § 1508.14	9, 15
40 C.F.R. § 1508.27	10, 25
40 C.F.R. § 1508.27(b)(1).....	35

Administrative Documents

* CEQ, <i>Environmental Justice Guidance Under the National Environmental Policy Act</i> (Dec. 10, 1997).....	15, 17, 18
---	------------

CEQ, <i>Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews</i> (Aug. 1, 2016)	29
CEQ, <i>Revised Draft Greenhouse Gas Emissions and Climate Change Guidance</i> (Dec. 2014)	7, 28, 33, 36
* EPA, <i>Final Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA Compliance Analyses</i> (Apr. 1998) ...	14, 21, 22, 23, 25
Letter from Christopher Militscher, Chief, EPA Region 4, to Kimberly Bose, Secretary, FERC (Oct. 26, 2015)	8, 20, 21, 28, 33
Letter from G. Alan Farmer, Director, EPA Region 4, to Kimberly Bose, Secretary, FERC (Jan. 25, 2016)	6, 7, 18, 31, 33, 34
Letter from Kenneth A. Westlake, Chief, EPA Region 5, to Kimberly D. Bose, Secretary, FERC (Oct. 11, 2016).....	8
Letter from Members of Congress to FERC Chairman and Commissioners (Oct. 23, 2015)	5, 16, 20

* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Authorization Order	Order Issuing Certificates and Approving Abandonment, <i>Florida Southeast Connection, LLC</i> , 154 FERC ¶ 61,080 (Feb. 2, 2016)
CEQ	Council on Environmental Quality
DOE	United States Department of Energy
Draft EIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
Environmental Petitioners	Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper
EPA	United States Environmental Protection Agency
Final EIS	Final Environmental Impact Statement
FERC or the Commission	Federal Energy Regulatory Commission
Florida Southeast	Florida Southeast Connection, LLC
NEPA	National Environmental Policy Act
Project	Southeast Market Pipelines Project
Rehearing Order	Order on Rehearing, <i>Florida Southeast Connection, LLC</i> , 156 FERC ¶ 61,160 (Sept. 7, 2016)
Sabal Trail	Sabal Trail Transmission, LLC
Transco	Transcontinental Pipe Line Company, LLC

JURISDICTIONAL STATEMENT

In accordance with 15 U.S.C. § 717r(b), Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively “Environmental Petitioners”), who were intervenors in the agency proceedings below, seek review of two final orders issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”). The first order, issued on February 2, 2016 under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c), authorized Transcontinental Pipe Line Company, LLC (“Transco”), Sabal Trail Transmission Company, LLC (“Sabal Trail”), and Florida Southeast Connection, LLC (“Florida Southeast”) to construct and operate the Southeast Market Pipelines Project (“Project”). *See Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 (Feb. 2, 2016) (JA__) (“Authorization Order”).²

On March 3, 2016, Environmental Petitioners timely filed their request for rehearing of the Commission’s first order. On September 7, 2016, FERC issued its second order under 15 U.S.C. § 717r(a) of the Natural Gas Act, denying Environmental Petitioners’ request for rehearing. *See Florida Southeast Connection, LLC*, 156 FERC ¶ 61,160 (Sept. 7, 2016) (JA__) (“Rehearing Order”).

On September 21, 2016, Environmental Petitioners timely filed their joint petition for review of the Commission’s two final orders which rejected all of

² “(JA__)” refers to pages of the Joint Appendix.

Environmental Petitioners' claims. This Court has jurisdiction under 15 U.S.C. § 717r(b).

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Commission's conclusion that the Project will not disproportionately affect environmental justice communities where 83.7% of the 685-mile-long Project crosses or is within one mile of an environmental justice population, including 135 environmental justice communities and five of seven affected census tracts in Dougherty County, Georgia, violates the National Environmental Policy Act ("NEPA"), violates Council on Environmental Quality ("CEQ") regulations, and is arbitrary and capricious.

2. Whether the Commission's conclusion that it need not consider the reasonably foreseeable indirect downstream environmental effects of the Project, including the greenhouse gas, health, and climate effects of burning 1.1 billion cubic feet of natural gas per day for several decades, when tools used by other federal agencies exist to measure such impacts, violates NEPA, violates CEQ regulations, and is arbitrary and capricious.

3. Whether the Commission's allowance of a 14% return on equity to Sabal Trail through the use of a fictitious capital structure is contrary to long-

standing precedent of the Commission and this Court, fails to properly consider Sabal Trail's ability to finance the Project, fails to properly consider the public interest and effect on the overall public convenience and necessity of the Project, and violates Section 7 of the Natural Gas Act.

STATEMENT OF THE CASE

I. Procedural History.

In September and November 2014, Florida Southeast, Transco, and Sabal Trail filed their respective applications with FERC for certificates of public convenience and necessity. (JA __, __, __). Environmental Petitioners moved to intervene and filed comments on December 22, 2014. (JA __).

FERC issued a Draft Environmental Impact Statement ("EIS") on September 4, 2015 (JA __), and Environmental Petitioners filed responsive comments on October 27, 2015. (JA __). On February 2, 2016, FERC issued its Authorization Order granting all three applications, adopting a Final EIS, and allowing Environmental Petitioners to intervene in all three docket proceedings. Authorization Order at ¶¶ 40, 43, 292, 294 (JA __, __, __).

On March 3, 2016, Environmental Petitioners timely filed a request for rehearing, rescission of the certificates, and stay. (JA __). On March 29, 2016, FERC granted Environmental Petitioners' request for rehearing for purposes of further consideration (JA __) – in essence, a non-final, tolling order – and on March

30, 2016, FERC denied Environmental Petitioners' request for stay. (JA__).

On August 17, 2016, Environmental Petitioners filed with FERC a request to stay construction (JA__), which FERC denied on September 29, 2016. (JA__).

On August 26, August 29, and September 2, 2016, Florida Southeast, Sabal Trail, and Transco filed with FERC notices of commencing construction. (JA__, __, __).

On September 7, 2016, FERC finally denied Environmental Petitioners' request for rehearing. (JA__). Environmental Petitioners timely filed their appeal of the Authorization and Rehearing Orders in this Court on September 21, 2016.

II. Statement of Facts.

The Project includes construction of 685 miles of pipeline, six compressor stations, and associated facilities to transport up to 1.1 billion cubic feet of natural gas per day through Alabama, Georgia, and Florida. Authorization Order at ¶¶ 1-4 (JA__-__). The Project has three connected segments consisting of Transco's 45-mile expansion of its line in Alabama, Sabal Trail's 515 miles of new construction in Alabama, Georgia, and Florida, and Florida Southeast's 126 miles of new construction in Florida. *Id.* The primary stated purpose of the Project is to deliver natural gas to natural gas power plants in Florida operated by Florida Power & Light Company and Duke Energy Florida, LLC. *Id.* at ¶¶ 4, 18, 78, 85 (JA__, __, __, __).

According to FERC, 83.7% of the Project would cross or be within one mile

of environmental justice populations, including such populations in five of seven census tracts in Dougherty County, Georgia and 135 communities overall. Final EIS at 3-215, 216, 218 (JA__, __, __). This includes six compressor stations contributing significant amounts of air pollution, including a massive one in Albany, Georgia, in the middle of an African-American residential neighborhood with two large subdivisions, a mobile home park, schools, recreational facilities, and a 5,000-plus member Baptist Church. Congressional Letter to FERC 10/23/15 at 2 (JA__); Final EIS at 3-218 (JA__). South Dougherty County, where the pipeline would run through environmental justice communities, already has 259 hazardous waste facilities, 78 facilities releasing air pollutants, 20 facilities releasing toxic pollutants, and 16 facilities releasing water pollutants. Congressional Letter to FERC 10/23/15 at 1 (JA__).

FERC further found that 54%-80% of the Project under several land-based alternative routes would affect environmental justice communities. Final EIS at 3-216 (JA__). Thus, FERC's approved route has nearly 30% more impact on environmental justice communities than the least damaging alternative route. FERC has determined that a 10% differential is "meaningful." Final EIS at 3-215 n.13 (JA__).

FERC's analysis also did not include Environmental Petitioners' proposed alternative across the Gulf of Mexico which would avoid Georgia entirely, most of

Alabama, and significant portions of Florida, and hence involve substantially even fewer environmental justice communities. Final EIS at 4-4, 4-5 (JA__, __); Environmental Petitioners' Comments on Draft EIS at 27 (JA__). Nor did FERC compare the approved route with the "no action" alternative, which would completely avoid all environmental impacts. Final EIS at ES-8 (JA__).

FERC found that the Project would not have a disproportionately high and adverse impact on environmental justice communities by comparing the approved route and land-based alternatives to each other rather than to the general population. Environmental Protection Agency ("EPA") Letter 1/25/16 at 5 (JA__); Final EIS at 3-216 (JA__). FERC also found no disproportionately high and adverse impact from the compressor station that would be located in the middle of an African-American community in Albany, Georgia based on the composition of that particular census tract. Rehearing Order at ¶¶ 74-75 (JA__-__). FERC ignored the compressor station being located in the northern periphery of that tract, that 100% of the residents within the census block occupied by the station are African-American, 84% of the residents within a one-half mile radius of the location are African-American, and 82% of the residents within a one-mile radius of the location are African-American. Environmental Petitioners' Comments on Draft EIS at 28-29 (JA__-__).

FERC's finding of no disproportionately high and adverse impact from the

Albany compressor station was made despite knowing that the station would emit almost 200,000 tons of pollutants per year; that such pollutants are known to cause a wide variety of serious adverse health effects including respiratory, cardiovascular, neurological, and kidney problems, lung damage, cancer, and premature death; and that “African-Americans have one of the highest rates of current asthma compared to other racial/ethnic groups” such that “African American populations . . . have an increased risk of experiencing adverse impacts from decreased air quality.” Environmental Petitioners’ Request for Rehearing at 24-25 (JA__-__); Final EIS at 3-214 (JA__).

In its NEPA analysis, FERC refused to consider the downstream effects of burning 1.1 billion cubic feet of natural gas per day, including greenhouse gas emissions and climate change impacts. Rehearing Order at ¶ 63 (JA__-__). FERC knows that the natural gas will be burned at certain specific power plants in Florida. Authorization Order at ¶¶ 4, 18, 78, and 85 (JA__, __, __, __). FERC has widely available tools already in broad use to estimate greenhouse gas emissions. Council on Environmental Quality (“CEQ”), *Revised Draft Greenhouse Gas Emissions and Climate Change Guidance* (Dec. 2014) at 15 (Add. 185; JA__)³; EPA Letter 1/25/16 at 4 (JA__). EPA urged FERC to conduct a life cycle analysis of greenhouse gas emissions utilizing the U.S. Department of Energy’s (“DOE”)

³ “(Add. __)” refers to pages of the Addendum to this brief.

established methodology, but FERC refused to do so. EPA Letters of 10/26/15 at 25 and 1/25/16 at 4 (JA__ and __); Final EIS at 3-297 (JA__). Instead, FERC directed interested parties to apply the DOE's methodology themselves. Final EIS at 3-297 (JA__).⁴

In its application, Sabal Trail requested an initial rate of 14% return on equity based upon a capital structure of 60% equity and 40% debt. Application, Vol. I at 41-42 (JA__-__). Finding that such a high rate for a low debt capital structure "does not reflect current Commission policy," FERC approved the rate by imposing a hypothetical 50% equity/50% debt capital structure. Authorization Order at ¶¶ 117-118 (JA__). FERC did so without any advance notice to the public for comment and without any evidence in the record demonstrating that Sabal Trail could adopt such a structure.

SUMMARY OF ARGUMENT

This case involves FERC's lack of compliance with NEPA in approving the Southeast Market Pipelines Project ("Project"), a 685-mile-long natural gas pipeline and related facilities in Alabama, Georgia and Florida. Environmental

⁴ Based upon FERC's repeated failure under NEPA to consider the combustion of natural gas (and associated greenhouse gas emissions and climate change impacts) as a reasonably foreseeable indirect effect of pipeline projects, EPA recently called for headquarters-level discussions with FERC. *See* Letter from Kenneth A. Westlake, Chief, EPA Region 5, to Kimberly D. Bose, Secretary, FERC (Oct. 11, 2016), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14373821>.

Petitioners present three issues demonstrating that FERC's action violated NEPA, its implementing regulations, and was arbitrary and capricious.

First, FERC failed to properly consider the environmental justice impacts of the Project, *i.e.*, its impacts on minority and/or low-income communities, which is required to comply with 40 C.F.R. §§ 1508.8 and 1508.14. Although 83.7% of the Project cuts through environmental justice communities, FERC found there was *no* disproportionate impact on them based on several fundamental errors, including:

(1) comparing the approved route's extraordinarily high 83.7% impact to minority populations to the other "land-based" alternative routes rather than to the general population;

(2) finding that the Project's impacts were "relatively similar" to the other alternatives despite a difference of up to 30%, and despite FERC's admission that 10% is a "meaningful difference";

(3) failing to compare the Project to the Gulf of Mexico alternative or the "no action" alternative, both of which would cause considerably fewer or no adverse environmental justice impacts;

(4) failing to consider that the environmental justice communities were already overburdened with infrastructure and polluting facilities;

(5) failing to find the existence of a minority community in Albany, Georgia where the Project would site a massive polluting compressor station, by relying on

over-broad census tract information contrary to evidence on the actual make-up of the surrounding community; and

(6) finding no disparate environmental justice impact because FERC found there would be no “significant” impact to any community, contrary to (1) - (5) above, the EPA’s Environmental Justice Guidance that FERC purported to follow, the CEQ’s Environmental Justice Guidance interpreting its regulations, and 40 C.F.R. § 1508.27.

Second, FERC failed and refused to consider the reasonably foreseeable downstream effects of the power plants’ combustion of the natural gas, particularly greenhouse gases and climate change that will be caused by burning 1.1 billion cubic feet per day of natural gas transported by the Project. This is required by 40 C.F.R. §§ 1508.8(a), (b) (direct and indirect effects) and 40 C.F.R. § 1508.7 (cumulative effects), as interpreted by the Council on Environmental Quality, which is entitled to substantial deference on NEPA and its regulations.

FERC knows where the natural gas will be burned, how it will be burned, and the amount that will be burned. It can measure the greenhouse gas emissions with widely available tools already in broad use by other federal agencies. And FERC failed to comply with 40 C.F.R. § 1502.22, which requires the agency, when the costs of obtaining incomplete information are exorbitant or the means to obtain it are unknown, to explain the relevance of the missing essential information,

summarize existing scientific evidence, and evaluate the foreseeable impacts based on generally accepted theoretical approaches or research methods.

Third, FERC improperly allowed Sabal Trail an exorbitant 14% return on equity. This is a crucial factor in determining whether the Project is in the public interest justifying the issuance of a certificate of public convenience and necessity. But FERC's approval was based on hypothetically assuming that Sabal Trail's capital structure would be a 50/50 equity/debt ratio even though its application stated its capital structure would be 60/40. FERC has not provided an adequate explanation for relying on a fictitious capital structure as required by *North Carolina Utilities Commission v. FERC*, 42 F.3d 659, 664 (D.C. Cir. 1994). And FERC's action is contrary to its own precedent that favors using actual capital structures. Because the rate is not in the public interest, the certificate should be denied. *Atlantic Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 390-91 (1959).

Based on these numerous failures, FERC's decision to issue the certificates of public convenience and necessity is contrary to the public interest and is arbitrary and capricious. Therefore, the certificates should be rescinded.

STANDING

Environmental Petitioners are non-profit environmental organizations with members who reside, work, and recreate in the areas that will be affected by the

Project. *See* declarations of Hall, Malwitz-Jipson, Marietta, Koon, Hastings, and Costello. (Add. 22, 25, 36, 46, 49, 57). Additionally, Environmental Petitioners are customers of Intervenor Florida Power & Light and Duke Energy whose power plants will be served by the Project. *See* Costello Declaration (Add. 57).

The construction, maintenance and operation of the Project will cause Environmental Petitioners concrete, particularized, and imminent harm, which this Court can redress by setting aside the Commission's NEPA analysis of the Project, remanding it to the agency, and vacating the certificates based upon it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *and see WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) (“[v]acatur of the [] order would redress the [Environmental Petitioners'] members' injuries because, if the [agency] is required to adequately consider each environmental concern, it could change its mind about authorizing” the Project). A decision by this Court vacating the Commission's Certificates for failure to comply with NEPA would redress these injuries “regardless [of] whether the [NEPA violation] relates to local or global environmental impacts.” *Id.* at 307; *and see Sierra Club v. FERC*, 827 F.3d 36, 44 (D.C. Cir. 2016) (vacating FERC's order authorizing

projects due to violating NEPA would redress standing declarant's injuries).⁵

STANDARD OF REVIEW

Judicial review of agency actions under NEPA is available “to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.” *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312-13 (D.C. Cir. 2014), citing *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983). Although the standard of review is deferential, “[s]imple, conclusory statements of ‘no impact’ are not enough to fulfill an agency's duty under NEPA.” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). The agency must comply with “principles of reasoned decisionmaking, NEPA’s policy of public scrutiny, and [the Council on Environmental Quality’s] own regulations.” *Id.* (citations omitted). And under the applicable arbitrary and capricious standard of review,

the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to

⁵ The Court should deny Transco’s motion to dismiss on standing. The Transco segment is part of the entire Project, all of which FERC considered in one EIS, and has no independent utility. Also, the Hastings Declaration provides standing on that segment.

the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given.

Del. Riverkeeper Network, 753 F.3d at 1313, citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted).

ARGUMENT

I. FERC'S ANALYSIS OF ENVIRONMENTAL JUSTICE IMPACTS VIOLATED NEPA, CEQ REGULATIONS, AND WAS ARBITRARY AND CAPRICIOUS.

A. NEPA Requires Consideration of Environmental Justice Impacts.

The term “environmental justice” means “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.” Rehearing Order at 31, n.148 (JA__).⁶

⁶ FERC cites <https://www.epa.gov/environmentaljustice>. That further states: “Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.” EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (Apr. 1998), at 1.1.1 (Add. 101-102; JA__-__).

According to CEQ, which is entitled to substantial deference in interpreting NEPA,⁷ several provisions of NEPA require consideration of environmental justice in environmental impact statements. For instance, NEPA's fundamental policy is to "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. In NEPA, Congress "recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331(c). The CEQ states the goals set forth in NEPA "make clear that attainment of environmental justice is wholly consistent with the purposes and policies of NEPA."⁸

In addition, the CEQ regulations implementing NEPA define "effects" or "impacts" that agencies must analyze in an environmental impact statement to include "ecological..., aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. This includes environmental justice impacts such as human health or ecological impacts on minority and low-income populations.⁹ *See also* 40 C.F.R. § 1508.14 ("When an [EIS] is prepared and economic or social and natural or physical environmental

⁷ *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

⁸ CEQ, *Environmental Justice Guidance Under the National Environmental Policy Act* (Dec. 10, 1997) at 7 (Add. 68; JA__). This guidance interprets NEPA as implemented through the CEQ regulations. *Id.* at 21 (Add. 81; JA__).

⁹ *See* CEQ's *Environmental Justice Guidance* at 8, 21 (Add. 69, 81; JA__, __).

effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.”).

The adequacy of an agency’s environmental justice impacts is subject to judicial review. Where, as here, the agency considers environmental justice issues in its EIS, the Court reviews that analysis under the Administrative Procedure Act’s “arbitrary and capricious” standard. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 688-89 (D.C. Cir. 2004).

B. Summary of FERC’s Environmental Justice Analysis.

The Commission acknowledged that 83.7% of the Project would cross or be within one mile of environmental justice populations, including 135 environmental justice communities and environmental justice communities in five of the seven affected census tracts in Dougherty County, Georgia. Final EIS at 3-215, 216, 218 (JA__, __, __). This includes six compressor stations contributing significant amounts of air pollution, including a massive one in Albany, Georgia, in the middle of an African-American residential neighborhood with two large subdivisions, a mobile home park, schools, recreational facilities, and a 5,000-plus member Baptist Church. Congressional Letter to FERC 10/23/15 at 2 (JA__); Final EIS at 3-218 (JA__).

In its environmental justice analysis, the Commission adopted and purported to follow the three-part test of EPA's Environmental Justice Guidance.¹⁰ Final EIS at 3-215 (JA__). First, it identifies minority and low-income populations. *Id.* Second, it “determines if the impacts are high and adverse.” *Id.* Third, it determines if the impacts fall disproportionately on environmental justice populations. *Id.* The Commission ultimately found the Project “*would not disproportionately impact environmental justice populations.*” *Id.* at 3-217 (JA__) (emphasis added). But as Environmental Petitioners, the Georgia members of the Congressional Black Caucus, and EPA all pointed out, the Commission's analysis of environmental justice impacts did not comply with the EPA test, and its conclusion was arbitrary and capricious.

C. FERC's Finding of No Disproportionate Impact Was Based on Faulty Metrics and Was Arbitrary and Capricious.

1. FERC failed to compare the impacted population to the general population and other alternatives showing a disparate impact.

The Commission compared the concentration of minority and low-income

¹⁰ The purpose of EPA's Environmental Justice Guidance is to implement Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (1994), which requires federal agencies to consider if a project's impacts on health and the environment would be disproportionately high and adverse for minority and low-income populations. The Executive Order is attached to CEQ's Environmental Justice Guidance at p. 25. (Add. 85; JA__).

populations residing in the Commission's approved route and "land-based" alternative routes *to each other* to find no disproportionate impact from the Project, rather than comparing the route minority and low-income population concentrations to the general population. EPA Comment Letter 1/25/16 at 5 (JA__); Final EIS at 3-216 (JA__). That methodology conflicts with the CEQ's Environmental Justice Guidance interpreting CEQ's regulations, which directs agencies to determine whether the impact "appreciably exceeds . . . the general population."¹¹ *See also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 541 (8th Cir. 2003) (to determine whether there is a disproportionate adverse effect "an agency must compare the demographics of an affected population with demographics of a more general character...").

The Commission's comparison of the approved route and "land-based" alternative routes to one another begs the question of whether the *Project* has a disparate impact on African-American communities. Since 83.7 % of the Project is through environmental justice communities, the discriminatory impact appears on its face.

Even if a comparison of the approved route and alternatives to each other was the proper metric, which it is not, FERC misapplied it. It found the alternatives fell in the 54%-80% range in impacts to minority communities. Final

¹¹ CEQ Environmental Justice Guidance at 26-27 (Add. 86-87; JA__-__).

EIS at 3-216 (JA__). And then “[b]ecause these route alternatives would affect a relatively similar percentage of environmental justice populations, [FERC] determined that the SMP Project would not disproportionately impact environmental justice populations.” *Id.* at 3-217 (JA__). At 83.7%, FERC’s approved route was the most impactful route it considered – nearly 30% greater than the least impactful. *Id.* at 3-216 (JA__). That range does not mean the alternatives are “relatively similar”; it evidences a wide range of difference. On the previous page of the Final EIS, FERC itself noted that “meaningfully greater” is defined in its environmental justice analysis when minority populations “are at least 10 percentage points more than in the comparison group.” *Id.* at 3-215 n.13 (JA__).

FERC also wrongly limited itself to the “land-based” alternatives in the environmental justice analysis. It did not consider the Gulf of Mexico alternative which would avoid Georgia entirely, reduce pipeline length in Florida by 122 miles, and hence involve fewer areas classified as environmental justice communities. Final EIS 4-4, 4-5 (JA__, __); Environmental Petitioners’ Comments on Draft EIS at 27 (JA__).

Nor did FERC compare the land-based alternatives to the “no action” alternative. This alternative “would avoid the environmental impacts identified in [the] EIS.” Final EIS at ES-8 (JA__). A proper environmental justice analysis

requires this comparison. *See, e.g., Cmtys. Against Runway Expansion*, 355 F.3d at 688 (finding no disparate impact because the minority proportion of the impacted population would be no greater under the chosen alternative than under the “no-action” alternative).

2. FERC failed to consider that environmental justice communities were already subject to adverse impacts from infrastructure and other facilities.

The Commission used a simple metric of *miles* of pipeline through the environmental justice communities to determine there was no disproportionate impact on them. EPA Letter 10/26/15 at 14 (JA__). It defended its use of “[m]iles of EJ [c]ommunities [c]rossed” as “sufficiently informative for the purpose of comparing alternatives.” Final EIS at App. O-16 (JA__). Thus, it dismissed the fact that compared to non-environmental justice communities, environmental justice communities are already overburdened with industrial facilities and infrastructure with impacts on drinking water supplies, neighborhoods, and air and water pollution.

Not counting this pipeline and the Albany compressor station, south Dougherty County, Georgia has 259 hazardous waste facilities, 78 facilities releasing air pollutants, 20 facilities releasing toxic pollutants, and 16 facilities releasing water pollutants. Congressional Letter to FERC 10/23/15 at 1 (JA__); Request for Rehearing at 23 (JA__). Locating this pipeline and compressor

stations in clusters of facilities or sites that are current sources of environmental pollution contributes to the cumulative impacts of the surrounding area, and therefore should have been considered by FERC in its environmental justice analysis, but was not. *See* 40 C.F.R. § 1508.7 (defining cumulative impacts as “the incremental impact(s) of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions”); *see also* EPA Environmental Justice Guidance at 2.2.2 (Add. 114; JA__) (“EPA NEPA analyses must consider the cumulative effects on a community by addressing the full range of consequences of a proposed action as well as other environmental stresses which may be affecting the community.”).

The Commission defended the siting of the Project based on its practice of co-locating new pipelines with older pipelines to mitigate harm generally (*e.g.*, by not requiring additional right-of-way). *See* Final EIS at 3-218 and App. O-16 (JA__ and __). But that does not justify disregarding the over-burdened nature of these communities. And as EPA pointed out, FERC did not identify the extent environmental justice populations were burdened with multiple pipelines, increasing their potential exposure risk. EPA Letter 10/26/15 at 14 (JA__). The fact they were discriminated against in the past with infrastructure siting does not justify compounding that discrimination with more infrastructure now.

3. Improper identification of environmental justice communities.

FERC found that the Albany compressor station would not be in an environmental justice community based on its application of a census tract. Rehearing Order at ¶¶ 74-75 (JA__). Environmental Petitioners pointed out that although it was in a majority white census tract, the Albany compressor station would be in the northern periphery of that tract, surrounded by an environmental justice community. Environmental Petitioners' Comments on Draft EIS at 28-29 (JA__-__). Specifically, 100% of the residents within the census block occupied by the station (as opposed to the larger census tract) are African-American, 84% of the residents within a one-half mile radius of the proposed location are African-American, and 82% of the residents within a one-mile radius of the proposed location are African-American. *Id.*

FERC defended its use of a census tract because EPA approves using them. Rehearing Order at ¶ 75 (JA__). But that was error, for as noted in EPA's Guidance:

[t]he fact that census data can only be disaggregated to certain prescribed levels (*e.g.*, census tracts, census blocks) suggests that pockets of minority or low-income communities, including those that may be experiencing disproportionately high and adverse effects, may be missed in a traditional census tract-based analysis. Additional caution is called for in using census data due to the possibility of distortion of population breakdowns. . . .

EPA Environmental Justice Guidance at § 2.1.1 (Add. 110; JA__).

The EPA recognizes “[w]hile the census provides valuable information . . . , there are often many gaps associated with the information. Therefore, it may be necessary . . . to validate this information with the use of additional sources.” *Id.* at 2.1.2 (Add. 112; JA__). In this case, the additional source of information was the census block information demonstrating that the overwhelming majority of persons living near the compressor station are African-American. FERC’s finding that the compressor station was not in an environmental justice community was contrary to the evidence before the agency and therefore arbitrary and capricious.

4. Improper reliance on National Ambient Air Quality Standards to find no disparate health impacts on the African-American community.

FERC noted that “African Americans have one of the highest rates of current asthma compared to other racial/ethnic groups’ (American Lung Association, 2015)” and that “[t]herefore, it is reasonable to assume that, where African American populations are present, they have an increased risk of experiencing adverse impacts from decreased air quality.” Final EIS at 3-214 (JA__). FERC then summarily dismisses this concern on the grounds that the Project will meet all federal regulatory standards for air quality and that the Albany compressor station will be more than a mile from the nearest designated environmental justice tract. *Id.*; Authorization Order at ¶ 263 (JA__-__).

FERC's analysis was wrong since the compressor station is in an environmental justice tract, as set forth above. And FERC's conclusion was based on the erroneous premise that air pollution is of no concern so long as there is not a National Ambient Air Quality Standards (NAAQS) violation. Environmental Petitioners set forth the severe health air impacts from toxic emissions at the compressor station, even at less than permitted levels. Environmental Petitioners' Request for Rehearing at 24-25 (JA__-__); Statement of Facts, *supra* at 7. The issuance of a permit only provides that a polluting source has met a "minimum condition"; it does not establish that a project will have no significant impact under NEPA. *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1123 (D.C. Cir. 1971).

5. FERC's finding of no significance does not excuse its arbitrary environmental justice analysis.

FERC provides another rationale for finding no disparate impact, which is while "environmental justice populations will be affected by the project," the environmental justice impact would be "reduced to less than significant." Rehearing Order at ¶ 75 (JA__). But that does not excuse FERC's arbitrary methodology set forth above, such as misidentifying environmental justice communities and comparing to the wrong population. It is also erroneous because: 1) the proper environmental justice analysis is not whether the impacts rise to the

level of “significance,” but whether there is a discriminatory impact; and 2) intensity, extent, and duration of the impacts in this cases are significant for environmental justice purposes.¹²

In related fashion, FERC misstated the second element of the EPA environmental justice test that it purported to apply. The test is not whether impacts are “high and adverse.” Rehearing Order at ¶ 75 (JA__). It is whether they are “*disproportionately* high and adverse.” See EPA Environmental Justice Guidance at 1.0, 2.2.1 and 5.0 (emphasis added) (listing tools for identifying and assessing disproportionality) (Add. 100, 114, 151; JA__, __, __). Because the routes in this case are 83.7% through environmental justice communities, they are “disproportionately high” on those communities. And they are “adverse,” *i.e.*, they are not beneficial. For instance, they involve risk of leaks and explosions, lost property values, and construction impacts such as right-of-way clearing, heavy machinery, traffic, noise, and air pollution, to name a few.

¹² Regardless of the mitigation of some impacts, this project satisfies numerous significance factors in the NEPA regulations at 40 C.F.R. § 1508.27. Notably, FERC did not prepare a Finding of No Significant Impact for this project under 40 C.F.R. § 1508.13.

II. FERC’S FAILURE TO CONSIDER THE REASONABLY FORESEEABLE DOWNSTREAM ENVIRONMENTAL EFFECTS OF GREENHOUSE GASES AND CLIMATE CHANGE VIOLATES NEPA, CEQ REGULATIONS, AND IS ARBITRARY AND CAPRICIOUS.

A. FERC Must Consider the Effects of Downstream GHG Emissions on Climate Change and the Environment.

NEPA requires that agencies consider a project’s direct and indirect effects, as well as their significance, in an environmental impact statement. 40 C.F.R. §§ 1502.16, 1508.8. Indirect effects “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b); *see New York v. Nuclear Regulatory Comm’n*, 681 F.3d 471, 476 (D.C. Cir. 2012). An environmental impact is reasonably foreseeable “if it is ‘sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.’” *Mid States*, 345 F.3d at 549 (internal citation omitted). Implicit in this requirement to analyze foreseeable effects is a duty to engage in “reasonable forecasting.” *Scientists’ Inst. for Pub. Info., Inc. v. Atomic Energy Comm’n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973).

The indirect effects inquiry is thus wide-ranging. Under this standard, courts have required federal agencies to consider the indirect effects of energy-related infrastructure projects. In *Mid States*, for example, because a new rail line provided a more direct route from coal mines to power plants, the court held that NEPA required the Surface Transportation Board to consider the downstream

impacts of burning the coal. *Mid States*, 345 F.3d at 549 (“[I]t is reasonably foreseeable – indeed, it is almost certainly true – that the proposed project will increase the long-term demand for coal and any adverse effects that result from burning coal.”); *see also Border Power Plant Working Grp. v. Dep’t of Energy*, 260 F. Supp. 2d 997, 1030 (S.D. Cal. 2003) (air quality impacts of Mexican power plant that would export electricity to the United States over new transmission line were reasonably foreseeable result of constructing transmission line).

In addition, “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” *Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008), *citing* 40 C.F.R. § 1508.7 (cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency ... or person undertakes such other actions”); *see also id.* at 1216 (cumulative impacts analysis inadequate where agency failed to “discuss the *actual* environmental effects resulting from [greenhouse gas] emissions” (emphasis in original)). Nonetheless, in the Final EIS, FERC did not analyze the Project’s climate impacts.

In December 2014, CEQ (whose interpretation of NEPA is entitled to

substantial deference by the Court¹³) issued a draft guidance to provide agencies direction on how to consider the effects of greenhouse gas emissions and climate change. *See* CEQ, *Revised Draft Guidance for Greenhouse Gas Emissions and Climate Change Impacts* (“CEQ Draft Greenhouse Gas Guidance”) (Add. 171; JA__). The guidance, which interpreted *existing* legal requirements, stated that emissions “that may occur as a ... consequence of the agency action (often referred to as downstream emissions) should be accounted for in the NEPA analysis.” *Id.* at 1, 11 (citing 40 C.F.R. § 1508.8) (Add. 171, 181; JA__, __).

B. FERC Failed to Take a Hard Look at the Project’s Greenhouse Gas Emissions and Climate Impacts.

Despite this clear NEPA mandate, FERC failed to take a hard look at the greenhouse gas emissions and climate impacts from burning the natural gas that the Project will deliver to power plants.

After FERC issued the flawed Draft EIS, EPA strongly urged FERC to “comply with the [CEQ draft greenhouse] guidance and fully address the requirements,” specifically recommending a full life cycle analysis due to “the potential magnitude of the proposed project and its resulting greenhouse gas (GHG) emissions.” EPA Letter 10/26/15 at 2-3 (JA__-__).

Nevertheless, FERC ignored the CEQ Draft Greenhouse Gas Guidance, as

¹³ *Andrus*, 442 U.S. at 357-58.

well as EPA's recommendation to comply with it.¹⁴ FERC does not dispute that "operation of [the] SMP Project would *result in the distribution and consumption* of about 1,000,000 Dth/d of natural gas." Final EIS at 3-297 (JA__) (emphasis added). But FERC still attempted to cast doubt on the connection between the pipeline and the power plants receiving the gas. FERC further asserted that "[e]ven if [FERC] were to find a sufficient connected relationship . . . , it would still be difficult to meaningfully consider these impacts." *Id.* Neither of these claims supports FERC's refusal to evaluate downstream greenhouse gas emissions and climate impacts flowing from its decision.

1. The purpose of the Project is to transport natural gas to several power plants.

Supplying natural gas to power plants for combustion is not just a foreseeable consequence of the Project; it is the primary objective. FERC acknowledges that the purpose of the Project is to "provide transportation service for up to approximately 1.1 billion cubic feet per day of natural gas to markets in Florida and the southeast United States" to supply existing and new natural gas

¹⁴ CEQ's *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* issued on August 1, 2016, before FERC's ruling on Environmental Petitioners' rehearing request. Like the Draft Guidance, the Final Guidance explained that indirect effects include "impacts associated with the end-use of the fossil fuel." *Id.* at 16 n.42 (Add. 217). CEQ's Final Greenhouse Gas Guidance is available at https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

power plants. Authorization Order at ¶ 4 (JA__); *see also* Sabal Trail Application, Vol. I at 3, 9 (JA__, __) (Florida Power & Light request for proposals for new pipeline for its Florida power plants). FERC knows that the Project will “result in the ... consumption” of the transported gas. Final EIS at 3-297 (JA__). Because the purpose of the pipeline project is to deliver gas to power plants so that it can be consumed there, there is clearly a “sufficient connected relationship” between the Project and downstream end-use. *See City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975) (“The argument that the principal object of a federal project does not result from federal action contains its own refutation.”).

The relation of the pipeline to the power plants further demonstrates that burning the gas is reasonably foreseeable. Corporate affiliates of the pipeline’s primary customers – *i.e.*, the companies that will burn the gas at their power plants – also own the pipeline. *See* Final EIS at 1-5 (JA__) (Sabal Trail contracts with Florida Power & Light and Duke Energy Florida); Authorization Order at ¶¶ 7, 77 (JA__, __) (Sabal Trail owners include Duke Energy Florida’s parent company and Florida Power & Light affiliate). These companies are essentially building a pipeline to ship natural gas to themselves. FERC cannot credibly claim that the connection between the pipeline and the downstream end-use is too attenuated.

2. FERC had sufficient information to meaningfully evaluate downstream effects.

As EPA informed FERC, the flawed Final EIS “does not contain a detailed

evaluation” of the indirect emissions and “does not contain evidentiary support for the conclusion that the project would not significantly contribute to GHG impacts.” EPA Letter 1/25/16 at 4 (JA__). FERC claims that there is “insufficient information in this case to meaningfully evaluate these impacts.” Rehearing Order at ¶ 63 (JA__-__). This determination is squarely refuted by the record. The Project will result in the “consumption of about 1,000,000 Dth/d of natural gas,” and the details of this consumption are known. Final EIS at 3-297 (JA__). *See* Authorization Order at ¶ 4 (JA__) (Florida Power & Light’s existing natural gas-fired Martin Plant); *id.* at ¶ 18 (JA__) (Duke Energy’s proposed 1640 megawatt combined cycle Citrus Plant); *id.* at ¶ 78 (JA__) (Florida Power & Light’s proposed 1600 megawatt combined cycle Okeechobee Plant); *id.* at ¶ 85 (JA__) (existing Florida Power & Light natural gas-fired power plants).

Nonetheless, FERC concluded that it would be “difficult to meaningfully consider these [downstream] impacts, primarily because emission estimates would be largely influenced by assumptions rather than direct parameters about the project.” Final EIS at 3-297 (JA__). The underlying premise of this vague and conclusory statement is contradicted by the record and misunderstands FERC’s NEPA obligation. *See Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1136-37 (9th Cir. 2011) (agencies cannot justify refusal to consider indirect effects with conclusory allegations). To the extent FERC relies on the absence of perfect

information regarding the precise fate of every single cubic foot of natural gas that the Project will transport, this Court has stated unequivocally that it “must reject any attempt by agencies to shirk their responsibilities under NEPA” by labeling discussion of future environmental effects “as ‘crystal ball inquiry.’” *Scientists’ Inst.*, 481 F.2d at 1092. FERC maintains that it is not required to “engage in speculative analyses,” Final EIS at 3-297 (JA__), but “[r]easonable forecasting and speculation is ... implicit in NEPA.” *Scientists’ Inst.* at 1092. NEPA does not permit FERC to throw up its hands in the face of uncertainty and refuse to analyze potential impacts. *See Del. Riverkeeper*, 753 F.3d at 1310 (“an agency must fulfill its duties to ‘the fullest extent possible’”).

The pipeline is directly analogous to the rail line in *Mid States*, except that analyzing downstream emissions requires much *less* speculation here. In *Mid States*, far fewer details were known regarding the quantity and final destination of the fossil fuel that the project would transport. The project proponent argued that downstream impacts were not reasonably foreseeable because the agency would need to know where the power plants would be built and how much coal they would use. The court disagreed, concluding that where the agency action would foreseeably increase the availability and use of coal, the NEPA analysis could not ignore “the construction of additional power plants” that may result merely because the agency did not “know where those plants will be built, and how much

coal these new unnamed power plants would use.” *Id.* at 549-50; *see also id.* (even if the *extent* of the effect was speculative, the *nature* of the effect was not). Here, the agency knows how much of the fossil fuel will be used, who will use it, and where and how it will be used.

3. FERC ignored tools available to estimate greenhouse gas emissions.

FERC had access to tools to estimate downstream greenhouse gas emissions and climate impacts. Greenhouse gas “estimation tools have become widely available” and are “already in broad use.” Draft CEQ Greenhouse Gas Guidance at 15 (Add. 185; JA__); *see also id.* (“These widely available tools address GHG emissions, including emissions from fossil fuel combustion and other activities.”); *id.* at 18-27 (Add. 188-197; JA__-__) (discussing quantitative analyses, alternatives, climate change consequences, and tools, methods, and models for NEPA analysis).

EPA urged FERC to comply with CEQ’s Draft Greenhouse Gas Guidance and requested a “life cycle analysis.” EPA Letter 10/26/15 at 2-3 (JA__-__). In addition, EPA pointed FERC to the U.S. Department of Energy’s May 29, 2014 report: *Life Cycle Analysis of Natural Gas Extraction and Power Generation* (“DOE Report”), noting that it “outlines the type of analysis that would provide the emissions estimates that FERC could use for this project.” EPA Letter 1/25/16 at 4 (JA__). EPA recommended that FERC use the DOE Report “to calculate the

emissions from the transportation of natural gas, including the development, transportation, and *end use* of the natural gas.” *Id.* (emphasis added); *see also id.* (“This type of analysis would be informative for decision-makers and the public and is appropriately provided at this stage of decision-making.”).

Nonetheless, FERC failed to utilize available tools to estimate greenhouse gas emissions. The arbitrary nature of FERC’s refusal to use the DOE Report is underscored by its recommendation that “stakeholders, or other interested parties” review the report because it “looks at the lifecycle of natural gas from various sources and compares the lifecycle [greenhouse gas] emissions to other fuels used for energy production.” Final EIS at 3-297, 3-298 (JA___, ___).¹⁵ Despite recognizing the DOE Report as a tool to estimate greenhouse gas emissions, FERC shirked its duty to actually utilize such a tool to evaluate such downstream emissions.

If the tools provided by CEQ and EPA were not to FERC’s liking, FERC was free to select another tool to estimate greenhouse gas emissions. But FERC did not (and could not) show that no tool exists for analyzing such emissions, or that it would be prohibitively expensive for FERC to find such a tool. In this regard, FERC violated 40 C.F.R. § 1502.22(b). That includes requirements for

¹⁵ *See also Ill. Commerce Comm’n v. Interstate Commerce Comm’n*, 848 F.2d 1246, 1258 (D.C. Cir. 1988) (“The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it.”)

dealing with incomplete information, including a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts; and the agency's evaluation of such impacts based on theoretical approaches or research methods generally accepted in the scientific community. *Id.* at §§ 1502.22(b)(3) and (4). FERC could have disclosed the limitations of available tools rather than refuse to use them. *See Ctr. for Biological Diversity*, 538 F.3d at 1201.

4. FERC improperly discounted the Project's greenhouse gas emissions based on replacement of coal plants with natural gas plants.

FERC cannot excuse its wholly inadequate analysis by arguing that portions of the gas transported by the Project will be consumed by power plants that are replacing coal-fired power plants. *See* Final EIS at 3-298 (JA__). FERC makes no attempt to quantify the potential emission offset. Nor does the agency offer legal authority suggesting that NEPA permits a failure to analyze a reasonably foreseeable effect because it may be offset to an unknown degree. Even if considered a net benefit, NEPA requires the agency to take a hard look at all environmental impacts, including beneficial impacts. 40 C.F.R. § 1508.27(b)(1). And the possibility that some emissions may be offset does not excuse FERC's failure to estimate emissions from other power plants that FERC admits will not displace coal-fired plants. *See* Final EIS at 3-298 (JA__).

5. FERC cannot avoid the downstream effects analysis by citing to future air permitting processes.

FERC also erred in concluding that it could ignore its NEPA obligations because new natural gas power plants would “undergo state and federal air permitting processes.” Final EIS at 3-298 (JA__). Future regulation by another agency does not negate FERC’s responsibility to fully and independently assess indirect effects. *See* CEQ Draft Greenhouse Gas Guidance at 10 n.24 (NEPA “calls for the disclosure of the full range of effects that flow from the action, regardless of the ability to control or regulate those effects”) (Add. 180; JA__); *Idaho v. Interstate Commerce Comm’n*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (holding that an agency fails to take a required “hard look” when it “defer[s] to the scrutiny of others”); *North Carolina v. FAA*, 957 F.2d 1125, 1129-30 (4th Cir. 1992) (“[NEPA] precludes an agency from avoiding the Act’s requirements by simply relying on another agency’s conclusions about a federal action’s impact on the environment.”).

FERC cannot rely on regulation by other agencies as a reason to forego analysis. *Calvert Cliffs’*, 449 F.2d at 1122-23. The issuance of permits by other entities does not establish that a project will not have significant impacts under NEPA. *Id.*; *see also Mid States*, 345 F.3d at 550 (Surface Transportation Board must consider air quality impacts from induced coal combustion because pollution could increase notwithstanding Clean Air Act limits). FERC must assess indirect

effects so it can consider those impacts when determining whether to approve the Project. *See id.* at 549-50; *Calvert Cliffs*, 449 F.2d at 1123.

C. This Case is Distinguished from *EarthReports*.

FERC based its position that it need not consider the downstream greenhouse gas impacts on *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016). Rehearing Order at ¶ 63 n.132 (JA__). But *EarthReports* turned on the Natural Gas Act's peculiar treatment of exports. The Court held that FERC was not required to consider indirect effects of increased export through a FERC-licensed liquid natural gas facility because the Department of Energy “*alone* has the legal authority to authorize” increased exports. *EarthReports* at 956 (emphasis added). Here, there is not another federal agency with exclusive authority over the relevant action.

EPA regulation of power plant emissions is immaterial. CEQ regulations specifically provide that the agency must assess the “impact of the action when added to other . . . actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*” 40 C.F.R. § 1508.7 (emphasis added). This is the ordinary case in which NEPA requires an agency to consider indirect effects that the agency does not regulate. *See Mid States*, 345 F.3d at 550; *Ctr. for Biological Diversity*, 538 F.3d at 1217; *Sierra Club v. Army Corps of Eng'rs*, 803 F.3d 31, 40 n.3 (D.C. Cir. 2015); *O'Reilly v. Army Corps of Eng'rs*, 477 F.3d 225,

234-35 (5th Cir. 2007); *City of Davis*, 521 F.2d at 675, 677.

Also, FERC has the ability to deny the Project, which would directly prevent the “distribution and consumption” of the natural gas. Final EIS at 3-297 (JA__). Because FERC has statutory authority to deny the certificates or set conditions on them, it is a legally relevant cause of the downstream impacts. *Ctr. for Biological Diversity*, 538 F.3d at 1213 (distinguishing *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004)). And FERC will issue a certificate only “where the public benefits of the project outweigh the project’s adverse impacts,” which includes analysis of clean air impacts and environmental impacts. *Minisink Residents for Env’tl. Pres. and Safety v. FERC*, 762 F.3d 97, 102-03 n.1 (D.C. Cir. 2014) (citation omitted). Because FERC possesses the power to act on whatever information might be contained in this EIS, it must consider these impacts, including climate change. *Ctr. for Biological Diversity*, 538 F.3d at 1216-17.

III. FERC’S ALLOWANCE OF A 14% RETURN ON EQUITY BASED ON A FICTITIOUS CAPITAL STRUCTURE VIOLATES SECTION 7 OF THE NATURAL GAS ACT.

The initial rate proposed for services delivered by a pipeline project is a critical factor in determining whether the Commission should issue a certificate of public convenience and necessity under Section 7, 15 U.S.C. § 717f, of the Natural Gas Act. If the rate is not in the public interest, the certificate should be denied. *Atlantic Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 390-91 (1959).

Establishing a fair initial rate is particularly crucial because consumers are not entitled to refunds based upon later downward adjustments to the initial rate under the more stringent “just and reasonable” standard of Sections 4 or 5 of the Natural Gas Act, thereby resulting in a windfall to the gas company contrary to Congressional intent. *Id.* This fact, coupled with the “long” and “inordinate delay” that typically occurs in the Commission’s review of initial rates under Section 5, requires “a most careful scrutiny and responsible reaction to initial price proposals . . . under Section 7.” *Id.*

Sabal Trail’s application for a certificate of public convenience and necessity requested an initial rate of 14% return on equity based upon a capital structure of 60% equity and 40% debt. Application, Vol. I at 41-42 (JA__-__). Finding that such a high rate for a low debt capital structure “does not reflect current Commission policy,” FERC approved the high rate based upon the imposition of a hypothetical 50% equity/50% debt capital structure. Authorization Order at ¶¶ 117-118 (JA__). In doing so, FERC assumed, without any supporting evidence in the record, that Sabal Trail would be able to adopt such a capital structure. Thus, it is impossible to determine whether the initial rate is too low to financially support the project or too high to the detriment of consumers.

Notably, the Commission’s decision to reject a 14% return on equity under a 60/40 equity/debt capital structure is consistent with the Commission’s prior cases

finding such a rate excessive because such a thin equity/debt ratio (1) does not have a sufficient level of risk to justify a high return and (2) is more costly to consumers. *See* Authorization Order at ¶ 117 (JA__), *citing MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165 at 61,871 (2008); *see also Missouri Interstate Gas, LLC*, 100 FERC ¶ 61,312, at 62,397 (2002) (finding that a 45% equity component – or 15% less than here – represented “average risk” resulting in reducing a requested 14% return on equity to 13.3%).

Thus, the Commission found that a 14% return on equity was permissible based solely on its imposition of a fictitious 50/50 equity/debt capital structure. This Circuit, however, has rejected the use of hypothetical capital structures absent an adequate explanation from the Commission: “FERC has not adequately explained how its reliance on the hypothetical capital structure to reach a 14.45% return is anything more than a device to mask an otherwise anomalous return as something more appealing.” *North Carolina Utilities Comm’n v. FERC*, 42 F.3d 659, 664 (D.C. Cir. 1994).

FERC’s primary justification here is that the proposed pipeline is a new pipeline. *See* Rehearing Order at ¶ 19 (JA__). FERC’s explanation, however, is belied by numerous previous cases, including ones involving new construction, where the Commission followed its established policy of disfavoring substitution of a fictitious capital structure to justify a high return on equity. *See, e.g.,*

Panhandle Eastern Pipeline Co., LLC, 71 FERC ¶ 61,228 at 61,828 (1995).

Instead, the Commission typically reduces the return on equity. *See Pine Needle LNG Co., LLC*, 77 FERC ¶ 61,229 at 61,915-16 (1996) (reducing a new liquefied natural gas structure's return on equity from 15% to 12.75% after rejecting the company's proposal to adjust its capital structure); *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010 at 61,053 (2010) (reducing 15% return on equity to 14% for an **actual** 50/50 equity/debt capital structure); *Williams Natural Gas Co.*, 77 FERC ¶ 61,277 at 62,192-93, 62,199 (1996) (reducing 15.5% return on equity to 11.85% for an **actual** 64/36 equity/debt capital structure "to account for the [reduced] financial risk associated with a high equity ratio"); *Panhandle Eastern Pipeline Co.*, 71 FERC ¶ 61,228 at 61,828 (1995) ("preferred course" is to use company's actual capital structure and adjust return on equity). As such, FERC's explanation is hardly adequate. Rather than employ a fictitious capital structure to allow an abnormally high rate of return, FERC should have cut Sabal Trail's return on equity or denied the certificate.

FERC also attempts to justify its adoption of a fictitious capital structure on the ground that Sabal Trail, as a new pipeline, has no existing capital structure. Rehearing Order at ¶ 22 (JA__-__). Of course, if that provides an adequate explanation, there would never be any restriction on using a fiction to establish rates for new pipelines – an outcome hardly conducive to the public interest as

required for the issuance of a certificate. FERC also fails to explain why it departs from its practice in other similar cases of adopting the capital structure of the applicant's parent companies. Doing so here would result in approximately a 40/60 equity/debt structure.¹⁶

Finally, FERC attempts to defend its action based on two cases where it allowed a 14% return on equity based on a 50/50 equity/debt ratio: *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165 (2008) and *Bison Pipeline LLC*, 131 FERC ¶ 61,013 (2010). Rehearing Order at ¶ 18 n.36 (JA__). Both of those cases, however, were uncontested. More importantly, *Bison* did not involve a fictitious capital structure as the applicant itself proposed a 50/50 equity/debt capital structure.

FERC's overwhelming precedent is to allow a 14% return on equity only with much higher debt components of 70-80%. *See, e.g., Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 at ¶ 62,047 n.28 (2014); *Gulfstream Natural Gas Sys., L.L.C.*, 105 FERC ¶ 61,052 at 61,314 n.26 (2003); *Georgia Strait Crossing Pipeline LP*, 98 FERC ¶ 61,271 at 62,054 (2002); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at 62,149 (2002); *Vector Pipeline, L.P.*, 85 FERC ¶ 61,083 at

¹⁶ *See* Environmental Petitioners' Request for Rehearing at 11 n.3, 17 (JA__, __). Also, although FERC complains that Environmental Petitioners make this argument for the first time on rehearing (Rehearing Order at ¶ 23 (JA__)), this was the first opportunity to make the argument because FERC gave no indication it would use a fictitious capital structure to justify the excessive 14% return on equity until it issued its Authorization Order.

61,303 (1998); *Discovery Producers Serv. LLC*, 78 FERC ¶ 61,194 at 61,841-42 (1997); *Alliance Pipeline, L.P.*, 80 FERC ¶ 61,149 at 61,592 (1997); *Maritimes & Northeast Pipeline, L.L.C.*, 76 FERC ¶ 61,124 at 61,672 (1996); *Portland Natural Gas Transmission Sys.*, 76 FERC ¶ 61,123 at 61,661 (1996); *Kern River Gas Transmission Co.*, 50 FERC ¶ 61,069 at 61,150 (1990).

FERC has not stated an adequate explanation for allowing a high rate of return based upon a hypothetical capital structure. Its decision is contrary to this Circuit's precedent, FERC's own precedent, the public interest, and reason and logic. Consequently, the certificate should be revoked until such time as FERC adopts a reasonable return on equity for the Sabal Trail component of the Project after providing adequate opportunity for public notice and comment.¹⁷

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, FERC's analysis under NEPA, and its issuance of the certificates of public convenience and necessity, were arbitrary and capricious and must be vacated and remanded to the agency under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

¹⁷ FERC also suggests that Environmental Petitioners have no standing to raise the return on equity issue because they are not affected ratepayers. Rehearing Order at ¶ 17 (JA__). FERC cites no authority, nor can it, for the novel proposition that parties who otherwise have standing to challenge the issuance of certificates of public convenience and necessity are limited in the legal arguments they can make. In any event, Environmental Petitioners are ratepayers of Intervenors Florida Power & Light and Duke Energy Florida whose power plants will be served by the Project, thereby obviating this objection. *See Costello Declaration (Add. 57)*.

Dated: December 9, 2016

Respectfully submitted,

/s/ Steven D. Caley

Steven D. Caley

GreenLaw

State Bar of Georgia Building

104 Marietta Street, N.W., Suite 430

Atlanta, Georgia 30303

(404) 659-3122, ext. 222

scaley@greenlaw.org

Elizabeth F. Benson

Sierra Club

2101 Webster Street, Suite 1300

Oakland, California 94612

(415) 977-5723

elly.benson@sierraclub.org

Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of November 17, 2016 because this brief contains 9,856 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2016 Times New Roman) in 14 point font.

This brief has been scanned for viruses and is virus free.

Dated: December 9, 2016

/s/ Steven D. Caley
Steven D. Caley
GreenLaw
State Bar of Georgia Building
104 Marietta Street, N.W.
Suite 430
Atlanta, Georgia 30303
(404) 659-3122, ext. 222
scaley@greenlaw.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2016, I electronically filed the foregoing Petitioners' Opening Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

/s/ Steven D. Caley

Steven D. Caley

GreenLaw

State Bar of Georgia Building

104 Marietta Street, N.W.

Suite 430

Atlanta, Georgia 30303

(404) 659-3122, ext. 222

scaley@greenlaw.org

Counsel for Petitioners