

**ORAL ARGUMENT HELD ON APRIL 18, 2017  
DECISION ISSUED AUGUST 22, 2017**

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

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NO. 16-1329 (consolidated with 16-1387)

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SIERRA CLUB, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

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

Intervenors.

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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)

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**PETITIONERS' OPPOSITION TO FLORIDA RELIABILITY  
COORDINATING COUNCIL, INC.'S MOTION FOR LEAVE  
TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
RESPONDENT AND RESPONDENT-INTERVENORS' REQUEST  
FOR PANEL REHEARING**

The Court should deny Florida Reliability Coordinating Council, Inc.'s (FRCC) motion for leave to file an *amicus curiae* brief in support of the Federal Energy Regulatory Commission's (FERC) and Intervenors' requests for panel

rehearing as to remedy. FRCC in essence is seeking leave to submit new arguments and new evidence. This is not allowed on a petition for rehearing.

Merits and remedy briefing were not bifurcated in this litigation. Accordingly, Environmental Petitioners addressed remedy in their briefs. *See, e.g., Sierra Club et al. Opening Brief* (Doc. No. 1664693) at 12 (“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.”); *id.* at 43–44 (“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).”); and *Sierra Club Reply Brief* (Doc. No. 1664696) at 22 (“Petitioners respectfully request that the Court vacate the EIS and FERC’s Orders, stay construction of the Project, ... and remand this matter to FERC.”).

Sierra Club requested vacatur, but the other parties and *amicus curiae* FRCC chose not to address it with regard to Sierra Club’s claims. Respondent FERC and Intervenors addressed it only in the context of the Sunshine Act violations that were brought by different Petitioners, GBA Associates. (See Doc. No. 1664763 at 73; Doc. No. 1664866 at 16). Similarly, FRCC presented no arguments or evidence opposing

Sierra Club’s request for vacatur. If FRCC desired to weigh in on remedy, it could have done so in its *amicus curiae* merits brief it filed on February 7, 2017. (Doc. No. 1659878). Because it chose not to address this issue then, it should be barred from doing so now. *See City of Holyoke Gas & Elec. Dep’t v. F.E.R.C.*, 954 F.2d 740, 745 (D.C. Cir. 1992) (denying petition for rehearing where petitioner “did not direct this court’s attention, either in its briefs or at oral argument, to the evidence it now cites”); *Easley v. Reuss*, 532 F.3d 592, 593–94 (7th Cir. 2008) (“Panel rehearing is not a vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing.”); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir. 1994) (“arguments raised for the first time on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result” (citation omitted)); *Am. Policyholders Ins. Co. v. Nyacol Prod., Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993) (“a party may not raise new and additional matters for the first time in a petition for rehearing”). *And see*, *Wright & Miller, Federal Practice & Procedure* § 3986.1 (4th ed.) (“Issues that were not presented in the initial briefs and argument will seldom be considered when presented for the first time by petition for rehearing.”); *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003) (“Ordinarily, we do not address issues or arguments raised on rehearing that a party should have addressed in prior briefing.”).

FRCC’s request for another bite at the apple is thus unavailing. FRCC had the opportunity to make its case regarding the appropriate remedy, but did not take it. *See Am. Policyholders Ins. Co.*, 989 F.2d at 1264 (1st Cir. 1993) (“We will not revisit specific issues merely because an adverse result has infused new vigor into a discontented party’s advocacy.”).

FRCC also has not demonstrated how its participation as *amicus curiae* at the rehearing stage would assist the Court. Neither FRCC’s motion nor its proposed *amicus* brief “state with particularity the errors that the panel is claimed to have made.” *See* D.C. Cir. Handbook § XIII(B)(1). Nor does FRCC state “each point of law or fact” that it “believes the court has overlooked or misapprehended.” Fed. R. App. P. 40(a)(2). *See Easley*, 532 F.3d at 593 (“It goes without saying that the panel cannot have ‘overlooked or misapprehended’ an issue that was not presented to it.”). In addition, FRCC’s arguments are similar to arguments already proffered by FERC and Intervenors in their petitions for rehearing. Intervenors Duke Energy Florida and Florida Power & Light Company are members of FRCC, representing substantially the same interests in this litigation.<sup>1</sup> In this regard FRCC’s proposed brief is skirting the word count limits on petitions for rehearing.<sup>2</sup>

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<sup>1</sup> *See* 2017 FRCC Members – Member Services Division, *available at* [https://www.frcc.com/AboutUs/Shared%20Documents/FRCC%20MEMBERS-Member%20Services%20Division-%202017%20\(11.2.16\).pdf](https://www.frcc.com/AboutUs/Shared%20Documents/FRCC%20MEMBERS-Member%20Services%20Division-%202017%20(11.2.16).pdf)

<sup>2</sup> Fed. R. App. P. 40(b)(1) limits a petition for panel hearing to 3,900 words.

For the foregoing reasons, this Court should deny FRCC's motion for leave to file an *amicus curiae* brief.

Dated: October 17, 2017

Respectfully submitted,

**/s/ Elizabeth F. Benson**

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Intervenors' petition for panel or *en banc* rehearing is 3,895 words. FRCC's proposed *amicus* brief is 2,134 words.

## **CERTIFICATE OF COMPLIANCE**

This brief complies with the type, volume, and font limitation of Fed R. App. P. 27(d) because the foregoing response contains 819 words, which is less than the maximum length authorized by the Rule. This was prepared using 14-point font.

/s/ Eric E. Huber  
Eric E. Huber

## CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2017, I electronically filed the foregoing *Petitioners' Opposition to Florida Reliability Coordinating Council's Motion for Leave to File Amicus Curiae Brief in Support of Respondent and Respondent-Intervenors' Request for Panel Rehearing* with the Clerk of the Court by using the appellate CM/ECF System, sent four copies to the Court via U.S. Postal Service, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ Eric E. Huber  
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