

**In the United States Court of Appeals
for the District of Columbia Circuit**

Nos. 17-1236 & 17-1240 (consolidated)

SIERRA CLUB,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

**RESPONSE OF FEDERAL ENERGY REGULATORY COMMISSION
TO MOTION FOR DISMISSAL WITHOUT PREJUDICE**

The Federal Energy Regulatory Commission (“Commission”) does not oppose dismissal of Sierra Club’s petitions in these consolidated dockets. And the Commission is not opposed to Sierra Club retaining its right to subsequently file a *timely* petition for review of the Commission order at issue—i.e., after the Commission issues its order on the pending requests for rehearing. But the Commission opposes Sierra Club’s request that the dismissal be “without prejudice” to the filing of *untimely* petitions in the future.

As explained in the Commission’s emergency response to Sierra Club’s Emergency Motion for Stay and All Writs Act Petition, these appeals are

“incurably premature” because they challenge non-final agency action. *See Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (such a petition “must be dismissed”); *see also In re Murray Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (“In short, the All Writs Act does not authorize a court to circumvent bedrock finality principles[.]”). Therefore, dismissal without prejudice is contrary to this Court’s precedent and could be interpreted to countenance these types of premature appeals in the future. *Accord D.C. Cir. Handbook of Practice and Internal Procedures VIII.D* (“[C]onditional motions for dismissal or stipulations of dismissal, such as those requesting that the dismissal be without prejudice, will usually be denied by the Clerk.”).

Further, responding to emergency petitions takes considerable resources. This case is particularly illustrative in that regard. The Commission had 72 hours to review Sierra Club’s emergency motion and petition, consider the voluminous administrative record compiled over a two-year period, and mount a defense. This effort came a mere five days after the Court denied Sierra Club’s substantially similar request for extraordinary relief in a different (and equally complex) pipeline proceeding. And then, one day after the Commission and Intervenor filed their emergency responses in this case, Sierra Club conceded that there was no emergency. Dismissal without prejudice could invite similarly unwarranted requests for extraordinary relief in the future.

Dismissal of Sierra Club's petitions with prejudice will not deprive Sierra Club of the opportunity to seek judicial review of the Commission's order at the appropriate time. The statutorily-prescribed administrative process is ongoing; the Commission will issue an order addressing the merits of the pending requests for rehearing. If Sierra Club is aggrieved at the conclusion of that process, the statute provides a vehicle for seeking judicial review. There is no basis for short-circuiting that Congressionally-designed framework. Accordingly, the Court should dismiss Sierra Club's petitions for review as incurably premature, or deny them as inadequate to justify the stay Sierra Club seeks.

CONCLUSION

For the foregoing reasons, Sierra Club's motion for voluntary dismissal without prejudice should be denied, and the petitions should instead be dismissed, with prejudice, or denied.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ Nicholas M. Gladd
Nicholas M. Gladd
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C.

November 21, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this response contains 508 words.

I further certify that this response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Nicholas M. Gladd

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 21st day of November 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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