ORAL ARGUMENT NOT YET SCHEDULED

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

Appalachian Voices, *et al*., Petitioners, v. Federal Energy Regulatory Commission, Respondent.	))))))))))	No. 17-1271 (consolidated with 18-1002 and 18-1006)

On Petition for Review of Order of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,043 (October 13, 2017)

APPALACHIAN VOICES, *ET AL.*'S REPLY IN SUPPORT OF MOTION FOR STAY AND ALL WRITS ACT PETITION

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INTRODUCTION

Mountain Valley Pipeline, LLC's ("Mountain Valley") imminent construction of the Mountain Valley Pipeline ("MVP") would cause irreparable injury to Petitioners' members' property and their aesthetic, recreational, and environmental interests. The Federal Energy Regulatory Commission ("FERC") issued the Certificate Order ("Order") authorizing the project based on a finding of public convenience and necessity that was not supported by substantial evidence and an Environmental Impact Statement ("EIS") that did not satisfy the National Environmental Policy Act ("NEPA"). FERC and Mountain Valley's contrary arguments lack merit. The Court should thus issue a stay pending review if it believes that it has jurisdiction over Petitioner's Petition for Review or, alternatively, a stay under the All Writs Act ("AWA") to preserve its prospective jurisdiction.

ARGUMENT

I. Petitioners Are Likely To Succeed On The Merits

a. FERC's Public Convenience and Necessity Finding Lacked Substantial Evidence

FERC lacked sufficient evidence to conclude that the public benefits of the MVP outweigh the adverse impacts to landowners, surrounding communities, and the environment. Both FERC and Mountain Valley argue that FERC may rely

exclusively on precedent agreements with an applicant's corporate affiliates to establish that the public benefits of a project are sufficient to support a finding that the project is *required* by the public convenience and *necessity*. Under FERC's reading, any time a company believes that a new pipeline may be profitable, it can create an affiliate and enter into precedent agreements sufficient to satisfy FERC's standard. This would allow FERC to abdicate its responsibility to protect the public interest to the whims of speculative profit seeking enterprises.[1] Simply because private parties are willing to take the risk that they will be able take advantage of FERC's excessive allowable rates of return to profit from shipping gas does not establish a public need for that gas. Such an easily manipulable process cannot form the basis for the grant of the extraordinary power of eminent domain.

FERC's Policy Statement, 88 FERC 61,227, makes clear that, though precedent agreements remain evidence of market need, those contracts alone are insufficient to support a finding of public need. The language could not be clearer: "*The amount of capacity under contract also is not a sufficient indicator by itself of the need for a project*. … Thus, the test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry's structure and presents difficult issues." 88 FERC 61,744 (emphasis added).

[1] *See Order* ¶41 (finding that the project's shippers, not FERC itself, "have determined that there is a market for their gas")

The section of the Policy Statement FERC cites for the proposition that precedent agreements alone can establish public benefits sufficient to outweigh substantial impacts to landowners and the environment contradicts its claims. *See* FERC Opp. 14 (citing 88 FERC 61,747). There, FERC states that "[r]ather than relying only on one test for need, the Commission *will consider* all relevant factors reflecting on the need for the project." 88 FERC 61,747 (emphasis added). The Policy Statement further explains that "the evidence necessary to establish the need for the project will usually include a market study. … Vague assertions of public benefits will not be sufficient." *Id.* at 61,748.

FERC's assertion that its Policy Statement does not require it to "distinguish between [agreements] entered into with affiliates or nonaffiliates in determining public need" is similarly unsupported. *See* FERC Opp. 16. Remarkably, FERC cites to the Policy Statement's description of FERC's *old* policy that was replaced by the 1999 Policy Statement. 88 FERC 61,744. The other portion FERC cites in its opposition states that a "project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate." *Id.* at 61,748. As newly appointed FERC Commission Glick recently explained, affiliate agreements are "not necessarily the result of an arms-length negotiation" such that "the existence of precedent agreements that are in significant part between the pipeline developer and its

affiliates is insufficient to carry the developer's burden to show that the pipeline is needed." *PennEast Pipeline Company, LLC*, 162 FERC 61,053 (2018) (Glick, Comm'r, dissenting).

FERC's exclusive reliance on the affiliate precedent agreements was impermissible in light of the evidence before it demonstrating the lack of market demand for the MVP's capacity. Though FERC briefly mentioned a couple of the many studies and detailed comments showing the lack of market need, it did not actually assess public need separate from the existence of the affiliate precedent agreements. *Order* ¶41. Nor did FERC's EIS include a meaningful discussion of market demand, as FERC claims. *See* FERC Opp. 16-17. That document merely found that Mountain Valley's desired 2 billion cubic feet per day capacity was not available on certain existing pipeline systems—not that the additional capacity was required to serve any public demand in the first place.

The cases cited to support FERC's exclusive reliance on precedent agreements are distinguishable because they either did not involve affiliate agreements[2] or the court was not confronted with the same record evidence including multiple independent studies showing a lack of market demand.[3] Additionally, in those cases, it appears that the proponents had identified end users

[2] *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015).
[3] *Sierra Club v.FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

for the vast majority of the projects' capacity. Here, Mountain Valley has identified purchasers for only thirteen percent of the MVP's gas; demand for the remaining capacity is entirely speculative. *Order* (LaFleur, Comm'r, Dissenting).

Finally, FERC's failure to meaningfully evaluate the public need for the project is compounded by its failure to properly weigh adverse impacts to landowners and communities, which both FERC and Mountain Valley ignore. *See* AWA Pet. 17. FERC was required to find that the MVP's public benefits outweigh the adverse impacts to, among other things, landowners and surrounding communities. Policy Statement, 88 FERC 61,745. FERC acknowledged that Mountain Valley "has been unable to reach easement agreements with many landowners," but found, without any record support or analysis, that Mountain Valley "has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities." *Order* ¶57. Based only on this conclusory determination, FERC resolved that "the benefits that the MVP Project will provide to the market outweigh any adverse effects." *Id.* ¶64.

As with its assessment of the public benefits, FERC's assessment of adverse impacts runs counter to its Policy Statement. A pipeline's effort to minimize impacts must occur before FERC employs its balancing test. Policy Statement 88 FERC 61,745. Whether Mountain Valley has "generally taken sufficient steps to minimize adverse impacts" is irrelevant to whether any residual impacts remain

(which is certain here, with over 650 individuals subject to condemnation actions) and whether those impacts outweigh public benefits. *Id*. Instead, FERC must actually weigh the adverse impact to landowners and communities, including the use of eminent domain, against whatever public benefits Mountain Valley demonstrates. FERC's consideration of adverse impacts, however, fails to address even the number of landowners that would be affected or the amount and characteristics of the property to be taken. In sum, FERC balanced illusory public benefits, in the form of self-dealing affiliate agreements, against considerable, but wholly ignored, adverse impacts to arbitrarily support its finding of public convenience and necessity.

b. FERC's EIS Failed to Adequately Consider Alternatives

Petitioners do not dispute that FERC discussed a number of alternatives. *See* FERC Opp. 17-20. However, that discussion did not satisfy NEPA because FERC failed to evaluate the need that the project would serve, instead uncritically adopting the goals of the applicant. FEIS 1-9. That failure unreasonably narrowed the range of alternatives. AWA Pet. 24-25; EPA Comments at 2, Ex. L to AWA Pet. Though an agency should consider an applicant's goals, it should "[p]erhaps more importantly … always consider the views of Congress, expressed … in the agency's statutory authorization to act." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). Congress made clear that FERC should only

approve projects that are required by the public convenience and necessity. By refusing to consider the public need for the pipeline and relying entirely on Mountain Valley's narrow goals, FERC failed to consider this important aspect of the problem, rendering its decision arbitrary and capricious.

c. FERC's EIS Failed to Adequately Assess Climate Impacts

FERC's greenhouse gas analysis violates NEPA for reasons outlined in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) ("*Sabal Trail*"), which holds that downstream combustion emissions are an indirect effect of pipeline projects such as the MVP and that an EIS for such projects must "*include a discussion of the 'significance'* of this indirect effect." *Id*. at 1374 (emphasis added, citing 40 C.F.R. § 1502.16(b)). AWA Pet. 25-27. Here, FERC refused to consider combustion of the gas to be carried on the MVP as an indirect effect. FEIS 4-516. Moreover, in the limited context in which it did consider combustion emissions, FERC avoided any real discussion of significance with a single, conclusory sentence: "Because we cannot determine the projects' incremental physical impacts on the environment caused by climate change, we cannot determine whether the projects' contribution to cumulative impacts on climate change would be significant." FEIS 4-620. FERC thus adopts the untenable position that discussing the significance of downstream emissions—*i.e.*, precisely what this

Court directed in *Sabal Trail*—is impossible. This cursory treatment of a major environmental consequence[4] does not constitute a "hard look." FERC Opp. 21.

FERC attempts in the Order to supplement the EIS's lack of analysis. But this assessment needed to be include *in the EIS*. *See* 867 F.3d at 1368 ("the agency action [an EIS] undergirds is arbitrary and capricious[] if the EIS does not contain 'sufficient discussion of the relevant issues …"). Moreover, the Order does not supply the required analysis. FERC asserts that it "examined both the regional and national emissions of GHGs" in an effort "to put [the project's] emissions in to context." *Order* ¶294. *See* FERC Opp. 22; MVP Opp. 21. In an attempt to mask the magnitude of the project's emissions, FERC used an inappropriately large "regional" baseline.[5] *Order* ¶294 n.289. More importantly, FERC again failed to actually discuss or assess significance. *Id*. ¶295. The project would cause massive downstream emissions and attendant climate impacts; this Court should not entertain FERC's attempt to insulate its shoddy analysis by adding a few sentences

[4] The pipeline's end-use emissions are equivalent to annual emissions from 9.9 coal-fired power plants. *See* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

[5] The reader is left guessing which states' emissions were included, but number crunching reveals that FERC used an inflated "regional" baseline of 2.4 *billion* tons of carbon dioxide emissions. In 2015, energy-related carbon dioxide emissions totaled 92 million tons in West Virginia and 103 million tons in Virginia (where the pipeline is located). *See* https://www.eia.gov/environment/emissions/state/analysis/pdf/stateanalysis.pdf. Thus, combustion emissions from the pipeline represent 43.5% of West Virginia's total emissions, and 38.8% of Virginia's total emissions.

to the Order that do nothing to provide the public and decisionmakers with useful information for a reasoned choice among alternatives. 867 F.3d at 1374.

II. Petitioners Will Suffer Irreparable Harm

FERC and Mountain Valley claim that Petitioners' members will not suffer irreparable harm from pipeline construction. Neither can seriously maintain that the taking and alteration of Petitioners' members' private property, including the cutting of mature trees and fragmentation of large tracts of forests, does not constitute irreparable harm. *See* Pet'rs Decl., Ex. D to AWA Pet. Those harms are real and cannot be remedied in Petitioners' members' lifetimes, regardless of whether FERC deemed them "significant" in its EIS.

Further, FERC fails to acknowledge that its conclusions regarding those impacts, including its unsupported finding that its selected mitigation measures will be successful, are widely disputed, including in Petitioners' rehearing request, which FERC claims may still result in alteration of its Order. For example, that request documented significant aquatic impacts resulting from other FERC-authorized projects that employed the same types of mitigation that FERC relies on here. Rehearing Request at 62-75, Ex. C to AWA Pet.

III. Harm to MVP is Mostly Temporary and Entirely Self-Inflicted

FERC and Mountain Valley claim that a stay will lead to substantial monetary harm. FERC Opp. 31-32; Mountain Valley Opp. 29-32. Both are wrong.

In the unlikely event that construction is stayed but FERC and Mountain Valley ultimately prevail on the merits, the project would still likely move forward and the bulk of claimed economic losses could be recouped. Mountain Valley's harm declarant, Robert Cooper, has admitted as much in federal court.

In its eminent domain actions seeking to gain early entry onto private land for construction, *see* AWA Pet. 17, Mountain Valley makes the same claims of economic harm from delay that it does here, relying on the testimony of Mr. Cooper. When subject to cross-examination, however, Mr. Cooper's allegations crumble. *See, e.g.*, Transcript Excerpts, *MVP v. Easements, et al.*, 7:17-cv-492, (W.D. Va. Jan. 12, 2018), Ex. A.

For instance, Mr. Cooper claims that Mountain Valley will suffer monthly revenue losses of $40-50 million. Cooper Decl. ¶21. But Mountain Valley's revenue sources are its corporate affiliates. Thus, to the extent that Mountain Valley "loses" revenue each month that its pipeline is not in service, its affiliates retain that money. Tr. 173:13-16; 174:10-15. MVP's owners will not "lose" anything; they simply fail to transfer money from one affiliate to another.

Further, Mountain Valley's "lost" revenue is, at worst, merely "delayed." The MVP is premised on a 20-year transportation agreement that does not start to run until service begins. Mountain Valley will have 20 years of revenue from the pipeline, regardless of whether the pipeline is placed in service on its target date or

at some later time. It will earn the delayed revenue on the back-end, thus rendering its "loss" illusory. Tr. 173:1 to174:3.[6]

Mountain Valley's claimed delay and cancellation fees of up to $200 million are likewise inflated and, ultimately, self-inflicted.[7] Mr. Cooper admitted in his testimony that the $200 million is an absolute maximum and that he had multiple ways to mitigate any potential penalties. Tr. 196:20 to 197:6, 198:3-6. Moreover, Mountain Valley's contracts include a "Force Majeure" clause that allow it to escape penalties resulting from circumstances that could not be prevented by the company's reasonable efforts, such as a judicially imposed stay. *See, e.g.*, Master Construction Services Agreement, Condition 5.8, Ex. B. Most importantly, Mountain Valley voluntarily subjected itself to any penalties by entering those contracts, some of which were formed *before receiving its Certificate*. Tr. 196:2-5. Such self-inflicted harm cannot tip the balance of equities in Mountain Valley's favor. *See Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002).

Finally, FERC's claim that a stay would "imperil the project," FERC Opp. 3, is unsupported. Mountain Valley admitted that it would likely build its pipeline even if it has to wait until November 15, 2018 to begin construction and that it has already established schedules to do so. Tr. 209:9 to 211:17. FERC and MVP's

[6] The same is true of any jobs that the project would create, which would not be "lost" but merely delayed.

[7] Mountain Valley's claimed $40-45 million in administrative costs are also inflated and largely mitigable. *See* Tr. 204:9 to 209:4.

claimed losses thus cannot outweigh the substantial harm that Petitioners' members would suffer in the absence of a stay.

CONCLUSION

For the foregoing reasons, the Court should issue a stay to prevent irreparable harm and preserve meaningful judicial review.

Dated: January 26, 2018.

Respectfully submitted,

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this motion contains 2,596 words.

I further certify that this motion 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 motion has been prepared in Times New Roman 14-point font using Microsoft Word.

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Certificate of Service

I hereby certify that on January 26, 2018, I caused to be served the foregoing Appalachian Voices, *et al*.'s Reply In Support of All Writs Act Petition and Motion for Stay upon all ECF-registered counsel via the Court's CM/ECF system.

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