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

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

MOTION TO HOLD PROCEEDING IN ABEYANCE OR, IN THE ALTERNATIVE, TO DEFER FILING OF THE CERTIFIED INDEX TO THE RECORD

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") requests that the Court hold this proceeding in abeyance or, in the alternative, defer the filing of the certified index to the record, until after the Commission issues its order addressing the many pending requests for agency rehearing of the non-final Commission order challenged in these consolidated petitions.

BACKGROUND

On October 13, 2017, the Commission issued the order challenged in the petitions here, *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (Oct. 13, 2017) ("Certificate Order"), *reh'g pending*. In accordance with Natural Gas Act section 19, 15 U.S.C. § 717r, twenty requests for rehearing of the Certificate Order

-- including requests filed by the petitioners here -- were recently filed with, and are pending before, the Commission. *See* FERC Docket No. CP16-10, available at https://www.ferc.gov/docs-filing/elibrary.asp. Those rehearing requests raise numerous substantive issues in 583 pages of briefing and 199 pages of attachments. Petitioners' rehearing requests alone (which total 145 pages of briefing and 104 pages of attachments) raise 31 issues alleging Constitutional, Natural Gas Act, National Environmental Policy Act, and National Historic Preservation Act violations. *See* FERC Docket No. CP16-10, Accession Nos. 20171113-5331, 20171113-5366, 20171113-5374. The pages of petitioners' requests for rehearing listing the issues they raise are included as attachments to this motion.

On December 13, 2017, FERC's Secretary issued a procedural order, pursuant to 18 C.F.R. § 375.302(v), tolling the time for the Commission to issue its order addressing the matters raised in the requests for rehearing of the Certificate Order. *Mountain Valley Pipeline, LLC*, Docket No. CP16-10-001 (Dec. 13, 2017) ("Tolling Order"). That order stated that, "[i]n order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration," and that "[r]ehearing requests of the above-cited order filed in this proceeding will be addressed in a future order."

Just nine and 21 days after the Tolling Order issued, petitioners Appalachian Voices, *et al.*, and Blue Ridge Environmental Defense League, respectively, filed the petitions here seeking judicial review of the Certificate Order, without waiting for the Commission to issue the promised rehearing order addressing the numerous and complex matters raised in their and other parties' requests for rehearing. On January 26, 2018, the Commission filed a motion to dismiss the petitions as premature. Respondent's Motion to Dismiss, *Appalachian Voices, et al. v. FERC*, Nos. 17-1271, *et al.*, ECF No. 1714908. On February 2, 2018, the Court referred the motion to dismiss to the merits panel. *Appalachian Voices, et al. v. FERC*, Nos. 17-1271, *et al.*, ECF No. 1716262. The Court also denied motions and a petition to stay the Certificate Order. *Id.*

The Clerk's January 5, 2018 order (ECF No. 1711743) directed the Commission to file the certified index to record for the underlying non-final Commission proceeding by February 20, 2018.

ARGUMENT

Requiring the Commission to file the certified index to the record now, before it issues the promised rehearing order addressing the many issues raised in the 20 pending rehearing requests, could have detrimental consequences for parties to the ongoing FERC proceeding and the public at large.

Filing the certified index to record has legal significance. Section 19(a) of the Natural Gas Act ("Act"), 15 U.S.C. § 717r(a), provides:

> Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this act.

Furthermore, section 19(b) of the Act, 15 U.S.C. § 717r(b), provides that, when a petition for review is filed with a court of appeals, "such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part."

To counsel's knowledge, the question whether the Commission may issue an order addressing pending rehearing requests after it has filed the record (or record index) with the court of appeals has never been presented to a court. *Accord Clifton Power Corp. v. FERC*, 294 F.3d 108 110-112 (D.C. Cir. 2002) (a petition for review filed before the rehearing order issues is "incurably premature" and "must be dismissed"). Natural Gas Act section 19(a)'s language does not, on its face, prohibit the Commission from issuing a rehearing order after the record is filed. That language, however, arguably limits the actions the Commission may take in such a rehearing order to those that do not "modify or set aside" its initial order. *See Pan Am. Petroleum Corp. v. FPC*, 322 F.2d 999, 1004 (D.C. Cir. 1963) (Commission has "power to correct an order" until the "record . . . has been filed

with a court of appeals or the time for filing a petition for judicial review has expired"); *Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 367-68 (D.C. Cir. 1990) (same).

Thus, if the Commission is required to file the certified index to record before it has sufficient time to address the issues raised in the rehearing requests, it might not be able to issue a rehearing order that, after consideration of the issues raised in those rehearing requests, modifies, or provides additional explanation for, the findings in the Certificate Order. That result would conflict with "[t]he very purpose of rehearing[, which] is to give the Commission the opportunity to review its decision before facing judicial scrutiny." *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 499 n.8 (D.C. Cir. 2003). This "enables the Commission to correct its own errors, which might obviate juridical review, or to explain why in its expert judgment the party's objection is not well taken, which facilitates judicial review." *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381 (D.C. Cir. 2005).

Moreover, rehearing parties that are properly waiting for the Commission to act on their rehearing requests before petitioning for judicial review (if still aggrieved) could be further disadvantaged if it is determined that, by relying on the assurance in the Tolling Order that their rehearing requests will be addressed in a future Commission order, they missed their opportunity to obtain judicial review. Those parties should not be prejudiced simply because they adhered to the

Commission's long-standing process, which was established in reliance on this Court's precedent construing statutory prerequisites. *See, e.g., Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) ("[T]he Commission has power to act on applications for rehearing beyond the 30-day period [for seeking agency rehearing] so long as it gives notice of this intent.").

Accordingly, the Court should hold these consolidated petitions in abeyance until after the Commission issues its rehearing order. Even if the Court does not hold the petitions in abeyance, it should defer the requirement that the Commission file the certified index to record until after the rehearing order issues. The Court has discretion to set the time for filing the certified index to record. *See* Fed. R. App. P. Rule 17(a) ("The court may shorten or extend the time to file the record."). In the past, the Court has deferred the filing of the certified index in light of "ongoing administrative proceedings." *Mun. Elec. Utils. Ass'n v. FERC*, 2000 WL 274215, at *1 (D.C. Cir. 2000) (suspending deadline "until further order of the court"). The Court should do so again here.

CONCLUSION

For the foregoing reasons, the Commission requests that the Court hold this proceeding in abeyance until after the Commission issues its final order on rehearing in the underlying FERC proceeding. Alternatively, the Commission

requests that the Court defer the requirement to file the certified index to record until after the rehearing order issues.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6048
FAX: (202) 273-0901
E-mail: beth.pacella@ferc.gov

February 20, 2018

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 1,407 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 2013.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
Washington, DC 20426
TEL: (202) 502-6048
FAX: (202) 273-0901
E-mail: beth.pacella@ferc.gov

February 20, 2018

ATTACHMENTS

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

MOUNTAIN VALLEY PIPELINE, LLC	**Docket Nos. CP16-10-000**
EQUITRANS, LP	**CP16-13-000**

REQUEST FOR REHEAHRING AND RECISION OF CERTIFICATES AND MOTION FOR STAY OF APPALACHIAN VOICES, CENTER FOR BIOLOGICAL DIVERSITY, CHESAPEAKE CLIMATE ACTION NETWORK, NATURAL RESOURCES DEFENSE COUNCIL, PROTECT OUR WATER, HERITAGE AND RIGHTS (POWHR), SIERRA CLUB, WEST VIRGINIA RIVERS COALITION, WILD VIRGINIA, BOLD ALLIANCE, ORUS ASHBY BERKLEY, CHARLES CHONG, REBECCA CHONG, JUDY HODGES, STEVEN HODGES, DONALD JONES, GORDON JONES, ELISABETH TOBEY, RONALD TOBEY, AND KEITH WILSON

Pursuant to section 19(a) of the Natural Gas Act ("NGA"), 15 U.S.C. §717r(a) and Rule 713 of the Federal Regulatory Energy Commission's ("FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.713, Appalachian Mountain Advocates, on behalf of Appalachian Voices, Center for Biological Diversity, Chesapeake Climate Action Network, Natural Resources Defense Council, Protect Our Water, Heritage and Rights (POWHR), Sierra Club, West Virginia Rivers Coalition, and Wild Virginia, and Chris Johns, on behalf of Bold Alliance and landowners Orus Ashby Berkley, Charles Chong, Rebecca Chong, Judy Hodges, Steven Hodges, Donald Jones, Gordon Jones, Elisabeth Tobey, Ronald Tobey, and Keith Wilson, (collectively, "Intervenors") hereby request rehearing of FERC's "Order Issuing Certificates and Granting Abandonment Authority," issued October 13, 2017, in the above-captioned proceeding ("Certificate Order"). See Mountain Valley Pipeline, LLC, 161 FERC ¶ 61,043 (Oct. 13, 2017). FERC granted the Intervenors' respective motions to intervene in this proceeding. *See id.* at ¶

Together, MVP and Equitrans' ("the applicants") authorized activities ("the projects") will adversely affect significant sensitive environmental resources. A project of this magnitude has never been undertaken in the steep and challenging Appalachian mountain terrain that the Projects would traverse. Construction of the projects would cross 1,146 waterbodies, including more than 400 perennial waterbodies, and would disturb over 5,200 acres of soils that are classified as having the potential for severe water erosion.[16] About 32 percent of the MVP and 45 percent of the EEP will cross topography with steep (greater than a 15 percent grade) slopes.[17] About 67 percent of the MVP and all of the EEP will cross areas susceptible to landslides.[18] Additionally, the MVP will require construction through about 67 miles of fragile karst terrain.[19] Both projects will result in significant climate-altering greenhouse gas (GHG) emissions.[20] In addition to environmental impacts, the projects would have substantial impacts on landowners, hundreds of whom will have their property forcibly taken through the applicants' use of the eminent domain power granted by FERC's Certificate Order.[21]

CONCISE STATEMENT OF ALLEGED ERRORS

1. FERC violates the NGA by granting the certificate without meaningfully assessing the market demand for the projects. FERC's failure to consider

---

[16] Final Environmental Impact Statement for Mountain Valley Pipeline, LLC and Equitrans, LP's Mountain Valley Project and Equitrans Expansion Project under CP16-10 et al. (Accession No. 20170623-4000) ("FEIS") at 4-118, 5-2.

[17] Certificate Order ¶ 143.

[18] *Id.*

[19] *Id.* ¶151.

[20] *Id.* ¶¶274, 293.

[21] *Id.* ¶57.

substantial evidence in the record showing the lack of market demand for the MVP's capacity renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. FERC's decision to rely solely on the existence of precedent agreements runs counter to its Certificate Policy Statement. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61, 744, 61,747 (Sept. 15, 1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

2. FERC violates the NGA by granting the certificate without acknowledging the impact of the affiliate nature of the precedent agreements on those agreements' ability to demonstrate need for the projects. FERC's refusal to "look behind" the affiliate precedent agreements renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. FERC's decision to ignore the risks of overbuilding presented by blind reliance on affiliate precedent agreements runs counter to its Certificate Policy Statement. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,744 (Sept. 15, 1999) ("Certificate Policy Statement"), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

3. FERC violates the NGA by failing to support its decision to approve an unreasonably high rate of return on equity of 14 percent with substantial evidence. FERC's blind reliance on past precedent, without any effort to evaluate the risk faced by the developers of this specific project, renders its finding that the project is required by the public convenience and necessity, 15 U.S.C. § 717f(c)(1)(A), unreasonable. *See Sierra Club v. FERC*, 867 F.3d 1357, 1378 (D.C. Cir. 2017).

4. FERC violates the NGA by not granting an evidentiary hearing to resolve disputed issues of material fact regarding the need for the project. Intervenors made allegations of fact, submitted expert analysis and other evidence to support their allegations, and demonstrated that their allegations were in dispute. Moreover, FERC's Order confirms that these allegations have not been, and should not be, resolved on the basis of the written record. *See* 15 U.S.C. § 717f(c)(1)(B); 18 C.F.R. § 385.502; *Cascade Nat. Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992).

5. FERC violates NEPA by failing to properly evaluate the purpose and need for the projects in its draft and final EIS. 40 C.F.R. § 1502.13. By relying entirely on the goals of the applicants to establish the purpose of the projects, FERC fails to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project." *Simmons v. U.S. Army Corps of Eng's*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting)).

6. FERC violates NEPA by failing to rigorously explore and objectively evaluate all reasonable alternatives to the projects, including reasonable alternatives not within its jurisdiction and including the "no action" alternative. 40 C.F.R. § 1502.14; *WildEarth Guardians v. Nat'l Park Serv.*, 703 F.3d 1178, 1184 (10th Cir. 2013); *Milwaukee Inner-City Congregations Allied for Hope v. Gottlieb*, 944 F.Supp.2d 656, 670 (W.D. Wis., 2013); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F.Supp.2d 1143, 1154 (W.D. Wash., 2002). FERC's dismissal of any alternatives that do not meet the applicants' desires improperly restricts its analysis to those "alternative means by which a particular applicant can reach his goals." *Simmons*, 120 F.3d at 669 (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986); *see also Nat'l Parks & Cons. Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2009). In particular, FERC's failure to rigorously analyze the ability of a "one corridor" alternative collocated with the concurrently-approved Atlantic Coast Pipeline to meet any demonstrated need for the projects violates NEPA. *See* Certificate Order, Dissent at 2–3.

7. FERC violates NEPA by failing to include sufficient information in its draft EIS to permit meaningful public review and comment. 40 C.F.R. § 1502.9(a). The DEIS was so lacking in information and analysis that the public (and FERC's sister federal agencies) could not properly assess the project's impacts or critique FERC's assessment thereof. FERC's deficient DEIS and its refusal to provide a revised or supplemental EIS for public review and comment thus violates NEPA's public participation requirements. *Burkey v. Ellis*, 483 F. Supp. 897, 915 (N.D. Ala. 1979); *Habitat Educ. Ctr. v. U.S. Forest Servs*., 680 F. Supp. 2d 996, 1005 (E.D. Wis. 2010) (emphasis added), *aff'd sub nom. Habitat Educ. Ctr., Inc. v. U.S. Forest Serv*., 673 F.3d 518 (7th Cir. 2012).

8. FERC violates NEPA by failing to adequately analyze the climate change impacts of the end use of the gas transported by the projects. FERC fails to acknowledge that the greenhouse gas emissions from the combustion of the gas are indirect effects of the projects. 40 C.F.R. § 1508.8(b); 40 C.F.R. § 1502.16(b); *Sierra Club v. FERC*, 867 F.3d 1357, 1371–74 (D.C. Cir. 2017). Further, FERC's discussion of cumulative impacts fails to satisfy NEPA because it does not constitute the requisite "hard look" at the significance of the impacts of the downstream greenhouse gas emissions on the environment, nor does it discuss the comparative impacts of other reasonable alternatives or practicable mitigation measures that could reduce the downstream emissions or their impacts. 40 C.F.R. § 1508.7; *Sierra Club*, 867 F.3d at 1375. Finally, FERC's analysis of impacts of the projects' downstream greenhouse gas emissions fails to satisfy NEPA because FERC relies on vague, unsubstantiated claims that impacts would be offset by displacement of emissions from burning coal. *Sierra Club*, 867 F.3d at 1375.

9. FERC violates NEPA by failing to take a "hard look" at the direct, indirect, and cumulative impacts of the projects on waterbodies and wetlands. FERC fails to adequately analyze the direct and indirect impacts because it relies on unsupported assumptions about the effectiveness of the applicants' proposed

mitigation measures to conclude that impacts to aquatic resources would not be significant. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998). FERC's assessment of sedimentation impacts is further undermined by its failure to account for long-term increases in runoff and erosion as a result of land cover change within the pipeline right-of-way. *bertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Finally, FERC's analysis of the cumulative impacts on aquatic resources of the projects in conjunction with other past, present, and reasonably foreseeable projects lacks sufficient rigor and detail to satisfy NEPA. 40 C.F.R. § 1508.7; *Natural Res. Def. Council v. Hodel*, 865 F.2d 288, 298-99 (D.C. Cir. 1988); *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1306 (9th Cir. 1994).

10. FERC violates the NGA by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. *See* 15 U.S.C. §717f(e). Legislative history and case law indicate that the NGA empowers FERC only to impose "conditions" on pipeline activity in the sense of "limitations," not to make certificates "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence. *See N. Nat. Gas Co., Div. of InterNorth, Inc. v. F.E.R.C.*, 827 F.2d 779, 782 (D.C. Cir. 1987); *Panhandle E. Pipe Line Co. v. F.E.R.C.*, 613 F.2d 1120, 1131-32 (D.C. Cir. 1979); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 389, 392 (1959).

11. FERC violates the Fifth Amendment by granting certificates that are conditional on applicants obtaining future permits from state or local agencies. As soon as FERC issues a certificate, even a "conditional" one, the certificated pipeline entity can arguably start acquiring property by condemnation. 15 U.S.C. §717f(h). But if the entity still has additional permits to obtain, there is a chance it will fail to obtain those permits. If that happens, the entity will never be allowed to begin operations—and it will have taken private property for no reason (i.e., without a public necessity) in violation of the Fifth Amendment.

12. By allowing conditional-certificate holders to exercise eminent domain before they have obtained all necessary approvals, FERC interprets the NGA in a manner that violates the Constitution. FERC could obviate this problem by imposing conditions prohibiting applicants from exercising eminent domain until after they obtained all necessary approvals, *see Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011), and, under the doctrine of constitutional avoidance, FERC *should* do so. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

13. FERC exceeds its statutory authority by granting blanket certificates. The grant of blanket authority covers projects that FERC presently knows, to a virtual certainty, will *not* be where MVP's application describes the pipeline as being. And, in connection with any of these activities, the certificate holder has effectively unrestricted authority to exercise eminent-domain power to force sales

of private property, including of properties outside the areas described in MVP's application. 15 U.S.C. §717f(h). This is incompatible with the statutory requirements imposed by Sections 7(c) and 7(e) of the NGA. FERC's authority does not extend to blanket approvals of unknown future extensions, expansions, rearrangements, or replacements, at least where such actions are not limited to the pipeline footprint actually proposed by an applicant and considered and approved by FERC. *See Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

14. FERC's practice of granting "blanket" certificates—at least those that authorize construction outside evaluated and approved project footprints—violates FERC's statutory mandate to consider the economic and environmental impacts of proposed pipeline projects. *See* 15 U.S.C. §717f(a).

15. Granting blanket certificates violates the NGA's notice-and-hearing requirements. 15 U.S.C. §717f(c)(1)(B). This is especially true for "future facility construction" contemplated but not specified by a certificate application.

16. Permitting private entities to exercise eminent domain for previously unconsidered project expansions or "rearrangements," as blanket certificates do, violates due-process requirements under the Fifth Amendment. *See Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 328 (3d Cir. 2014) (Jordan, J., dissenting).

17. Granting blanket certificates that allow applicants to condemn property not specifically described in their existing applications violates constitutional separation of powers principles and the private nondelegation doctrine. *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, __ F.3d __, 2017 WL 4367151, at *5 (5th Cir. Oct. 3, 2017); *Williston Basin Interstate Pipeline Co. v. Exclusive Gas Storage Leasehold & Easement*, 524 F.3d 1090, 1099 (9th Cir. 2008).

18. FERC violates the just-compensation clause of the Fifth Amendment by granting certificates (and therefore condemnation power) to entities that have not shown they have sufficient financial resources to guarantee payment of just compensation. *Sweet v. Rechel*, 159 U.S. 380, 400-02 (1895); *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Mortgomery County*, 706 F.2d 1312, 1320-21 (4th Cir. 1983).

19. FERC violates the NGA by failing to make findings about applicants' ability to pay just compensation. 15 U.S.C. §717f(e) provides that an applicant can obtain a certificate only "if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter." One of the "acts" contemplated by "this chapter" of the NGA is eminent domain, *see* 15 U.S.C. §717f(h), and the only way "properly to do" eminent domain is to pay just compensation. Thus, FERC's failure to make a

finding that an applicant "is able and willing properly to" pay just compensation in a given certificate is fatal. *See Steere Tank Lines, Inc. v. I.C.C.*, 714 F.2d 1300, 1314 (5th Cir. 1983).

20. FERC violates the Constitution by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. *Cf. Mid-Atlantic Express, LLC v. Baltimore Cty., Md.*, 410 Fed. App'x 653, 657 (4th Cir. 2011); *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

21. FERC violates constitutional separation-of-powers doctrine by failing to use its conditioning power to prevent applicants from "quick-taking" property, i.e., taking property before just compensation has been fully and finally determined in a judicial proceeding. When judges allow quick-taking, they are effectively granting eminent-domain power, which is something only the legislative branch has the constitutional authority to do. *See Berman v. Parker*, 348 U.S. 26, 32 (1954). FERC could prevent that state of affairs with its conditioning power.

22. By failing to use its conditioning power to preclude applicants from quick-taking property, FERC facilitates due-process problems. When a pipeline company avails itself of the quick-take procedure in district court, the landowner has no opportunity to conduct discovery, obtain its own appraisal of just compensation, or avail itself of any of the other procedural protections inherent in traditional judicial proceedings. This violates the due-process guarantee of the Fifth Amendment. FERC could prevent that state of affairs with its conditioning power.

23. By failing to preclude applicants from quick-taking property, FERC violates the just-compensation clause of the Fifth Amendment. With the quick-take procedure, a pipeline company is able to take property based on only its own, self-serving appraisal of what just compensation will ultimately be. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823-27 (4th Cir. 2004). This poses constitutionally unacceptable risk that the landowner will not ultimately receive just compensation if it proves to be more than the pipeline company estimated. FERC could obviate that risk by prohibiting applicants from using "quick take."

24. FERC's refusal to consider challenges to the constitutionality of the Natural Gas Act and the exercise of eminent domain thereunder violates landowners' Fifth Amendment due-process rights. Although the appellate court that reviews a FERC order can consider such challenges, the damage is already done by the time it gets to, as certificated pipeline companies have often long since taken property and commenced construction, irreversibly altering the landowners' property.

25. FERC denied landowners constitutional due process by refusing them access to key documents. In granting MVP's conditional certificate, FERC relied on MVP's precedent agreements and Exhibit G flow diagrams to find project need. Despite landowners' repeated demands for disclosure, FERC denied them access to this

evidence, thus preventing them from meaningfully responding to or rebutting FERC's conclusions in the Certificate Order. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985); *Minisink Residents for Envtl. Pres. v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014); *Myersville Citizens for Rural Cmt. v. FERC*, 783 F.3d 1301 1328 (D.C. Cir. 2014). FERC cannot cure its violation of the intervenors' due-process rights by disclosing the documents after this rehearing request is filed, as by that time, the deadline for rehearing will have passed and landowners' arguments based on the previously undisclosed information will be untimely under §717f(a) of the NGA.

STATEMENT OF ISSUES

I. FERC's Finding of Public Convenience and Necessity Violates the Natural Gas Act

FERC violated the Natural Gas Act by failing to establish the public market demand for the gas proposed to be carried by the MVP and relying exclusively on Mountain Valley's precedent agreements with its corporate affiliates to establish need for and public benefits of the Project. Under Section 7(c) of the NGA, a proponent of an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC.[22] "The statute provides that a certificate shall be issued to any qualified applicant upon a finding that . . . the proposed service and construction is or will be *required* by the present or future *public convenience and necessity*."[23] Because such certificates confer federal eminent domain power upon the applicant, they may only be issued for projects that serve a "public use" in accord with the Fifth Amendment to the United States Constitution.[24] Those polestars of "public use" and "public convenience

[22] 15 U.S.C. § 717f(c)(1)(A); *Minisink Residents for Envtl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014).

[23] *Minisink*, 762 F.3d at 101 (quoting 15 U.S.C. § 717f(e)) (internal quotation marks and ellipses omitted) (emphasis added).

[24] *See Kelo v. City of New London*, 545 U.S. 469 (2005).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline LLC,	)	
Docket No. CP16-10-000	)	November 13, 2017
Mountain Valley Pipeline Project	)	
and	)	
Equitrans, LP	)	
Docket No. CP16-13-00	)	

PETITION FOR REHEARING AND IMMEDIATE STAY OF THE ORDER OF BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE

This request for rehearing is made on behalf of the Blue Ridge Environmental Defense League ("BREDL"), an intervenor in this proceeding, including BREDL's chapters, Preserve Roanoke and Preserve Franklin (jointly referred to as "BREDL"), pursuant to 15 U.S.C. § 717r and 18 C.F.R. § 385.713, BREDL hereby requests rehearing, rescission, and stay of the Commission's Order Issuing Certificates and Granting Abandonment entered on October 13, 2017 ("Certificate"), authorizing Mountain Valley Pipeline, LLC, and Equitrans, LP (jointly referred to as "MVP"), to construct and operate the proposed Mountain Valley Pipeline Project ("MVP Project" or the "Project") in West Virginia and Virginia.

BREDL incorporates by reference, pursuant to FERC Rule 203, 18 C.F.R. § 385.203(a)(2), all evidence and arguments presented in BREDL's prior comments submitted to FERC.

All communications regarding this request should be addressed to and served upon the following counsel for BREDL:

Andrea C. Ferster
Attorney at Law
2121 Ward Court, N.W. 5th Fl.
Washington, D.C. 20037
(202) 974-5142
(202) 223-9257 (Facsimile)
aferster@railstotrails.org

CONCISE STATEMENT OF ERRORS

1. FERC's issuance of a certificate prior to the completion of the Section 106 process violates Section 106 of the National Historic Preservation Act ("NHPA"), which requires completion of the Section 106 process "prior to" the issuance of any license. 54 U.S.C. § 306108

2. The FEIS failed to take the necessary hard look at impacts on historic and cultural resources required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332.

3. Certificate, Appendix C, Condition # 15 fails to ensure that the Section 106 process will be completed prior to construction and related activities that could harm identified and as-yet identified historic and cultural resources.

4. FERC's refusal to grant consulting party status to persons and organizations who intervened in the FERC proceeding, unlawfully forcing parties to choose between protecting their demonstrated interests through the Section 106 process and protecting their interests through intervening as a party in the FERC proceeding, violates the NHPA and the Due Process Clause.

5. FERC's issuance of the Certificate violates the U.S. Constitution, NEPA, and the Natural Gas Act, as specified in the petition for rehearing filed by Appalachian Mountain Advocates.

STATEMENT OF ISSUES & SPECIFICATION OF ERROR

I. FERC's Issuance of A Certificate Prior to Completion of the Section 106 Process Violates Section 106 of the National Historic Preservation Act.

Prior to issuance of the Certificate, FERC completed a Final Environmental Impact Statement ("FEIS") that included an assessment of cultural resource impacts pursuant to the National Environmental Policy Act ("NEPA"). However, as the Certificate acknowledges, the "process of compliance with section 106 of the National Historic Preservation Act has not been

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline, LLC	)	Docket Nos.	CP16-10-000
Equitrans, L.P.	)		CP16-13-000
	)		

SIERRA CLUB'S SUPPLEMENTAL REQUEST FOR REHEARING AND STAY

Sierra Club submits the attached request for rehearing and motion for stay as a supplement to the request separately filed on behalf of Sierra Club *et al.* by Appalachian Mountain Advocates.[1] Pursuant to 18 C.F.R. § 386.713, Sierra Club contends that for the reasons stated in that filing, and for the additional reasons stated below, the Commission's October 13, 2017 "Order Issuing Certificates and Granting Abandonment Authority" in the above-captioned dockets, 161 FERC ¶ 61,043 ("Order") should be withdrawn. In addition, the Commission must promptly stay that order, and must not issue notices to proceed or take other action that will authorize the start of construction, pending both a decision on the merits on rehearing requests and completion of judicial review thereof. As we explain below, FERC's practice of issuing "tolling orders" on requests for rehearing, while allowing construction to proceed, further violates Sierra Club's right to due process and improperly deprives courts of jurisdiction to review FERC decisions.

I. Statement of Issues

A. The Order Violates The Due Process Rights of Sierra Club and Its Members

FERC should rescind the Order because the Order deprives Sierra Club and its members

[1] "Request For Rehearing and Recision of Certificates and Motion for Stay of Appalachian Voices, Center for Biological Diversity, Chesapeake Climate Action Network, Natural Resources Defense Council, Sierra Club, and Wild Virginia," filed Nov. 13, 2017, hereinafter "Appalmad Request."

of protected interests without the due process guaranteed by the Fifth Amendment. "Due process generally requires a meaningful opportunity to be heard before one is deprived of life, liberty, or property." *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (quotation omitted) (citing *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006), *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976)). A meaningful opportunity to be heard requires opportunity to examine, analyze, explain, and rebut evidence relied upon by the Commission. *Ohio Bell Tel. Co. v. Pub. Utilities Comm'n of Ohio*, 301 U.S. 292, 300-302 (1937). Here, the Order relies on extensive evidence and reasoning that was not presented in the applications, draft EIS, or other document provided for public comment, and which Sierra Club has not had a meaningful opportunity to dispute. *See, e.g.*, Appalmad Request at 38-39, 42-46 (summarizing omissions in draft EIS). The Order's conclusion that the public was not entitled to a formal opportunity to contest this information prior to project approval, whether through a renewed or supplemental draft EIS, Order PP132-135, or through a formal evidentiary hearing, Order P28, was unlawful. By authorizing construction and the exercise of eminent domain prior to resolution of Sierra Club's challenges to Commission's underlying evidence and logic, the Order violates the Due Process Clause.

1. Sierra Club and Its Members Have Interests Protected By The Due Process Clause

The scope of Due Process Clause protection is determined by a "familiar two-part inquiry": whether action will implicate a "protected interest," and, if so, whether the government provided the process that was due. *UDC Chairs Chapter, Am. Ass'n of Univ. Professors v. Bd. of Trustees of Univ. of D.C.*, 56 F.3d 1469, 1471 (D.C. Cir. 1995) (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, (1982)). Here, Sierra Club and its members easily satisfy the first

Appalachian Voices, et al. v. FERC **Docket No. CP16-10**
D.C. Cir. Nos. 17-1271, *et al.*

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 20th day of February 2018, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Telephone: (202) 502-6048
Fax: (202) 273-0901
Email: beth.pacella@ferc.gov