

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

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

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-Respondents.

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)

**PETITIONER SIERRA CLUB ET AL.'S RESPONSE TO
RESPONDENT'S PETITION FOR PANEL REHEARING AND
INTERVENOR-RESPONDENT'S PETITION FOR PANEL OR EN BANC
REHEARING AS TO REMEDY**

(Names and addresses of counsel appear inside cover.)

November 10, 2017

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* Authorities chiefly relied upon are marked with an asterisk.

GLOSSARY

The following is a glossary of acronyms and abbreviations used in this brief:

Decl.	Declaration
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Intervenors	Duke Energy Florida, LLC; Florida Power & Light Company; Florida Southeast Connection, LLC; Sabal Trail Transmission, LLC; and Transcontinental Gas Pipe Line Company, LLC
NEPA	National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4347
Project	Southeast Market Pipelines Project
SEIS	Supplemental Environmental Impact Statement
Sierra Club	Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper

INTRODUCTION

The Federal Energy Regulatory Commission (FERC) issued a Certificate of Public Necessity and Convenience allowing construction and operation of a major interstate natural gas pipeline without considering the impact of greenhouse gas emissions from burning the gas in the downstream power plants. The panel majority correctly held that FERC thereby violated the National Environmental Policy Act (NEPA). *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1371–75 (D.C. Cir. 2017) (citing 40 C.F.R. § 1502.16(b), 40 C.F.R. §1508.8(b)). It also correctly held that FERC failed to explain not using the Social Cost of Carbon tool to value impacts on climate change. *Id.* at 1375. The Court vacated the Certificate and remanded to FERC to prepare a proper environmental impact statement. *Id.* at 1379.

FERC and the Respondent-Intervenor pipeline companies and utilities do not seek rehearing on the merits, but only on the vacatur of the Certificate. But the panel correctly applied the standard vacatur remedy for NEPA cases. The panel did not overlook or misapprehend points of law or fact making rehearing appropriate under Fed. R. App. P. 40. Nor does this opinion require consideration to maintain uniformity of circuit decisions or present a question of exceptional importance for rehearing *en banc* under Fed. R. App. P. 35.

ARGUMENT

I. The Petitions Do Not Satisfy The Requirements For Rehearing

A. There Is No Conflict With *Delaware Riverkeeper*

Delaware Riverkeeper Network v. FERC, 753 F.3d 1304 (D.C. Cir. 2014) held FERC violated NEPA by not considering the impacts of all segments of a pipeline on forests and wetlands. *Id.* at 1319. The Court remanded “for further consideration,” but did not mention vacatur. *Id.* at 1320. It did not set a precedent requiring remand without vacatur here. This case involves different NEPA violations, a different record, and different circumstances supporting vacatur. *See Sierra Club*, 867 F.3d at 1374–75.

B. The Panel Correctly Applied The Standard NEPA Remedy

The Supreme Court has stated that under the Administrative Procedure Act, 5 U.S.C. §706(2)(A), “[i]n all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” *FCC v. NextWave Pers. Commc’ns*, 537 U.S. 293, 300 (2003) (internal quotation omitted). “If the decision of the agency is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded.” *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

The panel applied the rule on vacatur, not the exception. “Pursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy.” *Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) (citing *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001); see also *Public Employees for Env'tl. Responsibility v. U.S. Fish and Wildlife Service*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) *appeal dismissed*, 2016 WL 6915561 (D.C. Cir. Oct. 31, 2016) (“A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations.”).

Remand without vacatur is “unusual” and “uncommon,” and there is a presumption against it. Stephanie J. Tatham, *The Unusual Remedy of Remand without Vacatur*, Administrative Conference of the United States – Final Report (Jan. 3, 2014). See also *Illinois Pub. Telecommunications Ass'n v. F.C.C.*, 123 F.3d 693–94 (D.C. Cir. 1997) (noting this Court vacates rules even when agency “may develop a convincing rationale for re-adopting the same rule on remand.”).

Nevertheless, FERC and Intervenors fault the panel for not addressing the vacatur factors in *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993). But this Court frequently imposes a remedy without discussion. See, e.g., *Pub. Employees for Env'tl. Responsibility*, 189 F. Supp. 3d at 3 (“[I]n the NEPA cases cited by defendants, where courts ordered remand without vacatur, the courts generally did so without explanation.” (citing *Idaho v. Interstate*

Commerce Comm'n, 35 F.3d 585, 599 (D.C. Cir. 1994))). There is no authority requiring the Court to make express findings on *Allied-Signal* before vacatur for NEPA violations.

Intervenors state that “[n]o special rule exempts NEPA cases from *Allied-Signal*,” Pet. at 15, and then support that statement with a NEPA case that does not mention *Allied-Signal*. *Id.* at 15–16 (citing *Public Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016)). That case actually vacated the environmental impact statement (EIS) and required its supplementation prior to construction. *Id.* at 1084.

The cases they cite where vacatur was not ordered are distinguishable precisely because they were not NEPA cases, and vacatur would have caused environmental harm that the challenged rule was meant to address. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (Rogers, J., concurring in granting rehearing in part); *see also Honeywell Intern. v. EPA*, 393 F.3d 1315 (D.C. Cir. 2005) (Rogers, J., dissenting on vacatur of rule that would cause harm to the environment). This approach makes sense where leaving a weak regulation in place during remand is preferable to no rule at all. *See, e.g., Envtl. Def. Fund v. EPA*, 898 F.2d 183 (D.C. Cir. 1990). Those circumstances are not present here.

II. *Allied Signal* Does Not Require Remand Without Vacatur

Allied-Signal held an inadequately supported rule “need not necessarily be vacated,” depending on “the seriousness of the order’s deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.” 988 F.2d at 150–51. But those factors are not exclusive or overriding in every case. *See Tatham, The Unusual Remedy of Remand without Vacatur* at 7 (*Allied-Signal* “is simply an articulation of two categories of equitable factors courts that courts consider, at times together, in determining whether to vacate an agency’s decision on remand.”). Here, the record, Sierra Club’s prior briefing, and the panel’s opinion abundantly support vacatur.

Allied-Signal’s first element on seriousness of the violation is satisfied here. The panel held that the “EIS fails to fulfill its primary purpose.” *Sierra Club*, 867 F.3d at 1375. This renders the agency action it undergirds arbitrary and capricious. *Id.* at 1368. Vacatur addresses Sierra Club’s harms. *Id.* at 1366. And, as discussed *infra* regarding the supplemental EIS (SEIS), FERC’s violations cannot be corrected readily. In fact, the draft SEIS fails to satisfy NEPA and this Court’s remand order.

FERC’s failure to consider greenhouse gas emissions goes to the integrity of its decisionmaking, not merely the adequacy of its explanation. *Cf. Heartland*

Reg'l Med. Ctr. v. Sebelius, 566 F.3d 193, 198 (D.C. Cir. 2009). FERC must analyze an impact that it failed to consider and then make a new decision taking this into account. FERC must do this by “balanc[ing] ‘the public benefits against the adverse effects of the project.’” *Sierra Club*, 867 F.3d at 1373. *See, e.g., Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 43 (D.C. Cir. 2015) (“More extensive environmental analysis could lead the agencies to different conclusions, with live remedial implications.”).

Allied-Signal's second element does not mandate remand without vacatur in every case where there is some “disruption.” There, the court withheld vacatur because the agency would have had to refund fees that would be unrecoverable later. 988 F.2d at 203. Similarly, in *Heartland*, vacatur would have resulted in extensive payments that could not be recouped. 566 F.3d at 198. *See also Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 97 (D.C. Cir. 2002) (remanding without vacatur where farmers relying on rule had already plowed under their crops). No such regulatory system is upended by vacatur in this case.

There is likely to be disruption in any NEPA case where the project proceeds notwithstanding a defective EIS, but if that prohibited vacatur it would nullify the requirement that NEPA analysis occur before the agency decision. *See* 40 C.F.R. §1506.1(a). (“[N]o action concerning the proposal shall be taken which would: (1) Have an adverse environmental impact; or (2) Limit the choice of reasonable

alternatives.”); *Sierra Club*, 803 F.3d at 43 (“If the NEPA analysis were legally inadequate, ‘we could order that the [pipeline] be closed or impose restrictions on its use,’ ... ‘until [the agencies] complied with NEPA.’” (internal citation omitted)); *Montana Wilderness Ass’n v. Fry*, 408 F. Supp. 2d 1032, 1037–39 (D. Mont. 2006) (enjoining pipeline operations for NEPA violations after discussing the difficulty of an agency “fulfilling its procedural obligations without favoring a predetermined outcome”); *Friends of the Capital Crescent Trail v. Federal Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C. 2016) (vacating permits for a rail line because “[w]hile a temporary halt in the project is not ideal, it would make little sense and cause even more disruption if defendants were to proceed with the project while the SEIS was being completed, only to subsequently determine that another alternative is preferable”).

FERC’s violation of law has no consequences unless the Certificate is vacated. And the Court should not accommodate them by delaying the mandate. *See, Public Employees for Environmental Responsibility*, 189 F. Supp. 3d at n. 1. Otherwise, the project’s environmental harm will continue unabated while the agency prepares its SEIS. This harm includes greenhouse gas emissions as well as tons of ongoing toxic air pollution associated with pipeline operation. *See* Doc. 1642403 at 21 and record citations therein. Vacating the Certificate, on the other hand, vindicates the purposes of NEPA. As this Court has explained, “[t]he NEPA

duty is more than a technicality; it is an extremely important statutory requirement to serve the public and the agency *before* major federal actions occur If plaintiffs succeed on the merits, then the lack of an adequate environmental consideration looms as a serious, immediate, and irreparable injury.” *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (emphasis in original).

III. Post-Opinion Evidence Does Not Support Remand Without Vacatur

The Court should not consider FERC’s draft SEIS and Intervenors’ declarations because they are post-opinion evidence. *See City of Holyoke Gas & Elec. Dep’t v. F.E.R.C.*, 954 F.2d 740, 745 (D.C. Cir. 1992); *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.”).

A. The Draft SEIS Does Not Support Remand Without Vacatur

FERC has submitted a *draft* SEIS as justification for disturbing the panel’s vacatur. Public comments on the draft are due November 20, 2017 and it is subject to change. The Court should not pre-judge the adequacy of the SEIS or the outcome of this process. *Cuomo v. U.S. Nuclear Regulatory Comm’n*, 772 F.2d 972, 977 (D.C. Cir. 1985).

Although it estimates greenhouse gases, FERC has not complied with the remand order. It failed to “include a discussion of the significance” of these emissions, or analyze “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” *Sierra Club*, 867 F.3d at 1374 (internal quotations omitted). FERC does not use the new information to address the alternatives analysis or mitigation measures. *See Daniel Dec.* (attached exhibit B) at ¶16. It does not apply it in balancing “the public benefits against the adverse effects of the project, including adverse environmental effects.” *Sierra Club*, 867 F.3d at 1373 (internal citations omitted).

The SEIS asserts the project’s 22.1 million metric ton per year increase in Florida greenhouse gas emissions is not “significant” – without explanation. *See SEIS* at 2. Yet that amount exceeds emissions from Florida’s six largest coal power plants combined and equates to the emissions of 4.7 million passenger vehicles every year. *Daniel Dec.* at ¶18. Further, their facts on coal plant offsets are misleading and wrong. *Id.* at ¶¶15, 17. The Court should reject FERC’s reduction of the opinion to simply generating numbers to support a predetermined outcome.

B. Vacatur Will Not Disrupt Consumer Service

Intervenors falsely claim that “vacating the orders ... would cause severe disruption . . . [for] millions of Florida residents who rely on electricity generated at plants served by the pipelines.” Intervenor Pet. at 2.

At oral argument, Intervenors’ counsel acknowledged there would be no interruption of consumer electrical service. Oral Argument Transcript (Exhibit C) at 50. Intervenors’ own declarations and an expert analysis of Florida’s capacity demonstrate that there will be no blackouts or interruption of electrical service for any Florida residents. Daniel Decl. ¶¶3–8.

Intervenors’ claims of “immediate” need to meet “rapidly expanding” demand are overstated and existing pipelines have adequate capacity to meet current needs. *Id.* at ¶9,14. The utilities are entering low-demand season, hence there is more than enough gas capacity to serve the power plants while FERC prepares a valid SEIS. *Id.* ¶¶6,7,15. Utilities in Florida can also draw from out-of-state gas storage. *Id.* ¶10.

Intervenors claim they would have to rely on coal plants while a new SEIS is prepared, but they are either already retired or rarely operate during low-demand winter months. *Id.* ¶¶14–15. Intervenors do not support their claims that vacatur could jeopardize safety since they are still subject to Pipeline and Hazardous Materials Safety Administration requirements; or that vacatur could harm streams

or wetlands since they are still subject to their Corps of Engineers' section 404 permits. Their claim that it would take 12-18 months to start-up after "permanently shutting down and abandoning the pipeline," is spurious; this is considerably longer than it took to construct the pipeline and put it in service, and vacatur does not require permanently shutting down. *Id.* ¶11.

C. Intervenor Assumed the Risk of Economic Harm From Vacatur

Economic harm to Intervenor is not grounds to forgo vacatur. If considered, the Court should note their lost revenue claims are based on permanent shutdown and otherwise inflated. Daniel Dec. ¶¶12–13.

Intervenor fully assumed the risk. Before construction started, FERC warned them that "[t]o the extent that the company elects to proceed with construction, it bears the risk that ... our orders will be overturned on appeal." JA-1293. And, "[i]f this were to occur, the company might not be able to utilize any new facilities, and could be required to remove them or to undertake further remediation." *Id.* FERC notified Intervenor in this Court that an unlawful certificate could be vacated. Doc. No. 1644296 at 17. At oral argument, the court noted that FERC "can shut down the pipeline." Exhibit C at 49.

Nevertheless, Intervenor chose to initiate operations in June 2017, approximately two months after oral argument. Thus their financial harm is self-

inflicted. *See Sierra Club v. U.S. Army Corps*, 645 F.3d 978, 998 (8th Cir. 2011) (enjoining power plant permit where proponent “repeatedly ignor[ed] administrative and legal challenges and a warning by the Corps that construction would proceed at its own risk”); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) *abrogated on other grounds*, *Dine Citizens Against Ruining Our Environment v. Jewell*, 839 F. 3d 1276 (10th Cir. 2016) (finding defendants “‘jumped the gun’ on the environmental issues by entering into contractual obligations that anticipated a pro forma result . . . [and] are largely responsible for their own harm”). *See also Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) (“‘The substantial additional costs which would be caused by court-ordered delay’ may well be justified by the compelling public interest in the enforcement of NEPA.”).

CONCLUSION

For the foregoing reasons, the petitions for rehearing and rehearing *en banc* should be denied.

Dated: November 10, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitation in this Court's order of October 27, 2017 because this response contains 2,596 words, excluding the parts of the response exempted by FRAP 32(f) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 computed the word count.

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

Dated: November 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2017, I electronically filed the foregoing Response of Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper 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.

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**Index to Addendum to Petitioner Sierra Club et al.'s Response To
Respondent's Petition For Panel Rehearing And Intervenor-Respondent's
Petition For Panel Or En Banc Rehearing As To Remedy**

Exhibit	Description
A	Corporate Disclosure Statements
B	Declaration of Joseph M. Daniel
C	Oral Argument Transcript

Exhibit A

CORPORATE DISCLOSURE STATEMENTS

1. Sierra Club has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the Sierra Club. Sierra Club is a national non-profit organization dedicated to the protection, preservation, and enjoyment of the environment.
2. Flint Riverkeeper has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the Flint Riverkeeper. Flint Riverkeeper is a Georgia non-profit organization dedicated to the protection, preservation, and enjoyment of the Flint River and its watershed.
3. Chattahoochee Riverkeeper has no parent companies, and there are no companies that have a 10 percent or greater ownership interest in the Chattahoochee Riverkeeper. Chattahoochee Riverkeeper is a Georgia non-profit organization dedicated to the protection, preservation, and enjoyment of the Chattahoochee River and its watershed.

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Dated: November 10, 2017

Exhibit B

DECLARATION OF JOSEPH M. DANIEL

1. My name is Joseph Daniel, I am currently employed by the Sierra Club where I serve as an Electric Sector Analyst and have been in this position for nearly two years. In this capacity I have performed technical and economic analysis of the ten-year site plans of Florida's major utilities, including Florida Power and Light (FPL) and Duke Energy Florida. As the point person for internal analysis in the southeastern region, which includes Florida, I've also served as a technical consultant and reviewer on many other comments submitted by the Sierra Club on dockets concerning Florida's electric utilities as well as other state electric utility dockets in the region. My duties also include serving as the lead analyst on a number of issues including analysis of federal energy and environmental policy; fossil fuel economics; and analysis of the natural gas sector.

2. I have a B.S. from Florida Institute of Technology in Chemical Engineering (2006) and M.P.A. from Columbia University's School of International and Public Affairs in Environmental Science and Policy (2012). I also have a certificate from the University Of Texas at Austin on Petroleum Fundamentals (2007). I have over a decade of experience working on energy related issues from both technical and financial perspectives. I began my career in 2006 as an engineer at oil refineries. Immediately prior to joining the Sierra Club in 2016, I was a consultant at Synapse Energy Economics, a research and consulting firm that specializes in energy,

environmental, and electricity sector issues and policies, including fossil fuel generation. There I served as one of the firm's technical experts on utility planning, energy modeling, integrated resource planning, and economic forecasting. I've also authored many publications including an article on the risks of pipeline overdevelopment published in *Natural Gas and Electricity*. My CV and a full list of my publications can be found as an attachment to this declaration.

3. I have been asked to perform a technical review of the declarations submitted by Intervenor Duke Energy Florida, LLC et al. with their petition for rehearing en banc. My review focuses on whether there would be reliability or critical capacity issues, i.e. a disruption to natural gas and electricity service to Florida consumers from a temporary cessation of the delivery of natural gas through the Southeast Market Pipelines to comply with the court's vacatur of the FERC certificate. Or, in the words of Intervenor's petition at p. 2, whether this would "cause severe disruption ... for millions of Florida residents who rely on electricity generated at plants served by the pipelines." As set forth below there should not be serious reliability concerns or any interruption of service to consumers.

4. In connection with this I have reviewed the Intervenor's declarations of Shammo, Sideris, Stubblefield, Macon, and Duvall, along with publicly available data on Florida Power & Light Company's (FPL) electric system including

historical load profiles and generation patterns of coal and gas assets using data from EIA and S&P Global Market Intelligence. I have also reviewed available operational data on the Gulfstream and Florida Gas Transmission (FGT) pipelines using S&P Global Market Intelligence. Additionally, I reviewed the ten-year site plans of Duke Florida and FPL, as well as the “Regional Load and Forecast Plan” of the Florida Reliability Coordinating Council (FRCC). I also reviewed North American Electric Reliability Corporation (NERC) and Federal Energy Regulatory Commission (FERC) reliability reports.

5. The Intervenors’ own declarations indicate that there would be no “severe disruption,” i.e. no interruption of electrical service for any Florida residents. None of the declarations conclude there would be any blackouts or loss of service and none of the declarants offer any evidence into the record that conclude that there would be meaningful service disruptions (i.e. blackouts or interruption of service) caused by a temporary halt of pipeline operations. Rather they indicate the grid would rely on a combination of increased use of existing power plants, including coal units, oil units, or gas units currently being served by existing gas pipelines. See e.g., Stubblefield declaration at ¶4.

6. This lack of interruption of electrical service is consistent with my own research concerning whether a temporary interruption in operation of the Southeast Market Pipeline (SMP) would cause reliability problems in Florida. Contrary to the

claim that “FPL is still in its peak demand season,” (Stubblefield at ¶7) FPL is not in peak demand season, rather it is leaving high demand season and entering low demand season. Since 2012, FPL and Duke’s system peak have only occurred in June, July, or August.¹ Both Florida’s peak gas demand and the state’s peak electric demand occur in the summer and are driven by electric sector load (which is driven by air conditioning load, which peaks in the summer). Fall, winter, and early spring months are lower load months for Florida, both in terms of overall gas demand and electric demand. Based on the Energy Information Agency, a part of the U.S. Department of Energy that “collects, analyzes, and disseminates independent and impartial energy information,” Florida’s October gas consumption is typically about at average levels (October 2016 was 0.1% above 2016 monthly average, October 2015 was 2% above 2015 monthly average).² In both 2015 and 2016, January, February, March, November, and December were the months with the lowest monthly gas consumption for the electric power sector.³ Florida’s gas consumption in August 2016 was at its peak and was 57% higher than consumption in the lowest month that year, November.⁴ If existing gas

¹ Data compiled by S&P Global Market Intelligence

² Calculations are my own based on data from EIA form 923. EIA-923 data for 2016 is still in “early release” form and not finalized.

³ Id.

⁴ Id.

infrastructure can serve the needs of this past summer, then it can likely meet the needs of this forthcoming winter.

7. In fact, Florida has plenty of excess generation capacity to meet future demands. The North American Electric Reliability Corporation (NERC) assesses the electric grid's ability to meet load by assessing changes in demand and load serving resources. NERC identifies a reference reserve margin for the FRCC (the reliability region which includes all of Duke Florida's and FPL's territory and most of Florida) as 15 percent; Florida's investor owned utilities have a voluntary reserve margin of 20 percent.⁵ NERC's most recent estimates indicate that this winter the FRCC region will have a winter reserve margin of nearly 40 percent.⁶

8. Intervenors' declarations also claim risks of additional reliability impacts from discontinuing operation of Sabal Trail's Central Florida Hub, which currently allows for pipeline transportation hub service among Sabal Trail, Florida Southeast, and Gulfstream Natural Gas System and also will connect to the fourth interstate pipeline in the central and south Florida regions (Florida Gas Transmission Company, LLC). The declarants claim that the hub is currently

⁵ FRCC. "Florida Public Service Commission 2017 Ten-Year Site Plan Workshop FRCC Presentation." September 12, 2017. Available online at: http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2017/FRCC_Presentation.pdf

⁶ FERC. "Winter 2017-18 Energy Market Assessment." Docket No. AD06-3, Item No. A-3. October 19, 2017. Available online at: <https://www.ferc.gov/market-oversight/reports-analyses/mkt-views/2017/10-19-17-A-3.pdf>

providing important supply reliability and flexibility benefits for natural gas-fired electric generation connected to the pipeline grid in these regions by focusing on firm capacity availability on the existing pipelines (see Shammo at ¶10 and ¶16; Stubblefield at ¶5 and ¶7; and Macon at ¶8). Availability of contractible firm capacity is not, however, indicative of available space on a pipeline to procure gas. Industry wide, most gas is not procured on firm capacity contract, rather on spot purchases.⁷ As detailed below, Florida's two major pipelines have plenty of availability for power plants to procure more gas.

9. According to Intervenors' declarations, of the two other interstate natural gas pipelines that provide service into central and southern Florida (Gulfstream Natural Gas System, LLC and Florida Gas Transmission, LLC), only one has available firm and uncommitted capacity, which is limited to only approximately 97,000 Dth/d, just 2% of total capacity with deliverability into central Florida. Intervenors assert that this is insufficient to cover the firm capacity being provided by the Sabal Trail Project and suggest that without more firm capacity, natural gas power plants will not be able to procure the gas needed to meet electric demand. The declarants' fixation on firm capacity is misleading. FGT is three times the size of SMP and Gulfstream is 1.3 times the size of SMP (both in terms of capacity). Historically, both FGT and Gulfstream have been underutilized, even during

⁷ Based on "Fuel Receipt Data" from EIA-923

Florida's peak demand days. I analyzed the utilization of both pipelines between January 1, 2014 and December 31, 2016 (the three calendar years prior to SMP operation) using data compiled by S&P Global Market Intelligence, and found that FGT's average utilization at power plant delivery points was 28 percent and peak utilization was 40 percent. Similarly, Gulfstream's 3-year average utilization rate for power plant deliveries was 36 percent, with a peak utilization of 49 percent. Using that same data, and comparing to data on annual peak load for the Duke Energy Florida system and the FPL system, I found that on no utility system peak day did either pipeline have a utilization rate above 48 percent. Below I have included a table of the dates when Duke Energy Florida's and FPL's systems have respectively peaked and the corresponding utilization rate of each major pipeline on that same date.

Year	Utility	Date of Utility System Peak	FGT Utilization Percent on Date	Gulfstream Utilization on Date
2014	Duke Energy Florida	7/28/2016	40%	44%
	Florida Power & Light	7/6/2016	35%	41%
2015	Duke Energy Florida	8/25/2015	40%	44%
	Florida Power & Light	6/22/2015	40%	43%
2016	Duke Energy Florida	8/21/2014	38%	48%
	Florida Power & Light	7/28/2014	36%	44%

10. Intervenors also point out that Florida has no natural gas storage (Stubblefield at ¶3 and Shammo at ¶10), suggesting that in the absence of storage, that additional pipeline capacity is necessary to maintain reliability. This statement is misleading because utilities in Florida have contracts for out-of-state gas storage with the ability to withdraw 0.94 Billion cubic feet per day.⁸

11. Intervenors' declarations state that it would take 12-18 months to get the pipeline up and running after a shutdown (Shammo at ¶14). However, Phase 1 of the Sabal Trail Transmission project only took approximately nine months to construct, and once construction was completed, only took one month to start delivering gas.⁹ The declarations are suggesting that it will take longer to bring a pipeline back online than it took to construct and bring it into service in the first place.

12. Some of the declarants lay out claims of economic harms in the form of lost tax revenue, economic output, and wages. For example, Shammo at ¶17 identifies

⁸ FRCC. "Florida Public Service Commission 2017 Ten-Year Site Plan Workshop FRCC Presentation." September 12, 2017. Available online at: http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2017/FRCC_Presentation.pdf

⁹ Based on claims made on the Sabal Trail Transmission website which states that Phase 1 was scheduled to "[C]ommence in June 2016 and be completed by March 2017" which is nine months (<http://www.sabaltrailtransmission.com/faq>). Subsequent press reports confirm that the construction was completed nine months after it began (<http://www.mypalmbeachpost.com/business/just-fpl-pipeline-done-but-when-will-pump-natural-gas/mMniGRWI0xJT4LqUI9B53N/>). Construction was completed in May and began delivering fuel in June.

\$1.4 billion in potential ad valorem tax revenue across Alabama, Georgia and Florida states, which seems to be inclusive of the \$262 million in ad valorem tax revenue Macon at ¶11 identifies for Florida. However, both of these values would have been accrued over a 60-year time horizon; therefore the declarant's are over-estimating the *costs* (in the form of potential lost revenue) by 3,900 percent to 23,900 percent.¹⁰

13. Moreover, some of the supposed costs identified by the declarants are not genuine economic costs rather they are either sunk costs or internal transfer of funds. The developers of Sabal have already spent the money for constructing it, these costs are sunk, and are not new costs as suggested by Shammo at ¶13, Shammo at ¶15, and Macon at ¶12. To suggest that those costs are somehow newly incurred costs precipitated by a delay in pipeline operation is disingenuous and roughly equivalent to claiming that paying your credit card bill is a cost, when in reality paying of debt doesn't not change your net worth. Macon at ¶7 discusses how Nextera may have to pay FPL for failure to deliver firm capacity, however FPL is owned by Nextera, this isn't a cost so much as it is an internal transfer of funds. If I transfer money from one bank account to a separate bank account (both of which are in my name), my net worth has remained the same.

¹⁰ Range based on assuming an 18-month delay versus assuming a 3-month delay.

14. Intervenors' declarations also state that without the Southeast Market Pipeline (SMP) Project, Duke cannot begin bringing online its new Citrus County Combined Cycle Project, a gas plant needed to meet peak load "in the immediate future." Shammo at ¶11 cites to similar needs to meet "rapidly expanding" load, and Macon at ¶9 points to the need of a different gas plant, Okeechobee Clean Energy Center, to serve local load. These claims are supported by no evidence and as established earlier, ignore the excess generation and pipeline capacity that already exists within Florida. It is also worth noting that the growth rate in the region has slowed considerably and is currently only at about 1% per year.¹¹ Consequently, claims of "immediate need" to meet "rapidly expanding" demand are overstated.

15. The Intervenors' declarations are also misleading on whether a temporary interruption in operation of the Southeast Market Pipeline would have adverse environmental impacts in the form of delayed retirements of coal facilities like Cedar Bay (Stubblefield at ¶4), Indiantown (Stubblefield at ¶4), or Crystal River Units 1 & 2 (Sideris at ¶6). It is worth noting, Cedar Bay is already retired, and it

¹¹ FRCC. "Florida Public Service Commission 2017 Ten-Year Site Plan Workshop FRCC Presentation." September 12, 2017. Available online at: http://www.psc.state.fl.us/Files/PDF/Utilities/Electricgas/TenYearSitePlans/2017/FRCC_Presentation.pdf

retired nearly a year ago, on December 31st of 2016.¹² Indiantown generally runs less in the winter / low load months anyways, and it did not run at all between December 2016 and June 2017, the seven months prior to the Pipeline's operational start. Similarly, Crystal River Units 1 and 2 rarely operate in the winter / low load months and last November Crystal River Unit 1 was down November 28, 2016 through March 26, 2017.¹³ Similarly, Crystal River Unit 2 operated very little last year; Unit 2 was brought down in September 2016, and through March of 2017 was only brought back up three times.¹⁴

16. In response to the court's order FERC generated a *draft* "Supplemental Environmental Impact Statement." This is only a draft and the public has until November 20, 2017 to provide written comments on it, after which FERC will presumably issue a final SEIS based on those comments. Sierra Club and others intend to file comments on the SEIS by the due date. Thus, the final SEIS may or may not contain the same findings and conclusions as the draft, and could revise the decisions made in the Final Environmental Impact Statement as to the choice of alternatives and mitigation measures.

¹² FPL. "FPL shuts down Cedar Bay coal-fired power plant, helping the environment and saving customers more than \$70 million." Press Release. December 21, 2016. Available online at: <http://newsroom.fpl.com/2016-12-21-FPL-shuts-down-Cedar-Bay-coal-fired-power-plant-helping-the-environment-and-saving-customers-more-than-70-million>

¹³ Analysis of S&P Global Market Intelligence data

¹⁴ Analysis of S&P Global Market Intelligence data

17. FERC's draft SEIS is flawed and makes several assumptions that result in meaningful underestimations of the emissions impacts of the pipeline. A full assessment and comment period for the draft SEIS is underway and may significantly impact its conclusions. Sierra Club will be preparing separate comments for the draft SEIS, but there are several significant flaws with the draft SEIS including:

- The draft SEIS assumes that gas from the pipeline will go to gas-fired power plants that will displace coal- and oil-fired generation resources. This is based on a trend to retire aging coal and oil facilities.¹⁵ However, as illustrated above, most of these coal units have either already retired or operate infrequently leaving little opportunity for them to be further displaced. If we accept the declarants claims that the gas pipeline is needed to serve new, increasing load, then the gas is actually replacing some other new source of generation, like solar or wind.
- The draft SEIS does not account for methane leakage as a contributor to greenhouse gas estimates. Methane leaks occur downstream of the pipeline at many points including at power plants and at industrial facilities. By excluding these emissions the draft SEIS is effectively assuming that no gas will leak from the system.

¹⁵ Draft SEIS, Page 2

- The draft SEIS uses a 100-year global warming potential (which is a measure of the relative global warming impact of various greenhouse gases) based on the IPCC's 2007 evaluation. However, more recent assessments have increased the relative global warming impacts of greenhouse gases, including methane. Moreover, the draft SEIS doesn't investigate the impacts of using an alternative, 20-year global warming potential value. Either of these adjustments would increase the final estimate of downstream emissions.

18. The report's conclusion, that 22.1 million metric tons per year increase in Florida GHG emissions is "not significant," is flawed not only because that value is a clear underestimation of the overall impacts but also because 22.1 million metric ton per year is, in fact, significant. For reference, Florida's six largest emitters of CO₂ within the electric power sector in 2016 were all coal units; that year, they collectively emitted only 20.3 million metric tons of CO₂.¹⁶ For an alternative comparison, the Environmental Protection Agency offers a greenhouse gas equivalency calculator that allows users to compare emissions numbers in terms of other metrics like vehicles on the road or coal plants. Based on that

¹⁶ Crystal River 5, Crystal River 4, Seminole Unit 1, Seminole Unit 2, St. Johns River Power unit 2, Stanton Energy Center Unit 2. Based on data compiled by S&P Global Market Intelligence.

calculator, 22.1 million metric tons is equivalent to greenhouse gas emissions from 4.7 million passenger vehicles or 5.5 coal plants.¹⁷

I declare under the penalty of perjury under the laws of the United States that, to the best of my knowledge, the foregoing is true and correct.

DATED: October 31, 2017



Joseph M. Daniel

¹⁷ Available here: <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator>

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PROFESSIONAL EXPERIENCE

Sierra Club, Washington, D.C. *Electric Sector Analyst*, 2016 – Present

- Serves as lead analyst on federal policy, natural gas, coal economics, and energy markets.
- Supports the development of junior staff through mentorship and training
- Reviews utility rate cases, integrated resource plans, and long term planning
- Presented analysis and represented organization at academic and industry conferences
- Responsible for conducting economic analysis of federal regulations and market rules
- Builds and maintains databases; constructs economic and technical models for internal use
- Subject matter expert and lead analyst on: fossil fuel economics, markets design, natural gas, long term energy planning, and federal policy.

Synapse Energy Economics Inc., Cambridge, MA. *Associate*, 2013 –2015

- Specialized in reviewing long-term planning and cost-benefit analysis within the energy sector
- Provided recommendations to utility regulator on how to align utility's short- and long-term fuel cost assumptions with industry best practices.
- Led researching efforts and conducted primary analysis on the electric industry including utility forecasting, regulatory compliance, and distributed energy resources
- Conducted economic modeling of distributed energy resources under various utility rate tariffs
- Modeled costs and benefits of energy efficiency and small scale solar in ISO New England using Market Analytics

Independent Consultant, New York, NY. 2011 – 2013

- Wrote executive briefs on the sustainability and economic development efforts of municipalities for the Economic Transformation Group (ETG)
- Analyzed technical and economic drivers for "Green Palm Oil Production" for the ETG
- Co-authored World Bank report: *Kathmandu Valley Cultural Tourism Competitiveness Assessment and Action Plan*
- Designed and developed mathematical models for the STAR Community Index

Environmental Law & Policy Center, Madison, WI. *Policy and Science Intern*, 2011

- Investigated consequences of state policy changes related to wind turbine siting regulations
- Initiated research for a report to quantify jobs created by wind and solar energy industries
- Analyzed regional economic impacts of USDA grant data associated with renewable energy provisions of the 2008 Farm Bill

Tel Aviv – Yafo Municipality, Tel Aviv, Israel. *Research Assistant to Deputy Mayor*, 2010

- Presented urban sustainability case studies (including PlaNYC) and best practices to the mayor, deputy mayor, and city council
- Worked with public- and private-sector partners to define metrics for a governmental Green Business Certification Program
- Investigated US and European greenhouse gas emission reduction policies and programs for application in Tel Aviv

Baker Hughes - Baker Petrolite (Industrial Division), Honolulu, HI. *Engineer II*, 2006 – 2010

- Managed daily operation of the primary account on the island, worth over \$1.8 million annually

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- Monitored performance metrics, analyzed project performance, calculated energy and cost savings related to efficiency upgrades
- Consulted with customers on reducing environmental impacts of facilities

EDUCATION

Columbia University – School of International Public Affairs, New York, NY
Master of Public Administration in Environmental Science and Policy, 2012

University of Texas, Austin, TX
PETEX Petroleum Fundamentals Program, 2007

Florida Institute of Technology – College of Engineering, Melbourne, FL
Bachelor of Science in Chemical Engineering, 2006

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Exhibit C

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SIERRA CLUB, ET AL.,	:
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Petitioners,	:
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v.	:
	:
FEDERAL ENERGY REGULATORY	:
COMMISSION,	:
	:
Respondent.	:
----- X	:

No. 16-1329, et al.

Tuesday, April 18, 2017

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES ROGERS, BROWN, AND GRIFFITH

APPEARANCES:

ON BEHALF OF THE PETITIONER SIERRA CLUB, ET AL.:
ELIZABETH F. BENSON, ESQ.

ON BEHALF OF THE PETITIONER G.B.A. ASSOCIATES,
ET AL.:
JONATHAN PERRY WATERS, ESQ.

ON BEHALF OF THE RESPONDENT:
ROSS R. FULTON (FERC), ESQ.

ON BEHALF OF THE INTERVENORS:
JEREMY C. MARWELL, ESQ.

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C O N T E N T S

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P R O C E E D I N G S

THE CLERK: Case number 16-1329, et al., Sierra Club, et al., Petitioners versus Federal Energy Regulatory Commission. Ms. Benson for Petitioners Sierra Club, et al.; Mr. Waters for Petitioners G.B.A. Associates, et al.; Mr. Fulton for the Respondent; Mr. Marwell for the Intervenors.

JUDGE ROGERS: Good morning.

ORAL ARGUMENT OF ELIZABETH F. BENSON, ESQ.

ON BEHALF OF THE PETITIONERS SIERRA CLUB, ET AL.

MS. BENSON: Good morning. May it please the Court, Elizabeth Benson on behalf of the Environmental Petitioners. And I'm going to take 15 minutes to address the issues in our briefs, and then Mr. Waters will take five minutes to address the issues in Petitioner G.B.A.'s brief. And I'd like to reserve five minutes for rebuttal.

This case involves a 686 mile long pipeline that cuts across Alabama, Georgia, and Florida, exposing communities to risks from pipeline ruptures, construction impacts, groundwater contamination, and air and water, air pollution and noise from compressor stations, just to name a few. The issues in this case involve FERC's arbitrary environmental-justice analysis, its refusal to take a hard look at the greenhouse gas impacts from consumption of a billion cubic feet a day of gas, which FERC says will result from the project, and FERC's improper allowance of a 14

1 percent return on equity based on a hypothetical capital
2 structure.

3 JUDGE ROGERS: All right. So, in terms of the
4 environmental-justice communities, in the analysis by the
5 Commission did it identify all of the burdensome facilities
6 that were within the census tract at issue here?

7 MS. BENSON: Well, there are multiple census
8 tracts at issue here.

9 JUDGE ROGERS: I thought we were really focusing
10 on the place where Albany is.

11 MS. BENSON: We are interested in Albany as well
12 as the entire pipeline, but for Albany itself, there are
13 many burdensome, the community is overburdened already, and
14 the --

15 JUDGE ROGERS: No, my question is in FERC's
16 analysis did it identify how the community was overburdened?

17 MS. BENSON: No, Your Honor. FERC said that this
18 is a majority white census tract, and so therefore it's not
19 in an environmental-justice community, when in reality, but
20 then it said it was looking at a mile radius around the
21 compressor station, so Petitioners showed that in fact the
22 community around the compressor station is over 80 percent
23 African-American as demonstrated by the census block data.

24 JUDGE ROGERS: That's right. So, you have those
25 two arguments, as well. So, I just want to be clear, is

1 your understanding of what FERC said is because the census
2 tract is a majority white, therefore it is not an
3 environmental-justice community?

4 MS. BENSON: Correct. FERC said that because it's
5 in a majority white census tract the compressor station is
6 more than a mile from the nearest environmental-justice
7 community.

8 JUDGE GRIFFITH: Didn't the EIS itself, though,
9 recognize that the immediate vicinity surrounding the
10 compressor station was 80 percent African-American
11 community. I mean --

12 MS. BENSON: No, Your --

13 JUDGE GRIFFITH: -- they may not have called the
14 area an environmental-justice community, but they recognized
15 that, didn't they?

16 MS. BENSON: No, Your Honor. In the comparison of
17 alternatives they have a table where they're comparing
18 different compressor station locations, and they list the
19 proposed location as not being an environmental-justice
20 community.

21 JUDGE GRIFFITH: That's not my question.

22 MS. BENSON: And I do not believe that they
23 recognized --

24 JUDGE GRIFFITH: That's not my question. That's
25 not my question. My question is did -- and you can help me

1 here, I'm not arguing --

2 MS. BENSON: Yes.

3 JUDGE GRIFFITH: The question isn't whether they
4 called it an environmental-justice community, but whether
5 they recognized that the area immediately surrounding the
6 compressor was in a black neighborhood. I thought that the
7 report itself acknowledged that.

8 MS. BENSON: Your Honor, it did not acknowledge it
9 for the mile radius around the compressor station. It did
10 talk about communities --

11 JUDGE GRIFFITH: No, I'm not saying whether it
12 acknowledge that it was an environmental-justice
13 community --

14 MS. BENSON: Right.

15 JUDGE GRIFFITH: -- but just the facts on the
16 ground, what the demographics were, and you're saying
17 they --

18 MS. BENSON: No, I do not think --

19 JUDGE GRIFFITH: -- did not recognize it.

20 MS. BENSON: -- that they recognized that. They
21 talked about some communities that were over a mile away,
22 but, you know, they really relied on the fact that the mile
23 radius they said was not an environmental-justice community,
24 so they didn't have to take a closer look at the impacts on
25 that community. And that was, directly contravened the

1 evidence submitted by Petitioners, and they didn't say
2 that's wrong, they just said EPA says we can look at census
3 tract data. In fact, EPA, the EPA guidance that they cited
4 for that proposition warns against relying on census tract
5 data repeatedly because, specifically because it can miss
6 pockets of, high concentration pockets of minority
7 communities, or low income communities.

8 JUDGE ROGERS: So, the Commission said but it
9 wanted to rely on census tract data because then it would
10 have uniformity and information along the pipeline?

11 MS. BENSON: Well, Your Honor, I think uniformly
12 along the pipeline doesn't mean that they shouldn't look at
13 the facts on the ground for the one-mile radius around the
14 compressor station. So, what they did here is said we're
15 going to ignore this data which is census block data, so
16 it's just as accessible, just as reliable as the census
17 tract data.

18 JUDGE ROGERS: Who creates that?

19 MS. BENSON: The census data?

20 JUDGE ROGERS: The census block? Is that a
21 creation of the Census Bureau?

22 MS. BENSON: Yes.

23 JUDGE ROGERS: All right.

24 MS. BENSON: If you go to the Census Bureau
25 website it shows census tract data and census block data.

1 So, that was not a creation of Petitioners, that's the U.S.
2 Government.

3 So, that was a fundamental error because FERC
4 couldn't assess the impacts on a community that it refused
5 to acknowledge exists, and while it does have some
6 discretion and methodology, it does not have discretion to
7 ignore the evidence in the record before it.

8 FERC also found that 83.7 percent of the pipeline
9 route affects environmental-justice populations, but said
10 that's not a disproportionate impact. It did that by
11 comparing the percentage of environmental-justice
12 populations affected by the project, 83.7 percent, only to
13 the percentage affected by a few other select alternatives,
14 and as the EPA said in its comments, disproportionality
15 needs to be considered in the context of whether impacts
16 appreciably exceed those on the general population, not just
17 on other alternatives that also primarily affect.

18 JUDGE GRIFFITH: But isn't, I mean, doesn't common
19 sense tell us that the best comparison is between proposed
20 alternatives? I mean, we're trying to give to the public
21 and to the decision maker a real decision, and you can have
22 a pipeline going here, or here, or here, why not compare the
23 demographic groups between and among those pipelines, what's
24 wrong with that?

25 MS. BENSON: Your Honor, I think it's fine to do

1 that, but there also has to be a comparison to a more
2 general population to get some understanding of how
3 impactful the pipeline is. And again, the FERC said that
4 EPA supported its approach of only comparing to these
5 alternatives that also highly impact these populations, but
6 again, the EPA guidance that FERC purported to rely on
7 actually says that if you do take alternatives that are also
8 only affecting areas that are predominantly environmental-
9 justice communities, you need to also look at an alternative
10 that doesn't do that so you get a sense of the actual
11 demographics and whether environmental-justice communities
12 are being disproportionately impacted.

13 JUDGE BROWN: What in your view is the Court
14 supposed to do with this? In other words, what standard are
15 we applying here, because the guidance says it doesn't
16 create any right, it's for the benefit of the Executive
17 Branch departments just to help them look at this, so what
18 does the Court do with this?

19 MS. BENSON: So, Your Honor, we are trying to
20 enforce NEPA, this claim arises under NEPA and the APA, not
21 under the guidance of the Executive Order. So, we'd like
22 the Court to look at whether FERC's analysis was arbitrary
23 and capricious, and we believe it was because it ignored the
24 data on the ground regarding the actual composition of the
25 population around the compressor station, even though it

1 said it was using a one-mile area of analysis, it completely
2 ignored who actually lives in a one-mile area of analysis,
3 or one-mile radius around that station. And for the 83.7
4 percent that was arbitrary and capricious because they only
5 compared it to alternatives that also primarily affect
6 environmental-justice populations, there were other
7 alternatives they could have compared it to that affected a
8 lower percentage of environmental-justice populations.

9 JUDGE ROGERS: Well, there was the no action
10 alternative, but the other alternatives I thought FERC did
11 address and explain why they wouldn't work. I mean, there
12 wasn't a port, one was very expensive.

13 MS. BENSON: So, they did address other
14 alternatives --

15 JUDGE ROGERS: Yes.

16 MS. BENSON: -- but they didn't include that in
17 their environmental-justice analysis where they said 54 to
18 83 point, 54 to 80 percent of those alternatives also impact
19 environmental-justice communities, that only included what
20 they called the major, the land base major route
21 alternatives, so it was really only a few other
22 alternatives. And then they compounded that error by saying
23 that 54 percent is similar to 83.7 percent, those
24 percentages are not similar, it's 30 percent for a 686-mile
25 pipeline, that means more than 200 additional miles of pipe

1 affecting environmental-justice communities, that's from
2 here to New York. So, and by FERC's own benchmarks 10
3 percent is meaningfully greater. So, that was also
4 arbitrary and capricious under the APA standard.

5 JUDGE ROGERS: So, just back to Judge Brown's
6 question, the argument is that because of the way FERC
7 proceeded it didn't have the information that was relevant
8 to making a decision whether to issue the certificates of
9 convenience and necessity. In other words, you know,
10 Intervenor makes this argument, and our Court has said, you
11 know, NEPA is not a substantive, it's just a procedural, so
12 if the Commission says well, you know, we did this mammoth
13 study, and as Judge Griffith's question suggested it
14 mentioned the African-American community around the
15 compressor station, and we would have to find, wouldn't we,
16 that if we were to agree with some of your arguments that
17 those omissions were material to the decision FERC had to
18 make?

19 MS. BENSON: Your Honor, we --

20 JUDGE ROGERS: In other words, I'm just trying to
21 understand, as I understood what Judge Brown was focusing
22 on, even if you're right about some of these things, sort of
23 what difference does it make under NEPA?

24 MS. BENSON: Well, underneath --

25 JUDGE ROGERS: And so --

1 MS. BENSON: I'm sorry.

2 JUDGE ROGERS: -- I'm just trying to think of
3 what's the best articulation, does the Agency have the
4 information it needs in order to make the decision? And
5 obviously, there's a judgment involved.

6 MS. BENSON: Right. So, Petitioners don't need to
7 show that FERC would change its decision, we just need to
8 show that they made an unformed decision, and we believe
9 that here they did. You know, when an environmental-justice
10 community is identified, you know, the Agency is supposed to
11 take certain steps to zero in on whether that community is
12 disproportionately impacted. Here they didn't do that, so
13 it did affect their consideration of alternatives, as I
14 mentioned earlier, it affected mitigation measures, it
15 affected their decision about whether the project as a
16 whole, whether the public benefits outweigh the adverse,
17 potential adverse impacts.

18 And I see I only have three minutes left, so I
19 would like to turn briefly to downstream greenhouse gas
20 impacts. Just the primary objective of this project is to
21 supply natural gas to power plants, NEPA requires indirect
22 effects to be analyzed, the consumption is not speculative,
23 FERC said that this project would result in the consumption
24 of a billion cubic feet a day, it had widely available tools
25 available. EPA pointed it to a Department of Energy study

1 that it could have used, and its excuse that some of the
2 gas, or some of the emissions will potentially be offset is
3 not an adequate explanation for not analyzing those impacts,
4 nor is the fact that it will be regulated downstream.

5 JUDGE GRIFFITH: If we disagreed with you and felt
6 that there wasn't a sufficient link between the greenhouse
7 gas emissions and specific climate change, okay, if we
8 disagreed with that, is there some reason then for them to
9 do the calculations for methane emission, if you can't link
10 it to specific climate change?

11 MS. BENSON: Well, I think we're primarily talking
12 about carbon dioxide --

13 JUDGE GRIFFITH: Okay.

14 MS. BENSON: -- from the power plants. Yes, and
15 that if they, they can calculate that, and they failed to do
16 so, and FERC has --

17 JUDGE GRIFFITH: But why do that unless you can
18 link it to a specific climate change?

19 MS. BENSON: Because it gives the Petitioners, the
20 public, and FERC itself more information about the impacts
21 of this project. And I now have under two minutes left, so
22 I think I'd like to submit --

23 JUDGE ROGERS: We'll give you some more time, but
24 I just --

25 MS. BENSON: Okay.

1 JUDGE ROGERS: -- I just want to be clear, the
2 Agency itself in its environmental analysis makes the
3 connection between greenhouse gases and climate change, so
4 at least when it was making this determination the Agency
5 had already accepted that, had it not?

6 MS. BENSON: The Agency accepts the idea that
7 greenhouse gas impacts cause climate change, but they
8 include no analysis of how this project, how many, any
9 meaningful assessment of the greenhouse gas impacts, the
10 greenhouse gas emissions that will result --

11 JUDGE ROGERS: No, I understand. I understand.
12 But I thought Judge Griffith's question was getting to the
13 basic point, and what I was trying to respond in part was
14 the Agency has already for purposes of this order and
15 rehearing order accepted the link, and of course the Agency
16 can respond if that's incorrect, but I thought the Agency
17 had already accepted that there was a link, and it gave
18 other reasons for not proceeding.

19 MS. BENSON: It accepts the link between
20 greenhouse gases and climate change, but doesn't assess them
21 as to this project. As for the emissions from the power
22 plants, FERC both provides a few excuses for failing to take
23 a hard look, and that's the portions of the gas will be
24 offset, and that downstream power plants are regulated, and
25 those excuses do not hold water. But then it also says

1 there's not a sufficient connection, and even if there was
2 we don't have the information available. But --

3 JUDGE ROGERS: Not a sufficient connection between
4 what and what?

5 MS. BENSON: The pipeline and the power plants,
6 the power plant emissions.

7 JUDGE BROWN: Well, I mean, isn't that right? One
8 of the problems with trying to understand how this really
9 works is that when FERC is looking at, trying to do its NEPA
10 analysis it's looking at what impact will building the
11 pipeline actually have, right? That project, whereas who
12 uses it later, that's not something they can control.

13 MS. BENSON: Well, Your Honor, the --

14 JUDGE BROWN: So, I guess the question is what is
15 it that you think should be part of their analysis of the
16 pipeline when it's really an effect that's going to be, if
17 it happens the result of the, how the end user uses that gas
18 that goes through the pipeline?

19 MS. BENSON: Well, because NEPA requires indirect
20 effects that are reasonably foreseeable be analyzed, and
21 this is clearly a reasonably foreseeable effect of building
22 this pipeline. That billion cubic feet a day of gas is not
23 going to flow, and not going to be burnt to power plants if
24 FERC does not approve this pipeline. So, it should be as a
25 classic indirect effect considered before FERC decides

1 whether the project is in the public interest.

2 JUDGE GRIFFITH: Why isn't this controlled by
3 *Public Citizen* and ours cases interpreting *Public Citizen*?

4 MS. BENSON: Well, *Public Citizen* had a pretty
5 narrow holding that it's only if the Agency has no control
6 over the effects, or the action itself, such that the
7 information in the EIS would hold no value, it would have no
8 impact on the decision. Here, FERC makes an analysis of
9 whether a project, whether the project's public benefits
10 outweigh the potential adverse impacts. So, it can take
11 into account that X number of greenhouse gases are going to
12 be released in making that determination. And then the LNG
13 cases that you reference they held that the Department of
14 Energy is the entity that's turning, basically turning the
15 spigot on or off here, releasing, letting that billion cubic
16 feet of day per gas flow through the world. Here, there is
17 no divided statutory authority like there is in the LNG
18 context, FERC is the one making that decision to turn the
19 spigot on or off, there's no intervening decision like there
20 was in those LNG cases.

21 JUDGE ROGERS: Let me just ask you about the 14
22 and a half percent, what's your response to FERC's argument?

23 MS. BENSON: Well, our claim is pretty simple,
24 despite the complexity of the issues here. Initial rates
25 have to be in the public interest.

1 JUDGE ROGERS: So, FERC says it's recently
2 approved 14 and a half percent, so that's what it was doing
3 here.

4 MS. BENSON: Well, this Court has held that bare
5 reliance on prior cases is not sufficient, FERC needs to
6 provide a reasoned and substantial authority for doing so.
7 So, here basically, FERC said well, in the past we've given
8 new pipelines this 14 percent return on equity with up to a
9 50 percent debt structure, so they said up to a 50 percent
10 debt structure, that means that's the highest that they
11 give. And when FERC undertakes this analysis, I'll quote
12 the *Pine Needle*, which was a Section 7 case, and which very
13 similar language is used in this Court's *North Carolina*
14 *Utilities Commission* case, that to establish a rate of
15 return on equity FERC identifies a zone of reasonableness
16 based on the range of returned experienced by comparable
17 companies, and then adjusts the return of the pipeline at
18 issue within this zone to reflect the business and financial
19 risks specific to that pipeline. So, merely saying we've
20 done this in the past with other pipelines, so we're going
21 to give this pipeline the highest --

22 JUDGE GRIFFITH: Did you make that argument in
23 your briefs? I had a hard time finding that. I think
24 that's a good, I think it's a strong argument that there
25 wasn't substantial evidence supporting this, that they just

1 relied on what it had done in the past, but I couldn't find
2 that argument in your briefs.

3 MS. BENSON: Yes, I think we argue that they can't
4 just cite to prior authority, and that is because they need
5 to provide substantial evidence. I believe we used those
6 words, or at least that they need to have a well reasoned
7 decision.

8 JUDGE GRIFFITH: Okay.

9 JUDGE ROGERS: All right. Let us hear from, let's
10 see --

11 MS. BENSON: Thank you.

12 JUDGE ROGERS: -- the consolidated case, G.B.A.

13 ORAL ARGUMENT OF JONATHAN PERRY WATERS, ESQ.

14 ON BEHALF OF THE PETITIONERS G.B.A. ASSOCIATES, ET AL.

15 MR. WATERS: May it please the Court, my name is
16 Jonathan Waters, and I represent G.B.A. Associates and K.
17 Gregory Isaacs, who are the Appellants here.

18 Just a little bit of background, briefly. They
19 are landowners down in South Georgia near Moultrie, Georgia.
20 For the last four years as this project has been working its
21 way from surveying stages to now they have been fighting
22 this pipeline. To give you an idea of this pipeline,
23 because pipelines are different sizes, this seal of the
24 United States, the center circle of that seal I would say is
25 approximately 36 inches, that is the diameter of this

1 pipeline that is running through South Georgia. Now, our
2 chief argument is an argument discredited by FERC, and that
3 is that we think that FERC violated the Sunshine Act when
4 they permitted this pipeline in the manner in which they did
5 it, by notational voting.

6 JUDGE ROGERS: Well, how do you distinguish our
7 precedent?

8 MR. WATERS: Okay. The central precedent they use
9 in you all's cases here in the D.C. Circuit is the
10 *Communication Systems, Inc. v. Federal Communications*
11 *Commission*. I would say that's the seminal case. And even
12 in their brief FERC states that they have relied on that
13 precedent for 35 years to support notational voting. Now,
14 when that opinion was written it's apparent from that
15 opinion because the Sunshine Act hadn't been around for very
16 long, it even states that in the opinion, that they look to
17 the legislative history of the passing of that legislation.
18 Now, the Sunshine Act, as you know, was basically a result
19 of the Watergate, the Ford administration came in and
20 basically said we want to do some legislation that makes, as
21 Judge Brandeis said brings to light, sunlight is said to be
22 the best disinfectant, and electric light the best
23 policeman. Now, here's how that case is distinguished, in
24 that opinion they quote Congressman Walter Flowers from
25 Alabama who offered the original language that this Court,

1 the D.C. Circuit noted that the amended subsection would not
2 preclude agencies from disposing of non-controversial
3 matters by written circulation, and that is our argument.

4 For --

5 JUDGE ROGERS: That this is a controversial
6 matter?

7 MR. WATERS: Yes. For four years we have fought
8 this pipeline. I will tell you how controversial it is in
9 the State of Georgia. Back in January/February of last year
10 legislation was being passed in the Georgia legislature
11 where basically what they do is they give approvals for
12 different activities, and then this activity was for the
13 pipeline company Sabal Trail to go underneath the waterways
14 in the State of Georgia. Okay? Overwhelmingly, legislation
15 was not passed to prevent them from doing that. Now, that
16 shows that the majority of legislators in the State of
17 Georgia were trying to prevent this pipeline from being
18 constructed because they didn't have permission to go under
19 the waterways, they couldn't construct the pipeline.

20 Now, political things happened, Sabal threatened
21 to sue --

22 JUDGE GRIFFITH: I'm sorry, help me, I thought in
23 our precedent that the *Texas Railroad Commission* case
24 specifically disregarded that distinction you're making, it
25 said it doesn't make that distinction between controversial

1 and non-controversial. Did I read that wrong?

2 MR. WATERS: I don't think so. I think, and even
3 the *MREP* case that you all had more recently where MREP made
4 the procedural argument that it asserted that the
5 Commission's use of the written (indiscernible) in the case
6 violated the Sunshine Act, it quotes back to *Communication*
7 *System*, but then it goes on to use one of the exceptions
8 where the Sunshine Act doesn't apply. So, it refers back to
9 that Commission, but then it goes further to say why in that
10 case it didn't matter.

11 So, what we're basically asking this Court to do,
12 my clients are, is, I mean, basically, in our opinion the
13 Sunshine Act has been being killed for 35 years because they
14 have leapfrogged on that decision that was passed, that
15 specifically contained this language about disposing of non-
16 controversial matters. So, it's our request of this Court,
17 because what's going on here is they're circumventing the
18 meeting process, they have to put out, as you're all aware,
19 a notice, a Sunshine Act meeting notice. Okay. My clients
20 had intended to -- we all believed that the meeting that
21 would have occurred approximately the second or third week
22 of February was when this matter was going to be taken up by
23 FERC. My clients and many others in South Georgia were
24 intending to come to Washington when that happened. It
25 didn't happen that way because on February 2nd by a

1 notational voting, by a basically the petition circulating
2 around the office like a memo, and being checked off, that's
3 how they conducted the business on this super-controversial
4 issue. My clients --

5 JUDGE ROGERS: So, let me just be clear --

6 MR. WATERS: I'm sorry.

7 JUDGE ROGERS: -- your clients were very much
8 involved in this in terms of notice of the pipeline, and
9 opportunity to comment, et cetera, so --

10 MR. WATERS: They were.

11 JUDGE ROGERS: -- the February notice that you
12 referred to, did that notice say --

13 MR. WATERS: No, wait. I apologize.

14 JUDGE ROGERS: Go ahead.

15 MR. WATERS: There was no February notice, that's
16 just when the notational, when it was granted, the order was
17 issued.

18 JUDGE ROGERS: So, that's what I want to --

19 MR. WATERS: Yes.

20 JUDGE ROGERS: -- understand your understanding of
21 the Act, is it your view that the Commission must give prior
22 notice that on a certain day it will take a vote in public
23 on these applications?

24 MR. WATERS: On a controversial issue we believe
25 so, Your Honor.

1 JUDGE ROGERS: I see.

2 MR. WATERS: That's our opinion, and that's the
3 way the law I think was written based on the legislative
4 history.

5 JUDGE ROGERS: Any other Circuits with you?

6 MR. WATERS: No, Your Honor.

7 JUDGE ROGERS: All right.

8 MR. WATERS: But, I mean, this is the seminal
9 circuit on this issue on administrative law.

10 JUDGE ROGERS: Okay.

11 MR. WATERS: Yes. And like I say, we were
12 planning to come up there for that meeting, and then it
13 didn't occur, and then we find out that it's been passed by
14 notational procedure, and --

15 JUDGE ROGERS: So, then you got an opportunity to
16 file a petition for reconsideration.

17 MR. WATERS: We did, Your Honor, and --

18 JUDGE ROGERS: Yes.

19 MR. WATERS: -- we raised that issue in our
20 petition --

21 JUDGE ROGERS: Right.

22 MR. WATERS: -- for rehearing, and that's our
23 argument, that that --

24 JUDGE ROGERS: So, the votes were public in terms
25 of the Commissioners being identified as to who voted for?

1 MR. WATERS: After the fact, yes, Your Honor.

2 JUDGE ROGERS: After the fact.

3 MR. WATERS: After the fact. And --

4 JUDGE ROGERS: And on reconsideration, I'm just
5 trying to understand here --

6 MR. WATERS: Yes.

7 JUDGE ROGERS: -- you didn't point out any fraud,
8 conflict of interest, collusion --

9 MR. WATERS: No, we're not intending they -- no.
10 We're not intending --

11 JUDGE ROGERS: So, this is just --

12 MR. WATERS: -- any fraud or collusion on the part
13 of the Commission.

14 JUDGE ROGERS: So, this is just a formality?

15 MR. WATERS: Well, it's a -- here's the question,
16 if you look at the Press Club speech of the Commissioner
17 from exactly one year before this was passed, was
18 notationally passed, she basically, I mean, in that
19 quotation she basically says, you know, it's becoming
20 inconvenient for us to conduct our business by people coming
21 that are objecting to these pipelines, that defeats the
22 whole purpose in the Sunshine Act. If the Sunshine Act's
23 purpose is to, is entitling the public to the fullest
24 practical information regarding the decision-making
25 processes of the Federal Government, then excluding the

1 public, then purposely excluding them by saying hey, I've
2 done a lot of county work for counties in Georgia, okay, for
3 Twiggs County, small county, 10,000 people, we have an
4 agenda we publish before those meetings, it's a big deal
5 what's on that agenda because people come out if they want
6 to argue about any little nominal thing. But in this case
7 you have a super-controversial pipeline, 600 miles long, 36
8 inches wide, coming through people's neighborhoods that the
9 potential for explosion is there, that's the type of case
10 where they should be provided the opportunity, and I think
11 that's what the Sunshine Act, you know --

12 JUDGE ROGERS: All right.

13 MR. WATERS: -- contemplated.

14 JUDGE ROGERS: I think we have your argument.

15 MR. WATERS: Yes, thank you very much.

16 JUDGE ROGERS: Thank you. All right, Counsel for
17 the Commission.

18 ORAL ARGUMENT OF ROSS R. FULTON, ESQ.

19 ON BEHALF OF THE RESPONDENT

20 MR. FULTON: Thank you, Your Honors. Ross Fulton
21 for the Commission. Your Honors, after a careful balancing
22 here, and a thorough environmental review the Commission
23 approved the projects at issue because they found a public
24 need for increased natural gas supply to the Southeast,
25 enhanced competition, a protection against supply

1 disruptions, and the fact that much of the natural gas from
2 the projects would be offsetting the burning of high
3 emissions coal.

4 JUDGE ROGERS: So, what do you do about these
5 environmental-justice communities which are inconvenient to
6 the purpose?

7 MR. FULTON: Well, the Commission certainly did
8 not find that they were inconvenient or a problem, Your
9 Honor, instead, the Commission in its discretion decided to
10 identify and assess the project's impacts on environmental-
11 justice --

12 JUDGE ROGERS: But you heard the discussion with
13 Petitioners' Counsel, so how do you respond?

14 MR. FULTON: I think there was a couple of issues
15 there, so I'll start with, for instance, the comparison to
16 alternatives. The Commission's finding here was that,
17 again, going to the standard of the Executive Order it's
18 disproportionately high in adverse effects, the Commission
19 found that this project would not have high adverse effects
20 on environmental-justice communities because it would not
21 meet the extent or intensity criteria.

22 JUDGE GRIFFITH: What if it had moderate effect,
23 but everywhere it was routed it went through African-
24 American communities? It's a hypothetical, I know, but
25 what, how would you read the law then?

1 MR. FULTON: So, I think there is indication in
2 the Executive Order itself at J.A. 1359 that if the project
3 doesn't have high and adverse effects it therefore cannot
4 have disproportionately high adverse effects, but that's --

5 JUDGE GRIFFITH: Okay. So, in my hypothetical,
6 has moderate effects everywhere it goes, but the only place
7 it goes are through black neighborhoods, or Latino
8 neighborhoods, not a problem? Yes or no, is that a problem
9 or not?

10 MR. FULTON: I think the Commission --

11 JUDGE GRIFFITH: Yes or no, is that a problem or
12 not?

13 MR. FULTON: Not under the standard --

14 JUDGE GRIFFITH: Not? Okay.

15 MR. FULTON: -- of disproportionate and adverse.

16 Now, I think if I might explain a little bit --

17 JUDGE GRIFFITH: Yes.

18 MR. FULTON: -- Your Honor? I think in that
19 situation what the Executive Order is seeking to do, and
20 what the Commission did here is identify and assess, so if
21 that situation was presented to the Commission I presume the
22 Commission would do similar to what it did here with
23 Dougherty County, which was most of the route was put within
24 existing right-of-ways to minimize the impacts on
25 environmental-justice communities, but in Dougherty the

1 Commission found that doing so would actually put it near
2 residential areas, so the route was actually changed from
3 existing right-of-ways to minimize impacts on residential
4 communities. As the Commission talks about it at 450 of the
5 environmental impact study at J.A. 967, the compressor
6 station originally was going to be in an environmental-
7 justice tract, but based on collaboration with, between the
8 pipeline and Sierra Club and others the compressor station
9 was actually moved out of the environmental-justice tract,
10 which is now the situation that Sierra Club points to. But
11 nonetheless, the Commission did in fact study the effects of
12 the compressor station and other aspects of the pipeline on
13 Dougherty County and found that it would be within air and
14 noise requirements, and not have other impacts that would
15 rise to a high and adverse level.

16 JUDGE ROGERS: So, what would you have to show in
17 order to meet FERC's standard?

18 MR. FULTON: According to the Commission, and I
19 should note that the Executive Order and the EPA guidance
20 provides discretion to the agencies to exercise informed --

21 JUDGE ROGERS: No question about it, and the
22 question is how do you meet your burden under the Agency's
23 standard?

24 MR. FULTON: If you look at 3-217837 of the record
25 the Commission has a chart to have high and adverse as

1 particularly under the extending intensity there needs to be
2 a substantial change to the resource, and have a region-wide
3 impact.

4 JUDGE ROGERS: So, if the community is suffering
5 from asthma with 80 percent of its population then it has to
6 go up to 95 percent?

7 MR. FULTON: I don't think that the Commission
8 puts such sort of quantification on it.

9 JUDGE ROGERS: Well, that's why I'm trying to
10 understand, how do you meet the burden to show an impact
11 where as you point out the Commission prefers to run the new
12 pipelines alongside the old pipeline, so the old pipelines
13 are already, you know, an adverse impact, so now we've put
14 another pipeline there. I'm just trying to understand, I
15 never quite understood despite all the words what has to be
16 shown once it's establishes that South Florida needs natural
17 gas.

18 MR. FULTON: Under NEPA, Your Honor --

19 JUDGE ROGERS: Or at least it needs some
20 alternative to fossil fuels, not necessarily natural gas,
21 but it's proposing natural gas.

22 MR. FULTON: That's correct, Your Honor. And
23 obviously, the Commission does not control those decisions,
24 but under NEPA --

25 JUDGE ROGERS: What decisions?

1 MR. FULTON: That Florida has made as terms of
2 what types of energy supplies it needs, and were to site its
3 utilities.

4 JUDGE ROGERS: Well, it could depending on other
5 findings, it could deny the applications.

6 MR. FULTON: It could, and, Your Honor, the
7 Commission considered that in the no action and found that
8 it would either not meet the purpose of the project, or it
9 would have uncertain effects because the Commission
10 recognizes Florida wants to increase its natural gas supply,
11 so there could be other things done that have comparable
12 environmental impacts, but --

13 JUDGE ROGERS: How about taking Judge Griffith's
14 hypothetical and saying not moderate, but great effect, and
15 the only place the pipeline goes is through the
16 environmental-justice communities, and even though the EPA
17 guidance suggests various things, the Commission has decided
18 in its discretion not to use the measurements that would be
19 most direct, and here the measurement was specifically
20 proposed to the Commission, so it couldn't say well, we're
21 not going to do it because no one's proposed anything to us.

22 MR. FULTON: I'm sorry, can you repeat that, Your
23 Honor?

24 JUDGE ROGERS: I guess I don't understand, I mean,
25 you tell me they have discretion, of course they have

1 discretion, South Florida needs some new energy source and
2 it wants natural gas, and so it's inconvenient that there
3 are these environmental-justice communities, and the fact
4 that they are suffering health impacts at high rates isn't
5 enough. I mean, I just wonder have we written a lot of
6 words, or the Executive Branch written a lot of words by
7 they have no real meaning?

8 MR. FULTON: So, I think a couple of points here,
9 Your Honor. The Commission, again, to start with the
10 Commission undertook an extensive look at the environmental
11 resources potentially affected by the project. The
12 Commission found, for example, on water quality, ground
13 water, socioeconomic status, air, and noise, the Commission
14 found with its required mitigation, minimization, and
15 avoidance techniques those would not rise to significant
16 impacts under NEPA. The Commission then put that in the
17 rubric of high and adverse, and the Commission similarly
18 found that those would not rise to the level of, to the
19 intensity or extent now. In terms of, as Your Honor
20 recognized, this is and areas the Commission saw all the
21 various alternatives, all impacted a fair number of
22 environmental-justice communities, and the Commission was
23 sensitive to that. In fact, contrary to what Sierra Club
24 said, the Commission considered with the Gulf of Mexico
25 route, for instance, the impacts on environmental justice

1 communities, so if you look, for example, at, it's 412 J.A.
2 929 --

3 JUDGE ROGERS: Did it consider no, the no action
4 alternative?

5 MR. FULTON: It did, Your Honor, in 4-3J920 the
6 Commission said that the no action would self evidently
7 impact less environmental resources, and that includes
8 environmental-justice communities. The Commission with the
9 Gulf route noted this route would affect nearly 300 miles
10 less of environmental-justice communities, so the Commission
11 is cognizant of the routes affects. But as with all
12 alternatives, the Commission has to balance those choices,
13 and the Commission found here given A) that the impacts in
14 the Commission's understanding would not rise to the level
15 of high and adverse, and the fact that the Gulf of Mexico
16 route would not only cost \$2.2 billion more, but bring in a
17 whole host of marine effects that would not have been
18 present --

19 JUDGE ROGERS: So, I guess the question is if the
20 Commission had used the data tract, the census tract data
21 would that have provided it with information that might have
22 caused the Commission to decide to grant the applications,
23 but to add additional conditions of mitigation?

24 MR. FULTON: I don't believe so here, Your Honor,
25 because with respect to the specific area of Dougherty that

1 Sierra Club points to, as I noted the Commission recognized
2 although it wasn't an environmental-justice tract, the
3 environmental impact statement nonetheless considered the
4 effects in Dougherty County, it routed, it changed the route
5 of the pipeline there so as to minimize the effects on
6 residents, including environmental-justice communities in
7 that area, and it moved the compressor station. So, the
8 ultimate purpose of this Executive Order and the guidance is
9 so that agencies are cognizant of the potential effects of a
10 project on environmental-justice communities. And
11 ultimately here by using its discretion to consider the
12 issue and address it where necessary to try to minimize
13 those impacts, that's why the Commission reasonably
14 concluded that it would not be disproportionately high and
15 adverse or significant.

16 With respect to greenhouse gas, Your Honor, the
17 Commission did in fact consider the downstream effects of
18 the project, it found that it would lead to the distribution
19 and consumption of about 1 million dekatherms a day, and the
20 Commission also recognized that greenhouse gas emissions are
21 the source of climate, or the primary source of climate
22 change, but the Commission found that it would not
23 meaningfully inform the Commission's decision to try to go
24 further and estimate the physical effects from power plants,
25 not the pipeline, but from power plants burning the natural

1 gas delivered at issue.

2 JUDGE ROGERS: And why?

3 MR. FULTON: Two reasons, I think, Your Honor. A)
4 based on this Court's decision in *EarthReports* the
5 Commission --

6 JUDGE ROGERS: Okay, so that's totally different,
7 and we know why, and you know why. So, here FERC has
8 complete authority, all right, it knows precisely where the
9 pipeline is going, it knows how much is being transmitted
10 daily, it knows that on the two major, I don't know if
11 they're pipelines, but the companies that they have
12 contracts, firm contracts for 95 percent of the natural gas,
13 and what is it, 83 percent, I mean, very high percentages,
14 so they know how it's going to be used, they know in
15 Florida, the Commission in Florida has told them, and they
16 have these contracts that are ready to roll, and it has
17 complete authority, and EPA wrote it and said FERC, why
18 aren't you looking at these options for measuring these
19 emissions, and in reconsideration the Petitioners suggested
20 some tools that were available, and FERC said we're just not
21 going to do anything.

22 MR. FULTON: So, I think that there is not quite
23 the direct linkage between the pipeline and power plants,
24 there are, for instance the project is building a central
25 hub for trading and natural gas, there is uncertainty

1 regarding how much gas the power plants that are proposed
2 will use, but even that's --

3 JUDGE ROGERS: But in the record it tells me, FERC
4 has told me exactly how much is going to be transmitted
5 daily, and it's told me that the contracts are already
6 signed, all right, for 95 percent, or 83 percent, two
7 contracts.

8 MR. FULTON: Yes, and there's --

9 JUDGE GRIFFITH: It wouldn't have been hard to do,
10 would it?

11 MR. FULTON: I think it would not have been hard
12 to do --

13 JUDGE GRIFFITH: With all that information readily
14 available.

15 MR. FULTON: It would not have been hard to do,
16 but it would have been hard to do in a meaningfully
17 informative way for this reason, the Commission could have
18 said X tons or X amount is going to these two proposed power
19 plants, that will lead to the emission of X amount, but the
20 problem is there is also a significant amount of that new
21 gas is going to be offsetting pull, so --

22 JUDGE ROGERS: But there's a lot of carbon that's
23 going to be emitted anyway, the offset is not 100 percent.

24 MR. FULTON: It's not 100 --

25 JUDGE ROGERS: FERC acknowledges that.

1 MR. FULTON: But if we assume that it's zero
2 percent that would not lead to a meaningfully informative
3 number because --

4 JUDGE ROGERS: But they couldn't say zero because
5 they know it's not 100 percent set off. So, they could
6 measure the difference, right?

7 MR. FULTON: The Commission in theory could have
8 provided with a wide range of caveats that we believe --

9 JUDGE ROGERS: What caveats?

10 MR. FULTON: Well, if -- there would be a big
11 difference if natural gas was 30 percent, 40 percent, 50
12 percent, 60 percent on and on, offsetting the use of coal.
13 The other thing I should point out is that --

14 JUDGE ROGERS: The Florida Commission has told the
15 Commission our fossil fuel plans are exhausted, the demand
16 is growing, we need natural gas, so approve this pipeline.
17 So, not only did FERC know all that, I mean, what more did
18 FERC have to know? I just, all these other cases there's
19 been some excuse, we don't have the authority to make the
20 final decisions, or we don't know what's going to happen to
21 the gas that's flowing through this pipeline, all those
22 uncertainties are gone here.

23 MR. FULTON: I think Your Honor's point regarding
24 the role of Florida here is an independent intervening
25 actor, such as in *Sierra Club* or *Public Citizen*, because --

1 JUDGE ROGERS: *Public Citizen* the Agency didn't
2 have this authority, all right. Here, the Agency has the
3 authority.

4 MR. FULTON: The Agency does, just like the FERC
5 did in *Sierra Club*, but where there there was the Department
6 of Energy, a federal agency --

7 JUDGE ROGERS: We don't have that issue here.

8 MR. FULTON: We have a state agency, the Florida
9 Public --

10 JUDGE ROGERS: Florida can't overrule, Florida is
11 asking the Commission to support these applications, it's
12 not intervening as a cause.

13 MR. FULTON: It's instructed the pipeline that's
14 improving, or approving to obtain natural gas supplies, and
15 to burn natural gas, so --

16 JUDGE ROGERS: In other words, Counsel, what I'm
17 trying to understand is when would FERC ever have enough
18 information, and enough certainty to think that it was
19 required to use these tools to measure carbon dioxide
20 emissions?

21 MR. FULTON: I should distinguish, Your Honor, the
22 claim brought by *Sierra Club* is not to the emissions, it's
23 brought to, *Sierra Club* wants the Commission to go the
24 further step and measure the physical effects on the
25 environment as the --

1 JUDGE ROGERS: But first they have to measure.

2 MR. FULTON: They'd have to measure emissions, and
3 then --

4 JUDGE ROGERS: All right. So, you can't even get
5 there.

6 MR. FULTON: Correct. But Sierra Club didn't say
7 just measure emissions, they said we want you to go the next
8 step and measure physical effects on the environment. Not
9 even the --

10 JUDGE ROGERS: What do you think that meant?

11 MR. FULTON: I think that meant using a tool, such
12 as the social cost of carbon.

13 JUDGE ROGERS: And why couldn't the Commission use
14 that?

15 MR. FULTON: Well, the Commission, as the
16 Commission explained, and it was upheld in *EarthReports* it
17 has --

18 JUDGE ROGERS: Totally different case. All right.
19 The Department of Energy was in charge. Here FERC is in
20 charge.

21 MR. FULTON: It's different in that sense, Your
22 Honor, but the Commission there still provided rationale for
23 why the social, it believed the social cost of carbon
24 tool --

25 JUDGE GRIFFITH: And I thought, you know, I

1 shouldn't speak for Sierra Club, but I thought they asked
2 for both, and I thought that was the question that I asked
3 your Opposing Counsel, and set up the question of what, if
4 we disagree with you that there are specific, links to
5 specific climate change events is there still a reason for
6 FERC to do the calculation and tell the world what the
7 caveats that you identified what the emissions will be.

8 MR. FULTON: I think --

9 JUDGE GRIFFITH: And you're saying no, right?

10 MR. FULTON: Yes, Your Honor. Because it goes --

11 JUDGE GRIFFITH: And why, why?

12 MR. FULTON: Because the Commission --

13 JUDGE GRIFFITH: And --

14 MR. FULTON: Yes.

15 JUDGE GRIFFITH: -- let's say even I agree with
16 you that you can't make the link between specific climate
17 events, let's say I agree with you on that, isn't there
18 still a reason to do the calculation and let the public
19 know, let the decision makers know what the emissions effect
20 of greenhouse gas will be?

21 MR. FULTON: The Commission did not believe there
22 was because they did not believe there was a standard
23 methodology. The Commission thought that, the Commission's
24 baseline determination is --

25 JUDGE ROGERS: That's what they said, that's what

1 they said in *EarthReports*, but since then the Department of
2 Energy report has come out, and that's what was twice
3 referred to the Commission by EPA saying look at this
4 report, read this report, this tells you how to come about
5 the measurements. And FERC didn't do it.

6 MR. FULTON: The draft guidance, which was what
7 was before the Commission at the time, provides discretion
8 to agencies to make reasonable determinations as to what is,
9 would immediately inform the decision.

10 JUDGE ROGERS: All right.

11 MR. FULTON: And the Commission here baseline
12 determine was that this project would not substantially
13 contribute to greenhouse gas.

14 JUDGE ROGERS: But it didn't know.

15 MR. FULTON: It did, Your Honor, it took in a
16 qualitative basis it determined --

17 JUDGE ROGERS: It said well, Florida won't be
18 burning coal anymore. All right? End of discussion.

19 MR. FULTON: In addition to the fact that for the
20 two plants that the Commission knew about, yes, the Citrus
21 and Okeechobee, and those plants are going to be replacing
22 coal, that as the DOE study cited to, Your Honor, says that
23 cuts emissions in over half.

24 JUDGE ROGERS: And it's 50 percent left.

25 MR. FULTON: And for any future plants that may be

1 using the project those are going to be subject to federal
2 and state permitting to meet certain emission standards.

3 JUDGE ROGERS: So, FERC just doesn't have to do
4 its duty because it thinks somebody else will.

5 MR. FULTON: Not quite, Your Honor. The
6 Commission at this point in time just doesn't know what
7 these future plants would look like in terms of what their,
8 you know, how they would actually use the gas, let alone
9 what they would be, it would just be speculative to --

10 JUDGE ROGERS: They have signed contracts, 95
11 percent.

12 MR. FULTON: But this is referring to the actual
13 plants that FPL --

14 JUDGE ROGERS: Right.

15 MR. FULTON: -- or Duke would choose to build, not
16 just the fact that they've agreed to accept the natural gas.
17 Again, NEPA is not going to the outcomes, it's just trying
18 to meaningfully inform here. And here, the Commission
19 believed that because it's natural gas replacing coal it
20 is --

21 JUDGE ROGERS: Of course it's going to be 50
22 percent better, we don't need to worry about the residual 50
23 percent.

24 MR. FULTON: I think the Commission is worrying
25 about it, I think that's why the Commission is looking, does

1 an extensive review of the type of consumption and
2 distribution that the project will cause, and the effects of
3 global warming in the region. It just isn't taking the
4 further step.

5 JUDGE GRIFFITH: Can I ask you a question about
6 your capital structure issue. Is it your position that you
7 can justify a particular capital structure on the grounds
8 that it was already approved elsewhere? It's already been
9 used before?

10 MR. FULTON: The Commission's position is that
11 it's a, there's -- the Commission has established a policy
12 for the 14 percent with at least 50 percent debt, and that's
13 basically based on two things. Ultimately, this is a market
14 based decision, the Commission is looking at past new
15 pipelines, and asking itself what have investors required to
16 get a sufficient rate of return in those cases, but at the
17 same time keeping a reasonable rate for customers. And the
18 Commission in previous, is building upon its past precedent,
19 so in previous cases --

20 JUDGE GRIFFITH: So, what I hear you saying then
21 is that in the particular case in front of it it doesn't
22 have to justify that rate structure based on the
23 circumstances presented before it?

24 MR. FULTON: So, for new green fill pipelines the
25 Commission has studied general policy and has determined it

1 doesn't, for that particular pipeline doesn't necessarily
2 get, need to get into the particulars of how much --

3 JUDGE GRIFFITH: Yes, and what's the authority for
4 that? Because I thought each case was supposed to be taken
5 on its own.

6 MR. FULTON: Well, that's the reason the
7 Commission's established that policy. So, for example in
8 *Constitution*, which is 149 FERC 61999 the Commission notes
9 that its new pipeline policy is based upon the regulatory
10 contractual construction risks the new pipelines face,
11 namely the uncertainty with --

12 JUDGE GRIFFITH: Sure. Sure.

13 MR. FULTON: -- obtaining approval --

14 JUDGE GRIFFITH: Without any regard to the
15 particular case in front of it, the unique circumstances of
16 this particular pipeline, you don't have to, FERC's position
17 is we don't have to look at that.

18 MR. FULTON: I don't think that's the position, I
19 think the position is as a base --

20 JUDGE GRIFFITH: Well, that's what happened here,
21 right?

22 MR. FULTON: Well, I think the baseline, Your
23 Honor, is the Commission's sort of default is that the
24 policy applies. Now, if there were particular facts brought
25 to their attention then they may deviate from the policy, or

1 come to an alternative here, but as --

2 JUDGE ROGERS: So, it's the burden --

3 JUDGE GRIFFITH: (Indiscernible.)

4 JUDGE ROGERS: It's a rebuttable presumption,
5 everybody gets 14 and a half percent?

6 MR. FULTON: That is essentially how I read it,
7 Your Honor. And that is, again, that's just at the initial
8 Section 7 stage, and that's subject to review for just and
9 reasonable rates. So, at this point we don't have a lot of
10 evidence since it's a new pipeline without any sort of
11 actual capital returns, or it's not even, you know, the gas
12 is not flowing. So, once that is happening the Commission
13 obtains a lot more information and evidence about what would
14 actually be necessary for this particular case. And so,
15 that's why it works off of baseline assumption.

16 JUDGE ROGERS: So, somebody has to file a
17 complaint, or the Commission sua sponte has to act?

18 MR. FULTON: So, the Commission has to sua sponte
19 act within three years, but in that time anyone can file a
20 complaint. So --

21 JUDGE ROGERS: Right. So, I'm a rate payer, and
22 for three years I've been paying these rates based on this
23 14 and a half percent ROE, and then another two years will
24 pass, and another three years, by the time the appeals are
25 resolved, and of course, no, you know, full retroactive

1 refund process, that the way it works? So, you know, I'm a
2 corporation, and I set up another corporation that's going
3 to be the owner of this pipeline, and everything's new
4 because I know I'm going to get 14 and a half percent, is
5 that the way you read the cases?

6 MR. FULTON: I read the cases as having
7 established that a 14 percent return with at least 50
8 percent debt is, at least as a sort of beginning step the
9 Commission has determined through its adjudication of
10 numerous pipelines that this creates a reasonable rate of
11 return to attract new investors to a new pipeline, but at
12 the same time --

13 JUDGE ROGERS: So, we don't care, really, anything
14 about the parent company, says FERC?

15 MR. FULTON: The Commission, yes, the Commission
16 has determined that it can use a hypothetical capital
17 structure here because the parent, as an existing entity
18 isn't necessarily, it's not an apples to apples comparison
19 to a new pipeline. The Commission could --

20 JUDGE ROGERS: So, it would be impossible to rebut
21 the 14 percent, would it? I mean, what could you rebut it
22 with?

23 MR. FULTON: I think, for instance, you could --
24 so, to my point about what was setting the *Constitution*
25 case, if you introduced evidence that something about the,

1 for instance, contractual or construction risks that are
2 with a general pipeline in a specific case, perhaps those
3 don't exist for any number of reasons, you know, large
4 locked in contracts, construction is easier for whatever
5 reason. I think that -- but I guess my ultimate point would
6 be before the Commission here that argument was never
7 raised, and it's not raised on appeal either that the
8 Commission lacked substantial evidence, there's complaints
9 about how the Commission followed its policy here, but
10 there's no complaints about that the Commission's
11 determination was not supported by substantial evidence, or
12 that the Commission should have --

13 JUDGE ROGERS: No, but did it give a reasoned
14 basis? Say we've done it before?

15 MR. FULTON: Well, the Commission says that while
16 citing an, you know, extensive amount, and the Commission
17 didn't just approve it here, I should note, the Commission
18 in fact reduced the proposal by Sabal Trail to lower rates
19 for consumers.

20 JUDGE ROGERS: All right. Anything further,
21 Counsel?

22 MR. FULTON: Only I guess with respect to
23 notational voting here, the Commissions gave an extensive
24 opportunity for parties to participate, it held dozens of
25 public hearings, it gave notice to interested parties, and

1 this, in fact, G.B.A. as an active participant had the route
2 in fact altered in response to its concerns, so --

3 JUDGE GRIFFITH: Do you agree with their reading
4 of our precedent?

5 MR. FULTON: I do not, Your Honor, no. I read
6 *Texas Railroad Commission* as stating that notational voting
7 is acceptable under the Sunshine Act, and there's no
8 distinction between, quote, unquote, controversial and non-
9 controversial cases, that it's instead an acceptable policy.

10 JUDGE ROGERS: All right. Thank you.

11 MR. FULTON: Thank you, Your Honor.

12 JUDGE ROGERS: Counsel for Intervenor.

13 ORAL ARGUMENT OF JEREMY C. MARWELL, ESQ.

14 ON BEHALF OF THE INTERVENORS

15 MR. MARWELL: May it please the Court, Jeremy
16 Marwell for the Respondent/Intervenors. If I could start
17 with the greenhouse gas issues, and focus on the question of
18 causation. I think that the causal arrow here runs the
19 opposite direction, the cause of these power plants and
20 emissions associated with that is economic in population and
21 growth in Florida, decision by the Florida Public Service
22 Commission to choose a certain kind of fuel to fuel power
23 plants, and decisions by the relevant federal and state
24 agencies about how those power plants will be built and
25 operated. And if you look at J.A. 910 to 911 it discusses

1 the Duke Citrus Plant, and talks about the authorizations
2 from the Public Service Commission, and the other federal
3 agencies, not the Commission, that have authority over the
4 licensing and operation of the power plant.

5 JUDGE ROGERS: So, EPA was just wrong when it told
6 FERC to go ahead and measure these Commissions?

7 MR. MARWELL: Well, I think it's important to
8 differentiate between EPA's comments on the draft
9 environmental impact statement and --

10 JUDGE ROGERS: But it came back a second time.

11 MR. MARWELL: They did, but they also acknowledged
12 that the Commission took into account the EPA comments, and
13 that, I would submit, is all that NEPA requires. NEPA
14 doesn't require the Commission to comply with everything
15 that EPA asks for.

16 JUDGE ROGERS: Of course not, but the question is
17 why didn't it do it? Right?

18 MR. MARWELL: Well --

19 JUDGE ROGERS: It can point to, you know, 5,000
20 other causes, it's raining, it's hot in Florida, you know,
21 things like that, but question here is you've got these
22 pipelines South Florida wants, you've got contracts lined up
23 for nearly all the capacity, FERC has full authority as to
24 whether or not to grant or deny these applications.

25 MR. MARWELL: And all of that was true in

1 *EarthReports*, FERC had authority to grant or deny the export
2 facilities.

3 JUDGE ROGERS: But we held that DOE was the final
4 decision maker on authorizing the imports and exports, all
5 right, so that FERC didn't have the authority.

6 MR. MARWELL: And I would respectfully submit the
7 same is true here, FERC has no authority over the power
8 plants, and Florida Power and Light and Duke --

9 JUDGE ROGERS: It can shut down the pipeline.

10 MR. MARWELL: Well, it could deny the certificate,
11 I suppose, but --

12 JUDGE GRIFFITH: So, is your --

13 JUDGE ROGERS: What do you mean suppose? That's
14 what's before a Commission, the application for the
15 certificates of convenience and necessity. FERC could deny
16 them.

17 MR. MARWELL: As FERC could have done in
18 *EarthReports*, it could have denied authorization to build
19 the physical facilities required to export --

20 JUDGE ROGERS: If you're going to rely on
21 *EarthReports* you know what I'm going to say about reliance
22 on that case. All I'm saying is FERC is not in the same
23 situation vis-à-vis another federal agency.

24 MR. MARWELL: Well, J.A. 910 to 911 talks about
25 the other federal agencies, EPA, the Fish and Wildlife

1 Service, the Army Corps that had permitting authority over
2 the power plants, and so I would submit that if your concern
3 is other federal agencies being involved. But, and I won't
4 push the point too hard, but I don't take *EarthReports* for
5 the causation analysis to depend on the identity of the
6 other actor, to say that it has to always --

7 JUDGE GRIFFITH: You're just saying in this case
8 it was Florida, Florida was the DOE.

9 MR. MARWELL: That's right. And --

10 JUDGE GRIFFITH: (Indiscernible).

11 MR. MARWELL: -- frankly, Florida Power and Light
12 and Duke are going to keep the lights on whether or not this
13 pipeline gets built. And you see in the alternatives
14 analysis that FERC did in its environmental assessment that
15 there are alternatives.

16 JUDGE ROGERS: Why would it do that?

17 MR. MARWELL: I'm sorry, why would it?

18 JUDGE ROGERS: You said regardless of whether FERC
19 approves these applications or not, Duke is going to keep
20 the lights on in Florida.

21 MR. MARWELL: Because it is a utility charged with
22 doing so, with serving its customers.

23 JUDGE ROGERS: Under what law?

24 MR. MARWELL: Well, under the relevant state laws
25 that govern, the relevant state laws that govern utilities.

1 I mean, this is why I think this is in some ways the tail
2 wagging the dog.

3 JUDGE ROGERS: But Counsel, that's what we've
4 heard about every argument here as to where somebody has
5 tried to identify a responsibility that FERC has, and FERC
6 has a major role to play, it can't be denied. If FERC was
7 unimportant you wouldn't have sought its approval of these
8 applications.

9 MR. MARWELL: That is true. I guess if you're not
10 satisfied with the causation analysis I would just point out
11 I think the obligation under NEPA is to analyze effects,
12 impacts on the environment, and so there is --

13 JUDGE ROGERS: Is the obligation to get the
14 information that it needs, and the public needs, right? So
15 it can make, so the agency involved can make an informed
16 decision, right?

17 MR. MARWELL: And I would submit that's what the
18 Commission did here. In *EarthReports* this Court upheld the
19 proposition that there was no generally accepted methodology
20 to connect marginal emissions with specific climate impacts,
21 and that was --

22 JUDGE ROGERS: Okay. But we're talking not
23 marginal here, and we're talking after the DOE report of
24 2014 is available.

25 MR. MARWELL: And FERC --

1 JUDGE ROGERS: And --

2 MR. MARWELL: Sorry.

3 JUDGE ROGERS: -- EPA has pointed this out not
4 once, but twice to FERC, and the Petitioners in their
5 petition for reconsideration pointed out these tools, and so
6 this is not a case where they don't know if there available.
7 And I thought Judge Griffith's question was right on, I
8 mean, is it difficult to do?

9 MR. MARWELL: So, FERC did cite the life cycle
10 analysis --

11 JUDGE ROGERS: Yes.

12 MR. MARWELL: -- and it cited the key quantitative
13 conclusion from that life cycle analysis at J.A. 917. So,
14 it's not like FERC ignored that, the question was is it
15 within the deferential standard of review and the
16 substantial leeway that the Agency has in choosing the
17 methodology about how to consider these effects did FERC,
18 was FERC arbitrary and capricious, was it outside the bounds
19 of --

20 JUDGE GRIFFITH: I don't understand the resistance
21 to this, again, would it create some horrible precedent if
22 you were to say to FERC you've got all this information
23 together, now just do the calculations and let the public
24 know what the greenhouse gas emissions will be from the
25 plant when it's up and running, with all the caveats. We

1 understand, it's not, we're forecasting, speculation plays,
2 can play a role in the forecasting, right, can't be too
3 wild, but what's the, there must be something that I'm not
4 understanding that maybe you can help me understand because
5 there's such resistance to this on something that seems
6 fairly easy to do, so what am I missing?

7 MR. MARWELL: Well, if I could respond in two
8 ways. One is I don't think it's as easy as everyone
9 suggests; and two, you have a --

10 JUDGE GRIFFITH: No, I mean, what I'm saying is
11 you're saying it's difficult for them to estimate what the
12 greenhouse gas emissions will be from the operable plant
13 that's --

14 MR. MARWELL: Well, I would suggest that --

15 JUDGE GRIFFITH: -- burning the natural gas, is
16 that --

17 MR. MARWELL: I think the relevant question is --

18 JUDGE ROGERS: Coming out of a smokestack.

19 JUDGE GRIFFITH: Yes, right.

20 MR. MARWELL: What, I think the relevant question
21 is what are the emissions caused by and reasonably
22 foreseeable result of the action the Commission has taken,
23 which is approving the pipeline and its associated
24 facilities.

25 JUDGE GRIFFITH: And I'm asking something far more

1 modest, here's --

2 JUDGE ROGERS: Yes.

3 JUDGE GRIFFITH: -- the plant, there's the smoke,
4 what are the emissions? And it seems to me that's an
5 indirect effect of granting the license, and it's not hard
6 to figure out or let people know, but there's resistance to
7 it.

8 MR. MARWELL: Well, so, one, I think those are the
9 kinds of determinations that the air permit and the agencies
10 that have responsibility for licensing the plant would do.
11 I think with respect to authorizing the pipeline, I mean,
12 there is a somewhat reductionist view of what the purpose of
13 this project is. The purpose is not just to provide gas to
14 serve these power plants, this is a project that provides
15 access to a more diverse array of gas, and it provides
16 protection against supply disruptions, and it creates a new
17 Central Florida hub which allows additional trading --

18 JUDGE ROGERS: Bottom line, more gas for Southern
19 Florida, that's what this pipeline is all about.

20 MR. MARWELL: That's correct, because there was a
21 decision made by other agencies and the Florida Public
22 Service Commission to do that. I think, I'm not aware of a
23 decision of this Court that requires an agency to quantify a
24 particular emission for its own sake, and the question is
25 what are the impacts, and I think it would be a divergence

1 from *EarthReports* to say that FERC was required to try to
2 make that causal connection here.

3 On the question, Judge Griffith, of why resist, I
4 mean, we have multiple hundreds of pages of environmental
5 impact statement, we have a process that's been going on in
6 front of the Commission for years and years, we have
7 extensive engagement with relevant communities, and there is
8 a concern to those who have to finance and develop projects
9 that if NEPA becomes sort of a fly specking exercise there
10 is always something you can find --

11 JUDGE ROGERS: This is not fly specking, Counsel,
12 50 percent FERC Counsel acknowledged. All right? Any
13 event, tell us about the 14 and a half percent, if you
14 would?

15 MR. MARWELL: So, I think the key point is that
16 what FERC is trying to do is have a policy that looks to the
17 relevant market to provide a return on equity, or to use a
18 return on equity in the calculation of relevant rates that
19 provides a sufficient return to investors. And at paragraph
20 117 of the certificate order FERC specifically noted that
21 this was a green field pipeline, and the precedents it
22 cited, and I think you can fairly say incorporated by
23 reference, I would submit view that as the relevant feature
24 of this project. And there are many risks associated with
25 financing and developing a pipeline, as we see here today,

1 and so I think this is not a point, this is not a question
2 of the Commission just sort of blindly pointing to old
3 precedents, incorporating the key rationale, and there is a
4 benefit in providing this stability and predictability with
5 respect to a market based approach, so --

6 JUDGE ROGERS: So, I can understand how your
7 client could come to FERC and say look, this is so risky,
8 there are all kinds of problems with the economy, I need a
9 20 percent return on equity, I get that. I don't understand
10 how you ever get below 14 percent under your analysis.

11 MR. MARWELL: Well, the Commission's policies, if
12 I understand it, is 14 percent with 50/50 debt and equity,
13 and debt is generally understood to be less expensive for
14 rate payers in part because the interest on debt payments is
15 deductible. So, FERC's policy, and there are cases cited
16 that involve a higher debt ratio, which I think could
17 involve, could result in a lower net return on equity since
18 it's a multi-factor part equity, part debt --

19 JUDGE ROGERS: So, do you read our precedent as
20 endorsing this type of approach?

21 MR. MARWELL: I guess a few things, one, this is
22 an arbitrary and capricious standard of review, so the
23 Commission has some leeway in this very, very technical area
24 of setting rates. And --

25 JUDGE ROGERS: Arbitrary and capricious, or

1 contrary to law?

2 MR. MARWELL: That's, I guess that's correct.

3 JUDGE ROGERS: So --

4 MR. MARWELL: I'm not sure what the --

5 JUDGE ROGERS: -- the law is what does our
6 precedent require?

7 MR. MARWELL: So, I take *North Carolina* to be the
8 key case from this Court, and that case involved an existing
9 pipeline, not a new pipeline, and specifically I think
10 carved out the approach that the Commission took in this
11 case. So, I think it's a fair application of *North*
12 *Carolina* --

13 JUDGE ROGERS: So, there it had a lot of data, all
14 right, here it has none. I'm just trying to contrast. So,
15 it can make a determination where it has a lot of data, and
16 so it says even though we don't have any data, you get the
17 same.

18 MR. MARWELL: Well, you have the data, the reason
19 you don't have data is that *North Carolina* was a case
20 involving an operating pipeline, and these --

21 JUDGE ROGERS: I understand.

22 MR. MARWELL: -- are cost based rates. We don't
23 have any of that because the pipeline hasn't entered
24 service.

25 JUDGE ROGERS: That's why I didn't think *North*

1 Carolina was particular helpful.

2 MR. MARWELL: Right. Well, I guess it's
3 helpful --

4 JUDGE GRIFFITH: Is there a need for substantial
5 evidence, though, to support the determination here, and if
6 so, where is this substantial evidence?

7 MR. MARWELL: So, I mean, obviously, the relevant
8 certificate applicants provided, you know, in their
9 application requested a certain return on equity. I think,
10 I'm not sure there's a substantial evidence claim properly
11 before this Court, but that's your -- I won't push it
12 further than that. I think the --

13 JUDGE GRIFFITH: Push that, why don't you think
14 it's there?

15 MR. MARWELL: I don't read the opening brief as
16 raising that specific --

17 JUDGE GRIFFITH: It's in the reply brief --

18 MR. MARWELL: Right.

19 JUDGE GRIFFITH: -- but it's not sufficient.

20 MR. MARWELL: But you typically don't consider
21 claims raised for the first time on reply. But I guess I
22 would submit that in a new pipeline case where you do not
23 have any cost based data the relevant fact or evidence is
24 that it is a new green field pipeline, and so the Commission
25 can rely on that key fact, and rely on its precedent and on

1 this Court's, on the discretion that has at least until now
2 been available to it under this Court's cases.

3 JUDGE ROGERS: So, when it identifies it as a
4 green field pipeline what is it telling us?

5 MR. MARWELL: I mean, it's telling you that it's a
6 new pipeline that doesn't exist, and so there's a certain
7 lengthy process, as you now can see, involved in getting
8 from application we'd like to build this, to the pipeline
9 actually enters service so that revenue starts coming back
10 from the shippers who have signed the contracts for the
11 pipeline. If I --

12 JUDGE ROGERS: I know, but you understand what I'm
13 getting at, okay, so where does that take me?

14 MR. MARWELL: I guess it takes you to the market,
15 which is --

16 JUDGE ROGERS: Right.

17 MR. MARWELL: -- what investors required in other
18 projects that involve, I mean, there are certain
19 similarities when you're building a linear infrastructure
20 project like this, and certain --

21 JUDGE ROGERS: So, you look at what the return has
22 been on these operating pipelines?

23 MR. MARWELL: No. So, in this case FERC cited
24 other FERC precedents that involved green field pipelines,
25 and what the return was needed in those cases as the

1 Constitution case that Mr. Fulton cited, in --

2 JUDGE ROGERS: So, does it matter at all what the
3 status of the economy is?

4 MR. MARWELL: I think that is built into citing
5 recent decisions by the Commission building other --

6 JUDGE ROGERS: Well, but, you know, 2008 was a
7 very different year, 2007, '08. That's all I'm trying to
8 understand. Go ahead.

9 MR. MARWELL: No, I think it's, I think the answer
10 is it's built into what, I mean, the best evidence is what
11 other investors have required it to make, I mean, this is
12 not buying one share of GE stock, I mean these are risky
13 investments, more so than --

14 JUDGE ROGERS: Nice return.

15 MR. MARWELL: Well, I mean --

16 JUDGE ROGERS: All right.

17 MR. MARWELL: -- I think it's important to
18 remember that this is a consistent Commission policy,
19 there's usually a virtue in taking a consistent approach.

20 JUDGE ROGERS: So, when we say what other
21 investors have required we're talking about what the lending
22 institutions charge?

23 MR. MARWELL: Well, I guess lending would be the
24 debt component of the return on equity.

25 JUDGE ROGERS: So, tell me what we're talking

1 about.

2 MR. MARWELL: Well, we're talking about other
3 investors who take an equity interest in a new pipeline, and
4 the risks that are --

5 JUDGE ROGERS: Like who?

6 MR. MARWELL: Like risks that are associated.

7 JUDGE ROGERS: It's not Ma and Pa Jones buying a
8 couple of shares of Duke Energy, who is it?

9 MR. MARWELL: Well, I mean, the owners of this
10 project --

11 JUDGE ROGERS: Right.

12 MR. MARWELL: -- include Duke, and Florida Power
13 and Light, and other companies, that's correct. But these
14 are billion dollar projects.

15 JUDGE ROGERS: That's my point.

16 MR. MARWELL: Yes.

17 JUDGE ROGERS: So, it's not an incestuous
18 situation, but clearly if the three of us are pipeline
19 companies we're looking out for each other.

20 MR. MARWELL: Well, these are --

21 JUDGE ROGERS: That's all I'm trying to understand
22 what's going on here.

23 MR. MARWELL: I guess if --

24 JUDGE ROGERS: I mean, what, you say what other
25 investors have required, well, the Griffin Plant requires no

1 less than 16 percent, Brown Plant requires no less than 16
2 percent, so I want 16 percent, I mean, isn't that what's
3 going on here?

4 MR. MARWELL: I think what's going on is the
5 Commission is charged with making these determinations, and
6 as you can --

7 JUDGE ROGERS: But it doesn't give us much to go
8 on, does it?

9 MR. MARWELL: Well, I --

10 JUDGE ROGERS: Since 50 percent, 14 ROE. Okay.

11 MR. MARWELL: If I could make two quick points --

12 JUDGE ROGERS: Of course.

13 MR. MARWELL: -- about the environmental-
14 justice --

15 JUDGE ROGERS: Yes.

16 MR. MARWELL: -- components? First, I think it's
17 important to remember this is a NEPA claim, they are not
18 raising a claim under the Executive Order or the guidance.
19 And Judge Griffith, your question, what if there were
20 moderate effects all along the pipeline route, I don't
21 believe that would be a violation of NEPA so long as the
22 Agency acknowledged those effects, and disclosed them in its
23 NEPA analysis. I mean, it is true with respect to
24 environmental effects you, an agency can choose the most
25 environmentally impactful route as long as it has considered

1 all the effects. The Commission looked in great detail at
2 the effects on the communities within a one-mile radius of
3 the Albany compressor station, and you can see that at J.A.,
4 well, you could see it at --

5 JUDGE ROGERS: There are a couple of maps.

6 MR. MARWELL: -- in a couple of places, there's
7 maps in the environmental impact statement, and they
8 specifically looked this number of feet to this particular
9 mobile home park, this number of miles to this church, and
10 they acknowledged at J.A. 837 a relatively high degree of
11 minority and low income communities crossed or within one
12 mile of the route or compressor station. And the Commission
13 walked through every possible impact at those distances.
14 So, put aside anything about census tracts, or census
15 blocks, this is actual physical distance from the compressor
16 station, and it looked at air emissions, including the
17 higher incidence of asthma on African-American communities,
18 and said that there would be no significant effects and no
19 violations of any of the relevant air quality standards.

20 JUDGE ROGERS: What do you think significant
21 effects means?

22 MR. MARWELL: Well, there are, the CEQ regulations
23 provide a sort of a laundry list of significance factors.

24 JUDGE ROGERS: I know, but 85 percent of the
25 community is suffering from asthma because of this other

1 facility that's causing --

2 MR. MARWELL: Well, so, the Commission did a few
3 things, one was it acknowledged that the relevant ambient
4 air quality standards by law are required to be protective
5 of human health and welfare with a margin for safety. So,
6 this is a statutory requirement, and it found that none of
7 those, it went, you could see the charts in the EIS, this is
8 the amount of emissions.

9 JUDGE ROGERS: So, if you meet NAAQS you're okay?

10 MR. MARWELL: I think FERC did -- there was also
11 air modeling that FERC undertook, and it, you know, I think
12 there is a distinction between some of the cases which say
13 an agency can't just say look, somebody else is dealing with
14 that, and an agency says that look, these are the
15 standard --

16 JUDGE ROGERS: Well, you've heard what FERC said
17 earlier. Any rate, yet?

18 MR. MARWELL: I think there's a distinction, and I
19 don't think you have to worry about that risk here. The
20 other thing, on the 83 percent, the Sierra Club relies
21 heavily on that statistic, I think some context is important
22 here. First, that the environmental-justice analysis is not
23 a one factor test, and you have to work through. Second,
24 there are some socioeconomic realities associated with the
25 pipeline going from rural Alabama down through rural

1 Georgia, this is, and you can see the statistics had R-1925,
2 that's the document number in the certified index to the
3 record, D-500 to D-507, goes through each state, county, and
4 census record that the pipeline goes through. And remember,
5 environmental-justice effects are not just on minority
6 communities, but also based on income, and any divergence
7 from the state median income can qualify as an
8 environmental-justice community. And as the Commission
9 said, this is a process that took extensive account of
10 environmental-justice effects, in Albany they moved the
11 compressor station out from where it would have been if the
12 pipeline had been co-located. The Commission then undertook
13 an additional six alternatives, each one to the already
14 backup location, each one they analyzed the potential
15 environmental-justice impacts, and that --

16 JUDGE ROGERS: And the percentages were less.

17 MR. MARWELL: Well, they varied.

18 JUDGE ROGERS: In all of them.

19 MR. MARWELL: Well, some of the alternative
20 locations were in environmental-justice tracts --

21 JUDGE ROGERS: Yes.

22 MR. MARWELL: -- and they --

23 JUDGE ROGERS: But the impact was less. I mean,
24 83 percent is this tract.

25 MR. MARWELL: Well, I think it's important, so --

1 JUDGE ROGERS: Those are FERC's numbers, not mine.

2 MR. MARWELL: Yes, but what are the numbers? So,
3 83 percent of the pipeline location in Georgia overall I
4 think affected environmental-justice communities, but that
5 number is 30 percent in Dougherty County, they moved it
6 specifically for this reason, to take account. And again,
7 even if you thought this was a claim under the Executive
8 Order, all the Executive Order requires is that that the,
9 that, is that an agency take account as appropriate. So, I
10 think there was an extensive actual physically taking
11 account and attempting to address these effects on potential
12 environmental-justice communities. If there are no further
13 questions.

14 JUDGE ROGERS: Thank you.

15 MR. MARWELL: Thank you.

16 JUDGE ROGERS: Counsel for Petitioners Sierra
17 Club.

18 ORAL ARGUMENT OF ELIZABETH F. BENSON, ESQ.

19 ON BEHALF OF THE PETITIONERS SIERRA CLUB, ET AL.

20 MS. BENSON: Your Honors, I would just like to
21 make a few points on rebuttal. That is correct, this is a
22 NEPA claim, and we're looking at whether it was arbitrary
23 and capricious, and it is for the reasons that we've stated
24 regarding the compressor station refusing to acknowledge
25 that that community exists, saying that 83.7 percent is not

1 a disproportionate number even though it's greater than all
2 of the other alternatives, even though only a select few
3 alternatives were chosen, and that number, that percentage
4 comparison did not include the Gulf of Mexico alternative,
5 or the no action alternative.

6 This whole high and adverse rubric created by FERC
7 it is very confusing because it's not in the guidance, which
8 we are not trying to enforce, but they did say that they're
9 purporting to follow it. The test is whether adverse
10 impacts, whether they're disproportionately high in adverse
11 impacts. The whole purpose of the environmental-justice
12 analysis is to determine if minority or low income
13 communities are being disproportionately impacted. The EPA
14 guidance specifically says this does not mean a significant
15 impact, it means are they particularly disproportionately,
16 or particularly severely impacted. Here they clearly are,
17 and FERC refuses to acknowledge that.

18 As to greenhouse gas emissions, FERC has shown
19 that they do have a lot of information regarding the power
20 plants this is going to, the size of those power plants, et
21 cetera, and there's no reason to not engage in reasonable
22 forecasting, the tools are available for them to calculate
23 the greenhouse gas emissions.

24 And finally, with the return on equity, this isn't
25 a policy, they're just saying we've done this before, we've

1 gotten away with it. The *MarkWest* opinion actually cites in
2 the footnote where they discuss this rate two other cases
3 where they've done 70 percent debt, 30 percent equity ratio,
4 which makes a big difference for rates, and they don't
5 explain why that's okay.

6 So, we would ask the Court to vacate the
7 certificate order and remand to FERC. Thank you.

8 JUDGE ROGERS: Thank you. All right, Counsel for
9 Petitioner, do you want a minute?

10 ORAL ARGUMENT OF JONATHAN PERRY WATERS, ESQ.

11 ON BEHALF OF THE PETITIONERS G.B.A. ASSOCIATES, ET AL.

12 MR. WATERS: (Indiscernible) time. If the
13 standard, the standard of review here is de novo, but if the
14 Sunshine Act, if the Government agencies here like FERC they
15 would never have to have a meeting if the Sunshine Act
16 didn't require them to. What I'm saying is you could
17 conduct all your business of a federal agency through
18 notational voting, and there's nothing anybody could do
19 about it unless the legislative intent was that if there
20 were controversial matters that they would be brought
21 forward and have a meeting about, and that's the absurdity
22 of the reverse is I think what is the key point in our
23 argument, Your Honor, because you'd never have to have a
24 meeting, and you could just do everything, pass these memos
25 around, and business would be conducted in that matter, and

1 you'd say well, we did a lot of public meetings earlier on
2 these things, and FERC administered those, but that's the
3 central crux of our argument, you would never have to have a
4 meeting.

5 JUDGE ROGERS: All right. Thank you.

6 MR. WATERS: Thank you all very much.

7 JUDGE ROGERS: We'll take the case under
8 advisement.

9 (Whereupon, the proceedings were concluded.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

October 25, 2017

DEPOSITION SERVICES, INC.