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

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

NO. 16-1387
(Consolidated with Docket No. 16-1329)

G.B.A. ASSOCIATES, LLC AND K. GREGORY ISAACS

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITIONERS' RESPONSE IN OPPOSITION TO PETITION FOR PANEL REHEARING AND INTERVENOR-RESPONDENT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC AS TO REMEDY

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

As per Circuit Rule 28 (a)(1)(A), the undersigned, on behalf of G.B.A. Associates, LLC and K. Gregory Isaacs, as of the date of filing the Docketing Statement, the following entities are parties, intervenors, or amici in this Court in this and all related cases:

Petitioners: G.B.A. Associates, LLC and K. Gregory Isaacs; Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper

Respondents: Federal Energy Regulatory Commission

Intervenors: Florida Southeast Connection, LLC; Sabal Trail Transmission, LLC; Transcontinental Gas Pipe Line Company, LLC; Florida Power & Light Company; Duke Energy Florida, LLC

Amicus Curiae for Respondent: Florida Reliability Coordinating Council, Inc.

Parties who appeared before the U.S. Federal Regulatory Commission in respect to the rehearing request for the Order at issue herein are:

Petitioners: G.B.A. Associates, LLC and K. Gregory Isaacs;

Respondents: Federal Energy Regulatory Commission

Applicant: Sabal Trail Transmission, LLC

Parties who have appeared before the U.S. Federal Energy Regulatory Commission in respect to the Order at issue herein are:

Applicant: Sabal Trail Transmission, LLC.

Intervenors: G.B.A. Associates, LLC and K. Gregory Isaacs

Rulings Under Review

As per Circuit Rule 28 (a) (10) (B), the rulings under review are U.S. Federal Energy Regulatory Commission Order , 154 FERC ¶ 61.080 (Feb. 2, 2016) and

156 FERC ¶ 61,160 (Sept. 7, 2016) the following two orders issued by the Federal Energy Regulatory Commission granting certificates of public convenience and necessity authorizing construction and operation of the Southeast Market Pipe Lines Projects to Florida Southeast Connection, LLC, Transcontinental Gas Pipe Line Company, LLC, and Sabal Trail Transmission, LLC:

1. Order Granting Section 7 Authorizations, *Florida Southeast Connection*, 154 FERC ¶ 61,080 (Feb. 2, 2016); and
2. Order Denying Rehearing, Florida Southeast Connection, 156 FERC ¶ 61,160 (Sept. 7, 2016).

Related Cases

As per Circuit Rule 28(a) (1) (C), the following are related cases:

16-1329 Sierra Club, et al. vs. Federal Energy Regulatory Commission-

Consolidated with this case

Dated: November 13, 2017

Respectfully submitted,

/s/ Jonathan Perry Waters

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and D.C. Cir. R. 26.1, Petitioners submit their Corporate Disclosure Statement as follows:

A. G.B.A. Associates, LLC has no parent companies, and there are no companies that have 10 percent or greater ownership interest in the G.B.A. Associates, LLC.G.B.A. Associates, LLC is a closely held for profit limited liability company.

B. K. Gregory Isaacs is a private landowner in Moultrie, Colquitt County State of Georgia.

Dated: November 13, 2017

Respectfully submitted,

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GLOSSARY

APA	Administrative Procedure Act
Certificate	Certificate of Public Necessity and Convenience
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
NEPA	National Environmental Policy Act
Sabal	Sabal Trail Transmission, LLC
SEIS	Supplemental Environmental Impact Statement

INTRODUCTION

This case does not come close to satisfying the demanding standards for granting en banc rehearing and/or panel rehearing. The court's vacatur of the agency action was the appropriate remedy under the precedent of this circuit. The Panel majority correctly held that the Federal Energy Regulatory Commission violated the National Environmental Policy Act (NEPA) by not considering the impact of greenhouse gas emissions from burning the gas in the downstream power plants when it issued a Certificate of Public Convenience and Necessity approving the construction and operation of the 36 inch 516 mile pipeline crossing Alabama, Georgia and Florida. *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).

In fact, the Industry-Intervenor petitions do not raise any serious argument that casts doubt on the integrity or validity of the decision, even Agency FERC's brief points to the fact they are not challenging the merits of the decision but merely attack the vacatur (remedy). Hearings and rehearings en banc are not favored and ordinarily will not be ordered unless: en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a). This is not the case here. FERC is not seeking rehearing as to the merits of the

Court's NEPA remand showing its affirmation that said remand was warranted, instead they concentrate on protecting the private interests of Industry and their profits by attacking vacatur instead. This should be alarming to the court in that as Chief Justice John Robert's stated when referring to the D.C. Circuit, the court has a "special responsibility to review legal challenges to the conduct of the national government." 2005 Lecture of Chief Justice Roberts, Jr. entitled "What Makes the D.C. Circuit Different?" Review of the actions of the national government and making our agencies adhere to our environmental laws is paramount to our future. Removal of vacatur during such remand to adhere to these laws placed for our protection would be tantamount to turning a blind eye to NEPA's requirement that a NEPA review must "not be used to rationalize or justify decisions already made" 40 C.F.R. § 1502.5 Remand without vacatur would place an undue burden on FERC to reach a result based not on sound environmental science but rather the pressure to skew results toward continued operation of the pipeline.

The petitions for rehearing and rehearing en banc bring up new issues and do not address the obvious merits of the underlying decision. It is clear under the facts of this case that any harm to Industry Intervenor Sabal Trail Transmission, LLC's bottom line and that of its parents and subsidiaries is its' own fault, as it rushed the pipeline through construction to operation despite the ongoing legal and administrative challenges to it, and this economic harm is not the type of harm that

warrants deviating from the standard NEPA violation remedy of vacatur during remand of this NEPA case. The Court should deny both petitions.

ARGUMENT

I. STANDARD FOR EN BANC REVIEW NOT PRESENT

FERC does not request en banc Rehearing and Industry-Intervenors do not come close to meeting the standard for en banc review.

En banc rehearing "is not favored and ordinarily not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a) (requiring petitions to include a statement explaining which of these circumstances is met); see *Church of Scientology of Cal. V. Foley*, 640 F. 2d 1335, 1340-41) (D.C. Cir 1981) (citation omitted) ("En banc courts are the exception, not the rule. They are convened only when extraordinary circumstances exist that call for authoritative consideration and decision by those charges with the administration and development of the law of the circuit.") See also *Airline Pilots Ass'n v. Eastern Airlines*, 863 F. 2d 891, 925 (D.C. Cir. 1988).

Industry-Intervenors suggest that the en banc review is necessary in the alternative if their panel rehearing request is denied to determine the law of this circuit. This is unwarranted. In most of the NEPA cases in the DC

Circuit, *Allied-Signal vs. Nuclear Regulatory Comm'n*, 988 F. 2d 146 (D.C. Cir. 1993) and the possibility of remand without vacatur is not even discussed at all. Instead, vacatur simply is imposed without additional analysis, even though consequences are likely. Industry-Intervenors seem to concede that rehearing is not what they are after, but instead seek remand without vacatur to serve their own interests. None of the issues for panel review are present and arguments concentrate only on remedy. The law is well settled and stated in the rules that, "Hearings and rehearings en banc are not favored and ordinarily will not be ordered unless; en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)

II. THE APPROPRIATE REMEDY FOR A VIOLATION OF NEPA UNDER APA IS VACATUR

The Administrative Procedure Act ("APA"), which provides the cause of action for NEPA claims like those raised here, explicitly directs that a reviewing court "shall…hold unlawful and set aside agency action, findings, and conclusions found to be. ..arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The U.S. Supreme Court has repeatedly described this remedy as mandatory. *Fed.*

Commc'n Comm'n v. Nextwave Pers. Commc'ns Inc., 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act *requires* federal courts to set aside federal agency action that is 'not in accordance with law.'") (Emphasis added); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In 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' or if the action failed to meet statutory, procedural, or constitutional requirements."). When a plaintiff prevails on a claim brought under the APA, "it is entitled to relief under that statue, which normally will be a vacatur of the agency's order." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001).

The concept of remand without vacatur is controversial in this Circuit. *See, e.g., Checkosky v. SEC*, 23 F.3d 452, 462 (D.C. Cir. 1994). Critics view the concept skeptically as it directly contravenes the language of the APA. Id. at 490-93 (Randolph, J., dissenting) ("Once a reviewing court determines that the agency has not adequately explained its decision, the Administrative Procedure Act requires the court –in the absence of any contrary statue –to vacate the agency's action. The Administrative Procedure Act states this in the clearest possible terms"); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 758 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("when we hold that the

conclusion heretofore improperly reached should remain in effect, we are substituting our decision of an appropriate resolution for that of the agency to whom the proposition was legislatively entrusted").

In practice, the *Allied Signal* exception to the default remedy has been applied sparingly, and only in a handful of specific situations. The Court here applied the rule of vacatur and not the exception found in *Allied Signal.* "Vacating a rule or action promulgated in violation of NEPA is the standard remedy" *Humane Soc. of U.S. vs. Johanns, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) citing Am Biosciene at 1084.*

The biggest potential harm or injury in this process is, "the harm with which courts must be concerned in NEPA cases is not, strictly speaking the harm to the environment, but rather the failure of decision-makers to take environmental factors into account in the way that NEPA mandates." *Jones vs. District of Columbia Redevelopment Land Agency*, 499 F. 2d 502, 512 (D.C. Cir. 1974).

As then Judge Breyer stated his concern, "It is appropriate for the courts to recognize this type of injury in a NEPA case, for it reflects the very theory upon which NEPA is based-a theory aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action.... Once large bureaucracies are

committed to a course of action, it is difficult to change that course-even if new, or more thorough, NEPA statements are prepared and the agency is told to 'redecide." *Com. of Mass vs Watt*, 716 F.2d 946, 952-53(1st Cir. 1983) Making vacatur imperative to ensure the integrity of the process.

The stated purpose of an environmental impact statement that must be prepared by a Federal agency is to "provide full and fair discussion of significant environmental impacts and . . [to] inform decision makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts[.]" 40 CFR §1502.1.

This Court should allow the vacatur to stand to ensure the Agency does not simply reach presumptive conclusions but ensure environmental factors are addressed in the manner NEPA mandates. It will send a clear message of the seriousness of the courts directive in this case.

The Industry-Intervenors put forth a number of imaginatively forecasted potential economic impacts calculated over in some instances 60 years to produce huge numbers. However, this litany of economic catastrophes is variously irrelevant, exaggerated, hypothesized or lacking in evidentiary support appearing chiefly in self-serving affidavits from long time employees. It is chiefly questionable whether the financial impacts and diminished profits about which Industry-Intervenor Sabal Trail

Transmission, LLC complains carry much if any weight in the context of a NEPA violation. Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often…irreparable. Until an objective Supplemental Environmental Impact Statement is objectively done FERC should adhere to its NEPA mandate and the court should use the force of the vacatur to maintain the integrity of the process.

A delay to the issuance of the mandate is not warranted.

VIII. CONCLUSION

For the foregoing reasons, the petitions for en banc and panel rehearing should be denied. The panel's judgement of remand with vacatur of the Commission's Certificate Orders should stand and this court's mandate should issue.

Respectfully submitted this 13th day of November, 2017,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1911 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a) (7)(B)(iii). In determining the word count, I have relied on the automatic word count feature of Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a) (5) and the type style requirements of Fed. R. App. P. 32(a) (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Jonathan Perry Waters

Dated: November 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on November 13, 2017, I filed the original of the foregoing Brief via the Court's CM/ECF system, thereby causing an electronic copy to be served on all parties registered to receive notices in this case via electronic noticing.

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