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 Petitions for Review of Orders of the Federal Energy Regulatory Commission, 156 FERC ¶ 61,160 (Sept. 7, 2016) and 154 FERC ¶ 61,080 (Feb. 2, 2016)

INTERVENOR-RESPONDENTS' REPLY IN SUPPORT OF PETITION FOR PANEL OR EN BANC REHEARING AS TO REMEDY

(Names and addresses of counsel appear inside cover.)

November 15, 2017

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

* Authorities upon which we chiefly rely are marked with asterisks.

Cases—Continued: **Page(s)**

Rules:

Other Authorities:

Other Authorities—Continued: **Page(s)**

GLOSSARY

As used herein,

Duke means Duke Energy Florida;

FERC means the Federal Energy Regulatory Commission;

Florida Commission means the Florida Public Service Commission;

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

NEPA means the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347;

Project means the Southeast Market Pipelines Project;

SEIS means the Draft Supplemental Environmental Impact Statement for the Southeast Market Pipelines Project (Sept. 27, 2017), Intervenors' Reh'g Pet. Ex. D.

Petitioners oppose rehearing on two basic grounds: first, remand without vacatur is unavailable or disfavored in NEPA cases; and second, vacating the orders here, and potentially shutting down an interstate natural gas pipeline serving base-load power plants, would not cause disruption. The first argument conflicts with Circuit precedent and, if adopted, would only underscore the need for en banc review. The second rests on an "expert" declaration that misunderstands how Florida's pipeline and electric systems operate, and is replete with factual errors.

I. Remand Without Vacatur Is Appropriate in NEPA Cases.

Petitioners cannot contest that under "the law of this circuit," this Court may remand deficient agency actions without vacatur, "guided by [the] factors" in *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009). And despite their attempt to limit *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), to its facts, Petitioners concede the Court there remanded without vacating a FERC certificate. Sierra Club Resp. 2. The NEPA violation in *Delaware Riverkeeper* was far more significant than here; by ignoring three related projects in its NEPA analysis, FERC there failed "to assess the entire pipeline for environment effects." *Delaware Riverkeeper*, 753 F.3d at 1319.

Delaware Riverkeeper's remedy was hardly novel. *Minnesota v. U.S. Nuclear Regulatory Commission*, 602 F.2d 412, 418 (D.C. Cir. 1979), and *Arkansas Power*

& Light Co. v. Federal Power Commission, 517 F.2d 1223, 1237 (D.C. Cir. 1975), declined to vacate agency actions despite NEPA violations. Considering equitable factors effectively subsumed in *Allied-Signal* (*see* Intervenors' Reh'g Pet. 16 n.5), *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016), provided a tailored remedy, declining to authorize new construction pending NEPA compliance, but refusing to "vacate [a project's] lease or other regulatory approvals." *Accord Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) (NEPA case endorsing *Allied-Signal*).

Remand without vacatur is not "unusual" or "uncommon." *Compare* Sierra Club Resp. 3, *with In re Core Commc'ns, Inc.*, 531 F.3d 849, 862 (D.C. Cir. 2008) (Griffith, J., concurring) ("Remand without vacatur is common in this circuit . . . ."). Petitioners cite nonbinding district court decisions characterizing vacatur as a "standard remedy" for NEPA violations, Sierra Club Resp. 3,[1] but *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. 16-cv-1534, 2017 WL 4564714 (D.D.C. Oct. 11, 2017), remanded without vacating an easement—thus allowing a

[1] The NEPA violations there were far more significant than here. *See Public Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 5 (D.D.C. 2016) (environmental assessment "markedly deficient"); *Humane Soc'y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 18 (D.D.C. 2007) (no NEPA review). Petitioners' reliance on *Humane Society* is misplaced, because this Court *stayed* the district court's order pending appeal, which was later dismissed as moot. *See* Order, *Humane Soc'y of U.S. v. Cavel Int'l, Inc.*, No. 07-5120 (D.C. Cir. May 1, 2007).

pipeline to operate while the agency remedied NEPA violations. Petitioners cite *no* case vacating FERC's certification of an operational gas pipeline based on a NEPA violation; this should not be the first.[2]

II. *Allied-Signal* Strongly Supports Remand Without Vacatur.

Petitioners do not dispute that remedial questions are appropriately raised on rehearing. *See* Intervenors' Reh'g Pet. 7.[3] Nor do they disagree that even one *Allied-Signal* factor, standing alone, can justify remand without vacatur. *See id.* at 7-8. Here, both factors strongly support remand.

On the first factor, Petitioners contend FERC will have difficulty substantiating its original decision. *See* Sierra Club Resp. 8-9. Petitioners

[2] In *Friends of the Capital Crescent Trail v. Federal Transit Administration*, 200 F. Supp. 3d 248 (D.D.C. 2016) (Sierra Club Resp. 7), this Court stayed the district court's judgment, allowing construction to proceed pending appeal. *See* Order 2, *Fitzgerald v. Fed. Transit Admin.*, No. 17-5132 (D.C. Cir. July 19, 2017). *Montana Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032 (D. Mont. 2006) (Sierra Club Resp. 7), involved violations of the Endangered Species Act and National Historic Preservation Act, in addition to NEPA, and did not involve a FERC-certificated pipeline.

[3] Although Petitioners dismiss the draft SEIS and Intervenors' declarations as "post-opinion evidence," they cite only cases where parties attempted to raise new substantive (not remedial) issues on rehearing. Sierra Club Resp. 8. No authority requires a court conducting an *Allied-Signal* analysis to blind itself to the agency's *subsequent response* to its decision, or the disruptive effects of vacatur. This Court has accepted declarations supporting rehearing petitions seeking remand without vacatur. *See* EPA's Petition for Panel Rehearing as to Remedy, *U.S. Sugar Corp. v. EPA*, 844 F.3d 268 (D.C. Cir. 2016) (No. 11-1108). Petitioners also rely extensively on their own "post-opinion" Daniel Declaration.

improperly seek to pre-litigate merits challenges they *might* one day bring to this Court—if FERC were to finalize the draft SEIS in current form, issue a particular order on remand, and deny rehearing requests. But *Allied-Signal* asks only whether it is prospectively "plausible," *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013), for an agency to "substantiate its decision on remand," *Allied-Signal*, 988 F.2d at 151. *Allied-Signal* does not require this Court to decide whether one possible course of action would be upheld on appeal.

Moreover, Petitioners' criticisms of the draft SEIS are meritless. To begin, Petitioners apparently concede remand is appropriate where an agency need only provide additional explanation for its action—as with this Court's holding on the Social Cost of Carbon. *See* Sierra Club Resp. 5-6. Petitioners disagree with the draft SEIS's statement that downstream greenhouse gas emissions would not result in "significant" environmental impacts. *Id.* at 9. But the draft SEIS draws on data from federal and state agencies, and calculates an "unlikely" worst-case increase of less than 0.5% of national greenhouse gas emissions. *See* SEIS 3-4. Therefore, it is wrong to suggest the significance finding lacks "explanation." Sierra Club Resp. 9. Absent any accepted methodology for translating marginal emissions into foreseeable environmental effects (Petitioners identify none), FERC could reasonably conclude the environmental impacts caused by the Project's downstream emissions are not significant. SEIS 2. Even assuming otherwise, NEPA would not

bar FERC from re-approving the Project. *Cf. Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 968 (D.C. Cir. 2000) (upholding conclusion that "other values outweighed . . . environmental costs").

The heart of Petitioners' opposition is their belief that vacatur would not cause disruption. *See* Sierra Club Resp. 10-11. But the Florida Public Service Commission found that additional natural gas pipeline capacity is "necessary for assuring the reliability of Florida's electric generating system," JA11-12; and without this Project, existing "gas-fired generating units will not be able to serve . . . customers efficiently and reliably," JA16. Absent this Project, Florida Power & Light's "gas needs" could "exceed its [alternative pipeline] supply this year." Op. 3-4.

The Daniel Declaration is demonstrably incorrect (or at best misleading) in asserting that two other pipelines serving Florida have excess capacity even on "peak" demand days. Daily nominated demand quantities reported on each pipeline's website show the scheduled quantity load factors for the Gulfstream and Florida Gas Transmission pipelines exceeded 95%—and in some instances reached 100%—on each date cited in the Daniel Declaration. *See* Suppl. Shammo Decl. ¶ 7 (Ex. 2). Actual measured deliveries for Gulfstream on those dates were higher still—100% *or greater*. *Id.* ¶ 8; *see also* Patton Decl. ¶ 5 (Ex. 1) (discussing Duke utilization); Suppl. Stubblefield Decl. 3-4 (Ex. 3) (discussing Florida Power & Light

utilization). Gulfstream's average seasonal load factors have exceeded 90% every summer (i.e., June through August) since 2014, reaching 98% for summer 2016 and 96% for summer 2017; Gulfstream's average full-year load factor was 93% in 2016 and 91% in 2017 to date. Suppl. Shammo Decl. ¶ 6. Peak demand in Florida is not limited to the summer: Duke's and Florida Power & Light's highest recorded peaks occurred during cold winter weather in January 2010. Patton Decl. ¶ 7; Suppl. Stubblefield Decl. 2. Duke's "peak load occurred in the winter in five of the last ten years and 13 of the last twenty." Patton Decl. ¶ 7.

Petitioners also misunderstand key features of power generation and the Florida electric grid. There is nothing "misleading" (Daniel Decl. ¶ 9) about focusing on "firm" transportation capacity where pipelines serve base-load power plants. *See* Suppl. Stubblefield Decl. 3; Patton Decl. ¶ 8. Shippers pay higher rates, and sign decades-long contracts, for "firm" capacity precisely because it will be available when needed. That feature of "firm" capacity is most valuable on peak demand days. The suggestion that utilities should rely on "spot purchases" (Daniel Decl. ¶ 8)[4] both incorrectly assumes the availability of "spot" capacity and ignores that regional markets with inadequate firm pipeline capacity are characterized by

[4] To the extent Daniel expects electric utilities would "procure more gas" (Decl. ¶ 8) from pipelines in the sense of purchasing natural gas itself, that is incorrect. Since FERC restructured the natural gas pipeline market in 1992, interstate pipelines generally do not own gas shipped on their systems; rather, they provide unbundled transportation service to shippers who own the gas.

significant reliability and price volatility concerns.[5] (Of course, if "spot" capacity *were* available to transport the same volumes of gas to Florida power plants, Petitioners' asserted harms from burning the gas and emissions "associated with pipeline operation," Sierra Club Resp. 7, would occur with or without vacatur—the plants would simply be burning gas from different sources.) And although Florida utilities have "contracts for out-of-state gas storage" (Daniel Decl. ¶ 10), they need pipeline capacity to *transport* that gas to their power plants. *See* Suppl. Stubblefield Decl. 4; Suppl. Shammo Decl. ¶ 9.

The suggestion that Florida electric utilities do not face increasing demand (Daniel Decl. ¶ 14) contradicts the utilities' own experience and the Florida Commission's findings, *see* JA11-12, JA16. Petitioners do not dispute—indeed, appear to embrace—that shutting down this Project would force utilities to burn higher-emitting and more expensive coal and oil. *See* Daniel Decl. ¶ 5. That one coal-fired plant was retired in expectation of this Project entering service (*see id.* ¶ 15) hardly supports the Project's shutdown, which would delay other retirements. *See* Sideris Decl. ¶ 6, Intervenors' Reh'g Pet. Ex. F (Duke's plans to shut two coal-fired plants contingent on Project-dependent Citrus County facility entering service);

[5] *See* ISO New England, *2017 Regional Electricity Outlook* 25-26 (Jan. 2017), https://goo.gl/iknpjA (New England generators' reliance on "just-in-time" strategy for gas delivery, rather than long-term firm capacity pipeline contracts, "has severely limited the delivery of fuel," "threaten[ing] the reliable supply of electricity" and increasing "wholesale electricity prices and air emissions").

accord Patton Decl. ¶ 7. Petitioners also ignore the financial cost of shutdown for electric ratepayers. And they err by dismissing the enormous financial losses for pipeline companies, insisting that project developers "assumed the risk." Sierra Club Resp. 11-12. Case law does not support, let alone require, ignoring financial harms to regulated and third parties. *See* Intervenor Reh'g Pet. 15.[6]

* * *

Petitioners fear that "FERC's violation of law has no consequences unless the Certificate is vacated." Sierra Club Resp. 7. But the purpose of judicial review under NEPA is not to punish agencies, much less private parties that reasonably rely on administrative orders. Instead, judicial review ensures that agencies exercise their authority and discretion within legal bounds and with a thorough, public analysis of potential environmental effects. Particularly where FERC engaged in a multi-year review culminating in a 477-page (excluding appendices) environmental impact statement that this Court otherwise upheld, that purpose is "vindicate[d]" by remanding without vacatur. *Id.*[7]

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[6] In Petitioners' out-of-circuit cases, parties either proceeded with construction before receiving administrative authorization or treated NEPA as a "pro forma" requirement. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 991, 996 (8th Cir. 2011); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002). That did not happen here. *Cf. Sierra Club, Inc. v. Bostick*, 539 F. App'x 885, 891-94 (10th Cir. 2013) (limiting "self-inflicted" harm theory to cases involving misconduct).

[7] This Court's remand without vacatur in *Delaware Riverkeeper* did not undermine NEPA. FERC undertook a detailed supplemental environmental analysis on

III. Alternatively, the Court Should Grant En Banc Review.

If the panel denies rehearing, the question of whether FERC's orders should be remanded without vacatur warrants en banc review. *See* Fed. R. App. P. 35(b)(1)(A). This Court's practice is far from uniform, with some panels conducting the *Allied-Signal* inquiry, and others not explaining the rationale for their remedial decisions. *Compare, e.g.*, Op. 35 (vacating without *Allied-Signal* inquiry), *with Black Oak*, 725 F.3d at 244 (analyzing *Allied-Signal* factors in remanding without vacatur), *with Delaware Riverkeeper*, 753 F.3d at 1309, 1320 (remanding without vacatur without expressly addressing *Allied-Signal*).

The remedial question has prompted numerous separate writings from members of this Court expressing sharply conflicting views.[8] To the extent Petitioners believe vacatur is required "[i]n all cases" of agency legal error (Sierra Club Resp. 2; GBA Resp. 5), that position only underscores the need for en banc review. (In any event, Petitioners elsewhere concede that vacatur is not always

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remand, issued an order based on that analysis, and addressed rehearing requests. *E.g.*, *Tenn. Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 (2016). No party petitioned for review of those orders.

[8] *See, e.g.*, *Core Commc'ns*, 531 F.3d at 862-63 (Griffith, J., concurring); *Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1262-64 (D.C. Cir. 2007) (Randolph, J., concurring); *id.* at 1264-67 (Rogers, J., concurring in part and dissenting in part); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting); *Checkosky v. SEC*, 23 F.3d 452, 462-65 (D.C. Cir. 1994) (opinion of Silberman, J.).

required, Sierra Club Resp. 4—though apparently only where it aligns with their preferred policy outcomes.[9])

The issue has great practical significance. Routinely vacating agency orders based on remediable procedural errors would chill a broad range of private and public actions requiring federal government funding or approval, from energy infrastructure projects to myriad other private and public projects, from transportation and housing to public-works development.

IV. Conclusion

The Court should grant rehearing on whether this matter should be remanded to FERC without vacating its orders. If the Court denies rehearing, the mandate's issuance should be delayed for seven days per D.C. Circuit Rule 41(a)(1) to permit respondents to move to stay the mandate's issuance, and to ensure this Court has briefing on the distinct issues presented by such a request. *See Edison Mission Energy, Inc. v. FERC*, No. 03-1228, 2005 WL 3626890 (D.C. Cir. Mar. 24, 2005) (denying rehearing, but inviting "motion for stay of the vacatur").

[9] *See* Envtl. Pet'rs Pet. for Panel Reh'g 1, *Am. Petroleum Inst. v. EPA*, No. 09-1038 (D.C. Cir. Oct. 20, 2017) (environmental groups, including Sierra Club, request remand without vacatur without mentioning a "presumption against" that remedy).

Date: November 15, 2017

Respectfully submitted,

/s/ Jeremy C. Marwell

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CERTIFICATE REGARDING WORD COUNT, TYPEFACE, AND TYPE STYLE

This reply contains 2493 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1). It was prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

DATED: November 15, 2017

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on November 15, 2017, I electronically filed the foregoing *Intervenor-Respondents' Reply in Support of Petition for Panel or En Banc Rehearing as to Remedy* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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

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SIERRA CLUB, *et al.*,

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On Petitions for Review of Orders of the Federal Energy Regulatory Commission, 156 FERC ¶ 61,160 (Sept. 7, 2016) and 154 FERC ¶ 61,080 (Feb. 2, 2016)

ADDENDUM TO INTERVENOR-RESPONDENTS' REPLY IN SUPPORT OF PETITION FOR PANEL OR EN BANC REHEARING AS TO REMEDY

Index to Addendum to Intervenor-Respondents' Reply in Support of Petition For Panel or En Banc Rehearing as to Remedy

Exhibit	Description
1	Declaration of Jeffrey C. Patton
2	Supplemental Declaration of David A. Shammo
3	Second Declaration of Heather Stubblefield

Exhibit 1

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

No. 16-1329

SIERRA CLUB, et al.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

and

SABAL TRAIL TRANSMISSION, LLC, et al.,

Intervenors.

DECLARATION OF JEFFREY C. PATTON IN SUPPORT OF REPLY SUPPORTING PETITION FOR PANEL OR EN BANC REHEARING AS TO REMEDY

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

BEFORE ME, the undersigned authority duly authorized to administer oaths, personally appeared Jeffrey C. Patton, who being first duly sworn, on oath deposes and says that:

1. My name is Jeffrey C. Patton. I am over the age of 18 years old and I have been authorized by Duke Energy Florida, LLC (hereinafter "DEF" or the "Company") to give this declaration in the above-styled proceeding on DEF's behalf and in support of the Reply in Support of Petition for Panel or En Banc Rehearing as to

Remedy, filed by DEF and other respondent-intervenors. The facts attested to in my declaration are based upon my personal knowledge.

2. I am a Lead Originator in the Fuel Procurement Section of the Fuels & Systems Optimization Department for Duke Energy's regulated generation fleet. In this role, I am responsible for the procurement of natural gas supply, transportation and storage services for DEF, Duke Energy Progress, Duke Energy Carolinas, Duke Energy Indiana, and Duke Energy Kentucky electrical power generation facilities. I testified on behalf of DEF in support of its Petition for Determination of Need for the Citrus County Combined Cycle Power Plant ("CCCP") to describe the gas supply and transportation plan to support the CCCP. I have been in my role since 2008 and, I have first-hand knowledge of the facts and information stated herein.

3. As indicated in Mr. Harry Sideris' Declaration, DEF will need additional natural gas capacity to meet its peak load in the immediate future to serve its Florida customers. Part of this need will be met by DEF's new Citrus County Combined Cycle Project, a 1,640 megawatt natural gas-fired plant with a 2018 planned in-service date. The planned fuel source for the CCCP is a lateral from the Sabal Trail pipeline, part of the Southeastern Market Pipelines Project ("SMP Project").

4. I have reviewed the declaration of Mr. Joseph M. Daniel and the purpose of my declaration is address statements by Mr. Daniel in regards to DEF's utilization of its FGT and Gulfstream capacity, the need for the CCCP, and Crystal River Units 1 and 2.

5. In regards to the FGT and Gulfstream utilization percentages shown in the table on page 7 of his declaration, Mr. Daniel asserts that on the days of August 21, 2014,

August 25, 2015, and July 28, 2016 that Gulfstream and FGT pipelines were not fully utilized. However, based on DEF's operational fuel data, DEF utilized 100% of DEF's Gulfstream and FGT contracted firm transportation capacity during these peak days. Furthermore, DEF has also highly utilized its contracted firm transportation capacity during high load days in the winter time period. Based on DEF's operational fuel data DEF utilized 100% of DEF's Gulfstream and FGT contracted firm transportation capacity on each of these winter days: February 19, 2015, November 2, 2015 and November 2, 2016.

6. With respect to DEF's need for the CCCP, Mr. Daniel states in his declaration that "These claims are supported by no evidence and as established earlier, ignore the excess generation and pipeline capacity that already exists within Florida." However in 2014, the Florida Public Service Commission ("FPSC") determined that "the proposed Citrus County Plant represents the optimal resource option to meet the Company's projected need in 2018." The FPSC also held that the CCCP will increase DEF's fuel diversity and supply reliability via its new fuel transportation provider, i.e. the SMP Project.

7. Mr. Daniel also incorrectly states that "Crystal River Units 1 and 2 rarely operate in the winter/low load months …" DEF is a winter peaking utility. DEF's peak load occurred in the winter in five of the last ten years and 13 of the last twenty. Indeed, the highest peak ever recorded by DEF occurred in the winter, specifically on January 11, 2010. Mr. Daniel has been selective in his data presentation. The winter of 2016/17 was one of the mildest in recent years and had the lowest recorded winter peak in the last ten years. When peak loads occur, DEF must utilize all available resources, and that includes

the 1960's vintage coal units. In addition, these units provide critical reliability support during outage periods for one or both of the other Crystal River coal units, a function that will be provided in the future by the CCCP units. DEF will continue to operate these units, as system needs dictate, if it is not able to bring the CCCP into service.

8. Mr. Daniel also states that "Industry wide, most gas is not procured on firm capacity contract, rather on spot purchases." However, DEF procures most of its gas utilizing firm capacity contracts. As a regulated public utility with an obligation to provide at all times reliable electric service to its customers, DEF is necessarily required to structure gas transportation for its generation system resources to meet that obligation to its customers. DEF needs to provide for sufficient firm gas for its system to ensure that gas is available at a reasonable price at all times to meet customer load requirements. At peak operation, the CCCP will require approximately 300,000 million British thermal units ("MMBtu") of natural gas a day. DEF therefore contracted for 300,000 MMBtu/day of firm transportation on the SMP Project ("Sabal Trail Precedent Agreement") to support reliable CCCP operation.

9. This concludes my declaration.

Further affiant sayeth not.

Dated the 15 day of November, 2017.

(Signature)

Jeffrey C. Patton
Lead Originator
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THE FOREGOING INSTRUMENT was sworn to and subscribed before me this 15 day of November , 2017 by Jeffrey Patton. He is personally known to me, or has produced his _____ driver's license, or his _____ as identification.

Mary B Vicknair
(Signature)

Mary B Vicknair
(Printed Name)

NOTARY PUBLIC, STATE OF _____

09-21-2022
(Commission Expiration Date)

_____
(Serial Number, If Any)

(AFFIX NOTARIAL SEAL)

MARY B VICKNAIR
NOTARY PUBLIC
Davie County
North Carolina
My Commission Expires Sept. 21, 2022

Exhibit 2

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

No. 16-1329

SIERRA CLUB, et al.,

Petitioners,

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FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

and

SABAL TRAIL TRANSMISSION, LLC, et al.,

Intervenors.

SUPPLEMENTAL DECLARATION OF DAVID A. SHAMMO

I, David A. Shammo, hereby depose and state that I am over the age of 18 and am in all respects competent and qualified to make this Declaration. All facts stated are within my personal knowledge and are true and correct.

1. I am the Vice President, Business Development Southeast, of Sabal Trail Management, LLC. Sabal Trail Management, LLC is the operator of Sabal Trail Transmission, LLC ("Sabal Trail"), and is a wholly-owned affiliate of Spectra Energy Partners, LP ("SEP"). SEP is owned in substantial part by, and is controlled by, Enbridge Inc. ("Enbridge"), the parent company of the General Partner of SEP. SEP indirectly owns a 50 percent interest in Sabal Trail

Transmission, LLC ("Sabal Trail"). NextEra Energy, Inc. ("NextEra") and Duke Energy Florida, LLC ("Duke Energy") own the remaining 42.5 percent and 7.5 percent interests in Sabal Trail, respectively.

2. I am also the Vice President, Business Functions of Gulfstream Management & Operating Services, L.L.C., an operator of Gulfstream Natural Gas System, L.L.C. ("Gulfstream"). Gulfstream has a capacity of approximately 1.3 billion cubic feet per day and is one of three interstate natural gas pipelines that serve central and southern Florida. Gulfstream is jointly owned by Williams Partners Operating, LLC and SEP and jointly operated by affiliates of SEP and Williams Partners Operating, LLC.

3. As Vice President of Business Development, I have more than 36 years of experience overseeing various accounting, project performance, marketing, and business development components of transmission projects for Enbridge and its predecessor companies, including the Sabal Trail Project and Gulfstream. I have been actively involved for a number of years in market assessments in the southeast U.S. generally, and in Florida specifically, and I am familiar with the natural gas pipelines and transportation customers and their needs and usage of capacity in Florida.

4. I am providing this declaration to respond to and correct certain factual inaccuracies contained in the October 31, 2017 Declaration of Joseph M.

Daniel (the "Daniel Declaration"), submitted by Petitioners in D.C. Circuit Case 16-1329.

5. In the context of arguing that Florida electric utilities do not need the firm capacity transportation service available through the Southeast Market Pipelines Project, the Daniel Declaration asserts that "[i]ndustry wide, most gas is not procured on firm capacity contract, rather on spot purchases." Daniel Decl. ¶ 8. This statement is not accurate with respect to power generation in Florida. As authority for its assertion, the Daniel Declaration relies on "Fuel Receipt Data" from survey Form EIA-923, which collects detailed electric power data, including fuel receipts and costs. In fact, aggregate data for 2016 reports over 700 natural gas fuel supply transactions for the power plants in Florida. Of those, over 600 resulted from a firm natural gas supply and delivery contract type. By contrast, only approximately 80 transactions involved natural gas supply via an interruptible supply and delivery contract. In other words, approximately 89 percent of reported natural gas transactions involving Florida power plants in 2016 resulted from firm capacity contracts, and only 11 percent involved interruptible capacity. Based on these calculations, and contrary to the Daniel Declaration, most gas in Florida is transported on firm capacity contracts. *See* U.S. Energy Information Administration, Form EIA-923 Detailed Data, 2016 Final EIA-923,

Schedule 2, Page 5, "Fuel Receipts and Cost Time Series File," available at https://www.eia.gov/electricity/data/eia923/.

6. The Daniel Declaration claims that the two other interstate pipelines serving central and southern Florida are "underutilized." In particular, the Daniel Declaration asserts that for the period January 1, 2014 to December 31, 2016, Florida Gas Transmission's ("FGT") "average utilization at power plant delivery points was 28 percent and peak utilization was 40 percent" and that Gulfstream's "3-year average utilization rate for power plant deliveries was 36 percent, with a peak utilization of 49 percent." Daniel Decl. ¶ 9. These numbers are misleading. Both pipelines report their daily operationally available capacity based on design capacity, operational capacity, and total scheduled quantities on their informational postings webpage.[1] Using this publicly available data, Gulfstream's average annual actual utilization for 2014, 2015, 2016 and year-to-date 2017 can be calculated and equals 87 percent, 92 percent, 93 percent, and 91 percent respectively. Gulfstream provides transportation service primarily to electric generation load facilities, which reflects primarily a summer peak delivery pattern. Gulfstream's peak summer utilization (June – August) for 2014, 2015, 2016, and year-to-date 2017 can also be calculated and equals 94 percent, 98 percent, 98

[1] *See* Florida Gas Transmission, LLC, *FGT Operationally Available Capacity*, http://fgttransfer.energytransfer.com/ipost/FGT/capacity/operationally-available; Gulfstream Natural Gas System, *Informational Postings*, http://www.1line.gulfstreamgas.com/GulfStream/index.html.

percent and 96 percent respectively. FGT's calculated average annual utilization figures using publicly available data for the same years equaled 67 percent, 77 percent, 79 percent, and 77 percent, and its peak summer utilization equaled 78 percent, 85 percent, 94 percent and 85 percent. As demonstrated below, FGT's firm capacity is almost fully utilized for peak periods, and is nearly fully contracted.

7. The Daniel Declaration included a table of what it asserts were peak electricity demand days for Duke Energy Florida and Florida Power & Light in 2014, 2015, and 2016, with asserted pipeline utilization rates. Daniel Decl. ¶ 9. The pipeline utilization rates provided are misleading. The following chart reflects the FGT and Gulfstream "scheduled quantity" load factor percentages for the dates provided in the Daniel Declaration. The load factors shown in the chart reflect the *full* pipeline's utilization, including service provided to all of FGT's and Gulfstream's customers on those specific dates (not only service to Duke Energy Florida, and Florida Power & Light). "Scheduled quantity" refers to the daily nominations made in advance by shippers before each service day, designating the amount of capacity the shipper anticipates using and relevant start and end points. As the chart indicates, both pipelines were either fully, or nearly fully, scheduled on each of the peak days, with no scheduled utilization rate below 96%. Once

again, the data below is taken from publicly reported information on the Gulfstream and FGT pipeline websites.

Year	Date of Utility System Peak	FGT Utilization on Date	Gulfstream Utilization on Date
2014	7/28/2014	100%	96%
	8/21/2014	97%	100%
2015	8/25/2015	97%	100%
	6/22/2015	97%	100%
2016	7/28/2016	100%	100%
	7/6/2016	100%	98%

8. Gulfstream and FGT also collect data for the actual (i.e., measured) deliveries, which can vary slightly from the daily "scheduled" figures reported above, when actual usage happens to be higher or lower than a shipper's daily advance prediction of needed capacity. FGT does not publicly report its actual utilization data on its website. But in my capacity as Vice President, Business Functions of Gulfstream Management & Operating Services, L.L.C., I have access to and am familiar with Gulfstream's records regarding Gulfstream's actual deliveries. On each of the days in question, the actual measured deliveries for the 15 power plants served by Gulfstream were at least 100 percent of Gulfstream's nominal capacity. The figures in the third column of the chart below reflect measured deliveries in dekatherms; the slight variation in those figures from day to day reflects the fact that actual delivery can exceed the pipeline's nominal capacity for short periods of time (i.e., yielding a utilization rate greater than 100%). This is

possible when a shipper takes delivery of some of the gas that serves as "line pack"—i.e., gas owned by the pipeline used by the operator to maintain the pressure required for operations. The amount of line pack may fluctuate from time to time, and if demand exceeds the pipeline's capacity supply, line pack in small amounts may be operationally available to be delivered to shippers.

Year	Date of Utility System Peak	Gulfstream Measured Deliveries (in dekatherms)	Total Gulfstream Utilization on Date
2014	7/28/2014	1,380,141	100%
	8/21/2014	1,322,524	100%
2015	8/25/2015	1,376,675	100%
	6/22/2015	1,328,253	100%
2016	7/28/2016	1,399,750	100%
	7/6/2016	1,337,737	100%

9. The Daniel Declaration asserts that utilities in Florida have contracts for out-of-state gas storage, and that (as a result) pipeline capacity is not required to maintain reliability. Daniel Decl. ¶ 10. This statement ignores the critical role that pipeline capacity plays in transporting gas supplies from the out-of-state gas storage facilities to the utilities in Florida. Given the lack of other viable transportation alternatives for natural gas, without reliable pipeline capacity to deliver stored supply on peak days, out-of-state storage would not meet the needs of Florida utilities.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 2017.

David A. Shammo

Exhibit 3

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

SIERRA CLUB, et al.	)	
	)	
Petitioners	)	
	)	
v.	)	No. 16-1329
	)	
FEDERAL ENERGY REGULATORY COMMISSION	)	
	)	
Respondent	)	
_____/		

SECOND DECLARATION OF HEATHER STUBBLEFIELD

Pursuant to 28 U.S.C. § 1746, I, Heather Stubblefield, state the following:

1. My name is Heather Stubblefield. I am a resident of Martin County, Florida. I am employed by Florida Power & Light Company ("FPL"), an intervenor in this proceeding. I hold the position of Senior Manager of Project Development. In that capacity, I have first-hand knowledge of the facts and information stated herein.

2. I previously provided a declaration in support of the intervenors' petition for rehearing. This declaration addresses several misstatements and errors

contained in the Sierra Club's declaration submitted by Joseph M. Daniel. I will refer to each such statement by the paragraph number:

- ¶ 6: Mr. Daniel's assumption that FPL's peak occurs only in the summer is incorrect. FPL must plan for winter peaks as well. Indeed, FPL's all-time high peak occurred on January 11, 2010 as a result of colder than normal weather in peninsular Florida. This winter peak load was approximately 6,200 MW higher than FPL's forecast, and its system generation was highly stressed as a result. Likewise, high energy demands in the winter also place stress on the FGT and Gulfstream pipelines to meet this electrical load. Winter loads are much more difficult for FPL to manage because FPL does not hold as much firm gas transportation capacity in the winter as it does in the summer. Given that one coal-fired plant has already been retired, this puts even more stress on gas-fired units in the event of a significant winter peak.
- ¶ 7: Mr. Daniel has misstated the reserve margin criterion shared by the three investor owned utilities in Florida. That reserve margin criterion is 20% (not 15%), and it is *not* voluntary; it is binding on the utilities and has been applied consistently by the Florida Public Service Commission as a key planning criterion.

- ¶ 8: Mr. Daniel is incorrect about the Florida market and firm gas transportation capacity. Although it is common practice in electric RTOs for gas-fired generators to not purchase firm pipeline transportation capacity, it is the standard for vertically integrated utilities like FPL to purchase firm transportation capacity. In Florida, municipalities and utilities with the obligation to serve are very unlikely to consider building new gas-fired generation without ensuring that there is sufficient contracted firm gas transportation capacity for the facility. Mr. Daniel may be confusing gas commodity purchases with gas transportation purchases. FPL does buy gas commodity on a spot and short term basis, but gas transportation must be secured on a long-term, firm basis to assure it is available when needed. Both FGT and Gulfstream are nearly 100% subscribed under long term firm gas transportation agreements. Thus, firm gas transportation capacity is required to reliably serve FPL's plants.
- **¶ 9:** Mr. Daniel's statements about FPL's usage of the FGT and Gulfstream pipelines during peak periods, and his accompanying chart, are confusing and do not accurately reflect FPL's gas transportation usage on peak days. For example, on each of the three FPL peak days referred to by Mr. Daniel (7/28/14, 6/22/15, & 7/6/16), FPL utilized over 98% of its FGT and Gulfstream firm transportation capacity to meet its demand. In addition,

during the peak summer periods (June-August) of these years, FPL utilized more than 90% of its gas transportation capacity over 96% of the time.

- ¶ **10**: Mr. Daniel's statement about out-of-state natural gas storage entirely misses the point. The gas stored out-of-state *still must be transported* to Florida via the pipelines. The issue at hand is not about storage capacity and access to gas commodity, but instead access to the gas *transportation* capacity required to deliver gas to FPL's plants.
- ¶ 14: Mr. Daniel's statements about the Okeechobee Clean Energy Center and Florida's growth rate also are erroneous. The Florida Public Service Commission expressly determined that there was a need for the Okeechobee facility in approving its construction. As for population growth, the Florida Office of Economic & Demographic Research reported at its July 10, 2017 Demographic Estimating Conference that Florida's population growth will continue at rate of approximately 320,000 per year, or 1.5%. This equates to nearly 900 new residents a day. This data is available at http://edr.state.fl.us/Content/conferences/population/index.cfm.

I declare under penalty of perjury that the foregoing is true and correct.

DATED November 15, 2017.

Heather Stubblefield

Heather Stubblefield