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

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

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

SIERRA CLUB, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

DUKE ENERGY FLORIDA, LLC, *et al.*,

Intervenors.

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)

PETITIONERS' OPPOSITION TO INTERVENOR-RESPONDENTS' MOTION TO FILE REPLY IN SUPPORT OF PETITION FOR PANEL OR EN BANC REHEARING

The Court should deny Intervenor-Respondents' motion for leave to file a reply brief in support of their pending petition for panel or en banc rehearing as to remedy ("Motion for Leave"). As stated in this Court's Amended Order, dated October 27, 2017, "[a]bsent an order of the court, replies to the responses will not be

accepted for filing." The Court has not issued such an order. Moreover, Intervenors' misleading claims in their motion for leave and proposed reply brief further demonstrate that a reply is not warranted here. The proposed reply brief has been lodged with the Court. Petitioners Sierra Club, *et al*. ("Sierra Club") respectfully request that the Court deny Intervenors' motion and strike the declarations as improper post-opinion evidence.

Intervenors claim that their proposed reply "address[es] the new issues that Petitioners have raised for the first time in their response." Motion for Leave at 4. But Intervenors' reply is not directed at "new" issues raised by Sierra Club. Indeed, there are no such "new" matters, as Sierra Club's response brief simply responds to arguments and allegations raised in FERC's and Intervenors' petitions for rehearing. Intervenors' proposed reply demonstrates that their intent is not to respond to allegedly "new" issues, but to re-argue issues already raised in their petition for rehearing.

In doing so, Intervenors misrepresent Sierra Club's response to the petitions for rehearing. For example, citing their own rehearing petition as authority, Intervenors claim that Sierra Club does not dispute that remedial questions are appropriately raised on rehearing. Proposed Reply at 3. But Sierra Club did contest this. *See, e.g*., Sierra Club Response at 8 (rehearing is not a vehicle for presenting new arguments). Merits and remedy briefing were not bifurcated in this litigation.

Accordingly, Sierra Club addressed remedy in its briefs. *See, e.g.*, Sierra Club, *et al.* Opening Brief (Doc. No. 1664693) at 12; *id*. at 43–44; Sierra Club Reply Brief (Doc. No. 1664696) at 22. Sierra Club requested vacatur, but Respondent FERC and Intervenors chose not to address remedy with regard to Sierra Club's claims. Instead, they addressed it only in the context of the Sunshine Act claims brought by different petitioners. Intervenors thus had the opportunity to make their case regarding the appropriate remedy, but did not take it. Because it chose not to address this issue then, it should be barred from doing so now. *See Am. Policyholders Ins. Co. v. Nyacol Prod., Inc.*, 989 F.2d 1256, 1264 (1st Cir. 1993) ("We will not revisit specific issues merely because an adverse result has infused new vigor into a discontented party's advocacy."). Similarly, Intervenors' declarations are improper post-opinion evidence and should be rejected.[1] *See City of Holyoke Gas & Elec. Dep't v. F.E.R.C.*, 954 F.2d 740, 745 (D.C. Cir. 1992) (denying petition for rehearing where petitioner "did not direct this court's attention, either in its briefs or at oral argument, to the evidence it now cites"); *Easley v. Reuss*, 532 F.3d 592, 593–94 (7th Cir. 2008) ("Panel rehearing is not a

[1] Intervenors contend otherwise, but the case they cite does not support them. Proposed Reply at 3 n.3. In that case, the U.S. Environmental Protection Agency (EPA) filed a petition for rehearing asking that a rule be remanded without vacatur, and *all relevant parties supported the EPA's request*. *See U.S. Sugar Corp. v. EPA*, 844 F.3d 268, 270 (D.C. Cir. 2016) (vacatur would defeat the enhanced protection of the environmental values covered by the EPA rule).

vehicle for presenting new arguments, and, absent extraordinary circumstances, we shall not entertain arguments raised for the first time in a petition for rehearing."); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1274 (2d Cir. 1994) ("arguments raised for the first time on a petition for rehearing are deemed abandoned unless manifest injustice would otherwise result" (citation omitted)); *Am. Policyholders Ins. Co.*, 989 F.2d at 1264 ("a party may not raise new and additional matters for the first time in a petition for rehearing"); *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003) ("Ordinarily, we do not address issues or arguments raised on rehearing that a party should have addressed in prior briefing.").

Again citing their own petition for rehearing as authority, Intervenors also claim that Sierra Club does not dispute that "one *Allied-Signal* factor, standing alone, can justify remand without vacatur." Proposed Reply at 3. This again misconstrues Sierra Club's response. *See, e.g.*, Sierra Club Response at 5 (*Allied-Signal* "factors are not exclusive or overriding in every case"); *id*. at 6 ("*Allied-Signal*'s second element does not mandate remand without vacatur in every case where there is some 'disruption.'"). By using "and" rather than "or," *Allied-Signal* itself indicates both elements must be satisfied. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (holding that an inadequately supported rule "need not necessarily be vacated," based on "the seriousness of the

order's deficiencies … *and* the disruptive consequences of an interim change that may itself be changed" (emphasis added)). For example, the court did not vacate the rule at issue in *Allied-Signal* because the agency could not later recover refunded fees, despite the "serious possibility" it could explain its rule on remand. *Id*. at 203. Similarly, in *Heartland*, the Court did not vacate because the agency could not later recoup payments, despite the agency's minor defect in explaining its decision. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). Both *Allied-Signal* factors were present in these cases.

Furthermore, Sierra Club pointed out that the cases Intervenors cited where the Court declined to vacate an inadequately supported rule are distinguishable because they were not National Environmental Policy Act (NEPA) cases, and vacatur would have caused environmental harm that the challenged rule was meant to address. Sierra Club Response at 4.[2] *See also Public Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077 (D.C. Cir. 2016). Intervenors made their arguments regarding *Allied-Signal* in their petition for rehearing, which Sierra Club responded to, and this Court should reject their attempt to re-argue these issues under the guise of addressing allegedly "new" issues in Sierra Club's response.

[2] *See also* Sierra Club Response at 6 ("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.").

Similarly, Intervenors attempt to re-argue the significance of *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), though they cannot credibly claim that this constitutes a "new" issue raised by Sierra Club in its response. *See* Intervenors' Rehearing Petition at 1-3, 16-17; Sierra Club Response at 2. The Court should reject Intervenors' misleading attempt to characterize these issues as "new," and thereby to evade the clear instructions in the Court's October 27, 2017 amended order that replies will not be accepted absent a court order.

Nor can Intervenors credibly claim that arguments regarding disruption are "new" issues raised by Sierra Club, which was responding to arguments and assertions made in the petitions for rehearing. In support of this claim, Intervenors advance spurious arguments regarding Sierra Club's declaration. To begin with, Sierra Club argued in its response that the Court should not consider Intervenors' declarations because they are post-opinion evidence. Sierra Club Response at 8 (citing *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)). While objecting to the numerous and lengthy declarations attached to Intervenors' petition for rehearing, Sierra Club submitted a single declaration in response to those five declarations. Now Intervenors attempt to file three *additional* declarations. These should not be allowed, for the same reason that Intervenors' initially filed declarations should be barred. And as Sierra Club pointed out in its response, at oral

argument Intervenors' counsel acknowledged that there would be no interruption of consumer electrical service. Sierra Club Response at 10 (citing Oral Argument Transcript (Exhibit C) at 50) ("Florida Power and Light and Duke are going to keep the lights on whether or not this pipeline gets built"). Moreover, Intervenors' own declarations demonstrate that there will be no blackouts or interruption of electrical service for Florida residents. *Id*.

Intervenors make similarly specious claims regarding the draft Supplemental Environmental Impact Statement ("SEIS"). Intervenors disingenuously maintain that "petitioners have sought to convert the *Allied-Signal* analysis into an opportunity to pre-litigate merits objections to FERC's draft supplemental environmental impact statement." Motion for Leave at 3. But it was Intervenors who attached the draft SEIS to their petition for rehearing, citing it as a reason that this Court should decline to impose the standard remedy of vacatur for a NEPA violation. Intervenors' Rehearing Petition at 2 & Ex. D. Sierra Club, on the other hand, argued that the Court should not consider the draft SEIS because it is post-opinion evidence. Sierra Club Response at 8; *see also id*. ("The Court should not pre-judge the adequacy of the SEIS or the outcome of this process." (citing *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 977 (D.C. Cir. 1985)). In other words, Intervenors requested that the Court prejudge the draft SEIS, and now object to the possibility that the Court will prejudge it.

Furthermore, Sierra Club was allocated 2,600 words to respond to both FERC's and Intervenors' petitions for rehearing, which together totaled 7,463 words. Intervenors should not now be allowed an additional 2,493 words. Such an imbalance would be unfair and prejudicial. If the Court nonetheless grants Intervenors' motion for leave to file a reply, Sierra Club should be allowed to file a sur-reply (including declarations to respond to the three additional declarations attached to Intervenors' proposed reply).

For the foregoing reasons, this Court should deny Intervenors' motion for leave to file a reply brief.

Dated: November 20, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d) and Circuit Rule 27(d) because it contains 1,639 words. I further certify that this response 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 Times New Roman 14-point font using Microsoft Word.

/s/ Elizabeth F. Benson
Elizabeth F. Benson

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2017, I electronically filed the foregoing *Petitioners' Opposition to Intervenor-Respondents' Motion to File Reply in Support of Petition for Panel or En Banc Rehearing* with the Clerk of the Court 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.

/s/ Elizabeth F. Benson
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