**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

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

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SIERRA CLUB, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

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

Intervenors.

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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)

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# RESPONSE OF PETITIONERS SIERRA CLUB, CHATTAHOOCHEE RIVERKEEPER, AND FLINT RIVERKEEPER TO RESPONDENT'S AND INTERVENOR-RESPONDENTS' MOTIONS TO STAY ISSUANCE OF MANDATE

(Names and addresses of counsel appear inside cover.)

February 16, 2018

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Statutes and Regulations**

**Other Authorities**



**Rules**

# GLOSSARY

| | |
|---|---|
| Daniel Decl. | Declaration of Joseph M. Daniel (attached 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 (Doc. No. 1703931) as Exhibit B) |
| Draft SEIS | Draft Supplemental Environmental Impact Statement (attached to Intervenor-Respondents' Petition for Panel or En Banc Rehearing as to Remedy (Doc. No. 1697633) as Exhibit D) |
| EPA | U.S. Environmental Protection Agency |
| FERC | Federal Energy Regulatory Commission |
| FERC Mot. | Motion of Federal Energy Regulatory Commission to Stay Issuance of Mandate (Doc. No. 1716729) |
| Final SEIS | Final Supplemental Environmental Impact Statement (attached as Addendum to FERC Mot.) |
| Intervenors' Mot. | Motion of Intervenor-Respondents for 90-Day Stay of Issuance of Mandate (Doc. No. 1716814) |
| NEPA | National Environmental Policy Act |
| Petitioners | Sierra Club, Chattahoochee Riverkeeper, and Flint Riverkeeper |
| the Project | Southeast Market Pipeline Project |
| SEIS | Supplemental Environmental Impact Statement |
| Sierra Club SEIS Comment | Sierra Club Comment Letter on Draft Supplemental Environmental Impact Statement (Nov. 20, 2017) |

## INTRODUCTION

On August 22, 2017, this Court held that the Federal Energy Regulatory Commission (FERC) violated the National Environmental Policy Act (NEPA) by issuing a Certificate of Public Necessity and Convenience for construction and operation of the Southeast Market Pipeline Project ("the Project") without considering the impact of greenhouse-gas emissions from burning the gas in downstream power plants. *Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1371–75 (D.C. Cir. 2017). It also held that FERC failed to explain not using the Social Cost of Carbon tool to valuate 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 filed a petition for panel rehearing and the Respondent-Intervenor pipeline companies and utilities filed a petition for panel rehearing and rehearing *en banc*. Doc. Nos. 1697613, 1697633. Both petitions sought rehearing only on the Court's vacatur of the Certificate, not on the merits or the remand. They argued FERC had complied with the remand order by preparing a draft supplemental environmental impact statement ("SEIS"), and that vacatur of the Certificate would cause "disruption" in the Project's operation and interfere with electrical service for consumers in Florida. Petitioners Sierra Club, Chattahoochee Riverkeeper, and Flint Riverkeeper (collectively, "Sierra Club" or "Petitioners") responded that the

draft SEIS did not satisfy the remand order and there would be no disruption of consumer service. Doc. No. 1703931.

Those petitions for rehearing were denied, with no member of the Court requesting a vote. *See* Doc. Nos. 1715801, 1715804 (Orders of January 31, 2018).

Now, nearly six months since the Court's order, FERC and Intervenors ask the Court to stay the mandate to stop the vacatur from going into effect. FERC requests a 45-day stay to give it more time to issue a new Certificate. Intervenors request a 90-day stay, potentially pending a petition for certiorari to the U.S. Supreme Court, essentially repeating their claims of "disruption." But they have not established the "good cause" necessary for a stay and, as the Court recognized, vacatur addresses Sierra Club's harms. *Sierra Club*, 867 F.3d at 1366. The Court should deny their motions and issue the mandate immediately under Federal Rule of Appellate Procedure 41(b).

## ARGUMENT

### I. LEGAL STANDARD

#### A. Requirements for Stays of the Mandate

The mandate ordinarily issues within seven days after entry of an order denying a timely petition for panel rehearing or for rehearing *en banc*. Fed. R. App. P. 41(b). This Circuit will grant a motion to stay issuance of the mandate only if "the motion sets forth facts showing good cause for the relief sought." D.C. Cir.

R. 41(a)(2). Courts consider traditional stay factors when determining whether good cause for staying the mandate has been shown. *See California v. Am. Stores Co.*, 492 U.S. 1301, 1304–07 (1989) (considering whether movant for stay of mandate has made adequate showing of irreparable injury, probability of success, and balance of equities in favor of stay); *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (denying stay of mandate for failure to show "substantial harm"); *see also Natural Res. Def. Council v. EPA*, 489 F.3d 1250, 1263 (D.C. Cir. 2007) (Randolph, J., concurring) (decisions on motions to stay the vacatur of an agency rule are to be "made in accordance with this court's long-standing principles governing stays—irreparable harm, probability of success, public interest, and so forth.").

To merit a stay pending a petition for writ of certiorari, Intervenors "must show that the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). More specifically, they must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, J., in chambers); *South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, J.,

in chambers). *See also* Robert L. Stern, *et al.*, *Supreme Court Practice* § 17.19, at 689 (7th ed. 1993) (lower courts apply same factors).

**B. Intervenors' Cases Distinguished**

The cases that Intervenors cite are distinguishable, and do not support a stay. *See* Intervenors' Mot. (Doc. No. 1716814) at 6–7. They are not NEPA cases, involve agency rules and not approval of a particular project, and/or the parties all agreed to the stay. In *Maryland People's Counsel v. FERC*, 768 F.2d 1354 (D.C. Cir. 1985) (per curiam), for example, FERC asserted that immediate termination of the programs at issue would "substantially disrupt ongoing arrangements to the detriment of" all involved parties—and the petitioner did not object to the proposed stay. *Id*. at 1354. Here, there is no potential disruption to an entire regulatory scheme, there has already been a delay in the issuance of the mandate due to the petitions for rehearing, and Petitioners object to the proposed stay.

In *Independent U.S. Tanker Owners Comm. v. Dole*, 809 F.2d 847 (D.C. Cir. 1987), the Court concluded the agency had failed to provide a valid legal basis for its rule and decided to withhold issuance of the mandate for six months "to avoid further disruptions in the domestic market and to allow the Secretary to undertake further proceedings to address the problems of the merchant marine trade." *Id*. at

855. Again, here there is not an entire regulatory program at risk of disruption.[1] Moreover, FERC's failure to consider greenhouse-gas emissions for a specific project goes to the integrity of its decisionmaking, not merely the adequacy of its explanation. This is not a situation where the agency has been tasked with "rehabilitat[ing] its rationale for [a] regulation." *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009).

*Comcast Corp.* and *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008), also do not support FERC and the Intervenors here. In *Comcast Corp.*, the Court vacated an agency rule after applying the *Allied-Signal* factors.[2] In a concurring opinion, Judge Randolph noted his "belie[f] that whenever a reviewing court finds an administrative rule or order unlawful, the Administrative Procedure Act requires the court to vacate the agency's action." 579 F.3d at 10. He noted that "the losing agency may always file a post-decision motion for a stay of the mandate showing why its unlawful rule or order should continue to govern until proceedings on remand are completed." *Id.* at 11. He emphasized that this would "preserve[] the adversarial process" because "the parties rarely discuss what

[1] *Cf. Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Aug. 16, 2017) (per curiam) (EPA asserted that a short-term stay was necessary to develop guidance for farms on how to measure emissions of hazardous substances because many were asking EPA for help in determining their emissions; and a stay would provide relief for these farms from enforcement suits during the transition).
[2] *Allied-Signal, Inc. v. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993).

remedy the court should impose if the agency loses." *Id.* Here, however, that post-decision adversarial process has already taken place through the petitions for rehearing on remedy—and the Court has reaffirmed that vacatur is the appropriate remedy. Thus, the Court has already "hear[d] from all parties" with regard to "whether to allow the unlawful [order] to remain in place." *Id.*

Similarly, in *In re Core Communications*, Judge Griffith noted in a concurring opinion that "[t]he circumstances that occasion today's decision lead [him] to question the wisdom of the open-ended remand without vacatur." 531 F.3d at 862. That concurring opinion cites Judge Randolph's concurrence in *Honeywell Int'l Inc. v. EPA*, 374 F.3d 1363 (D.C. Cir. 2004), with regard to the option of staying issuance of the mandate. In *Honeywell*, Judge Randolph again emphasized that vacating and then entertaining a motion to stay issuance of the mandate would "preserve[] the adversary process" because when the court "order[s] a remand at the end of [a] merits opinion [it is] invariably making a remedial decision without the benefit of briefing or argument," in that it is "quite rare for the parties even to mention the question of remedy in their merits briefs."[3] *Id.* at 1375. Here, the Court has already "ha[d] the benefit of hearing from both sides." *Id.* In denying the petitions for rehearing, the Court already "act[ed] with its

[3] *But see* Sierra Club Opening Brief (Doc. No. 1664693) at 12, 44; Sierra Club Reply Brief (Doc. No. 1664696) at 22 (requesting vacatur).

eyes open and [had] the information needed to assess the consequences" of its decision regarding remedy. *Id*.

The other cases that Intervenors cite involve situations where vacatur of a rule would cause environmental harm that the challenged rule was meant to address. In *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855 (D.C. Cir. 2001), both industry and environmental groups challenged air pollution standards for hazardous waste combustors. *Id.* at 857. The Court vacated the regulations. But because this would leave EPA without standards, the Court noted that "EPA (or any of the parties to this proceeding) may file a motion to delay issuance of the mandate to request either that the current standards remain in place or that EPA be allowed reasonable time to develop interim standards." *Id*. at 872. EPA, environmental petitioners, and various industry petitioners ultimately filed a joint motion for stay of issuance of the mandate. *See also Columbia Falls Aluminum Co. v. EPA*, 139 F.3d 914, 924 (D.C. Cir. 1998) (because the Court's decision left "EPA without a regulation governing spent potliner," the Court invited EPA to file a motion to delay issuance of the mandate); *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 148 (D.C. Cir. 2006) (recognizing that neither the environmental petitioner nor EPA "wants the Anacostia River to go without dissolved oxygen and turbidity" total maximum daily loads). Here, in contrast, staying issuance of the

mandate would not leave a regulation in place during remand that it is preferable to no rule at all, and Petitioners oppose a stay.

## II. LACK OF GOOD CAUSE FOR STAY

### A. A Stay would Undermine the Court's Vacatur Order

FERC's and Intervenors' motions are based on the same arguments made in their petitions for rehearing—namely, that the Court should not vacate the Certificate because FERC has taken steps to comply with the Court's remand order, shutting down the pipeline would cause financial harm to the pipeline companies, and it would allegedly interrupt service to consumers. Their goal is to push the mandate off until after FERC can issue a new Certificate, rendering the vacatur moot and achieving the same result they sought with their petitions for rehearing. But for the same reasons the Court denied their petitions for rehearing, it should not permit them to skirt the vacatur through motions to stay issuance of the mandate.

A similar argument was rejected in *Public Employees for Environmental Responsibility v. U.S. Fish and Wildlife Servi*ce, 189 F. Supp. 3d 1 (D.D.C. 2016), *appeal dismissed*, 2016 WL 6915561 (D.C. Cir. Oct. 31, 2016). As that court explained:

> [The Fish and Wildlife Service] requests that in the event of vacatur, the Court "exercise its equitable discretion to stay the effect of its order to allow the Service time to address NEPA and promulgate and issue a new rule." Defs.' Mem. at 12–13. While the D.C. Circuit has

> used this approach on occasion, *see Chamber of Commerce v. SEC*, 443 F.3d 890, 909 (D.C. Cir. 2006), the cases cited by FWS show that it is generally an interim measure used by courts where the plaintiffs agree that staying vacatur is appropriate. *See Anacostia Riverkeeper, Inc. v. EPA*, 713 F. Supp. 2d 50, 55 (D.D.C. 2010); *Hawaii Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 12 (D.D.C. 2003). For the same reasons that the Court rejects FWS's request for remand without vacatur, the Court will not stay its order here.

189 F. Supp. 3d at 5, n.1.

Issuance of the mandate, like vacatur of the Certificate, vindicates the purposes of NEPA. Here, NEPA required a proper environmental analysis before FERC issued the Certificate. "The 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). Because the current Certificate was based on FERC's inadequate NEPA analysis, it is defective and unlawful.

Because the current Certificate is unlawful, Intervenors should not be allowed to continue constructing and operating under it until FERC issues a new one. If the mandate causes, in FERC's words, a "lapse" in certificates, this is the consequence of FERC's NEPA violation. Allowing the Project to continue to operate in the interim, on the other hand, not only undermines NEPA, it allows the Project's environmental harm to continue unabated until a new Certificate issues,

with potentially new or different terms and mitigation measures. This harm includes the greenhouse-gas emissions the Court ordered FERC to analyze, as well as tons of ongoing toxic air pollution associated with pipeline operation. *See* Petitioners' Emergency Motion for Stay (Doc. No. 1642403) at 14, and record citations therein.

### B. FERC's New SEIS and Promised New Certificate Do Not Justify Staying the Mandate

FERC and Intervenors base their motions on FERC's final SEIS that it issued three business days after the Court denied the petitions for rehearing, and two days before the mandate was to issue. Both FERC and Intervenors filed the final SEIS as an attachment to their motions to stay issuance of the mandate. Addendum to FERC Mot. (Doc No. 1716729); Intervenors' Mot. (Doc. No. 1716814) at Ex. A. They are asking the Court to pre-judge whether it complies with the remand order and supports a new Certificate.

Nevertheless, FERC's final SEIS suffers from many of the same insufficiencies as the draft SEIS and does not satisfy the Court's remand order. The insufficiencies in the draft SEIS are set forth in Sierra Club's comment on it, which is reprinted in the addendum to FERC's motion. *See* Doc No. 1716729 (FERC Mot.) at 34-50. This includes failing to provide an adequate quantification of indirect emissions, including by arbitrarily undercutting the "full burn" disclosure; making no attempt to satisfy this Court's instruction to provide a discussion of

their significance or cumulative impact; failing to meaningfully juxtapose the project's indirect emissions with those that would result under any alternative; offering no explanation of whether these emissions warrant adoption of additional mitigation measures or rejection of the project entirely; and providing arbitrary reasons for declining to use the Social Cost of Carbon tool. *Id.* In addition, numerous other commenters explained how FERC's draft SEIS did not satisfy NEPA. *See id*. at 25-33, 51-88; *see also id.* at 94-111.

In the draft SEIS, FERC found the Project could cause a 22.1 million metric ton per year *increase* in Florida greenhouse-gas emissions. *See* Draft SEIS at 4.[4] FERC found this is equivalent to 9.7% of the total greenhouse-gas emissions of the State of Florida. *Id*. Although it quantified the greenhouse gases, FERC did not comply with the remand order because it failed to include a full "discussion of the 'significance'" of these emissions. *Sierra Club*, 867 F.3d at 1374. It did not analyze "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." *Id.* (internal quotations omitted). It did not use the new information to address the alternatives analysis or mitigation measures. *See* Daniel Decl. at ¶16.[5] FERC also did not apply it in balancing "'the

[4] Attached to Intervenor-Respondents' Petition for Panel or En Banc Rehearing as to Remedy (Doc. No. 1697633) as Exhibit D.

[5] Attached 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

public benefits against the adverse effects of the project,' including adverse environmental effects." *Sierra Club*, 867 F.3d at 1373 (internal citations omitted).

FERC also found that although this one project accounts for nearly 10% of the greenhouse-gas emissions of the State of Florida, it was not significant. Draft SEIS at 2. However, based on readily available online data and an EPA modeling tool, Sierra Club's comment demonstrated that this amount exceeds emissions from Florida's *six largest coal units* combined, and equates to the emissions of *4.7 million passenger vehicles* every year – which is significant. Doc No. 1716729 at 49 (Sierra Club SEIS Comment at 16); Daniel Decl. at ¶18. FERC's response to comments in the final SEIS does not address these facts. Doc No. 1716729 at 49. Thus, FERC did not fully or fairly "discuss[]" the "significance" of these emissions as the Court required. *See Sierra Club*, 867 F.3d at 1374.

FERC's final SEIS deals with the "significance" issue by revoking the draft's "not significant" finding and replacing it with a statement that FERC lacks the modeling to determine whether this is significant on a global scale. Doc. No. 1716729 at 16-17 (Final SEIS at 6-7). Sierra Club pointed out in its comment that proceeding on this claimed lack of knowledge violates 40 C.F.R. § 1502.22, Doc. No. 1716729 at 43 (Sierra Club SEIS Comment at 10), which requires the agency, when the costs of obtaining incomplete information are exorbitant or the means to

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Rehearing as to Remedy (Doc. No. 1703931) as Exhibit B. This declaration was also attached to Sierra Club's comment letter to FERC on the draft SEIS.

obtain it are unknown, to explain the relevance of the missing essential information, summarize existing scientific evidence, and evaluate the foreseeable impacts based on generally accepted theoretical approaches or research methods. Although FERC responded to parts of Sierra Club's comment, it did not respond regarding its violation of 40 C.F.R. § 1502.22. *See* Doc. No. 1716729 at 43, 48 (Final SEIS, App. A at 20, 25). Because the final SEIS is seriously flawed in this respect and others, it cannot serve as the basis for a new Certificate for the Project.

FERC should not have pre-judged whether a new Certificate should be issued, nor should the Court. FERC contends it lacks sufficient information on climate to apply to a new Certificate, but (based on its current motion) it intends to issue a new Certificate just the same. Even if the final SEIS were sufficient, FERC must reconsider the Project alternatives, including the no-action alternative, before issuing a new Certificate. 40 C.F.R. § 1502.14. This could mean no Certificate or a new, revised one with different conditions or mitigation measures that should be incorporated into the Certificate. *See* 40 C.F.R. §§ 1505.2(c), 1505.3, 1508.20. By issuing the mandate immediately the Court will encourage FERC to issue a Certificate promptly that meets these requirements, without further delay.

### C. Lack of Irreparable Harm

The motions for stay should be denied for the independent reason that FERC and Intervenors cannot show irreparable harm from issuing the mandate. *See*

*United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (en banc) (holding that stay motion must be denied regardless of whether Microsoft's certiorari petition would present a "'substantial question'" because Microsoft could not "demonstrate any substantial harm" from the denial of a stay). Their "irreparable harm" arguments are substantially the same arguments they made regarding "disruption" in their petitions for panel rehearing and rehearing *en banc*, and the Court should reject them for the same reason it did earlier.[6]

**1. There will be No Interruption of Consumer Service**

If FERC meets its 45-day target for issuing a new Certificate then the only period in which there could be any disruption would be between the issuance of the mandate and their 45-day mark. Intervenors have demonstrated that it is technically and economically feasible for them to not transport any gas through the pipeline for that amount of time. Intervenors' own declarations filed with their petition for rehearing demonstrated that vacatur would not result in blackouts or interruption of electrical service for any Florida residents.[7] Zero or low amounts of gas flow in the pipeline during the months since the Court's opinion further

[6] The Court also declined to grant FERC's request in its petition for rehearing that the panel grant a stay of issuance of the mandate for an additional 90 days. *See* FERC's Petition for Panel Rehearing (Doc No. 1697613) at 4, 17.

[7] *See, e.g.*, 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 (Doc. No. 1703931) at 10; *see also id.* at Ex. B.

underscores that this would not occur.[8] Moreover, Duke Energy Florida is no longer listed as a customer in the Sabal Trail Transmission Index of Customers.[9]

FERC is wrong that a lapse in Certificate authority would "potentially endanger[] the supply of electricity to Florida residents." FERC Mot. at 2. Intervenors do not make that claim. They admit they would continue to meet demand by using other sources. Intervenors' Mot. at 12. This is consistent with statements made at oral argument, where Intervenors' counsel acknowledged there would be no interruption of consumer electrical service. Oral Argument Transcript at 50.[10] 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. at ¶¶3–8. The utilities are in low-demand season, hence there is more than enough gas capacity to serve the power plants while FERC prepares a new Certificate. *Id.* at ¶¶6, 7, 15. Utilities in Florida can also draw from out-of-state gas storage. *Id.* at ¶10.

Intervenors' claim of "environmental harm" is also exaggerated. They do not establish that relying on coal plants for a short amount of time until a new

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[8] *See, e.g.*, Petitioner Sierra Club *et al.*'s Supplemental Response to Petitions for Rehearing (Doc. No. 1706178) at 2-4; *see also id.* at Exs. A-C. *See also* Exhibit 1, attached hereto (showing zero or minimal "Total Scheduled Quantity" for Sabal Trail).

[9] *See* Exhibit 2, attached hereto, *available at* https://infopost.spectraenergy.com/InfoPost/STTHome.asp?Pipe=STT.

[10] Attached as Exhibit C to Sierra Club's response to the rehearing petitions (Doc. No. 1703931).

Certificate issues is necessary. And they do not support their claims that stopping the flow of gas could jeopardize safety, since they are still subject to Pipeline and Hazardous Materials Safety Administration requirements; or that it could harm streams or wetlands, since they are still subject to their Army Corps of Engineers' section 404 permits. Their claim of harm from permanently shutting down and abandoning the pipeline also is exaggerated. Although a lapse in the Certificate should require stopping the flow of gas, it does not require permanently shutting down. *See* Daniel Decl. at ¶11.

### 2. Economic Harm to Intervenors Does Not Justify Delaying the Mandate

Intervenors fully assumed the risk of a lapse in Certificates. 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." Order Denying Stay at ¶9 (March 30, 2016) [JA-1293]. And that "[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 Intervenors in this Court that an unlawful certificate could be vacated. *See* Respondent's Opposition to Emergency Motions for Stay and Expedited Review (Doc. No. 1644296) at 17. At oral argument, the Court noted that FERC "can shut down the pipeline." Oral Argument Transcript at 49.

Nevertheless, Intervenors 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, 996 (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 by 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.").

Finally, Intervenors threaten to pass on to ratepayers any increased costs of temporarily using alternate fuels. Intervenors' Mot. at 12-13. But Intervenors are not unilaterally allowed to pass their costs on to ratepayers, especially where their alleged economic losses were self-inflicted. The Florida Public Service Commission has "exclusive jurisdiction" over that issue. *Citizens of the State of Florida v. Fla. Pub. Serv. Comm'n*, 146 So. 3d 1143, 1151 (Fla. 2014) (citing

sections 350.001, 366.04, and 366.06, Florida Statutes); *cf. Citizens of the State of Florida v. Graham*, 213 So. 3d 703, 714 (Fla. 2017) (describing Commission's annual proceeding to determine whether utilities may recover fuel-related costs from customers). And Florida law is clear that a utility cannot recover costs without carrying its burden to prove that "it took every reasonably available prudent action to minimize [its cost of service]." *Gulf Power Co. v. Pub. Ser. Comm'n*, 453 So. 2d 799, 802 (Fla. 1984) (internal citation omitted); *see also Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982) (denying cost recovery to utility that failed to carry its burden of proof).[11]

### D. Intervenors have Not Established the Elements Required for a Stay Pending a Petition for Writ of Certiorari

Under Federal Rule of Appellate Procedure 41(d)(2)(A), a party seeking a stay of the mandate pending the filing of a petition for a writ of certiorari must make two showings. First, it "must show that the certiorari petition would present a substantial question." *Id.* This requires a showing that it is both "reasonably likely" that the Supreme Court will "vote to grant the petition for writ of certiorari," and

[11] Contrary to Intervenors' comment that Sierra Club is "unconcerned" about costs to ratepayers, Intervenors' Mot. at 14, Sierra Club is actively litigating multiple cases to protect Floridians from high-cost, high-risk gas pipelines and power plants. *See, e.g.*, Florida Supreme Court docket no. SC17-82 (appealing Florida Power & Light rate increase for gas-burning power plants); Florida Public Service Commission docket no. 20170225 (challenging Florida Power & Light's proposed gas-burning power plant); Federal Energy Regulatory Commission docket no. CP17-463 (protesting proposed gas pipeline).

that "there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous." *O'Brien v. O'Laughlin*, 557 U.S. 1301, 1302-03 (2009) (Breyer, J., in chambers) (denying motion for stay of mandate); *accord Jepson v. Bank of New York Mellon*, 821 F.3d 805, 807 (7th Cir. 2016) (Ripple, J., in chambers) (same). Second, the motion must show "that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A).

Based on its motion, FERC does not plan to seek a writ of certiorari. Intervenors raise two main issues in support of a stay pending a petition for writ of certiorari, but neither has merit.

First, they contend that the panel decision is inconsistent with *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004). But the *Public Citizen* test was met in this case. Unlike the agency in *Public Citizen*, FERC has statutory authority to refuse to issue the Certificate due to these effects. *Sierra Club*, 867 F.3d at 1372. It can, and indeed must, balance the public benefits against the adverse effects of the project and has legal authority to prevent the adverse environmental effects of the Project. *Id*. at 1373.

Second, Intervenors re-argue whether vacatur was appropriate. Intervenors' Mot. at 18-19. But the Supreme Court authority is clear: "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." *FCC v. NextWave Pers. Commc'ns*, 537

U.S. 293, 300 (2003) (internal quotations 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) (internal quotation omitted). In addition, 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 Envtl. Responsibility*, 189 F. Supp. 3d at 2 ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations.").

Simply put, this case is not worth further review. Indeed, this Court has recognized as much. Fully aware of all the factors outlined above that weigh against further review, the Court denied rehearing *en banc*. This means that the Court concluded that this case is not of "exceptional importance." Fed. R. App. P. 35(a)(2). And it did so without a single member of the Court calling for a vote. Given that this case is of insufficient importance to warrant further review by this Court, it is unlikely to be of sufficient importance to warrant review by the Supreme Court. Moreover, certiorari is unlikely because there is no circuit split on the question decided by this Court, and the case does not present any issue of pressing national importance. *See* Sup. Ct. R. 10.

## CONCLUSION

For the reasons set forth above, the motions to stay issuance of the mandate should be denied.

Dated: February 16, 2018

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 5,030 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 February 16, 2018, I caused to be served the foregoing *Response of Petitioners Sierra Club, Chattahoochee Riverkeeper, and Flint Riverkeeper to Respondent's and Intervenor-Respondents' Motions to Stay Issuance of Mandate* upon all ECF-registered counsel via the Court's CM/ECF system.

/s/ Elizabeth F. Benson
Elizabeth F. Benson