ORAL ARGUMENT NOT YET SCHEDULED

THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CASE NO. _____
FERC DOCKET NOS. CP15-554-000 & CP15-555-000

IN RE
APPALACHIAN VOICES, CHESAPEAKE CLIMATE ACTION NETWORK, COWPASTURE RIVER PRESERVATION ASSOCIATION, FRIENDS OF BUCKINGHAM, HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION, SHENANDOAH VALLEY NETWORK, SIERRA CLUB, INC., SOUND RIVERS, INC., VIRGINIA WILDERNESS COMMITTEE, WILD VIRGINIA, AND WINYAH RIVERS FOUNDATION,

Petitioners.

On Petition for Extraordinary Writ Pursuant to the All Writs Act to Stay Order of the Federal Energy Regulatory Commission, 161 FERC ¶ 61,042 (Oct. 13, 2017)

PETITION FOR A WRIT STAYING THE FERC ORDER

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INTRODUCTION AND FACTS

Petitioners, pursuant to the All Writs Act, 16 U.S.C. § 1651, Federal Rule of Appellate Procedure 21(c), and Local Rule 21, seek a stay of construction authorized by the Federal Energy Regulatory Commission ("FERC") order issuing a Certificate of Public Convenience and Necessity in *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (Oct. 13, 2017) ("Certificate Order"), Ex. A. Petitioners request that the stay remain in effect until fifteen days after FERC issues a final order on Petitioners' Rehearing Requests.

The proposed Atlantic Coast Pipeline ("ACP") is a 604-mile, 42-inch-diameter gas pipeline stretching from West Virginia to North Carolina. *See* Certificate Order, 161 FERC ¶ 61,042 at P 1. FERC approved the project on October 13, 2017. *See id.* at P 1. The Natural Gas Act requires parties to seek rehearing from the agency before obtaining judicial review of any FERC order. *See* 15 U.S.C. § 717r(a). On November 13, 2017, Petitioners filed a timely Request for Rehearing and moved for a stay of FERC's Certificate Order pending resolution of the Request. *See* Pet'rs' Req. for Reh'g & Rescission of Certificates & Mot. for Stay, Docket No. CP15-554 (Nov. 13, 2017) (FERC eLibrary No. 20171113-5367), ("Rehearing Request"), Ex. B.

Rather than ruling on Petitioners' Rehearing Request by the statutory deadline, FERC indefinitely postponed a ruling without issuing a stay. In the

meantime, construction of the pipeline has begun and, if allowed to proceed, will irreparably harm Petitioners' property and environmental interests. Absent a stay, pipeline developers will condemn private property, cut thousands of acres of trees, trench through rivers and wetlands, and blast and bulldoze miles of mountain ridges on public and private land. This Petition therefore asks the Court to issue a writ pursuant to the All Writs Act staying construction of the Atlantic Coast Pipeline to preserve the status quo and the Court's prospective jurisdiction under the Natural Gas Act. *See* 15 U.S.C. § 717r(b).

Petitioners separately filed a Petition for Review, docketed as Case No. 18-1114, contending that FERC's Certificate Order is final and immediately reviewable by this Court. The instant petition is filed in the alternative to that Petition for Review. If the Court determines that it has jurisdiction to stay FERC's Certificate Order pursuant to the Petition for Review, it need not consider this Petition for Extraordinary Writ. However, if the Court determines it lacks immediate jurisdiction over the Petition for Review, Petitioners ask the Court to preserve its prospective jurisdiction by granting a writ staying construction.

If granted, the instant Petition for Extraordinary Writ would not trigger immediate judicial review of FERC's Certificate Order; that review would not occur until FERC issues a final order on Petitioners' Rehearing Requests. Petitioners do not seek a writ of mandamus to compel immediate agency action.

Rather, Petitioners' request is narrow: that the Court act only to the extent necessary to preserve its prospective jurisdiction by staying construction until FERC issues a final, appealable order.[1]

Without action by this Court, FERC's dilatory process will deny Petitioners an opportunity to obtain timely judicial review of the Certificate Order. Upon receiving a rehearing request, FERC must act within thirty days by "grant[ing] or deny[ing] rehearing or [by] abrogat[ing] or modify[ing] its order without further hearing." 15 U.S.C. § 717r(a). If FERC does not do so, the request is denied by operation of law. *Id*; 18 C.F.R. § 385.713(f). But here, without ruling on Petitioners' Motion for Stay, FERC issued a "tolling order" indefinitely postponing a ruling on Petitioners' Rehearing Request. *See* Order Granting Rehearings for Further Consideration, Docket No. CP15-554, (Dec. 11, 2017) (FERC eLibrary No. 20171211-3013) ("Tolling Order"), Ex. C. The Tolling Order purports to grant rehearing, but only "for the limited purpose of further consideration," and it neither stays the Certificate Order nor advises Petitioners when to expect a final, appealable order on their Request. *See id.* Absent a stay, pipeline construction will proceed while Petitioners are indefinitely barred from obtaining judicial review.

The Tolling Order conforms to a pervasive pattern: since 2009, FERC has issued open-ended tolling orders in response to 77 of 78 requests for rehearing. *See*

[1] The writ sought by this Petition is in the form of the common law writ of *supersedeas*.

Decl. of R. Talbott (Nov. 4, 2017), Ex. D.[2] Those tolling orders persisted for months or years. *Id.* Without a stay, pipeline construction will proceed as long as the Tolling Order is in place—potentially until the project is complete. The longer the Tolling Order persists, the deeper the incursion into this Court's jurisdiction and ability to craft a meaningful remedy to protect Petitioners' interests should Petitioners succeed on the merits of their claims. This Petition for Extraordinary Writ provides a solution to the otherwise intractable problem created by FERC's Tolling Order.

RELIEF REQUESTED

Petitioners ask this Court to issue, as soon as practicable, a writ pursuant to the All Writs Act, staying construction authorized by the October 13, 2017 Certificate Order until fifteen days after FERC issues a final order on Petitioners' Rehearing Request.

[2] Petitioners attach as an appendix to Exhibit D a spreadsheet detailing FERC's tolling order practice since 2009 in 75 proceedings where rehearing was requested. FERC has since tolled requests in this case, the Mountain Valley Pipeline case, and the NEXUS Pipeline LLC case. Order Granting Rehearing for Further Consideration, Docket No. CP16-10 (Dec. 13, 2017) (FERC eLibrary No. 20171213-3061); Order Granting Rehearing for Further Consideration, Docket No. CP16-22-001 (Oct. 23, 2017) (FERC eLibrary No. 20171023-3012). In most cases, while requests were pending, FERC authorized construction of the pipeline. FERC ultimately denied all the requests for rehearing raising private property or environmental issues.

ISSUE PRESENTED

The Natural Gas Act requires FERC to rule on rehearing requests within thirty days, but FERC indefinitely postponed a ruling on Petitioner's Rehearing Request for the ACP. In the meantime, pipeline construction has begun and will irreparably harm Petitioners' property and environmental interests. Can this Court issue a writ pursuant to the All Writs Act staying construction of the ACP to preserve the status quo and its prospective jurisdiction under the Natural Gas Act?

ARGUMENT

I. The All Writs Act Confers Jurisdiction to Issue a Stay of Construction Authorized by FERC's Certificate Order.

The All Writs Act, 28 U.S.C. § 1651(a), empowers this Court to stay construction of the ACP until the Court can exercise jurisdiction over FERC's Certificate Order. The All Writs Act permits "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." § 1651(a). The Supreme Court has explained that the All Writs Act allows courts to preserve "jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." *FTC v. Dean Foods Co.*, 384 U.S. 597, 604 (1966).

The animating purpose of the All Writs Act is to protect the jurisdiction of the federal courts by "provid[ing] the instruments necessary to perform their duty." *Cherrix v. True*, 177 F. Supp. 2d. 485, 496 (E.D. Va. 2001) (quoting *United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995)). To that end, "[i]t is well-settled that in rare instances an appellate court may act under the authority of the All Writs Act in granting interlocutory relief to a party aggrieved by administrative actions when the court would have full appellate jurisdiction following a final agency decision." *Va. Dep't of Educ. v. Riley*, 23 F.3d 80, 83 (4th Cir. 1994). This Court has held that its authority under the All Writs Act "is to be exercised sparingly and that relief is not to be granted unless irreparable harm is likely." *Id.* at 84. The "crucial inquiry" is whether the problem raised by Petitioners "is one that can be safeguarded against in the very course of the ongoing administrative proceedings." *Id.* (quoting *N.C. Envtl. Policy Inst. v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989)).

Irreparable harm from construction of the ACP is not merely likely, but certain, and the ongoing FERC process offers no meaningful safeguard for Petitioners' interests. This case is therefore one of those "exceptional instances where jurisdiction under the All Writs Act is appropriately exercised." *Id.* Petitioners' interests cannot be left to an administrative process that thwarts judicial review while allowing irreparable harm to occur.

Had FERC acted on Petitioners' Rehearing Request within thirty days, as Congress intended, Petitioners would have no reason to seek relief under the All Writs Act, because the Natural Gas Act contains an adequate judicial review provision: "Any person … aggrieved by an order issued by the Commission ... may apply for a rehearing within thirty days ...." 15 U.S.C. § 717r(a). Here, however, FERC's Tolling Order has prevented Petitioners from obtaining timely judicial review.

Congress enumerated the four ways in which FERC may act on a request for rehearing: FERC "shall have the power to grant or deny rehearing or abrogate or modify its order ...." *Id.* If FERC does not act within thirty days, the request is denied and a party may seek judicial review in the appropriate court of appeals. *Id* § 717r(a)-(b); 18 C.F.R. § 385.713(f). Thus, Congress intended that requests for rehearing be adjudicated expeditiously.

However, FERC regularly circumvents the statutory process by issuing open-ended tolling orders that delay decisions on rehearing requests until significant portions of pipelines are complete—or even fully operational. FERC issues these tolling orders without staying construction. *See, e.g.*, Order Granting Rehearings for Further Consideration, Docket No. CP15-138-004 (Nov. 1, 2017) (FERC eLibrary No. 20171101-3006) (Tolling Order for the Transcontinental Gas Pipeline); *see also* Ex. D. Since 2009, FERC has issued tolling orders in 99 percent

(77 of 78) of gas pipeline proceedings where a party requested rehearing. *See* Ex. D. On average, those tolling orders persisted for 194 days. *Id.* By the time FERC issued a final, appealable order on a rehearing request, the pipeline was often in the ground, and FERC, shielded by its tolling order, had evaded judicial review.[3]

FERC's pattern of issuing tolling orders "frustrates Congress' purposes" and intent to subject FERC's orders to timely judicial review. *Sheehan v. Purolator Courier Corp.*, 676 F.2d 877, 885 (2d Cir. 1981); 15 U.S.C. § 717r(b); *see also* Letter from Tim Kaine, U.S. Senator, to Hon. Kevin McIntyre, Chairman, FERC (Jan. 5, 2018), https://www.scribd.com/document/368500513/Kaine-Calls-For-FERC-Rehearing-On-Mountain-Valley-And-Atlantic-Coast-Pipelines (questioning

[3] Two recent cases exemplify the effect of FERC's abuse of tolling orders. For the Northeast Upgrade Project pipeline and the Sabal Trail pipeline, the court ultimately found that FERC's certificate orders were invalid. *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). In both cases, however, FERC tolled the rehearing requests for nearly six months. Order Granting Rehearing for Further Consideration, Docket No. CP11-161-001 (July 9, 2012) (FERC eLibrary No. 20120709-3002); Order Granting Rehearing for Further Consideration, Docket No. CP14-554 (Mar. 29, 2016) (FERC eLibrary No. 20160329-3008). While the tolling orders were in place, FERC authorized construction. *Id.* The court in each case ultimately found that FERC violated the National Environmental Policy Act, but by the time the decisions were issued, both pipelines were operational. *Compare Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025 (Jan. 11, 2013) (requiring that the Northeast Upgrade pipeline be placed into service by November 1, 2013) *with Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (issued June 6, 2014); *and compare* Sabal Trail Transmission, http://www.sabaltrail transmission.com (Phase I facilities brought on line July 3, 2017) *with Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (issued Aug. 22, 2017).

adequacy of the rehearing process where FERC allows construction while requests are pending).

Former FERC commissioners have criticized FERC's custom of issuing tolling orders while denying stays, calling the practice "an abuse of our discretion to grant … tolling orders and a violation of the criteria for issuing stays." *Edwards Mfg. Co., Inc. & City of Augusta*, 82 FERC ¶ 61,012, 61,049 (Jan. 14, 1998) (Comm'r Hebert, dissenting). One former commissioner asked, "How am I to reconcile that it is reasonable for the Commission to need more time but unreasonable for [a party requesting rehearing] to ask for a stay[?]." *Id.* (Comm'r Bailey, dissenting in part).

Petitioners find themselves in precisely that irreconcilable position: they have no way of knowing how long FERC will toll the time for rehearing, and meanwhile, pipeline construction has begun and will proceed during the tolling period. In some cases, FERC has waited more than 600 days to grant or deny a request. *See* Ex. D. Without a stay from this Court, irreparable harm will occur with no opportunity for judicial review. Once Atlantic Coast Pipeline, LLC ("Atlantic") exercises eminent domain, cuts mature forests, flattens miles of mountain ridges, and buries the pipeline on public and private property, the Court will be unable to restore the status quo. Consequently, this Court would be denied the ability to enter "an effective remedial order" to undo those harms—even if it

ultimately agrees with Petitioners that the Certificate Order is invalid. *Dean Foods*, 384 U.S. at 605 (explaining that the Seventh Circuit had jurisdiction to enjoin a proposed merger because "an effective remedial order, once the merger was implemented, would otherwise be virtually impossible, thus rendering the enforcement of any final decree … futile.").

FERC's Tolling Order forces Petitioners' members and the Court into an intolerable predicament. *See* Decls. of Pet'rs' Members, Ex. E. When the "legislature has provided appropriate resort to the courts" to correct "errors of law" committed by an administrative agency, "such judicial review would be an idle ceremony if the situation were irreparably changed" before courts had an opportunity to rule on the merits of a petitioner's claims. *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 10 (1942); *see also Dean Foods*, 384 U.S. at 605. Here, FERC's indiscriminate use of tolling orders puts the Court's review of FERC's actions at risk of being reduced to just such "idle ceremony." *Scripps-Howard*, 316 U.S. at 10.

If the Court concludes that it lacks jurisdiction over the Petition for Review in Case No. 18-1114, Petitioners respectfully request that it exercise its authority under the All Writs Act to protect its jurisdiction by granting a stay of construction authorized by the Certificate Order. *See Dean Foods*, 384 U.S. at 605. Such a stay

would allow FERC to resolve Petitioners' Rehearing Request without allowing irreparable harm to occur in the absence of judicial review.

II. Petitioners Satisfy the Requirements for a Stay.

A court's analysis whether to issue a stay pending review requires "consideration of four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

a. Petitioners Make a Strong Showing of Likelihood of Success on the Merits.

FERC's Certificate Order suffers from critical flaws that render it unlawful. FERC may only issue a certificate permitting an interstate natural gas pipeline after it has determined that the project is required by the public convenience and necessity. 15 U.S.C. § 717f(c)(1)(A). FERC implements the Natural Gas Act through its 1999 Certificate Policy Statement, but the agency disregards that policy in a systematic manner, ensuring approval of any project with signed precedent agreements (contracts for pipeline capacity).

Consistent with that practice, the first critical flaw in FERC's Certificate Order is that it based its finding of public benefit of the pipeline solely on

Atlantic's capacity contracts with its own corporate affiliates. In doing so, FERC ignored its own policy and refused to consider substantial evidence in the record showing that the precedent agreements between Atlantic and its affiliates are not reliable indicia of market demand.

A second critical flaw is that FERC authorized Atlantic's exercise of eminent domain to forcibly obtain the property of as many as 600 landowners without meaningful consideration of the harm that will result to those landowners. By so doing, FERC again contradicted its own policy.[4]

FERC's Certificate Order violates the Natural Gas Act. FERC failed to apply its own policy and ignored evidence in the record; therefore, the Commission lacked substantial evidence to support its conclusion that the pipeline meets the public convenience and necessity standard. These failures allow Atlantic to exercise eminent domain and cause environmental harm in violation of the Act's requirement that such harm only be allowed for projects required by the public convenience and necessity.

i. Statutory and Regulatory Background

Under the Natural Gas Act, a proponent of an interstate natural gas pipeline must obtain a "certificate of public convenience and necessity" from FERC. 15

[4] Petitioners identified numerous other defects in FERC's approval process in the Request for Rehearing, including claims that FERC failed to meet its obligations under the National Environmental Policy Act (NEPA).

U.S.C. § 717f(c)(1)(A). "FERC issues a certificate if it finds that the proposed project 'is or will be required by the present or future public convenience and necessity.'" *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 818 (4th Cir. 2004) (quoting § 717f(e)). This standard—not merely public use—must guide FERC's consideration of applications to construct new pipelines. If FERC cannot conclude that a pipeline is necessary based on substantial evidence, it may not authorize the taking of private property for that project.

FERC implements the Natural Gas Act through its 1999 Certificate Policy Statement ("Policy Statement"), which establishes the framework the agency must follow to determine whether a proposed project meets that standard. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,747 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (July 28, 2000). The Policy Statement establishes a balancing test that requires FERC to first measure any residual adverse impacts of the project after the proponent has, to the extent possible, minimized those impacts. *Id.* ¶ 61,745. Those impacts include effects on "landowners and communities." *Id.* The Policy Statement then requires FERC to balance the residual adverse impacts against "evidence of public benefits to be achieved." *Id.* Pipelines that impose adverse impacts will only be approved "where the public benefits to be achieved … outweigh the adverse impacts. *Id.* ¶ 61,747.

FERC must base its determination of public convenience and necessity on "substantial evidence." 15 U.S.C. § 717r(b). The substantial evidence standard requires "more than a mere scintilla, but less than a preponderance …." *N.C. Utils. Comm'n v. FERC*, 741 F.3d 439, 446 (4th Cir. 2014). "The substantial evidence inquiry turns ... on whether that evidence adequately supports [FERC's] ultimate decision," *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010), based on consideration of the record as a whole, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.").

The substantial evidence standard is functionally equivalent to the arbitrary and capricious standard under the Administrative Procedure Act, *James City Cty. v. EPA*, 12 F.3d 1330, 1337 n.4 (4th Cir. 1993), requiring an agency to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Agency action is arbitrary and capricious if the agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

ii. FERC Lacked Substantial Evidence of Market Demand to Support a Finding that Public Benefit Outweighed Adverse Impacts.

FERC acted arbitrarily and capriciously when it approved the ACP. First, it ignored its Policy Statement, which recognizes that "[t]he amount of capacity under contract … is not a sufficient indicator by itself of the need for a project…." Policy Statement, 88 FERC ¶ 61,744; *see also* Order Clarifying Statement, 90 FERC ¶ 61,390 ("[A]s the natural gas marketplace has changed, the Commission's traditional factors for establishing the need for a project, such as contracts and precedent agreements, may no longer be a sufficient indicator that a project is in the public convenience and necessity.").

Moreover, the Policy Statement acknowledged that problems created when precedent agreements are the sole indicator of need are exacerbated when those agreements are between affiliated companies. *See* Policy Statement, 88 FERC ¶ 61,744. ("Using contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates.") Contracts between affiliated companies create the risk of self-dealing to inflate perceived market demand and are not reliable indicators of the need for a project. *See id.* ¶ 61,748 ("A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate.").

The 1999 Policy Statement sought to remedy problems caused by FERC's historic reliance on precedent agreements as the sole indicator of market demand, one of the prime indicators of public benefit for a proposed project. To that end, the Commission established a list of factors to assess market demand. *See id.* ¶ 61,747. Those factors include, but are not limited to, "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market." *Id.*

Although a central purpose of the 1999 Policy Statement was to eliminate FERC's sole reliance on precedent agreements, the agency relied exclusively on such agreements to approve the ACP. *See* Certificate Order, 161 FERC ¶ 61,042 at P 63. ("Precedent agreements signed by Atlantic for approximately 96 percent of the project's capacity adequately demonstrate that the project is needed."). FERC also dismissed Petitioners' concern that contracts between affiliated companies are not reliable indicators of market demand. *See id.* at P 59 ("Moreover, the fact that five of the six shippers on the ACP Project are affiliated with the project's sponsors does not require the Commission to look behind the precedent agreements to evaluate project need.").

To justify its flawed approach, FERC improperly relied on language in the Policy Statement that "precedent agreements are still significant evidence of project need or demand." *Id.* at P 54. While precedent agreements may provide

evidence of demand, the Policy Statement makes clear that such agreements alone constitute insufficient evidence. *See* Policy Statement, 88 FERC ¶ 61,744. FERC plainly disregarded what its 1999 Policy Statement was intended to clarify: reliance on affiliate precedent agreements as the sole indicator of demand is improper.

FERC also wrongly contended that "it is current Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers." Certificate Order, 161 FERC ¶ 61,042 at P 54. The section of the Policy Statement cited by FERC does not discuss *current* policy as of 2017, but *previous* FERC policy—the very policy the 1999 Policy Statement replaced. *See* Policy Statement, 88 FERC ¶ 61,744 (discussing FERC's pre-1999 policy). FERC's ACP decision, therefore, improperly relied on a policy it explicitly rejected in 1999.

Several Commissioners have recently criticized FERC's sole reliance on precedent agreements. In February 2017, former Commission Chairman Norman Bay criticized the practice in his statement on the Northern Access Pipeline. *See Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (Feb. 3, 2017) (Comm'r Bay, separate statement) (observing that "focusing on precedent agreements may not take into account a variety of other considerations, including, among others: … whether the precedent agreements are largely signed by affiliates; or whether there

is any concern that anticipated markets may fail to materialize."). In October 2017, Commissioner LaFleur dissented to the Certificate Order for the ACP, urging the Commission to consider "whether evidence other than precedent agreements should play a larger role in our evaluation regarding the economic need for a proposed pipeline project." Certificate Order, 161 FERC ¶ 61,042 (Comm'r LaFleur, dissenting). And in January 2018, Commissioner Glick wrote in his dissent in FERC's PennEast pipeline decision that "[b]y itself, the existence of precedent agreements that are in significant part between the pipeline developer and its affiliates is insufficient to carry the developer's burden to show that the pipeline is needed." *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (Jan. 19, 2018) (Comm'n Glick, dissenting). He concluded that in such circumstances, "the Commission must consider additional evidence regarding the need for the pipeline." *Id.*

Not only did FERC disregard its current Policy Statement, it disregarded substantial evidence in the record undermining the reliability of Atlantic's precedent agreements as a proxy for market demand. First, expert evidence in the record showed that contracts supporting the ACP differ from earlier pipeline projects approved by FERC: Atlantic's agreements for 93 percent of the pipeline's contracted capacity are with affiliated companies that are also regulated utilities. *See* Pet'rs' Mot. for Evidentiary Hr'g 12-16, Attachs. 1-4 (June 21, 2017) (FERC

eLibrary No. 20170621-5160), Ex. F. Atlantic and the affiliated utilities holding contracts on the ACP are owned by parent companies—Dominion Energy, Duke Energy, or Southern Company—whose shareholders will profit from the pipeline. *See id.*

Table 1. ACP Affiliate relationships.

Parent Company	Percent Ownership of Atlantic Coast Pipeline, LLC	Subsidiary Shippers	Contracted Capacity
Dominion Resources, Inc.	48%	Virginia Power Services	300,000 Dt/day (20% of total capacity)
Duke Energy	47%	Duke Energy Progress Duke Energy Carolinas Piedmont Natural Gas	885,000 Dt/day (59% of total capacity)
Southern Company	5%	Virginia Natural Gas	155,000 Dt/day (10.3% of total capacity)

Atlantic Coast Pipeline, LLC, Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates 7-8, 12 (Sept. 18, 2015) (FERC eLibrary No. 20150918-5212) ("ACP Application"). This record shows that the ownership and financial structure behind the ACP creates a powerful

incentive for pipeline investment even if market demand is weak or absent. *See* Pet'rs' Mot. for Evidentiary Hr'g 18-19. This is especially true in light of the high guaranteed return embodied in the recourse rate FERC approved for the project in the Certificate Order. *See id.*, Attach. 4. Consistent with FERC's Policy Statement, expert evidence in the record demonstrates that FERC must look outside the precedent agreements to determine whether the ACP is necessary.

In its cursory dismissal of record evidence addressing the affiliated nature of Atlantic's contracts, FERC stated only that its "primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper" which, it observed, is not present for the ACP. Certificate Order, 161 FERC ¶ 61,042 at P 59. However, FERC failed to consider the primary issue: the risk that agreements between a pipeline developer and affiliated utilities, as opposed to arm's-length agreements between independent actors, are not suitable proxies for market demand. The lack of an arm's-length relationship between Atlantic and its subsidiary shippers should have—according to FERC's 1999 Policy Statement and evidence in the record—increased FERC's scrutiny of the affiliate agreements. FERC, however, disregarded the implications of those affiliate relationships.

Moreover, FERC failed to consider record evidence that market demand for the ACP is weak or nonexistent. According to Atlantic's application, 79% of the

pipeline's capacity will supply power plants. ACP Application at 6-8, 12 (Sept. 18, 2015) (FERC eLibrary No. 20150918-5212); Pet'rs' Mot. for Evidentiary Hr'g 12-16, Attachs. 1, 2, 3 & 4. Expert analysis in the record shows that demand for electricity—and consequently, the need for natural gas to fuel power plants—has leveled off in Virginia and North Carolina since the ACP's precedent agreements were signed in 2014. *See* Pet'rs' Mot. for Evidentiary Hr'g 19-29, Attachs. 1 & 5.

FERC never acknowledged that ACP's precedent agreements were three years old at the time it issued the Certificate Order. The record establishes that electricity load in the territories of Dominion Energy Virginia, Duke Energy Progress, and Duke Energy Carolinas will not experience the growth rates the utilities predicted in 2014, when they contracted for ACP capacity. *See id.* For Virginia, load forecasts from PJM Interconnection, the independent regional grid manager, are level for the next ten years, sharply contradicting the forecasts from Dominion Energy Virginia. *See id.* at 19-22, Attachs. 1 & 5. By 2027, PJM's forecast is the equivalent of almost two power plants fewer than the utility's forecast, undermining the claim that the ACP is necessary to fuel Dominion power plants in Virginia. *See id.* at 19-24, Attachs. 1 & 5. In North Carolina, forecasts from Duke Energy Progress and Duke Energy Carolinas have dropped considerably since 2014. *See id.* at 24-29, Attach 1. Furthermore, the Energy

Information Administration projects that demand for natural gas to fuel power plants in the Southeast will remain below 2015 levels until 2034. *See id.* at 17-18.

Record evidence also shows that existing pipeline capacity is adequate to meet natural gas demand in Virginia and North Carolina without the ACP. FERC gave this evidence only superficial consideration in its Certificate Order. *See* Certificate Order, 161 FERC ¶ 61,042 at P 56. An analysis from Synapse Energy Economics showed that even under a "high demand" scenario, the capacity of the existing pipeline system, with upgrades that FERC has now approved, would be adequate. *See* Pet'rs' Mot. for Evidentiary Hr'g 30-31, Attach. 6. FERC brushed aside the Synapse analysis, concluding that "long-term demand projections, such as those presented in the Synapse Study" are uncertain. Certificate Order, 161 FERC ¶ 61,042 at P 56. But FERC failed to consider that the Synapse Study modeled a range of demand projections to address that very uncertainty. FERC cannot resort to its generic position—market studies are unreliable because demand varies—to avoid engaging with expert studies that contradict its preferred outcome, particularly when it simultaneously disregards its Policy Statement and relies solely on precedent agreements among affiliated entities to establish the need for the project.

Synapse analyzed the potential to convert the Transco Mainstem, the largest North-South pipeline on the East Coast, to bidirectional flow to allow Marcellus

gas to move southward from Pennsylvania as far south as Alabama. *See* Pet'rs' Mot. for Evidentiary Hr'g 30-31, Attach. 6. Not only did FERC not address Synapse's analysis, it failed to acknowledge that it already approved the project that would complete the Transco conversion. *See* Order Issuing Certificate, *In re Transcon. Gas Pipe Line Co., LLC* 158 FERC ¶ 61,125 (Feb. 3, 2017). Despite clear evidence to the contrary, FERC summarily dismissed the Transco pipeline as not having enough available capacity to be a viable alternative to the ACP. *See* Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project under CP-15-554 et al. 3-4 to 3-5 (July 21, 2017) (FERC eLibrary No. 20170721-4000) ("Final EIS"); Certificate Order, 161 FERC ¶ 61,042 at P 57. But the record shows that the approved conversion project will move more Marcellus gas to the Southeast than ACP (1.7 bcf/day), and that gas would be available for end users like utilities in Virginia and North Carolina. *See id.* at P 4, 11. Moreover, FERC approved the Mountain Valley Pipeline in October 2017, another producer-backed project that will supply 2.0 bcf/day of Marcellus gas into the Transco system, confirming that this system has available capacity. *See* Order Issuing Certificates, *In re Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 6, 10 (Oct. 13, 2017) (FERC eLibrary No. 20171013-4002).

More recent evidence that Petitioners submitted to the record with their Rehearing Request confirms that market demand for the pipeline in Virginia and

North Carolina is weak or nonexistent. In September 2017, proceedings before the Virginia State Corporation Commission ("SCC") showed that Dominion Energy Virginia is relying on inflated electricity load forecasts. Questioning the utility's counsel, an SCC Commissioner observed that the utility's load forecast "appear[ed] to be always high year after year" and asked, "[W]hat is the Company going to do about refining it or redefining it to recognize that you shouldn't put too high a confidence level in that projection?" Rehearing Request at 28-29. Even Dominion Energy Virginia's own expert witness observed that load forecasts were declining across the industry as a result of new utility energy efficiency programs and utility standards. *See id.* at 29.

In North Carolina, the Duke Energy utilities sharply reduced their electricity load forecasts in 2017 in Integrated Resource Plans filed with the North Carolina Utilities Commission. *See id.* at 30-35. Decreasing electricity demand projections in North Carolina have been driven by increased energy efficiency, which could obviate the need for new gas-fired power generation in the state for the foreseeable future. *See id.* at 34-35. Because the ACP is primarily slated to fuel gas-fired power generation, the decline in demand for generation is central to the question whether the pipeline is needed. FERC failed to consider this issue.

In conclusion, FERC's decision "to not look behind precedent or service agreements to make judgments about the needs of individual shippers," Certificate

Order 161 FERC ¶ 61,042 at P 54, renders its finding of public benefit arbitrary and capricious because it "failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. To compound the problem, FERC not only ignored its 1999 Policy Statement, but it adhered to its arbitrary sole reliance on precedent agreements instead of meaningfully considering substantial evidence in the record. FERC's conclusory decision and inadequate review of the record led it to approve a project with questionable market support. That decision, in turn, allows Atlantic to exercise eminent domain and cause irreparable environmental harm.

iii. FERC Superficially Considered Adverse Impacts to Landowners.

In determining whether to issue a Certificate, FERC must assess the adverse impacts of the project—including effects on landowners and communities—and balance those impacts against evidence of public benefits. Policy Statement, 88 FERC ¶ 61,745. Here, FERC's finding that the public benefits of ACP outweigh the adverse impacts is not supported by substantial evidence, and its balancing analysis runs counter to the Policy Statement. FERC relied on Atlantic's purported minimization of impacts to landowners and communities from the use of eminent domain to find that the project's benefits outweigh its adverse impacts. In so doing, FERC failed to actually assess and balance the residual adverse impacts from the use of eminent domain against the ACP's supposed public benefits. FERC's

finding that the project is required by the public convenience and necessity is therefore arbitrary and capricious.

FERC's Policy Statement recognizes that landowners and communities along a pipeline's route have an interest in avoiding unnecessary construction and any adverse impacts to property that result from the use of eminent domain. Policy Statement, 88 FERC ¶ 61,748. The Policy Statement thus encourages applicants to minimize adverse impacts to those interests at the outset. *Id.* ¶ 61,745. FERC's review of an applicant's minimization efforts, however, "is not intended to be a decisional step in the process for the Commission." *Id.* Though FERC may suggest further minimization, "the choice of how to structure the project at this stage is left to the applicant's discretion." *Id.* The meaningful analysis comes *after* such minimization efforts: "If residual adverse effects … are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects." *Id.*; *see also id.* ¶ 61,749 ("[T]he more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance the adverse impact.").

Here, FERC relied entirely on Atlantic's purported minimization efforts to find that the ACP's public benefits outweigh its adverse impacts. FERC merely discussed measures Atlantic took to co-locate a small portion of its pipeline with

existing rights-of-way and to incorporate route variations "for various reasons, including landowner requests."[5] Certificate Order, 161 FERC ¶ 61,042 at P 65. FERC then found that "while we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Atlantic has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities." *Id.* Based on this conclusory determination, FERC resolved that "the benefits that the ACP Project will provide to the market outweigh any adverse effects on … landowners or surrounding communities." *Id.* at P 70.

FERC's evaluation of the considerable adverse impacts of Atlantic's use of eminent domain lacked any serious analysis. FERC did not address the number of landowners that would be affected or identify the amount, character, or categories of property to be taken, nor the impact that taking would have on surrounding communities. Its boilerplate conclusion provides no rational assessment of how or why any of the ostensible benefits outweigh the adverse impacts to landowners.

The residual impacts that FERC failed to assess are substantial. Approximately twenty percent of the 2,900 landowners in the path of ACP have

[5] FERC does not say, and it apparently did not analyze, how many of the 201 route variations that it touts were actually in response to landowners concerns, as opposed to Atlantic's own engineering needs or requests from state and federal agencies to avoid sensitive resources.

not reached voluntary agreements for easements across their property. John Murawski, *Atlantic Coast Pipeline to Take Landowners to Court to Clear Way for 600-Mile Project*, News Observer (Nov. 16, 2017), http://www.newsobserver.com/news/business/article184993198.html. In all, nearly 600 landowners will be subject to eminent domain proceedings. *See id.* The ACP has faced considerable opposition from landowners and communities along its path. *See, e.g.*, Michael Martz, *Gas Pipeline Faces Mountain of Opposition in Western Virginia*, Richmond Times Dispatch (Jan. 3, 2015), www.richmond.com/news/virginia/gas-pipeline-faces-mountain-of-opposition-in-western-virginia/article_2f830d85-f1ac-5e77-95e6-c25dafd66699.html.

Whether Atlantic has "generally taken sufficient steps to minimize adverse impacts," Certificate Order, 161 FERC ¶ 61,042 at P 65, does not answer the relevant question: whether the residual impacts are outweighed by the public benefits. Accordingly, FERC's application of its balancing test was arbitrary and capricious because it did not "examine the relevant data and articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43. FERC's subsequent conclusion that the public benefits of the ACP outweigh the adverse impacts lacks the support of substantial evidence and renders FERC's finding that the ACP is "required" by the public convenience and necessity arbitrary and capricious.

b. Petitioners Will Be Irreparably Injured Absent a Stay.

Construction of the ACP will cause imminent, significant, and permanent harm to the property and to the recreational and aesthetic interests of Petitioners' members. Once this harm occurs, it cannot be undone. Atlantic will seize private property, including farmland owned by families for generations; clear thousands of acres of mature forests, including stands of old growth trees; and blast and flatten miles of mountain ridges to build the ACP. *See* Certificate Order, 161 FERC ¶ 61,042 at P 65-66; Final EIS at 4-38; 4-44; 4-137; 4-167. It will trench through hundreds of waterways and wetlands, including mountain streams with vulnerable brook trout populations, permanently damaging these waterways. *See* Final EIS at 4-94; 4-100; 4-128; 4-213; 4-215; 4-243.

The Supreme Court and the Fourth Circuit recognize that this kind of environmental harm, "by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Amoco v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 201 (4th Cir. 2005). For example, courts in this Circuit have found that filling a stream valley constitutes irreparable harm because "the damage cannot be undone" and "money cannot rectify this type of loss." *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs*, 528 F.Supp. 2d 625, 631-32 (S.D.W. Va. 2007). And numerous courts have found that the cutting of mature

trees constitutes irreparable harm that warrants preliminary relief. *See, e.g.*, *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014); *Tioronda, LLC v. New York*, 386 F. Supp. 2d 342, 350 (S.D.N.Y. 2005). For these reasons, a stay is necessary to protect Petitioners' members from irreparable harm until the Court reviews the merits of FERC's decision to approve the pipeline.

FERC itself acknowledges that construction of the ACP will cause irreparable harm. *See, e.g.*, Final EIS at 4-75 (acknowledging permanent effects on soil resources that cannot be mitigated); 4-128 (describing the risk of substantial, long-term harm to water quality); 4-153 (identifying permanent harm to thousands of acres of mature forests). Petitioners submit 26 declarations from members whose land will be taken and degraded by Atlantic, who live near the proposed route, and who use national forest lands and other resources that will be harmed by the pipeline. Petitioners' members' declarations confirm the harm identified by FERC and describe in clear and compelling detail the harm each declarant would suffer without a stay. *See* Ex. E.

In one of the most striking examples of the harm that will occur from pipeline construction, Atlantic will blast and flatten Appalachian mountain ridges to establish working platforms to install the pipeline. *See, e.g.*, Final EIS at 4-38 ("Another source of project-induced landslides are narrow ridgetops that require widening and flattening to provide workspace in the temporary right-of-way."). In

one instance, the pipeline will run approximately 0.7 of a mile along the crest of Little Mountain in Bath County, Virginia, requiring that Atlantic lower the ridge by blasting, irreparably disfiguring the mountain. *See* W. Limpert Decl. ¶ 16, Ex. E. Below Little Mountain, the pipeline will cross more than a half mile of property owned by William Limpert, where it will require the clearing of a mature forest with trees that are hundreds of years old, before ascending another narrow, steeply sloped ridge, which will also be blasted and flattened. *See id.* ¶ 5, 11-13,17-21.

In total, 11,776 acres of land would be disturbed by construction. *See* Final EIS at 4-349. Furthermore, ACP has already begun eminent domain proceedings in the Western District of Virginia against some of Petitioners' members. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury from potentially wrongful exercise of eminent domain).

As courts have long recognized, no amount of money can recreate a mature forest, which will take hundreds of years to return after cutting, or restore an iconic Appalachian ridgeline once Atlantic blasts and flattens it. "Money can be earned, lost, and earned again; a valley once filled is gone." *Ohio Valley Envtl. Coal.*, 528 F. Supp. 2d at 632. The same is true of harm to the environment threatened by the construction of the ACP. Therefore, legal remedies cannot cure these harms, and a stay is justified.

c. Neither Atlantic nor FERC Will Be Substantially Injured by Issuance of a Stay.

A stay pending FERC's resolution of Petitioners' Rehearing Request is unlikely to result in any substantial injury to Atlantic, and certainly not to FERC. Atlantic will likely argue that delaying its construction schedule will result in economic harm. While such harm is relevant, any potential temporary harm to Atlantic's economic interests is outweighed by the irreparable harm to the environment caused by pipeline construction. *See Connaughton*, 752 F.3d at 766 (finding that temporary delay of one year resulting in economic harm to ski resort developer was not so substantial as to outweigh the irreparable environmental harm faced by plaintiffs). *See also Bair v. Cal. Dep't of Transp.*, No. C 10-04360 WHA, 2011 WL 2650896, at *8 (N.D. Cal. July 6, 2011) (irreparable harm to redwoods outweighed cost of delaying the project for a year as a result of time of year restrictions); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000) (finding irreparable harm of cutting old growth trees outweighed financial harm to Forest Service, companies, and local communities).

d. A Stay Pending a FERC Decision on Rehearing is in the Public Interest.

In cases involving preservation of the environment, the balance of harms generally favors the grant of injunctive relief. *See Amoco*, 480 U.S. at 545 ("If such injury is sufficiently likely ... the balance of harms will usually favor the issuance

of an injunction to protect the environment."). Here, construction impacts to forests, streams, and wetlands, and the resulting loss of ecological services they provide, constitute injury to the public interest in protecting natural resources pursuant to environmental and property protection laws.

Moreover, the public interest requires that the eminent domain power granted to Atlantic be exercised for the public benefit. The public, therefore, has an interest in FERC's compliance with the Natural Gas Act by its terms—public convenience and necessity—when it grants the extraordinary power of eminent domain to a private company.

Finally, as discussed above, the record demonstrates that there is no immediate need for the ACP to meet the region's energy needs, such that the public's interest in having adequate energy infrastructure would not be threatened by a stay. Indeed, the record establishes that the pipeline is completely unnecessary because there is sufficient capacity in current pipelines to transport natural gas most of the way to ACP's end-users.

CONCLUSION

Accordingly, Petitioners request that the Court, pursuant to the All Writs Act, stay construction authorized by FERC's Certificate Order for the Atlantic Coast Pipeline until fifteen days after FERC has issued a final order on Petitioners' Request for Rehearing.

Respectfully submitted,

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Dated: March 8, 2018

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 21(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 7,649 words.

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Dated: March 8, 2018

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 21(c), I hereby certify that, on March 8, 2018, a copy of the foregoing Petition was served by email and U.S. Mail first-class certified mail, return receipt requested, on the following parties:

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