ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1098 (consolidated with 17-1127, 17-1128, 17-1263, 18-1030)

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

ALLEGHENY DEFENSE PROJECT, *et al.*,
and
HILLTOP HOLLOW LIMITED PARTNERSHIP, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
ANADARKO ENERGY SERVICES COMPANY, *et al.*,
Intervenors.

On Petition for Review of Orders of the Federal Energy Commission,
158 FERC ¶ 61,125 (Feb. 3, 2017),
161 FERC ¶ 61,250 (Dec. 6, 2017), *et al.*

PETITIONERS' JOINT OPENING BRIEF

Benjamin A. Luckett
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
(304) 645-0125
bluckett@appalmad.org

Counsel for Allegheny Petitioners

Elizabeth F. Benson
Sierra Club
2101 Webster Street, Ste. 1300
Oakland, California 94612
(415) 977-5723
elly.benson@sierraclub.org

Siobhan K. Cole
White and Williams LLP
1650 Market Street, Suite 1600
Philadelphia, PA 19103
(215) 864-6891
coles@whiteandwilliams.com

Counsel for Hilltop Petitioners

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

In accordance with D.C. Cir. Rule 28(a)(1), Petitioners submit this certificate of parties, rulings, and related cases.

A. Parties and Amici

Petitioners[1]: Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. [Case Nos. 17-1098, 17-1263]; Geraldine Nesbitt [Case No. 17-1127]; Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC; Stephen D. Hoffman [Case Nos. 17-1128, 18-1030].

Respondent: Federal Energy Regulatory Commission [all cases].

Intervenors: Transcontinental Gas Pipe Line Company, LLC [all cases]; Anadarko Energy Services Company, Chief Oil & Gas LLC, ConocoPhillips Company, Southern Company Services, Inc. (agent of Alabama Power Company, Georgia Power Company Gulf Power Company, Mississippi Power Company, Southern Power Company) [Case No. 17-1098].

Amici Curiae: None.

[1] In addition to the parties listed, Allegheny Petitioners' Petition for Review also included Concerned Citizens of Lebanon County. Allegheny Petitioners have since discovered that Concerned Citizens of Lebanon County did not intervene in the underlying proceeding. Petitioners intend to file a motion for voluntary dismissal to remove Concerned Citizens of Lebanon County.

Rule 26.1 Disclosure Statement

Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. are non-profit organizations who have no parent companies, and there are no companies that have a 10 percent or greater ownership interest in them.

Allegheny Defense Project, a corporation organized and existing under the laws of Pennsylvania, is a nonprofit organization dedicated to the protection and restoration of the Allegheny Bioregion, including the Allegheny National Forest and other public lands in Pennsylvania.

Clean Air Council is a 501(c)(3) non-profit corporation whose mission is to serve as a collaborative dedicated to preserving and protecting clean air, land, and water as a civil and basic human right in the face of the threat posed by the shale gas extraction industry and other threats to human and environmental health.

Heartwood, a corporation organized and existing under the laws of the State of Indiana, is a nonprofit organization that works regionally to protect forests and support community activism in the eastern United States through education, advocacy, and citizen empowerment.

Lancaster Against Pipelines, a corporation organized and existing under the

laws of the Commonwealth of Pennsylvania, is a nonprofit organization dedicated to protecting farmland, forests, homes, and history of Lancaster County, Pennsylvania, from the Atlantic Sunrise Project.

Lebanon Pipeline Awareness, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is a nonprofit organization dedicated to protecting the rights, health, and safety of the residents of Lebanon County, Pennsylvania, from the Atlantic Sunrise Project.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a nonprofit organization dedicated to the protection and enjoyment of the environment.

Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. (AMP Creeks), is a 501(c)(4) non-profit corporation dedicated to protecting the environment, and ensuring the sustainability of natural resources and the basic human right to clean air and water.

Hilltop Hollow Limited Partnership is organized under the laws of Pennsylvania for the sole purpose of maintaining the property located at 415 Hilltop Road, Conestoga, PA 17516, which is the primary residence of Gary and Michelle Erb. Hilltop Hollow Limited Partnership has no parent companies, and there are no publicly held companies have a 10 percent or greater ownership interest in Hilltop Holow Limited Parnership.

Hilltop, LLC is a limited liability company organized and existing under the laws of Pennsylvania and is the general partner of Hilltop Hollow Limited Partnership. Hilltop, LLC has no parent companies and there are no publicly held companies that have a 10 percent or greater ownership interest in Hilltop, LLC.

B. Rulings Under Review.

The following five orders issued by Respondent Federal Energy Regulatory Commission are under review:

a. Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017) [JA-___].

b. Order Granting Rehearings for Further Consideration (March 13, 2017) (FERC Accession No. 20170313-3024) [JA-___].

c. Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017) (FERC Accession No. 20170915-3021) [JA-____].

d. Order Granting Rehearing for Further Consideration, Transcontinental Gas Pipe Line Company, LLC (Oct. 17, 2017) (FERC Accession No. 20171017-3050) [JA-___].

e. Order on Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017) [JA-___].

C. Related Cases.

This case has not previously been before this Court or any other court, and undersigned counsel is not aware of any other cases related to this case within the meaning of D.C. Cir. Rule 28(a)(1)(C).

On September 21, 2017, Hilltop Petitioners filed an appeal in the Third Circuit Court of Appeals for review of the Orders issued on August 23, 2017 by the Eastern District of Pennsylvania in Civil Action Nos. 5:17-cv-00715 and 5:17-cv-00723, which granted Transco's request for permanent injunctive relief condemning rights of way and easements pursuant to the same Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017), that is at issue in this case. That case, however, did not address the merits of the Certificate Order.

On May 5, 2016, Petitioner Lancaster Against Pipelines filed a petition in the Third Circuit Court of Appeals for review of the Pennsylvania Department of Environmental Protection's decision to grant a water quality certification under Section 401 of the Clean Water Act for the Atlantic Sunrise Project. *See Lancaster Against Pipelines v. Secretary, Pennsylvania Dep't of Environmental Protection* (3d Cir., Case No. 16-2212). On May 12, 2016, Petitioner Sierra Club filed a similar petition for review. *See Sierra Club v. Secretary, Pennsylvania Dep't of*

Environmental Protection (3d Cir., Case No. 16-2400). Those cases, however, involve a different defendant and different claims than are involved here.

On January 19, 2018, the North Carolina Utilities Commission filed a petition for review of the Certificate Order and Rehearing Order challenged in this case, but that case (Case No. 18-1018) involves a different petitioner and different claims than are involved here.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Constitutional Provisions

Administrative Documents

GLOSSARY

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Allegheny DEIS Comments	Allegheny Petitioners' Comments on the Federal Energy Regulatory Commission's Atlantic Sunrise Project Draft Environmental Impact Statement (June 27, 2016) (FERC Accession No. 20160627-5296)
Allegheny Petitioners	Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc.
Certificate Order	Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017)
Draft EIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
EPA DEIS Comments	Comments of the United States Environmental Protection Agency on the Atlantic Sunrise Project Draft Environmental Impact Statement (June 27, 2016) (FERC Accession No. 20160706-0052)
Final EIS	Final Environmental Impact Statement
FERC or the Commission	Federal Energy Regulatory Commission
Hilltop Petitioners	Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, and Stephen D. Hoffman
Landowners	Hilltop Petitioners
NEPA	National Environmental Policy Act

Notice to Proceed	Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017) (FERC Accession No. 20170915-3021)
Petitioners	Allegheny Petitioners and Hilltop Petitioners
Policy Statement	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)
Project	Atlantic Sunrise Pipeline Project
Rehearing Order	Order on Rehearing, *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017)
Rehearing Request	Allegheny Petitioners' request for rehearing and motion for stay of the Certificate Order (Feb. 10, 2017)
Request for Revised or Supplemental EIS	Allegheny Petitioners' comments regarding the need for a Revised or Supplemental Draft EIS for the Atlantic Sunrise Project (Oct. 10, 2016)
Transco	Transcontinental Pipe Line Company, LLC
Transco Application	Application for Certificate of Public Convenience and Necessity (Atlantic Sunrise Project) (March 31, 2015)

JURISDICTIONAL STATEMENT

In accordance with 15 U.S.C. § 717r(b), Allegheny Defense Project, Clean Air Council, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, Sierra Club, and Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. (collectively "Allegheny Petitioners"), and Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman (collectively "Hilltop Petitioners"), who were intervenors in the proceedings below, seek review of five orders issued by the Federal Energy Regulatory Commission ("FERC" or the "Commission").

The first order, issued on February 3, 2017 under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(c), authorized Transcontinental Pipe Line Company, LLC ("Transco") to construct and operate the Atlantic Sunrise Pipeline Project ("Project"). *See Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017) [JA-___][2] ("Certificate Order"). Allegheny Petitioners and Hilltop Petitioners timely filed requests for rehearing and stay of the Certificate Order on February 10 and March 6, 2017, respectively. [JA-___],[3] [JA-___]. On March 13, 2017, the Commission Secretary issued an Order Granting Rehearing for Further Consideration, or "tolling order," that purported to grant rehearing for the limited

[2] "[JA-___]" refers to pages of the Joint Appendix.
[3] Petitioner Accokeek, Mattawoman, Piscataway Creeks Communities Council Inc. timely filed a request for rehearing and stay on February 24, 2017. [JA-___].

purpose of further consideration. [JA-___]. Because the tolling order was invalid, Petitioners considered the Certificate Order to be a final order and timely filed petitions for review on March 23, 2017 (Case No. 17-1098) and May 12, 2017 (Case No. 17-1128). The Commission and Transco filed motions to dismiss for lack of jurisdiction, arguing that the Certificate Order was not final. On September 21, 2017, the Court ordered that those motions be referred to the merits panel, and directed the parties to address the jurisdictional issues in their briefs.

On December 6, 2017, FERC issued an order denying Petitioners' rehearing requests.[4] No party disputes that FERC has issued a final order in the proceedings below and that FERC's Certificate Order is now properly subject to judicial review in this Court pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).[5]

Following FERC's issuance of its final Rehearing Order, on December 15, 2017, Allegheny Petitioners filed a second petition for review (Case No. 17-1263). In addition to challenging the Certificate Order and Rehearing Order, this petition timely sought review of FERC's September 15, 2017 letter order, or "Notice to

[4] *Transcontinental Gas Pipe Line Company, LLC*, 161 FERC ¶ 61,250 (Dec. 6, 2017) [JA-____] ("Rehearing Order").

[5] Because the Court's jurisdiction over the Certificate Order is no longer in question, Petitioners do not directly address the jurisdictional issues in this brief.

Proceed,"[6] authorizing construction of greenfield pipeline in Pennsylvania, and October 17, 2017 "tolling order"[7] issued in response to Petitioners' request for rehearing of the Notice to Proceed. On January 29, 2018, Hilltop Petitioners also filed a second petition for review (Case No. 18-1030).

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF ISSUES

1. Whether the Commission's failure to adequately analyze the significance and cumulative impact of downstream greenhouse-gas emissions from burning 1.65 billion cubic feet per day of gas for several decades – including the Commission's reliance on an invalid "partial offset" assumption to dismiss these greenhouse-gas and climate effects as insignificant, as well as its failure to consider the greenhouse-gas effects of the Southeast Market Pipeline as a connected or cumulative action – violates NEPA, violates CEQ regulations, and is arbitrary and capricious.

2. Whether the Commission deprived Allegheny Petitioners of procedural due process rights guaranteed by the Fifth Amendment to the United States Constitution by issuing the Notice to Proceed with pipeline construction and

[6] Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards (Sept. 15, 2017) [JA-___].
[7] Order Granting Rehearing for Further Consideration (Oct. 17, 2017) [JA-___].

tolling orders before issuing a final ruling on their requests for rehearing, thus depriving Petitioners of an opportunity to be heard at a meaningful time and in a meaningful manner.

3. Whether the combined application of sections 717f(h) and 717r(a) of the Natural Gas Act, the Federal Energy Regulatory Commission's March 13, 2017 Order, and Section 713(e) of FERC's Rules of Practice and Procedure affect an improper taking of the Hilltop Petitioners' private property without respect for their due process rights, as guaranteed by the Fifth Amendment to the United States Constitution, by depriving Petitioners of their right to be heard at a meaningful time and in a meaningful manner as to whether the proposed taking of their property is truly for a public use.

4. Whether FERC lacked substantial evidence to conclude in its Certificate Order that the Project is required by the public convenience and necessity pursuant to Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(e), and its own Certificate Policy Statement, 88 FERC ¶ 61,227, because FERC failed to adequately and independently evaluate the public need for the Project.

5. Whether FERC's February 3, 2017 Order granting a certificate of public convenience and necessity is arbitrary and capricious pursuant to Section 7 of the Natural Gas Act because FERC failed to adequately and independently

evaluate proposed alternate routes for the project, which would result in a lesser impact than the proposed current route.

STATEMENT OF THE CASE

In March 2015, Transco filed its application with FERC for a certificate of public convenience and necessity for the Atlantic Sunrise Project. [JA-___]. The Project involves Transco's plan to reconfigure its mainline to transport gas from the Marcellus and Utica formations in northern Pennsylvania to the Southeast and Gulf Coast regions. As part of the Project, Transco is constructing nearly 200 miles of large-diameter pipeline across Pennsylvania to carry gas from production areas to the mainline. Certificate Order at ¶¶5, 6 [JA-___]. The primary stated purpose of the Project "is to increase firm incremental transportation service on the Transco system by 1,700,002 dekatherms (Dth) per day." *Id.* at ¶1 [JA-___].

On October 22, 2015, FERC advised Hilltop Petitioners that numerous alternative routes, including Central Penn Line South Alternative 22, were under consideration and, if adopted, would cut through their properties. In response, the principals of Hilltop, Gary and Michelle Erb, filed or joined eight comments between November 16, 2015 and January 31, 2017, each of which highlighted the advantages of another alternate route known as the Conestoga Alternative Route.

FERC issued a Draft Environmental Impact Statement ("EIS") on May 5, 2016 [JA-___], and Allegheny Petitioners filed responsive comments on June 27,

2016. [JA-___]. On October 10, 2016, Allegheny Petitioners also filed comments regarding the need for a revised or supplemental Draft EIS for the Project [JA-___].

On October 13, 2016, FERC advised Hilltop Petitioners of additional proposed route changes in the pipeline. In response, Hilltop Petitioners (Stephen D. Hoffman) filed two comments on October 17 and 19, 2016. Those comments noted that placing the pipeline on their property would jeopardize a Native American archeological site (Site 336LA55) and highlighted the advantages of the Conestoga Alternative Route.

On December 30, 2016, FERC issued a Final EIS. [JA-___]. In the EIS, FERC estimated the greenhouse-gas emissions from burning 1.65 billion cubic feet of gas per day. EIS at 4-318 [JA-___]. But FERC concluded that because increased production and distribution of gas might displace some use of coal and fuel oil, operation of the Project would not significantly contribute to greenhouse-gas cumulative effects or climate change. *Id.*

On February 3, 2017, FERC issued its Certificate Order granting Transco's application. [JA-___]. In evaluating the public need for the Project, FERC relied solely on the fact that Transco entered contracts with gas shippers for all of the Project's anticipated capacity. Certificate Order ¶¶28-29 [JA- ___]. In rejecting the Conestoga Alternative Route, FERC stated only that the route "would be slightly

shorter, but would cross more recreation areas/preserved lands and waterbodies than the corresponding segment of the proposed route," in support of its conclusion that the route "is not environmentally preferable to the proposed Route." *Id.* at ¶157 [JA-___].

On February 10 and March 6, 2017, Allegheny Petitioners and Hilltop Petitioners, respectively, timely filed requests for rehearing and stay.[8] [JA-___], [JA-___].

On March 13, 2017, FERC (while lacking a quorum) issued a "tolling order" purporting to grant the requests for rehearing for purposes of further consideration [JA-___]. Because the tolling order was invalid, and Petitioners' requests were thus denied by operation of law pursuant to 15 U.S.C. § 717r(a), Allegheny Petitioners and Hilltop Petitioners filed petitions for review of the Certificate Order on March 23, 2017 and May 12, 2017, respectively.[9] On April 28, 2017 and May 12, 2017, respectively, FERC and Transco filed motions to dismiss for lack of jurisdiction, arguing that the Certificate Order was not final. On September 21, 2017, the Court ordered that the motions to dismiss be referred to the merits panel, and directed the parties to address in their briefs the jurisdictional issues presented in the motions.

[8] Petitioner Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. timely filed a request for rehearing and stay on February 24, 2017. [JA-___].
[9] Allegheny Petitioners filed an amended petition on April 19, 2017 that added Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. as a petitioner.

On August 31, 2017, FERC denied Allegheny Petitioners' request for stay. [JA-___]. On September 22, 2017, Allegheny Petitioners filed with FERC a request for rehearing of its letter order, or "Notice to Proceed," authorizing pipeline construction to proceed in Pennsylvania, which included a request to stay construction [JA-___]. FERC issued a tolling order in response to this rehearing request on October 17, 2017, and denied it on March 1, 2018. [JA-___]. Thus, FERC's procedure provided for construction for nearly six months between the Notice to Proceed and its final ruling.

On October 30, 2017, Allegheny Petitioners filed an emergency motion for stay in Case No. 17-1098. After issuing a temporary administrative stay to provide sufficient opportunity to consider the motion, the Court denied the motion on November 8, 2017, and referenced the jurisdictional issues raised in the then-pending motions to dismiss.

On December 6, 2017, FERC issued an order denying Petitioners' requests for rehearing on the Certificate Order. [JA-___]. Allegheny Petitioners filed their petition for review of the Certificate Order, Notice to Proceed and associated tolling order, and Rehearing Order in this Court on December 15, 2017 (Case No. 17-1263). Allegheny Petitioners filed a motion for stay on January 16, 2018, which this Court denied on February 16, 2016. Hilltop Petitioners filed their appeal of the Certificate Order and Rehearing Order in this Court on January 29, 2018 (Case No.

18-1030).

SUMMARY OF ARGUMENT

First, FERC failed to adequately assess the downstream greenhouse-gas and climate effects of burning an additional 1.65 billion cubic feet of gas per day. FERC incorrectly asserted that downstream emissions were not causally connected to its decision to approve the Project. Although FERC estimated greenhouse-gas emissions from burning this amount of gas, it refused to engage in the required discussion of their significance and cumulative impact. Instead, FERC's EIS summarily dismissed downstream effects as insignificant, relying on an invalid and unsupported assumption that portions of the gas would potentially displace higher-emitting fuels such as coal and fuel oil. FERC also failed to consider the greenhouse-gas effects of the Southeast Market Pipeline as a connected or cumulative action, despite the physical, temporal, and economic connection between the projects.

Second, FERC's actions deprived Allegheny Petitioners of due process. Allegheny Petitioners have protectable interests, including under the Pennsylvania Constitution's Environmental Rights Amendment, and the Natural Gas Act provides them with a procedure to protect these interests. But FERC directly harmed these interests, including by issuing the tolling orders and the Notice to Proceed with construction before issuing final orders on Allegheny Petitioners'

rehearing requests. In so doing, FERC deprived Petitioners of their right to be heard "at a meaningful time and in a meaningful manner" as guaranteed by the Fifth Amendment to the U.S. Constitution. *See Mathews v. Eldridge,* 424 U.S. 319, 333 (1976).

Third, FERC failed to adequately and independently evaluate the public need for the Project by relying solely on the existence of contracts for the pipeline capacity, known as "precedent agreements," to determine the public need for the Project and by assuming that the majority of the natural gas transported by the pipeline will be consumed domestically when evidence shows that the gas is actually slated for foreign export.

Fourth, Hilltop Petitioners' due process rights were violated by the combined application of sections 717f(h) and 717r(a) of the Natural Gas Act, FERC's Rules of Practice and Procedure, FERC's issuance of the tolling order, and the exercise of the quick take power of eminent domain by the Eastern District of Pennsylvania based on the Certificate Order.

Finally, FERC failed to consider viable alternative routes for the Project, including the Conestoga Alternative Route, that would have greatly reduced the negative impacts of the Project.

Based on these numerous failures, FERC's decision to issue the certificate of public convenience and necessity is contrary to the public interest and is arbitrary and capricious. Therefore, the certificate should be vacated.

STANDING

Allegheny Petitioners are non-profit organizations with members who reside, work, and recreate in the areas that will be affected by the Project. *See* Member Declarations (Add. 27–107).[10] The construction, maintenance, and operation of the Project will cause Allegheny Petitioners concrete, particularized, and imminent harm, which this Court can redress by setting aside the Commission's NEPA analysis, remanding it to the agency, and vacating the certificate based upon it. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 306 (D.C. Cir. 2013) ("[v]acatur of the [] order would redress the [environmental petitioners'] members' injuries because, if the [agency] is required to adequately consider each environmental concern, it could change its mind about authorizing" the Project). A decision by this Court vacating FERC's Certificate Order for failure to comply with NEPA would redress these injuries "regardless [of] whether the [NEPA violation] relates to local or global environmental impacts." *Id.* at 307; *see also Sierra Club v. FERC*, 827 F.3d 36, 44 (D.C. Cir. 2016).

[10] "(Add. ___)" refers to the Addendum attached to this brief.

Hilltop Petitioners are landowners whose property was taken by eminent domain pursuant to the Certificate Order. *See Carpenter Tech. Corp. v. City of Bridgeport*, 180 F.3d 93, 97 (2d Cir. 1999) (finding threat of irreparable injury presented by potentially wrongful exercise of eminent domain). Vacatur of the Certificate Order would allow them to keep their property.

ARGUMENT

I. STANDARD OF REVIEW

Judicial review of agency actions under NEPA is available "to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1312-13 (D.C. Cir. 2014) (*citing Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97-98 (1983)). Although the standard of review is deferential, "[s]imple, conclusory statements of 'no impact' are not enough to fulfill an agency's duty under NEPA." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154 (D.C. Cir. 1985). The agency must comply with "principles of reasoned decisionmaking, NEPA's policy of public scrutiny, and [the Council on Environmental Quality's] own regulations." *Id.* (citations omitted). And under the applicable arbitrary and capricious standard of review,

> the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of

> the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has 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. The reviewing court should not attempt itself to make up for such deficiencies: We may not supply a reasoned basis for the agency's action that the agency itself has not given.

Del. Riverkeeper Network, 753 F.3d at 1313, *citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted).

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 scintilla, but can be satisfied by something less than a preponderance …." *FPL Energy Me. Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C. Cir. 2002). The standard is functionally the same as the arbitrary and capricious standard. *Crooks v. Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016).

Appellate review of constitutional due process claims is *de novo*. *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009).

II. FERC'S FAILURE TO ADEQUATELY ANALYZE DOWNSTREAM GREENHOUSE-GAS AND CLIMATE EFFECTS VIOLATES NEPA AND IS ARBITRARY AND CAPRICIOUS.

The Project will provide "*additional*" capacity to deliver 1.65 billion cubic feet per day (bcf/d) of natural gas. EIS at 1-2 [JA-___] (emphasis added). Burning

that gas would emit 32.9 million metric tons per year of carbon dioxide. *Id.* at 4-318 [JA-___]. Although FERC's EIS acknowledges these facts, FERC undermines these disclosures, and violates NEPA, by a) arguing that downstream combustion impacts are not causally connected to its Project approval because "end-use would occur with or without this project," Certificate Order at ¶138 [JA-___], b) speculating that even if additional gas is burned, the resulting emissions may be partially offset by decreases in other emissions, and c) concluding on that basis that downstream greenhouse-gas and climate effects are not significant.

A. FERC'S Conclusion that Downstream Greenhouse-Gas Emissions Are Not Indirect Effects was Arbitrary and Capricious.

NEPA requires that agencies develop high-quality information on a project's effects, including potentially significant indirect effects. 40 C.F.R. §§ 1500.1(b), 1500.2(b), 1502.16(b). Indirect effects "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). Effects are reasonably foreseeable if they are "sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted).

In the gas pipeline context, downstream greenhouse-gas emissions are quintessential indirect effects, because such emissions predictably result from building and operating a pipeline whose sole purpose is to transport gas that will be

burned by end-users. *See Sierra Club v. FERC*, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017). Here, FERC found that the Project will "increase firm incremental transportation service" by 1,700,002 dekatherms per day, Certificate Order at ¶1 [JA-___], and that additional gas "transported by the Project would be combusted by downstream uses." EIS at CO-76 [JA-___]. This downstream combustion of the gas transported by the Project is not just "reasonably foreseeable," it is the Project's entire purpose. *See* EIS at 1-2 [JA-___]; Certificate Order ¶¶28-30 [JA-___-___]; Transco Application at 18 [JA-___]. *See City of Davis v. Coleman*, 521 F.2d 661, 677 (9th Cir. 1975) ("The argument that the principal object of a federal project does not result from federal action contains its own refutation."). And "[i]t is just as foreseeable … that burning natural gas will release into the atmosphere the sorts of carbon compounds that contribute to climate change." *Sierra Club*, 867 F.3d at 1371–72.

FERC is thus a "legally relevant cause" of this downstream gas combustion, and the resulting climate effects. *Id.* at 1373. FERC nonetheless determined, incorrectly, that "downstream combustion impacts did not meet the definition of indirect impacts." Rehearing Order at ¶92 [JA-___]. FERC provides no explanation as to how its conclusion that this Project would provide *additional* gas supply can be reconciled with its assertion that "downstream combustion of gas is not causally connected because … end-use would occur with or without this

Project." Certificate Order at ¶138 [JA-___]. This assumption is irrational. *See WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1235-36, 1238 (10th Cir. 2017) (rejecting "irrational and unsupported" assumption that if agency rejected a proposed coal lease, the same amount of coal would be mined elsewhere, such that greenhouse-gas emissions would be the same under the proposed action and no-action alternative); *id.* at 1237 ("failing to adequately distinguish between [the preferred and no-action] alternatives defeated NEPA's purpose").

The fact that this Project's capacity is not currently slated for delivery to specific power plants does not meaningfully distinguish *Sierra Club*. *See* Rehearing Order at ¶92 n.209 (arguing that here, unlike in *Sierra Club*, transported gas would not be "delivered to specific destinations"); *but see* Certificate Order at ¶30 [JA-___-___] (describing project shippers' stated uses for project capacity). Uncertainty regarding the ultimate destination of some of the gas does not change the fact that FERC is a legally relevant cause of a Project that will provide "about 1.65 billion cubic feet per day (bcf/d) of *additional* firm transportation capacity"—and thus a relevant cause of the combustion of that transported gas. EIS at 1-2 [JA-___] (emphasis added). *See also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003).

B. The Record Does Not Support FERC's Conclusion that the Project's Greenhouse-Gas and Climate Impacts Are Insignificant.

1. Quantifying Downstream Emissions Does Not Satisfy FERC's Duty to Assess Significance and Cumulative Impacts

Despite clear NEPA mandates, FERC refused to take a hard look at the Project's downstream greenhouse-gas effects. FERC's EIS estimated the Project's "full-burn" emissions at 32.9 million metric tons of carbon dioxide per year, but did not provide *any* meaningful discussion regarding this estimate.[11] *See* EIS at 4-318 [JA-___]. This is a staggering amount of greenhouse-gas emissions for a single project, equivalent to the emissions from 8.1 coal-fired power plants in one year, or 7,044,968 passenger vehicles driven for one year.[12]

FERC nonetheless failed to engage in the required "discussion of the 'significance' of this indirect effect, *see* 40 C.F.R. § 1502.16(b), as well as 'the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions'" (*i.e.*, cumulative impact). *Sierra Club*, 867 F.3d at

---

[11] FERC mentions earlier in the EIS that Pennsylvania's 2005 GHG inventory "determined statewide GHG emissions were 313 million metric tons of CO_{2e}." EIS at 4-317 [JA-___]. FERC does not explain why it uses information that is more than a decade old, or include any discussion whatsoever regarding conclusions to be drawn from this information (such as why a *single project* with greenhouse-gas emissions equivalent to 10.5 percent of the emissions for the *entire state* is purportedly insignificant). Instead, the EIS simply dismisses these downstream effects based on a conclusory statement, devoid of data or analysis, that partial offset of emissions may occur.

[12] *See* EPA, Greenhouse Gas Equivalencies Calculator, *available at* https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator.

1374 (citation omitted). Despite FERC's protestations to the contrary, *see* Rehearing Order at ¶92 [JA-___], simply estimating full-burn emissions in the EIS, *and then summarily dismissing their impact as insignificant based on an unsupported "partial offset" assumption*, does not satisfy this NEPA duty. *See, e.g.*, *WildEarth Guardians*, 870 F.3d at 1228, 1237 (agency's approval of coal leases was arbitrary and capricious even though it quantified downstream emissions because, although agency "has not completely ignored the effects of increased coal consumption, … it has analyzed them irrationally"); *Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008) (analysis inadequate where agency "quantifie[d] the expected amount of CO_2" but failed to "evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally in light of other past, present, and reasonably foreseeable actions"). *See also Sierra Club*, 867 F.3d at 1368 ("the agency action [an EIS] undergirds is arbitrary and capricious[] if the EIS does not contain 'sufficient discussion of the relevant issues'" (internal citations omitted)). The Certificate and Rehearing Orders do not remedy the EIS's deficient analysis.[13] *See also Ill. Commerce Comm'n v. Interstate Commerce*

[13] In the Rehearing Order, FERC claims the *Sierra Club* decision caused it to "reevaluate[] the GHG emissions" by comparing the Project's emissions to the combined fossil fuel combustion inventory of *sixteen states* that could receive gas supplied by the Project, and to the national greenhouse-gas inventory. Rehearing Order at ¶94 [JA-___]. *But see Sierra Club*, 867 F.3d at 1374 (recommending

Comm'n, 848 F.2d 1246, 1258 (D.C. Cir. 1988) ("The Commission may not delegate to parties and intervenors its own responsibility to independently investigate and assess the environmental impact of the proposal before it.").

FERC also failed to discuss or use any available tools to "analyze[] the climate change impact of emitting millions of metric tons of carbon dioxide." Rehearing Request at 34 [JA-___]. *See also* 40 C.F.R. § 1508.7. "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Ctr. for Biological Diversity*, 538 F.3d at 1217. Nonetheless, FERC failed to take a hard look at *this Project's* climate impacts. *See id*. (fact that climate change is a global phenomenon does not release agency from duty of assessing effects of *its* action on climate change). FERC did not employ or even discuss any available methodology for assessing the climate impact of the Project's greenhouse-gas emissions. *See Sierra Club*, 867 F.3d at 1375 (directing FERC to address Social Cost of Carbon tool on remand). Nor did it provide any reasons for its failure to do so. *Id.* FERC should

---

comparison to "national emissions-*control goals*" (emphasis added)); Rehearing Order at ¶92 n.209 [JA-___] (gas transported by the Project "will be delivered to markets along Transco's pipeline system in *seven states*, as well as to interconnects with existing pipelines serving Florida markets" (emphasis added)). This appears to be a thinly veiled attempt to downplay the magnitude of the Project's emissions by comparing them to an inflated "regional" baseline that is almost half of the national greenhouse-gas inventory. *See id*. at ¶94, n.215, 216 [JA-___]. *See also* EPA Draft EIS Comments, Enclosure 1 at 8 [JA-___]. In any event, FERC declined to revisit the EIS's conclusion that potential partial offset rendered downstream emissions insignificant.

have disclosed any limitations of available tools rather than decline to use them. *See Ctr. for Biological Diversity*, 538 F.3d at 1201; *see also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549–50 (citing 40 C.F.R. § 1502.22).

2. FERC's Speculation That Downstream Greenhouse-Gas Emissions Could Be Partially Offset Does Not Support FERC's Conclusion That These Emissions are Insignificant.

FERC's EIS maintains that although full combustion of the gas the pipeline can transport would emit 32.9 million metric tons per year of carbon dioxide, the net impact will be lower—and insignificant—because some of this gas might be used in lieu of other fossil fuels. EIS at 4-318 [JA-___]. In support of this assertion, the EIS provides the following three sentences:

> Because fuel oil and coal have been and remain widely used as an alternative to natural gas in the region, increased production and distribution of natural gas would *likely* displace *some* use of higher carbon emitting fuels. This would result in a *potential* reduction is [sic] regional GHG emissions. ***Therefore, we conclude that neither construction nor operation of the Project would significantly contribute to GHG cumulative effects or climate change.***

Id. (emphases added). This cursory statement constitutes the EIS's entire assessment of the significance and cumulative impact of the Project's massive downstream emissions. FERC failed to provide any analysis of the extent (if any) to which the Project would lead to a reduction in the use of other fossil fuels; the impacts of such a reduction; or the countervailing impact of displacement of use of

renewable energy. Absent any discussion of these issues, FERC's assertion that partial offset of other emissions would reduce the net climate impacts of the Project to insignificance is arbitrary.

FERC claims that "any estimate provided for this offset would be too uncertain, given the many variables involved." Rehearing Order at ¶95 [JA-___]. *But see* Certificate Order at ¶30 [JA-___-___]; EIS at CO-76 [JA-___]. The record provides no support for this conclusion: FERC did not attempt to estimate or otherwise assess the degree of anticipated fuel displacement or emissions offset, nor did FERC provide any discussion of specific factors that would preclude such an analysis. The uncertainty that FERC relies on exists because FERC refused to study the issue. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) ("an agency must fulfill its duties to 'the fullest extent possible'"); *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("Reasonable forecasting and speculation is … implicit in NEPA.").

Insofar as FERC concludes there is no basis for estimating the emissions offset, then there is no basis to support FERC's conclusion that the offset will be large enough to reduce net climate impacts to insignificance. FERC provides no evidentiary support for its claim that downstream "emissions are likely to be significantly lower than" the 32.9 million metric tons per year estimate—or that

this unspecified lower amount would be insignificant. Certificate Order at ¶143 [JA-___]. *See Ctr. for Biological Diversity*, 538 F.3d at 1223 (agency's conclusion that a reduction "in the growth of carbon emissions would not have a significant impact … was unaccompanied by any analysis or supporting data"); 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."). Moreover, given the size of the project and its downstream emissions,[14] even if a large percentage of downstream emissions are offset, the remaining net increase in emissions could be sufficiently large to warrant denying the Project because it is "too harmful to the environment." *Sierra Club*, 867 F.3d at 1373.

FERC's discussion of potential offset was not merely a caution to the public about the accuracy of FERC's downstream estimate, or a disclosure of assumptions or uncertainties so the reader could "take the resulting estimate[] with the appropriate amount of salt." *Id.* at 1374. Rather, FERC simply asserted in a conclusory fashion that partial offset could occur, and then *based its significance finding entirely on this unsupported conjecture*.

NEPA does not allow agencies this type of informational dodge. This Court has squarely rejected FERC's reliance on a "partial offset" approach to dismiss a pipeline's downstream impacts—even where there was evidence that portions of

[14] *See* footnote 12, *supra*, and accompanying text.

the transported gas would, in fact, "be employed to reduce coal consumption." *Sierra Club*, 867 F.3d at 1375. There, the project developers indicated the pipeline would allow utilities to retire specific coal-fired power plants, thereby offsetting some regional greenhouse-gas emissions. *Id*. at 1364, 1375. After noting that an EIS must discuss impacts "resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial," the Court explained:

> An agency decisionmaker reviewing this EIS would thus have no way of knowing whether total emissions, on net, will be reduced or increased by this project, or what the degree of reduction or increase will be. In this respect, then, *the EIS fails to fulfill its primary purpose*.

Id. at 1375 (emphasis added). The same is true here. The EIS suffers from the same fundamental defect, while providing even less evidentiary support of offset. As in *Sierra Club*, FERC states that some unspecified portion of the gas could displace higher-emitting fuels, which would potentially reduce regional greenhouse-gas emissions—but makes no attempt to assess the anticipated degree of reduction or increase in total emissions, or the consequent climate impacts. Instead, the EIS simply dismisses this serious environmental impact in one short, conclusory paragraph that downplays the impact as insignificant when, in fact, FERC has failed to undertake any sort of analysis showing that to be the case. Because the public and decisionmakers are left in the dark as to the magnitude and

consequences of the total downstream emissions resulting from the Project, the EIS "fails to fulfill its primary purpose." 867 F.3d at 1375.

3. The Certificate and Rehearing Orders Do Not Remedy the EIS's Fatal Deficiencies

The Certificate and Rehearing Orders add another, equally flawed offset argument. FERC claims (again without any evidentiary support) that "gas transported by the project may also displace gas that otherwise be [sic] transported via different means, resulting in no change in emissions." Rehearing Order at ¶95 [JA-___]. *See also* Certificate Order at ¶143 [JA-___]. But Transco's application states that "Project Shippers will use the capacity under the Project to provide access on a firm basis to *new sources* of gas supply, and to serve the *incremental growth* requirements of natural gas markets, not to displace existing transportation providers." Transco Application at 15 [JA-___] (emphasis added). FERC's speculation that some fraction of the gas transported by the Project will displace gas consumption that would have occurred anyway lacks record support. Moreover, it does not support FERC's conclusion that the Project's net climate impacts will be not be significant (and do not warrant denial of the proposal).

Other courts have rejected agencies' unsupported speculation that projects that expand access to fossil fuels would not increase fossil fuel use, instead merely replacing or substituting for other consumption. In *WildEarth Guardians*, the Tenth Circuit rejected an agency's "irrational and unsupported" assumption that

issuing coal leases "would not result in higher national carbon dioxide emissions than would declining to issue them" because, according to the agency, "even if it did not approve the proposed leases, the same amount of coal would be sourced from elsewhere." 870 F.3d at 1238, 1226, 1228. Here, FERC's "replacement" assumption similarly "lacks support in the record[, which] is enough for [the Court] to conclude that the analysis which rests on this assumption is arbitrary and capricious,"—and, moreover, "the assumption itself is irrational (i.e., contrary to basic supply and demand principles)." *Id.* at 1235, 1236. *See also Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (agency must take a hard look at downstream emissions caused by rail line providing shorter route from coal mines to existing power plants because "the proposition that the demand for coal will be unaffected by an increase in availability and a decrease in price, which is the stated goal of the project, is illogical at best"); *Mont. Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1098 (D. Mont. 2017) (rejecting the notion that a coal mine expansion would merely displace other coal in the marketplace as "illogical").

FERC's Rehearing Order also admits that "gas transported on the project could offset renewable energy production." Rehearing Order at ¶95 [JA-___]. But FERC characterizes efforts to account for this potential displacement of renewables as "flyspecking," while at the same time relying solely on speculative

displacement of fossil fuels to conclude that downstream climate impacts would be reduced to insignificance. *Id.*

C. FERC's Failure to Adequately Analyze Downstream Greenhouse-Gas Effects Undermined Informed Decisionmaking and Public Comment

FERC's failure to adequately assess the Project's downstream greenhouse-gas emissions—including their significance and cumulative effect—defeated NEPA's goals of informed decisionmaking and informed public comment. This deficiency is "more than a mere flyspeck." *WildEarth Guardians*, 870 F.3d at 1237. This Project would likely cause massive downstream emissions and attendant climate impacts.[15] FERC was required to take a hard look at these impacts so it could consider them when deciding whether to approve the pipeline, or to deny it on the ground that it "would be too harmful to the environment." *Sierra Club*, 867 F.3d at 1373. *See Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 102-03 n.1 (D.C. Cir. 2014) (citation omitted) (FERC will issue a certificate only "where the public benefits of the project outweigh the project's adverse impacts," including environmental impacts).

As a result of its failure to adequately consider these impacts, FERC failed to provide the public and decisionmakers with useful information for a reasoned choice among alternatives (including the no-action alternative)—and also failed to

[15] *See* footnote 12, *supra*, and accompanying text.

assess possible mitigation. *See Sierra Club*, 867 F.3d at 1374. NEPA requires federal agencies to "present *complete and accurate information* to decision makers and the public to allow an informed comparison of the alternatives." *N.R.D.C. v. U.S. Forest Serv.*, 421 F.3d 797, 813 (9th Cir. 2005) (emphasis added). *See also WildEarth Guardians*, 870 F.3d at 1235; EPA DEIS Comments, Enclosure 1 at 9 [JA-___] ("While combustion of natural gas results in lower amounts of GHG emissions than combustion of coal or fuel oil, lower relative levels of impacts do not exempt consideration of … *measures to avoid, reduce, or compensate for those effects*.") (emphasis added).

In sum, FERC failed to "engage in 'informed decision making' with respect to the greenhouse-gas effects of this project." *Sierra Club*, 867 F.3d at 1374 (citation omitted). FERC's EIS quantified and then summarily dismissed the Project's downstream greenhouse-gas emissions. This cursory treatment of a major environmental consequence of FERC's pipeline approval hardly constitutes a "hard look." This Court should remand and vacate because "[m]ore extensive environmental analysis could lead the agenc[y] to different conclusions." *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015).

D. FERC Failed to Consider the Greenhouse-Gas Effects of the Southeast Market Pipeline as a Connected or Cumulative Action

The Atlantic Sunrise Project connects to the Southeast Market Pipeline Project (the pipeline at issue in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir.

2017)) at Transco's Station 85 in Choctaw County, Alabama. EIS at 1-2 [JA-___]; *see also* Transco Application at 3 (Mar. 31, 2015) [JA-___] (the Project interconnects with "pipelines serving the Florida market" at Station 85).

On November 14, 2014, just a few months before Transco filed its application for Atlantic Sunrise, Transco filed an application with FERC for the Hillabee Expansion Project—which, together with Sabal Trail and the Florida Southeast Connection pipeline, is a component of the Southeast Market Pipeline Project. According to Transco, its Hillabee Expansion would provide Sabal Trail with gas capacity from Station 85 to Hillabee's interconnection with Sabal Trail. As a result, the "*Atlantic Sunrise-Hillabee-Sabal Trail combo*" will deliver "Marcellus/Utica supply … [to] the Florida market."[16]

Despite the physical, temporal, and economic connection between its projects, Transco presented its Atlantic Sunrise Project to FERC, and FERC approved it, as if these projects were completely unrelated. This violated NEPA. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1308 (D.C. Cir. 2014) (holding that since there was a "clear physical, functional, and temporal nexus between the projects," they should have been considered together under NEPA).

FERC addressed this issue in its Rehearing Order by distinguishing

[16] *See* Request for Revised or Supplemental DEIS at 4 [JA-___] (quoting Sheetal Nasta, *Too Much Pipe On My Hands? – Marcellus/Utica Takeaway Capacity to the Southeast*, RBN Energy (Aug. 15, 2016) (emphasis added)).

Delaware Riverkeeper since Station 85 is a connection point for several interstate pipelines in addition to Atlantic Sunrise. Rehearing Order at ¶56 [JA-___]. But FERC missed the point. It did not recognize that the greenhouse-gas emissions of the Southeast Market Pipeline and Atlantic Sunrise had to be discussed in the same impact statement under 40 C.F.R. § 1508.25(a)(1)(iii) as "[c]onnected actions," regardless of whether there are other pipelines connecting there, because they "[a]re interdependent parts of a larger action and depend on the larger action for their justification." Without the Southeast Market Pipeline, the Atlantic Sunrise Project could not meet its goal of delivering gas to the Florida market.

In a related fashion, FERC's failure to consider the greenhouse-gas emissions of the end-users of the Southeast Market Pipeline Project in conjunction with those of the Atlantic Sunrise Project violated its duty to consider the cumulative impacts of these projects under 40 C.F.R. § 1508.25(a)(2) (the EIS must include "[c]umulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.").[17] The combustion of gas carried by the Project

[17] FERC's refusal to consider the Southeast Market Pipeline in this EIS is even more glaring here because it is approving numerous pipelines carrying gas from the Marcellus/Utica shale in Pennsylvania and Ohio to power plants and other destinations in the U.S. without considering the cumulative climate impacts of these actions together. Examples of these include the Constitution Pipeline, Atlantic Coast Pipeline, Mountain Valley Pipeline, Rover Pipeline, and Nexus Pipeline. *See* Allegheny DEIS Comments at 70, Figure 3 [JA-___].

causes greenhouse-gas emissions through numerous end-sources in addition to the emissions from the power plants served by the Southeast Market Pipeline. These are cumulative impacts. *See* 40 C.F.R. § 1508.7 ("Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.").

III. FERC DEPRIVED ALLEGHENY PETITIONERS OF PROCEDURAL DUE PROCESS BY ISSUING THE NOTICE TO PROCEED AND TOLLING ORDERS BEFORE FINAL RULING ON THEIR REQUESTS FOR REHEARING.

A. Background

The sequence of FERC's actions shows that Allegheny Petitioners' members' protected interests were harmed by the agency's procedures. FERC issued the Certificate on February 3, 2017. [JA-___]. Allegheny Petitioners timely filed their request for rehearing including a request for stay of the Certificate on February 10, 2017. [JA-___]. FERC issued a tolling order (the "first tolling order") on March 13, 2017, [JA-___], and denied the stay on August 31, 2017. [JA-___].

Six months after Allegheny Petitioners' rehearing request, FERC had still not issued a final ruling, but on September 15, 2017 it nonetheless issued a Notice to Proceed with pipeline construction. [JA-___].[18] Allegheny Petitioners requested

[18] This Notice to Proceed was the Authorization to Construct Central Penn Lines North and South Pipelines, Meter Stations, and Use of Contractor Yards.

a rehearing and stay of construction activity authorized by the Notice to Proceed on September 22, 2017. [JA-___]. FERC issued a tolling order on that (the "second tolling order") on October 17, 2017. [JA-___].[19]

On December 6, 2017, FERC finally ruled on Allegheny Petitioners' first request for rehearing, denying it. Rehearing Order at ¶5 [JA-___].

On March 1, 2018, FERC issued a final ruling on Allegheny Petitioners' request for rehearing on the Notice to Proceed, denying it without expressly mentioning the request for stay.[20] Thus, FERC's procedure provided for construction and irreparable harm for approximately six months between the Notice to Proceed and its final ruling. This harm is continuing.

B. FERC's Actions Deprived Allegheny Petitioners of Due Process

Whether administrative procedures are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Courts consider three factors: (1) the private interest affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and

[19] Allegheny Petitioners filed an Emergency Motion for Stay in this Court on Oct. 30, 2017. After a temporary administrative stay, the Court denied this motion on November 8, 2017.

[20] *Available at* http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20180301-3115.

administrative burdens that additional or substitute procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 206 (D.C. Cir. 2001). Each of these indicates FERC deprived Allegheny Petitioners due process in this case.

1. Allegheny Petitioners' Interests

An expectation created by state law can be an interest that procedural due process protects. *See Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009). In this case, the Pennsylvania Constitution's Environmental Rights Amendment creates a property and liberty interest that is afforded due process protection:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. art. I, § 27.

The Pennsylvania Supreme Court construed the Environmental Rights Amendment in *Robinson Township v. Commonwealth*, 83 A.3d 901 (Pa. 2013). The court found for individuals challenging an act regulating oil and gas operations, explaining: "[T]he express purpose of the Environmental Rights Amendment [is] to be a bulwark against actual or likely degradation of, *inter alia*, our air and water quality." *Id.* at 953. "The right delineated in the first clause

of Section 27 presumptively is on par with, and enforceable to the same extent as, any other right reserved to the people in Article I." *Id*. at 953-54.[21] "Section 27 also separately requires the preservation of 'natural, scenic, historic and esthetic values of the environment.'" *Id.* at 953. The Environmental Rights Amendment "now places citizens' environmental rights on par with their political rights." *Id*. at 960.[22]

The Pennsylvania Supreme Court confirmed these rights in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF*"). It held the rights stated in Section 27 are among the "'inherent and indefeasible' rights" set forth in Article I. *Id.* at 931. The court sided with the environmental organization plaintiffs and held the Commonwealth's disposition of proceeds from the sale of natural resources violated the Environmental Rights Amendment. *Id.* at 938-39.[23]

The Hawaii Supreme Court recently considered its similar constitutional provision, for "the right to a clean and healthful environment," and held it provides

---

[21] Among other rights, Article I of the Pennsylvania Constitution includes religious freedom, freedom of press and speech, security from searches and seizure, and access to courts. *See* §§ 3, 7, 8, and 9.

[22] "The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law. In addition to Pennsylvania, Montana and Rhode Island are the only other states of the Union to do so." *Robinson*, 83 A.3d at 962.

[23] *But see Delaware Riverkeeper Network v. FERC*, 243 F.Supp.3d 141, 152-53 (D.D.C. 2017) (appeal pending, D.C. Cir. No. 17-5084), holding Section 27 did not create a protectable interest; however it was decided before *PEDF* and involves FERC's conflict of interest.

a protectable property interest for due process purposes. *In re Application of Maui Electric Co., Ltd.*, 408 P.3d 1, 5 (Haw. 2017). The court explained:

> "These interests—property interests—may take many forms" because courts have long recognized that "property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents v. Roth*, 408 U.S. 564, 571–72, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A property interest does not need to be "tangible" to be protected by the due process clause. Rather, a protected property interest exists in a benefit—tangible or otherwise—to which a party has "a legitimate claim of entitlement." *Sandy Beach Def. Fund*, 70 Haw. at 377; 773 P.2d at 260 (quoting *Roth*, 408 U.S. at 577); . . . [The Environmental Rights section of the Hawaii Constitution] is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.

Id. at 12-13.[24]

Thus, Allegheny Petitioners' members have specific, protectable rights under the Pennsylvania Environmental Rights Amendment. As set forth in their declarations, they have specific interests in the air, forests, wildlife, rivers and streams impacted by the Project. *See* Member Declarations (Add. 27-107). At least one of Allegheny Petitioners' members owns real property the pipeline crosses and it impacts her environmental interests there as well. *See* Pantalone Declarations (Add. 48-57). Allegheny Petitioners' Request for Rehearing protects these rights

[24] Pennsylvania's Environmental Rights Amendment, unlike Hawaii's, is self-executing and does not require further legislative action to vindicate the rights of the people. *Robinson*, 83 A.3d at 962; *PEDF*, 161 A.3d at 937.

and interests by alleging FERC violated NEPA, which "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).

The Natural Gas Act provides Allegheny Petitioners with an entitlement and procedure to protect their interests. Statutes and other non-constitutional law can give rise to expectations and interests protected by the Due Process Clause. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The Act provides the right to participate in a hearing on the application, 15 U.S.C. § 717f(c)(1)(B), and the right to seek rehearing and judicial review, *id.* § 717r(a)-(b). And it imposes on FERC a substantive obligation to consider environmental impacts in weighing whether a proposed pipeline is in the public interest. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017). In sum, Allegheny Petitioners interests are far more than "generalized environmental concerns"[25] that would not constitute a property or liberty interest. They are protectable interests that are harmed directly by FERC's procedures in this case.

2. The Deprivation of Allegheny Petitioners' Interests through FERC's Procedures

a. The Notice to Proceed

The statutory intent on the face of the Natural Gas Act is that petitioners are entitled to a rehearing – that is, a meaningful rehearing. *See* 15 U.S.C. § 717r(a)-(b). "Due process generally requires a meaningful opportunity to be heard before

[25] *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 (D.C. Cir. 1981).

one is deprived of life, liberty, or property." *Blumenthal v. FERC*, 613 F.3d 1142, 1145 (D.C. Cir. 2010) (quotation omitted). FERC must provide an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" before impairing these interests. *Mathews*, 424 U.S. at 333.

FERC's timing worked more than a mere delay in adjudication of Allegheny Petitioners' claims. Nearly three months of construction impacts occurred before FERC ruled on the first Request for Rehearing, involving permanent deforestation, impacts to numerous waterbodies and wetlands, and air pollution. The harm the rehearing request procedure is meant to address had already occurred, at least in part, and FERC's allowing a hearing after the fact is not "meaningful."

FERC compounded this by issuing the Notice to Proceed based on incomplete information (*e.g.*, before considering the information provided in the Request for Rehearing and final ruling), and acting while the possibility existed that it could modify or revoke the Certificate Order. This Court has recognized this harm in an analogous situation: "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 . . . [T]he lack of an [agency's] 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).

By issuing the notices to proceed FERC also pre-determined the outcome of Allegheny Petitioners' Request for Rehearing. This undermines the purpose of the rehearing, and is analogous to numerous cases finding pre-decisional agency action undermines the purpose of NEPA. *See, e.g.*, *Jones v. D.C. Redevelopment Land Agency*, 499 F.2d 502, 511 (D.C. Cir. 1974); *Realty Income Tr. v. Eckerd*, 564 F.2d 447, 457 (D.C. Cir. 1977); *Davis v. Mineta*, 302 F.3d 1104, 1115 n.7 (10th Cir. 2002), *abrogated on other grounds by Diné Citizens Against Ruining Our Env't v. Jewell*, 839 F.3d 1276, 1282 (10th Cir. 2016). It does not matter that FERC eventually denied the Request for Rehearing. The issue on post-deprivation procedures is whether they are adequate to protect the interest. *Nat'l Council of Resistance of Iran*, 251 F.3d at 205-06; *see also United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (post-deprivation hearing will only satisfy due process in "extraordinary situations"). Here they were not adequate because Allegheny Petitioners' interests were damaged between the Notice to Proceed and FERC's final rulings.

b. The Tolling Orders

The Natural Gas Act provides intervenors before FERC with rights to protect their interests, including the right to seek rehearing and judicial review, § 717r(a)-(b). The way FERC is using tolling orders, however, is contrary to the Natural Gas Act and deprived Allegheny Petitioners of their ability to protect their

interests before the agency and on appeal to this Court.

The source of tolling orders in this Circuit is *California Co. v. Federal Power Commission*, 411 F.2d 720 (D.C. Cir. 1969). That was a fee case that held an "act" that is required within 30 days under section 717r(a) can include a tolling order because "no strong reason is advanced why Congress would have wished to" not allow the agency more time to rule on a request for rehearing. *Id.* at 721. "Nor is any reason suggested why Congress would wish to put courts in the awkward position of reviewing a decision which the agency for the best of reasons may be willing to alter." *Id*. But neither of those justifications applies in this case. Here there are strong reasons against it.

California Co. did not involve irreparable environmental harm and was decided before NEPA was in effect. It does not address this situation, where FERC issued a tolling order and then a notice to proceed with construction of a major interstate pipeline months before its final ruling on rehearing. And it does not address the situation where FERC relies on a tolling order to deprive this Court of jurisdiction to hear an appeal during this process – as occurred in regards to this Court's denial of Allegheny Petitioners' first motion for stay in this Court.[26]

These factors also distinguish the other authority from this circuit upholding tolling orders, such as *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d

[26] Nothing herein should be construed as waiving Allegheny Petitioners' arguments that the Court has jurisdiction in Case No. 17-1098.

330, 336 (D.C. Cir. 2006) (rate increase), *and Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (civil penalty).[27]

Kokajko v. FERC, 837 F.2d 524 (1st Cir. 1988) upheld a tolling order against a due process challenge, but it too did not involve a notice to proceed, a request to stay, or irreparable harm. It involved monetary payments that are presumptively not irreparable and explained due process concerns could arise when there was a risk of "irreparable injury" or harm to "human health and welfare," which are implicated here. *Id.* at 526. In addition, *Kokajko* relied on *California Co., supra*, and *General American Oil, supra*, as its authority for the tolling order. *Id.* at 525. These pre-NEPA cases should not be used to impute a congressional intent to delay a request for rehearing on NEPA issues until after the environmental harm addressed by the request has happened.

Even if the first tolling order was allowed, there is no authority for extending that to the second tolling order FERC issued on Allegheny Petitioners' request for rehearing and stay on the Notice to Proceed. The Notice to Proceed is a final order. *See Bradwood Landing LLC, NorthernStar Energy LLC*, 128 FERC ¶ 61,216, 62,017 (Sept. 1, 2009) ("[I]t is the Notice to Proceed which represents the Commission's 'final decision' in the context of the ESA and MSA."); *Atlanta Gas*

[27] The Fifth Circuit has also accepted FERC's use of tolling orders in a different context. *See Gen. Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969) (rate proceedings).

Light Co. v. Federal Power Comm'n, 476 F2d 142, 148 (5th Cir. 1973) (holding "interim suspension order is reviewable because it is definitive in its impact upon the rights of the parties and threatens irreparable harm"); *Transcontinental Gas Pipe Line Corp. v. FERC*, 589 F.2d 186, 188 (5th Cir. 1979) (it is not necessary for section 717r(b) review to be "final" action – reviewability question limited to whether or not plaintiff sustained "injury in fact"). Hence, it was appropriate for Allegheny Petitioners to seek rehearing on the notice under section 717r(a) and (b). There is no indication Congress intended that construction proceed by virtue of a tolling order while FERC decides what to do with a request for rehearing on a notice to proceed; or that it could issue a tolling order on a request for stay of this notice as it did here. It does not matter that FERC eventually ruled on this rehearing request because, in the six months between the Notice to Proceed and the final ruling, Allegheny Petitioners suffered irreparable harm, which rendered the rehearing not fully meaningful.

3. The Burden on FERC that Additional or Substitute Procedures Would Entail is Minimal.

To protect Allegheny Petitioners' interests pending a final ruling on their requests for rehearing would simply require FERC to *not* issue a notice to proceed until after its final ruling on the request for rehearing. This would not place an undue fiscal or administrative burden on FERC. And to the extent this requires FERC to prioritize its final ruling on a request for rehearing, this is consistent with

the Natural Gas Act. The Act evidences a congressional intent that matters be decided promptly. Its administrative and judicial appeal deadlines are all in 30-day or 60-day increments – not six months. *See also* 15 U.S.C. § 717r(d)(5). Where the enabling statute sets out an explicit timetable indicating the speed with which Congress expects the agency to proceed, that timetable may supply context for the agency action and application of a rule of reason. *Telecomms. Research and Action Ctr. v. Fed. Commc'ns Comm'n*, 750 F.2d 70, 80 (D.C. Cir. 1984).

FERC is capable of withholding notices to proceed until after final ruling on a request for rehearing, and has done so in other cases. For example, in *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416 (1st Cir. 2001), the court reviewed a pipeline project and noted that FERC approved the project on October 27, 2000. *Id.* at 420. Petitioners filed a timely request for rehearing and FERC issued a tolling order. *Id.* FERC did not issue its final decision on rehearing until nearly five months later but, unlike in this case, construction did not commence until approximately one month after FERC's order denying rehearing. *Id.* at 421. Thus, parties aggrieved by the certificate order were not subjected to watching project construction proceed without resolution of their request for rehearing or while the tolling order arguably blocked their access to the court to seek a stay of the construction pending appeal.

IV. THE CERTIFICATE ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE FERC FAILED TO ADEQUATELY EVALUATE THE PUBLIC NEED FOR THE PROJECT.

The Certificate Order is arbitrary and capricious under Section 7 of the Natural Gas Act, and cannot support the taking of private property by eminent domain, because FERC did not base its finding of the public need for the Atlantic Sunrise Project on substantial evidence. *See* 15 U.S.C. §§ 717f(e), 717r(b); U.S. Const. amend. V. To establish the public need for the Project, FERC relied entirely on the existence of contracts with gas shippers for the pipeline's capacity, in direct contravention of its own Certificate Policy Statement.

"The Fifth Amendment, as applied to the states through the Fourteenth Amendment, imposes two limitations on the sovereign's right to exercise eminent domain: the property taken must be for public use, and the owner must receive just compensation." *Brody v. Vill. of Port Chester*, 434 F.3d 121, 127 (2d Cir. 2005) (quoting U.S. Const. amend. V). Although public use jurisprudence affords legislative bodies broad latitude in determining what public needs justify the use of the takings power, the inquiry is nevertheless an important constitutional limitation, which must be undertaken with due diligence. *Id*.; *Kelo v. City of New London*, 545 U.S. 469 (2005).

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 requires FERC to balance the public benefits of a proposed pipeline against the adverse impacts on, among other things, landowners whose property would be taken through eminent domain. *Id.* ¶ 61,745. And although evidence of market demand can be an indication of public benefit, the Policy Statement 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.").

FERC, however, systematically violates its policy by approving pipelines based solely on the existence of capacity contracts, which are known as "precedent agreements." 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 at *57 (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," and warning that FERC's practice could lead to pipeline overbuilding). Likewise, in October 2017, Commissioner LaFleur dissented to the Certificate Order for the Atlantic Coast Pipeline, urging the Commission to consider "whether evidence other than precedent agreements should play a larger role in [FERC's] evaluation regarding the economic need for a proposed pipeline project." *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at *99 (Comm'r LaFleur, dissenting).

Here, FERC did exactly that which its former Commissioners warned against – it relied solely on the fact that Transco secured precedent agreements from other shippers to establish the public benefits of the Project. Certificate Order at ¶28 [JA-___-___] (citation omitted).

FERC's failure was exacerbated by the fact that it failed to consider evidence in the record demonstrating a lack of domestic demand for the Project's capacity. Specifically, FERC ignored the fact that the purpose for the reversal of the Transco longhaul pipeline to the southeast is to allow northern Pennsylvania shale gas to reach Gulf Coast export terminals. Indeed, Transco's parent company,

Williams, "has been on a mission to send Marcellus gas south – including to Georgia" such that "Marcellus Shale gas will, via the Transco [pipeline], be at least some of, if not the primary, source for gas exported from the Elba Island facility." *See* Elba Island LNG Update: Non-FTA Exports Approved, Marcellus Drilling News, Dec. 2016, http://marcellusdrilling.com/2016/12/elba-island-lng-update-non-fta-exports-approved-dump-truck-city/.

Additionally, Cabot, who subscribed to approximately half of the Project's capacity, stated in January 2017, that the "anticipated pricing" for gas transported on facilities made available by Atlantic Sunrise will be based on two market areas: the D.C. market area (where Cove Point export terminal is located) and the Gulf Coast market area (where multiple export facilities are located). Rehearing Request at 37 [JA-___]. In other words, Cabot plans to sell its gas based on prices for exporting. Therefore, FERC's assumption in the EIS that the "vast majority of natural gas transported through the firm capacity under the Project would be consumed domestically in markets along the East Coast" lacks substantial evidence. *See* EIS at 1-10 [JA-___].

FERC's refusal to seriously question whether gas transported by the Atlantic Sunrise pipeline is intended primarily for export undermines its finding of public need for the Project. Had Transco announced that Atlantic Sunrise was intended to export northern Pennsylvania shale gas through terminals at Cove Point and along

the Gulf Coast, the Project likely would have received greater scrutiny from the public and elected officials. The fact that 87% of the Project's capacity is subscribed to by four gas production companies that, upon completion of the Project, will have direct access to export facilities, raises serious concerns that the main driver behind the Project is to provide these companies with access to higher priced markets overseas, as opposed to satisfying any domestic demand. Thus, it was improper for FERC to rely entirely on the precedent agreements to demonstrate the public need for the Project. Because FERC lacked substantial evidence for its public benefits finding, its conclusion that the Project is required by the public convenience and necessity is invalid and Petitioners' property cannot be taken by eminent domain.

V. THE LANDOWNERS ARE ENTITLED TO A MEANINGFUL OPPORTUNITY TO BE HEARD BEFORE THEIR PROPERTY CAN BE TAKEN BY EMINENT DOMAIN.

The Landowners' constitutional due process rights were violated by the combined application of sections 717f(h) and 717r(a) of the Natural Gas Act, FERC's Rules of Practice and Procedure, FERC's routine issuance of the tolling order, and the district court's exercise of the quick take power of eminent domain.

As the United States Supreme Court held in *Mathews v. Eldridge* (and numerous other cases) and the Third Circuit held in *Finberg v. Sullivan*, the right to continued use and possession of one's private property must receive strong

protection. In particular, due process requires notice and an opportunity to be heard before a final taking. *Mathews*, 424 U.S. 319, 331 (1976); *Finberg*, 634 F.2d 50, 56 (3d Cir. 1980). "The 'right to be heard before being condemned to suffer grievous loss of any kind…is a principle basic to our society.'" *Mathews*, 424 U.S. at 333 (citation omitted). Although the judicial model of an evidentiary hearing may not be required in all cases, the right to be heard requires that the available procedures be tailored, in light of the decision to be made, to "'the capacities and circumstances of those who are to be heard,' … to insure they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. at 349 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-269 (1970)).

Here, it is an unassailable fact that the Landowners have been denied the right to be heard on whether Transco's taking of their property actually satisfies the public use requirement of the Fifth Amendment. Although the Landowners sought a hearing before FERC on whether Transco presented enough evidence to demonstrate that the Project is for public use, FERC denied those requests and issued the Certificate Order solely on the basis of the written record. Subsequently, and in accordance with FERC's rules of procedure, the Landowners submitted requests for rehearing to FERC, but FERC issued the tolling order and later denied their request for rehearing. In the meantime, Transco was allowed to move forward with condemnation proceedings in the Eastern District of

Pennsylvania, where the Landowners were again denied the right to a hearing on whether the Project actually satisfied the public use requirement of the Fifth Amendment. Instead, the District Court gave Transco immediate possession of the Landowners' property (without compensation), finding the Landowners' due process challenges to the public need for the Project were attacks on the FERC order itself, which can only be challenged in front of FERC, and then before this Court. *See* August 23, 2017 Memorandum Opinion, *Transcontinental Gas Pipe Line Company, LLC, v. Permanent Easement for 1.02 Acres, et al*., No. 17-1725, D.I. 39, at p. 8 (Schmehl, J.).

In issuing its opinion, the District Court relied on section 717f(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), which allows a pipeline company that receives a certificate from FERC to construct, operate and maintain a pipeline for transportation of gas in interstate commerce to immediately exercise the power of eminent domain, absent a stay, in order to acquire lands necessary for the pipeline. Pursuant to Section 717r(a) of the Act, any appeal of FERC's issuance of a certificate must, in the first instance, be directed to FERC and must be filed within thirty days of the issuance of the certificate. Section 717r(a) further provides that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 15 U.S.C. § 717r(a). If the application is denied, or deemed denied due to the passage of time,

then the requestor may file an appeal to an appropriate federal circuit court of appeals. However, as demonstrated here, FERC's routine practice in response to requests for rehearing is to issue an order that facially grants rehearing but indefinitely extends the time for the Commission to consider the issues raised in the request. That practice, when combined with Section 713(e) of FERC's Rules of Practice and Procedure, which states that the filing of a request for rehearing does not stay the Commission's decision or order, 18 C.F.R. § 385.713(e), and the District Court's rejection of the Landowners' request for a hearing on the public use of the Project, means that Landowners were deprived of any meaningful opportunity for judicial review of FERC's decisions regarding public use and the taking of their private property before it was taken, which is unconstitutional.

In *Brody v. the Village of Port Chester*, the Second Circuit confronted the question of whether, and to what extent, the public use limitation in the takings clause of the Fifth Amendment triggers procedural due process rights for condemnees. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 127 (2d Cir. 2005). In finding that it does confer due process rights, and that those rights include the right to judicial review of a legislative body's judgment of what constitutes a public use, the Second Circuit unequivocally stated "despite the broad deference given to the government's decision to exercise its power of eminent domain, at bottom, "the question [of what is a public use] remains a judicial one . . . which

[the courts] must decide in performing [their] duty of enforcing the provisions of the Federal Constitution." *Id.* at 128-29 (citing *City of Cincinnati v. Vester*, 281 U.S. 439, 446 (1930)) (internal quotations omitted).

"The Supreme Court has long recognized this crucial, albeit limited, role that the courts play in enforcing the public use limitation." *Id*. at 129 (citing *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); *Berman v. Parker*, 348 U.S. 26, 32 (1954); *City of Cincinnati v. Vester*, 281 U.S. 439, 446-47 n.1 (1930)) (collecting cases). "Thus, while the legislative decision to condemn is not reviewable, the purpose of the condemnation is. The role of the judiciary, however narrow, in setting the outer boundaries of public use is an important constitutional limitation. To say that no right to notice or a hearing attaches to the public use requirement would be to render meaningless the court's role as an arbiter of a constitutional limitation on the sovereign's power to seize private property." *Brody*, 434 F.3d at 129.

Here, FERC erroneously determined that the Atlantic Sunrise Project will serve a public use and under settled Supreme Court precedent, the Landowners are entitled to meaningful judicial review of that determination. However, FERC's issuance of the Tolling Order and the District Court's refusal to hear the Landowners' challenges to FERC's public use determination prior to the taking of their property, denied the Landowners that right. "'[D]ue process,' unlike some

legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Therefore, it is incumbent upon this Court to finally give the Landowners the opportunity to be heard on whether and to what extent the Project serves any public need whatsoever, or whether its primary purpose and function is to provide private gain to Transco and the shippers it serves.

VI. THE CERTIFICATE ORDER IS ARBITRARY AND CAPRICIOUS BECAUSE FERC FAILED TO ADEQUATELY CONSIDER THE ADVANTAGES OF THE CONESTOGA ALTERNATIVE ROUTE.

The Certificate Order is arbitrary and capricious under Section 7 of the Natural Gas Act, because FERC failed to consider viable alternative routes for the Project that would have greatly reduced the negative impacts of the Project.

As set forth above, and in the Certificate Order itself, from pre-filing until the issuance of the Certificate Order Transco incorporated 132 route variations into the proposed route, allegedly to avoid or reduce effects on environmental or other

resources, resolve engineering or constructability issues, or address stake holder concerns. These changes represented about a 50 percent change to Transco's original route design. Certificate Order at ¶151 [JA-___].

As a result, on or about October 22, 2015, FERC Staff advised landowners like the Erbs that numerous alternatives, including Central Penn Line South Alternative 22, were under consideration, which if adopted, would cut through the Erbs' land. In response, the Erbs filed or joined in at least eight comments between November 16, 2015 and January 31, 2017, each of which objected to the proposed route and argued that the pipeline should be routed through the Conestoga Alternative Route instead. Many other stakeholders filed comments in favor of the Conestoga Alternative Route or signed petitions in favor of it. State Representative Brett Miller also submitted hundreds of signatures from Conestoga Township residents and their neighbors in favor of the Conestoga Alternative Route.

On or about October 13, 2016, FERC staff advised landowners of additional proposed route changes in the pipeline. One of the proposed changes would route the pipeline through the middle of the Hoffmans' property. In response, the Hoffmans filed two comments objecting to the pipeline on or about October 7 and 19, 2016. The Hoffmans noted that placing the pipeline on their property would probably jeopardize a Native American archeological site located there (Site #36LA55) or other sites not yet formally recognized. The Hoffmans suggested that

the pipeline be re-routed to avoid their land and join the Conestoga Alternative Route.

In rejecting the Conestoga Alternative Route, FERC stated only that "the Conestoga Alternative Route would be slightly shorter, but would cross more recreation areas/preserved lands and waterbodies than the corresponding segment of the proposed route. For this reason, the final EIS concludes, and we agree, that the Conestoga Alternative Route is not environmentally preferable to the proposed Route." Certificate Order at ¶157 [JA-___-___]. FERC's conclusion is contradicted, however, by the facts and evidence. Some of the demonstrable advantages of the Conestoga Alternative Route are as follows:

1) The Conestoga Alternative Route is one mile shorter and is co-located along existing utility rights of way.
2) The current route crosses 26 streams and 12 wetlands, nearly triple the number reported in the FEIS at Table 3.3.2-13.
3) The environmental impact on waterbodies along the current route is greater than reflected in the FEIS and the Conestoga Alternative Route would be superior.
4) The Conestoga Alternative Route crosses fewer roads than the current route.

5) There are more residences directly impacted by the current route. Fewer would be impacted by the Conestoga Alternative Route.

6) Any environmental impact of tree-felling incurred as a result of widening existing rights of way could be remedied by requiring Transco to replace the felled trees "in kind."

7) FERC's decision to choose a route that impacts more local land owners than another route that impacts fewer local land owners is contrary to FERC policy.

8) The Conestoga Alternative Route, since it is sited along existing utility ROWs, is straighter, requiring fewer welds, bends, cuts and curves; therefore it is safer, and easier and cheaper to build.

9) The Conestoga Alternative Route does not impact Farmland Trust property, like the Erbs' land.

10) The Conestoga Alternative Route will not impact the Native American site on the Hoffmans' property.

This list is not exhaustive. Numerous other advantages of the Conestoga Alternative Route were submitted to FERC and should be reviewed and analyzed by this Court.

VII. REMEDY.

Allegheny Petitioners request that the Court vacate the Certificate and

remand to FERC to prepare a proper EIS. The Supreme Court has stated that under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), "[i]n 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 quotation 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).

"Pursuant to the case law in this Circuit, vacating a rule or action promulgated in violation of NEPA is the standard remedy." *Humane Soc'y 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 Pub. Emps. for Envtl. Responsibility v. U.S. Fish and Wildlife Serv.*, 189 F. Supp. 3d 1, 2 (D.D.C. 2016) *appeal dismissed*, 2016 WL 6915561 (D.C. Cir. Oct. 31, 2016) ("A review of NEPA cases in this district bears out the primacy of vacatur to remedy NEPA violations.").

The Court is not required to make express findings on *Allied-Signal* before vacatur for NEPA violations. *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," depending on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed"). In any event, the *Allied-Signal* factors support vacatur where, as here, an agency's EIS is so deficient that it undermined informed decisionmaking. An agency's failure to consider an impact goes to the integrity of its decisionmaking, not merely the adequacy of its explanation. *Cf. Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). When an agency fails to take a hard look at the environmental consequences of a project, it must analyze the impacts it failed to consider and then make a new decision taking this into account. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015). While there is likely to be disruption in any NEPA case where the project proceeds notwithstanding a defective EIS, if that prohibited vacatur it would nullify the requirement that NEPA analysis occur *before* the agency decision. *See* 40 C.F.R. § 1506.1(a).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, FERC's analysis under NEPA, and its issuance of the certificate of public convenience and necessity, were arbitrary and capricious and must be vacated and remanded to the agency under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Dated: March 9, 2018

Respectfully submitted,

/s/ Elizabeth F. Benson
Elizabeth F. Benson
Sierra Club
2101 Webster Street, Ste. 1300
Oakland, California 94612
(415) 977-5723
elly.benson@sierraclub.org

Benjamin A. Luckett
Appalachian Mountain Advocates
P.O. Box 507
Lewisburg, WV 24901
(304) 645-0125
bluckett@appalmad.org

Counsel for Allegheny Petitioners

Siobhan K. Cole
White and Williams LLP
1650 Market Street, Suite 1600
Philadelphia, PA 19103
(215) 864-6891
coles@whiteandwilliams.com

Counsel for Hilltop Petitioners

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of November 21, 2017 because this brief contains 13,239 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 2016 computed the word count.

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Microsoft Word 2016 Times New Roman) in 14-point font.

Dated: March 9, 2018

/s/ Elizabeth F. Benson
Elizabeth F. Benson
Sierra Club
2101 Webster Street, Ste. 1300
Oakland, California 94612
(415) 977-5723
elly.benson@sierraclub.org

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I electronically filed the foregoing Petitioners' Joint Opening Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

/s/ Elizabeth F. Benson
Elizabeth F. Benson
Sierra Club
2101 Webster Street, Ste. 1300
Oakland, California 94612
(415) 977-5723
elly.benson@sierraclub.org