ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals for the District of Columbia Circuit

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

ALLEGHENY DEFENSE PROJECT, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

JOINT BRIEF OF INTERVENORS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenors Transcontinental Gas Pipe Line Company, LLC ("Transco"), Anadarko Energy Services Company, Chief Oil & Gas LLC, and Southern Company Services, Inc. state the following:

A. Parties and Amici

All parties, intervenors, and amici appearing in this Court are identified in the Rule 28(a)(1) certificate in Petitioners' Joint Opening Brief.

Intervenors make the disclosures required by Circuit Rule 26.1 in a Corporate Disclosure Statement immediately following this Certificate.

B. Rulings Under Review

References to the rulings at issue appear in the Rule 28(a)(1) certificates in Petitioners' Joint Opening Brief and Respondent's Brief.

C. Related Cases

This case has not previously been before this Court or any other court. In addition to the cases identified in the Rule 28(a)(1) certificates in Petitioners' Joint Opening Brief and Respondent's Brief, the following are, or may be, related cases:

1. *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easements for 2.14 Acres, et al.*, Nos. 17-3075, 17-3076, 17-3115, 17-3116 (3d Cir.). Petitioners identify two of the four appeals in this consolidated proceeding. The appeals in this consolidated proceeding challenge orders of the United States

District Court for the Eastern District of Pennsylvania granting Transco possession of rights-of-way on appellants' properties to construct and operate the Atlantic Sunrise Project. Appellants filed opening briefs on May 7, 2018. The appeals remain pending.

2. *Adorers of the Blood of Christ, et al. v. Federal Energy Regulatory Commission, et al.*, No. 17-3163 (3d Cir.). This appeal challenges the United States District Court for the Eastern District of Pennsylvania's order dismissing appellants' claims under the Religious Freedom Restoration Act related to construction and operation of the Atlantic Sunrise Project on their property for lack of jurisdiction. Briefing has concluded and oral argument was held on January 19, 2018. The appeal remains pending.

3. *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al.*, Nos. 16-2211, 16-2212, 16-2218, 16-2400 (3d Cir.). Petitioners identify two of the four appeals in this consolidated proceeding. The appeals in this consolidated proceeding challenge a Water Quality Certification issued for the Atlantic Sunrise Project by the Pennsylvania Department of Environmental Protection under Section 401 of the Clean Water Act. Briefing has concluded and oral argument was held on November 7, 2017. The appeals remain pending.

4. *Delaware Riverkeeper Network, et al. v. Pennsylvania Department of Environmental Protection, et al.*, No. 17-3299 (3d Cir.). This appeal challenges the Pennsylvania Department of Environmental Protection's approval of Transco's notice of intent for coverage under the PAG-10 National Pollutant Discharge Elimination System General Permit for hydrostatic test water discharges for the Atlantic Sunrise Project. Briefing has concluded and the appeal has been tentatively listed on the merits on June 15, 2018.

Dated: May 24, 2018

/s/ John F. Stoviak
John F. Stoviak
Counsel for Intervenor
Transcontinental Gas Pipe Line
Company, LLC

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 of the Rules of this Court, Intervenors Transcontinental Gas Pipe Line Company, LLC, Anadarko Energy Services Company, Chief Oil & Gas LLC, and Southern Company Services, Inc. make the following disclosures:

Transcontinental Gas Pipe Line Company, LLC is a natural gas pipeline company engaged in the transportation of natural gas in interstate commerce, which owns and operates an interstate natural gas transmission system that extends from Texas, Louisiana and the offshore Gulf of Mexico area to a terminus in the New York City metropolitan area. Its parent corporation is Williams Partners Operating, LLC. Williams Partners, L.P. owns 10% or more of the limited liability company interest of Williams Partners Operating LLC. In addition, The Williams Companies, Inc. owns 10% or more of the publicly-held limited partner interest in Williams Partners, L.P.

Anadarko Energy Services Company ("Anadarko") is a Delaware corporation with its principal place of business in the Woodlands, Texas. Anadarko is a wholly owned subsidiary of Anadarko Petroleum Corporation. Anadarko Petroleum Corporation is among the world's largest independent oil and natural gas exploration and production companies. Anadarko is engaged in trading and marketing natural gas and other petroleum products. No publicly held

company has a ten percent or greater ownership interest in Anadarko or Anadarko Petroleum Corporation.

Chief Oil & Gas LLC ("Chief") is a private company engaged in exploration, production and marketing of natural gas in the Appalachian Basin, with its principal place of business in Dallas, Texas. No publicly held company has a ten percent or greater ownership interest in Chief.

Southern Company Services, Inc.: Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company (collectively, "Southern Companies") are each a wholly-owned subsidiary of The Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10% or more of Southern Companies' stock. No publicly-held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO."

Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—and a

wholesale energy provider—Southern Power Company. These subsidiaries, each an Intervenor here through their agent Southern Company Services, Inc., own and operate electric transmission facilities and are engaged in the manufacture, generation, transmission, and sale of electricity and serve both retail and wholesale customers within specified franchised electric service territories in portions of Alabama, Georgia, Florida, and Mississippi. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for those operating subsidiaries.

Dated: May 24, 2018

/s/ John F. Stoviak
John F. Stoviak
Counsel for Intervenor Transcontinental Gas Pipe Line Company, LLC

/s/ Kevin M. Sweeney
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*Authorities upon which we chiefly rely are marked with asterisks.

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GLOSSARY

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	*Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (Feb. 3, 2017)
FERC	Federal Energy Regulatory Commission
JA	Joint Appendix citation
Landowner-Petitioners	Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman
NEPA	National Environmental Policy Act
Petitioners	Allegheny Petitioners and Landowner-Petitioners
Project	Transco's Atlantic Sunrise Project
R.	Record citation
Transco	Intervenor Transcontinental Gas Pipe Line Company, LLC

STATEMENT OF JURISDICTION

Intervenors adopt and incorporate by reference the Counterstatement of Jurisdiction in the Brief of Respondent.

STATEMENT OF ISSUES

Intervenors adopt and incorporate by reference the Statement of the Issues in the Brief of Respondent.

STATUTES AND REGULATIONS

Except for 28 U.S.C. § 1651(a), all applicable statutes and regulations are contained in the Brief of Petitioners. 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

I. FERC's Extensive Review and Approval of the Project.

On March 31, 2015, following an extensive pre-filing period that commenced one year earlier, Intervenor Transcontinental Gas Pipe Line Company, LLC ("Transco") filed an application under section 7(c) of the Natural Gas Act for authorization to construct and operate the Atlantic Sunrise Project (the "Project") in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. R. 1585-87. Following the comprehensive administrative review process conducted by the Federal Energy Regulatory Commission ("FERC") lasting nearly three

years, FERC issued a Certificate of Public Convenience and Necessity to Transco on February 3, 2017 approving the Project. R. 3954, *Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, ¶¶ 1-2, 68 (Feb. 3, 2017) ("Certificate Order"), JA___, ___. FERC determined that "***the public convenience and necessity requires approval of Transco's proposal***" based on "the benefits that Transco's proposal will provide, the absence of adverse effects on existing customers . . . and the minimal adverse effects on landowners or surrounding communities." *Id.* ¶ 33, JA___ (emphasis added).

A. Need for the Project.

The Project is ***fully subscribed*** and ***Transco has executed binding precedent agreements with nine shippers for 100% of the incremental firm transportation capacity that will be created by the Project***, demonstrating the immediate and compelling need for the Project's capacity. *Id.* ¶¶ 11, 28-33, JA___, JA___. Chief Oil & Gas LLC and Anadarko Energy Services Company (both Intervenors in this proceeding) are among the natural gas producers that executed binding precedent agreements for long-term firm transportation service on the fully-subscribed Project and filed comments with FERC in support of the Project. *See, e.g.*, R. 1648, Motion to Intervene and Comments in Support of Chief Oil & Gas LLC (Apr. 23, 2015), JA___; R. 2651, Letter from Anadarko Energy Services Company to FERC (Feb. 3, 2016), JA___; R. 2657, Letter from Chief Oil

& Gas LLC to FERC (Feb. 4, 2016), JA___. Southern Company Services, Inc., an Intervenor whose affiliated electric utilities serve the retail and wholesale electric needs of customers throughout the Southeast, also executed a binding precedent agreement for long-term service and commented in support of the Project. R. 2652, Letter from Southern Companies to FERC (Feb. 3, 2016), JA___. As Intervenors explain in their comments to FERC, the Project facilities provide new pipeline infrastructure that will enable producers with production in Northern Pennsylvania to ship gas to downstream markets in the Northeast and Southeast United States. Producers have made major investments in the exploration and development of natural gas production, including production that would be transported by Transco on the Project facilities. *See, e.g.*, R. 1648, Motion to Intervene and Comments in Support of Chief Oil & Gas LLC (Apr. 23, 2015), JA___; R. 2657, Letter from Chief Oil & Gas LLC to FERC (Feb. 4, 2016), JA___. By relieving capacity constraints limiting the ability of Northern Pennsylvania natural gas production to reach markets with growing need for natural gas, this new infrastructure supports future economic development, enhances service reliability, and provides downstream markets with new competitively priced supplies, thereby benefiting natural gas consumers. *See id.*; R. 2651, Letter from Anadarko Energy Services Company to FERC (Feb. 3, 2016), JA___.

B. Extensive Public Comments and Input.

Over the course of its proceedings, FERC held multiple notice-and-comment periods and public meetings, and provided responses to public input on the Project. ***1,185 written comments, 296 oral comments, and more than 900 letters*** were submitted to FERC addressing various issues regarding the Project, Certificate Order ¶¶ 69, 72, 73, JA___, including ***37 comments submitted by Petitioners***.[1] FERC issued its Draft Environmental Impact Statement in May 2016 and received over 1,000 comments and letters in response. Certificate Order ¶ 72, JA___. After considering the issues raised in these comments, FERC issued its Final Environmental Impact Statement in December 2016, *id.* ¶ 75, JA___, and approved the Project in February 2017 via the Certificate Order, *see id.* ¶ 2, JA___.

C. Notices to Proceed Allowing Construction.

FERC has issued a series of Notices to Proceed allowing construction of the Project. Construction of the Project has occurred in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina, with only 29% of construction remaining to be completed, primarily on the Central Penn Line and Transco's

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[1] *See* R. 1265; R. 1269; R. 1822; R. 2297; R. 2485; R. 2577; R. 2623; R. 2662; R. 2670; R. 2724; R. 2759; R. 2760; R. 2908; R. 2930; R. 3187; R. 3386; R. 3554; R. 3567; R. 3570; R. 3636; R. 3640; R. 3648; R. 3667; R. 3743; R. 3789; R. 3807; R. 3810; R. 3857; R. 3876; R. 3880; R. 3940; R. 3944; R. 3945; R. 3946; R. 3984; R. 4105; R. 4135. This list includes comments submitted by Gary and Michelle Erb, the principals of Petitioner Hilltop Hollow Limited Partnership.

mainline.[2] Petitioners sought to stay construction, both before this Court and FERC, but their stay requests were denied. *See* R. 4139, Order Denying Stay, *Transcon. Gas Pipe Line Co., LLC*, 160 FERC ¶ 61,042 (Aug. 31, 2017), JA___; Docket No. 17-1098, Order (D.C. Cir. Nov. 8, 2017); Docket No. 17-1098, Order (D.C. Cir. Feb. 16, 2018). Certain Project facilities already have been placed in service.[3] On September 1, 2017, several mainline facilities were placed into service under the Project, providing 400,000 dekatherms per day of interim service.[4] On May 15, 2018, FERC approved Transco's request to place additional

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[2] The Notices to Proceed were issued on: February 23, 2017; March 16, 2017; March 24, 2017; March 28, 2017; March 29, 2017; April 5, 2017; June 9, 2017; August 30, 2017; September 7, 2017; September 15, 2017; and December 14, 2017. *See* R. 3973; R. 4013; R. 4025; R. 4030; R. 4034; R. 4044; R. 4090; R. 4137; R. 4148; R. 4157; Accession No. 20171214-3013 (Dec. 14, 2017), available on FERC's eLibrary in Docket Number CP15-138-000, *see* https://www.ferc.gov/docs-filing/elibrary.asp.

[3] *See* R. 4097, Letter order granting Transco's 6/22/17 request to place into service the Mainline B Replacement facilities in Prince William County, Virginia (June 23, 2017); R. 4115, Letter order granting Transco's 7/19/17 request to place into service the Mainline A Replacement facilities in Prince William County, VA (July 21, 2017); R. 4133, Letter order granting Transco's 8/11/17 request to commence partial path service by 9/1/17 of the Mainline A and B Replacement facilities, etc. (Aug. 28, 2017); Accession No. 20180515-3002, Letter order granting Transco's May 4, 2018 filing of the Authorization to Place Certain Facilities into Service and Commence Interim Partial Path Service (May 15, 2018), available on FERC's eLibrary in Docket Number CP15-138-000, *see* https://www.ferc.gov/docs-filing/elibrary.asp.

[4] *See* R. 4133, Letter order granting Transco's 8/11/17 request to commence partial path service by 9/1/17 of the Mainline A and B Replacement facilities, etc. (Aug. 28, 2017).

facilities into service, which will provide an additional 150,000 dekatherms per day of interim service beginning on or about June 1, 2018.[5] By June 1, 2018, more than 32% of the Project's total capacity will be in service.

II. The Eminent Domain Proceedings.

After unsuccessful attempts to obtain rights-of-way needed for the Project by agreement, Transco initiated eminent domain proceedings against Landowner-Petitioners[6] on February 15, 2017 in the United States District Court for the Eastern District of Pennsylvania. *See* Verified Complaints in Condemnation of Property Pursuant to Fed. R. Civ. P. 71.1, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. Feb. 15, 2017).[7] Landowner-Petitioners answered Transco's complaint on March 13, 2017. *See* Answers, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. Mar. 13, 2017). On June 28, 2017, Transco filed an Omnibus Motion for Possession of the Rights of Way so that Transco could proceed with construction on Landowner-Petitioners' properties. *See* Omnibus Motion, Docket

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5 *See* Accession No. 20180515-3002, Letter order granting Transco's May 4, 2018 filing of the Authorization to Place Certain Facilities into Service and Commence Interim Partial Path Service (May 15, 2018), available on FERC's eLibrary in Docket Number CP15-138-000, *see* https://www.ferc.gov/docs-filing/elibrary.asp.

6 Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC and Stephen D. Hoffman (collectively, "Landowner-Petitioners").

7 The eminent domain proceedings are matters of public record that are subject to judicial notice under Fed. R. Evid. 201.

Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. June 28, 2017). The district court held an evidentiary hearing on the Omnibus Motion during two full-day hearings on July 17 and July 20, 2017, during which Landowner-Petitioners were heard. Their counsel argued, *inter alia*, that violations of due process had occurred and that the Project did not serve a public purpose. *See, e.g.*, Transcript of Evidentiary Hearing held on July 20, 2017 at 142-150, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. Oct. 19, 2017). Landowner-Petitioners gave testimony in which they each admitted receiving notice of the FERC proceedings and having the opportunity to participate and submit comments to FERC before the Certificate Order issued. *See id.* at 48-49, 64-65. The district court thereafter granted the motion for possession on August 23, 2017. *See Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, Nos. CV 17-715, 17-723, 2017 WL 3624250 (E.D. Pa. Aug. 23, 2017), *appeals docketed*, No. 17-3075 (3d Cir. Sept. 26 2017), No. 17-3076 (3d. Cir. Sept. 26, 2017), No. 17-3115 (3d Cir. Sept. 29, 2017), No. 17-3116 (3d Cir. Sept. 29, 2017). On or about September 21, 2017, Landowner-Petitioners appealed the district court's orders granting the Omnibus Motion to the United States Court of Appeals for the Third Circuit. *See Transcon. Gas Pipe Line Company, LLC v. Permanent Easements for 2.14 Acres, et al.*, Nos. 17-3075, 17-3076 (3d Cir.). Landowner-Petitioners filed their opening brief with

the Third Circuit on May 7, 2018. Their appeals remain pending before the Third Circuit.

SUMMARY OF ARGUMENT

Intervenors adopt and incorporate by reference all of the arguments set forth in the Brief of Respondent. In this Brief, Intervenors supplement FERC's arguments in opposition to the due process issues raised by Petitioners and address the issue of remedies, though for the reasons explained below and in the Brief of Respondent, the petitions for review should be denied, obviating the need for any remedy. Intervenors also supplement the discussion of the need for the Project in the Statement of the Case and in the discussion of remedies in Argument Section III.

The Allegheny Petitioners'[8] and Landowner-Petitioners' due process claims are not properly before this Court, *see* Brief of Respondent at 3, 7-10, 28-29, 40, 47-48, and even if they were, each claim fails on the merits. Petitioners' due process arguments are united by a single theme: a desire to stop construction activities authorized by FERC during judicial review. Due process, however, does not entitle Petitioners to their preferred form of process.

[8] 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").

As an initial matter, Petitioners do not have a protectable due process interest in the Natural Gas Act's review procedures. But even if they did, Petitioners' argument that FERC may not issue tolling orders or authorize construction while rehearing requests remain pending directly contradicts Congress's determination in the Natural Gas Act that the filing of a request for rehearing or a petition for review does not stay the effectiveness of FERC's orders unless specifically ordered by FERC or the Court. Indeed, Petitioners sought stays of construction before both FERC and this Court (twice) and in each instance their stay requests were denied.

In addition, assuming arguendo that FERC's longstanding use of tolling orders to afford adequate time to consider rehearing requests creates "delay," such delay does not extinguish Petitioners' causes of action and, therefore, does not constitute a deprivation of a property interest that triggers due process protections. Even while FERC considers requests for rehearing, interim relief is available before both FERC and the Courts of Appeals when warranted—relief which Petitioners sought, but which was denied because Petitioners failed to demonstrate entitlement to such relief.

Landowner-Petitioners' argument that they have been denied the right to be heard ignores the entire comprehensive administrative process before FERC. Landowner-Petitioners' active participation in FERC's proceedings satisfies due

process requirements. FERC was not required to hold an in-person evidentiary hearing on Landowner-Petitioners' challenges when, as here, the paper record provided a sufficient basis to resolve the issues presented.

Landowner-Petitioners' arguments about the district court's orders in the eminent domain proceedings are not appropriately before this Court on appeal of FERC's orders. Indeed, Landowner-Petitioners are currently pressing their challenges related to the eminent domain proceedings before the United States Court of Appeals for the Third Circuit. Nevertheless, Landowner-Petitioners' arguments that they were deprived due process in the eminent domain proceedings are meritless. All of the Natural Gas Act's Congressionally-approved prerequisites for the use of eminent domain were satisfied when Transco initiated the condemnation proceedings, and Landowner-Petitioners have an opportunity to be heard as to compensation in those proceedings, which is all due process requires. Petitioners have received—and continue to receive—all process due to them.

Although Petitioners have failed to demonstrate any entitlement to relief, even if they had done so, the remedy they seek—vacatur and remand of the Certificate Order—would not be appropriate under this Court's precedent in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993). Both of the *Allied-Signal* factors weigh against vacatur here, where the record demonstrates a high likelihood that FERC would be able to readily cure any

defect in its explanation and the disruptive consequences of vacatur on the public and Intervenors (economic and otherwise) would be severe.

ARGUMENT

I. Standards for Review of Due Process Claims.

The Due Process Clause of the Fifth Amendment prohibits the deprivation of life, liberty or property without due process of law. U.S. Const. amend. V. Due process claims require a two-part inquiry: (1) whether there has been a deprivation of a protectable interest; and (2) if so, what process is due. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

Although some form of hearing is required before a person is finally deprived of a protectable property interest, "due process is flexible and calls for such procedural protections as the particular situation demands," and the timing and nature of the required hearing will depend on the competing interests involved. *Brody v. Vill. of Port Chester*, 434 F.3d 121, 134 (2d Cir. 2005) (internal quotations omitted); *see also Logan*, 455 U.S. at 433-34. The determination of how much process is due requires a balancing of three factors: (1) the private interest affected; (2) the risk of an erroneous deprivation and the probable value, if any, of additional safeguards; and (3) the Government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

The Fifth Amendment likewise imposes two limitations on the right to exercise eminent domain: (1) the taking must be for public use; and (2) the owner must receive just compensation. U.S. Const. amend. V. While there is a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, that role is extremely narrow. *Brody*, 434 F.3d at 127-29, 135. The Supreme Court has defined the concept of public use broadly, reflecting its longstanding policy of deference to legislative judgments in this field. *Id.* at 135 (quoting *Kelo v. City of New London*, 545 U.S. 469, 480 (2005)). Accordingly, "the role of the courts in enforcing the constitutional limitations on eminent domain is one of patrolling the borders." *Brody*, 434 F.3d at 135.

II. Petitioners Have Been Provided All Process Due to Them and Continue to Receive Process in This Proceeding and the Eminent Domain Proceedings Pending in the District Courts and the U.S. Court of Appeals for the Third Circuit.

A. Petitioners Do Not Have a Due Process Interest in the Natural Gas Act's Adjudicatory Procedures.

The Allegheny Petitioners argue that the Natural Gas Act "give[s] rise to expectations and interests protected by the Due Process Clause," Pets.' Br. at 35, but the alleged deprivation of use of the Natural Gas Act's review procedures through FERC's issuance of tolling orders cannot form the basis of a due process claim because Allegheny Petitioners do not have a property interest in the Natural Gas Act's review procedures. *See Griffith v. Fed. Labor Relations Auth.*, 842 F.2d

487, 495 (D.C. Cir. 1988) (rejecting claim that plaintiff had a constitutional right to use certain adjudicatory procedures, explaining that property interest was the substantive cause of action, not the procedural specifications, and recognizing that procedural safeguards cannot create a property interest for due process purposes). To hold that such procedures create property rights would make the scope of the Due Process Clause virtually boundless, and would mean that a person may not be deprived of a hearing without having a hearing. *See Shvartsman v. Apfel*, 138 F.3d 1196, 1199-1200 (7th Cir. 1998). The Supreme Court has made the same distinction between substance and procedure when faced with claims of property entitlement to a set of procedures. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct."); *Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement.").

Any alleged deprivation with respect to the Natural Gas Act's review procedures cannot sustain a due process claim because Allegheny Petitioners do not have a property interest in those procedures. Furthermore, as explained in Sections II.B.-C., below, FERC's use of tolling orders is fully consistent with

Congress's mandate in the Natural Gas Act and does not deprive Petitioners of any other property interests.

B. FERC's Long-Standing and Consistently-Upheld Use of Tolling Orders and Issuance of Notices to Proceed While Rehearing Requests Remain Pending Do Not Deny Petitioners a Meaningful Opportunity to be Heard Because the Natural Gas Act Expressly Provides That the Filing of a Request for Rehearing or an Appeal Does Not Automatically Stay the Certificate Order.

Petitioners ask this Court to depart from more than 20 years of FERC practice issuing tolling orders pursuant to lawfully delegated authority, as well as this Court's precedent and the significant body of case law developed over nearly 50 years, which recognizes the validity of tolling orders as "acts" under Section 19(a) of the Natural Gas Act and establishes that FERC is not required to act on the merits of a rehearing request within 30 days. *See, e.g.*, *California Co. v. Fed. Power Comm'n*, 411 F.2d 720, 721-22 (D.C. Cir. 1969); *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969). Petitioners fail to offer any persuasive reasons to deviate from this longstanding precedent. This Court is "bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court." *Nat'l Inst. of Military Justice v. U.S. Dep't of Def.*, 512 F.3d 677, 682 (D.C. Cir. 2008) (quoting *United States v. Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006)).

Ignoring the entire multi-year administrative process preceding issuance of the Certificate Order, in which Petitioners were active participants, Petitioners argue that FERC's use of tolling orders denies them an opportunity to be heard. Petitioners incorrectly assert that their filing requests for rehearing of the Certificate Order with FERC entitles them to complete administrative and judicial review of their challenges before construction may proceed. Petitioners similarly challenge FERC's issuance of Notices to Proceed with construction while their rehearing requests remain pending. However, the essential premise of Petitioners' arguments is incorrect as a matter of law.

Petitioners are not entitled to have their challenges resolved before construction may begin. The Natural Gas Act requires aggrieved parties to seek rehearing from FERC before they may obtain judicial review, and it expressly provides that the filing of a request for rehearing shall not, unless specifically ordered by FERC, operate as a stay of the Certificate Order, and that the filing of a petition for review with a federal court of appeals shall not, unless specifically ordered by the court, operate as a stay of the Certificate Order. 15 U.S.C. § 717r(c). In essence, Petitioners are asking this Court to read into the Natural Gas

Act a stay requirement that is flatly contradicted by Congress's determinations reflected in the plain language of the Natural Gas Act.[9]

C. FERC's Issuance of Tolling Orders to Afford Adequate Time to Consider Rehearing Requests Does Not Extinguish Any Causes of Action and Therefore Does Not Constitute a Deprivation of Property Protected By the Due Process Clause.

FERC's issuance of tolling orders does not extinguish a judicial challenge to the Certificate Order or any Notice to Proceed with construction activities. Nor should FERC's use of tolling orders to afford itself adequate time to consider Petitioners' rehearing requests be considered delay—it is nothing more than the ordinary functioning of the administrative process, fully consistent with the Natural Gas Act. But even if the proper functioning of the administrative process was considered delay, a delayed challenge is not an extinguished challenge, and only the latter constitutes a deprivation of a property interest that triggers due process protections.

For purposes of constitutional due process guarantees, a cause of action can constitute a protectable property interest. *See Logan*, 455 U.S. at 428. Delays in the adjudication of a cause of action, however, do not amount to a deprivation of

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[9] Landowner-Petitioners' argument with respect to Section 713(e) of FERC's regulations fails for the same reasons. *See* Pets.' Br. at 49. The language in Section 713(e) of FERC's regulations corresponds with the language in Section 19(c) of the Natural Gas Act. *Compare* 18 C.F.R. § 385.713(e) *with* 15 U.S.C. § 717r(c).

property. *See Council of & for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) ("In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.") (emphasis in original); *see also Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983) (finding that plaintiff's property right, while delayed, was not extinguished, and that no deprivation of property interest occurred). "Where only property rights are involved, *mere postponement of the judicial enquiry is not a denial of due process*, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips v. Comm'r of Internal Revenue*, 283 U.S. 589, 596-97 (1931) (emphasis added). The First Circuit has specifically rejected the argument that this kind of tolling violates the Due Process Clause. *See Kokajko*, 837 F.2d at 525-26. Thus, even if Petitioners had a protected property interest in their causes of action, and those causes of action were delayed, Petitioners would be unable to show a violation of due process because they cannot demonstrate a deprivation of a protected property interest.

D. Interim Judicial Recourse Is Available in Appropriate Circumstances.

Opponents of Project construction are not without recourse while rehearing requests remain pending before FERC. Although a petition for review may not be filed in the Courts of Appeals until FERC has ruled on the merits of a request for

rehearing, *see* 15 U.S.C. § 717r(b), and the filing of a request for rehearing or petition for review does not stay FERC's order unless ordered otherwise in a particular case, *see id.* § 717r(c), parties seeking to prevent construction from proceeding can—and routinely do—seek a stay from FERC and the federal Courts of Appeals. Here, Petitioners sought stays from both FERC and this Court—all of which were considered and denied. *See* R. 4139, Order Denying Stay, *Transcon. Gas Pipe Line Co., LLC*, 160 FERC ¶ 61,042 (Aug. 31, 2017), JA___; Docket No. 17-1098, Order (D.C. Cir. Nov. 8, 2017); Docket No. 17-1098, Order (D.C. Cir. Feb. 16, 2018).

The All Writs Act provides a mechanism for petitioners to bring their concerns to the appropriate federal Court of Appeals, as required by the Natural Gas Act, if in fact the statutory remedies are inadequate. *See* 28 U.S.C. § 1651(a) (empowering federal courts to issue writs as necessary to protect their prospective jurisdiction); *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (recognizing availability of relief under the All Writs Act when statutorily prescribed remedies are inadequate); *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015) ("Under the All Writs Act, [a project opponent] may apply to the Court of Appeals for, and that Court may grant, ancillary relief in aid of its future jurisdiction" even before the Commission has acted on a rehearing request); *see also, e.g.*, *Am. Pub. Gas Ass'n*

v. Fed. Power Comm'n, 543 F.2d 356, 357-58 (D.C. Cir. 1976) (exercising jurisdiction under the All Writs Act and issuing injunctive relief).

Given the availability of both administrative and judicial relief while a request for rehearing is pending, Petitioners' complaint can only be about the "delay" in adjudicating a formal petition for review pursuant to § 717r(b) of the Natural Gas Act. But the decisions of this Court and other courts make clear that the Natural Gas Act does not vest Petitioners with a statutory right to a specific form of judicial review prior to the beginning of construction on a pipeline project. *See California Co.*, 411 F.2d at 721-22; *California Mun. Utils. Ass'n v. FERC*, No. 01-1156, 2001 WL 936359, at *1 (D.C. Cir. July 31, 2001); *Gen. Am. Oil Co. of Tex.*, 409 F.2d at 599; *see also Kokajko*, 837 F.2d at 525-26.

E. Landowner-Petitioners Have Received All Process Due to Them Through Their Numerous Opportunities to be Heard in the Proceedings Before FERC and This Court and in the Eminent Domain Proceedings.

1. Landowner-Petitioners Received Extensive Process in the FERC Proceedings Commensurate with the Requirements Established in *Mathews* and Continue to Receive Process in This Proceeding.

Landowner-Petitioners' claim that "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," Pets.' Br. at 47, overlooks the entire multi-year proceeding leading

up to FERC's issuance of the Certificate Order—a process in which Landowner-Petitioners actively participated. Landowner-Petitioners have received—and continue to receive—all process due to them.

In its regulation of interstate commerce through the Natural Gas Act, Congress conditioned the right to exercise eminent domain authority *only* on the issuance of a certificate of public convenience and necessity, which in turn requires notice and a hearing by FERC to determine whether a project is required by the public convenience and necessity. *See* 15 U.S.C. §§ 717f(c)(1)(B), 717f(h). Landowner-Petitioners' opportunity to challenge FERC's determination of public need during FERC's public notice-and-comment proceedings satisfies constitutional due process requirements. *See Mathews*, 424 U.S. at 333 (explaining that due process requires only the opportunity to be heard "at a meaningful time and in a meaningful manner") (quotations omitted); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1327 (D.C. Cir. 2015) ("[A] commenter before [FERC] who has ample time to comment on evidence before the deadline for rehearing is not deprived of a meaningful opportunity to challenge the evidence."); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 115 (D.C. Cir. 2014) ("Petitioners had the chance to make meaningful use of this information in connection with their petitions for rehearing. Under our precedent, this fact neutralizes any constitutional claim under the Due Process Clause.");

Blumenthal v. FERC, 613 F.3d 1142, 1146 (D.C. Cir. 2010) (claim of denial of due process because no opportunity to respond before FERC issued initial decision failed because party "had such an opportunity and took advantage of it when filing its petition for rehearing, which FERC in turn thoroughly considered. So this due process argument fails as well."); *see also Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.59 Acres*, No. 4:17-CV-00289, 2017 WL 1105237, at *7 (M.D. Pa. Mar. 24, 2017) (finding no violation of landowner's Fifth Amendment due process rights where "[landowner] had notice and opportunity to be heard before FERC and will have further notice and opportunity to be heard before this Court as to the amount of compensation to be determined"), *aff'd*, 709 F. App'x 109 (3d Cir. 2017), *subsequent mandamus proceeding*, 711 F. App'x 117 (3d Cir. 2018).

Landowner-Petitioners' contention that they have not had a meaningful opportunity to be heard with respect to their opposition to the Project is baseless. *See Mathews*, 424 U.S. at 333; *Minisink*, 762 F.3d at 115; *Blumenthal*, 613 F.3d at 1145-46. FERC has broad discretion to determine how best to order its proceedings, including whether to provide for a paper hearing or an in-person evidentiary hearing. *Minisink*, 762 F.3d at 114 (finding that FERC need not hold an evidentiary hearing regarding its determination of public convenience and necessity where disputed issues can be adequately resolved on a written record);

see also Mobil Oil Expl. & Prod. Se. Inc. v. United Dist. Cos., 498 U.S. 211, 230-31 (1991). "This Court has never held that an *in-person evidentiary* hearing is constitutionally required whenever FERC makes decisions. Indeed, we have frequently suggested the opposite." *Blumenthal*, 613 F.3d at 1145 (emphasis in original). An evidentiary hearing is required only when there are material factual issues in dispute that cannot be resolved on the basis of the written record. *Moreau*, 982 F.2d at 568 (collecting cases); *see also CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1293 (D.C. Cir. 1994). When the paper record provides a sufficient basis for resolving issues, FERC's long-standing practice is to provide for a paper hearing, as it did here.

Landowner-Petitioners had ample notice and opportunity to be heard in the FERC proceedings as to the public purpose of the Project. During the course of FERC's consideration of Transco's application for a certificate authorizing the Project, the public, and all landowners affected by the Project, had an opportunity to intervene in FERC's proceeding and comment on Transco's application and the Project. ***Landowner-Petitioners not only intervened in the FERC proceeding, they also submitted 9 comments to FERC.***[10] FERC considered and responded to

[10] R. 2485; R. 2577; R. 2623; R. 3187; R. 3807; R. 3810; R. 3857; R. 3880; R. 3940. This list includes comments submitted by Gary and Michelle Erb, the principals of Petitioner Hilltop Hollow Limited Partnership, who were granted late intervention in the FERC proceeding. *See* R. 3954, Certificate Order ¶ 13, App'x B, JA___, JA___.

comments submitted by Landowner-Petitioners and other interested parties in the December 30, 2016 Final Environmental Impact Statement and its accompanying volumes. *See generally* R. 3913, Final Environmental Impact Statement. The Certificate Order also addressed concerns raised during the FERC proceeding. *See generally* R. 3954, Certificate Order. Landowner-Petitioners had a further opportunity to be heard after the Certificate Order issued by participating in the rehearing process, 15 U.S.C. § 717r(a), and submitting their Requests for Rehearing, which FERC responded to at length in its Order on Rehearing. *See* R. 4203, Order on Rehearing, *Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, ¶¶ 25-39, 42-61, 68-71 (Dec. 6, 2017), JA___, JA___, JA___. All of this process, including Landowner-Petitioners' opportunity to challenge the Certificate Order, satisfies constitutional due process requirements. *See Myersville*, 783 F.3d at 1327 ("[A] commenter before the Commission who has ample time to comment on evidence before the deadline for rehearing is not deprived of a meaningful opportunity to challenge the evidence.").

Landowner-Petitioners' reliance on the Second Circuit's decision in *Brody v. Vill. of Port Chester*, 434 F.3d 121 (2d Cir. 2005) and the Third Circuit's decision in *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) as support for their argument that due process requires judicial review of a public use determination prior to possession of rights-of-way, *see* Pets.' Br. at 46-50, is misplaced. As the district

court correctly explained in the eminent domain proceedings involving Landowner-Petitioners, "neither case addresses a taking under the Natural Gas Act and both are clearly distinguishable from the instant set of facts." *Transcon. Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, 2017 WL 3624250, at *5 n.4.

In *Brody*, the Second Circuit discussed the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine whether due process is satisfied with respect to both when a hearing is required and what procedures are due. Notably, because the plaintiff in *Brody* had the opportunity for a pre-deprivation hearing, the *Brody* court did not need to consider whether a pre-deprivation hearing was required and did not reach any holding on that issue. *Brody*, 434 F.3d at 135. Instead, the Second Circuit held only that "where, as here, a condemnor provides an exclusive procedure for challenging a public use determination, it must also provide notice" of that procedure. *Id.* at 129. The court in *Brody* ***did not*** hold that an evidentiary hearing on public use must take place prior to the commencement of eminent domain proceedings. In fact, the Second Circuit noted that "the risk of erroneous deprivation and the marginal benefit of additional procedures are low," given the "long line of Supreme Court cases" that "have 'defined [the concept of public use] broadly, reflecting [the Court's] longstanding policy of deference to legislative judgments in this field.'" *Id.* at 135

(quoting *Kelo v. City of New London*, 545 U.S. 469, 480 (2005)). The narrow scope of *Brody*'s holding is consistent with those of other federal courts which have found that, for the purposes of a taking, due process only requires that reasonable notice and the opportunity to be heard is provided in the compensation proceedings. *See Bailey v. Anderson*, 326 U.S. 203, 205 (1945); *Collier v. City of Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984); *Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006); *see also* Section II.E.2., below.

Landowner-Petitioners' reliance on *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980) is similarly misplaced. *Finberg* arose following a postjudgment garnishment action where an elderly woman's social security benefits were frozen ***without any notice*** and ***where she had no pregarnishment opportunities to defend against the taking***. 634 F.2d at 52. The ruling in *Finberg* is not relevant to this case, given that Landowner-Petitioners received notice of the condemnations and had many opportunities to be heard regarding the Certificate Order and Transco's right to condemn through their intervention and participation in the FERC proceeding and in the eminent domain proceedings. To the extent that *Finberg* applies here, Landowner-Petitioners received more than adequate procedural protections "against erroneous or arbitrary seizures." *Id.* at 58.

2. Landowner-Petitioners Have Received, and Continue to Receive, All Process Due to Them in the Eminent Domain Proceedings Pending in the District Court and the Third Circuit.

Landowner-Petitioners' argument that the district court's purported exercise of the "quick take power of eminent domain"[11] and refusal to entertain challenges to FERC's public use determination in the condemnation proceedings violated their due process rights is not appropriately considered in this proceeding, which is limited to review of the challenged orders issued by FERC, not the district court's rulings. Indeed, Landowner-Petitioners appealed the district court's order awarding Transco possession of the rights-of-way on their property to the United States Court of Appeals for the Third Circuit, where Landowner-Petitioners filed

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[11] The rights-of-way on Landowner-Petitioners' property were not acquired through a "quick take." Instead, Transco initiated the condemnations pursuant to federal law, under Rule 71.1 of the Federal Rules of Civil Procedure, and several months later filed an omnibus motion for a preliminary injunction for possession of the rights-of-way. *See* Omnibus Motion, Docket Nos. 5:17-cv-00715, 5:17-cv-00723 (E.D. Pa. June 28, 2017). The district court held an evidentiary hearing on Transco's injunction motion in which Landowner-Petitioners participated through counsel. Transco obtained possession of the rights-of-way only after demonstrating to the district court that it satisfied the stringent requirements for a preliminary injunction. *See Transcon. Gas Pipe Line Co., LLC*, 2017 WL 3624250. As a precondition to taking possession of the rights-of-way on each property, Transco posted a bond with the district court to secure just compensation for Landowner-Petitioners pending completion of the valuation proceedings. *See* Bond in Condemnation Proceedings, Docket No. 5:17-cv-00715 (E.D. Pa. Aug. 29, 2017); Bond in Condemnation Proceedings, Docket No. 5:17-cv-00723 (E.D. Pa. Aug. 29, 2017).

their opening brief on May 7, 2018, raising many of the same arguments (in some instances, nearly verbatim). *See Transcon. Gas Pipe Line Company, LLC v. Permanent Easements for 2.14 Acres, et al.*, Nos. 17-3075, 17-3076 (3d Cir.).

Nevertheless, Landowner-Petitioners' arguments that they were deprived of due process in the eminent domain proceedings are meritless because Landowner-Petitioners have an opportunity to be heard in compensation hearings in those proceedings, which is all due process requires. *See Bailey v. Anderson*, 326 U.S. 203, 205 (1945) ("[I]t has long been settled that due process does not require the condemnation of land to be in advance of its occupation," so long as "the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken."); *Collier v. City of Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984) (explaining that "it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the [C]onstitution without providing prior notice, hearing or compensation so long as there exists an adequate mechanism for obtaining compensation" and collecting cases); *Presley v. City of Charlottesville*, 464 F.3d 480, 490 (4th Cir. 2006) ("[W]hen the alleged deprivation is effectively a physical taking, procedural due process is satisfied so long as private property owners may pursue meaningful postdeprivation procedures to recover just compensation.") (citing *Bailey*, 326 U.S. at 205); *see id.*, 464 F.3d at 489-90 (collecting "a century

of precedent" for the proposition that a "physical taking" does not require a hearing or notice prior to the taking).

Landowner-Petitioners' central argument that judicial review of FERC's public use determination must precede the use of eminent domain is directly contrary to the well-established case law from the Supreme Court and the federal Courts of Appeals, discussed above, and the Congressional directive in the Natural Gas Act authorizing the use of eminent domain for interstate natural gas pipeline projects. In the Natural Gas Act, Congress conditioned the right to exercise eminent domain authority ***only*** on the issuance of a certificate of public convenience and necessity, which in turn requires notice and a hearing by FERC to determine that a project is required by the public convenience and necessity. *See* 15 U.S.C. § 717f(c)(1)(B); *id.* § 717f(h) ("When ***any holder of a certificate of public convenience and necessity*** cannot acquire by contract . . . the necessary right-of-way. . . it may acquire the same by the exercise of the right of eminent domain . . . .) (emphasis added). Those prerequisites were satisfied when Transco initiated eminent domain proceedings after unsuccessful efforts to acquire the rights-of-way from Landowner-Petitioners by agreement and after FERC issued the Certificate Order following its multi-year review of the Project during which it considered all comments submitted by Landowner-Petitioners and other interested parties.

III. Petitioners Have Failed to Demonstrate That They Are Entitled to Relief, But Even if They Had Done So, Vacatur Would Not Be an Appropriate Remedy Here Under This Court's Precedent.

Petitioners' claims have no merit and their petitions for review should be denied. But even if the Court finds some merit in Petitioners' claims, the relief sought by Petitioners—vacatur and remand of the Certificate Order—is not the appropriate remedy. Under this Court's decision in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146 (D.C. Cir. 1993), the appropriate remedy would be a remand to FERC without vacatur.

In *Allied-Signal*, this Court established a two-part inquiry for assessing whether vacatur is an appropriate remedy. The Court considers: (1) "the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)"; and (2) "the disruptive consequences of an interim change that may itself be changed." *Id.* at 150-51 (internal quotations omitted). Thus, the Court must determine whether there is "at least a serious possibility that the [agency] will be able to substantiate its decision on remand," and whether vacatur will lead to impermissibly disruptive consequences in the interim. *See id.* at 151; *see also Williston Basin Interstate Pipeline Co. v. FERC*, 519 F.3d 497, 504 (D.C. Cir. 2008) (declining to vacate when "significant possibility that the [agency] may find an adequate explanation for its actions").

A. A Showing on Either *Allied-Signal* Factor is Sufficient to Decline Vacatur.

This Court does not require the proponent or opponent of vacatur to prevail on both factors. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (remanding without vacatur, despite serious flaws in rule, where vacatur would be disruptive); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048–49 (D.C. Cir. 2002) (remanding without vacatur even though "the disruptive consequences of vacatur might not be great"), *opinion modified in other respects on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *U.S. Telecom Ass'n v. FBI*, 276 F.3d 620, 626–27 (D.C. Cir. 2002) (remanding several rules but vacating only one in light of the first *Allied–Signal* factor).

With respect to *Allied-Signal*'s first factor, vacatur is generally an appropriate remedy when an agency's reasoning is "so crippled as to be unlawful." *See Radio–Television News Directors Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999). If, however, the action is "potentially lawful but insufficiently or inappropriately explained," remand without vacatur may instead be imposed. *Id.* "As the Supreme Court has instructed . . . where 'the record before the agency does not support the agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)); *see id.*, 192 F.3d at 1023

("While we have identified significant inconsistencies and gaps in the Secretary's rationale . . . bedrock principles of administrative law preclude us from declaring definitively that her decision was arbitrary and capricious without first affording her an opportunity to articulate, if possible, a better explanation.") (collecting cases); *see also Checkosky v. SEC*, 23 F.3d 452, 463 (D.C. Cir. 1994) (Silberman, J., concurring) (citing some of the "many instances where we have remanded to an agency for a better explanation before finally deciding that the agency's action was arbitrary and capricious"), *superseded on other grounds by rule as stated in, Marrie v. S.E.C.*, 374 F.3d 1196 (D.C. Cir. 2004); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 60 (D.C. Cir. 2015) (following "well-worn path" established by this Court's decisions and "remand[ing] to the Secretary for additional explanation"). Thus, "[w]hen an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur." *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009); *see also, e.g., Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) ("[T]he EPA's failure adequately to explain itself is in principle a curable defect."); *Louisiana Fed. Land Bank Ass'n, FLCA v. Farm Credit Admin.*, 336 F.3d 1075, 1085 (D.C. Cir. 2003) (vacatur inappropriate where the agency's "only error was its failure to explain what seems to be a policy difference with the plaintiffs"); *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013)

("We find it plausible that FERC can redress its failure of explanation on remand . . . ."); *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (remanding without vacatur where "the FDA may well be able to explain" its conclusion).

When the first *Allied–Signal* factor supports remand without vacatur, the second prong "is only barely relevant." *Fox Television Stations*, 280 F.3d at 1049. In those instances, "though the disruptive consequences of vacatur might not be great, the probability that the [agency] will be able to justify retaining [its prior decision] is sufficiently high that vacatur . . . is not appropriate." *Id.*

Significantly, even when there are serious deficiencies in an agency's action, this Court has declined to vacate when the disruptive consequences of vacatur would be significant. *See, e.g.*, *North Carolina*, 550 F.3d at 1177-78 (no vacatur due to disruptive consequences, despite "more than several fatal flaws in the rule"); *see also Shands Jacksonville Med. Ctr. v. Burwell*, 139 F. Supp. 3d 240, 270-71 (D.D.C. 2015) (no vacatur where "the deficiencies in the rule [we]re serious," and the first factor therefore supported vacatur, but the disruptive consequences outweighed that factor).

B. Neither of the *Allied-Signal* Factors Would Support Vacatur in This Case.

Petitioners do not meaningfully attempt to justify their request for vacatur, going so far as to suggest that this Court need not consider the *Allied-Signal* factors

at all. Nevertheless, in addressing the first factor to be considered, Petitioners merely assert in a conclusory fashion that the "EIS [Environmental Impact Statement] is so deficient that it undermined informed decisionmaking," Pets.' Br. at 56, but the record belies this assertion and shows that FERC took a hard look at the Project's anticipated environmental effects, including each of the issues raised by Petitioners. *See generally* Brief of Respondent at 16-35, 51-65. But even if Petitioners had identified some deficiencies in FERC's environmental review, that would be a far cry from demonstrating that FERC's analysis was "so crippled as to be unlawful," *see Radio–Television News Directors Ass'n*, 184 F.3d at 888, and would not justify disrupting "bedrock principles of administrative law," that preclude courts "from declaring definitively that [a] decision was arbitrary and capricious without first affording [the agency] an opportunity to articulate, if possible, a better explanation," *see Cty. of Los Angeles*, 192 F.3d at 1023.

Turning to the second *Allied-Signal* factor, Petitioners concede that "there is likely to be disruption" but discount the relevance of this disruption, claiming "if that prohibited vacatur it would nullify the requirement that NEPA analysis occur *before* the agency decision," *see* Pets.' Br. at 56 (emphasis in original). Courts in this Circuit, however, routinely consider the economic implications of vacatur, including in cases addressing environmental harms and NEPA claims. *See Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1273 (D.C. Cir. 1994) (declining to

vacate rule addressing lead in drinking water in part because "vacatur would be unnecessarily disruptive to the [affected] industries"); *see also Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1309, 1320 (D.C. Cir. 2014) (remanding, but not vacating, for further consideration of segmentation and cumulative impacts under NEPA); *State of Idaho By & Through Idaho Pub. Utils. Comm'n v. I.C.C.*, 35 F.3d 585, 599 (D.C. Cir. 1994) (remanding, but not vacating, NEPA analysis). Additionally, although this Court vacated a certificate of public convenience and necessity in *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) when it remanded to FERC for further environmental review, the Court granted FERC's motion to stay the issuance of the mandate to avoid immediate vacatur, which, if not stayed, would have required the pipelines to cease operations. *Sierra Club v. FERC*, Docket No. 16-1329, Order (D.C. Cir. Mar. 7, 2018). Vacatur in this case would present similarly severe and disruptive consequences as those present in *Sierra Club*.

Vacating the Certificate Order would have several highly disruptive and significant consequences. Not only would Transco be unable to fulfill its transportation contracts and receive a return on its multi-billion dollar investment, but also Transco's customers (including Intervenors Anadarko Energy Services Company, Chief Oil & Gas LLC, and Southern Company Services, Inc.) would not have access to the capacity to which they have subscribed, and/or likewise would

be unable to realize returns on their substantial investments and use this capacity to meet their customers' demand for economical, clean-burning natural gas. *See, e.g.*, R. 1648, Motion to Intervene and Comments in Support of Chief Oil & Gas LLC (Apr. 23, 2015), JA___; R. 2651, Letter from Anadarko Energy Services Company to FERC (Feb. 3, 2016), JA___; R. 2657, Letter from Chief Oil & Gas LLC to FERC (Feb. 4, 2016), JA___; R. 2652, Letter from Southern Companies to FERC (Feb. 3, 2016), JA___. Transco's customers (and their customers) are already using gas that has been made available through the Project facilities currently in service, which is helping to enhance service reliability and provide downstream markets with new competitively priced natural gas supplies. *See id.* Indeed, the Project is designed to supply enough natural gas to meet the daily needs of more than 7 million American homes by connecting producing regions in northeastern Pennsylvania to markets in the Mid-Atlantic and southeastern states. *See, e.g.*, R. 3232, Comments regarding the Atlantic Sunrise Project (June 23, 2016), JA___.[12]

Significantly, the disruptions from vacating the Certificate Order would extend well beyond these impacts. Certain Project facilities are currently being used by Transco to provide much-needed "partial path" transportation service to the Project customers of up to 400,000 dekatherms of natural gas per day. *See* R.

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[12] *See also* Williams, *Overview*, Atlantic Sunrise Pipeline Project, http://atlanticsunriseexpansion.com/about-the-project/overview/ (last visited May 19, 2018).

4133, Letter order granting Transco's 8/11/17 request to commence partial path service by 9/1/17 of the Mainline A and B Replacement facilities, etc. (Aug. 28, 2017). Starting on or about June 1, 2018, Transco will begin providing an additional 150,000 dekatherms of partial path natural gas transportation service per day,[13] which, together with the existing partial path service of 400,000 dekatherms per day, represents more than 32% of the transportation capacity to be provided by the fully-completed Project. Because these facilities are integrated into Transco's existing mainline pipeline system, and are being operated as an essential component of Transco's existing system, they are necessary for Transco to be able to provide natural gas transportation service to Transco's existing customers located along the Transco pipeline system. In other words, these facilities cannot be shut down without also shutting down existing Transco facilities. Transco would sustain substantial lost revenue from its existing system, and Transco's existing customers would be deprived of transportation service.

In sum, Petitioners have fallen far short of demonstrating that this case presents the sort of "rare circumstances" that justify vacatur. *See Cty. of Los Angeles*, 192 F.3d at 1023 (quoting *Florida Power & Light Co.*, 470 U.S. at 744).

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[13] *See* Accession No. 20180515-3002, Letter order granting Transco's May 4, 2018 filing of the Authorization to Place Certain Facilities into Service and Commence Interim Partial Path Service (May 15, 2018), available on FERC's eLibrary in Docket Number CP15-138-000, *see* https://www.ferc.gov/docs-filing/elibrary.asp.

CONCLUSION

If not dismissed for lack of jurisdiction, the petitions for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced, 14-point typeface (Times New Roman) and is set in a plain, roman style, using italics for emphasis and citation only.

2. This brief complies with the type-volume limitations in this Court's Order of November 21, 2017 because it contains 8,604 words, excluding the parts of the brief exempted by Circuit Rule 32(e)(1) and Fed. R. App. P. 32(f).

Dated: May 24, 2018

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United States Court of Appeals
for the District of Columbia Circuit

ALLEGHENY DEFENSE PROJECT, *et al.*, *v.* FEDERAL ENERGY REGULATORY COMMISSION. No. 17-1098 (consolidated with Nos. 17-1128, 17-1263, 18-1030)

CERTIFICATE OF SERVICE

I, Elissa Diaz, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by SAUL EWING ARNSTEIN & LEHR LLP, Attorneys for Intervenors to prepare this document. I am an employee of Counsel Press.

On **May 24, 2018**, Counsel for Intervenors have authorized me to electronically file the foregoing **Joint Brief of Intervenors** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users:

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Paper copies of this filing are not due at the Court at this time.

May 24, 2018

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