ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1098 (consolidated with 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 REPLY 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

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STATUTES AND REGULATIONS

Except for the following, which are contained in the Addendum to this reply brief, all applicable statutes and regulations are contained in Petitioners' opening brief and FERC's response brief: 42 U.S.C. § 7171(e); 40 C.F.R. § 1502.14; 60 Fed. Reg. 62,326.

REPLY TO COUNTERSTATEMENT OF JURISDICTION

I. Petitioners' Challenge to FERC's Certificate

A. Case Nos. 17-1263 and 18-1030

FERC issued the Certificate Order on February 3, 2017. [JA-___]. Petitioners timely filed requests for rehearing and stay under 15 U.S.C. § 717r(a). [JA-___], [JA-___]. FERC denied the rehearing requests in its order of December 6, 2017, [JA-___], and Petitioners timely filed petitions for review of that in case nos. 17-1263 and 18-1030. This Court has jurisdiction to hear Petitioners' challenges to FERC's Certificate under 15 U.S.C. § 717r(b).

B. Case Nos. 17-1098 and 17-1128

These petitions were filed after the requests for rehearing on the Certificate and FERC's tolling order of March 13, 2017. FERC moved to dismiss because they preceded the final ruling on the rehearing requests. But the Court has jurisdiction over these petitions because of the invalidity of FERC's tolling order. This issue is not moot because FERC continues to misuse tolling orders to block

this Court's jurisdiction, including over motions for stay. *See, e.g.*, Rehearing Request, Ex. 2 [JA-___-___] (listing recent cases in which FERC issued tolling orders).

In issuing the tolling order FERC failed to "grant or deny rehearing or to abrogate or modify its order" within 30 days of the rehearing requests, which means they were denied by operation of law. 15 U.S.C. § 717r(a). At that point Petitioners timely filed petitions for review in case nos. 17-1098 and 17-1128, and jurisdiction attached under 15 U.S.C. § 717r(b).

The tolling order was invalid for several reasons. First, under the Natural Gas Act, "[u]nless *the Commission acts* upon the application for rehearing within thirty days…, such application may be deemed to have been denied."[1] *Id.* § 717r(a) (emphasis added). Although some cases have held a tolling order is an "act," an effort by the Secretary to "[t]oll the time for action" under 18 C.F.R. § 375.302(v) does not constitute an "act" by the Commission. This Court should not defer to FERC's view of what constitutes an "act" for purposes of 15 U.S.C. § 717r(a). *See Murphy Exploration & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 478 (D.C. Cir. 2001); *infra* at II.B (distinguishing cases upholding tolling orders).

[1] Congress expressly authorized the Commission to delegate certain of its powers, *see* 42 U.S.C. § 7171(g), 15 U.S.C. § 717m(c), 15 U.S.C. § 717n(e), but did not allow for delegation to act on rehearing requests. *See Cudahy Packing Co. of La. v. Holland*, 315 U.S. 357, 364 (1942).

Second, even under FERC's interpretation of its regulation, the Secretary's authority is limited to tolling orders on stand-alone rehearing requests. 60 Fed. Reg. 62,326, 62,327 (Dec. 6, 1995). The rehearing requests here were not stand-alone requests but were combined with motions for stay. [JA-___], [JA-___].

Third, FERC lacked a quorum when the tolling order issued. The Commission cannot act without a quorum of at least three members. *See* 42 U.S.C. § 7171(e). Thus, even if the Commission could lawfully make the *initial* delegation of authority to the Secretary, "that delegation cannot survive the loss of a quorum." *Laurel Baye Healthcare of Lake Lanier, Inc. v. Nat'l Labor Relations Bd.*, 564 F.3d 469, 472 (D.C. Cir. 2009). An "agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended." *Id.* at 473 (citation omitted).

Because the March 2017 "tolling order" was *void ab initio*, *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129, 134 (1936), this Court has jurisdiction under 15 U.S.C. § 717r(b).

II. Due Process Claims

FERC asserts timing and exhaustion defenses to the due process claims. FERC Br. 9-10, 28-29. But Petitioners were not required to file requests for rehearing on the tolling orders or a petition for review challenging the Notice to Proceed to assert these claims. Under FERC's reading of the law, Petitioners

would have to file rehearing requests on tolling orders, which would lead to more tolling orders and rehearing requests *ad infinitum*. Courts reject such results. *See AKM LLC v. Sec'y of Labor*, 675 F.3d 752, 758 (D.C. Cir. 2012) (rejecting federal agency interpretation of statute that would have "absurd consequence" of expanding deadlines *ad infinitum*).

If FERC were correct, the Project could be finished and the environmental harm from construction done before the rehearing is decided or becomes appealable, rendering the Natural Gas Act provisions for rehearing and appeal of environmental claims meaningless. This also undermines FERC's duties under the Act to consider environmental factors in its decision-making. *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

Whether FERC's final ruling on the rehearing requests could include additional mitigation measures under NEPA, FERC Br. 47, is irrelevant. They will not necessarily undo the damage and reconsideration of the "no action" alternative will have been foreclosed. *See* 40 C.F.R. § 1502.14 (alternatives are the heart of NEPA); *id*. § 1502.14(d) (requiring consideration of a "no action," *i.e*., no-build, alternative). It also does not matter that the Natural Gas Act lacks an automatic stay provision. FERC Br. 43. Section 717r(a)-(b) provides for a speedy administrative rehearing and judicial appeal process, making an automatic stay unnecessary.

Moreover, Allegheny Petitioners' first rehearing request included a request for stay, and specifically objected to issuing notices to proceed. Rehearing Request at 42-43 [JA-___-___]. FERC denied that stay motion more than six months later, on August 31, 2017. [JA-___]. Allegheny Petitioners filed a request for rehearing on that order, raising their due process arguments. [JA-___]. On December 6, 2017, FERC finally denied Petitioners' requests for rehearing on the Certificate Order *and* on the stay denial. [JA-___]. Thus, Allegheny Petitioners brought their due process claim before FERC, and FERC ruled on it, *before* filing the petition in case no. 17-1263. In addition, the petition specifically listed the September 15, 2017 Notice to Proceed as one of the final actions being appealed. Doc. No. 1709731.[2]

Finally, Petitioners were not required to go through another round of tolling orders and rehearing on the Notice to Proceed because it was futile. *See Am. Fed'n of Gov't Emps. v. Acree*, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (failure to exhaust administrative remedies did not bar due process claims where exhaustion would be an exercise in futility); *Tensoro Ref. and Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (finding petitioner should have exhausted administrative remedies but distinguishing cases like this one, where it would be futile because FERC had

[2] Allegheny Petitioners' request for rehearing on the Notice to Proceed also included the due process claim. [JA-___]. FERC issued a tolling order on that, which was invalid for the same reasons as the prior tolling order. It issued its ruling on the request after the petition for review was filed.

rejected the same argument previously); *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 106 (D.C. Cir. 1986).

SUMMARY OF ARGUMENT

NEPA: FERC failed to adequately analyze downstream greenhouse-gas and climate impacts, which FERC incorrectly claims are not indirect effects of the Project. In the EIS, FERC provides a full-burn estimate but relies on potential displacement of higher-emitting fuels to conclude that emissions would be offset to the point of insignificance. In its response brief, FERC changes tack and claims it did not make a significance finding. FERC's failure to thoroughly consider these effects, including their significance and cumulative impacts, violates NEPA.

Due Process: This Court has jurisdiction over the due process claim under 15 U.S.C. § 717r(b) because Allegheny Petitioners raised it in their October 2, 2017 rehearing request (on FERC's stay denial), which FERC denied in its December 6, 2017 order. Petitioners were not required to seek rehearing on the tolling order(s) or file another petition for review on the Notice to Proceed.

Allegheny Petitioners satisfy the three elements for a due process violation in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The Pennsylvania Constitution establishes environmental rights on par with any other right, and state constitutional rights can serve as the source of a federal due process claim.

While the Natural Gas Act provides Petitioners a right to a meaningful appeal, FERC's tolling orders deny it. Under FERC's practice, Petitioners had no right to seek a stay in this Court until after the final ruling on the rehearing requests, which came almost three months after greenfield pipeline construction started. The cases upholding tolling orders are distinguishable because they were not dealing with notices to proceed, construction, and resultant irreparable harm; and the tolling orders here were not proper "acts" under section 717r(a). Finally, Intervenors are wrong that Petitioners have a remedy under the All Writs Act because this case does not satisfy the three elements of *American Hospital Association v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016).

Pursuant to the takings clause of the Fifth Amendment, and the Natural Gas Act, the Landowners cannot be deprived of their private property unless that taking serves a public use. Neither FERC nor the District Court conducted any substantive inquiry into whether the gas that will be transported by the Project will be distributed to the public, or exported for private profit. These failures, and the refusal of both FERC and the District Court to afford the Landowners a meaningful opportunity to be heard in opposition to FERC's faulty public use determination, deprived the Landowners of their rights to substantive and procedural due process.

Route Alternative: FERC failed to take a hard look at the Conestoga Route Alternative or to demonstrate that its rejection of that alternative was based on a full and fair review of its advantages and disadvantages.

ARGUMENT

I. FERC FAILED TO ADEQUATELY ANALYZE DOWNSTREAM GREENHOUSE-GAS AND CLIMATE IMPACTS

A. Downstream Emissions are an Indirect Effect of the Project

Combusting the gas transported by the Project will result in a staggering amount of greenhouse-gas emissions, equivalent to 8.1 coal-fired power plants annually. Opening Br. 17. This Court has already established these are an indirect effect of FERC's approval of gas pipelines that FERC must consider in its EIS. *Sierra Club*, 867 F.3d at 1373-74.[3] But FERC doggedly argues these are not an indirect effect because the Project "was not designed to provide service to any *particular* end user or market…." FERC Br. 55 (emphasis added).

FERC acknowledges the Project will provide "additional" capacity to deliver 1.65 billion cubic feet/day of gas, EIS at 1-2 [JA-___], and that the gas "transported by the Project would be combusted by downstream uses." EIS at CO-76 [JA-___]. Uncertainty regarding end-use is thus limited to *where*, not *whether*, combustion will occur. *See* EIS at 4-318 [JA-___] (Project will "result" in downstream emissions "due to end-use of the natural gas transported by the

[3] Also referred to as "*Sabal Trail*" herein.

Project"). Indeed, this is the entire purpose of the Project. The Court should reject FERC's untenable position that downstream emissions are not an indirect effect of the Project and that uncertainty regarding end-use absolves the agency of "further environmental examination."[4] FERC Br. 55.

B. FERC Failed to Take a Hard Look at Downstream Emissions

FERC's EIS included a full-burn emissions estimate but then dismissed the impact as insignificant based on an unsupported partial offset theory that this Court has rejected. *Sierra Club*, 867 F.3d at 1374-75. FERC argues the "potential offset… could not be quantified" because "any estimate would be too uncertain given the many variables involved." FERC Br. 60. But "some educated assumptions are inevitable in the NEPA process." *Sierra Club*, 867 F.3d at 1374. And insofar as FERC concludes it cannot estimate the emissions offset, there is no basis to support the EIS's conclusion that emissions will be reduced to insignificance.

Additionally, FERC failed to gather information regarding end use and potential displacement. Opening Br. 21. For example, Transco executed precedent agreements with nine shippers, but there is no indication that FERC sought out or

[4] FERC's defiance of *Sabal Trail* is also evident in recent administrative processes. *See Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at *24 (May 18, 2018) (LaFleur, Comm'r, dissenting in part) (noting the "majority has changed the Commission's approach for environmental reviews to do the exact opposite" of what *Sabal Trail* requires).

considered information regarding how they intended to use the gas. *See* 163 FERC ¶ 61,128 at *28-29 (Glick, Comm'r, dissenting in part); *Barnes v. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011); 40 C.F.R. § 1502.22. The record indicates that FERC could have obtained such information, but did not. *See, e.g.*, Certificate Order ¶30.

The Rehearing Order, issued after *Sabal Trail*, also lacks the required analysis. It provides an inflated emissions baseline using the inventory of sixteen states,[5] *see* FERC Br. 53, and states that downstream emissions "would result in no more than a 1.4 percent increase in GHG emissions from fossil fuel combustion" in those states, "and a 0.6 percent increase in national emissions." Rehearing Order ¶94 [JA-___-___]. There is *no discussion or analysis* of those figures, including how they bear on significance or cumulative impact. *See Ill. Commerce Comm'n v. Interstate Commerce 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."). Instead, FERC simply repeats its excuse that estimating displacement would be too difficult—without making any effort to do so. Rehearing Order ¶95 [JA-___].

[5] Emissions from these sixteen states comprise 47.9 percent of the national inventory. *See* Rehearing Order ¶94 [JA-___]; Opening Br. 18-19, n.13.

C. FERC's New Assertion that It Did Not Make a Significance Finding Contradicts the EIS

FERC now claims that "neither the Environmental [Impact] Statement nor the Commission's orders made a finding regarding whether downstream emissions were significant." FERC Br. 58. This misstates the record. The Final EIS states:

> [I]ncreased 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.

EIS at 4-318 [JA-___] (emphasis added). The EIS thus explicitly relied on potential offset to conclude the impact would not be significant. Neither the Certificate Order nor the Rehearing Order modified that conclusion. *See* Certificate Order ¶143 [JA-___]; Rehearing Order ¶¶93, 95 [JA-___, ___]. The Court should reject FERC's post-hoc litigation position. *See Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991).

FERC attempts to make up for the absence of *any* discussion of this position in the record by arguing that it "recently explained" in a supplemental EIS and remand order in *Sabal Trail* that "it cannot make a significance finding regarding downstream emissions."[6] FERC Br. 58-59. As an initial matter, as two dissenting

[6] *But see* 162 FERC ¶ 61,233 at *20 (Glick, Comm'r, dissenting) (Through the *Sabal Trail* remand order, FERC "is engaging in a collateral attack on the Court's decision by suggesting that it is not the Commission's 'job' to consider whether

Commissioners recognized, that is wrong. *See Fla. Southeast Connection, LLC*, 162 FERC ¶ 61,233 at *17 (Mar. 14, 2018), *reh'g pending* (LaFleur, Comm'r, dissenting in part) ("We are required by NEPA to reach a determination regarding the significance of all environmental impacts, including downstream GHG emissions."); *id*. at *21 (Glick, Comm'r, dissenting) (Under the majority's reasoning, "no Federal agency would ever be able to evaluate the impact of an agency action on climate change. It is absurd to even contemplate NEPA not applying to the most significant environmental issue of our time.").[7] Moreover, none of FERC's excuses for failing to make a significance finding that are set forth in the *Sabal Trail* remand order are in the record for *this* case. And even if the Court were to accept FERC's newly adopted position, that would simply mean that FERC completely failed to engage in the required discussion of significance. *Sierra Club*, 867 F.3d at 1374.

D. FERC Failed to Analyze the Climate Impact of Downstream Emissions

Quantifying greenhouse-gas emissions does not assess their impact. *See* 162 FERC ¶ 61,233 at *21 (Glick, Comm'r, dissenting). In their Rehearing Request,

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emissions from 'the *end use* of the gas would be too harmful to the environment.'") (footnote omitted).

[7] The *Sabal Trail* petitioners requested rehearing and a stay of FERC's remand order on April 13, 2018, based in part on this conclusion. *See* FERC Accession No. 20180413-5296. FERC issued a tolling order on May 11, 2018, and has not yet issued a rehearing order.

Allegheny Petitioners specifically identified FERC's failure to "adequately analyze[] the climate change impact of emitting millions of metric tons of carbon dioxide." Rehearing Request at 34 [JA-____]. FERC failed to remedy this deficiency in a rehearing order, and Allegheny Petitioners raised it in their opening brief. Opening Br. 19. Thus, Allegheny Petitioners have not waived this claim. FERC Br. 57.

Although FERC has discretion to choose among reliable methodologies for evaluating impacts, FERC cannot refuse to provide any evaluation whatsoever when a generally accepted methodology is available. *Sierra Club*, 867 F.3d at 1374; 162 FERC ¶ 61,233 at *21-22 (Glick, Comm'r, dissenting); 40 C.F.R. § 1502.22.

To defend its lack of analysis, FERC again cites to the *Sabal Trail* remand order to explain its position that "the Social Cost of Carbon tool would not meaningfully inform natural gas transportation decisions." FERC Br. 57. Once again this is irrelevant because nothing in the record *of this case* explains FERC's failure to analyze the impact of this Project's greenhouse-gas emissions. *See Sierra Club*, 867 F.3d at 1375 ("We do not decide whether those arguments [regarding

Social Cost of Carbon] are applicable in this case … because FERC did not include them in the EIS that is now before us.").[8]

E. Segmentation

Contrary to FERC's arguments on waiver, FERC Br. 61, Allegheny Petitioners raised the connected action and cumulative impact issues in their comments. [JA-___-___]. FERC objects these came after the comment period on the Draft EIS closed, but they were filed on October 10, 2016, approximately 2.5 months before the Final EIS and 14 months before FERC's Rehearing Order. Moreover, FERC considered these issues in its ruling. [JA-___]. Therefore, the claim is not barred. *Nat. Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1150–51 (D.C. Cir. 1987); *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). And, contrary to FERC's assertions, FERC Br. 62, the projects should have been considered together under NEPA due to their physical, functional, and temporal nexus. Opening Br. 27-30. *See also* 40 C.F.R. § 1502.16 (mandatory duty to discuss cumulative impacts in an EIS).

[8] Even if considered, the *Sabal Trail* remand order is insufficient. Commissioner Glick noted that the order, including the Social Cost of Carbon discussion, "does not adequately respond to the Court's mandate" in *Sabal Trail*. 162 FERC ¶ 61,233 at *19 (Glick, Comm'r, dissenting). *See also id.* at *21-22; *id.* at *17, 18 (LaFleur, Comm'r, dissenting in part).

II. FERC DEPRIVED ALLEGHENY PETITIONERS OF DUE PROCESS

A. Allegheny Petitioners Have Established a Federally Protected Interest

Allegheny Petitioners have a constitutionally protected interest at stake. Opening Br. 32-35. Section 27 of the Pennsylvania Constitution creates an interest that is afforded due process protection. *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 931 (Pa. 2017). Like Hawaii's Environmental Rights Amendment, Section 27 "is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process." *In re Application of Maui Elec. Co., Ltd.*, 408 P.3d 1, 13 (Haw. 2017).

This is more than a mere "public right to sue." FERC Br. 41. Section 27 provides "a right to clean air, pure water and to the preservation of the natural, scenic, historic and esthetic values of the environment." Pa. Const. Art. 1, § 27. This is "on par with" any other right reserved to the people in Article I, which includes freedom of religion, press, and speech. *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 953-54 (Pa. 2013).

FERC argues the Pennsylvania Constitution does not provide the necessary *federal* property or liberty interest, based on *Delaware Riverkeeper Network v. FERC*, 243 F.Supp.3d 141, 153 (D.D.C. 2017), *on appeal*, No. 17-5084 (D.C. Cir. Apr. 24, 2017). FERC Br. 41. But protected interests can "stem from an independent source such as state law," *Board of Regents v. Roth*, 408 U.S. 564,

577 (1972); they "are normally 'not created by the [U.S.] Constitution,'" *Goss v. Lopez*, 419 U.S. 565, 572–73 (1975). *See* Opening Br. 32; *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 689 (D.C. Cir. 2009) ("Liberty interests … 'may arise from an expectation or interest created by state laws or policies.'") (citation omitted); *Brandon v. D.C. Bd. of Parole*, 823 F.2d 644, 647 (D.C. Cir. 1987) ("A protectible liberty interest may arise from two sources – the Due Process Clause itself or the laws of the states."); *Asbestec Constr. Servs., Inc. v. EPA*, 849 F.2d 765, 770 (2d Cir. 1988); *Paul v. Davis*, 424 U.S. 693, 710 (1976) (protected "interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law") (footnote omitted). Additionally, at least one of Allegheny Petitioners' members owns real property that the pipeline crosses. Opening Br. 34.

Their arguments that Allegheny Petitioners do not have interests in the Natural Gas Act review procedures are also misguided. FERC Br. 42; Int. Br. 12. The Act imposes on FERC a *substantive* obligation to consider environmental impacts in weighing whether a pipeline is in the public interest. *Sierra Club v. FERC*, 867 F.3d at 1373. This is in addition to the Pennsylvania Constitution. The Act provides the procedure to protect Allegheny Petitioners' interest in FERC meeting this substantive obligation. 15 U.S.C. § 717r(a)-(b).

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

It is not the tolling order by itself that is the due process violation, because simply extending the time to rule on a rehearing request causes no harm. It is allowing construction to proceed and using the tolling orders to deprive this Court of jurisdiction during this period that constitutes the due process violation. FERC and Intervenors do not respond to Allegheny Petitioners' arguments that the Natural Gas Act's appeal at section 717r(b) must be *meaningful*, and an appeal that can only happen *after* the damage is done is not fully meaningful. Opening Br. 35-36. In short, while the Natural Gas Act gives affected parties a right to appeal to protect their interests, FERC's practice denies it.

It is immaterial that the Act lacks an automatic stay provision or that Allegheny Petitioners had a right to move for a stay before FERC (and did so).[9] Due to FERC's misuse of tolling orders to thwart this Court's jurisdiction while construction proceeded, Allegheny Petitioners had no appeal for interim relief to this Court from FERC's denial of the stay; and no ability to appeal from a final order until it issued, which was after several months of damage.

[9] FERC denied Allegheny Petitioners' stay request more than six months after they filed it—and after issuing at least eight notices to proceed with construction and three letter orders authorizing Transco to place Project facilities into service. *See* Int. Br. 5, n.2-3.

FERC and Intervenors argue the Natural Gas Act allows this, but the cases they rely on involved a different situation, such as fees or rates (rather than construction of massive interstate pipelines), where there was no irreparable harm from delaying the court's jurisdiction. FERC Br. 44; Int. Br. 14. Allegheny Petitioners pointed this out, and that *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988) indicates due process considerations on tolling orders would be different where such harm exists. Opening Br. 38-40. FERC and Intervenors did not respond to this critical distinguishing factor.

They rely on *City of Glendale, California v. FERC*, No. 03-1261, 2004 WL 180270 (D.C. Cir. Jan. 22, 2004), but that does not indicate whether a notice to proceed with construction was involved, and is unpublished and of no precedential value under D.C. Circuit Rule 36(e)(2). Their reliance on *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018) is also of no weight since it is an unpublished extra-circuit decision based on *Glendale*; and it erred in not realizing the tolling order cases it relied on are inapposite. *Kokajko* involved fees and *General American Oil Company of Texas v. FPC*, 409 F.2d 597, 598 (5th Cir. 1969) involved rates, neither of which are irreparable.

FERC argues that Congress designed the Natural Gas Act to produce the "default outcome" of authorizing construction while withholding a final order. FERC Br. 43. In fact, Congress designed the Act to require parties to request

rehearing within 30 days,[10] to require FERC to act on such requests within 30 days, and to allow aggrieved parties to seek judicial review immediately thereafter. 15 U.S.C. § 717r(a)-(b). *See* Opening Br. 41. It is thus "a tightly structured and formal provision." *Boston Gas Co.*, 575 F.2d at 979. Here, Allegheny Petitioners filed a rehearing request on February 10, 2017 [JA-___]. Thus, under the "default outcome" envisioned by Congress, FERC was required to "grant or deny rehearing or to abrogate or modify its order," 15 U.S.C. § 717r(a), by March 13, 2017—more than six months prior to issuance of the Notice to Proceed.

FERC alleges Allegheny Petitioners' concern involves only "certain, limited construction" that FERC authorized "to commence before agency rehearing and judicial review have occurred." FERC Br. 42-43. But the September 15, 2017 Notice to Proceed authorized construction of the Central Penn Line North and South Pipelines, which account for 185.9 miles of greenfield pipeline—approximately 93 percent of the Project's total 199.4 miles of pipeline. EIS at ES-1 [JA-___]. And prior to issuing the Rehearing Order, FERC issued ten notices to proceed—and had already authorized several project facilities to be placed into service. Int. Br. 5, n.2-4. Moreover, the procedural history of this case demonstrates that FERC's issuance of the Rehearing Order in December 2017 was

[10] *See Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978) ("A formal time limit assures all participants that their claims will be settled expeditiously.").

precipitated only by this Court's order requiring filing of the record index by December 14, 2017.[11] In light of FERC's obligation to consider environmental impacts in its decision-making, *Sierra Club*, 867 F.3d at 1373, this could not have been Congress's intent.

FERC and Intervenors note this Court denied Petitioners' stay motions. FERC Br. 43; Int. Br. 18. But stay motions are no substitute for the timely appeal of section 717r(b). In denying Allegheny Petitioners' first stay motion, the Court cited the jurisdictional issues raised in the motions to dismiss, which were based on the tolling order. Doc. No. 1703665. And there are multiple examples of cases where FERC delayed judicial review by issuing a tolling order, the court denied a stay, and the petitioners ultimately prevailed—but the pipeline was already constructed and operating. *See Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1320 (D.C. Cir. 2014); *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).

C. The All Writs Act Does Not Cure the Due Process Violation

Intervenors, but not FERC, argue the All Writs Act provides a remedy so FERC did not deprive Petitioners of due process. Int. Br. 18. But "[t]o show entitlement to mandamus, plaintiffs must demonstrate (1) a clear and indisputable right to relief, (2) that the government agency … is violating a clear duty to act,

[11] *See* Doc. No. 1694194 (ordering FERC to file the record index by 10/6/17); Doc. No. 1696987 (FERC's 10/4/17 motion to defer filing of record index); Doc No. 1705427 (ordering FERC to file record index by 12/14/17).

and (3) that no adequate alternative remedy exists." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Those elements are not present here for several reasons.

First, FERC itself has successfully argued that petitioners do not have a right to relief from tolling orders under the All Writs Act. *See, e.g.*, *In re: Appalachian Voices*, No. 18-1006 (D.C. Cir. Feb. 2, 2018); *In re: Appalachian Voices*, No. 18-1271 (4th Cir. Mar. 21, 2018); *Coalition to Reroute Nexus*, *supra*. Thus, petitioners have been unable to demonstrate the "clear right to relief" that would justify mandamus. Intervenors' reliance on *Town of Dedham v. FERC*, No. 15-cv-12352-GAO, 2015 WL 4274884 (D. Mass. July 15, 2015), is misplaced because that simply held the Natural Gas Act provided exclusive jurisdiction to the appeals court, so the petitioners were in the wrong court. Its statements on the availability of mandamus from the appeals court were *dicta*.

Second, because 15 U.S.C. § 717r provides for judicial review where, as here, the Commission fails to act on a rehearing request within thirty days, that same review may not be had through an extraordinary writ. *See Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383 (1953) (explaining "extraordinary writs cannot be used as substitutes for appeals" and "whatever may be done without the writ may not be done with it"). Third, such a writ would not guarantee due process. A court has discretion to deny the writ even if a petitioner demonstrates it satisfies

all requirements for issuance, including irreparable injury. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004).

III. FERC FAILED TO ADEQUATELY EVALUATE PUBLIC NEED

FERC lacked substantial evidence of market demand for the Project's capacity to support a finding of public convenience and necessity, as required by the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A). FERC maintains it may rely exclusively on the existence of precedent agreements to establish the public need for a project. FERC Br. 35-36. FERC's position directly contradicts its own Policy Statement and threatens overbuilding of pipeline infrastructure and unnecessary exercise of eminent domain by a private entity. Further, the additional evidence cited by FERC does not establish market demand, particularly in light of contrary evidence suggesting that much of the gas to be carried by the Project may be destined for export.

FERC's policies make clear that narrow reliance on contracts for pipeline capacity, known as precedent agreements, to support a finding of public need is improper. Prior to 1999, FERC required applicants to show market support for a project through contractual commitments for capacity. *See* Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,743 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) ("Policy Statement"). In its Policy Statement, FERC acknowledged that its prior

sole reliance on precedent agreements was inadequate because, in part, "[t]he amount of capacity under contract ... is *not a sufficient indicator by itself* of the need for a project.… [T]he test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry's structure…." *Id.* at 61,744 (emphasis added). The Policy Statement explains that "[r]ather than relying only on one test for need, the Commission *will consider* all relevant factors reflecting on the need for the project." *Id.* at 61,747 (emphasis added). It further explains "the evidence necessary to establish the need for the project will usually include a market study.… Vague assertions of public benefits will not be sufficient." *Id.* at 61,748. FERC's assertion that it may rely solely on the existence of precedent agreements to establish market demand sufficient to justify the taking of private property thus runs directly counter to its own guidance document. *See Nat. Res. Def. Council, Inc. v. Rauch*, 244 F. Supp. 3d 66, 97 (D.D.C. 2017) (vacating agency decision when it neglected to consider a factor that its own guidance stated should be relevant).

The statements from Project shippers cited by FERC do not remedy this. FERC Br. 37-38. FERC argues that statements from Seneca Resources Corp. and Southern Company Services expressing a need for the capacity adequately support its finding of public convenience and necessity, but they represent less than 15 percent of the total capacity. Certificate Order ¶11 [JA-___-___]. Only Seneca

asserted it has end-use contracts for its contracted capacity, representing just over 11 percent of Project capacity.[12] FERC fails to make any other showing of market need for the remainder of the capacity.[13]

FERC here needed to require some sort of actual market analysis to support its finding of need, as opposed to relying exclusively on the existence of precedent agreements and self-serving statements from Project beneficiaries. *See Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (agencies must "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project"); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at *83 (Oct. 13, 2017) (LaFleur, Comm'r, dissenting); 88 FERC ¶ 61,227, 61,748. FERC thus lacked substantial evidence for its finding of public need, particularly in light of extensive evidence in the record demonstrating the vast majority of the Project's capacity was directly linked to gas export terminals. Opening Br. 44-46.

[12] Seneca's claim that the Project's capacity was "essential to meeting the market demands for the 2017 heating season," FERC Br. 37, is contradicted by the fact that the season passed without the Project being completed, without any apparent disruption. *See* http://atlanticsunriseexpansion.com/about-the-project/project-timeline.

[13] FERC cites to vague statements from Transco customer Washington Gas Light Co. that the Project "will provide access to competitively-priced alternative gas supplies, helping Washington Gas cost-effectively meet its customers' future firm natural gas requirements," but does not cite to any specific need for or commitment to purchase the gas. FERC Br. 38.

IV. FERC'S RESPONSE TO THE LANDOWNERS' DUE PROCESS CHALLENGE MISUNDERSTANDS AND MISCHARACTERIZES THE NATURE OF THE CHALLENGE

The fundamental basis for the Landowners' due process challenge is that neither FERC nor the courts have adequately tested whether the Project actually serves a public use. Therefore, pursuant to the Fifth Amendment, the Natural Gas Act, and federal common law, taking the Landowners' private property by eminent domain was wrongful.

Contrary to FERC's assertions, the Landowners' due process challenge is not based upon the tolling order, in and of itself, nor is it based upon the actions of the District Court in the condemnation proceeding. The Landowners' due process challenge is based on FERC's failure to seriously evaluate the need for the pipeline before it issued the Certificate Order, and the refusal of both FERC and the courts to meaningfully entertain the Landowners' challenges to FERC's analysis after FERC issued the Certificate Order.

A. FERC Did Not Adequately Question Whether the Gas Transported by the Project Would Ultimately Be Distributed to the Public

In response to the Landowners' due process challenge, FERC argues the Landowners were not entitled to "a trial-type hearing" because FERC was able to resolve the public use issues that the Landowners raised "on the written record." FERC Br. 48. In support of this argument, FERC relies solely upon restatements of

black-letter law cited in the Certificate Order and portions of the Natural Gas Act. FERC does not offer any evidence that FERC analyzed or tested the public need for the Project. In short, FERC argues that it adequately "resolve[d] the Landowner-Petitioners' public use claim on the written record," such that the Landowners were not entitled to any further process, because Congress declared (in the Natural Gas Act) that the transportation and sale of gas for ultimate distribution to the public is in the public interest and the Project will transport gas. *See* FERC Br. 48-49.

Leaving aside the fact that a gas pipeline does not automatically satisfy the public use requirement of the Fifth Amendment, as FERC argues, simply because Congress declared that the transportation and sale of gas for ultimate distribution to the public is in the public interest, FERC's argument ignores the fact that the Natural Gas Act itself requires a showing that the gas *will ultimately be distributed to the public*. 15 U.S.C. § 717(a). FERC conducted no such inquiry before issuing the Certificate Order, therefore it could not have adequately "resolve[d] the Landowner-Petitioners' public use claim on the written record" and the Landowners were entitled to a hearing to challenge FERC's inadequate inquiry.

FERC cannot rely on the fact that the Natural Gas Act automatically confers eminent domain rights on the holder of a certificate of public convenience to argue that it had no obligation to conduct a full inquiry into whether the gas at issue will

be distributed to the public. FERC was required to conduct a full and fair examination of whether the gas to be transported by the Project would be distributed to the public or whether it would be exported for private profit of Transco and the shippers it signed agreements with. The Certificate Order is arbitrary and capricious because FERC did not conduct this essential inquiry, and the Landowners' substantive and procedural due process rights under the Fifth Amendment, the Natural Gas Act, and federal common law were violated as a result.

B. The Natural Gas Act was Not Designed to Deny Landowners a Meaningful Opportunity to Oppose Inadequate Public Use Determinations

According to FERC, the second basis for the Landowners' due process challenge is that they were denied the right to be heard on their public use claim because eminent domain proceedings took place while their request for rehearing of the Certificate Order was pending. FERC Br. 50. FERC then argues that the Landowners' challenge must fail because Congress designed the Natural Gas Act to produce that default outcome. *Id*. FERC is incorrect.

Although FERC's procedures and the Natural Gas Act provide that substantive challenges to the Certificate Order be directed in the first instance to FERC, the Act also provides that a rehearing request is denied by operation of law "[u]nless the Commission acts upon the application for rehearing within thirty days

after it is filed." 15 U.S.C. § 717r(a). After a request is denied, either by operation of law or on the merits, the petitioner may immediately file an appeal to an appropriate federal circuit court of appeals. *Id*. § 717r(b). Therefore, it is not the case, as FERC argues, that the Act was designed to forestall the ability of landowners to obtain meaningful judicial review of FERC's decision prior to the irreparable taking of their property. FERC is similarly incorrect that it is the Natural Gas Act that authorizes FERC to issue tolling orders. That authority comes from FERC's own rules, codified in 18 C.F.R. § 375.302(v), and it does not overrule the Landowners' right to a meaningful opportunity to be heard.

As the Landowners set forth at length in their opening brief, the U.S. Constitution and federal common law guarantee the Landowners a meaningful opportunity to be heard in opposition to FERC's faulty public use determination before their property can be permanently taken. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Moreover, "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 334 (quotation omitted). Therefore, it is of no consequence that FERC has authority to issue tolling orders, or that eminent domain proceedings under the Natural Gas Act may go forward while petitions for review are pending. Due process requires that these practices, procedures, and laws not be combined to deprive citizens of their right to be heard before their property is taken, and it requires that FERC and the courts do what is

necessary to ensure that there is actual public need for the taking of private property. The basis for the Landowners' due process challenge is that both FERC and the District Court failed to satisfy their obligations in this regard.

V. LANDOWNERS' ARGUMENTS IN SUPPORT OF THE CONESTOGA ALTERNATIVE ROUTE DO NOT MISSTATE THE RECORD

In response to the Landowners' claim that the Certificate Order is arbitrary and capricious because FERC failed to adequately consider the Conestoga Alternative Route, FERC argues that the Landowners misstated the record and that their list of advantages constitutes unnecessary "flyspecking." FERC Br. 65. FERC cites no support for its assertions, or any evidence that it "gave a hard look at" the Conestoga Alternative Route before rejecting it. FERC Br. 65. To the contrary, FERC's response relies solely on the Final EIS, and fails to address the Landowners' assertions that this alternative is co-located along existing utility rights of way or that fewer residences would be impacted by it. Therefore, FERC failed to demonstrate that its decision to reject the Conestoga Alternative Route was based on a full and fair review of its advantages and disadvantages.

VI. REMEDY

Vacatur is the proper remedy. *See, e.g.*, 5 U.S.C. § 706(2)(A); *Sierra Club*, 867 F.3d at 1379; *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331

(1976); *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)).

There is no authority requiring the Court to make express findings on *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), which involved an inadequately supported rule, before vacating an agency order for NEPA violations. Int. Br. 29. In any event, the *Allied-Signal* factors support vacatur here.

The first element on seriousness of the violation is satisfied. The EIS's deficiencies go to the integrity of FERC's decisionmaking, not merely the adequacy of its explanation. *See Sierra Club*, 867 F.3d at 1368; *cf. Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). In other words, the EIS's deficiencies, by definition, render FERC's decision "so crippled as to be unlawful." *Radio-Television News Dirs. Ass'n v. F.C.C.*, 184 F.3d 872, 888 (D.C. Cir. 1999).

Allied-Signal's second element alone does not mandate remand, much less in every case where there is some "disruption." There, the court withheld vacatur because the agency would have had to refund fees that would be unrecoverable later. 988 F.2d at 203. Similarly, in *Heartland*, vacatur would have resulted in extensive payments that could not be recouped. 566 F.3d at 198. No such regulatory system would be upended by vacatur here. And while remand without

vacatur may be appropriate where vacating a regulation would cause the environmental harm that the challenged rule was meant to address, those circumstances are not present here. *See, e.g.*, *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (Rogers, J., concurring in granting rehearing in part).

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); *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 43 (D.C. Cir. 2015); *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1037-39 (D. Mont. 2006).

Vacating the Certificate, on the other hand, vindicates the purposes of NEPA. *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985). And Intervenors fully assumed the risk of any economic harm, which, unlike the environmental harm to Petitioners, is reparable. *See* Order Denying Stay ¶18 [JA-___]; *see also Realty Income Trust v. Eckerd*, 564 F.2d 447, 456 (D.C. Cir. 1977) ("'The substantial additional costs which would be caused by court-ordered delay' may well be justified by the compelling public interest in the enforcement of NEPA.").

Furthermore, the Court should not delay the mandate. *See Pub. Emps. for Envtl. Responsibility v. U.S. Fish & Wildlife Serv.*, 189 F. Supp. 3d 1, 5 n.1

(D.D.C. 2016), *appeal dismissed*, 2016 WL 6915561 (D.C. Cir. Oct. 31, 2016). Otherwise, the Project's irreparable environmental harms would continue unabated while FERC prepares a supplemental EIS. *See Pub. Emps. for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) (vacating EIS and requiring its supplementation prior to construction).

Intervenors have not shown that vacatur would cause electricity or power disruption. *See* Int. Br. 35. If the Court is concerned that Transco's existing customers would be deprived of transportation service, it should nevertheless halt the construction and operation of greenfield pipeline in Pennsylvania, authorized in the September 15, 2017 Notice to Proceed, because that would not disrupt existing service.

CONCLUSION AND REQUESTED RELIEF

For the foregoing reasons, Petitioners respectfully request that the Court vacate the EIS and FERC's orders, stay construction and operation of the Project, particularly in connection with greenfield pipeline in Pennsylvania, and remand this matter to FERC.

Dated: June 7, 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 7,469 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1). Microsoft Word 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 (Times New Roman) in 14-point font.

Dated: June 7, 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 June 7, 2018, I electronically filed the foregoing Petitioners' Joint Reply 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