

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

Constitution Pipeline Company, LLC,)	
Petitioner,)	
)	
v.)	No. 18-1251
)	
Federal Energy Regulatory Commission,)	
Respondent.)	

**UNOPPOSED MOTION OF RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION
FOR VOLUNTARY REMAND**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) respectfully requests that the Court grant voluntary remand of this appeal, which involves a challenge to Commission determinations in *Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014 (Jan. 11, 2018), *reh’g denied*, 164 FERC ¶ 61,029 (July 19, 2018). As explained below, the Commission believes it is appropriate for the agency to reconsider the orders on review in this case in light of a recent decision by this Court concerning similar issues. Counsel for the Petitioner and for all Intervenors have authorized Commission counsel to state that this motion is unopposed.

On October 22, 2018, the Commission requested that the Court hold this case in abeyance pending the outcome of the appeal in *Hoopa Valley Tribe v. FERC*, D.C. Cir. No. 14-1271 (filed Dec. 9, 2014), based on common questions of law regarding the Commission's interpretation of the Clean Water Act, 33 U.S.C. § 1341(a)(1). As in this case, the petition in *Hoopa Valley* challenged the Commission's determination that, if an applicant withdraws its application for state certification within a year and subsequently refiles it, the one-year period for the state to act on the application begins anew and the state has not waived its authority by failing to act within the year. The Court granted the motion for abeyance on November 5, 2018, directing the parties to file motions to govern future proceedings within 30 days after the Court's disposition in *Hoopa Valley*.

On January 25, 2019, the Court issued its decision in that case, vacating and remanding the Commission's orders. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019). The Court held that withdrawal and resubmission of water quality certification requests "does not trigger new statutory periods of review." *Id.* at 1101. The court declined to decide whether withdrawal of a section 401 request and submission of "a wholly new one" can restart the one-year period, or (if so) to determine "how different a request must be" to restart the clock. *Id.* at 1104. But the court found, on the facts of that case — where the applicant and the states had explicitly agreed to delay water quality certification — that the states

had “defie[d]” section 401’s requirement of state action within a reasonable period of time. *Id.*

Accordingly, the Commission respectfully requests that the Court grant a voluntary remand of this case to permit additional consideration of orders on review. A voluntary remand of the case and record by the Court will avoid the unnecessary expenditure of resources by the Court and parties on review of orders that do not address the Court’s *Hoopa Valley* decision. *See* 16 U.S.C. § 825l(b) (“Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.”). To help inform the Commission’s decision on remand, the Commission will permit the parties to file, within 30 days of the Court’s order on this motion, supplemental pleadings and record materials on the significance of the *Hoopa Valley* decision. The Commission will also permit the parties to file responsive pleadings within 30 days after that initial deadline.

Respectfully submitted,

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Corrected: February 25, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(a), I certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this Motion contains 550 words.

I further certify that this Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Motion has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

/s/ Carol J. Banta
Carol J. Banta