FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

April 15, 2019

Via Electronic Case Filing

Mark J. Langer, Clerk
U.S. Court of Appeals for the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 5205
Washington, DC 20001

Re: *Otsego 2000 Inc. v. FERC,* No. 18-1188 and *Birckhead v. FERC*, No. 18-1218; both argued April 11, 2019

Dear Mr. Langer:

During oral argument in *Birckhead v. FERC*, No. 18-1218, the Court asked counsel for the Federal Energy Regulatory Commission in that case about a discussion at pages 34-35 of the Commission's brief in *Otsego 2000, Inc. v. FERC*, No. 18-1188, which had just been argued by separate counsel for the Commission. The passage in the *Otsego 2000* brief addressed whether the Commission can be deemed the legally-relevant cause of any downstream emissions for purposes of the National Environmental Policy Act when the Commission lacks jurisdiction over the local distribution company shippers. Specifically, Chief Judge Garland asked whether the Commission was "taking the position that the jurisdictional limitations by themselves break the causal chain." Counsel for the Commission in *Birckhead* stated that the Commission was not taking that position. *See* Oral Argument Recording at 27:05-27:50; *cf. id.* at 25:05 ("The jurisdictional limitations are relevant, but they are not dispositive.").[1]

Counsel for the Commission in *Birckhead* misspoke, and it is necessary for the Commission to correct those statements to prevent the Court from deciding either the *Otsego 2000* case or the *Birckhead* case based on a mistaken understanding of the Commission's position. Consistent with its briefs, the Commission continues to take the position that, in order to reconcile Supreme Court precedent with this Court's decision in *Sierra Club v. FERC*, 867 F.3d 1357

[1] Available at: https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/567E4BCD682293EB852583D90057BC51/$file/18-1218.mp3

(D.C. Cir. 2017), jurisdictional limitations in the Natural Gas Act "break the causal chain" for NEPA purposes in most circumstances. *See* Brief for Respondent in No. 18-1188 at 33-37. As stated in the Commission's brief in the *Otsego 2000* matter, "[f]inding that these jurisdictional limitations break the causal chain for NEPA purposes is consistent with the Supreme Court's directive to look to underlying policies or legislative intent when drawing 'a manageable line between those causal changes that may make an actor responsible for an effect' under NEPA 'and those that do not.'" *Id.* at 35 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)). Ignoring that limitation and reading this Court's decision in *Sierra Club* to mean that "any pipeline approved by the Commission must be the legally relevant cause of any conceivable downstream activities … would transform NEPA's causation test into a 'but for' question, rather than the 'proximate cause' analysis dictated by the Supreme Court." *Id*. at 34 (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004)). For avoidance of doubt, the Commission continues to support the causation discussion at pages 33-37 of its brief in the *Otsego 2000* matter.

The misstatements of counsel for the Commission in *Birckhead* should not, indeed cannot, be understood to overcome or alter the unambiguous position taken by the Commission in a brief submitted in a case argued by another attorney.

Respectfully submitted,

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cc: Counsel of Record (via ECF)

CERTIFICATE OF SERVICE

I hereby certify that, on April 15, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney