In the United States Court of Appeals for the District of Columbia Circuit

Nos. 10-1389 and 10-1407 (consolidated)

SUMMIT LAKE PAIUTE TRIBE, *ET AL.*,
AND
DEFENDERS OF WILDLIFE, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

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FEBRUARY 16, 2011

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GLOSSARY

BLM	Bureau of Land Management
Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	*Ruby Pipeline, LLC*, 131 FERC ¶ 61,007 (2010) (A42)
Defenders	Petitioners Defenders of Wildlife, Sierra Club, and Great Basin Resource Watch
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
NEPA	National Environmental Policy Act
Notice to Proceed	*Ruby Pipeline, LLC*, Notice to Proceed with Construction from Mileposts 509.9 to 549.9, FERC Dkt. No. CP09-54 (Jan. 31, 2011) (A117)
Order Denying Stay	*Ruby Pipeline, LLC*, 134 FERC ¶ 61,103 (2011) (A120)
Preliminary Determination Order	*Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 (2009) (A1)
Project	Ruby Pipeline Project, consisting of facilities capable of transporting up to 1.5 million dekatherms per day of natural gas from Wyoming to Oregon.
Rehearing Order	*Ruby Pipeline, LLC*, 133 FERC ¶ 61,015 (2010) (A94)
Ruby	Ruby Pipeline, LLC
Tribe	Petitioner Summit Lake Paiute Tribe of Nevada

INTRODUCTION

Defenders of Wildlife, Sierra Club, and Great Basin Resource Watch (collectively, "Defenders") ask this Court for the extraordinary remedy of indefinitely delaying the completion of a natural gas pipeline that the Federal Energy Regulatory Commission ("FERC" or "Commission") has determined, in its expert judgment and after thorough consideration of an extensive record, is needed to meet the Nation's energy needs. This request comes on the heels of this Court's January 28, 2011 order refusing to stay construction of this same pipeline in response to a request by the Summit Lake Paiute Tribe ("Tribe") in the companion docket to this case. *Summit Lake Paiute Tribe of Nevada v. FERC*, No. 10-1389 (D.C. Cir. Jan. 28, 2011). Defenders' motion duplicates many of the arguments raised by the Tribe and rejected by this Court, yet Defenders do not once mention the Tribe's motion, or this Court's order denying that motion.

Defenders' motion also comes more than nine months after the Commission issued its pipeline certificate, four months after the Commission denied rehearing of that order, and more than two months after Defenders appealed that approval to this Court. Defenders offer no explanation for their delay; any "emergency" is entirely of their own making. Nor do Defenders offer any explanation for filing this motion before the Commission ruled upon a then-pending agency stay request, or any explanation why both the Court and the Commission must expend resources

in responding twice to essentially the same request.

For these reasons alone, the Court should reject Defenders' request for extraordinary relief. In any event, as the Commission found in its February 11, 2011 order denying Defenders' stay request, Defenders have failed on the merits to justify issuance of a stay pending judicial review. *Ruby Pipeline, LLC*, 134 FERC ¶ 61,103 ("Order Denying Stay"), A120.[1]

This case concerns a proposal by Ruby Pipeline, LLC ("Ruby") to construct a 675-mile-long natural gas pipeline running from a hub in western Wyoming, through northern Utah and Nevada, to an interconnection in Oregon (the "Project"). *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224, P 6 (2009) ("Preliminary Determination Order"), A3; *see also Ruby Pipeline, LLC*, 131 FERC ¶ 61,007, PP 4-6 (2010) ("Certificate Order"), A43-44. The Project will supply lower-priced natural gas from the Rocky Mountains to customers in the Pacific Northwest and California who currently depend upon steeply declining western Canadian supplies. Preliminary Determination Order, PP 20, 41, A7, A16. In light of these benefits, the Commission found the Project, upon Ruby's satisfaction of numerous environmental conditions and mitigation measures, to be consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(e). *Id*. at PP 41-42, A16.

[1] Citations to "A" refer to the Appendix accompanying this response.

In support of the requested stay of all pipeline construction, Defenders contend that the Commission's analysis failed to satisfy National Environmental Policy Act ("NEPA") standards for consideration of route alternatives and cumulative impacts. Motion at 5-14. Absent a stay, Defenders assert that the sagebrush steppe ecosystem, found along portions of (though not the entirety of) the pipeline route, will suffer irreparable environmental harm. Motion at 14-18.

These unsupported assertions fail to justify a stay. As an initial matter, neither Defenders of Wildlife nor the Sierra Club[2] raised several of the issues, now presented in their motion for stay to this Court, on rehearing before the agency, leaving this Court without jurisdiction to address them. 15 U.S.C. § 717r(b); *see infra* pp. 13-14. The Commission addressed those issues actually brought before it, and imposed extensive environmental conditions and mitigation measures to prevent and remedy environmental impacts that could result from construction and operation of the pipeline. Likewise, the Commission considered a wide range of alternatives, and sufficiently considered cumulative impacts of the Project.

[2] Great Basin Resource Watch did not intervene to become a party to the Commission's proceeding, and did not seek rehearing of the Commission's Certificate Order. As a result, this Court lacks jurisdiction to entertain its claims. *See* 15 U.S.C. §§ 717r(a) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."), 717r(b) ("Any party to a proceeding under this chapter aggrieved by an order . . . may obtain a review of such order in the court of appeals . . . .").

Defenders' remaining contentions fail to establish that they are likely to succeed on their claims that the Commission violated its statutory obligations, or that any irreparable injury will result from the Project. Conversely, delaying construction will cause significant harm to Ruby and to the customers who will benefit from increased gas supplies. Defenders' stay request – like the Tribe's stay request denied by the Court just last month – is thus entirely without merit.

ARGUMENT

I. Defenders' Motion Should Be Rejected.

The timing of Defenders' extraordinary plea is both inexcusable and left entirely unexplained. Defenders do not explain why this motion, purportedly prompted by the Commission's authorization of construction from mileposts 509.9 to 549.9 (Motion at 1, 3), was not brought at the same time as the Tribe's motion to stay construction of this *very same* pipeline segment. Indeed, Defenders' motion does not once mention the Tribe's motion or this Court's denial of that motion less than three weeks ago. The claimed justifications for the stay largely mirror those previously raised by the Tribe. And, Defenders repeat some of the very same arguments rejected by this Court in denying the Tribe's motion. *See infra* p. 12.

Moreover, Defenders could have sought injunctive relief over nine months ago, when the Commission issued the Certificate Order, over four months ago, when the Commission denied rehearing of that order, or more than two months

ago, when Ruby sought Commission approval to proceed with construction from mileposts 509.9 to 549.9. *See* Order Denying Stay, P 23, A126. Defenders offer no explanation, to the agency or now to this Court, for their delay. This significant omission is inconsistent with this Court's rules and policies. *See* Cir. Rule 27(g) ("request for expedition must state the nature of the emergency and the date by which court action is necessary"). To the extent any emergency exists, it is solely of Defenders' own making. *See, e.g., Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (44-day delay in seeking injunctive relief is inexcusable).

Defenders point to the "recent approval to proceed in areas containing vitally important and sensitive habitat," Motion at 1, referencing, in particular, the Commission's notice to proceed allowing construction between mileposts 509.9 to 549.9. *Ruby Pipeline, LLC*, Notice to Proceed with Construction from Mileposts 509.9 to 549.9, FERC Dkt. No. CP09-54 (Jan 31, 2011) ("Notice to Proceed"), A117. *See also* Motion at 3; Joint Stipulation of Defenders and Ruby, D.C. Cir. Nos. 10-1389 and 10-1407 (filed Feb. 10, 2011) (agreement for an administrative stay, subject to the Court's approval, of construction between mileposts 518 and 549.9). Defenders neglect to mention that Ruby sought that authorization on December 8, 2010, Notice to Proceed at 1, A117, and Defenders raised no objection to the Commission. *See* Order Denying Stay, P 23 ("Petitioners provide no justification for remaining quiescent during months of construction and then

insisting on an immediate stay."), A126. Defenders also fail to mention that the Commission's Notice to Proceed, allowing construction along this particular pipeline stretch, issued immediately after this Court's denial of the Tribe's stay request. Now, Defenders ask this Court to revisit its recent determination.

Finally, Defenders state that they filed a motion for stay with the Commission on February 3, 2011, requesting Commission action by February 7, 2011 (Motion at 1 n.1), but fail to explain why they did not await a decision from the Commission, as required by this Court's rules and procedures. *See* Cir. Rule 18(a)(1); Handbook of Practice and Internal Procedures, VIII.A ("If the . . . agency denies the relief requested, an application may *then* be made to this Court.") (emphasis added).[3] The Commission issued its Order Denying Stay on February 11, 2011, the day after Defenders filed their motion with this Court. Defenders' disregard for the Federal Rules of Appellate Procedure, this Court's rules and policies, and the time and resources of this Court warrant rejection of the motion.

At the very least, Defenders' conduct militates in favor of denial of their motion on the merits, as explained in the following section.

[3] Defenders cannot plausibly argue that they feared undue delay on their motion for agency stay – as the agency acted on the Tribe's earlier motion for stay (filed between Christmas and New Year's Day) in only two weeks.

II. Defenders Have Not Justified The Extraordinary Remedy Of A Stay.

"A stay pending appeal is always an extraordinary remedy." *Bhd. of Ry. & S.S. Clerks v. Nat'l Mediation Bd.*, 374 F.2d 269, 275 (D.C. Cir. 1966). In order to obtain such extraordinary relief, Defenders must establish: (1) a strong showing that they are likely to prevail on the merits of their appeal; (2) that, without such relief, they will be irreparably injured; (3) the lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc*., 559 F.2d 841 (D.C. Cir. 1977). Defenders cannot rely on unsupported assertions to meet this stringent standard, but must instead "justify the court's exercise of such an extraordinary remedy." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985).

Just as this Court recently found with respect to the Tribe's motion, Defenders too have "not satisfied the stringent standards required for a stay pending court review." January 28, 2011 Court Order Denying Tribe Stay Request at 2 (citations omitted).

A. Defenders Have Not Established Irreparable Injury.

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). *See also Reynolds Metals Co. v. FERC*, 777 F.2d 760, 764 (D.C. Cir. 1985) (citing *Wisconsin Gas*). Implicit in this requirement is the

"further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Wisconsin Gas*, 758 F.2d at 674. "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will *in fact* occur. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Id*.

Defenders seek to justify a stay of construction by pointing to the potential environmental impacts to the sagebrush steppe ecosystem, claiming that construction, in particular between mileposts 509.9 and 549.9 (the pipeline stretch at issue in the Tribe's unsuccessful stay motion), will cause permanent habitat loss for the greater sage-grouse and pygmy rabbit. Motion at 15-18.[4] The Commission studied this environmental issue extensively, developed numerous measures to both prevent and mitigate its potential impact, and balanced the anticipated impact against the public benefits provided by the Project.

In the final environmental impact statement ("EIS" or "FEIS"), the Commission recognized that construction impacts on sagebrush steppe habitat may be significant "due to the amount of habitat affected." *Ruby Pipeline, LLC*, 133

[4] Defenders rely here, and elsewhere (Motion at 10, 14), on interagency communications, between FERC staff and Bureau of Land Management ("BLM") staff, concerning comments from other federal agencies and offices on non-final drafts of the final EIS circulated among the cooperating agencies. These documents are not part of the Commission's record on appeal.

FERC ¶ 61,015, P 36 (2009) ("Rehearing Order"), A108; *see also* FEIS at 4-152, A193. The Commission also noted the scientific uncertainty regarding the rate at which that habitat can be restored. *Compare* FEIS at 4-152 (noting that restoration "could take 50 years or longer"), A193 *with* FEIS 4-142 (noting recent study indicating that restoration of similar habitat on pipeline right-of-way occurred on "approximately 50 percent of the right-of-way within 8 years"), A188. With regard to greater sage-grouse habitat, in particular, the final EIS explains that only a small proportion of such habitat will be permanently impacted, and that "these impacts would be relatively localized and short term." FEIS at 4-145, A191.

In order to address these potentially significant impacts, the Commission imposed extensive prevention and mitigation measures. Rehearing Order, P 37, A109. These include "realignment of the pipeline, pre-construction surveys, construction buffers, construction-timing restrictions, and specific revegetation activities." *Id*.; *see* FEIS at 4-142 – 4-146 (discussing measures in detail), A188-92. In addition, Ruby, BLM, and state agencies, including the Nevada Department of Wildlife, have entered into a *Cooperative Conservation Agreement for the Greater Sage-Grouse and Pygmy Rabbit* to further mitigate impacts. Rehearing Order, P 37, A109. Under this agreement, Ruby has committed to a specific plan addressing the greater sage-grouse and pygmy rabbit, and will also fund state conservation efforts. *Id*.; *see also* FEIS at 4-144 (describing plan), A190; *see also*

id. at 4-145 – 4-146 (implementation of these measures "would likely result in reduced impacts on greater sage-grouse and its habitat"), A191-92.

Defenders' suggestion that the potential impact upon the sagebrush steppe ecosystem necessarily amounts to irreparable harm (Motion at 17) disregards the record in this proceeding. Defenders question whether habitat losses can be restored or offset, but the final EIS determined that the extensive conservation measures imposed "could have long-term beneficial impacts on greater sage-grouse and other sage obligate species," FEIS at 4-146, A192, and the Project "would not cause population-level effects nor lead to a trend toward federal listing." *Id*. Likewise, Defenders' reliance on *Winter v. NRDC*, 555 U.S. 7, 129 S. Ct. 365, 367 (2009), for the proposition that this is a "new activity" with unknown potential impacts is unavailing. The final EIS demonstrates (as discussed further in the next section) that the Commission took a "hard look" at the potential impacts, and that this type of activity is not, in fact, new. *See, e.g.*, FEIS at 4-142 (discussing study addressing pipeline impacts on similar habitat), A188.

Defenders attempt to bolster their argument regarding irreparable harm through declarations from their members. But those declarations merely "assert generalized harm to the individuals without identifying how, why, or where construction of the Ruby project causes that harm." Order Denying Stay, P 19, A125. In any event, Defenders' allegations fail to account for the numerous

prevention and mitigation measures discussed above. *Id*. at P 20, A125. Defenders' motion rests on the unjustified assumption that the mitigation measures required by the Commission in its expert judgment will not be effective.

B. Defenders Have Not Shown A Likelihood Of Success On The Merits.

A NEPA violation must be "clearly established" in order to justify a stay. *Cuomo*, 772 F.2d at 976 ("The NEPA violation in this case has not been clearly established . . . as should be done in order to justify injunctive relief."). Defenders cannot meet this standard. Many of their arguments were not preserved for judicial review. And all are rebutted by the Commission's extensive analysis, reflected in the challenged orders and the final EIS, which considered a wide range of alternative pipeline routes and the cumulative effects of the Project.

1. FERC's Alternatives Analysis Satisfies NEPA.

Defenders, like the Tribe in its unsuccessful motion for stay, claim that the Commission's analysis of alternative pipeline routes in the final EIS fails to satisfy NEPA standards. NEPA requires federal agencies to "study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). The breadth of the agency's analysis is dictated by the nature and scope of the proposed action. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196-97 (D.C. Cir. 1991). "[A] rule of reason governs both

which alternatives the agency must discuss, and the extent to which it must discuss them." *Id*. at 195.

Here, the Commission evaluated 15 alternatives to the pipeline route proposed by Ruby. Alternatives were recommended for inclusion in the Project's design if they conferred a significant advantage over the proposed route. In the absence of such advantages, "an alternative merely represents a shift in impacts from one area or resource to another." FEIS at 3-10, A142. The Commission's analysis of route alternatives is summarized in a 45-page discussion in the final EIS. *See id*. at 3-9 – 3-54, A141-86.

Like the Tribe, Defenders claim that the alternatives discussion in the final EIS is too short. Defenders specifically challenge the adequacy of the Commission's analysis of the Jungo-Tuscorora and Black Rock route alternatives. Motion at 7-8. As to the Jungo-Tuscorora route alternative, Defenders fault the Commission for including a table summarizing findings on 13 issues, while a similar table addressing the Sheldon Rock alternative route addressed 24 factors. But the final EIS merely summarizes the Commission's extensive analysis of the Jungo-Tuscorora alternative and explains that it does not offer significant environmental benefits as compared to the Ruby Project:

> The overall footprint of the alternative (51.9 extra miles; 18.7 extra miles of pronghorn [antelope] crucial winter habitat; 50.0 extra miles of mule deer crucial winter habitat; and an additional compression station facility) would create a larger environmental footprint which

> we conclude would not significantly outweigh the benefits to be gained in certain individual resources areas.

FEIS at 3-51, A183.

Rather than alleviating impacts associated with the Project, the Jungo-Tuscarora alternative would shift them "to pronghorn crucial winter habitat, mule deer crucial winter habitat, national historic trails, [Wilderness Study Areas], [National Wildlife Refuges], recreation [and] air quality." *Id*. *See also* Rehearing Order, P 55 (same), A115. The Commission also observed that "it appears that the route alternative is not economically feasible," FEIS at 3-51, A183, which is a permissible consideration when evaluating alternatives. *See*, *e.g.*, *Mt. Lookout – Mt. Nebo Property Protection Ass'n v. FERC*, 143 F.3d 165, 172-73 (4th Cir. 1998) (affirming FERC orders rejecting alternative under NEPA because it was not economically feasible); *City of Grapevine v. Dep't of Transp*., 17 F.3d 1502, 1506 (D.C. Cir. 1994) (rejecting argument that "it was improper for the [agency] . . . to consider the economic goals of the project's sponsor").

Defenders specifically complain that the Jungo-Tuscorora route alternative discussion in the final EIS does not address impacts to cultural sites and sensitive soils. Motion at 8. But this contention was not raised in the requests for agency rehearing filed by either the Defenders of Wildlife or the Sierra Club. *See* Defenders Rehearing Request at 6 (filed May 5, 2010) (discussing Jungo-Tuscorora alternative analysis, without reference to cultural resources or sensitive

soils), A202. As a result, this Court is without jurisdiction to consider it. 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in an application for rehearing unless there is reasonable ground for the failure to do so."). This Court recently noted this statutory jurisdictional prerequisite in denying the Tribe's requested stay. January 28, 2011 Court Order Denying Tribe Stay Request at 2. In any event, because the Commission found significant factors weighing, on balance, against the Jungo-Tuscorora alternative, it was not unreasonable for the final EIS to omit discussion of cultural resource and sensitive soil impacts. *See Citizens Against Burlington, Inc.*, 938 F.2d at 195.

Defenders question (Motion at 10) the Commission's reliance on Ruby's cost estimates for the Black Rock and Jungo-Tuscorora alternatives. Again, however, Defenders did not challenge Ruby's cost estimates on rehearing. This Court therefore lacks jurisdiction to consider this issue. *See supra* pp. 13-14. In any event, the final EIS explains that the Black Rock route alternative was modified throughout the Commission's NEPA process, FEIS at 3-42, A174, which explains the variation in cost estimates. Further, while the draft EIS questioned the completeness of Ruby's estimates (*see* Motion at 10 n.4), the final EIS notes that Ruby explained, in response to the draft EIS, that this alternative "would, in fact, be substantially more costly that the proposed route," citing several reasons. FEIS

at 3-48, A180. As required by Commission regulations, Ruby's cost estimates were submitted as sworn statements (*see* 18 C.F.R. § 157.6(a)(4)), and Defenders provide no evidence to suggest that Ruby's estimates are inaccurate.

Defenders acknowledge that the "two routes certainly do result in different environmental impacts" but claim that the Commission did not adequately "explore the relative severity of the impacts." Motion at 8; *id*. at 9 (citing 40 C.F.R. § 1502.14). As above, Defenders did not raise this contention on rehearing; therefore, this Court is without jurisdiction to consider it. 15 U.S.C. § 717r(b).

In any event, the Commission's analysis of the Jungo-Tuscorora and Black Rock route alternatives is sufficiently comparative. The Black Rock route alternative is "longer," "would create more greenfield right-of-way," add "73.5 more miles of access roads," and the "impacts of construction and operation . . . would be greater." FEIS at 3-43, A175; *see also id*. at 3-43 (Table 3.4.13-1) (Black Rock Route Alternative Comparison), A175; *see also* Rehearing Order, PP 53-54, A115. "The first half of the Jungo-Tuscarora route alternative follows the same route as the Black Rock route alternative" and it would likewise "create a larger environmental footprint" than the proposed action. Rehearing Order, P 55, A115; *see also* FEIS at 3-51, A183; *see also id*. at 3-50 (Table 3.4.14-1 (Jungo-Tuscorora Route Alternative Comparison) (listing comparative environmental features of Jungo-Tuscorora alternative and the proposed action)), A182. The

Commission affirmed the finding in the final EIS that reduced disturbance to winter sage-grouse and sage-grouse lek habitat did not justify increased disturbance to mule deer and pronghorn habitat, particularly when the increased route length and additional costs and air emissions are considered. Rehearing Order, P 55, A115. Defenders' true objection is to the Commission's ultimate result – that, on balance, and after review of the potential environmental impacts and imposition of numerous environmental conditions, the Project is an environmentally acceptable action. Certificate Order at P 107, A79. But this does not establish a claim under NEPA, which is merely a procedural statute that does not dictate an agency's results. *U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756 (2004). And Defenders cannot demonstrate that the Commission did not take the requisite "hard look" at the potential Project impacts. *See, e.g.*, *Baltimore Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983).

2. FERC's Cumulative Effects Analysis Satisfies NEPA.

Defenders claim that alleged inadequacies in the Commission's analysis of the potential cumulative impacts of the Project weigh in favor of granting a stay. Motion at 11-14. Specifically, Defenders now claim that the analysis in the final EIS of the Project's cumulative impacts on sagebrush steppe vegetation, wildlife and habitat, as well as grazing, is conclusory and unsupported. Motion at 12-14. On rehearing, the Sierra Club raised different cumulative impacts arguments than

those presented now to the Court, and Defenders did not challenge the Commission's cumulative impacts analysis at all. *See* Sierra Club Rehearing Request at 14-15 (filed May 5, 2010), A219-20. Accordingly, like the Tribe, Defenders have now waived these arguments, and this Court lacks jurisdiction to consider them. *See supra* pp. 13-14.

In any event, while Defenders allege (Motion at 12) that the analysis is "unsubstantiated," they point to no specific errors in the Commission's analysis and offer no contrary evidence. Indeed, the final EIS explains that *some* cumulative effects upon vegetation and wildlife and wildlife habitat are expected, but that construction of the Project is not likely to result in "significant cumulative impacts." FEIS at 4-304, A196; *id*. at 4-303, A195. The Commission's judgment is based upon its expertise and entitled to deference from this Court. *See, e.g.*, *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) ("When an agency 'is evaluating scientific data within its technical expertise,' an 'extreme degree of deference to the agency' is warranted.") (citation omitted).

C. A Stay Will Substantially Injure Other Parties.

The Court must also consider whether "a stay would have a serious adverse effect on other interested persons." *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, a stay would obviously interrupt Ruby's construction efforts. This Court has recognized a substantial interest in continuing

with approved construction activities in light of the costly nature of interruptions. *See, e.g.*, *3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay"); *Tri County Indus. v. District of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997) ("The property interest here – the entitlement to continue construction without unfair interference – is substantial; any interruption of construction is likely to be very costly.").

Halting construction of the pipeline at this point, even temporarily, would cause both significant financial losses for Ruby and detrimental environmental impacts. Ruby estimates that, for every month of delay, it would experience an irreversible revenue loss of $18.7 million per month, ramping up to a revenue loss of $28 million per month over time. Ruby Answer to Stay Request at 5 (filed Feb. 8, 2011), A228. As the Commission explained in denying Defenders' requested stay, "[n]otices to proceed have been issued for 98 percent of the pipeline route, and construction has begun on most of these sections." Order Denying Stay, P 21, A126. Due to the late stage of construction, "certain environmental compliance timelines meant to limit or mitigate any environmental impacts have already begun." *Id*. For example, Ruby states that the crossing of the Lost River in Oregon is subject to a 144-hour time frame that has already started. Ruby Answer to Stay Request at 5-6, A228-29. According to the Commission, "halting

construction at this point would limit the mitigative effect of such compliance timelines." Order Denying Stay, P 21, A126.

A stay will also injure customers in California and the Pacific Northwest, who are currently subject to "declining imports of Canadian gas supplies." Preliminary Determination Order, P 37, A14. They will benefit from improved "reliability and flexibility of service" as a result of access to the Project's "abundant supply of competitively priced domestic gas." *Id*. at P 41, A15. Delays would frustrate this objective. Order Denying Stay, P 22, A126.

D. The Public Interest Does Not Favor A Stay.

The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Virginia Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay pending appeal. *North Atlantic Westbound Freight Ass'n v. Federal Maritime Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here, the Commission found that the public interest would not be served by

a stay of construction. Notices to proceed have been issued for construction for all but approximately 13 miles of the 675-mile-long Project. Order Denying Stay, P 22, A126. Any delay in construction will delay delivery of needed gas supplies to West Coast markets, which would ultimately harm consumers. *Id*. Further, based on the Commission's extensive environmental analysis, construction and operation of the Project in compliance with the conditions imposed in the Certificate Order would result in limited adverse impacts upon environmental resources. Certificate Order, P 107, A79. In these circumstances – just as in the similar circumstances presented to this Court last month by the Tribe in its unsuccessful stay motion – the public interest does not support issuance of a stay.

CONCLUSION

For the foregoing reasons, Defenders' motion should be denied.

Respectfully submitted,

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February 16, 2011

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 16th day of February, 2011, filed the foregoing with the Court via the Court's CM/ECF system by 10:00 a.m. as required by the Court, and served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

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