In the United States Court of Appeals for the Third Circuit

No. 15-2940

IN RE: CLEAN AIR COUNCIL

ON PETITION FOR WRIT OF MANDAMUS AND EMERGENCY STAY OF A FEDERAL ENERGY REGULATORY COMMISSION ORDER

RESPONSE OF FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION TO PETITION FOR MANDAMUS AND STAY

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GLOSSARY

Commission or FERC	Federal Energy Regulatory Commission
Certificate Order	Columbia Gas Transmission, LLC, 149 FERC ¶ 61,255 (Dec. 18, 2014), *reh'g pending*
Certificate Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000)
Columbia	Columbia Gas Transmission, LLC, sponsor of the East Side Expansion Project
EA	Environmental Assessment for the East Side Expansion Project, issued Aug. 29, 2014
P	Paragraph number within a FERC order
Project	East Side Expansion Project, upgrades to existing facilities that will provide an additional 312,000 decatherms of natural gas per day through: (1) replacing compressor units at two existing compressor stations with higher horsepower units; (2) looping two segments of 9.5 miles of existing pipeline; and (3) adding ancillary facilities

INTRODUCTION

The Clean Air Council's petition for emergency relief is premised on its assertion of extraordinary facts. But there is nothing extraordinary here. All the Federal Energy Regulatory Commission ("Commission" or "FERC") has done here, as it must whenever it considers an application to develop new natural gas infrastructure, is to balance public benefit against residual adverse effects. Here, consistent with its public interest responsibilities under the Natural Gas Act, *see* 15 U.S.C. § 717f, the Commission responsibly struck that public interest balance when it considered, following extensive public input, and approved, with numerous environmental conditions, an application by Columbia Gas Transmission, LLC ("Columbia") to expand its pipeline facilities.

The Commission currently is considering multiple requests for rehearing, filed in January 2015, of its December 2014 decision approving Columbia's application. One of those requests for agency rehearing was filed by Clean Air Council, which also moved the agency in April 2015 for a stay of the December order's effectiveness pending agency rehearing. Clean Air Council now claims that the Commission has engaged in extraordinary delay, by not issuing a rehearing order sooner.

But, again, there is nothing extraordinary here as to the pace of the agency's deliberations. The rehearing and judicial review provisions of the Natural Gas Act,

see 15 U.S.C. § 717r(a)-(b), do not compel, as Clean Air Counsel argues, an agency rehearing order within 30 days of receiving a rehearing request. Numerous case decisions – entirely ignored by Clean Air Council – affirm the Commission's ability to "toll" the time to make a rehearing decision. This procedure is consistent with the Natural Gas Act and affords the Commission time necessary for careful consideration of the often complicated questions presented, in order to prepare a thoughtful, responsive rehearing order appropriate for meaningful judicial review.

Here, there is no undue delay rising to the extraordinary level necessary to justify the extraordinary remedy of mandamus. The Commission was proceeding diligently and responsibly on the requests for agency rehearing prior to receiving Clean Air Council's mandamus petition, and is continuing to act diligently following receipt of the mandamus petition. The Commission intends to issue an order on rehearing within 30 days of filing this response – consistent with the time it typically takes in pipeline cases of this degree of sophistication and opposition. If Clean Air Council or any other party remains aggrieved from the agency's order on rehearing, it can, pursuant to the Natural Gas Act, seek further redress from the Commission and the courts – it simply cannot do so now under the guise of an extraordinary petition when the agency is currently deliberating and has not yet issued a final order appropriate for judicial review.

The one thing different here is Clean Air Council's decision to file its extraordinary petition with this Court. Other courts, not surprisingly, have repeatedly rejected similar efforts to interfere with the Commission's consideration of natural gas infrastructure applications, or halt the effectiveness of its natural gas infrastructure decisions, prior to judicial review on the merits. Indeed, as described below, *see infra* pp. 13-14, courts have dismissed all ten attempts in the last five years in other natural gas infrastructure cases to halt the effectiveness of FERC certificate orders – including dismissing four emergency requests for mandamus or stay just since March 2015. *See Town of Dedham v. FERC*, No. 1:15-cv-12352 (D. Mass. Jul. 15, 2015); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015). Clean Air Council has not presented any legitimate reason why this Court should reach any different decision here.

BACKGROUND

This case concerns a proposal by Columbia to increase the capacity of its existing facilities through modifications to pipeline, compression, and auxiliary facilities in Pennsylvania, New Jersey, New York, and Maryland. The East Side Expansion Project ("Project") would provide an additional 312,000 decatherms of firm natural gas transportation service per day to five natural gas shippers, through

replacing units at two compressor stations with higher horsepower units and "looping"[1] two segments of pipeline (each roughly 9.5 miles). *See Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014) ("Certificate Order"); *see also* Environmental Assessment for the East Side Expansion Project at 1-6, FERC Docket No. CP14-17-000 (Aug. 29, 2014) ("EA").

Applying its Certificate Policy Statement, as it does with all new natural gas infrastructure projects, the Commission balanced the public benefits of the Project against the potential adverse consequences. *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement); *see also* Certificate Order P 11. The Commission found that the Project is designed to meet new demand for natural gas transportation service, while minimizing the adverse impacts on landowners and the communities that might be affected by the Project. *Id*. PP 14, 15. Recognizing that Columbia maximized its use of existing pipeline and utility corridors to reduce impacts to affected landowners from construction, the Commission found that the Project is required by the public convenience and necessity. *Id*. PP 15, 16.

[1] A "loop" is a segment of pipe that is usually installed adjacent to an existing pipeline and connected to it at both ends. The loop allows more gas to be moved through the system. EA at 1-1, n.1.

In addition to finding a need for the Project, the Commission conducted a detailed environmental review consistent with its obligations under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq*. The Commission conducted four public scoping meetings where 60 individuals provided verbal comments. Certificate Order P 26. Based on these comments, Columbia adopted several changes to its proposed route. *Id*. P 27. Next, Commission staff prepared its Environmental Assessment, in cooperation with the U.S. Army Corps of Engineers, addressing all substantive environmental comments raised during the scoping process. After publishing the Environmental Assessment in the Federal Register for comment (and mailing it to all stakeholders on the Commission's environmental mailing list), the Commission received comments from three local agencies, two state agencies, one federal agency, four organizations, and approximately 200 individual stakeholders. *Id*. P 29. Ultimately, the Commission found that, if the Project is constructed and operated in accordance with Columbia's application and supplements, and in compliance with the 27 environmental conditions required by its order, approval of Columbia's Project would not constitute a major federal action significantly affecting the quality of the human environment. *Id*. P 128.

Columbia filed its Implementation Plan on December 30, 2014, including the information necessary to meet the pre-construction conditions in the Certificate

Order. On January 7, 2015, Columbia filed a request to commence activities for which it had received all relevant federal authorizations. The Commission, after confirming that Columbia had met all pre-construction conditions and had obtained the necessary authorizations, granted that request on January 9, 2015. *See* Letter from FERC's Office of Energy Projects to Columbia, Docket No. CP14-17-000 (Jan. 7, 2015).

On January 16, 2015, Clean Air Council filed a request for rehearing of the Certificate Order. Two other parties – Downingtown Area School District and Allegheny Defense Project – also requested rehearing.[2] On February 18, 2015, the Commission issued an Order Granting Rehearing For Further Consideration. *Columbia Gas Transmission, LLC*, FERC Docket No. CP14-17-001 (Feb. 18, 2015). On April 8, 2015, Clean Air Council filed with the Commission a motion to stay Project construction. Columbia responded to the motion on April 15, 2015. Less than four months later, on August 12, 2015, Columbia petitioned this Court for mandamus and stay of pipeline construction.

ARGUMENT

I. Mandamus Is Neither Necessary Nor Appropriate Here

Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004); *accord*

[2] Downingtown Area School District subsequently withdrew its rehearing request on January 28, 2015.

In re Diet Drugs Prods. Liab. Litig., 418 F.3d 372, 378 (3d Cir. 2005); *see also Yablonski v. United Mine Workers*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (writs of mandamus are "among the most potent weapons in the judicial arsenal" and, "as extraordinary remedies, . . . are reserved for really extraordinary causes") (internal quotation marks and citations omitted). Such extraordinary relief is not necessary here because the Commission has not unreasonably delayed action on rehearing and, in any event, intends to issue an order on Clean Air Council's pending request for agency rehearing within 30 days. If Clean Air Council objects to the Commission's resolution of matters in that upcoming order, it (like any other party) will be able to seek further agency rehearing of that order (if appropriate) or judicial review of a final order pursuant to the ordinary procedures under section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b). Therefore, the Court need go no further.

Even if the Court were to consider Clean Air Council's filing against the elements of a mandamus claim, its request for mandamus relief would still fail. A party seeking a writ of mandamus "must show both a clear and indisputable right to the writ and that he has no other adequate means to obtain the relief desired." *In re Jackson*, 445 Fed. Appx. 586, 588 (3d Cir. 2011) (citing *Haines v. Liggett Group Inc.*, 975 F.2d 81, 89 (3d Cir. 1992)). Clean Air Council has not satisfied either of these elements.

A. Clean Air Council Does Not Have A Right To An Immediate Commission Rehearing Order

First, Clean Air Council incorrectly asserts that, as a matter of law, it was entitled to a rehearing order on the merits within 30 days of its rehearing request. Pet. at 17. Clean Air Council argues that the Natural Gas Act, which provides that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied," 15 U.S.C. § 717r(a), means that the Commission was compelled to act on the merits of its rehearing request within 30 days. All courts that have reviewed this particular argument, and this particular provision of the Natural Gas Act (or similarly-worded provision of the FERC-administered Federal Power Act), however, have rejected, emphatically, Clean Air Council's cramped interpretation. *See Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969); *Gen. Amer. Oil Co. of Tx. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

These decisions have squarely rejected the contention that "act" means the Commission must act on the merits of a rehearing application within 30 days. *See Gen. Amer. Oil Co. of Tx*, 409 F.2d at 599 (rejecting a construction of section 19(a) of the Natural Gas Act as requiring the Commission to finally dispose of rehearing on the merits, within 30 days, consistent with interpretation adopted in the Third, Ninth, Tenth and D.C. Circuits) (citing *Freeport Sulphur Co. v. FPC*, 3d Cir. No. 17,691 (Feb. 7, 1969); *Union Oil Co. v. FPC*, 9th Cir. No. 23,794 (Feb. 28, 1969);

Pan American Petroleum Corp. v. FPC, 10th Cir. No. 11-69 (Mar. 3, 1969); *Pub. Serv. Comm'n of NY v. FPC*, D.C. Cir. No. 22,437 (Dec. 5, 1969)). "The statutory language [of an identical provision of the Federal Power Act] . . . although requiring FERC to 'act' within thirty days after filing . . . does not state, as the petitioner would have it, that FERC must 'act on the merits.'" *Kokajko*, 837 F.2d at 525 (holding that cases interpreting the rehearing provisions of the FPA and NGA may be cited interchangeably). All of these courts instead hold that Commission tolling orders constitute a valid 'act' that satisfies statutory responsibilities. *See id.* at 524 ("at least two circuits, in reviewing [the Natural Gas Act,] have ruled that 'tolling orders . . . are valid'") (citing *Cal. Co.*, 411 F.2d 720; *Gen. Am.*, 409 F.2d 597).

Nor can Clean Air Council argue that the Commission's delay here is "tantamount to a failure to exercise jurisdiction." *In re Jackson*, 445 Fed. Appx. at 588 (citing *Madden v. Myers*, 102 F.3d 74, 79 (3d Cir. 1996)). Where a petitioner asserts unreasonable agency delay, courts will only interfere with agency proceedings to correct "transparent violations of a clear duty to act," because courts seek the benefits of agency expertise and the creation of a record. *In re American Rivers*, 372 F.3d 413, 418 (D.C. Cir. 2004); *see also Oil, Chemical & Atomic Workers Union v. OSHA*, 145 F.3d 120, 124 (3d Cir. 1998) (denying writ where "agency possesses enormous technical expertise" and "has been far from

idle in its considerations"); *accord In re Cal. Power Exchange*, 245 F.3d 1110, 1125 (9th Cir. 2001) (a writ of mandamus for unreasonable delay is limited to when the agency has been so delayed as to frustrate the court's ability to review); *see also Towns of Wellesley, Concord and Norwood, Mass v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) (denying mandamus because, given FERC's assurances that it was moving in a diligent manner to conclude the proceedings, the court did not want to interfere in an ongoing agency proceeding).

"The central question in evaluating 'a claim of unreasonable delay' is 'whether the agency's delay is so egregious as to warrant mandamus.'" *In re Core Commc'ns*, 531 F.3d 849, 855 (D.C. Cir. 2008) (quoting *Telecomm'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984)). Courts measure such unreasonable delay in ***years*** – not months. *See In re Cal. Power Ex.*, 245 F.3d at 1125 ("[t]he cases in which courts have afforded relief have involved delays of years, not months"); *Towns of Wellesley v. FERC*, 829 F.2d at 277 ("The cases in which courts have afforded relief have involved delays of years."); *see also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade.").

Contrary to Clean Air Council's assertions (Pet. at 27), the Commission has many competing priorities, a significant portion of which involve impacts to

human health and welfare. *See What FERC Does*, http://www.ferc.gov (follow "About" hyperlink; then follow "What FERC Does" hyperlink) (Commission energy infrastructure responsibilities include reviewing proposals to build liquefied natural gas terminals and interstate natural gas pipelines as well as licensing hydropower projects). Because the Commission intends to act within 30 days on Clean Air Council's rehearing request, and because less than nine months have elapsed since the Certificate Order issued, Clean Air Council falls well short of the exacting standard for a writ of mandamus.

B. Clean Air Council Can Obtain Relief (If Warranted) In The Normal Course Of Appellate Review

Clean Air Council cannot demonstrate that it has no other avenues for relief. Clean Air Council argues that the Project "already is causing and will continue to cause environmental harms that will be essentially irreversible once construction is complete and the project is operational." Pet. at 39. Of course, the Commission is currently considering whether Clean Air Council is entitled to further redress on review of its rehearing claims.

Moreover, Clean Air Council's claim is based on the erroneous assumption that neither the Court nor the Commission has the authority, following appellate review on the merits, to terminate Project service, order removal of Project facilities, or otherwise take further remedial action to protect the public interest. *See In re Diet Drugs*, 418 F.3d at 379 (mandamus should not be used if a petitioner

can obtain relief on appeal). Putting aside whether the Commission's 27 conditions adequately mitigate any impacts to the environment (which they do, as discussed *infra* p. 22), a reviewing court would have the power to impose any additional requirements necessary to protect the environment – even requiring removal of existing facilities, as would the Commission. *See Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022 at PP 17, 21 (2012) (noting the Commission's broad remedial authority under the Natural Gas Act); *see also United Gas Imp. Co. v. Callery Prop., Inc.*, 382 U.S. 223, 229 (1965) (holding that FERC, like a court, can undo what is wrongfully done by virtue of its order).

II. Clean Air Council Cannot Demonstrate A Need For Stay

As noted above, the Commission intends to issue an order on rehearing within 30 days; therefore, a stay pending Commission action would serve little public interest purpose. Additionally, Clean Air Council fails to demonstrate a need for stay. The Commission's detailed analysis and comprehensive environmental review make success on the merits of any future appeal unlikely; Clean Air Council's speculative assertions of harm are neither certain nor irreparable; and the significant public interest in enabling the transportation of needed gas supplies in time for the winter heating season all weigh strongly against a stay.

This Court sets a "particularly high" bar for stay. *See Conestoga Wood*

Specialties v. Dept. of Health and Human Servs., 2013 WL 1277419, at *1 (3d Cir. 2013) (denying stay pending appeal notwithstanding irreparable harm, where petitioner failed to show a likelihood of success on the merits). Unlike some circuit courts, this Court requires a movant for stay pending appeal to show that all four stay factors favor relief. *Id*. (rejecting sliding scale approach where "preliminary injunctive relief can be granted upon particularly strong showing of one factor"). This means that, to obtain a stay in this Court, a movant must satisfy its burden to show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Id*. (citing *Kos Pharm., Inc. v. Andrx Corp*., 369 F.3d 700, 708 (3d Cir. 2004)). Clear Air Council has not carried its burden on any of the factors, much less all four.

Instructively, other courts have declined to grant stays in natural gas infrastructure cases, some with much greater project impacts (and alleged harm) than here. In particular, stays have been sought in **ten** recent natural gas infrastructure cases and all have been denied – including **four** such denials since March 2015:

- *Town of Dedham v. FERC*, No. 1:15-cv-12352 (D. Mass. July 15, 2015) (denying motion for preliminary injunction to stop pipeline construction and dismissing for lack of jurisdiction);

- *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015) (denying motion to stay construction of liquefied natural gas export facilities and clearing of acreage for construction staging);

- *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying a petition for mandamus to force the Commission to act on a pending rehearing petition regarding the issuance of a certificate for a 124-mile long pipeline to provide additional supplies of natural gas to New England);

- *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015) (denying a motion for stay to halt the clearing of 140 acres of forest adjacent to streams and wetlands for pipeline construction);

- *Minisink Residents for Envt'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (denying motion for stay to halt operation of natural gas compressor station where stated harm was the perceived safety threat to nearby residents);

- *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (denying a stay concerning tree clearing and the construction of a 40-mile pipeline);

- *In re Minisink Residents for Envt'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (denying stay of construction of natural gas compressor close to homes);

- *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (denying stay concerning clearing of 200,000 mature trees for a 39-mile greenfield natural gas pipeline); and

- *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011) (rejecting motions to stay construction of a 40-mile segment of a 675-mile pipeline that crosses a habitat for two sensitive species and land with special significance to Native Americans).

This record in this case supports the same result – denial of stay – as in these

recent cases.

A. Clean Air Council Fails To Show A Likelihood Of Success On The Merits

Clean Air Council raises eight challenges to the Certificate Order. Pet. at 41-51. Without prejudging what the Commission may do on rehearing, almost all of these arguments were addressed in the Certificate Order or 481-page Environmental Assessment or, if properly raised, can be further addressed on rehearing. *See, e.g.*, *Save Our Sebasticook v. FERC*, 431 F.3d 379, 381-82 (D.C. Cir. 2005) (very purpose of rehearing is to allow the agency a chance to correct any mistakes).

Commission orders will be upheld so long as they "articulate a satisfactory explanation for [the agency's] action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicles Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*,463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). Commission factual findings must be supported by "substantial evidence" which "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence." *Myersville Citizens For A Rural Community, Inc., v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2014) (quoting *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 108 (D.C. Cir. 2014)). In reviewing an agency's compliance with the National Environmental Policy Act, courts "consistently decline[] to 'flyspeck' an agency's

environmental analysis." *Minisink*, 762 F.3d at 112 (quoting *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) (citations omitted)).

First, Clean Air Council argues that the Commission impermissibly segmented its review of "other expansion projects Columbia will necessarily need to undertake if the [Project] is completed." Pet. at 43. Yet, as the Certificate Order explains, there are no other connected, similar, or cumulative actions to consider with the Project under applicable regulations and precedent. Certificate Order P 45; *see also* Certificate Order PP 37-47 (addressing all segmentation arguments raised).

The environmental review of this Project is readily distinguishable from *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014), that considered four pipeline upgrades on a specific linear mainline, all of which were either proposed and before the Commission or under construction as the same time, but reviewed separately. *See* Certificate Order P 45 (citing 753 F.3d at 1313); *see also Minisink*, 762 F.3d at 111, n.11 (rejecting segmentation claim based on *Delaware Riverkeeper* precedent because no temporal, functional or geographic nexus with other projects); *Myersville*, 782 F.3d at 1326-27 (same). Additionally, the Project is designed to operate without exceeding design requirements or calculated erosional velocities on its system (*contra* Pet. at 44), and the

Commission accepted Columbia's confirmation that it has no plans to upgrade other portions of the relevant Project pipelines at that time. Certificate Order PP 44, 103-106.

Second, Clean Air Council argues that the Commission should have analyzed how the Project will inevitably induce further upstream and downstream development, "despite the fact that their exact location, scale and timing may not be known." Pet. at 45. But the Commission explained the constraints on performing such an analysis, and that the required speculation would not provide meaningful information to its decision. Certificate Order PP 117-119; EA 2-117; *see also N. Plains Res. Council v. Surface Trasp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (agency need not "engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration").

Third, Clean Air Council claims that the Commission failed to undertake a fugitive emissions analysis. Pet. at 46. To the contrary, the Commission conducted an extensive analysis of air emissions associated with the Project, including estimating impacts associated with fugitive dust from construction. *See* EA 2-74 to 2-94; *see also* Certificate Order PP 91-100. In particular, the Environmental Assessment reviewed the applicable permitting requirements for the facilities and determined that operation of the Project would have no significant

impact on regional air quality. EA at 2-94. Additionally, the Certificate Order denied Clean Air Council's request to conduct a fugitive emissions analysis from liquefaction facilities, on the basis that the Project does not involve liquefaction. Certificate Order P 100. To the extent Clean Air Council renewed its argument, or made a different argument, with respect to fugitive emissions, the Commission will address that argument on rehearing. *But see No Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) (failure to raise an issue in a timely fashion before the agency may preclude a petitioner from raising it on review).

Fourth, Clean Air Council challenges the adequacy of the Commission's cumulative impacts analysis. Pet. at 47-48. Here again, the Commission prepared a very thorough environmental review. *See* Certificate Order PP 110-127; *see also* EA 2-111 to 2-119. Although the Clean Air Council seeks an even greater analysis, the Commission found, based on both the limited scope of the Project and the minimal environmental footprint, that the broader cumulative effects analysis is not required under the National Environmental Policy Act. Certificate Order P 121 (finding that limited scope of Project and minimal environmental footprint merit against broader cumulative effects analysis); *see also Minisink*, 762 F.3d at 113 (affirming Commission's finding that because the project itself would have minimal impacts, no significant cumulative impacts were expected to flow from other projects since construction timelines were distinct). This determination is

based on the Commission's special expertise and is owed deference. Certificate Order P 121 (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 413 (1976)).

Fifth, Clean Air Council argues that greenhouse gas emissions were not meaningfully analyzed. Pet. at 48. To the contrary, greenhouse gas emissions are addressed in two different sections of the Environmental Assessment. EA at Section 2.10.9 (Climate Change), and Section 2.8.1 (Air Quality). In compliance with the Environmental Protection Agency's definition of air pollution to include greenhouse gases, the analysis includes estimates of greenhouse gas emissions for construction and operation. *See* EA at 2-76, 2-86 to 2-87. Ultimately, the report concludes that there is no standard methodology to determine how a project's relatively small incremental contribution to greenhouse gases would translate into physical effects on the global environment. *See* EA at 2-119; *see also* Certificate Order P 125. That is all that is required. *See Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008) (agency is not obligated to engage in endless hypothesizing as to remote possibilities).

Sixth, Clean Air Council argues that the Commission improperly rejected the "no action alternative." Pet. at 49-50. Clean Air Council suggests that the Commission should have given more weight to the benefits of maintaining the status quo. *Id*. Yet Clean Air Council misunderstands the purpose of an alternatives analysis. As explained in the Environmental Assessment, to be viable,

an alternative must meet the stated objective of the project. EA at 3-2. No such alternatives (excess capacity on other pipeline systems, or renewable resources) were identified that could make it unnecessary to construct the Project. *Id*.; *see also Myersville*, 783 F.3d at 1323 (reasonable alternatives are those that "are technically and economically practical or feasible and meet the purpose and need of the proposed action") (quoting 43 C.F.R. § 46.420(b)).

Seventh, Clean Air Council argues that the Commission cannot rely on Columbia's assertions that it will comply with other agencies' permitting regimes or implement mitigation measures. Pet. at 50. Clean Air Council cites no reason why the Commission should not accept Columbia's representations. Further, failure to comply with Commission orders, or to make false representations to the Commission or its staff, can subject a person to civil or criminal penalties. *See* 15 U.S.C. § 717t-1 (civil penalty authority under the Natural Gas Act); *see also* 18 U.S.C. § 1001 (making it a crime to knowingly or willfully make materially false statements or representations to the United States government). In addition, failure by Columbia to comply with other agencies' permitting requirements might subject it to enforcement actions by those agencies as well.

Eighth, Clean Air Council believes that the Commission inappropriately balanced the public benefit of the Project against its costs. To the contrary, the Commission applied its Certificate Policy Statement in the same manner it has in

all other natural gas pipeline certificate decisions. The Commission's balance of the Project's benefits against residual adverse impacts under the Certificate Policy Statement is based upon its expertise and is entitled to deference from this Court. *See Minisink*, 762 F.3d at 111 (citing *Am. Gas Ass'n v. FERC*, 593 F.3d 14, 19 (D.C. Cir. 2010) (FERC has broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines in its projects analysis)); *see also Myersville*, 783 F.3d at 1314-15 (noting broad Commission discretion to determine whether a project is supported by public convenience and necessity).

B. The Alleged Harm Is Neither Certain Nor Irreparable

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); s*ee also Reynolds Metals Co. v. FEC*, 777 F.2d 760, 764 (D.C. Cir. 1985) (citing *Wis. Gas*). Implicit in this requirement is the "further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Wis. 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*. An applicant for a stay 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. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985).

Clean Air Council premises its motion for stay upon unsubstantiated and speculative allegations of perceived health threats and property value claims. But Clean Air Council, and in particular the Declaration of Joan Dean (the sole supporting Declaration), reveals that its concerns are just that – concerns. *See* Decl. of Joan Dean (describing "concerns" and "worries" about air pollution impacts on property values and recreational activities). Worries over potential impacts that are believed to occur at some point in the future are not irreparable injuries. *See ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226 (3d Cir. 1987) ("Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a 'clear showing of immediate irreparable injury.'") (quoting *Continental Groups, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 359 (3d Cir. 1980)).

In any event, the alleged "concerns" are unsupported by the underlying record. The Commission studied potential impacts extensively, and found them to be limited or minimal; where necessary, the Commission developed measures to prevent or mitigate potential impacts. Specifically, with respect to Clean Air Council's alleged injuries, the Commission's Environmental Assessment found that: (1) the Project would have a positive impact on the rental housing industry

during construction because it would increase demand, and has no long-term impact because housing proximity to natural gas pipelines has not been shown to have a negative effect on property values (Certificate Order P 64; EA at 2-61 to 2-62); and (2) the Project will not result in a significant impact on air quality because it will comply with Pennsylvania regulations to include the best available technology requirements to prevent toxic emissions, and because it will be in compliance with all Clean Air Act and all federal and state emissions standards (Certificate Order PP 91-101, EA at 2-84, 2-94).

Even if the Court finds an irreparable injury, that finding must be balanced against the other stay factors. A stay "is not a matter of right, even if irreparable injury might otherwise result . . . ." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Rather, a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case. *Id.* Clean Air Council's worries over potential future Project impacts, alone, are not enough to support a stay – especially now, as the Commission further considers Clean Air Council's arguments on rehearing.

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." *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Here, a stay would likely render impossible the

intended Fall 2015 in-service date. *See* Columbia Answer to Motion for Stay at 8-9, FERC Docket No. CP14-17-000 (Apr. 15, 2015) (noting that even a brief delay could cause the Project to miss its target in-service date prior to Winter 2015 heating season). Circuit courts have recognized a substantial interest in continuing with approved construction activities in light of the costly nature of interruptions. *See 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.").

Halting construction of the pipeline at this point would seriously jeopardize the availability of the Project for the upcoming winter heating season, to the detriment of Columbia, Project shippers (including local distribution companies New Jersey Natural Gas Company and South Jersey Gas Company), and natural gas customers in the Mid-Atlantic region. *See* Columbia Answer to Motion for Stay at 8-11 (detailing the economic harm to Columbia from project delay and harm to the Project's shippers that need to meet their increased demands for natural gas in the winter months). A delay would frustrate this objective.

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." *Va. 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. *N. Atlantic Westbound Freight Ass'n v. Fed. Maritime Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968).

Here, the public interest would not be served by a stay of construction, pending either agency rehearing or judicial review. A stay would delay delivery of needed gas supplies to Mid-Atlantic markets for this winter's heating season, which could ultimately harm consumers. In issuing the certificate of public convenience and necessity for the Project, the Commission found a strong showing of need for this Project. *See* Certificate Order P 16.

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 minimal adverse impacts upon

environmental resources. *See* Certificate Order PP 30, 128. In these circumstances, the public interest does not support issuance of a stay.

CONCLUSION

For the foregoing reasons, Clean Air Council's petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 16th day of September, 2015, served the foregoing by causing copies of it to be e-mailed and mailed to the counsel listed below.

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