
ORAL ARGUMENT HAS NOT BEEN SCHEDULED

**In the United States Court of Appeals
for the District of Columbia Circuit****No. 16-1329**
_____SIERRA CLUB, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.
_____ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION
_____**RESPONDENT'S OPPOSITION TO
EMERGENCY MOTIONS FOR STAY AND EXPEDITED REVIEW**
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Washington, D.C. 20426November 2, 2016

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GLOSSARY

Certificate Order	<i>Fla. Se. Connection, et al.</i> , 154 FERC ¶ 61,080 (Feb. 2, 2016)
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement or EIS	Final environmental impact statement issued for the Florida Southeast, Hillabee Expansion, and Sabal Trail project proposals
Florida Power	Florida Power and Light Co.
Florida Southeast	Florida Southeast Connection
Mot.	Movant-Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper Motion for Emergency Stay, filed on Oct. 24, 2016
Mot. to Exp.	Movant-Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper Motion for Expedited Review, filed on Oct. 24, 2016
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, <i>et seq.</i>
P	The internal paragraph number within a FERC order
Projects	Florida Southeast, Hillabee Expansion, and Sabal Trail pipeline projects
Rehearing Order	<i>Fla. Se. Connection, et al.</i> , 156 FERC ¶ 61,160 (Sep. 7, 2016)
Sabal Trail	Sabal Trail Transmission, LLC.
Sierra Club	Collectively, Movant-Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper
Transco	Transcontinental Gas Pipe Line Company, LLC

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**RESPONDENT'S OPPOSITION TO
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INTRODUCTION

Movant-Petitioners Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively, Sierra Club) ask this Court for the extraordinary remedy of indefinitely delaying three related pipeline projects – Florida Southeast Connection, Hillabee Expansion, and Sabal Trail (collectively, the Projects) – and for expedited review. The Projects are three interstate natural gas pipelines that the Federal Energy Regulatory Commission (FERC or Commission) has determined, in its expert judgment and after thorough consideration and balancing of competing values, are needed to meet the Nation's energy needs.

Sierra Club's emergency pleas ignore one-half of the Commission's public interest balance – whether the need for, and benefits from, the Projects outweigh potential adverse impacts. In its narrow focus on potential adverse impacts, Sierra Club fails to address the Commission's findings of substantial benefits from consumer access to new sources of natural gas in the Southeast.

As to the one-half of the balance Sierra Club does address, it ignores an array of mitigation measures designed to minimize, if not eliminate, environmental impacts. The Commission considered all views (including those of Sierra Club) in its orders and in its comprehensive environmental impact statement for the Projects that informed those orders, consistent with its responsibilities under the Natural Gas Act and the National Environmental Policy Act (NEPA). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives, whether economic or environmental in nature. The Commission was particularly sensitive to environmental concerns here, as it conducted a comprehensive review of related pipeline proposals that petitioners have claimed was lacking in other recent appeals of FERC natural gas infrastructure orders.

The requested stay would upset the Commission's public interest balance and imperil the Projects. Accordingly, it must be denied. This and other courts have repeatedly rejected similar efforts to halt the effectiveness of the Commission's natural gas infrastructure decisions prior to judicial review on the

merits. In fact, in the past five years, courts have denied all 13 emergency requests for stays of the Commission's natural gas certificate orders, including one denied by this Court just last Friday:

- *City of Boston Delegation, et al. v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016) (denying stay of pipeline in-service date based upon a challenge, in part, to FERC's cumulative impacts analysis);
- *Catskill Mountainkeeper, et al. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016) (denying stay of pipeline construction based upon a challenge to FERC's indirect and cumulative impacts analyses);
- *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015) (denying stay and expedited review based upon challenges to FERC's indirect and cumulative impacts analyses); and
- *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015) (denying emergency petition for stay of pipeline construction).¹

Sierra Club has not presented any legitimate reason why this Court should reach a different decision here. Nor can it justify expedited review where it cannot meet the same high standard for such relief, and when Sierra Club cannot justify

¹ The other nine court orders denying stays of FERC natural gas infrastructure orders are: *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *Town of Dedham v. FERC*, 2015 WL 4274884, No. 1:15-cv-12352 (D. Mass. July 15, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *Minisink Residents for Env't'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Env't'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); 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).

different, special treatment for its appeal than for other FERC infrastructure appeals that are awaiting judgement in the normal course of appellate review.

BACKGROUND

This case concerns the Commission's issuance of three conditional certificates of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). The certificates authorized the following entities to build and operate three natural gas transmission pipeline projects:

- Florida Southeast Connection (Florida Southeast) to build and operate the Florida Southeast Project;
- Transcontinental Gas Pipe Line Company, LLC (Transco) to build and operate the Hillabee Expansion Project and lease that capacity to Sabal Trail Transmission, LLC (Sabal Trail); and
- Sabal Trail to build and operate the Sabal Trail Project.

See Fla. Se. Connection, et al., 154 FERC ¶ 61,080, P 4 (Feb. 2, 2016) (Certificate Order), *on reh'g*, 156 FERC ¶ 61,160, P 1 (Sep. 7, 2016) (Rehearing Order).

Although the three applications were for separate Projects, FERC considered and addressed the Projects together as related proposals. *See* Certificate Order P 51.

The challenged orders authorized Florida Southeast, Transco, and Sabal Trail, upon satisfying necessary environmental conditions, to expand capacity at existing facilities and construct limited, new facilities to transport, in total, approximately 1.1 billion cubic feet of natural gas per day over 685.5 miles of transmission pipeline from Alabama, Georgia, and Florida to customers in Florida

and the Southeast. *See id.* PP 1-4. Under the Hillabee Expansion Project, Sabal Trail will transport up to 1,131,730 dekatherms of natural gas per day to Tallapoosa County, Alabama. *Id.* PP 2, 36. The Sabal Trail Project will transport up to 1,075,000 dekatherms per day over 515 miles of new pipeline and related facilities from Alabama to the Florida Southeast Project and other existing systems in Osceola County, Florida. *Id.* PP 3, 16. The Florida Southeast Project, which includes a new 126-mile pipeline and related facilities, will transport up to 640,000 dekatherms per day to a delivery point near Indiantown, Florida. *Id.* PP 1, 4. The Projects are scheduled to be placed in service in May 2017. *See id.* PP 12, 20, 31.

Applying its Certificate Policy Statement, as it does with all new natural gas infrastructure projects, the Commission balanced the public benefits of the Projects against the potential adverse consequences. *See id.* PP 62-63.² The Commission found “persuasive evidence” of public need for the Projects. *See id.* P 87; *see also* Rehearing Order P 5. Sabal Trail entered into long-term agreements with utilities Florida Power and Light (Florida Power) and Duke Energy to use approximately 93% of the Sabal Trail Project’s total capacity. *See* Certificate Order PP 23-24; *see also* Rehearing Order P 5 (public need further evidenced by the Florida Public

² *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

Service Commission's efforts to accommodate Florida's long-term natural gas needs, which led to one of Sabal Trail's contracts).

Florida Southeast also contracted with Florida Power, *see* Certificate Order P 31, and the Florida Southeast Project would help meet increased demand for natural gas in Florida, due to the lack of available transport capacity from existing central and southern Florida interstate pipelines. *See id.* at PP 74, 85. The Projects would increase market competition and deliver gas to existing systems in the event of a supply disruption. *See* Rehearing Order P 6; Certificate Order P 68.

After finding a need for the Project, the Commission conducted a lengthy, detailed environmental review consistent with its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* It reviewed the three separate applications collectively, resulting in a 449-page final environmental impact statement (Environmental Statement or EIS). *See* Certificate Order PP 226-92.

Before issuing the Environmental Statement, the Commission considered comments from over 350 people who spoke at 23 public meetings, and reviewed over 1,200 letters and comments. Certificate Order PP 226-27, 231. Based on these comments, Sabal Trail considered and adopted over 75% of the alternative routes identified by landowners and other stakeholders. *See id.* PP 70-71; Rehearing Order P 6; *see also* Certificate Order P 75 (noting that 81% of Florida Southeast's proposed route was next to existing roads and utilities). While the

Commission found that the Projects took sufficient steps to minimize any adverse effects, it imposed 30 conditions to mitigate potential environmental impacts associated with the Projects. *See* Certificate Order App. B.

Although the Commission's orders and EIS addressed numerous issues, Sierra Club raises just two in its stay motion. First, Sierra Club objects to the Commission's consideration of impacts on environmental justice communities. Mot. 5-8. The Commission carefully addressed potential impacts on environmental justice communities, and ultimately found no adverse or disproportionate impacts. *See* Rehearing Order PP 74-75; EIS 3-214 – 3-218.

Second, Sierra Club contends that the Commission improperly refused to consider the impacts from greenhouse gas emissions by the power plants contracted to use the Projects. Mot. 3, 8-12. The Commission found that the Projects would not significantly contribute to greenhouse gas cumulative impacts, based, among other things, on power plants using the natural gas to replace higher-emissions coal as a fuel source. *See* Rehearing Order P 70; EIS 3-297 – 3-298. But the Commission found it speculative to try and quantify the precise environmental effects from the delivered natural gas's eventual emissions. *See* EIS 3-297.

Sierra Club and other parties asked the Commission to stay the Projects, without success. *See* Rehearing Order P 2 n.7 (citing *Fla. Se. Conn., LLC*, 154

FERC ¶ 61,264 (Mar. 30, 2016) (denying stay request)); *Fla. Se. Conn., LLC*, 156 FERC ¶ 61,233 (Sept. 29, 2016) (dismissing stay request).

ARGUMENT

Sierra Club has not justified the extraordinary remedy of a stay. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) (stay pending appeal “is an extraordinary and drastic remedy; it is never awarded as of right”); *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (motion for stay pending review is “seeking extraordinary relief”). In order to obtain such extraordinary relief, Sierra Club must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) a lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Courts “must balance the competing claims of injury and must consider the effect . . . of the granting or withholding of the requested relief,” and “pay particular regard for the public consequences” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008) (quotations omitted).

I. Sierra Club Cannot Show A Likelihood Of Success On The Merits

Sierra Club cannot meet the “independent, free-standing requirement” of demonstrating a likelihood of success on the merits. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d

1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring), and citing *Winter*, 555 U.S. at 22). In the context of a National Environmental Policy Act claim, this Court has explained that a petitioner must “clearly establish[]” a violation to obtain injunctive relief. *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (finding that petitioner failed to demonstrate a “substantial case on the merits”).

Commission action taken pursuant to NEPA is entitled to a high degree of deference. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). If an agency’s NEPA “decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment.” *EarthReports v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016).

Here, the Commission satisfied its responsibilities under NEPA, and its decisions are supported by substantial record evidence – demonstrated by the 449-page Environmental Statement considering the three related pipeline proposals. In contrast to this extensive analysis, Sierra Club focuses solely on the purported impact upon environmental justice communities and FERC’s analysis of the environmental impact of greenhouse gas emissions. But Sierra Club cannot demonstrate it is likely to succeed on either NEPA claim.

A. The Commission Reasonably Assessed The Projects’ Effects On Environmental Justice Communities

Executive Order 12898 requires that specified federal agencies identify and address disproportionately higher and adverse human or environmental health

effects on minorities and low-income populations, known as environmental justice communities. *See* Certificate Order P 260. Although Executive Order 12898 does not apply to the Commission, *id.*, the Environmental Statement nevertheless addressed the impact upon environmental justice communities. *See* EIS 3-214 – 3-218. The Commission examines environmental justice issues under a three-step analysis, determining: (1) whether the project will be located within one-mile of minority and low-income populations; (2) if the impacts from that project are “high and adverse;” and (3) if the impacts fall disproportionately on environmental justice populations. Rehearing Order P 75 (citing EIS 3-215).

Although the Commission found that the Projects would be located within one mile of 135 environmental justice communities, it concluded that the Projects would not result in “high and adverse” impacts. Rehearing Order P 75; *see* EIS 3-214 – 3-216. The Projects were routed to avoid and minimize the effects upon those communities – with a majority of pipeline segments placed within or next to existing rights-of-way. *See* Certificate Order PP 255, 262; EIS 3-215; *see also* EIS 3-215 (the Projects would not adversely affect air quality within environmental justice communities). FERC nevertheless required additional mitigation measures. *See* EIS 3-215; *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010) (agency can fulfill its NEPA mandate when it adopts mitigation measures to reduce any environmental impacts).

Sierra Club objects to the Commission's methodology, asserting the Commission failed to compare the impact between environmental justice communities and the general population. Mot. 6-7. But the Commission found that the impacts were not "high and adverse," obviating the need to measure disproportionate impact under its three-part test. *See* EIS 3-215. Nevertheless, the Commission explicitly determined that the Projects "would not result in impacts disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population." *Id.* at 3-217.

The Commission then compared the number of environmental justice communities affected by the Projects against those that would be affected by alternatives. *See* Rehearing Order P 75 (citing EIS 3-216). The Commission concluded that Project alternatives would affect "a relatively similar percentage of environmental justice populations." EIS 3-217. The Commission's decision to (additionally) compare the Project route against proposed alternatives was reasonable. *See, e.g., Cmty. Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (rejecting claim that agency should have compared environmental justice impacts across larger geographic area, finding agency's choice of methodology "reasonable and adequately explained," and "entitled to deference"); *see also Murray Energy Corp. v. FERC*, 629 F.3d 231, 238 (D.C. Cir. 2011) (affirming FERC's conclusion regarding a natural gas pipeline's location).

B. The Commission Reasonably Analyzed The Projects' Greenhouse Gas Emissions

The Commission also took a hard look at the Projects' potential impacts on climate change. It quantified the greenhouse gas emissions associated with the Projects. *See* EIS 3-249 – 3-260. The Environmental Statement also identifies climate change-related environmental effects in the Southeast region resulting from overall greenhouse gas emissions. *Id.* at 3-296 – 3-297.

The Commission further noted that power plants are planning to use the Projects to convert from coal to natural gas. *Id.* at 3-297. The Commission found that, because natural gas emits less carbon dioxide than coal, the Projects would likely reduce those power plants' emissions, "potentially offsetting some regional" carbon dioxide. *Id.* Further, future projects that do not offset such emissions would be subject to pertinent emissions and mitigation requirements to obtain permits. *Id.* at 3-298. The Commission logically concluded that the Projects "would not significantly contribute to" greenhouse gas cumulative impacts. *Id.*

Sierra Club argues that the Commission was required to go further, by quantifying the "impacts of burning the gas delivered by the" Projects. Mot. 9. Sierra Club contends that FERC should have used a methodology such as the Department of Energy's "Life Cycle Analysis" or the Council on Environmental Quality's "Draft 2014 Climate Guidance" to estimate emissions – not from the Projects, but from the power plants contracted to use the pipelines. *Id.* at 9-10.

But the Commission is not required to “‘examine everything for which the [projects] could conceivably be a but-for cause’ in order to satisfy NEPA.” *EarthReports*, 828 F.3d at 955 (quoting *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016)). In *EarthReports*, this Court rejected a claim that the Commission impermissibly failed to use tools (such as those cited by Sierra Club) to determine the environmental effects of greenhouse gas emissions from a liquefied natural gas infrastructure project. *See* 828 F.3d at 956. The Court instead upheld as reasonable FERC’s conclusion that “‘there is not standard methodology to determine how a project’s incremental contribution to [emissions] would result in physical effects on the environment.’” *Id.* As the Commission has explained, the “‘CEQ’s 2014 Draft GHG Guidance emphasizes that agencies have the discretion to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations.’” *Constitution Pipeline Co. LLC*, 154 FERC ¶ 61,046, P 128 n.198 (2016) (citing 2014 CEQ Draft Guidance).³

So too here, the Commission reasonably concluded it could not determine whether the Projects’ incremental contribution of greenhouse gases from the

³ *See also* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews at 1, n.3, Council on Environmental Quality (Aug. 1, 2016) (announcing the guidelines are not legally binding).

delivered natural gas would result in appreciable physical effects on the environment – or quantify the amount of greenhouse gases offset by the use of natural gas instead of coal – because “there is no standard methodology” for such a determination. *Id.* at 3-297. Even if the Commission found a sufficient causal relationship between the Projects and eventual natural gas emissions, “it would still be difficult to meaningfully consider those impacts, primarily because emission estimates would be largely influenced by assumptions rather than direct parameters about the project[s].” Rehearing Order P 69 (quoting EIS 3-297). NEPA does not require the Commission to “engage in speculative analysis or provide information that will not meaningfully inform the decision-making process.” *Id.*; *see also Sierra Club*, 827 F.3d at 46 (finding that FERC was reasonable in not considering in its NEPA review how approving a pipeline would cause increased natural gas production because the linkage was too “attenuated”).

II. Sierra Club Has Not Established An Irreparable Injury

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). This includes the “further requirement that the movant substantiate the claim that irreparable injury is ‘likely’ to occur.” *Id.* (“The movant must provide proof . . . indicating that the harm is certain to occur in the near future.”). Unsupported assertions are insufficient. *Cuomo*, 772 F.2d at 978. The

party seeking relief must show that “the injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.” *Wis. Gas.*, 758 F.2d at 674 (quotation omitted). A stay is not a matter of right; rather, any injury must be balanced against the other stay factors. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case).

A. Sierra Club Does Not Cite Any Immediate Or Irreparable Harms

Sierra Club cites no immediate threat that justifies the Court exercising the extraordinary and drastic remedy of a stay. *Wis. Gas.*, 758 F.2d at 674. Instead, its alleged injuries are primarily based upon future construction or operation of the Projects. *See, e.g.*, Mot. 14 (focusing upon the alleged harm to air quality from operation of compressor stations); *see also Gulf Restoration Network v. U.S. Army Corps. of Engineers*, No. 16-15545 (11th Cir. Sept. 1, 2016) (in denying stay of the same Projects, court deemed the matter a “non-emergency”); *see generally Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (stay should not be granted unless the movant, by a clear showing, carries the burden of persuasion).

Further, Sierra Club bases its motion upon alleged impacts from the Projects. Mot. 13-16. Yet it ignores the mitigation measures designed to minimize, if not eliminate altogether, environmental impacts, including:

- **Right-of-Way** – 65 percent of the pipeline segments will be installed next to an existing utility right-of-way. Certificate Order P 255 (citing EIS 3-184);

- **Forests** – 95 percent of the affected forests will be within the pipeline right-of-way (maintained in an herbaceous state to retain environmental value), with approximately 63 percent of the affected forests allowed to revert to pre-construction conditions. EIS 3-294 – 3-295;
- **Air Quality** – strict adherence to all applicable federal and state regulations, with the Albany compressor station (*see* Mot. 14) “not hav[ing] a significant impact on regional air quality.” EIS 3-260; Certificate Order P 263;
- **Surface Waters** – specialized crossing methods so as not to disturb animals or habitats, restoration of disturbed habitats; minimization of vegetation clearing; implementation of erosion. EIS 3-56;
- **Wetlands** – the majority will be restored, with final mitigation plans filed with the U.S. Army Corps of Engineers before construction. Certificate Order PP 250-251;
- **Sinkhole Prevention** – Preventing and minimizing the potential for sinkhole development, including by stabilizing the area and/or rerouting the pipeline. EIS 3-10 – 3-12; *see* Certificate Order PP 235-37; and
- **Florida Aquifer** – 98 percent of the pipeline will use overland construction methods to limit groundwater disturbances, with impacts minimized based upon FERC-mandated conditions. Certificate Order PP 242-43.

The Commission thus reasonably considered and addressed any potential impacts caused by the Projects. *See also* Certificate Order App. B (containing environmental conditions for the Projects); *EarthReports*, 828 F.3d at 958 (affirming FERC’s NEPA review because it addressed concerns at length and made its authorization contingent on compliance with all applicable regulations and coordination with relevant agencies). Likewise, contrary to Sierra Club’s declarations (Mot. 16), the Commission found (at most) minimal impacts on

recreational interests (EIS 3-80 – 3-101) or property values – which the Commission again sought to minimize. *See* Certificate Order P 287; EIS 3-185; *see generally Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322-23, 1325 (D.C. Cir. 2015) (declining to “flyspeck” FERC’s NEPA analysis in finding that FERC appropriately concluded that project effects on property values should not alter certificate determination).

B. The Commission Has Full Remedial Authority

Further, Sierra Club’s concern (Mot. 19-20) that absent a stay it may be more difficult for the Commission to order its requested remedy 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 and order the removal of Project facilities. *See, e.g., Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, PP 17, 21 (2012) (noting the Commission’s broad remedial authority under the Natural Gas Act in denying stay); *see also United Gas Improvement 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).

The suggestion that continued construction could “render moot full and complete relief” (Mot. 1) once the Projects are operating (Mot. to Exp. 10-11) – or prevent the Commission from considering alternatives (*id.* at 19) – is thus unavailing. A natural gas certificate immediately goes into effect upon issuance by

the Commission. *See Panhandle Eastern Line Co. v. FERC*, 881 F.2d 1101, 1119 (D.C. Cir. 1989) (application for rehearing or judicial review does not stay a natural gas certificate) (citing 15 U.S.C. § 717r(c)). Sierra Club may not like the time it takes for judicial review (Mot. to Exp. 10-11), but its complaint is with the Natural Gas Act, not with the Commission or this Court. Sierra Club provides no reason why it is harmed more than others who have appealed FERC-certificate orders, and why it must jump to the front of the appellate line.

III. A Stay Will Substantially Injure Other Parties

The Court must 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). This Court has recognized that entities have a protected property interest in permits issued by the government. *See 3883 Conn. LLC v. Dist. 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”).

Enjoining the Commission-issued certificate and halting the Projects would seriously jeopardize the availability of additional capacity needed to transport natural gas to the Southeast. *See* Certificate Order P 88; Rehearing Order P 5. Such an outcome would harm not only the certificate holders, but also Florida Power, Duke Energy, and their customers who depend upon the utilities for

reliable electricity service. Moreover, the region will lose market competition and protection against regional supply disruption. *See* Rehearing Order P 6.

IV. 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 stay request. *N. Atl. Westbound Freight Ass’n v. Fed. Mar. Comm’n*, 397 F.2d 683, 685 (D.C. Cir. 1968); *see Myersville*, 783 F.3d at 1307-1308 (FERC determines if a certificate is in the public interest).

Here, a stay of the Projects would not serve the public interest. The Commission found a strong showing of need in issuing the certificates to provide natural gas (instead of higher-emissions coal) to meet the demand of local residents for electricity, increase competition, and mitigate supply disruptions in the Southeast. *See* Rehearing Order PP 5-6. A stay would frustrate these objectives.

V. Sierra Club's Motion For Expedited Review Is Legally Insufficient And Premature

Sierra Club's largely overlapping – and yet separate – motion to expedite review must also fail because Sierra Club cannot meet the same high standards for emergency relief, as explained above. *See EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015) (finding petitioner did not articulate “strongly compelling reasons justifying expedition”).

Sierra Club's motion is also premature. The Natural Gas Act's 60-day period to seek review has not yet run. *See* 15 U.S.C. § 717r(b). Other parties could still petition for review or seek to intervene. Given the lack of an emergency, there is no reason for Sierra Club to receive expedited review when other petitioners are awaiting the Court's review of their own (non-expedited) appeals of other FERC natural gas orders.⁴ Sierra Club has not demonstrated any reason why its petition is more urgent.

CONCLUSION

For the foregoing reasons, Sierra Club's motions should be denied.

⁴ *See* fully-briefed appeals, awaiting oral argument dates, in *Delaware Riverkeeper v. FERC*, No. 16-1092, and *City of Boston Delegation v. FERC*, Nos. 16-1081, *et al.*; *see also* *Catskill Mountainkeeper v. FERC*, Nos. 16-345, *et al.* (2d Cir.) (fully briefed; awaiting oral argument date).

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November 2, 2016

Sierra Club, et al. v. FERC
D.C. Cir. 16-1329

**Docket Nos. CP15-554,
CP 15-16, CP 15-17**

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 2nd day of November 2016, 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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