ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 17-1098, 17-1127, 17-1128

ALLEGHENY DEFENSE PROJECT, *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

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November 1, 2017

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GLOSSARY

Allegheny	Movant-Petitioners Allegheny Defense Project, *et al*.
Certificate Order	*Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, P 4 (Feb. 3, 2017)
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement or EIS	Final environmental impact statement issued for the Atlantic Sunrise project proposal
Mot.	Movant-Petitioners Allegheny Defense Project, *et al*., Motion for Emergency Stay, filed on Oct. 30, 2017
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*
P	The internal paragraph number within a FERC order
Project	Atlantic Sunrise pipeline project
Tolling Order	*Transcon. Gas Pipe Line Co.*, Docket No. CP15-138-001 (Mar. 13, 2017)
Transco	Transcontinental Gas Pipe Line Company, LLC

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INTRODUCTION

Movant-Petitioners Allegheny Defense Project, *et al*. (collectively "Allegheny") ask this Court for the extraordinary remedy of indefinitely delaying the Atlantic Sunrise pipeline project ("the Project"). Allegheny brings this "emergency motion" nearly nine months after the Federal Energy Regulatory Commission ("FERC" or "Commission") granted a certificate of public convenience and necessity to the Project, and two months after the Commission denied its request for a stay—but before the Commission has issued a final order responding to requests for rehearing of its certificate decision. The Project is an

interstate natural gas pipeline that the Commission has determined, in its expert judgment and after thorough consideration and balancing of competing values, is needed to meet the Nation's energy needs.

Allegheny's emergency plea ignores one-half of the Commission's public interest balance—whether the need for, and benefits from, the Project outweighs potential adverse impacts. In its narrow focus on potential adverse impacts, Allegheny fails to address the Commission's findings of substantial benefits from consumer access to new sources of natural gas in northeast Pennsylvania.

As to the one-half of the balance Allegheny 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 Allegheny) in its Certificate Order and in its comprehensive environmental impact statement for the Project that informed that order, 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 evidenced by its lengthy and comprehensive Environmental Impact Statement. To the extent that Allegheny and other parties believe that the Commission has been insensitive or inattentive to their concerns, they can request—and have requested—agency rehearing, as

contemplated by the Natural Gas Act; those requests remain pending before the agency.

The requested stay would upset the Commission's public interest balance and imperil the Project. 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 six years, courts have denied all 15 emergency requests for stays of the effectiveness of Commission natural gas certificate orders, including:

- *Adorers of the Blood of Christ, et al. v. FERC*, No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017) (denying preliminary injunction to stop Atlantic Sunrise pipeline construction and operation), *on appeal*, No. 17-3163 (3d Cir. Oct. 13, 2017) (denying injunction pending appeal);

- *Sierra Club, et al. v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016) (denying stay of pipeline construction based upon a challenge to FERC's indirect impacts analysis);

- *City of Boston, 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).[1]

[1] The other eleven 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*, No. 1:15-cv-12352, 2015 WL 4274884 (D. Mass. July 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); *In re Del. Riverkeeper*

Allegheny has not presented any legitimate reason why this Court should reach a different decision here.

BACKGROUND

This case concerns the Commission's issuance of a conditional certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). The certificate authorized Transcontinental Gas Pipe Line Company, LLC ("Transco") to build and operate its Atlantic Sunrise pipeline project. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, P 4 (Feb. 3, 2017) ("Certificate Order"), *reh'g pending*.

The challenged certificate order authorizes Transco, upon satisfying necessary environmental conditions, to expand capacity at existing facilities and construct new facilities to transport, in total, approximately 1.7 billion cubic feet of natural gas per day from Pennsylvania to Alabama, including to markets along the Transco pipeline system in Pennsylvania, Maryland, Virginia, North Carolina,

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Network, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Envt'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 Envt'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).

South Carolina, Georgia, and Alabama, and to interconnects with existing pipelines serving markets in Florida. *See id*.

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 id*. PP 20-21.[2] The Commission found evidence of public need for the Project based on "growing demand" for natural gas in the southeastern and Mid-Atlantic markets. *See id*. PP 28-30. Transco entered into long-term agreements for firm service with nine shippers to use 100 percent of the Project's total capacity. *See id*. PP 28-29. Several of the shippers also provided comments to the Commission as to their need for the firm transportation service that will be made available through the Project. *Id*. P 30. One of those shippers, for example, stated that it had entered into long-term natural gas sales contracts for all of its capacity on the Project with end users of natural gas and electricity. *Id*.

In addition to its need assessment, under the Natural Gas Act, the Commission conducted a detailed environmental review consistent with its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

[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).

Its review of the application resulted in a 778-page final environmental impact statement ("Environmental Statement" or "EIS").

Before issuing the Environmental Statement, the Commission considered comments from over 200 people who spoke at four public meetings, and reviewed over 1,400 letters and comments. Certificate Order P 72. Transco also considered and adopted 132 route variations, a 50 percent change to its original route design, to avoid or reduce effects on environmental or other resources, resolve construction issues, or address stakeholder concerns. *See id*. P 151. While the Commission found that the Project would result in some adverse environmental impacts, it concluded that those impacts would be reduced to less-than-significant levels by implementing 56 mandatory conditions to mitigate potential environmental impacts associated with the Project. *See id*. P 79; Certificate Order App. C.

Although the Commission's orders and EIS addressed numerous issues, Allegheny raises just two merits issues in its stay motion in this Court. First, Allegheny contends that the Commission failed to adequately analyze "the climate change impacts of the end use of the gas to be transported by the Project." Mot. 5. The Commission found that downstream combustion of natural gas did not qualify as an indirect effect, as defined by the Council on Environmental Quality, because production and end-use would occur with or without the Project. *See* Certificate

Order PP 138-39. While the Commission thus concluded that it was not required to consider upstream and downstream impacts as part of its NEPA review, its staff still developed estimates of the potential impacts associated with both upstream production and downstream use of natural gas. *See id*. P 139; EIS 4-316 – 4-318.

Second, Allegheny objects to the Commission's consideration of the indirect impacts of shale gas drilling "that would be induced by the construction of the Project." Mot. 5. The Commission, for its part, disagreed that its approval of the Project will induce additional shale gas production, and pointed to the variety of factors unrelated to the Project that drive new production. *See* Certificate Order PP 130, 133, 136. In any event, the Commission found that the scope of the impacts from any such induced production is not reasonably foreseeable. *See id*. P 137.

Allegheny and other parties asked the Commission to stay the Project, without success. *See Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042, PP 2, 4 (Aug. 31, 2017). These parties also requested rehearing, which is still pending before the Commission. *Id*. P 2; *see also Transcon. Gas Pipe Line Co.*, Docket No. CP15-138-001 (Mar. 13, 2017) ("Tolling Order") ("Rehearings have been timely requested of the Commission order issued on February 3, 2017, in this proceeding. . . . Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.").

ARGUMENT

Allegheny seeks judicial intervention too soon—the Commission has not yet acted on pending requests for rehearing of its Certificate Order, and thus has not yet issued a final order in this proceeding.

Nor has Allegheny 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, Allegheny 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. Allegheny Seeks Extraordinary Relief From A Non-Final FERC Order

This Court has jurisdiction to review "only final orders of the Commission." *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995). And it has

clarified that the "presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action." *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (internal quotation and citation omitted); *see also id*. ("Final agency action is that which 'mark[s] the consummation of the agency's decisionmaking process.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The Certificate Order is not final agency action. Allegheny and other parties requested rehearing before the agency, and those requests remain pending at the Commission—rendering the Order non-final. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the rehearing order issues is "incurably premature" and "must be dismissed"); *Papago Tribal Utility Auth. v. FERC*, 628 F.3d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying requests for rehearing is the final, reviewable agency order).

Allegheny's conviction that rehearing requests are not pending, *see* Mot. 21 n.12, does not conjure finality. This and other courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require it to act on the merits of a rehearing request within 30 days. Rather, the Commission appropriately "acts upon the application for rehearing" by providing notice within

that timeframe that it intends to further consider a rehearing request, as it did here. *See* Tolling Order ("Rehearings have been timely requested of the Commission order issued on February 3, 2017, in this proceeding. . . . Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order."); *California Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) ("the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent"); *City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) ("A petition for review of an agency order filed while an administrative request for reconsideration of the same order remains pending is incurably premature. Nor is there merit to petitioner's contention that this court should treat FERC's orders tolling the period for resolving petitioner's requests for agency rehearing as effectively denying rehearing; the tolling orders do not resolve the rehearing requests but simply extend the time to consider them.").[3]

[3] The Commission previously moved to dismiss, for lack of finality, petitions for review of the Certificate Order filed by Allegheny and others in Nos. 17-1098, *et al.*; on Sept. 21, 2017, this Court referred arguments in support of dismissal to briefing on the merits. The Commission explained in its pleadings in support of dismissal that Allegheny's arguments, that (1) the Tolling Order was invalid when issued and (2) rehearing was denied by operation of law, are irrelevant, as the Commission intends to act on pending requests for rehearing in a timely manner.

II. Allegheny Cannot Show A Likelihood Of Success On The Merits

Allegheny 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 under 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 NEPA responsibilities, and its decisions are supported by substantial record evidence – demonstrated by the 778-page Environmental Statement considering the proposed Project. In contrast to this extensive analysis, Allegheny focuses solely on the purported downstream climate impacts and indirect effects of shale gas drilling induced by the Project. It has not demonstrated that it is likely to succeed on either NEPA claim.

A. The Commission Reasonably Assessed The Project's Downstream Effects On Climate Change

Allegheny focuses on the downstream effects, i.e., "the climate change impacts of the end use of the gas to be transported by the Project." Mot. 5. But the Commission reasonably explained that it did not need to consider downstream combustion of natural gas to be an indirect effect, as defined by the Council on Environmental Quality, because it would occur with or without the Project. *See* Certificate Order PP 138-39.

In any event, the Commission took the requisite "hard look" at the Project's potential impacts on climate change. It developed estimates of the direct greenhouse gas emissions associated with construction and operation of the Project, as well as generic downstream emissions. *See* Certificate Order PP 138-39, 142; *see also id*. P 139 (explaining that downstream estimates were generic in nature "because no specific end uses have been identified and reflect a significant amount of uncertainty"); EIS 4-316 – 4-318. The Commission also found that the Project's likely greenhouse gas emissions at the Project's location would be lower than its "conservative[]" estimate, because natural gas may displace other fuel sources (e.g., coal) that emit higher volumes of carbon dioxide. Certificate Order P 143; EIS 4-318.

All of this satisfies this Court's recent *Sierra Club* decision (which issued after the issuance of the Commission's Certificate Order and after filing of requests

for rehearing of that order). There, this Court held that a FERC environmental impact statement "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017). Of those two paths, Allegheny concedes that FERC took the former approach here—i.e., it "roughly quantified the greenhouse gas emissions from burning the gas to be carried by the pipeline," Mot. 7.

In Allegheny's view, however, *Sierra Club* requires more. It contends that the Commission should have "seriously evaluate[d]" the "significance or cumulative impact" of these downstream emissions and "assess[ed] the effect of those emissions on the environment . . . ." *Id*.

Putting aside the fact that the Commission has not yet issued a rehearing order offering further evaluation and assessment of its certificate order, Allegheny's argument stretches *Sierra Club* too far. *See* 867 F.3d at 1371 ("We conclude that at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible"); *id*. at 1374 (requiring Environmental Impact Statement to contain either "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport" or an explanation "more specifically

why it could not have done so"). This Court declined the petitioner's invitation in that case to require a more detailed climate assessment from the agency—that is, it did not decide whether to require FERC to connect "downstream carbon emissions to particular climate impacts" using a particular carbon valuation tool. *Id*. at 1375. Instead, it asked the Commission to explain on remand whether the agency could use that tool.[4]

Allegheny again relies on *Sierra Club* to support its critique of the Commission's finding that the Project's likely climate emissions may be lower than estimated due to natural gas displacing higher-emitting fuel sources like coal. Mot. 5-6. Yet again, Allegheny misreads *Sierra Club*. That decision did not prohibit the Commission from making these sorts of "partial[] offset" findings when assessing the climate impacts of a natural gas pipeline, as Allegheny contends. *See* Mot. 6 ("This Court [in *Sierra Club*] squarely rejected this approach."). It merely found that such findings did not excuse FERC from making emissions estimates altogether, a responsibility the Commission met here. *See Sierra Club*, 867 F.3d at 1374-75 ("Nor is FERC excused *from making emissions estimates* just because the emissions in question might be partially offset by

[4] The Court's mandate in *Sierra Club* has not yet issued. Pending before the Court are petitions for rehearing, filed October 6, 2017, as to the Court's choice of remedy – whether the Court should have vacated the FERC certificate orders underlying the *Sierra Club* appeal.

reductions elsewhere.") (emphasis added); *see also* Mot. 7 (acknowledging that FERC "roughly quantified the greenhouse gas emissions from burning the gas to be carried by the pipeline").

Notwithstanding Allegheny's contention that the Commission failed to "employ or even discuss any available methodology for evaluating the impact of greenhouse gas emissions, such as the Social Cost of Carbon tool," Mot. 9, the agency was not obligated to adopt any particular methodology for making such an estimate. *See EarthReports*, 828 F.3d at 956 (rejecting claim that Commission impermissibly failed to use particular tools to determine the environmental effects of greenhouse gas emissions from a liquefied natural gas infrastructure project, and upholding FERC's conclusion that "there is no standard methodology to determine how a project's incremental contribution to [emissions] would result in physical effects on the environment"). The Commission, in its discretion here, used an accepted methodology—developed by the EPA—to determine a conservative estimate of downstream greenhouse gas emissions. *See* Certificate Order P 143; *see also Constitution Pipeline Co. LLC*, 154 FERC ¶ 61,046, P 128 n.198 (2016) (then-existing Council on Environmental Quality's draft 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.").

B. The Commission's Indirect Effects Analysis Complies With The National Environmental Policy Act

Under NEPA, indirect effects are those "caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." *Sierra Club*, 867 F.3d at 1371 (citing 40 C.F.R. § 1508.8(b)) (alteration and internal quotation marks omitted). Allegheny challenges the Commission's consideration of the indirect impacts of shale gas drilling "that would be induced by the construction of the Project." Mot. 5. The record, however, shows reasoned decisionmaking by the agency.

First, the Commission reasonably found that the record did not demonstrate the requisite causal relationship between the Project and the impacts of future natural gas production warranting further analysis. *See* Certificate Order P 133. As the Commission explained, "[t]he proposed project is responding to the need for transportation, not creating it." *Id.*; *see also id.* P 130 ("To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas."); EIS 4-282. In light of the numerous factors spurring new gas production, the Commission found it reasonable to assume that any such new production would find its way to the market, with or without construction of the

Project. *See* Certificate Order P 136. And commenters offered no evidence before the agency to identify "any new production specifically associated with the [Project]," especially given that "a significant amount of unconventional natural gas production currently exists." *See id.* P 135; *see also Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (finding no evidence suggesting that the gas to be processed at the facility at issue would come from "future, induced natural gas production, as opposed to from existing production, particularly in light of the longtime, extensive natural gas development that has already occurred in Texas") (internal quotation marks omitted).

Second, even presuming a causal relationship between FERC's approval of the Project and additional gas production, the Commission still found that the scope of impacts from any production induced by the Project was not reasonably foreseeable. *See, e.g.*, Certificate Order PP 131, 137. Here, the Commission again noted the lack of sufficient information on the origin of the gas to be transported by the Project. *See id.*; EIS 4-282 ("We are not aware of forecasts by [states having jurisdiction over natural gas production] that would make it possible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. . . . [T]he impacts of natural gas production are not reasonably foreseeable because they are so nebulous that we cannot forecast their likely effects in the context of an environmental analysis of the impacts related to a

proposed interstate natural gas pipeline."). Even where the Commission knows the "general source area of gas likely to be transported" by the Project, a "meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer" and by applicable state regulations. Certificate Order P 131.

The Commission's discharge of its duty under NEPA does not require it to speculate. *See 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"). Its reasoned finding that any indirect effects pertaining to increased gas production were neither caused by the Project nor reasonably foreseeable satisfied NEPA. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198-99 (D.C. Cir. 2017).

III. Allegheny 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).

Allegheny's allegations of harms to land, air quality, and surface waters from construction and operation of the Project ignore the mitigation measures designed to minimize, if not eliminate altogether, environmental impacts. Mot. 15-17. The Commission carefully addressed each of these concerns, and many others, in its Environmental Statement and concluded that, as mitigated, none of the impacts would be significant.

As to surface waters, it found that the mandatory mitigation measures would minimize impacts related to water discharge and waterbody crossings, and would minimize or prevent accidental spills and leaks, during construction and operation of the Project. *See*, *e.g*., Certificate Order P 87; EIS 4-52, 4-67-68, 4-71-72. These mandatory measures, as the Commission concluded, would prevent the Project from having adverse, long-term impacts on surface water resources. Certificate Order P 87.

Similarly, as a result of these mitigation measures, the Commission found that air quality impacts from construction would be temporary or short term, and would not significantly affect local and regional air quality. *See id*. PP 116, 119; EIS 4-221.

As for land affected by Project construction, Mot. 15, any impacts would be minimal and limited geographically. *See* Certificate Order P 101 (noting that, of the 3,700 acres of land affected by the Project, it would cross about 123 acres of organic farmland during construction and its operations would affect 43.7 acres). The Commission required Transco to file, prior to construction, an organic certification mitigation plan to ensure the maintenance of organic certification for farms crossed by the Project, which would include measures to facilitate reinstatement of such certification or compensate landowners. *See id*.; EIS 4-152 – 4-159. Any effects on recreational areas would be temporary and limited to the period of active construction. *See* Certificate Order P 104; EIS 5-15.

The Commission thus reasonably considered and addressed any potential environmental impacts caused by the Project. *See also* Certificate Order App. C (containing environmental conditions for the Project); *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).

IV. 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 Project would seriously jeopardize the availability of additional capacity needed to transport natural gas to southeastern and Mid-Atlantic markets. *See* Certificate Order P 28. Such an outcome would harm not only the certificate holder, but also the nine project shippers that have executed long-term supply agreements with Transco for 100 percent of the Project's capacity, and their customers who depend upon the utilities for reliable electricity service. *See id*. PP 28-30.

V. 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 Citizens For A Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1307-1308 (D.C. Cir. 2015) (FERC determines if a certificate is in the public interest).

Here, a stay of the Project would not serve the public interest. The Commission found a strong showing of need in issuing the certificate to provide natural gas to meet the region's growing demand for natural gas. *See* Certificate Order PP 28-30. A stay would frustrate these objectives.

As for the Commission's tolling order, it neither creates final action nor evidences bad faith by the agency; Allegheny's claims to the contrary are unfounded. *See* Mot. 22 n.14; *see also supra* pp. 9-10.

CONCLUSION

For the foregoing reasons, Allegheny's motion should be denied.

Respectfully submitted,

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Washington, D.C.

November 1, 2017

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) and this Court's October 31, 2017 Order because it contains 4,992 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that the foregoing complies with the requirements of Fed. R. App. P. 27(d)(1)(D)-(E) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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November 1, 2017

Allegheny Defense Project, et al. v. FERC **Docket No. CP15-138**
D.C. Cir. No. 17-1098, *et al*.

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 1st day of November 2017, served the foregoing upon the counsel listed in the Service Preference Report through the Court's CM/ECF system.

/s/ Anand R. Viswanathan
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