

Nos. 18-1114 and 18-1271

---

**United States Court of Appeals  
for the Fourth Circuit**

---

APPALACHIAN VOICES, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*,  
*Respondents.*

---

ON PETITION FOR WRIT UNDER ALL WRITS ACT TO STAY ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION (NO. 18-1271) AND  
MOTION FOR STAY OF THE SAME COMMISSION ORDER (NO. 18-1114)

---

**OPPOSITION TO PETITION FOR WRIT AND  
TO MOTION FOR STAY OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

James P. Danly  
General Counsel

Robert H. Solomon  
Solicitor

Susanna Y. Chu  
Attorney

Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C. 20426

March 15, 2018

---

**TABLE OF CONTENTS**

INTRODUCTION..... 1

BACKGROUND..... 6

STANDARD OF REVIEW ..... 10

ARGUMENT..... 12

I. Appalachian Voices Cannot Establish a Likelihood of Success on the Merits of Its Petition for Review ..... 12

    A. There Is No Likelihood of Success on the Merits Because Appalachian Voices Prematurely Seeks Judicial Review of a Non-Final Order under the Natural Gas Act, 15 U.S.C. § 717r..... 12

    B. In Any Event, Pending Agency Rehearing, the Challenged Determinations Are Reasonable and Supported ..... 14

        1. The Commission Reasonably Found that the Public Benefits Outweigh Potential Adverse Impacts ..... 15

        2. The Certificate Order Recognized and Reasonably Addressed Landowner Concerns Regarding Eminent Domain ..... 18

II. The Irreparable Injury Prong Does Not Support Issuance of a Stay ..... 21

III. A Stay Would Substantially Injure Other Parties..... 22

IV. The Public Interest Does Not Favor a Stay ..... 22

CONCLUSION..... 23

## TABLE OF AUTHORITIES

### COURT CASES:

<i>Adorers of the Blood of Christ v. FERC</i> , No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017).....	5
<i>Adorers of the Blood of Christ v. FERC</i> , No. 17-3163 (3d Cir. Oct. 13, 2017) .....	5
<i>Allegheny Def. Project v. FERC</i> , Nos. 17-1098, <i>et al.</i> (D.C. Cir. Feb. 16, 2018 and Nov. 8, 2017) .....	4
<i>Allied Chem. Corp. v. Daiflon, Inc.</i> , 449 U.S. 33 (1980).....	10
<i>Appalachian Voices, et al. v. FERC</i> , No. 17-1271 (D.C. Cir. Feb. 2, 2018).....	3
<i>Berkley v. Mountain Valley Pipeline &amp; FERC</i> , No. 7:17-cv-00357 (W.D. Va. Dec. 11, 2017) .....	4
<i>Berkley v. Mountain Valley Pipeline, et al.</i> , No. 18-1042 (4th Cir. Feb. 15, 2018) .....	3, 19
<i>Cantley v. W. Va. Reg’l Jail &amp; Corr. Facility Auth.</i> , 771 F.3d 201 (4th Cir. 2014) .....	10, 20
<i>Catskill Mountainkeeper v. FERC</i> , No. 16-345 (2d Cir. Feb. 24, 2016) .....	4
<i>City of Boston v. FERC</i> , No. 16-1018 (D.C. Cir. Oct. 28, 2016).....	4
<i>Clifton Power Corp. v. FERC</i> , 294 F.3d 108 (D.C. Cir. 2002).....	12
<i>Coal. For Responsible Growth &amp; Res. Conservation v. FERC</i> , No. 12-566 (2d Cir. Feb. 28, 2012) .....	4

<i>Coalition to Reroute Nexus, et al. v. FERC</i> , No. 17-4302 (6th Cir. Mar. 15, 2018) .....	3, 13
<i>Del. Riverkeeper Network v. FERC</i> , No. 13-1015 (D.C. Cir. Feb. 6, 2103).....	4
<i>E. Tenn. Nat. Gas Co. v. Sage</i> , 361 F.3d 808 (4th Cir. 2004) .....	19, 20, 22
<i>EarthReports, Inc. v. FERC</i> , No. 15-1127 (D.C. Cir. June 12, 2015) .....	4
<i>Feighner v. FERC</i> , No. 13-1016 (D.C. Cir. Feb. 9, 2013).....	4
<i>FERC v. Elec. Power Supply Ass’n</i> , 136 S. Ct. 760 (2016).....	13, 18
<i>Halifax Cnty., Va. v. Lever</i> , 718 F.2d 649 (4th Cir. 1983) .....	12
<i>In re Cal. Power Exch. Corp.</i> , 245 F.3d 1110 (9th Cir. 2001) .....	11
<i>In re Clean Air Council</i> , No. 15-2940 (3d Cir. Dec. 8, 2015).....	4
<i>In re Del. Riverkeeper Network</i> , No. 15-1052 (D.C. Cir. Mar. 19, 2015).....	4
<i>In re Minisink Residents for Env’tl. Pres. &amp; Safety</i> , No. 12-1390 (D.C. Cir. Oct. 11, 2012).....	4
<i>In re Murray Corp.</i> , 788 F.3d 330 (D.C. Cir. 2015).....	11

<i>In re Stop the Pipeline,</i> No. 15-926 (2d Cir. Apr. 21, 2015).....	4
<i>Minisink Residents for Envtl. Pres. &amp; Safety v. FERC,</i> No. 12-1481 (D.C. Cir. Mar. 5, 2013).....	4
<i>Minisink Residents for Envtl. Pres. &amp; Safety v. FERC,</i> 762 F.3d 97 (D.C. Cir. 2014).....	17
<i>Myersville Citizens for a Rural Cmty., Inc. v. FERC,</i> 783 F.3d 1301 (D.C. Cir. 2015).....	14
<i>Nantahala Power &amp; Light Co. v. FERC,</i> 727 F.2d 1342 (4th Cir. 1984).....	14, 18
<i>N.C. Utils. Comm’n v. FERC,</i> 741 F.3d 439 (4th Cir. 2014).....	12
<i>Nken v. Holder,</i> 556 U.S. 418 (2009).....	10, 20
<i>N.Y. State Dep’t of Envtl. Conservation &amp; Protect Orange Cnty. v. FERC,</i> Nos. 17-3770 & 17-3966 (2d Cir. Dec. 7 & 15, 2017).....	4
<i>Permian Basin Area Rate Cases,</i> 390 U.S. 747 (1968).....	13
<i>Reynolds Metals Co. v. FERC,</i> 777 F.2d 760 (D.C. Cir. 1985).....	11
<i>Roche v. Evaporated Milk Ass’n,</i> 319 U.S. 21 (1943).....	11
<i>Schneidewind v. ANR Pipeline Co.,</i> 485 U.S. 293 (1988).....	23
<i>Sierra Club v. FERC,</i> No. 16-1329 (D.C. Cir. Nov. 17, 2016).....	4

<i>Sierra Club, et al. v. U.S. Forest Serv. et al.</i> , Nos. 17-1299, <i>et al.</i> (4th Cir. Mar. 14, 2018).....	2
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	17
<i>Summit Lake Paiute Indian Tribe &amp; Defenders of Wildlife v. FERC</i> , Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28 & Feb. 22, 2011).....	4
<i>United States v. Moussaoui</i> , 333 F.3d 509 (4th Cir. 2003).....	10, 11
<i>Urban v. FERC</i> , No. 5:17CV1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) .....	5
<i>Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n</i> , 259 F.2d 921 (D.C. Cir. 1958).....	20, 21
<i>Winter v. Natural Res. Def. Council</i> , 555 U.S. 7 (2008).....	20

**STATUTES:**

All Writs Act

28 U.S.C. § 1651.....	10
28 U.S.C. § 1651(a).....	2

National Environmental Act of 1969

42 U.S.C. § 4321 <i>et seq.</i> .....	7
---------------------------------------	---

Natural Gas Act

Section 7, 15 U.S.C. § 717f.....	1
Section 7(c), 15 U.S.C. § 717f(c) .....	6
Section 7(h), 15 U.S.C. § 717f(h).....	19

Section 19(a), 15 U.S.C. § 717r(a) ..... 12

Section 19(b), 15 U.S.C. § 717r(b)..... 12

**REGULATIONS:**

18 C.F.R. § 375.302(v) ..... 9, 13

**ADMINISTRATIVE:**

*Certificate Policy Statement,*

88 FERC ¶ 61,744 (1999)..... 15, 16, 17

Nos. 18-1114 and 18-1271

**United States Court of Appeals  
for the Fourth Circuit**

---

APPALACHIAN VOICES, *ET AL.*,  
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION, *ET AL.*,  
*Respondents.*

---

ON PETITION FOR WRIT UNDER ALL WRITS ACT TO STAY ORDER OF THE  
FEDERAL ENERGY REGULATORY COMMISSION (NO. 18-1271) AND  
MOTION FOR STAY OF THE SAME COMMISSION ORDER (NO. 18-1114)

---

**OPPOSITION TO PETITION FOR WRIT AND  
TO MOTION FOR STAY OF RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

---

Petitioners Appalachian Voices, *et al.* (“Appalachian Voices”) seek the extraordinary remedy of stay of an order issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”), 161 FERC ¶ 61,042 (Oct. 13, 2017) (“Certificate Order”). The Certificate Order authorizes—subject to numerous environmental and operating conditions—construction of the Atlantic Coast Pipeline project (the “Project”), an interstate natural gas pipeline, based on the Commission’s environmental analysis and consideration of numerous public interest factors under the Natural Gas Act, 15 U.S.C. § 717f. That order is now pending before the Commission on numerous requests for agency rehearing.



The requests for stay of the Certificate Order come approximately five months after the challenged Certificate Order issued, six weeks after the filing of Appalachian Voices' petition for review in No. 18-1114, and three weeks after the filing of the Commission's motion to dismiss for lack of jurisdiction. Motion to Dismiss Petition for Review for Lack of Jurisdiction, No. 18-1114 (filed Feb. 16, 2018) (explaining that the Court lacks jurisdiction to review at this juncture because rehearing requests are pending before the Commission and, thus, the challenged Certificate Order is not final).<sup>1</sup>

Moreover, Appalachian Voices seeks a stay in the wake of numerous recent federal appellate and district court orders rejecting such requests. Just yesterday, this Court denied a motion for stay filed by Appalachian Voices and other petitioners concerning the Mountain Valley pipeline, which was authorized by the Commission on the same day as the Project at issue here. *Sierra Club, et al. v. U.S. Forest Serv., et al.*, Nos. 17-2399, *et al.* (4th Cir. Mar. 14, 2018). And, last

---

<sup>1</sup> Appalachian Voices requests stay of the Certificate Order in two related cases that have not yet been consolidated. In No. 18-1114, Appalachian Voices moves for a stay pending resolution of its petition for review of the non-final Certificate Order. In No. 18-1271, Appalachian Voices petitions for an extraordinary writ under the All Writs Act, 28 U.S.C. § 1651(a), "in the alternative to [its] petition for review" in No. 18-1114. As Appalachian Voices explains, "[I]f the Court determines it lacks immediate jurisdiction over the Petition for Review, Petitioners ask the Court to preserve its prospective jurisdiction by granting a writ staying construction." Petition for Writ at 2, No. 18-1271 (filed Mar. 8, 2018). Because the motion for stay and petition for writ are substantially similar and seek the same relief, the Commission is filing the same response in both dockets.

month, this Court denied an emergency motion under the All Writs Act to prevent the Mountain Valley pipeline from exercising eminent domain authority under a district court order pending appeal. *Berkley v. Mountain Valley Pipeline, et al.*, No. 18-1042 (4th Cir. Feb. 15, 2018). Likewise, the D.C. Circuit recently denied a motion for stay and petition for writ of mandamus filed by Appalachian Voices to stay the Mountain Valley Pipeline certificate order. *Appalachian Voices, et al. v. FERC*, No. 17-1271 (D.C. Cir. Feb. 2, 2018) (Appalachian Voices failed to “satisf[y] the stringent requirements for a stay pending court review,” and failed to “show[] a clear and indisputable right to the extraordinary remedy of mandamus”).

And just this morning, the Sixth Circuit issued an order rejecting a motion for stay and petition for mandamus concerning the Commission’s approval of the Nexus pipeline; the court also granted the Commission’s motion to dismiss for lack of jurisdiction. *Coalition to Reroute Nexus, et al. v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018).<sup>2</sup>

These recent orders are consistent with a uniform line of federal appellate and district court rejections of efforts to halt the effectiveness of the Commission’s natural gas infrastructure decisions prior to judicial review on the merits. Over the last seven years, the courts of appeals have rejected all 21 such efforts, those cited above and also:

---

<sup>2</sup> A copy of the four-page order is attached.

- *Allegheny Def. Project v. FERC*, Nos. 17-1098, *et al.* (D.C. Cir. Feb. 16, 2018 and Nov. 8, 2017) (twice denying stay of pipeline construction based on challenge to FERC’s indirect impacts analysis);
- *N.Y. State Dep’t of Env’tl. Conservation & Protect Orange Cnty. v. FERC*, Nos. 17-3770 & 17-3966 (2d Cir. Dec. 7 & 15, 2017) (denying stays of pipeline construction based on Clean Water Act waiver and bald eagle protection);
- *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016) (denying stay of pipeline construction based on challenge to FERC’s indirect impacts analysis); and
- *City of Boston v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016) (denying stay of pipeline in-service date based upon challenge, in part, to FERC’s cumulative impacts analysis).<sup>3</sup>

In addition, several district courts recently have denied requests for injunctive or interlocutory relief as to FERC natural gas certificate orders. *See, e.g., Berkley v. Mountain Valley Pipeline & FERC*, No. 7:17-cv-00357 (W.D. Va. Dec. 11, 2017) (denying preliminary injunction to stop pipeline construction based

---

<sup>3</sup> Other court of appeals orders denying stays of FERC natural gas infrastructure orders are: *Catskill Mountainkeeper v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 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 Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Env’tl. Pres. & 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’tl. Pres. & Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Responsible Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); and *Summit Lake Paiute Indian Tribe & Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28 & Feb. 22, 2011).

on constitutional eminent domain objections), *on appeal*, No. 18-1042 (4th Cir. Feb. 2, 2018) (denying emergency motion); *Adorers of the Blood of Christ v. FERC*, No. 5:17-cv-3163 (E.D. Pa. Sept. 28, 2017) (denying preliminary injunction to stop pipeline construction pending religious freedom challenge), *on appeal*, No. 17-3163 (3d Cir. Oct. 13, 2017) (denying injunction pending appeal); *Urban v. FERC*, No. 5:17CV1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) (dismissing challenge to FERC order for lack of subject matter jurisdiction and denying preliminary injunction).<sup>4</sup>

Appalachian Voices has not presented any legitimate reason for reaching a different decision here. The Certificate Order represents an exercise of the Commission's considered judgment and careful balancing of competing considerations. After extensive study of the environmental issues and balancing of public interest factors, the Commission determined that this pipeline project is in the public interest. Appalachian Voices ignores half of the Commission's public interest balance: whether the need for, and benefits from, the Project outweigh potential adverse impacts. The Commission determined that the Project benefits the public by providing reliable natural gas service to consumers in Virginia and

---

<sup>4</sup> In addition, parties have filed a district court complaint concerning both the Atlantic Coast and Mountain Valley pipeline proceedings. *Bold Alliance, et al. v. FERC, et al.*, D.D.C. No. 17-cv-01822 (Commission's motion to dismiss for lack of subject matter jurisdiction pending before the court).

North Carolina, and also will serve to ensure future domestic energy supplies. As to the other half of the balance, Appalachian Voices ignores the array of Commission-imposed mitigation measures to eliminate or minimize environmental impacts.

Requests for rehearing of the Certificate Order, including those by Appalachian Voices, are pending before the agency. The Commission will issue an order on rehearing, which will be subject to the Court's review, if parties remain aggrieved. A stay now would upset the Commission's public interest balance and imperil the Project. Because Appalachian Voices fails to demonstrate a basis for interrupting the ordinary process of administrative and (potential) judicial review, the requests should be denied.

### **BACKGROUND**

This case arises from the Commission's issuance of a Certificate Order granting a conditional certificate of "public convenience and necessity" to Atlantic Coast Pipeline, LLC ("Atlantic Coast") for the Project under the Natural Gas Act, 15 U.S.C. § 717f(c). Pending agency rehearing, the Certificate Order authorizes the construction of interstate natural gas pipeline facilities from West Virginia to the eastern portions of Virginia and North Carolina. Certificate Order PP 1-18

(describing Project and related facilities).<sup>5</sup> The new pipeline and facilities would transport approximately 1.5 million dekatherms of natural gas per day. *Id.*

Consistent with its policies, the Commission balanced the public benefits of the Project against potential adverse consequences. *See* Certificate Order PP 25-26. The Commission found that the Project would benefit the public because it contributes to the “develop[ment] [of] gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets in Virginia and North Carolina.” *Id.* P 55. In particular, the Commission found that the developer, Atlantic Coast, “sufficiently demonstrated that there is market demand for the project,” in light of its execution of long-term, firm-service agreements with six shippers for approximately 96 percent of the system’s capacity. *Id.* The shippers “supply gas to end users and electric generators, and those shippers have determined that natural gas will be needed and the . . . Project is the preferred means of obtaining that gas.” *Id.*

In addition to its need assessment under the Natural Gas Act, the Commission conducted an extensive environmental review consistent with the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* Commission staff conducted a lengthy public review and comment process regarding the

---

<sup>5</sup> The Certificate Order is attached as Exhibit A to Appalachian Voices’ motion for stay.

Project, considering, among other things, approximately 5,600 written comments and oral comments from 330 people at ten public meetings. Certificate Order PP 190-92. Commission staff’s environmental review resulted in a four-volume final Environmental Impact Statement (“Environmental Statement”) containing over 1,000 pages of analysis of potential environmental impacts, possible system and route alternatives, and staff conclusions and recommendations.<sup>6</sup>

After considering the findings contained in the Environmental Statement, the Commission generally adopted staff’s environmental recommendations. Certificate Order PP 199-326. In particular, the Commission imposed numerous mandatory conditions to avoid, minimize, and mitigate potential adverse environmental impacts associated with the Project. *See* Certificate Order PP 323-25 (“[W]e agree with the conclusions presented in the final EIS and find that the [P]roject[], if constructed and operated as described in the final EIS, are environmentally acceptable actions.”); *see also id.* App. A (listing mandatory environmental conditions for Project construction).

Numerous parties, including Appalachian Voices, requested rehearing of the Certificate Order. *See, e.g.,* Request for Rehearing of Appalachian Voices, *et al.*, FERC Dkt. No. CP15-554 (filed Nov. 13, 2017) (requesting rehearing and stay of

---

<sup>6</sup> The Final Environmental Impact Statement is available at <https://www.ferc.gov/industries/gas/enviro/eis/2017/07-21-17-FEIS.asp>.

Certificate Order).<sup>7</sup> On December 11, 2017, FERC’s Secretary, pursuant to 18 C.F.R. § 375.302(v), issued a procedural order, tolling the time for the Commission to issue its order addressing the matters raised in the rehearing requests filed by numerous parties. Order Granting Rehearings for Further Consideration, FERC Dkt. No. CP15-554 (Dec. 11, 2017) (“Tolling Order”) (“[R]ehearing of the Commission’s order is hereby granted for the limited purpose of further consideration.”).

Without waiting for the promised order on rehearing, in January 2018, Appalachian Voices filed a petition seeking judicial review of the Certificate Order. The Commission moved to dismiss the petition for lack of subject matter jurisdiction, based on the absence of a final agency order. Motion to Dismiss Petition for Review for Lack of Jurisdiction, No. 18-1114 (filed Feb. 16, 2018). Appalachian Voices filed a response on March 5, and the Commission filed its reply yesterday, March 14.

On March 8, Appalachian Voices filed a motion for stay of the Certificate Order pending judicial review (in No. 18-1114), and also filed an “alternative” petition under the All Writs Act for a writ staying the Certificate Order (in No. 18-1271). Although the Certificate Order and Environmental Statement address numerous issues, Appalachian Voices identifies just two substantive issues in

---

<sup>7</sup> Filings in FERC proceedings are available at <https://elibrary.ferc.gov>.



support of its stay motion and petition for stay: (1) the Commission’s public interest determination that the Project is needed (Stay Motion 6-16; Petition 15-25); and (2) the potential exercise of eminent domain by Atlantic Coast in connection with the Certificate Order (Stay Motion 16-22; Petition 25-28).

### **STANDARD OF REVIEW**

“A stay is not a matter of right, even if irreparable injury might otherwise result.” *Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (citation and internal quotations omitted). The Court considers four factors in determining whether to issue a stay: “(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at 434-35 (citation and internal quotations omitted). The moving party bears the burden of showing that the circumstances justify the issuance of a stay. *Id.* at 433-34. Also, the moving party must satisfy all four requirements of the four-factor test. *See Cantley v. W. Va. Reg’l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014) (citation omitted).

Appalachian Voices’ alternative request for a stay under the All Writs Act, 28 U.S.C. § 1651, is governed by substantially similar standards. Mandamus relief under the All Writs Act is a “drastic remedy,” that may be “invoked only in

extraordinary situations.” *United States v. Moussaoui*, 333 F.3d 509, 516-17 (4th Cir. 2003) (quoting *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)). Moreover, “[w]hile a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used . . . as a substitute for the appeal procedure prescribed by the statute.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943); *see also In re Murray Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015) (“[T]he All Writs Act does not authorize a court to circumvent bedrock finality principles[.]”) (citations omitted).

The party seeking mandamus relief must establish two conditions: (1) the party must “have no other adequate means to attain the relief [it] desires;” and (2) the party must show that [its] right to issuance of the writ is “clear and indisputable.” *Moussaoui*, 333 F.3d at 516-17 (citations and internal quotations omitted). *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1119-20 (9th Cir. 2001) (denying writ of mandamus to stay non-final FERC order and observing, “use of the All Writs Act in connection with agency matters [is] rare . . . [and] [t]he circumstances that will justify our interference with nonfinal agency action must be truly extraordinary”) (citation and internal quotations omitted); *see also Reynolds Metals Co. v. FERC*, 777 F.2d 760, 762 (D.C. Cir. 1985) (petitions for stay under All Writs Act must “satisfy the normal requirements . . . for all extraordinary

relief—i.e., the well established requirements that we routinely apply to motions for stay pending appeal”).

## **ARGUMENT**

### **I. Appalachian Voices Cannot Establish a Likelihood of Success on the Merits of Its Petition for Review**

#### **A. There Is No Likelihood of Success on the Merits Because Appalachian Voices Prematurely Seeks Judicial Review of a Non-Final Order under the Natural Gas Act, 15 U.S.C. § 717r**

As explained in the Commission’s motion to dismiss and reply in support of its motion to dismiss, Appalachian Voices seeks judicial intervention too soon.

The Commission has not yet acted on the merits of the requests for rehearing of its Certificate Order and, thus, has not yet issued a final, judicially reviewable order under the Natural Gas Act, 15 U.S.C. § 717r(a)-(b). Motion to Dismiss 2-3, 5-7.

*See N.C. Utils. Comm’n v. FERC*, 741 F.3d 439, 448 (4th Cir. 2014) (the requirement that a party must first seek agency rehearing is “based on the time-honored doctrine of exhaustion of administrative remedies”) (internal quotations omitted); *Halifax Cnty., Va. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983) (“proper remedy” if dissatisfied with a FERC order is to “petition for a rehearing by the Commission as provided for and mandated by the [statutes FERC administers]”; *see also Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the FERC rehearing order issues is “incurably premature” and “must be dismissed”).

In its rehearing request, which is pending before the Commission, Appalachian Voices raises the same issues that it seeks to raise to the Court now. The issues go not only to the agency's interpretation of the statute that Congress charged it to administer, but also to its expert judgment and to its careful consideration of the record evidence in the underlying proceeding. *See generally FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 784 (2016); *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968). The Commission is currently considering the arguments raised by Appalachian Voices on rehearing, along with those raised by numerous other parties with respect to the Certificate Order. Thus, the Court is not able to assess the reasonableness of the final ruling that the Commission has not yet made.

Contrary to Appalachian Voices' contention, Petition 7-10, the Commission's issuance of a procedural Tolling Order in the agency proceeding, indicating that it requires more than just 30 days to consider and address the numerous matters raised by parties on rehearing, does not signify bad faith or intent to delay review. The Commission's use of tolling orders has been upheld by every court that has addressed the issue, including by the Sixth Circuit today. *Coalition to Reroute Nexus*, No. 17-4302 (6th Cir. Mar. 15, 2018) (recognizing FERC's authority to use tolling orders under relevant case law and 18 C.F.R. § 375.302(v); finding that petitioners had not shown any "egregious" delay by

FERC that would warrant relief in mandamus”). *See also* Motion to Dismiss 7-9; Reply in Support of Motion to Dismiss 3-9 (discussing cases).

**B. In Any Event, Pending Agency Rehearing, the Challenged Determinations Are Reasonable and Supported**

Even though the Certificate Order does not represent final agency action and is not judicially reviewable at this time, the Commission’s determinations in the Certificate Order are reasonable and supported. Commission action under the statutes it administers, such as the Natural Gas Act, is entitled to a high degree of deference. *See Nantahala Power & Light Co. v. FERC*, 727 F.2d 1342, 1345 (4th Cir. 1984) (Court does not “reweigh the evidence and draw inferences therefrom”); *see also Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (because the grant or denial of a certificate of public convenience and necessity is “peculiarly within the discretion of the Commission,” the court does not “substitute its judgment for that of the Commission”). The Certificate Order is supported by substantial record evidence, including the extensive Environmental Impact Statement regarding the Project.

The two discrete issues raised by Appalachian Voices in support of its requests for stay have been raised and are pending on rehearing before the Commission; neither supports a finding of likelihood of success on the merits.

**1. The Commission Reasonably Found that the Public Benefits Outweigh Potential Adverse Impacts**

Appalachian Voices erroneously states that the Commission authorized the Project “based solely on the existence of precedent agreements with Atlantic [Coast]’s corporate affiliates,” and, in doing so, “ignored” its Certificate Policy Statement, 88 FERC ¶ 61,744 (1999) (“Policy Statement”). Motion for Stay 6.

First, although the Commission found that Atlantic Coast demonstrated “market need” for the project primarily on the basis of long-term, firm precedent agreements with shippers for approximately 96 percent of the system’s capacity, Certificate Order P 55, the Commission also determined that the Project provides public benefits because it would “develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets in Virginia and North Carolina.” *Id.* See generally *id.* PP 29-75 (addressing need for the Project and concluding that benefits from the Project will “outweigh” potential adverse effects). Thus, the Commission did not authorize the Project “solely” on the basis of such agreements.

Second, the Certificate Order discusses and applies the Commission’s 1999 Policy Statement, 88 FERC ¶ 61,744, explaining that the Policy Statement “provides guidance” for the Commission’s evaluation of new pipeline infrastructure proposals. Certificate Order PP 25-26 (under the Policy Statement, “the Commission balances the public benefits against the potential adverse

consequences,” giving “appropriate consideration” to diverse factors, including “the enhancement of competitive transportation alternatives, . . . the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain”).

As the Commission explains, the Policy Statement demonstrates that contracts and precedent agreements represent “significant evidence of project need or demand.” Certificate Order PP 25-26, 54. Contrary to Appalachian Voices’ contention, the Commission did not erroneously rely on a pre-1999 superseded policy in considering Atlantic Coast’s contracts for 96 percent of the Project’s capacity.

Prior to 1999, the Commission “use[d] the percentage of capacity under long-term contracts as the only measure of the demand for a proposed project,” a “narrow test” that did not take into account other public benefits such as “the environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure.” 88 FERC ¶ 61,744, p. 16. *See* Certificate Order P 54 n.83 (describing pre-1999 policy as “more stringent,” and observing that Project would have satisfied the more stringent standard in light of the 96 percent subscription

rate).<sup>8</sup> *See also Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) (“[T]he [P]olicy [S]tatement specifically recognizes that such agreements ‘always will be important evidence of demand for a project.’”); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (evidence showing that 93 percent of a project’s capacity had been contracted for satisfied market need showing).

The Commission also did not err in stating that, as a matter of current policy, the Commission does not look behind such agreements in order “to make judgments about the needs of individual shippers.” Certificate Order P 54.

Although the Commission cited to a portion of the Policy Statement summarizing the pre-1999 policy, 88 FERC ¶ 61,744, p. 15, nothing in the Policy Statement altered the Commission’s approach with respect to such agreements.

In any event, the argument that the contracts at issue here are unreliable because they represent agreements between Atlantic Coast and affiliated companies is pending before the Commission on rehearing. *See* Motion for Stay 10-16; Petition 18-25. Moreover, on the record presented, the Certificate Order rejected arguments challenging market demand for the Project as lacking merit.

---

<sup>8</sup> The 1999 policy announced that applicants were no longer required to submit contracts for any specific percentage of new capacity in order to demonstrate project need; instead, applicants could submit “any relevant evidence” to support various public benefits. Policy Statement 88 FERC ¶ 61,744, p. 25.



Certificate Order PP 54-63. In particular, the Commission explained that “projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states.” *Id.* P 56. “Given the uncertainty associated with long-term demand projections, such as those presented in the Synapse [s]tudy and other studies cited by commenters,” the Commission found that the precedent agreements constituted “better evidence of demand.” *Id.* The Commission’s determination is supported by the record and is entitled to deference. *See Elec. Power Supply Ass’n*, 136 S. Ct. at 784; *Nantahala Power*, 727 F.2d at 1345.

**2. The Certificate Order Recognized and Reasonably Addressed Landowner Concerns Regarding Eminent Domain**

The Certificate Order and Environmental Statement reflect the Commission’s recognition of, and sensitivity to, landowner concerns relating to the Project. *See* Certificate Order PP 65-69; Environmental Statement § 3.0. The Commission observed that Atlantic Coast “incorporated 201 route variations, totaling 199 miles, into its proposed route for various reasons, including landowner requests, avoidance of sensitive resources, or engineering considerations.” Certificate Order P 65. Moreover, the Environmental Statement contains an extensive evaluation of system alternatives (pp. 3-4 to 3-10) and route alternatives

(pp. 3-10 to 3-60).

The Certificate Order also addresses eminent domain issues raised by various parties. Certificate Order PP 76-81. The eminent domain provision of the Natural Gas Act, 15 U.S.C. § 717f(h), which provides that the holder of a FERC certificate may obtain eminent domain authority in federal district court, if unable to reach agreement with property owners, is the subject of pending challenges in *Berkley, et al. v. Mountain Valley Pipeline, et al.*, 4th Cir. No. 18-1042, *Bold Alliance, et al. v. FERC, et al.*, D.D.C. No. 17-cv-01822, and *N.J. Conservation Found. v. FERC*, D.N.J. No. 3:17-cv-11991. The Commission has moved to dismiss those challenges for lack of jurisdiction.

As the Certificate Order explains, “the Commission itself does not confer eminent domain powers.” Certificate Order P 77. Under the Natural Gas Act, the Commission has exclusive jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the “public convenience and necessity.” *Id.* Once the Commission makes that determination, it is 15 U.S.C. § 717f(h) that authorizes a certificate holder to acquire necessary land by exercising the right of eminent domain if it cannot reach agreement with a landowner. *Id. See also id.* P 79 (Congressional “recognition” in the Natural Gas Act “that natural gas transportation furthers the public interest is consistent with the Supreme Court’s emphasis on legislative declarations of public purpose in

upholding the power of eminent domain”); *E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 821 (4th Cir. 2004) (Congress, in the Natural Gas Act, “grant[ed] condemnation power to ‘private corporations . . . execut[ing] works in which the public is interested’”) (citation omitted).

As the Supreme Court has held, “[a] stay is an intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken*, 556 U.S. at 427 (citations and internal quotations omitted). And as this Court has specified, in the context of determining whether an injunction should issue under *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008), the moving party must satisfy all four requirements of the four-part test. *Cantley*, 771 F.3d at 207.<sup>9</sup>

Because Appalachian Voices fails to establish “probable success” on the merits, there is “no justification for the court’s intrusion into the ordinary processes of administration and judicial review.” *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958).

---

<sup>9</sup> As the Supreme Court has stated, there is “substantial overlap” between the four-factor test governing stays and preliminary injunctions, “because similar concerns arise whenever a court may allow or disallow anticipated action before the legality of that action has been conclusively determined.” *Nken*, 556 U.S. at 434 (citing *Winter*, 555 U.S. at 24).

## II. The Irreparable Injury Prong Does Not Support Issuance of a Stay

As part of its extensive public interest balancing analysis, the Commission recognized and analyzed potential environmental impacts associated with the Project. *See* Certificate Order PP 199-325; Environmental Statement 4-1 to 4-623. The Commission concluded that “most environmental impacts resulting from construction and operation of the [Project] would be temporary or short-term, but that some impacts would be adverse and significant.” Certificate Order P 199.

In assessing the environmental issues, the Commission took into consideration the views of numerous federal and state agencies, such as the Environmental Protection Agency, U.S. Fish and Wildlife Service, and the Virginia Department of Conservation and Recreation. Ultimately, in consultation with other agencies, the Commission imposed a broad array of mitigation measures designed to minimize Project impacts to the greatest extent possible. *See, e.g., id.* PP 229-50 (discussing impacts on vegetation, forested land, and wildlife, and mitigation measures). The Commission concluded that, as mitigated, Project construction and operation constitutes “environmentally acceptable action[.]” *Id.* P 325.

The injuries alleged by Appalachian Voices here must be balanced against the other stay factors, which, as shown here, weigh heavily against the granting of a stay. *See, e.g., Va. Petroleum Jobbers*, 259 F.2d at 925.

### **III. A Stay Would Substantially Injure Other Parties**

This Court has recognized that “Congress passed the Natural Gas Act and gave gas companies condemnation power to insure that consumers would have access to an adequate supply of natural gas at reasonable prices.” *E. Tenn. Nat. Gas Co.*, 361 F.3d at 830. In *East Tennessee*, the Court affirmed a district court’s issuance of a preliminary injunction to a gas company to obtain immediate possession of property for pipeline construction, finding that relief was necessary to prevent undue delay in pipeline construction and resulting financial harm to the company and some of its customers. *Id.* at 828-29.

Here, a stay of the Certificate Order and halting of the Project while the Commission considers rehearing requests would jeopardize the Project construction schedule and, as a result, jeopardize the availability of additional capacity to serve consumers in Virginia and North Carolina. *See* Certificate Order P 55. Such an outcome would harm consumers, the certificate holder, and the shippers that have executed long-term supply agreements with Atlantic Coast for 96 percent of the Project’s capacity.

### **IV. The Public Interest Does Not Favor a Stay**

This Court has found that the “need for natural gas supply” is a “substantial public interest.” *E. Tenn.*, 361 F.3d at 826-27, 830 (pipeline project served the public interest because it would “make gas available to consumers,” “help in the

efforts of local communities to attract much-needed new business,” and “make gas available for electric power generation plants”).

The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). Here, the Commission determined, based on the record, that the Project serves the “public convenience of necessity” and will provide natural gas to meet regional needs. *See, e.g., Certificate Order PP 55, 70, 75.* Accordingly, the public interest militates against issuance of a stay.

### **CONCLUSION**

For the foregoing reasons, Appalachian Voices has not established the extraordinary circumstances necessary to justify an extraordinary stay of the Certificate Order. Both the petition and motion for stay should be denied.

Respectfully submitted,

James P. Danly  
General Counsel

Robert H. Solomon  
Solicitor

/s/ Susanna Y. Chu  
Susanna Y. Chu  
Attorney

Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C. 20426  
(202) 502-8464  
[Susanna.Chu@ferc.gov](mailto:Susanna.Chu@ferc.gov)

March 15, 2018

## **CERTIFICATE OF COMPLIANCE**

This response complies with the type-volume limits of Fed. R. App. R. 27(d)(2) because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this response contains 5,187 words.

This response complies with the typeface and type style requirements because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14.

*/s/ Susanna Y. Chu*  
Susanna Y. Chu  
Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
Tel.: (202) 502-8464  
Fax: (202) 273-0901  
E-mail: [Susanna.Chu@ferc.gov](mailto:Susanna.Chu@ferc.gov)

March 15, 2018



## CERTIFICATE OF SERVICE

I certify that on March 15, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Susanna Y. Chu  
Susanna Y. Chu  
Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
Tel.: (202) 502-8464  
Fax: (202) 273-0901  
E-mail: [Susanna.Chu@ferc.gov](mailto:Susanna.Chu@ferc.gov)

March 15, 2018