

No. 18-1533

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

BOLD ALLIANCE AND BOLD EDUCATION FUND,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**MOTION TO DISMISS PETITION FOR REVIEW, OR,
IN THE ALTERNATIVE, FOR TRANSFER OR ABEYANCE**

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**MOTION TO DISMISS PETITION FOR REVIEW, OR,
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The Federal Energy Regulatory Commission (“FERC” or “Commission”) moves for dismissal of the petition filed by Petitioners Bold Alliance and Bold Education Fund (“Bold Alliance”). Dismissal—or alternatively transfer or abeyance—is necessary because the contents of that petition can now be heard only in the D.C. Circuit, not this Circuit.

Last Friday, the Commission issued an order addressing rehearing requests concerning its conditional authorization of the Mountain Valley Pipeline (“Mountain Valley”). Certificate Rehearing Order, 163 FERC ¶ 61,197 (June 15, 2018). Later that day, in compliance with a D.C. Circuit order, the Commission

filed the agency record in *Appalachian Voices et al. v. FERC*, D.C. Cir. Nos. 17-1271 and 18-1002 (petitions filed Dec. 22, 2017, and Jan. 3, 2018).

The agency record filed in *Appalachian Voices* includes the orders presented for review by Bold Alliance in this proceeding: certain notices to proceed with construction issued by FERC staff (“Construction Notices”), Pet. Ex. A, and a Commission rehearing order affirming the authority of FERC staff to issue the Construction Notices, 163 FERC ¶ 61,099 (May 4, 2018) (“Construction Rehearing Order”), Pet. Ex. B. Now that the record has been filed in the D.C. Circuit, that court has “exclusive” jurisdiction under 15 U.S.C. § 717r(b) to review the Commission’s actions in the Mountain Valley proceeding.

As a general matter, the Commission has no preference regarding the particular venue of appellate litigation. It does, however, prefer that all issues arising out of the same proceeding be heard in one court of appeals. This is the result mandated by the Natural Gas Act, 15 U.S.C. § 717r(b). Here, because jurisdiction is exclusive in the D.C. Circuit, the Court cannot proceed on Bold Alliance’s petition at this time.

Dismissal here does not preclude Bold Alliance from seeking review of the Construction Notices and Construction Rehearing Order. Bold Alliance may timely petition for review of those orders in the D.C. Circuit. This does not pose any hardship for Bold Alliance—it is already actively engaged in litigation

concerning Mountain Valley in that circuit. Several months ago, Bold Alliance intervened in the *Appalachian Voices* proceeding. *Appalachian Voices* (D.C. Cir. Feb. 6, 2018) (clerk's order granting Bold Alliance's motion to intervene). Bold Alliance also filed a complaint in the U.S. District Court for the District of Columbia concerning the Mountain Valley Pipeline. *Bold Alliance, et al. v. FERC, et al.*, D.D.C. No. 17-1822 (filed Sept. 5, 2017). The Commission moved to dismiss Bold Alliance's complaint for lack of subject matter jurisdiction; the motion is pending before the district court. If that case ultimately proceeds to appeal, it too will be heard by the D.C. Circuit.

If this Court does not dismiss this latest challenge to the Commission's Mountain Valley actions, the Commission moves for transfer of Bold Alliance's petition to the D.C. Circuit, or for abeyance in this Court pending the D.C. Circuit's resolution of *Appalachian Voices*. As discussed below, the Construction Notices and Construction Rehearing Order flow from and are derivative of the Certificate Order, which authorized the proposed Mountain Valley Pipeline subject to certain conditions. The FERC Construction Notices issued only after FERC staff confirmed that specific conditions had been met.

Accordingly, the issues raised in this petition inhere in and are interrelated with the issues that will be heard in the *Appalachian Voices* proceeding. Transfer or abeyance, as an alternative to dismissal, would promote principles of comity,

judicial efficiency, and administrative convenience, and avoid the possibility of concurrent, overlapping litigation in this Court and the D.C. Circuit on the same administrative record.

PROCEDURAL BACKGROUND

This case arises from the Commission’s issuance of a Certificate Order in October 2017, by a 2-1 vote, granting a conditional certificate of “public convenience and necessity” for the Mountain Valley Pipeline project. The Certificate Order conditionally authorized the construction of interstate natural gas pipeline facilities, subject to Mountain Valley’s compliance with numerous environmental and related conditions. Certificate Order, 161 FERC ¶ 61,043 (2017), App. C (listing conditions); *see also id.* P 187 (Mountain Valley “must obtain all necessary federal and state permits and authorizations, including the water quality certifications, prior to receiving Commission authorization to commence construction”).

After the Certificate Order issued, Mountain Valley submitted documentation to the Commission demonstrating that it had obtained certain federal and state authorizations, and also had reached agreements with certain landowners for access to private property. Commission staff confirmed that the relevant Certificate Order conditions were satisfied, and Paul Friedman, the FERC Environmental Project Manager for the Mountain Valley Pipeline project, issued

Construction Notices permitting construction to proceed on specific segments of pipeline. *See* Pet. for Review, Ex. A (Construction Notices issued in January and February 2018).

Bold Alliance challenged the FERC Project Manager's authority to issue the Construction Notices, arguing that the Project Manager lacked delegated authority. The Commission denied Bold Alliance's challenge, explaining that the Project Manager issued the Construction Notices under authority delegated by the Commission-issued Certificate Order. Construction Rehearing Order, 163 FERC ¶ 61,099, PP 5-6. Bold Alliance then filed a petition for review of the Construction Notices and Construction Rehearing Order, and a motion for stay in this Court. On June 7, by order of Chief Judge Gregory, with the concurrence of Judge Traxler and Judge Thacker, the Court denied the motion for stay.

Before the Commission, Bold Alliance also sought rehearing of the Certificate Order. Along with other parties, Bold Alliance filed a 119-page request for rehearing encompassing 25 "alleged errors." Request for Rehearing of Bold Alliance, *et al.*, FERC Dkt. No. CP16-10 (filed Nov. 13, 2017). On June 15, the Commission issued a final order addressing all of the requests for rehearing filed by all parties in the FERC Mountain Valley proceeding, including Bold Alliance. *See* Certificate Rehearing Order, 163 FERC ¶ 61,197, PP 2 & n.6, 25-31.

On the same day, in compliance with a D.C. Circuit order, the agency filed the certified index to the record in the D.C. Circuit. *See Appalachian Voices* (D.C. Cir. May 16, 2018) (directing agency to file certified index to the record by June 15, 2018). That record includes: the October 2017 Certificate Order, the January and February 2018 Construction Notices, the May 2018 Construction Rehearing Order, and the June 15, 2018 Certificate Rehearing Order. Certified Index to the Record, *Appalachian Voices* (D.C. Cir. June 15, 2018), R. 5757 (Oct. 13, 2017 Certificate Order), R. 5928 (Jan. 29, 2018 Construction Notice), R. 5954 (Feb. 8, 2018 Construction Notice), R. 5957 (Feb. 9, 2018 Construction Notice), R. 5959 (Feb. 12, 2018 Construction Notice), R. 5961 (Feb. 13, 2018 Construction Notice), R. 5966 (Feb. 14, 2018 Construction Notice), R. 5969 (Feb. 15, 2018 Construction Notice), R. 5975 (Feb. 16, 2018 Construction Notice), R. 6204 (May 4, 2018 Construction Rehearing Order), and R. 6291 (June 15, 2018 Certificate Rehearing Order).

ARGUMENT

I. The Petition Should Be Dismissed for Lack of Jurisdiction Because the D.C. Circuit Has Exclusive Jurisdiction, and the Merits of the Mountain Valley Proceeding Are Now Before It

The Natural Gas Act specifies that, upon the filing of a petition for review of a Commission order in a court of appeals, “the Commission shall file with the court the record upon which the order complained of was entered, as provided in

section 2112 of title 28.” 15 U.S.C. § 717r(b). In particular, “[u]pon the filing of such petition such court shall have jurisdiction, *which upon the filing of the record with it shall be exclusive*, to affirm, modify, or set aside such order in whole or in part.” *Id.* (emphasis added).

Now that the Commission has filed the record, as directed by the D.C. Circuit, in the D.C. Circuit *Appalachian Voices* proceeding, that court has “exclusive” jurisdiction to “affirm, modify, or set aside” the Commission’s orders authorizing the Mountain Valley Pipeline, “in whole or in part.” *Id.* In particular, that court has exclusive jurisdiction over all matters “inhering in the controversy” before the Commission. *See Me. Council of Atl. Salmon Fed. v. Nat’l Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J., sitting by designation) (“The Supreme Court has made it clear that the jurisdiction provided [to the U.S. Courts of Appeals] by [the Federal Power Act’s direct review provision] is ‘exclusive,’ not only to review the terms of the specific FERC order, but over any issue ‘inhering in the controversy.’”) (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958));¹ *Williams Nat. Gas Co. v. City*

¹ The relevant provisions of the Natural Gas Act and Federal Power Act, both administered by the Commission, are “analogous,” and the Supreme Court “routinely relie[s] on [Natural Gas Act] cases in determining the scope of the [Federal Power Act], and vice versa.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (“established practice” to cite “interchangeably decisions” interpreting the two statutes).

of Okla. City, 890 F.2d 255, 261-62 (10th Cir. 1989) (court of appeals has exclusive jurisdiction over all matters “inher[ing] in the controversy” before the Commission). As one court of appeals put it, “[e]xclusive means exclusive.” *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010).

Indeed, once the record is filed, the agency cedes jurisdiction to the court of appeals to “affirm, modify, or set aside” the agency’s orders. 15 U.S.C. § 717r(b). *See, e.g., Ind. & Mich. Elec. Co. v. Fed. Power Comm’n*, 530 F.2d 1060, 1061 (D.C. Cir. 1976) (“[T]he filing of a petition to review a Commission order gives the circuit court of appeals jurisdiction . . . [that] is concurrent with the continuing jurisdiction of the Commission until the record is filed. Once the record is filed, the court’s jurisdiction is exclusive.”); *Mun. Intervenors Grp. v. Fed. Power Comm’n*, 473 F.2d 84, 87 (D.C. Cir. 1972) (“Upon the filing of the petition jurisdiction is vested in [the court of appeals] and that jurisdiction is exclusive upon the filing of the record before the [agency].”).

It follows from these precedents that this Court cannot entertain a petition for review arising from orders included in the Mountain Valley record, now that the record has been filed in a sister circuit. The Construction Notices and Construction Rehearing Order, which are included in the agency record filed in the D.C. Circuit, necessarily constitute matters “inhering in the controversy” before the Commission, now subject to the D.C. Circuit’s exclusive jurisdiction. Moreover,

the Construction Notices and Construction Rehearing Order were issued under the Certificate Order, which is subject to direct review in the D.C. Circuit *Appalachian Voices* proceeding. See Construction Rehearing Order, 163 FERC ¶ 61,099, P 6 & n.11 (explaining that Certificate Order delegated authority to the FERC Director of the Office of Energy Projects, or the Director’s designee, “to address any requests for approvals or authorizations necessary to carry out the conditions” of the Certificate Order).

As this Court has explained, “no court, having the power of review of the actions of an administrative agency, should exercise that power to review mere preliminary or procedural orders or orders which do not finally determine (some substantive) rights of the parties” *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 958 (4th Cir. 1979) (citation omitted); see also *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) (petition seeking review of non-final FERC action is “not only premature but incurably so,” and subsequent agency action does not ripen the premature petition).

Here, the Construction Notices and Construction Rehearing Order are preliminary, and ancillary to, the final order on rehearing (of the Certificate Order) issued by the Commission in the Mountain Valley proceeding on June 15. In light of the filing of the record in the D.C. Circuit, and the preliminary, ancillary nature of the Construction Notices and Construction Rehearing Order, the Court should

dismiss Bold Alliance's petition.

Dismissal here does not prevent Bold Alliance from obtaining judicial review. As noted above, Bold Alliance is already a party to the *Appalachian Voices* proceeding in the D.C. Circuit. To the extent it—or any other party—now wishes to seek review of the June 15 order on rehearing of the Certificate Order (or of earlier, non-final orders in the Mountain Valley proceeding), it may petition for review in the D.C. Circuit, since the time to file such a petition has not yet expired. *See* 15 U.S.C. § 717r(b) (establishing 60-day period for seeking review of agency order on rehearing).

II. In the Alternative, the Petition Should Be Transferred to the D.C. Circuit, the Court of First Filing, Under 28 U.S.C. § 2112(a)

The Natural Gas Act contemplates that the Commission will file the agency record consistent with the requirements of 28 U.S.C. § 2112. 15 U.S.C. § 717r(b). 28 U.S.C. § 2112(a)(1) provides that, where “proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency . . . concerned shall file the record in the court in which proceedings with respect to the order were first instituted.” And 28 U.S.C. § 2112(a)(5) provides that “[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed.”

As this Court has recognized, the procedure set forth in 28 U.S.C. § 2112(a)

contemplates the filing of the agency record in a single court of appeals—specifically, the court of first filing—and the transfer of any subsequently-filed petitions to that court. *Chatham Mfg. Co. v. NLRB*, 404 F.2d 1116, 1118 (4th Cir. 1968) (transferring case because 28 U.S.C. § 2112(a) “plain[ly] . . . requires the [agency] to file the record in the court of appeals in which the petition was first filed,” and “leav[es] the court in which the petition is later filed no discretion but to transfer the petition to the court in which the petition is first filed”); *see also J.P. Stevens & Co., Inc. v. NLRB*, 592 F.2d 1237, 1239 (4th Cir. 1979) (transferring proceedings to Second Circuit as court of first filing) (citing 28 U.S.C. § 2112(a) and *Chatham Mfg.*, 404 F.2d at 1118).

Here, the Commission filed the record in the D.C. Circuit pursuant to that court’s order. The Construction Notices and Construction Rehearing Order are included in the record filed in the D.C. Circuit, and that court now has exclusive jurisdiction to review issues relating to those orders. Moreover, as explained above, *supra* pp. 8-9, the Construction Notices and Construction Rehearing Order were issued pursuant to authority granted by the Certificate Order, and thus review of those construction orders will necessarily overlap with the D.C. Circuit’s review of the Certificate Order.

In these circumstances, if the Court does not dismiss the petition, transfer is appropriate under the procedures set forth in 28 U.S.C. § 2112(a). Principles of

comity, judicial efficiency, and administrative convenience strongly support transfer. As this Court has explained, “[t]he doctrine of comity instructs federal judges to avoid stepping on each other’s toes when parallel suits are pending in different courts. . . . By applying comity . . . , courts achieve at least two positive results: avoiding an unnecessary burden on the federal judiciary and preventing the embarrassment of conflicting judgments.” *In re Naranjo*, 768 F.3d 332, 348 (4th Cir. 2014) (citations and internal quotations omitted). *See also Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488 (1900) (principles of comity have “substantial value in securing uniformity of decision, and discouraging repeated litigation of the same question”).

Addressing parallel litigation involving a prison system in district courts in Virginia and the District of Columbia, this Court found that such duplicative litigation represented “an intolerable waste of judicial effort and imposition on both courts” *Wright v. Jackson*, 505 F.2d 1229, 1232 (4th Cir. 1974). Such a result, the Court concluded, would be “easily avoided” by transferring the case to the District of Columbia, where related cases were pending, and where “the entire issue [could] be resolved by the formulation of a single decree.” *Id.*

The Court’s reasoning in *Wright* applies with equal force here. The D.C. Circuit *Appalachian Voices* appeal encompasses numerous substantive issues arising from the Commission’s Mountain Valley authorization. Indeed, because

the Commission's Certificate Rehearing Order issued just last Friday, additional petitions for review may be filed in the D.C. Circuit. *See supra* p. 10. In these circumstances, transfer of Bold Alliance's petition for review of an ancillary issue relating to the Construction Notices and Construction Rehearing Order is appropriate.

III. In the Event the Court Retains Jurisdiction, the Proceeding Should Be Held in Abeyance Pending the Resolution of *Appalachian Voices*

Finally, if the Court decides to retain jurisdiction over Bold Alliance's petition, it should hold the case in abeyance pending the D.C. Circuit's resolution of the *Appalachian Voices* appeal. If the Court retains the case, abeyance would be necessary because, as explained above, *see supra* pp. 10-11, the Commission is not empowered to file the agency record in more than one court of appeals. *See* 15 U.S.C. § 717r(b); 28 U.S.C. § 2112. Accordingly, to review the Construction Notices and Construction Rehearing Order, the Court would need to hold proceedings in abeyance pending resolution of *Appalachian Voices*, specifically, pending issuance of the mandate by the D.C. Circuit terminating that court's jurisdiction.

If the Court retains the case for review, at some point, of the issues presented by Bold Alliance, the D.C. Circuit's resolution of issues concerning the Certificate Order and Rehearing Order may moot or alter the scope of remaining issues

presented. *See, e.g., State of Alaska v. FERC*, 980 F.2d 761, 763-65 (D.C. Cir. 1992). Judicial efficiency thus also militates in favor of abeyance, if the case is not dismissed or transferred.

CONCLUSION

Because jurisdiction is now exclusive in the D.C. Circuit, the petition for review should be dismissed. In the alternative, the petition should be transferred to the D.C. Circuit, or held in abeyance pending resolution of the D.C. Circuit *Appalachian Voices* proceeding.

Respectfully submitted,

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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 3,077 words.

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June 19, 2018

CERTIFICATE OF SERVICE

I certify that on June 19, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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