

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 MOTION FOR STAY PENDING REVIEW
OF FERC NOTICES TO PROCEED

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

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**RESPONSE IN OPPOSITION TO MOTION FOR STAY OF
RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION**

The Federal Energy Regulatory Commission (“FERC” or “Commission”) opposes the motion for stay filed by Petitioners Bold Alliance and Bold Education Fund (“Bold Alliance”). That motion represents the sixth effort to preliminarily stay construction of the Mountain Valley Pipeline (“Pipeline”) pending judicial review. The first five such efforts have been rejected—three by this Court, one by a district court in the Western District of Virginia, and one by the D.C. Circuit:

- In *Berkley v. Mountain Valley Pipeline, et al.*, No. 18-1042 (4th Cir. Feb. 15, 2018) (merits argued May 10, 2018), this Court denied an emergency motion under the All Writs Act to prevent the Pipeline from exercising eminent domain authority pending review of a district court order dismissing a constitutional eminent domain challenge by landowners;

- In the district court proceeding giving rise to the *Berkley* appeal, a district court in the Western District of Virginia denied a motion for a preliminary injunction to halt pipeline construction. *Berkley v. Mountain Valley Pipeline, et al.*, No. 17-357 (W.D. Va. Dec. 11, 2017), *on appeal*, 4th Cir. No. 18-1042;
- In *Sierra Club, et al. v. U.S. Forest Serv., et al.*, Nos. 17-2399, *et al.* (4th Cir. Mar. 14, 2018) (merits argued May 8, 2018), the Court denied a motion to stay authorizations issued by the U.S. Forest Service and Bureau of Land Management for the Pipeline;
- In *Sierra Club v. U.S. Army Corps of Engineers*, No. 18-1173 (4th Cir. Mar. 16, 2018) (merits briefing in progress), the Court denied a stay motion relating to an authorization issued by the U.S. Army Corps of Engineers for the Pipeline;¹ and
- In *Appalachian Voices, et al. v. FERC*, No. 17-1271 (D.C. Cir. Feb. 2, 2018) (proceeding to merits briefing), the D.C. Circuit denied motions for stay and a petition for writ of mandamus filed by multiple petitioners, finding that petitioners 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.”

These five stay denials involving the Mountain Valley Pipeline are consistent with a uniform line of federal appellate and district court decisions rejecting similar efforts to halt the effectiveness of FERC natural gas infrastructure decisions prior to judicial review on the merits. Over the last seven years, the courts of appeals have rejected all such efforts, including those cited above (in *Berkeley* and *Appalachian Voices*) and also (most recently):

¹ Yesterday, petitioners filed a second motion for stay; that motion is pending before the Court.

- *Appalachian Voices, et al. v. FERC, et al.*, No. 18-1114 (4th Cir. Mar. 21, 2018) (dismissing petition for review for lack of final agency order, and denying motion for stay and petition for writ of mandamus concerning Commission’s conditional approval of the Atlantic Coast Pipeline);
- *Coalition to Reroute Nexus, et al. v. FERC*, Nos. 17-4302 and 17-4308 (6th Cir. Mar. 15, 2018) (dismissing petitions for review for lack of final agency order, and denying motions for stay and petition for writ of mandamus concerning Commission’s approval of Nexus pipeline);
- *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); and
- *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).²

In addition, several district courts recently have denied requests for injunctive or interlocutory relief as to FERC natural gas certificate orders. *See*,

² Other court of appeals orders denying stays of FERC natural gas infrastructure orders include: *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016); *City of Boston v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016); *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).

e.g., *Adorers of the Blood of Christ v. FERC*, No. 17-3163 (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. 17-1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) (dismissing challenge to FERC pipeline order for lack of subject matter jurisdiction and denying preliminary injunction).

There is no basis for reaching a different result here. Assuming jurisdiction, the challenged notices to proceed with construction on segments of the Mountain Valley Pipeline (attached as Exhibit A to Bold Alliance's motion for stay) represent legitimate exercises of delegated authority by Commission staff. In any event, even assuming any intra-agency delegation issues, the Commission ratified the notices to proceed in the Construction Rehearing Order, 163 FERC ¶ 61,099, PP 5-6 (2018) (attached as Exhibit B to Bold Alliance's motion), thus resolving any delegation issues.

Requests for rehearing of the Certificate Order, including a request for rehearing by Bold Alliance and other parties, are pending before the agency. *See* Request for Rehearing of Bold Alliance, *et al.*, FERC Dkt. No. CP16-10 (filed Nov. 13, 2017). The Commission expects to issue an order on rehearing soon. Last week, the D.C. Circuit issued an order denying further abeyance and requiring the agency to file the certified index to the record concerning the Mountain Valley

Pipeline authorization within 30 days. *Appalachian Voices, et al. v. FERC*, No. 17-1271 (D.C. Cir. May 16, 2018). Bold Alliance has intervened in support of petitioners in the D.C. Circuit *Appalachian Voices* proceeding. *Appalachian Voices*, No. 17-1271 (D.C. Cir. Feb. 6, 2018) (clerk’s order granting Bold Alliance’s motion to intervene). Accordingly, judicial review of the merits of the Commission’s consideration of the Pipeline—including review of Bold Alliance’s arguments—is imminent.

Bold Alliance and other parties have also filed a complaint in the U.S. District Court for the District of Columbia relating to both the Mountain Valley Pipeline and the Atlantic Coast Pipeline. *Bold Alliance, et al. v. FERC, et al.*, D.D.C. No. 17-1822 (FERC motion to dismiss for lack of subject matter jurisdiction pending before the court).

Because Bold Alliance filed (in this Court) its petition for review prior to the issuance of a final order on rehearing by the Commission of the Mountain Valley Pipeline Certificate Order, the petition is premature. The Commission intends to file a motion to dismiss or for abeyance pending issuance of the Commission’s order on rehearing.³ At this time, however, given the timing of the pending motion

³ Also, Mountain Valley Pipeline has filed a motion to dismiss, explaining that Pipeline is located and has its principal place of business in the Third Circuit, not the Fourth Circuit, and thus, the case should not proceed here. *See* 15 U.S.C. § 717r(b).

for stay, the Commission limits its response to explaining why a stay should be denied. As discussed below, a stay now would upset the Commission’s public interest balance and imperil the project. Because Bold Alliance fails to demonstrate a basis for interrupting the ordinary process of administrative and judicial review that is already underway, the motion should be denied.

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. Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 (2017) (“Certificate Order”) (attached as Exhibit C to Bold Alliance’s motion). Consistent with its policies, the Commission balanced the public benefits of the project against potential adverse consequences. *See id.* PP 30-31.

Among other things, the Commission evaluated the need for the project and determined that the Mountain Valley Pipeline is “required by the public convenience and necessity,” *id.* P 62, and 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 the Northeast, Mid-Atlantic, and Southeast regions.” *Id.* P 41.

The Certificate Order conditionally authorizes the construction of interstate

natural gas pipeline facilities in West Virginia and Virginia, subject to Pipeline’s compliance with numerous environmental and related conditions. *Id.*, App. C (listing environmental conditions); *see also id.* P 187 (Pipeline “must obtain all necessary federal and state permits and authorizations, including the water quality certifications, prior to receiving Commission authorization to commence construction”).

Two of the environmental conditions contained in Appendix C to the Certificate Order are most pertinent here:

- **Environmental Condition 9** provides that Pipeline must demonstrate that it has obtained all necessary authorizations (from the relevant federal and state agencies) in order to receive written authorization from the Director of FERC’s Office of Energy Projects (*i.e.*, a “notice to proceed”) before commencing construction; and
- **Environmental Condition 2** specifies: “The Director of [FERC’s Office of Energy Projects], or the Director’s designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the order, and take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the project”

Since the issuance of the Certificate Order, Mountain Valley Pipeline has obtained certain required federal and state authorizations, and has reached agreements with certain landowners to gain access to private property. Pipeline submitted documentation regarding such authorizations, and Commission staff confirmed that the authorizations met specific requirements set forth in the Certificate Order. Upon Commission staff’s confirmation that relevant conditions

had been met, the Environmental Project Manager for the Mountain Valley Pipeline project, Paul Friedman (“Project Manager”), issued “notices to proceed” with construction on specific segments of Pipeline. *See* Mot. for Stay, Ex. A (notices to proceed issued in Jan. and Feb. 2018).

Before the Commission, Bold Alliance challenged the Project Manager’s authority to issue the delegated notices to proceed. The Commission denied Bold Alliance’s challenge, explaining that the Project Manager issued the notices to proceed under authority delegated by the Certificate Order. Construction Rehearing Order PP 5-6. Subsequently, Bold Alliance filed a petition for review and this motion for stay with the Court.

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).

ARGUMENT

I. Bold Alliance Cannot Establish a Likelihood of Success on the Merits of Its Petition for Review

A. The Notices to Proceed Represent Legitimate Exercises of Delegated Authority

There is no merit to Bold Alliance's argument that the Environmental Project Manager for the Mountain Valley Pipeline Project lacked authority to issue the notices to proceed. The notices to proceed with construction on the Mountain Valley Pipeline represent duly issued, legitimate exercises of delegated authority by Commission staff. Moreover, even assuming any potential delegation issues, the Commission ratified the notices to proceed in the Construction Rehearing Order, thus conclusively resolving any delegation issues. *See* Construction Rehearing Order PP 5-6.

The Commission may delegate to its designated agents the authority to conduct any hearing or other inquiry necessary or appropriate to its functions. 42 U.S.C. § 7171(g). The Commission delegates certain authority through regulation, *see, e.g.*, 18 C.F.R. § 375.308 (delegating certain authority to the Director of the Office of Energy Projects, or the Director's designee), but also routinely delegates

authority through its orders. *See* Construction Rehearing Order P 6 (“[W]hile the Commission has, through its regulations, delegated authority to conduct specific enumerated functions to different Commission offices, [it] also routinely delegate[s] authority through . . . orders, as in this proceeding.”).

Contrary to Bold Alliance’s contention, the authority to issue notices to proceed with construction for specific segments of the Mountain Valley Pipeline was not delegated to the Director of the Office of Energy Projects under the Commission’s regulations. *See* Motion for Stay at 7-8 (arguing that 18 C.F.R. § 375.301(b) does not authorize delegation to the Project Manager). Rather, consistent with “routine” practice, in acting on the Mountain Valley Pipeline application here, the Commission “delegated authority to issue notices to proceed with construction to the Director . . . or the Director’s designee.” Certificate Rehearing Order P 6 & n.11 (citing Certificate Order, App. C, Environmental Condition 2, which provides that the Director, “or the Director’s designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of this order”).

Thus, the delegation contained at Environmental Condition 2 of the Certificate Order is “not tied to or limited by section 375.301 of the Commission’s regulations as Bold Alliance suggests,” and “any limitation in our regulations on which staff or Commission officials may be delegated authority is inapplicable.”

Id. P 6 & n.12 (“[T]he Commission has previously clarified that in certificate proceedings, it delegates authority to its Directors with the understanding that the Director may further delegate such authority to a designee.”) (citing FERC cases).

In any event, the Commission resolved any potential delegation problems by ratifying the notices to proceed in the Construction Rehearing Order. *See Murray Energy Corp. v. FERC*, 629 F.3d 231, 236 (D.C. Cir. 2011) (rejecting argument that Commission staff lacked delegated authority to issue construction order because “the Commission’s subsequent ratification resolved any potential delegation problems”) (citing *Dana Corp. v. ICC*, 703 F.2d 1297, 1301 (D.C. Cir. 1983)).

Bold Alliance’s contention that the Construction Rehearing Order does not expressly “address the merits of [the Project Manager]’s actions or adopt them as its own” is meritless. Motion at 10. The Construction Rehearing Order rejects Bold Alliance’s arguments and confirms the agency’s longstanding practice of delegating authority to staff to issue notices to proceed with construction. *See* Construction Rehearing Order PP 5-6; *see also, e.g., Tenn. Gas Pipeline Co.*, 162 FERC ¶ 61,013 PP 21-22 (2018) (explaining Commission’s “longstanding” practice of having the Director of the Office of Energy Projects, or the Director’s designees, “verify that certificate conditions have been met before issuing notices to proceed with construction”); *Algonquin Gas Transmission*, 161 FERC ¶ 61,287

PP 17-23 (2017) (same).

The Commission’s longstanding practice of delegating authority to the Director of its Office of Energy Projects—and staff within the Director’s office—to verify that conditions set forth in a FERC certificate order have been met, before allowing a pipeline to proceed with construction, is valid and supported by ample authority. *See* 42 U.S.C. § 7171(g); *see also Nat’l Comm. for New River, Inc. v. FERC*, 433 F.3d 830, 833 (D.C. Cir. 2005) (rejecting “frivolous” argument that FERC certificate was invalid because it was signed by the Deputy Director of the Office of Energy Projects, rather than the Director, and observing that “this Court has no reason to assume that a rogue deputy surreptitiously issued FERC’s order against the Director’s will”).

As a federal agency, the Commission is presumed to have authority to delegate its functions to subordinate agency officials. *See, e.g., U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”); *see also Ethicon Endo-Surgery, Inc. v. Covidien L.P.*, 812 F.3d 1023, 1031 (Fed. Cir. 2016) (explaining that an agency’s “implicit power to delegate to subordinates” was “firmly entrenched” in *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122 (1947)). “The general principle is so

well accepted that the Supreme Court has called it ‘unexceptional.’” *Ethicon*, 812 F.3d at 1032 (quoting *U.S. v. Giordano*, 416 U.S. 505, 514 (1974)).

The Commission’s interpretation of its own statutory authority, and its own regulations relating to the appropriate delegation of authority within the agency, is afforded substantial deference. *See Yi v. Fed. Bureau of Prisons*, 412 F.3d 526, 534 (4th Cir. 2005) (court “may not substitute [its] own construction of [a] statutory provision for a reasonable interpretation made by [an agency],” but “must uphold the agency’s interpretation if it is rational and consistent with the statute”) (citations and internal quotations omitted); *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296-98 (2013) (deference accorded to agency interpretation of scope of statutory jurisdiction).

B. In Addition, Bold Alliance Is Not Likely to Succeed on the Merits Because the Petition for Review Is Premature

Bold Alliance seeks judicial intervention too soon. *See supra* pp. 4-5 (noting pending requests for rehearing of the Certificate Order). 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). *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 [statute]”).

The prematurity of the petition for review represents an independent basis for concluding that Bold Alliance cannot demonstrate a likelihood of success on the merits sufficient to obtain the extraordinary remedy of stay.

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 Mountain Valley Pipeline project. *See* Certificate Order PP 122-268 (addressing, among other issues, water resources, wetlands, vegetation, forested land, and wildlife). In assessing potential environmental issues, the Commission took into consideration the views of numerous federal and state agencies, such as the U.S. Environmental Protection Agency, the Virginia Department of Conservation and Recreation, and the Virginia Department of Game and Inland Fisheries. *See id.*

In consultation with other agencies, the Commission imposed a broad array of mitigation measures designed to minimize any project impacts to the greatest extent possible. *See, e.g.*, Certificate Order P 187 (“We expect strict compliance by [Pipeline] with any federal and state-mandated conditions”) & App. C. Ultimately, the Commission concluded that, as mitigated, project construction and operation constitutes “environmentally acceptable action[.]” *Id.* P 308.

In any event, the environmental impacts alleged by Bold Alliance here must be balanced against the other stay factors, which, as shown here, weigh heavily against the granting of a stay. *See, e.g., Cantley*, 771 F.3d at 208.

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. v. Sage*, 361 F.3d 808, 830 (4th Cir. 2004). 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 its customers. *Id.* at 828-29.

Here, a stay of the Certificate Order and halting of the project, while the Commission considers requests for rehearing and pending judicial review,⁴ would jeopardize the project construction schedule and, as a result, jeopardize the availability of additional capacity to serve the public. Such an outcome would harm consumers, the certificate holder, and the shippers that have executed long-term supply agreements with the Pipeline.

⁴ As explained, *supra* pp. 4-5, the D.C. Circuit is entertaining a petition for review of the Certificate Order and is proceeding to merits review of that order (and upcoming rehearing order).

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, and subject to agency rehearing, that the Mountain Valley Pipeline project serves the “public convenience and necessity” and will provide natural gas to meet regional needs. *See, e.g., Certificate Order PP 41, 62.* Accordingly, the public interest militates against issuance of a stay.

CONCLUSION

For the foregoing reasons, Bold Alliance has not established the extraordinary circumstances necessary to justify a stay. The motion should be denied.

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 3,754 words.

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CERTIFICATE OF SERVICE

I certify that on May 23, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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