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

Nos. 16-1329 and 16-1387 (consolidated)

SIERRA CLUB, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

RESPONDENT'S OPPOSITION TO PETITIONERS' REQUEST FOR ATTORNEY FEES

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Robert M. Kennedy
Senior Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

August 13, 2018

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

COURT CASES **PAGE**

ADMINISTRATIVE CASES

STATUTES AND REGULATIONS

GLOSSARY

Certificate Order	*Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080 (2016)
Commission or FERC	Federal Energy Regulatory Commission
EAJA	Equal Access to Justice Act
NEPA	National Environmental Policy Act
Project	Southeast Market Pipelines Project
Rehearing Order	*Fla. Se. Connection, LLC*, 156 FERC ¶ 61,160 (2016)
Remand Order	*Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 (2016)
Riverkeepers	Flint Riverkeeper and Chattahooche Riverkeeper

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

Nos. 16-1329 and 16-1387 (consolidated)

SIERRA CLUB, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

RESPONDENT'S OPPOSITION TO PETITIONERS' REQUEST FOR ATTORNEY FEES

Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") opposes the motion for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("EAJA" or "Act"), filed by Flint Riverkeeper and Chattahooche Riverkeeper (collectively, "Riverkeepers"). The Riverkeepers are not entitled to any award of fees because they are not prevailing parties and because the Commission's position with respect to the single issue that was not affirmed by the Court was substantially justified. (Even on that one issue, the Commission won the vote of dissenting Judge Brown.) Moreover, the vast majority of the fees sought by Riverkeepers is ineligible for recovery under the Act.

BACKGROUND

In the underlying agency licensing proceeding, the Commission conditionally approved the construction and operation of three new interstate natural-gas pipelines that collectively comprise the Southeast Market Pipelines Project ("Project"). Prior to doing so, the Commission engaged in a lengthy, detailed review of the Project, culminating in a 477-page final environmental impact statement issued pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.* ("NEPA"). The Commission determined that the Project, upon the satisfaction of numerous mandatory environmental conditions and mitigation measures, was consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080 (2016) ("Certificate Order"), *on reh'g*, 156 FERC ¶ 61,160 (2016) ("Rehearing Order").

On October 24, 2016, Riverkeepers, joined by their co-party, Sierra Club, filed an emergency motion for stay of the Certificate Order to halt pipeline construction pending completion of their appeal. The Court denied the motion, finding that Sierra Club had failed to "satisf[y] the stringent standards" to stay agency action. *Sierra Club v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016).

On appeal, Riverkeepers and Sierra Club alleged that the Commission (1) failed to adequately consider the Project's impact on low-income and minority

communities; (2) failed to adequately consider the downstream greenhouse gas emissions from end users of the natural gas transported by the Project, and (3) used an invalid methodology to determine the Project's service rates. A second set of petitioners comprised of affected landowners alleged that the Commission's environmental impact statement (4) contained an inappropriately limited alternatives analysis and (5) failed to properly analyze safety risks. The landowner petitioners also alleged that the Commission erred in its (6) public interest analysis and (7) market-need analysis.

In its August 22, 2017 decision, the Court affirmed the Commission's orders in all respects but one: the Court found that the Commission's environmental review inadequately considered the indirect effects of downstream greenhouse gas emissions. *Sierra Club v. FERC*, 867 F.3d 1357, 1375 (2017). The Court directed the Commission to prepare a conforming environmental impact statement that addresses those impacts. *Id*.

To comply with the Court's directive, the Commission issued its final supplemental environmental impact statement on February 5, 2018. The statement quantified the possible maximum greenhouse gas emissions from power plants burning natural gas transported by the Project, and provided context for those emissions in comparison to state and national emissions. On March 14, 2018, before the Court's mandate issued, the Commission issued an order on remand

which found that the additional analysis in the supplemental environmental impact statement did not alter the prior conclusion that the Southeast Market Pipelines Project is an environmentally acceptable action. As a result, the Commission reinstated the prior authorizations for the Project. *Fla. Se. Connection*, LLC, 162 FERC ¶ 61,233, at P 2 (2018) ("Remand Order"). On August 10, 2018, the Commission denied rehearing of the Remand Order. *Fla. Se. Connection*, LLC, 164 FERC ¶ 61,099 (Aug. 10, 2018).

Although the Court denied the Commission's petition for rehearing of the Court's decision to vacate the remanded orders (*see Sierra Club v. FERC*, Nos. 16-1329, *et al*. (D.C. Cir. Jan. 31, 2018)), the Court granted the Commission's motion to stay the mandate until March 28, 2018. *See Sierra Club v. FERC*, Nos. 16-1329, *et al*. (D.C. Cir. Mar. 7, 2018). As a result, although the Commission's original orders were vacated, there was no lapse in the certification of the Project in light of the Commission's issuance of the Remand Order prior to the issuance of the Court's mandate.

ARGUMENT

I. RIVERKEEPERS ARE NOT PREVAILING PARTIES.

To be considered a "prevailing party" under the EAJA, a petitioner must "succeed on any significant issue in [the] litigation which achieves some benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433

(1983) (internal quotations omitted). The relief secured in court must "materially alter[] the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The benefit must amount to more than just a "favorable statement of the law in an otherwise unfavorable opinion." *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). "A remand to an agency or trial court for further proceedings generally will not justify an award of attorneys' fees." *Autor v. Pritzker*, 843 F.3d 994, 997 (D.C. Cir. 2016). *But see SecurityPoint Holidngs, Inc. v. Transp. Sec. Admin*, 836 F.3d 32 (D.C. Cir. 2016) (petitioner may be deemed "prevailing party" where agency decision is vacated on the merits and remand terminates court's jurisdiction). Riverkeepers have failed to establish that they are "prevailing parties" under the EAJA.

First, Riverkeepers ignore the fact that they succeeded on only one of the many issues raised on appeal (and only one of the three issues that they raised). *See* Motion at 3-5. The Court rejected challenges to the Commission's market need analysis, environmental justice analysis, and initial rate setting methodology, among other issues. *Sierra Club*, 867 F.3d at 1371, 1375-79. The significance of the Commission's victory on these issues is demonstrated by the number of judicial and agency citations to these aspects of the *Sierra Club* decision. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 282 F. Supp. 3d 91,

100-103 (D.D.C. 2017) (citing *Sierra Club* multiple times while discussing environmental justice issues); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 36 (2018) (citing approval of Commission's market need analysis in *Sierra Club*); *NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054, at P 58 (2018) (citing approval of hypothetical capital structure in *Sierra Club*).

Second, Riverkeepers ignore the fact that the Commission responded to the Court's decision with a supplemental environmental impact statement and Remand Order before the Court's mandate issued. Accordingly, although the Court vacated the Commission's initial orders, there was never a time when the Southeast Market Pipelines Project lacked Commission authorization. This is not, therefore, a case where the "terms of a remand [were] such that a substantive victory [would] obviously follow." *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 794 F.3d 21, 25 (D.C. Cir. 2015) (internal quotations omitted). Where, as here, the remand "did not foreclose the possibility that the government could prevail on the merits," this Court has declined to find that a litigant is a "prevailing party." *Autor*, 843 F.3d at 997. In short, although Sierra Club, on one issue, "'achieved a desired result,' their success [on appeal] 'lacks the necessary judicial *imprimatur*' on the merits of their challenge" to the Commission's authorization of the Project "to secure the status of 'prevailing party.'" *Id.* at 999 (quoting *Buckhannon Bd. &*

Care Home, Inc. v. W.V. Dep't of Health & Human Resources, 532 U.S. 598, 600 (2001)).

II. THE COMMISSION'S POSITION WAS SUBSTANTIALLY JUSTIFIED.

A fee award is precluded where the agency's position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A), meaning that it had a "reasonable basis in law and fact." *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The fact that the government loses on the merits "does not mean that legal arguments advanced in the context of our adversary system were unreasonable." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005). *See also Pierce*, 487 U.S. at 565 n.2 (distinguishing between the statutory standard substantially *justified*, versus substantially *correct*; the latter is not the standard).

When an agency discusses the relevant legal authority, *Taucher*, 396 F.3d at 177, and follows its longstanding policy, *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 698 F. Supp. 2d 168, 176 (D.D.C. 2010), its position is likely to be substantially justified. In contrast, positions may not be substantially justified where they are "obviously insufficient under well-established precedent," "pressed in the face of an unbroken line of authority," "or in defiance of a string of losses." *Taucher*, 396 F.3d at 1178.

A. The Commission's Position Regarding Downstream Emission Impacts Was Reasonable.

In support of their contention that the Commission's position regarding downstream emission impacts was not substantially justified, Riverkeepers do little more than repackage passages from the *Sierra Club* decision. *See* Motion at 8-14. But "it is not enough to repeat the analysis of the merits decision, and add adjectives." *Taucher*, 396 F.3d at 1175. The question is whether the Commission's position was "justified to a degree that could satisfy a reasonable person." *Pierce*, 497 U.S. at 565. And apart from a passing reference (Motion at 13), Riverkeepers ignore that one dissenting (and presumably substantially justified) judge – Judge Brown – would have affirmed the Commission's orders in all respects. This fact alone demonstrates that the Commission's position had a reasonable basis in law and fact. *See In re Long-Distance Tel. Serv. Fed. Excise Tax Refund Litig.*, 751 F.3d 629, 636 (D.C. Cir. 2014) ("[O]ne might also reasonably conclude that, absent other factors, dissenting opinions on difficult questions are sufficient evidence of substantial justification."); *Ivy Sports Medicine, LLC v. Burwell*, 174 F. Supp. 3d 130, 143 (D.D.C. 2016) ("Given that Judge Pillard's dissent adopted the agency's reading, the Court is hard pressed to conclude that the FDA's position lacked substantial justification.")

At the agency level and on appeal, the Commission explained that the environmental effects resulting from end use emissions from natural gas

consumption are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of the Commission's approval of a pipeline. *See* Rehearing Order, 156 FERC ¶ 61,160 at PP 62-70; FERC Br. at 62-64. This conclusion was consistent with the Commission's long-standing interpretation of its obligations under NEPA in natural gas infrastructure proceedings. *See* Rehearing Order, 156 FERC ¶ 61,160 at P 63 (citing cases and noting "we have previously concluded in natural gas infrastructure proceedings" that downstream emissions are neither caused by or the reasonably foreseeable consequence of pipeline projects). An agency's reliance on its own established precedent is reasonable even if a court disagrees with the analysis. *See Tripoli,* 698 F. Supp. 2d at 176 (finding that "deferring to a long-standing agency interpretation" supports a conclusion that the agency's position was substantially justified).

With respect to causation, the Commission relied upon this Court's determination that an agency is not "required to 'examine everything for which the project could conceivably be a but-for cause' in order to satisfy NEPA." *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (internal quotations omitted). *See* FERC Br. at 62. The Commission observed that Florida authorities would be permitting the power plants that receive gas from the Project and would be in a position to assess the emissions from those plants. *See*

Rehearing Order, 156 FERC ¶ 61,160 at PP 68-70; FERC Br. at 70. And where the downstream effects of a natural gas infrastructure project are contingent upon the issuance of a license from another agency, this Court had previously found that the Commission is not the legally relevant cause of those effects for NEPA purposes. *See Sierra Club (Freeport) v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016); *Sierra Club (Sabine Pass) v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016); *EarthReports*, 828 F.3d at 952.

Riverkeepers assert that reliance on these precedents was "misguided." Motion at 11. But the fact that the Court found that these precedents did not govern the instant case does not mean that the Commission's position was not substantially justified. *See Taucher*, 396 F.3d at 1177 (finding substantial justification where the court found cases cited by agency inapposite, recognizing that similar cases may be interpreted in different ways). *See also Sierra Club*, 867 F.3d at 1381 (Brown, J. dissenting) ("FERC's conclusion is both logical and consistent with this Court's precedent."). Indeed, in reaching the conclusion that *Freeport* did not govern here, the Court engaged in an extensive analysis of the facts underlying *Freeport*, rather than relying upon any express language in *Freeport* demonstrating its inapplicability. *Id.* at 1373 (noting that this case "raises the question: what did the *Freeport* court mean by its statement that FERC could not prevent the effects of exports?"). *See also id*. at 1381 (Brown, J., dissenting)

("This case presents virtually identical circumstances" to *Freeport* and other cases).

The Commission also believed that an extensive NEPA analysis of the downstream emissions impacts was not required because those impacts were not reasonably foreseeable. *See* FERC Br. at 63-66; Rehearing Order, 156 FERC ¶ 61,160 at P 69. The Commission explained that emissions estimates would be largely influenced by assumptions rather than the direct parameters of the Project, such as predictions regarding future regional electricity demand, operating decisions of individual plants, and assessments of the displacement of alternative generating sources. FERC Br. at 64-70. The Court *agreed* that "in some cases quantification may not be feasible" and expressly declined to hold that a quantification of downstream emissions was necessary in every case. *Sierra Club*, 867 F.3d at 1374. The Court believed, however, that the facts of this case indicated that such quantification was possible. *Id*. (directing the Commission to provide "quantitative estimate of downstream" emissions or "explain[] more specifically why it could not have done so"). Where, as here, the relevant issue turns on a fact-specific inquiry, with factual distinctions "shading into one another," the Commission's position should be found to be substantially justified. *Taucher*, 396 F.3d at 1176. *See also Holland v. Williams Mountain Coal Co.*, 496

F.3d 670, 674 (D.C. Cir. 2007) (rejecting fee petition where the application of facts to law in a given setting varies).

B. The Commission Prevailed On The Motion To Stay.

The reasonableness of the Commission's position is further demonstrated by the fact that the Court denied the motion to stay the challenged orders filed by Riverkeepers and Sierra Club. *See supra* p. 2. Courts have held that a government case that is strong enough to survive a motion to dismiss or for summary judgment is entitled to the presumption that it is substantially justified. *See, e.g., U.S. v. Thouvenot, Wade & Moerschen, Inc.*, 596 F.3d 378, 382 (7th Cir. 2010) (reasoning that a case that continues to trial is likely reasonable in law and fact). Similarly here, in denying Riverkeepers and Sierra Club's stay motion, the Court found that the movants had failed to meet the standards for a stay, one of which is a likelihood of success on the merits. That Riverkeepers and Sierra Club were unable to demonstrate to the Court that they were likely to succeed on the merits underscores that the Commission's position was justified to a degree that could satisfy a reasonable person.

In sum, the Commission's litigation position in this court challenge and in the agency licensing proceeding was in line with those that courts have found to be substantially justified. None of the Commission's positions was "pressed in the face of an unbroken line of authority" or "obviously insufficient under well-

established precedent." *See Taucher*, 396 F.3d at 1178. Quite the opposite, the Commission relied on what it believed to be analogous precedent and applied the facts of this case to the pertinent NEPA regulations. This Court should thus find that the Commission was substantially justified and deny Riverkeepers' fee petition in its entirety.

III. THE VAST MAJORITY OF THE FEES SOUGHT BY RIVERKEEPERS IS INELIGIBLE FOR RECOVERY.

If the Court determines Riverkeepers are entitled to fees, they are only entitled to "reasonable" fees. *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1992). Here, the vast majority of the fees sought by Riverkeepers is ineligible for recovery under the EAJA.

A. Fees Incurred In Connection With The FERC Licensing Proceedings Are Not Recoverable.

Riverkeepers seek recovery under 28 U.S.C. § 2412(d)(1)(A) (*see* Motion at 2), which permits an award of attorney's fees "incurred … in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action." Nearly half of the fees sought by Riverkeepers, however, relates to work performed in connection with the underlying FERC licensing proceeding. *See* Motion at 22-23 (seeking $192,437.42 (978 hours) for Mr. Caley's time expended between 2014 and 2016 on the administrative proceeding). The plain language of section 2412(d)(1)(A) bars recovery of such fees.

The "EAJA only contemplates reimbursement for fees and expenses directly associated with the pursuit of a 'civil action' in federal court and does not encompass administrative actions." *Cal. Marine Cleaning, Inc. v. United States*, 43 Fed. Cl. 724, 731 (1999). *See also Ardestani v. INS*, 502 U.S. 129, 138 (1991) ("we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise"). Indeed, this Court has recognized that, to interpret section 2412(d)(1)(A) to permit recovery of fees expended in administrative proceedings that precede civil court actions "would nullify the limitations Congress placed on fee awards for administrative proceedings" in other sections of the EAJA. *Full Gospel Portland Church v. Thornburgh*, 927 F.2d 628, 631 (D.C. Cir. 1991).[1] In light of the language and structure of the EAJA, courts have found that attorney's fees incurred in administrative proceedings are not recoverable, even where it is asserted that exhaustion of administrative remedies is necessary for judicial review. *See, e.g., Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887 (8th Cir. 1995) (finding that EAJA does not encompass pre-litigation administrative fees,

[1] Under 28 U.S.C. § 2412(d)(3), a court is authorized to award fees incurred in connection with adversary agency adjudications conducted under 5 U.S.C. § 554 to parties which eventually prevail in court.

notwithstanding argument that parties were "required to exhaust all of their administrative remedies before bringing an action in the district court").

Although Riverkeepers do not invoke 28 U.S.C. § 2412(d)(3) – which authorizes the recovery of fees incurred in connection with an agency "adversary adjudication," as defined in 5 U.S.C. § 504(b)(1)(C)[2] – they do cite one case addressing that section and argue that the FERC licensing proceeding was an "adversarial process." *See* Motion at 18-19 (citing *GasPlus, L.L.C. v. U.S. Dep't of Interior*, 593 F. Supp. 2d 80, 89-90 (D.D.C. 2009)). The statutory definition of "adversarial adjudication," however, expressly "excludes an adjudication for the … purpose of granting or renewing a license." *See* 5 U.S.C. § 504(b)(1)(C); *see also Sullivan v. Hudson*, 490 U.S. 877, 891 (1989) (discussing definition of "adversarial adjudication").[3] The Commission's licensing process under section 7(c) of the

[2] Section 5 U.S.C. § 504(b)(1)(C) defines "adversary adjudication" to mean "(i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 7103 of title 41 before an agency board of contract appeals as provided in section 7105 of title 41, (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993."

[3] The definition of "adversary adjudication" also includes the requirement that "the position of the United States is represented by counsel or otherwise." 5 U.S.C. § 504(b)(1)(C). In a licensing proceeding under the Natural Gas Act, the Commission serves as an adjudicator, rather than as an adversary represented by counsel. *See In re Perry*, 882 F.2d 534, 540-41 (1st Cir. 1989) (the EAJA reflects

Natural Gas Act, 15 U.S.C. § 717f(c), is thus expressly excluded from the definition of an adversarial agency adjudication.

Moreover, even if the claim for fees expended during the FERC licensing proceeding were not barred by law, Riverkeerers have failed to adequately document these fees. Indeed, Riverkeepers admit that Mr. Caley, the outside counsel who handled the licensing proceedings, "did not keep detailed time records during the administrative proceeding." Motion at 20. And although Riverkeepers claim that their estimate of fees is "conservative" (*id*.), they appear to seek recovery for all fees incurred during the licensing proceeding, not merely those related to the downstream emissions issue. *See* Caley Declaration at ¶¶ 10-28 (discussing work performed during licensing proceeding), 29 (discussing administrative matters excluded from fee calculation). Supreme Court precedent "says loud and clear that when a party has obtained no favorable results in a particular aspect of a litigation, that party may receive no fee for work on that part of the case. Thus … *no* fee may be granted for work done on claims on which the party did not prevail, unless the unsuccessful claims were submitted as alternative grounds for a successful outcome," which is not the case here. *Anthony*, 982 F.2d at (D.C. Cir. 1993) (citing *Hensely*, 461 U.S. at 435).

"Congress's unmistakable intent to disallow fee awards for administrative proceedings in which the government is an adjudicator rather than an adversary").

Riverkeepers' failure to adequately document and segregate the fees incurred during the FERC licensing proceeding is an independent reason to bar recovery. *See Hensely v*, 461 U.S. at 433 ("[w]here the documentation of hours is inadequate, the district court may reduce the award accordingly"); *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004) ("[S]upporting documentation must be of sufficient detail and probative value to enable the court to determine with a high degree of certainty that such hours were actually and reasonably expended.") (internal quotations omitted).

B. Fees For Sierra Club Attorneys Are Not Recoverable.

It is undisputed that Sierra Club is not eligible to recover fees under the EAJA. *See* Motion at 5 (acknowledging that Sierra Club "is not EAJA-eligible"). Nonetheless, roughly half of Riverkeepers' request ($208,608.29 (1033.5 hours)) relates to fees incurred by Sierra Club attorneys. Motion at 23. Riverkeepers have not – and cannot – establish the recoverability of these fees.

This Court has long recognized that the intent of the EAJA would be subverted if ineligible parties were permitted to recover fees from the government by pairing with eligible parties. *See, e.g., Unification Church v. INS.*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) ("We cannot, consistent with our duty to implement the will of Congress, allow such a situation.") Consistent with this recognition, the Court has found that otherwise eligible parties may not recover fees for services

provided by a non-eligible co-party's counsel. *See American Ass'n of Retired Persons v. EEOC*, 873 F.2d 402, 406 (D.C. Cir. 1989) (finding that eligible individuals may not recover fees for "any services provided by AARP's in-house counsel").

The Court has explained that the essential question is whether an ineligible party is the real party in interest with respect to the at-issue fees. *Unification Church*, 762 F.2d at 1082. With respect to the EAJA-ineligible church at issue in *Unification Church*, the Court reasoned as follows:

> If we deny fees, the Church will pay the fees. If we award fees, the INS will pay the fees. The Church is the beneficiary of any award of fees, not the individual appellants, and thus the Church can fairly be characterized as the real party in interest.

Id. That reasoning applies equally here.

There is no indication that Riverkeepers have agreed to reimburse Sierra Club for any portion of the costs associated with Sierra Club's in-house attorneys. Thus, if the Court were to deny fees, Sierra Club will pay the fees. If the Court were to award fees, FERC (or the federal government or federal taxpayers) will pay the fees. *See Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 106 (D.C. Cir. 2018) (explaining FERC's statutory funding scheme, through congressional appropriations and the assessment of annual fees and charges). Sierra Club would be the beneficiary of any award and thus can be fairly characterized as a real party in interest. And because Sierra Club is an ineligible party under the EAJA, this

aspect of Riverkeepers' request for fees should be denied. *See also American Ass'n of Retired Persons*, 873 F.2d at 406 (denying recovery of fees where EAJA-ineligible party retained and paid for counsel who represented multiple parties and there was no evidence that other parties undertook an obligation to pay that counsel).

Riverkeepers assert that they did not "gain a 'free ride' by having the Sierra Club involved as a petitioner." Motion at 6. But that is not the point. Permitting the recovery of fees associated with Sierra Club's in-house counsel – fees for which there is no indication that any EAJA-eligible party would be responsible – would circumvent the limitations of the EAJA.

For its part, Sierra Club's counsel speculates that the environmental group would not have pursued this appeal in the absence of the Riverkeepers' participation. *See* Motion at 6; Huber Declaration at ¶ 9. But that claim is belied by Sierra Club's aggressive pursuit of the downstream emissions issue in numerous natural gas infrastructure proceedings. Indeed, the *Sierra Club* decision alone cites three other recent indirect impact cases in which Sierra Club participated as a petitioner. *See Sierra Club*, 867 F.3d at 1372 (citing *Freeport*, 827 F.3d 36; *Sabine Pass*, 827 F.3d 59; *EarthReports*, 828 F.3d 949). The claim that Sierra Club may not have pursued this appeal is also belied by the record in this case, which demonstrates that Sierra Club's in-house counsel began working on the appeal in

June 2016 – three months before Mr. Caley (outside counsel representing Riverkeepers and Sierra Club) recorded any time on the appeal. *See* Huber Declaration, Attachment at 1-2; Caley Declaration, Attachment at 1.

In any event, regardless of whether Sierra Club was the catalyst for the appeal, the record demonstrates that permitting the recovery of fees associated with the EAJA-ineligible organization's in-house counsel would contravene the Act.

C. The Fees Associated With Mr. Caley's Work On The Appeal Should Be Reduced.

The remaining component of Riverkeepers' claim is for $23,638.82 (118.2 hours) associated with Mr. Caley's work on the appeal. Motion at 23. But Mr. Caley acknowledges that he did not have responsibility for the one issue upon which Riverkeepers and Sierra Club prevailed. *See* Caley Declaration at ¶ 31 ("Ms. Benson had primary responsibility for the [downstream emissions] NEPA claim").

It appears that a large portion of Mr. Caley's appeal-related time – approximately 23 hours – was spent on Riverkeepers' unsuccessful motion for stay.[4] Parties are not entitled to fees for motions on which they did not prevail. *Anthony*, 982 F.2d at 589 (no fee award for work on an unsuccessful aspect of

[4] *See* Caley Declaration, Attachment at 2-4 (entries for 9/29/16, 9/30/16, 10/5/16, 10/16/16, 10/17/16, 10/18/16, 10/19/16,10/20/16, 10/21/16, 10/23/16, 10/24/16, 10/25/16, 1/1/16, 11/2/16, 11/3/16, 11/5/16, 11/16/16, 11/9/16).

litigation); *see also Hirschey v. FERC*, 777 F.2d 1, 3 (D.C. Cir. 1985) (hours spent on first appeal of same FERC proceeding, dismissed as premature, not recoverable because petitioner was not prevailing party). Contrary to Riverkeepers' assertion (Motion at 17 n.11 (citing *Air Transport Ass'n of Canada v. FAA*, 156 F.3d 1329, 1335 (D.C. Cir. 1998)), they are not entitled to recover time spent on the unsuccessful stay motion because their attempt to halt the construction of the Project had no bearing on the Court's ultimate merits decision, or the status of the Project which remains in operation. *See, e.g., U.S. v. Eleven Vehicles, Their Equip. & Accessories*, 200 F.3d 203, 211 (3d Cir. 2000) (disallowing fees for unsuccessful motion that did not contribute to ultimate victory).

CONCLUSION

For the foregoing reasons, the Court should deny Riverkeepers' request for attorney's fees in its entirety. In the alternative, the Court should exercise its discretion to substantially reduce the fee award.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

For Respondent
Federal Energy Regulatory Commission
Washington, D.C.

August 13, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this reply complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 4,691 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel.: (202) 502-8904
Fax: (202) 273-0901
Email: robert.kennedy@ferc.gov

August 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on August 13, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney