ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

No. 17-1263 (consolidated with Nos. 17-1098, *et al.*)

ALLEGHENY DEFENSE PROJECT, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

RESPONDENT'S OPPOSITION TO MOTION FOR STAY

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Anand R. Viswanathan
Attorney

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

January 26, 2018

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GLOSSARY

Allegheny	Movant-Petitioners Allegheny Defense Project, *et al*.
Certificate Order	*Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (Feb. 3, 2017)
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement or EIS	Final environmental impact statement issued for the Atlantic Sunrise project proposal
Mot.	Movant-Petitioners Allegheny Defense Project, *et al*., Motion for Stay, filed on Jan. 16, 2018
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*
P	The internal paragraph number within a FERC order
Project	Atlantic Sunrise pipeline project
Rehearing Order	*Transcon. Gas Pipe Line Co.*, 161 FERC ¶ 61,250 (Dec. 6, 2017)
Tolling Order	*Transcon. Gas Pipe Line Co.*, Docket No. CP15-138-001 (Mar. 13, 2017)
Transco	Transcontinental Gas Pipe Line Company, LLC

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INTRODUCTION

For the second time, Movant-Petitioners Allegheny Defense Project, *et al.* (collectively "Allegheny") ask this Court for the extraordinary remedy of indefinitely delaying the Atlantic Sunrise pipeline project ("the Project") – an interstate natural gas pipeline that the Federal Energy Regulatory Commission ("FERC" or "Commission") has determined, in its expert judgment and after thorough consideration and balancing of competing values, is necessary to meet the Nation's energy needs. This Court previously denied Allegheny's motion for stay (in Nos. 17-1098, *et al*.) on November 8, 2017. The only thing that has

changed since that time is the issuance of a Commission order addressing rehearing requests that were pending at that time. The new order does not add anything to Allegheny's case (nor does Allegheny raise new arguments), but rather further demonstrates the reasonableness of the Commission's position. Accordingly, for the second time, the Court should deny the motion to stay.

As before, Allegheny's motion does not establish the extraordinary circumstances necessary to justify a stay. Allegheny ignores one-half of the Commission's public interest balance—whether the need for, and benefits from, the Project outweighs potential adverse impacts. In its narrow focus on potential adverse impacts, Allegheny fails to address the Commission's findings of substantial benefits from consumer access to new sources of natural gas.

As to the one-half of the balance Allegheny does address, it overlooks an array of mitigation measures designed to minimize, if not eliminate, environmental impacts. The Commission considered all views (including those of Allegheny) in its orders and its comprehensive environmental impact statement for the Project that informed those orders, consistent with its responsibilities under the Natural Gas Act and the National Environmental Policy Act ("NEPA"). The Commission is, as it must be under the statutes it administers, sensitive to all perspectives, whether economic or environmental in nature. The Commission was particularly

sensitive to environmental concerns here, as evidenced by its lengthy and comprehensive Environmental Impact Statement.

The requested stay would upset the Commission's public interest balance and imperil the Project. Accordingly, it must be denied. This and other courts have repeatedly rejected similar efforts to halt the effectiveness of the Commission's natural gas infrastructure decisions prior to judicial review on the merits. In fact, in the past six years, courts have denied all 19 requests for stays of the effectiveness of Commission natural gas certificate orders, including:

- *New York Dept. of Envtl. Conservation and Protect Orange Cnty. v. FERC*, Nos. 17-3770 and 17-3966 (2d Cir. Dec. 7 and 15, 2017) (denying stays of pipeline construction based on Clean Water Act waiver and bald eagle protection);

- *Orus Berkley, et al. v. Mountain Valley Pipeline and FERC*, No. 7:17-cv-00357 (W.D. Va. Dec. 1, 2017) (denying preliminary injunction to stop pipeline construction based on constitutional eminent domain objections), *on appeal*, No. 18-1042 (4th Cir. filed Jan. 11, 2018);

- *Allegheny Def. Project, et al. v. FERC*, No. 17-1098, *et al*. (D.C. Cir. Nov. 8, 2017) (denying Allegheny's previous motion to stay Atlantic Sunrise pipeline construction based on challenge to FERC's analysis of indirect impacts on downstream emissions and upstream gas production);

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

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

- *City of Boston, et al. v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016) (denying stay of pipeline in-service date based upon a challenge, in part, to FERC's cumulative impacts analysis).[1]

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

BACKGROUND

This case concerns the Commission's issuance of a conditional certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). The certificate authorized Transcontinental Gas Pipe Line Company, LLC ("Transco") to build and operate its Atlantic Sunrise pipeline project. *See Transcon. Gas Pipe Line Co.*, 158 FERC ¶ 61,125, P 4 (Feb. 3, 2017) ("Certificate Order"), *on reh'g*, 161 FERC ¶ 61,250 (Dec. 6, 2017) ("Rehearing Order").

[1] *See also Catskill Mountainkeeper, et al. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *Town of Dedham v. FERC*, No. 1:15-cv-12352, 2015 WL 4274884 (D. Mass. July 15, 2015); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *Minisink Residents for Envtl. Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Envtl. Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); and *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

The Certificate Order authorizes Transco, upon satisfying necessary environmental conditions, to expand capacity at existing facilities and construct new facilities to transport, in total, approximately 1.7 billion cubic feet of natural gas per day from Pennsylvania to Alabama, including to markets along the Transco pipeline system in Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Alabama, and to interconnects with existing pipelines serving markets in Florida. *See generally* Certificate Order P 4.

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

[2] *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000).

gas sales contracts for all of its capacity on the Project with end users of natural gas and electricity. *See id*.

In addition to its need assessment under the Natural Gas Act, the Commission conducted a detailed environmental review consistent with its obligations under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. Its review of the application resulted in a 778-page final environmental impact statement ("Environmental Statement" or "EIS").

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

Although the Commission's orders and EIS addressed numerous issues, Allegheny (again) raises just two merits issues in its stay motion in this Court. First, Allegheny contends that the Commission did not assess whether total

greenhouse-gas emissions would increase or decrease if the Project were constructed, and therefore failed to explain the environmental impacts of the Project. Mot. 5-7. But the Commission found that downstream combustion of natural gas did not qualify as an indirect effect, as defined by the Council on Environmental Quality, because production and end-use would occur with or without the Project. *See* Certificate Order PP 138-39; Rehearing Order PP 76, 82. While the Commission thus concluded that it was not required to consider upstream and downstream impacts as part of its NEPA review, its staff still developed estimates of the potential impacts associated with both upstream production and downstream use of natural gas. *See* Certificate Order P 139; Rehearing Order P 92; EIS 4-316 – 4-318.

Second, Allegheny objects to the Commission's consideration of the indirect impacts of shale gas drilling "that is predicated upon and induced by construction of the Project." Mot. 10. The Commission, for its part, disagreed that its approval of the Project will induce additional shale gas production, and pointed to the variety of factors unrelated to the Project that drive new production. *See* Certificate Order PP 130, 133, 136; Rehearing Order P 76, 82. And in any event, the Commission found that the scope of the impacts from any such induced production is not reasonably foreseeable. *See* Certificate Order P 137; Rehearing Order P 83.

Allegheny and other parties asked the Commission to stay the Project, without success. *See Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042, PP 2, 4 (Aug. 31, 2017). As noted above, the Court has already found that a stay was unwarranted. *Allegheny Def. Project v. FERC*, Nos. 17-1098 *et al.* (Nov. 8, 2017) ("Petitioners have not satisfied the stringent requirements for a stay pending court review, including given the issues raised in the pending motions to dismiss.").

ARGUMENT

As before, Allegheny has not justified the extraordinary remedy of a stay. *See Munaf v. Geren*, 553 U.S. 674, 691 (2008) (stay pending appeal "is an extraordinary and drastic remedy; it is never awarded as of right"); *Reynolds Metals Co. v. FERC*, 777 F.2d 760, 763 (D.C. Cir. 1985) (motion for stay pending review is "seeking extraordinary relief"). In order to obtain such extraordinary relief, Allegheny must establish: (1) a strong showing that it is likely to prevail on the merits of its appeal; (2) that, without such relief, it will be irreparably injured; (3) a lack of substantial harm to other interested parties; and (4) that the public interest favors a stay. *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). Courts "must balance the competing claims of injury and must consider the effect . . . of the granting or withholding of the requested relief," and "pay particular regard for the public consequences . . . ."

Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 9 (2008) (quotations omitted).

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

Allegheny cannot meet the "'independent, free-standing requirement'" of demonstrating a likelihood of success on the merits. *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011) (quoting *Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1296 (D.C. Cir. 2009) (Kavanaugh, J., concurring), and citing *Winter*, 555 U.S. at 22). In the context of a National Environmental Policy Act claim, this Court has explained that a petitioner must "clearly establish[]" a violation to obtain injunctive relief. *Cuomo v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (finding that petitioner failed to demonstrate a "substantial case on the merits").

Commission action under NEPA is entitled to a high degree of deference. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). If an agency's NEPA "decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *EarthReports v. FERC*, 828 F.3d 949, 954-55 (D.C. Cir. 2016).

Here, the Commission satisfied its NEPA responsibilities, and its decisions are supported by substantial record evidence – demonstrated by the 778-page Environmental Statement considering the proposed Project. In contrast to this extensive analysis, Allegheny focuses solely on the purported downstream climate

impacts and indirect effects of shale gas drilling induced by the Project. It has not demonstrated that it is likely to succeed on either NEPA claim.

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

Allegheny focuses on the downstream effects, i.e., the climate impacts of the end use of the gas to be transported by the Project. *See* Mot. 5-9. But the Commission reasonably explained, both in its initial order and on rehearing, that it did not need to consider downstream combustion of natural gas to be an indirect effect, as defined by the Council on Environmental Quality, because that combustion would occur with or without the Project. *See* Certificate Order PP 138-39; Rehearing Order P 92.

In any event, the Commission took the requisite "hard look" at the Project's potential impacts on climate change. It developed estimates of the direct greenhouse gas emissions associated with construction and operation of the Project, as well as generic downstream emissions. *See* Certificate Order PP 138-39, 142; *see also id*. P 139 (explaining that downstream estimates were generic in nature "because no specific end uses have been identified and reflect a significant amount of uncertainty"); Rehearing Order PP 92-93 (noting upper limit of potential greenhouse gas emissions related to the Project); EIS 4-316 – 4-318. The Commission also found that the Project's likely greenhouse gas emissions at the Project's location would be lower than its "conservative[]" estimate, because

natural gas may displace other fuel sources (e.g., coal) that emit higher volumes of carbon dioxide. Certificate Order P 143; EIS 4-318. On rehearing, the Commission provided further context and explanation of its emissions estimate. Rehearing Order PP 92-95. The Commission specifically related its effort to the quantification requirement that this Court recently articulated in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Rehearing Order P 92.

In *Sierra Club*—which issued after parties filed requests for rehearing of the Certificate Order, but before the Commission released the Rehearing Order—this Court held that a FERC environmental impact statement "should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." 867 F.3d at 1374. Of those two paths, Allegheny concedes that FERC took the former approach here—i.e., it "roughly quantified the greenhouse gas emissions from burning the gas to be carried by the pipeline," Mot. 7.

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

Allegheny's argument stretches *Sierra Club* too far. *See* 867 F.3d at 1371

("We conclude that at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible"); *id*. at 1374 (requiring Environmental Impact Statement to contain either "a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport" or an explanation "more specifically why it could not have done so"). This Court declined the petitioner's invitation in *Sierra Club* to require a more detailed climate assessment from the agency—that is, it did not decide whether to require FERC to connect "downstream carbon emissions to particular climate impacts" using a particular carbon valuation tool. *Id*. at 1375. Instead, it asked the Commission to explain on remand whether the agency could use that tool.[3]

Allegheny again relies on *Sierra Club* to support its critique of the Commission's finding that the Project's likely climate emissions may be lower than estimated due to natural gas displacing higher-emitting fuel sources like coal. Mot. 5-7. Yet again, Allegheny misreads *Sierra Club*. That decision did not prohibit the Commission from making these sorts of "partial[] offset" findings, Mot. 5, when assessing the climate impacts of a natural gas pipeline, as Allegheny

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

contends. *See* Mot. 6 ("This Court squarely rejected that approach in [*Sierra Club*]."). The Court merely found that such "partial offset" findings did not excuse FERC from making emissions estimates altogether, a responsibility the Commission met here. *See* Rehearing Order PP 92-95; *Sierra Club*, 867 F.3d at 1374-75 ("Nor is FERC excused *from making emissions estimates* just because the emissions in question might be partially offset by reductions elsewhere.") (emphasis added); *see also* Mot. 8-9 (acknowledging FERC's emissions estimate).

Notwithstanding Allegheny's contention that the Commission failed to "employ or even discuss any available methodology for evaluating the impact of greenhouse-gas emissions, such as the Social Cost of Carbon tool," Mot. 9, the agency was not obligated to adopt any particular methodology for making such an estimate. *See EarthReports*, 828 F.3d at 956 (rejecting claim that Commission impermissibly failed to use particular tools to determine the environmental effects of greenhouse gas emissions from a liquefied natural gas infrastructure project, and upholding FERC's conclusion that "there is no standard methodology to determine how a project's incremental contribution to [emissions] would result in physical effects on the environment"). The Commission, in its discretion here, used an accepted methodology—developed by the EPA—to determine a conservative estimate of downstream greenhouse gas emissions. *See* Certificate Order P 143; Rehearing Order P 92. *See also Constitution Pipeline Co. LLC*, 154 FERC

¶ 61,046, P 128 n.198 (2016) (then-existing Council on Environmental Quality's draft guidance "emphasizes that agencies have the discretion to determine the type and level of analysis that is appropriate and that the investment of time and resources should be reasonably proportional to the importance of climate change-related considerations.").

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

Under NEPA, indirect effects are those "caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable." *Sierra Club*, 867 F.3d at 1371 (citing 40 C.F.R. § 1508.8(b)) (alteration and internal quotation marks omitted). Allegheny challenges the Commission's consideration of the indirect impacts of shale gas drilling "that is predicated upon and induced by the construction of the Project." Mot. 10. The record, however, shows reasoned decisionmaking by the agency.

First, the Commission reasonably found that the record did not demonstrate the requisite causal relationship between the Project and the impacts of future natural gas production warranting further analysis. *See* Certificate Order P 133; Rehearing Order P 82. As the Commission explained, "[t]he proposed project is responding to the need for transportation, not creating it." Certificate Order P 133; Rehearing Order P 82. *See also* Certificate Order P 130 ("To date, the Commission has not been presented with a proposed pipeline project that the

record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas."); EIS 4-282. In light of the numerous factors spurring new gas production, the Commission found it reasonable to assume that any such new production would find its way to the market, with or without construction of the Project. *See* Certificate Order P 136; Rehearing Order P 76 (causal relationship triggering NEPA analysis of induced gas production could exist if production could not occur absent the Project). And commenters offered no evidence before the agency to identify "any new production specifically associated with the [Project]," especially given that "a significant amount of unconventional natural gas production currently exists." *See id.* P 135; *see also Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (finding no evidence suggesting that the gas to be processed at the facility at issue would come from "future, induced natural gas production, as opposed to from existing production, particularly in light of the longtime, extensive natural gas development that has already occurred") (internal quotation marks omitted).

Second, even presuming a causal relationship between FERC's approval of the Project and additional gas production, the Commission still found that the scope of impacts from any production induced by the Project was not reasonably

foreseeable. *See, e.g.*, Certificate Order PP 131, 137; Rehearing Order P 83. Here, the Commission again noted the lack of sufficient information on the origin of the gas to be transported by the Project. *See* Certificate Order PP 131, 137; EIS 4-282 ("We are not aware of forecasts by [states having jurisdiction over natural gas production] that would make it possible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. . . . [T]he impacts of natural gas production are not reasonably foreseeable because they are so nebulous that we cannot forecast their likely effects in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline."). Even where the Commission knows the "general source area of gas likely to be transported" by the Project, a "meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer" and by applicable state regulations. Certificate Order P 131.

The Commission's discharge of its duty under NEPA does not require it to speculate. *See Sierra Club*, 827 F.3d at 46 (finding that FERC was reasonable in not considering in its NEPA review how approving a pipeline would cause increased natural gas production because the linkage was too "attenuated"). Its reasoned finding that any indirect effects pertaining to increased gas production

were neither caused by the Project nor reasonably foreseeable satisfied NEPA. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198-99 (D.C. Cir. 2017).

II. Allegheny Has Not Established An Irreparable Injury

A claim of irreparable injury absent a stay must be "both certain and great; it must be actual and not theoretical." *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). This includes the "further requirement that the movant substantiate the claim that irreparable injury is 'likely' to occur." *Id.* ("The movant must provide proof . . . indicating that the harm is certain to occur in the near future."). Unsupported assertions are insufficient. *Cuomo*, 772 F.2d at 978. The party seeking relief must show that "the injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." *Wis. Gas*, 758 F.2d at 674 (quotation omitted). A stay is not a matter of right; rather, any injury must be balanced against the other stay factors. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (a stay is an exercise of judicial discretion dependent upon the circumstances of the particular case).

Allegheny's allegations of harms to land, air quality, and surface waters from construction and operation of the Project ignore the mitigation measures designed to minimize, if not eliminate altogether, environmental impacts. Mot. 16-18. The Commission carefully addressed each of these concerns, and many others, in its Environmental Statement and concluded that, as mitigated, none of the

impacts would be significant. *See* Rehearing Order P 90 (confirming that the detail in the Environmental Statement was appropriate to ensure that the Commission made a fully-informed decision about the cumulative impacts of the Project).

As to surface waters, the Commission found that the mandatory mitigation measures would minimize impacts related to water discharge and waterbody crossings, and would minimize or prevent accidental spills and leaks, during construction and operation of the Project. *See, e.g.*, Certificate Order P 87; EIS 4-52, 4-67 – 4-68, 4-71 – 4-72. These mandatory measures, as the Commission concluded, would prevent the Project from having adverse, long-term impacts on surface water resources. Certificate Order P 87; Rehearing Order PP 70-71.

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

As for land affected by Project construction, Mot. 15, any impacts would be minimal and limited geographically. *See* Certificate Order P 101 (noting that, of the 3,700 acres of land affected by the Project, it would cross about 123 acres of organic farmland during construction and its operations would affect 43.7 acres). The Commission required Transco to file, prior to construction, an organic certification mitigation plan to ensure the maintenance of organic certification for

farms crossed by the Project, which would include measures to facilitate reinstatement of such certification or compensate landowners. *See id*.; EIS 4-152 – 4-159. Any effects on recreational areas would be temporary and limited to the period of active construction. *See* Certificate Order P 104; EIS 5-15.

The Commission thus reasonably considered and addressed any potential environmental impacts caused by the Project. *See also* Certificate Order App. C (containing environmental conditions for the Project); *EarthReports*, 828 F.3d at 958 (affirming FERC's NEPA review because it addressed concerns at length and made its authorization contingent on compliance with all applicable regulations and coordination with relevant agencies).

III. A Stay Will Substantially Injure Other Parties

The Court must consider whether "a stay would have a serious adverse effect on other interested persons." *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). This Court has recognized that entities have a protected property interest in permits issued by the government. *See 3883 Conn. LLC v. Dist. of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay").

Enjoining the Commission-issued certificate and halting the Project would seriously jeopardize the availability of additional capacity needed to transport

natural gas to southeastern and Mid-Atlantic markets. *See* Certificate Order P 28; Rehearing Order PP 27-28. Such an outcome would harm not only the certificate holder, but also the nine project shippers that have executed long-term supply agreements with Transco for 100 percent of the Project's capacity, and their customers who depend upon the utilities for reliable electricity service. *See* Certificate Order PP 28-30; Rehearing Order PP 27-28.

IV. The Public Interest Does Not Favor A Stay

The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Va. Petroleum Jobbers*, 259 F.2d at 925. The Natural Gas Act charges FERC with regulating the interstate transportation and wholesale sale of natural gas in the public interest. *See, e.g.*, *Columbia Gas Transmission Corp. v. FERC*, 750 F.3d 105, 112 (D.C. Cir. 1984). Because the Commission is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a stay request. *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968); *see Myersville Citizens For A Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1307-1308 (D.C. Cir. 2015) (FERC determines if a certificate is in the public interest).

Here, a stay of the Project would not serve the public interest. The Commission found a strong showing of need in issuing the certificate to provide

natural gas to meet the region's growing demand for natural gas. *See* Certificate Order PP 28-30; Rehearing Order P 28. A stay would frustrate these objectives.

Finally, the Commission's tolling orders did not signify bad faith or intent to delay review, Mot. 14, but properly notified the parties that the agency needed more time to consider the arguments raised on rehearing of the Certificate Order. *See California Co. v. FPC*, 411 F.2d 720, 722 (D.C. Cir. 1969) ("We are reluctant to impute to Congress a purpose to limit the Commission to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active reconsideration by the agency."). As for the Notice to Proceed, it authorized construction of portions of the Project after the Commission approved the Environmental Statement and imposed appropriate environmental conditions under NEPA, and after FERC received all necessary federal certifications related to those elements. Notice to Proceed at 1, Docket Nos. CP15-138-000 and CP17-212-000 (Sept. 15, 2017). Allegheny suggests that the Commission should not authorize construction if a party has challenged the agency's NEPA analysis on rehearing. Mot. 15, 20. This theory would empower any party to stay construction merely by filing a rehearing request, and therefore forestall or override the Commission's judgment that construction may begin. *See also* Natural Gas Act 19(c), 15 U.S.C. § 717r(c)

("The filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order.").

CONCLUSION

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

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney

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

January 26, 2018

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) because it contains 4,870 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

/s/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-6537
Fax: 202-273-0901
E-mail: Anand.Viswanathan@ferc.gov

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Allegheny Defense Project, et al. v. FERC **Docket No. CP15-138**
D.C. Cir. Nos. 17-1263, *et al*.

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 26th day of January 2018, served the foregoing upon the counsel listed in the Service Preference Report through the Court's CM/ECF system.

/s/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, D.C. 20426
Telephone: (202) 502-6537
Fax: (202) 273-0901
Email: anand.viswanathan@ferc.gov