ORAL ARGUMENT HAS NOT BEEN SCHEDULED

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

Nos. 16-1081, 16-1098, 16-1103 (Consolidated)

CITY OF BOSTON DELEGATION, *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 EMERGENCY MOTION FOR STAY PENDING REVIEW

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GLOSSARY

Algonquin	Algonquin Gas Transmission, LLC
Algonquin Project or Project	Algonquin Incremental Market Project
Certificate Order	*Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163 P 4 (Mar. 3, 2015), R. 1857
Commission or FERC	Federal Energy Regulatory Commission
Environmental Statement	Environmental impact statement issued on January 23, 2015, by FERC for Algonquin's application to construct and operate the Algonquin Project, R. 1767
FERC Br.	Merits answering brief filed on September 27, 2016, by FERC in Nos. 16-1081, *et al.*
Indian Point	Indian Point Energy Center
Mot.	Riverkeeper, Inc. and Environmental and Community Petitioners' Motion for Emergency Stay, filed on September 21, 2016
NEPA	National Environmental Policy Act, 42 U.S.C. §§ 4321, *et seq.*
NRC	Nuclear Regulatory Commission
P	The internal paragraph number within a FERC order
R.	Item in the certified index to the record
Rehearing Order	*Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 (Jan. 28, 2016), R. 2181
Riverkeeper	Petitioners Riverkeeper Inc. and Environmental & Community Petitioners, in Docket No. 16-1103
Riverkeeper Br.	Citation to the joint opening brief of Riverkeeper and Town of Dedham, Massachusetts, filed on July 29, 2016

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RESPONDENT'S OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING REVIEW

INTRODUCTION

Movant-Petitioner Riverkeeper Inc. and Environmental and Community Petitioners (together, Riverkeeper) ask this Court for the extraordinary remedy of indefinitely delaying the Algonquin Incremental Market Project (Algonquin Project or Project). The Algonquin Project is 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 needed to meet the Nation's energy needs.

Riverkeeper filed its "emergency" motion just six days before the due date (September 27, 2016) for filing the Commission's answering brief regarding the merits of the Project. Riverkeeper provided no advance notice to the Commission that it would be seeking emergency relief. And its Motion offers no reason for the claimed "emergency," citing no new evidence that was not (or could not have been) included in Riverkeeper's opening merits brief – filed less than two months earlier. Nor does Riverkeeper explain its delay; after all, it previously chose not to seek emergency relief from this Court after earlier stays of the Project were rejected by the Commission and by the federal district court in Massachusetts. The only conclusion is that this Motion is a thinly veiled attempt by Riverkeeper to circumvent the word limitations for its merits brief, prevent the Commission from fully focusing on its responsive brief, and/or effectively seek expedited merits review.

Procedural infirmities aside, the emergency plea ignores one-half of the Commission's public interest balance – whether the need for, and benefits from, the Project outweigh potential adverse impacts. In its narrow focus on potential adverse impacts, Riverkeeper fails to address the Commission's findings of substantial benefits from consumer access to new sources of gas in the Northeast.

As to the one-half of the balance Riverkeeper does address, it completely ignores an array of mitigation measures designed to minimize, if not eliminate,

safety concerns and environmental impacts. As explained in the Commission's merits brief, the Commission considered all views (including those of Riverkeeper) in its orders and in its comprehensive environmental impact statement 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 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 five years, courts have denied all 12 emergency requests for stays of Commission natural gas certificate orders (some involving the same issues and/or Riverkeeper) – including one involving this Project:

- *Town of Dedham v. FERC*, 2015 WL 4274884 (D. Mass. July 15, 2015) (dismissing motion for a preliminary injunction against construction of this Project);

- *Catskill Mountainkeeper, et al. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016) (denying emergency motion for stay of pipeline construction);

- *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015) (denying emergency petition for stay of pipeline construction);

- *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (denying stay of tree clearing and construction of a 40-mile pipeline); and

- *Minisink Residents for Envt'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (denying emergency stay of construction based upon alleged safety threats).[1]

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

BACKGROUND

As detailed in the Commission's Brief (FERC Br. 10-19), filed on September 27, 2016, in the orders on review, the Commission issued to Algonquin Gas Transmission, LLC (Algonquin) a conditional certificate of public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing it to build and operate the Algonquin Project. *See Algonquin Gas Transmission, LLC*, Order Issuing Certificate and Approving Abandonment, 150 FERC ¶ 61,163 (Mar. 3, 2015) (Certificate Order), R. 1857, *reh'g denied*, 154 FERC ¶ 61,048 (Jan. 28, 2016) (Rehearing Order), R. 2181.[2]

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[1] The other seven court orders denying stays of FERC infrastructure orders are: *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); *George Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *In re Minisink Residents for Envt'l 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).

[2] "R." refers to a record item. "P" refers to the internal paragraph number within a FERC order.

The challenged orders authorize Algonquin, upon satisfying necessary environmental conditions, to expand capacity at existing facilities and construct limited, new facilities to transport 342,000 dekatherms of natural gas per day over 37.4 mile segments from New York to eight local distributors and two municipalities that serve more than 2.5 million customers in New York, Connecticut, Massachusetts, and Rhode Island. *See* Certificate Order PP 1, 19. The Project is scheduled to be placed in-service in November 2016. *See* FERC Br. 10-11 (describing Project).

The Commission engaged in a lengthy, detailed review of the Project, culminating in a 485-page final environmental impact statement (Environmental Statement). *See* Certificate Order PP 59-134; Envtl. Statement, R. 1767 (Jan. 23, 2015); *see also* FERC Br. 11-15. The orders reflect the Commission's consideration of all factors bearing upon the public interest. *See* Natural Gas Act section 7(e), 15 U.S.C. § 717f(e); *see generally* FERC Br. 15-19.

Riverkeeper participated throughout the Commission's certificate proceeding. Although the Commission Orders and Environmental Statement addressed numerous issues, Riverkeeper raises only three issues in this Motion – the same three issues raised in its merits brief. First, Riverkeeper objects to the Project's proximity to the Indian Point Energy Center in Buchanan, New York (Indian Point). *See* Mot. 4-10; Riverkeeper Br. 41-46. A segment of the

Algonquin Project will be located 0.5 mile south of Algonquin's existing right-of-way – approximately 2,370 feet from Indian Point's protected security barrier and adjacent to, but farther from Indian Point than, two existing pipeline segments. *See* Rehearing Order P 197. The Commission seriously and carefully addressed the potential for safety issues, and ultimately found that the Project, as designed and with appropriate mitigation measures, can be safely sited in the chosen location. *See* Certificate Order PP 106-07; Rehearing Order PP 197-206; Envtl. Statement 4-276 – 4-278; *see generally* FERC Br. 38-43.

Second, Riverkeeper contends that the Commission improperly segmented its environmental review of the Project from two contemplated proposals – Atlantic Bridge and Access Northeast – that were not yet before the Commission, and that the Commission's cumulative impacts analysis of the three projects was insufficient. *See* Mot. 15-18; Riverkeeper Br. 17-40. The Atlantic Bridge and Access Northeast projects – if ultimately proposed and approved – would not be constructed and placed in-service (at the earliest) until 2017 and 2018, respectively – after the Algonquin Project would be complete. *See* Rehearing Order P 71 (citing Certificate Order PP 118-19). The three projects would also largely serve different customers, *see* Rehearing Order P 75, at different locations. *See id.* P 70; *see generally* FERC Br. 46-59. While the Commission considered and rejected

Riverkeeper's segmentation arguments, it nonetheless conducted a cumulative impacts analysis, based on the information available. *See* FERC Br. 44-64.

Third, Riverkeeper claims that the Commission violated its conflict of interest guidelines because a third-party contractor, Natural Resource Group, subsequently began working for Algonquin's parent corporation on developing another project, while still assisting with the Project Environmental Statement. *See* Mot. 18-19; Riverkeeper Br. 47-50. Riverkeeper failed to raise this argument to the Commission – despite the publicly available information on the contractor's roles since October 2014. Nevertheless, the Commission controlled the production of the Environmental Statement and reached its own independent determination authorizing the Project. *See generally* FERC Br. 67-73.

Riverkeeper and other parties have previously sought to stay the Project, without success. On July 15, 2015, a federal district court judge in Massachusetts dismissed a motion for a preliminary injunction by the Town of Dedham, Massachusetts, to stay construction of the Project. *Dedham*, 2015 WL 4274884, at *2. In its Rehearing Order, issued on January 28, 2016, the Commission denied requests to stay Project construction brought by the Environmental and Community Petitioners. *See* Rehearing Order PP 261-71; *see generally* FERC Br. 18-19. Following the Rehearing Order, the Commission denied stay requests based on alleged safety concerns at Indian Point, reiterating its findings that the

Project does not increase safety risks to Indian Point. *See Algonquin Gas Transmission*, 154 FERC ¶ 61,236 (Mar. 25, 2016). Before this Court, Riverkeeper agreed to a non-expedited briefing schedule, and, on July 29, 2016, filed its joint opening merits brief. Riverkeeper filed its opening brief jointly with the Town of Dedham, Massachusetts, which did not join Riverkeeper's Motion.

ARGUMENT

Riverkeeper 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"); *see also 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, Riverkeeper 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). "The courts must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, paying particular regard to the public consequences." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 9 (2008).

I. Riverkeeper Has Not Established 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.* "Bare allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur. The movant must provide proof . . . indicating that the harm is certain to occur in the near future." *Id.* Unsupported assertions are insufficient. *Cuomo v. NRC*, 772 F.2d 972, 978 (D.C. Cir. 1985). 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).

Riverkeeper bases its Motion for stay upon unsubstantiated and speculative allegations of a perceived safety threat and lack of remedy. Neither justifies the Court exercising the extraordinary and drastic remedy of a stay. *See Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (stay should not be granted unless the movant, by a clear showing, carries the burden of persuasion).

A. There Is No Record Evidence Of A Safety Threat

Riverkeeper speculates that the Project's operation might result in adverse safety impacts to Indian Point. Mot. 4-10. But, as discussed in the Commission's

September 27 Brief, the Commission found the Project does not increase risks to Indian Point. *See* FERC Br. 38-43 (detailing the substantial evidence that FERC relied upon). The Commission based this determination primarily upon independent analyses by Entergy (the owner and operator of Indian Point) and the Nuclear Regulatory Commission. *See* Rehearing Order P 198; *see also* Envtl. Statement 4-276 – 4-278. In particular, in conducting its examination, the Nuclear Regulatory Commission proceeded conservatively, not taking into account the mitigation measures required of Algonquin, but rather assuming catastrophic failure. *See* Certificate Order P 107. The NRC considered the potential effects from a number of scenarios on all structures, systems, and components within Indian Point. *See* Rehearing Order P 198. Based on this analysis, the NRC determined that the Algonquin Project would not adversely affect Indian Point's continued safe operation. *See id*.

The Commission is entrusted to resolve disputes between expert witnesses. *See Murray Energy Corp. v. FERC,* 629 F.3d 231, 238 (D.C. Cir. 2011) (deferring to FERC's resolution of factual disputes between expert witnesses in affirming FERC's safety conclusions regarding a pipeline crossing over a coal mine). And here, the Commission reasonably found the NRC to be the expert agency authority and justifiably relied upon its findings in concluding that the Project would not increase safety risks to Indian Point. *See* Rehearing Order P 203 (FERC can

reasonably credit another federal agency's expertise to support its conclusion) (citing *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004)); *see also New York v. NRC*, 824 F.3d 1012, 1019-20 (D.C. Cir. 2016) (deferring to the NRC's "technical decision-making" regarding threats to nuclear power plants).

Riverkeeper reiterates its arguments from its opening brief by again objecting to the Commission relying upon the NRC over its preferred experts. *Compare* Riverkeeper Br. 43-44 *with* Mot. 4-10. But, in reaching its determination that the Project could safely operate near Indian Point, FERC not only evaluated the NRC and Entergy analyses. It also considered the Riverkeeper-preferred Blanch and Kuprewicz reports and objections. *See* Rehearing Order PP 199, 201. Unlike *Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288 (6th Cir. 1987), cited by Riverkeeper (Mot. at 4), where the Sixth Circuit granted a stay based partially upon the State of Ohio's right to participate in administrative proceedings under applicable regulations, *Celebrezze*, 812 F.2d at 291, here Riverkeeper participated in all Commission proceedings, and FERC was responsive to its submissions.

Riverkeeper does not offer any new evidence now. As Riverkeeper recognizes (Mot. 4), Messrs. Blanch and Kuprewicz submitted their expert reports to the Commission in September and November 2014 during the NEPA review process. *See* Mot. Ex. 1 Blanch Dec. ¶ 7; Mot. Ex. 2 Kuprewicz Dec. ¶ 10. Then, prior to the Commission's Rehearing Order, Blanch and Kuprewicz engaged in

extensive subsequent correspondence with the Nuclear Regulatory Commission regarding their objections to the NRC's findings (the same objections they raise in their declarations) – including regarding the Project's flow rates and potential blast radius. The NRC again considered those objections, found them unpersuasive, and affirmed its determination that the Project poses no increased safety risk to Indian Point. *See* Rehearing Order P 201; *see also* Dec. 18, 2015 Blanch Letter to FERC, R. 2160 (containing the NRC's responses to Blanch – including to the NRC's April 27, 2015 email). The Commission then found, after reviewing relevant record evidence, that the NRC reasonably addressed the concerns raised by Blanch and Kuprewicz, Rehearing Order P 201, based on the NRC's "competence and the validity of their basic data and analysis." *Id.* P 203.

Given that the Nuclear Regulatory Commission considered Riverkeeper's objections to the methodology used by the NRC, and found those objections unpersuasive, Riverkeeper cannot demonstrate why its safety concerns are now "imminent." There is no reason why Riverkeeper needed to wait until six days before the Commission's merits brief was due to present, in an "emergency" motion, a factual challenge to the record evidence relied upon by the Commission. Under the Natural Gas Act, this Court is not a *de novo* fact finder, but only reviews Commission orders based upon the agency's record evidence. *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) (court's review under the

Natural Gas Act is limited to the administrative record before FERC at the time of FERC's decision). And here, the record demonstrates that Riverkeeper's objections have been considered, and reasonably rejected, by both the NRC and the Commission. *See Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952, 954 (D.C. Cir. 2005) (record evidence need only support FERC's judgment, not petitioner's).

Likewise, as discussed below, *see infra* at 16-17, Riverkeeper does not face imminent harm from the Commission's decision not to delay review of the Project to await the Atlantic Bridge and Access Northeast proposals. *See* Mot. 11. The Commission adequately assessed the available information for these projects and will assess the cumulative impacts of the three projects again when, and if, the latter two are formally proposed. *See* FERC Br. 44-64; *see also Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 113 n.11 (D.C. Cir. 2014) (affirming FERC assessment of the cumulative impacts of a contemplated future project with the project under review when that future project is applied for). Similarly, this is not the time and place to litigate the Commission's review of the Atlantic Bridge project – when Riverkeeper has intervened in the Atlantic Bridge proceeding, and when the Commission will consider Riverkeeper's objection to the Atlantic Bridge project when it makes a decision on the Atlantic Bridge application. *See* Riverkeeper Mot. to Intervene, No. CP16-9 (Nov. 24, 2015); *see also Tenn. Gas Pipeline Co. v. FERC*, 736 F.2d 747, 749 n.2 (D.C. Cir. 1984)

(Natural Gas Act limits the Court to considering FERC orders on review). Nor does Riverkeeper show that its allegation of a third-party conflict of interest presents an imminent threat – that information was available before the Commission issued its Rehearing Order. *See infra* at 17-18.

In short, there is **no** reason for Riverkeeper's delay in bringing this "emergency" motion. Riverkeeper consented to the briefing schedule governing this matter, *see* Unopposed Motion to Increase Word Limits and Modify Briefing Schedule, Nos. 16-1081 *et al.* (filed June 8, 2016), providing no indication that Riverkeeper desired expedited merits review. This undercuts any claimed threat of "imminen[t]" harm justifying emergency relief. *Wis. Gas Co.*, 758 F.2d at 674.

B. The Commission Has Full Remedial Authority

Further, Riverkeeper's concern (Mot. 12-13) that absent a stay it may be more difficult for the Commission to order its requested remedy is based on the erroneous assumption that neither the Court nor the Commission has the authority, following appellate review on the merits, to terminate Project service and order the removal of Project facilities. *See, e.g.*, *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022 at PP 17, 21 (2012) (noting the Commission's broad remedial authority under the Natural Gas Act in denying stay); *see also United Gas Improvement Co. v. Callery Prop., Inc.*, 382 U.S. 223, 229 (1965) (holding that FERC, like a court, can undo what is wrongfully done by virtue of its order).

Riverkeeper acknowledges the Commission's broad remedial authority. Mot. 13 (citing *Hunt Oil Co. v. FPC*, 334 F.2d 474, 479 (5th Cir. 1964)). The suggestion that remedial action could be "more complicated" (Mot. 13) once the Project is operating not only is unavailing in light of FERC's authority, but also highlights Riverkeeper's delay in bringing its "emergency" Motion.

II. Riverkeeper Cannot Show A Likelihood Of Success On The Merits

Riverkeeper also 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). As explained in the Commission's September 27 Brief (FERC Br. 26-27), FERC action taken pursuant to the National Environmental Policy Act is entitled to a high degree of deference. *See Marsh v. Or. Natural 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*, 828 F.3d at 954-55.

Here, the Commission satisfied its responsibilities under NEPA, and the Commission's decisions are supported by substantial record evidence. *See* FERC Br. 24-64. Riverkeeper disputes the Commission's findings and rehashes its merits brief, clearly preferring a different result. But in light of the Court's deferential

review under both NEPA and the Natural Gas Act, Riverkeeper has not demonstrated that it is likely to succeed on the merits of its claims concerning safety at Indian Point, segmentation, or its belated conflict-of-interest claim.

As discussed, *supra* at 9-13, the Commission reasonably found that the Project does not threaten the safety of Indian Point after assessing all relevant record evidence. *See EarthReports*, 828 F.3d at 957 (affirming FERC's NEPA assessment where FERC relied upon another expert agency but then reached its own conclusion). Riverkeeper likewise repeats its segmentation arguments from its merits brief. *See* Riverkeeper Br. 17-40. But as the Commission established (FERC Br. 44-64), Riverkeeper cannot show improper segmentation because the Commission reasonably followed the approach upheld by this Court in *Minisink*, 762 F.3d at 113. The Commission here reasonably found that the Atlantic Bridge and Access Northeast projects are not connected to the Algonquin Project because the three projects are neither:

- temporally connected – given that Atlantic Bridge and Access Northeast were not proposals before the Commission and each would be constructed at different times; nor

- physically or functionally connected – because each would deliver gas to different locations to serve different customers.

See Rehearing Order PP 46-79; FERC Br. 46-56. So too in *Minisink*, the Court found that the Commission did not improperly segment its review because the "temporal nexus" that existed in *Delaware Riverkeeper Network v. FERC*, 753

F.3d 1304, 1313 (D.C. Cir. 2014) – where all four projects were pending before the Commission at the same time or under construction – was "worlds apart" from the situation in *Minisink*, where the second, complained-of project had not yet been proposed for agency review. *See Minisink*, 762 F.3d at 113 n.11; *see also Del. Riverkeeper*, 753 F.3d at 1313 ("NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed."). Yet here – as in *Minisink* – the Commission nevertheless conducted a cumulative impacts analysis of all three projects based upon the available information. *See* Rehearing Order PP 144-45 (citing Envtl. Statement 5-18); FERC Br. 56-65.

Nor, as explained in the Commission's brief (FERC Br. 65-67), can Riverkeeper show it is likely to succeed on its allegation of a conflict of interest by third-party contractor Natural Resource Group. The Court is unlikely to reach the merits of this issue, as Riverkeeper did not raise this argument to the Commission – and so waived it. *See Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016) (issues not raised on rehearing, under Natural Gas Act, are waived).

In any event, as the Commission's brief explains, the selection of Natural Resource Group as a third-party contractor to work on the Algonquin Project Environment Statement complied with the Commission's guidelines. *See* Letter from FERC Chairman Norman Bay to Senator Elizabeth Warren, Docket No. CP16-9 (July 19, 2016) (detailing how FERC's selection of Natural Resource

Group to assist with the environmental review for Atlantic Bridge complied with all the conflict of interest guidelines)[3]; *see also* FERC Br. 67-73. The alleged conflict arose over a year after FERC contracted with Natural Resource Group and after FERC issued the draft environmental impact statement. *See supra* at 7.

And the Commission exercised control over the scope, content, and development of the Environmental Statement. *See* Draft EIS, Appendix S (listing FERC's Project Manager for the environmental analysis). It reached an independent determination based on its review of the record evidence, properly maintaining the objectivity of the NEPA review process. *See Communities Against Runway Expansion v. Fed. Aviation Admin.*, 355 F.3d 678 (D.C. Cir. 2004) (rejecting third-party conflict of interest argument because the agency maintained control over the EIS and made an independent determination).

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

[3] Available on the Commission's website, at http://elibrary.ferc.gov/idmws/search/results.asp.

holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay"); *Tri County Indus. v. Dist. of Columbia*, 104 F.3d 455, 461 (D.C. Cir. 1997) (same).

As discussed in the Commission's September 27 brief, enjoining the Commission-issued certificate and halting the Project would seriously jeopardize the availability of additional capacity needed to transport natural gas to the Northeast. *See* FERC Br. 15-16. Such an outcome would be not only to the detriment of Algonquin, but also to the eight local distributors and two municipalities that contracted to use the Project to supply natural gas to more than 2.5 million customers.

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 the Commission 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); *accord*

Myersville Citizens for a Rural Cmty., Inc. v. FERC, 783 F.3d 1301, 1307-08 (D.C. Cir. 2015) (FERC determines whether a certificate is in the public interest).

Here, a stay of the Project would not serve the public interest. As discussed in the Commission's brief, the Commission found a strong showing of need in issuing the certificate to provide needed natural gas to high-demand Northeast markets. *See* FERC Br. 15-16. A court-issued stay would frustrate this objective.

Further, Riverkeeper's delay counsels against granting a stay. Project construction commenced, following issuance of FERC's Certificate Order, in June 2015, and the scheduled in-service date has been publicly available throughout construction. *See* FERC Br. 12, 15. Riverkeeper's decision to file its Motion just six days before the Commission's merits brief was due is not only unexplained, but was not preceded by the advance notice required by D.C. Circuit Rule 8(a)(2). Riverkeeper made no effort to contact Commission counsel – nor did it provide an "extraordinary reason" for failing to do so. *See id.* Motions that are procedurally untimely and fail to abide by Circuit rules are not in the public interest.

CONCLUSION

For the foregoing reasons, Riverkeeper's stay Motion should be denied.

Respectfully submitted,

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October 6, 2016

City of Boston Delegation, et al. v. FERC **Docket No. CP14-96**
D.C. Cir. No. 16-1081 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 6th day of October 2016, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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