

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Constitution Pipeline Company, LLC

Docket Nos. CP13-499-000
CP13-499-001
CP13-502-000
CP13-502-001
CP18-5-000
CP18-5-001
CP18-5-002
CP18-5-003

REQUEST FOR REHEARING ON ORDER ON REMAND

Pursuant to Section 19 of the Natural Gas Act¹ and Rules 203 and 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or the “Commission”),² the New York State Department of Environmental Conservation (“NYSDEC” or the “Department”) hereby files this Request for Rehearing of FERC’s *Order on Remand* issued on January 23, 2026 (the “Order on Remand”).³ FERC issued the Order on Remand in response to concerns that FERC had ignored a mandate from the Second Circuit that vacated certain FERC orders related to the approval of a pipeline project sponsored by Constitution Pipeline Company LLC (“Constitution”) and remanded the matter to FERC with express instructions to dismiss the underlying proceedings.⁴ In the Order on Remand, FERC purports to “confirm” that the agency proceedings subject to the Second Circuit’s mandate “are dismissed” while simultaneously agreeing to consider Constitution’s petition to “reissue” and “reaffirm” the orders issued in those

¹ 15 U.S.C. § 717r.

² 18 C.F.R. §§ 385.203 and 385.713.

³ Order on Remand, *Constitution Pipeline Co., et al.* 194 FERC ¶ 61,064 (Jan. 23, 2026).

⁴ *See, e.g.*, Letter from Letitia James to Robert Solomon (Jan. 13, 2026).

proceedings and vacated by the Second Circuit (“Petition”).⁵ Respectfully, FERC is elevating form over substance in that the Order on Remand focuses on FERC’s discretion over how to manage its dockets rather than the directive of the Second Circuit.⁶ The Second Circuit’s mandate vacated the orders under review and directed FERC to dismiss the underlying agency proceedings to ensure that Constitution could not revive its pipeline project in reliance on those orders. Yet Constitution is now asking FERC to “reissue” and “reaffirm” the prior orders—essentially, for FERC to snap its fingers and revive orders that were supposed to have been “completely and irrevocably eradicated”—language the Second Circuit’s order quotes. Inasmuch as Constitution’s Petition seeks relief that is barred by the Second Circuit’s mandate, the only action FERC can take with respect to the Petition is to dismiss it. The Department respectfully requests that FERC grant rehearing on the Order on Remand and, on rehearing, dismiss Constitution’s Petition, without prejudice.

I. PROCEDURAL BACKGROUND

In 2014, FERC issued a certificate of public convenience and necessity to Constitution that conditionally approved construction of an approximately 124-mile-long natural gas pipeline extending from Susquehanna County, Pennsylvania, to Schoharie County, New York, along with various related facilities.⁷ After FERC denied rehearing of the certificate order,⁸ multiple community and environmental groups petitioned the Second Circuit for review of the certificate order and rehearing denial.⁹ Although that case was fully briefed and ready for argument in

⁵ Order on Remand at 4-5.

⁶ *Id.*

⁷ See Order Issuing Certificates and Approving Abandonment, *Constitution Pipeline Co., LLC*, Docket No. CP13-499, 149 FERC ¶ 61,199, at ¶6 (Dec. 2, 2014), *reh’g denied* 154 FERC ¶ 61,046 (2016), *vacated by Order, New York State Dep’t of Envi’l Conservation v. FERC*, Case No. 19-4338, Doc. No. Doc. No.166 (2d Cir. November 18, 2021).

⁸ 154 FERC ¶ 61,046.

⁹ See Petition for Review, *Catskill Mountainkeeper, Inc., et al. v. FERC*, 2d Cir. No. 16-345, Doc. No. 1 (Feb. 5, 2016); Petition for Review, *Stop the Pipeline v. FERC*, 2d Cir. No. 16-361, Doc. No. 1 (Feb. 5, 2016). The two proceedings

October 2017,¹⁰ at FERC’s request, the Second Circuit repeatedly deferred oral argument pending the outcome of litigation and administrative proceedings regarding the Department’s decision to deny Constitution’s application for a water-quality certification.¹¹ In those proceedings, the Second Circuit upheld the Department’s denial on the merits, concluding that the record “amply show[ed]” that “Constitution persistently refused to provide information” relevant to its plans on how to cross “the vast majority of the 251 New York waterbodies to be crossed by the pipeline.”¹² However, the Second Circuit concluded that it lacked jurisdiction to determine whether the Department had “waived” its authority to deny a water-quality certification based on Constitution’s decision to twice withdraw and resubmit its application for a water-quality certification.¹³

Rather than providing the Department with the missing information necessary to make a determination on the request for a water quality certificate, Constitution filed a petition with FERC on a new docket seeking a declaratory order that the Department had waived its water-quality certification authority.¹⁴ FERC initially denied that petition but, after Constitution sought judicial review of that denial, FERC asked the D.C. Circuit to remand the matter to FERC for reconsideration based on then-new case law.¹⁵ Upon remand, FERC reversed course, concluding

were consolidated, fully briefed, and scheduled for oral argument in October 2017. *See* Case Calendaring Notice, *Catskill Mountainkeeper, Inc., et al. v. FERC*, Case No. 16-345, Doc. No.258 (2d Cir. June 12, 2017).

¹⁰ *See* Case Calendaring Notice, *Catskill Mountainkeeper, Inc., et al. v. FERC*, Case No. 16-345, Doc. No.258 (2d Cir. June 12, 2017).

¹¹ *See* Orders, *id.*, Doc. Nos. 275, 293, 314.

¹² *See* *Constitution Pipeline Co. v. New York State Dep’t of Evnt’l Conservation*, 868 F.3d 87, 103 (2d Cir. 2017), *cert. denied* 584 U.S. 962 (2018).

¹³ *Id.* at 99-100.

¹⁴ *See* Order on Petition for Declaratory Order, *Constitution Pipeline Co., LLC*, Docket No. CP18-5, 162 FERC ¶ 61,014, at ¶1 (Jan. 11, 2018), *reh’g denied* 164 FERC ¶ 61,029 (July 19, 2018), *pet. for review remanded*, Order, *Constitution Pipeline Co., LLC v. FERC*, Docket No. 18-1251 (D.C. Cir. Feb. 28, 2019).

¹⁵ *See* Order, *id.*, Doc. No.1775259.

that the Department had waived its authority to issue or deny a water-quality certification.¹⁶ The Department, as well as the parties that had previously challenged FERC's certificate order, petitioned the Second Circuit for review of FERC's waiver order.¹⁷

Thereafter, Constitution made various public statements indicating that it did not intend to construct the pipeline project and therefore, allowed the certificate of public convenience and necessity to expire by its own terms.¹⁸ FERC then moved to dismiss as moot the proceedings before the Second Circuit challenging its certificate and waiver orders.¹⁹ According to FERC, the matters were moot because the pipeline "is not being constructed;" Constitution had "concluded regulatory proceedings relating to the cancelled pipeline;" and FERC's "deadline for completion of the project" had expired with "no requests for an extension pending in the agency docket."²⁰

The Department and environmental groups did not oppose FERC's motion to dismiss, with the express understanding that any attempt to revive the pipeline project would require Constitution to submit new applications for a certificate of public convenience and necessity and water quality certification, rather than rely upon the challenged orders.²¹ Stop the Pipeline, a community organization, opposed FERC's motion to dismiss, expressing concern that FERC's "statement that the Certificate Order has lapsed does not mean it cannot be revived."²² Stop the

¹⁶ See Order on Voluntary Remand, *Constitution Pipeline Co., LLC*, Docket No. CP18-5, 168 FERC ¶ 61,129, at ¶1 (Aug. 28, 2019), *reh'g denied* 169 FERC ¶ 61,199 (Dec. 12, 2019), *vacated by Order*, Case No. 19-4338, Doc. No.161 (2d Cir. November 18, 2021).

¹⁷ See Pet. for Review, *New York State Dep't of Env't'l Conservation v. FERC*, 2d Cir. No. 19-4338 (Dec. 30, 2019); *Stop the Pipeline v. FERC*, 2d Cir. No. 20-158; *Catskill Mountainkeeper, et al. v. FERC*, 2d Cir. No. 20-208.

¹⁸ See 165 FERC ¶ 61,091 (2018).

¹⁹ See Mot. to Dismiss, 2d Cir. No. 19-4338, Doc. No. 111 (Jan. 25, 2021); Mot. to Dismiss, 2d Cir. No. 16-345, Doc.#414 (Jan. 26, 2021).

²⁰ *Id.* at 5.

²¹ Department's Response to FERC's Motion to Dismiss, *NYSDEC v. FERC*, Case No. 19-4338, Doc. No.120, at 4 (Feb. 1, 2021); *Id.*, Doc. No. 128, at 1 (Feb. 4, 2021).

²² *Id.*, Doc. No. 126, at 16 (Feb. 4, 2021).

Pipeline thus cross-moved to vacate the certificate and waiver orders.²³ In response, FERC opposed that relief, instead offering “that the construction authority granted by the Certificate Order has lapsed” and that upon “return of jurisdiction to the agency, [FERC] expects to act promptly to address the vacatur issue.”²⁴

Notwithstanding FERC’s assurance, the Second Circuit ordered supplemental briefing on several targeted issues relating to whether the proceedings were moot, and, if so, the appropriate disposition of the proceedings.²⁵ In their supplemental briefs, the Department, the environmental groups, Stop the Pipeline, and Constitution all urged the Court to vacate the challenged orders, rather than remand to FERC for vacatur.²⁶ Petitioners expressed concern that if the Court did not vacate the orders, Constitution might later seek to rely on those orders to revive the project.²⁷ Only FERC opposed having the Second Circuit vacate the challenged orders, asking the Court to remand the matter to the agency, after which it would vacate the lapsed certificate of public convenience and necessity, determine the appropriate action with respect to the waiver orders, and “terminate” both proceedings.²⁸ Constitution also conceded that because the certificate of public convenience

²³ See *id.* Doc. No. 126.

²⁴ FERC’s Reply in Supp. of Mot. to Dismiss, *id.* Doc. No.136, at 3 (Feb. 11, 2021).

²⁵ See Order, Case. No. 19-4338, Doc. No.146 (2d Cir. April 26, 2021). Specifically, this Court asked the parties to brief, among other things, “[i]f this Court holds that the present proceedings are moot, whether vacatur of the underlying orders would be appropriate and, if so, whether this Court should vacate them or remand to FERC for that purpose.” *Id.* at 2. The Court also asked whether FERC, in asserting that it “expect[ed] to act promptly to address the vacatur issue,” believed that “any disposition other than vacatur is possible and, if so, what those possible dispositions are.” *Id.* Finally, the Court directed Constitution to address “whether the project can be revived under the authority of the current underlying orders, and whether they oppose vacatur of the underlying orders.” *Id.*

²⁶ See Department Letter Br., Case No. 19-4338, Doc. No. 149, at 9; Stop the Pipeline Letter Br., Case No. 19-4338, Doc. No. 150, at 4; Constitution Letter Br., Case No. 16-345, Doc. No. 468, at 2-3; Catskill Mountainkeeper Letter Br., Case No. 19-4338, Doc. No. 151, at 4-5. The Department was not a party to the proceedings challenging the certificate order, and Constitution was not a party to the proceedings challenging the waiver order. Thus, the Department and Constitution took no position on vacatur of the orders that were subject to review in the proceedings they were not parties to.

²⁷ See Department Letter Br., Case No. 19-4338, Doc. No. 149, at 11-12; Catskill Mountainkeeper Letter Br., Case No. 19-4338, Doc. No. 151, at 1; Stop the Pipeline Letter Br., Case No. 19-4338, Doc. No. 150, at 4-5.

²⁸ FERC Letter Br., Case No. 19-4338, Doc. No.148, at 2-3 (May 17, 2021).

and necessity had expired, Constitution could not “revive its pipeline project under that authorization.”²⁹

On November 18, 2021, the Second Circuit granted FERC’s motion to dismiss the proceedings as moot and granted Stop the Pipeline’s motion to vacate the challenged orders.³⁰ The Court remanded the matter to FERC “with instructions to dismiss the agency proceedings.”³¹ The Court quoted its own precedent, holding that ““voluntary cessation of allegedly illegal conduct”” only moots a case if ““(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.””³² Additionally, the Court quoted precedent from the D.C. Circuit holding that vacatur of the challenged orders is appropriate when the proceedings are ““moot for a reason that deprives the agency action of all operative effect.””³³ After the time to seek rehearing or certiorari expired, the Court issued the mandate on January 10, 2022.³⁴

Despite the Court’s unambiguous instruction for FERC to “dismiss the agency proceedings” relating to Constitution’s pipeline project, and notwithstanding FERC’s representations to the Court that it would act quickly to “terminate” those proceedings on remand, FERC did not act on the Court’s remand over the ensuing years. On December 19, 2025, Constitution filed the Petition on the existing dockets seeking “reissuance” of the certificate order and “reaffirmance” of the waiver order, notwithstanding Constitution’s prior assurance to the Second Circuit that it could not “revive its pipeline project” under the prior authorizations, and notwithstanding the Second

²⁹ Case No. 16-345, Doc. No. 468, at 2 (Nov. 12, 2021); *accord id.* at 6.

³⁰ See Order, Case No. 16-345, Doc. No. 479, Case No. 19-4338, Doc.#161 (2d Cir. November 18, 2021).

³¹ *Id.* at 2.

³² *Id.* (quoting *Lamar Advert. Of Penn, LLC v. Town of Orchard Park, NY*, 356 F.3d 365, 375 (2d Cir. 2004)).

³³ *Id.* (quoting *Radiofone, Inc. v. Fed. Commc’ns Comm’n*, 759 F.2d 936, 940-41 (D.C. Cir. 1985)).

³⁴ See Mandate, Case No. 16-365, Doc.#484, Case No. 19-4338, Doc.#168 (2d Cir. Jan. 10, 2022).

Circuit's explanation that a challenge to voluntarily ceased administrative action becomes moot only when the action has been irrevocably eradicated.³⁵ Rather than immediately reject Constitution's Petition and dismiss the administrative proceedings, as directed by the Court's January 2022 mandate (and as FERC itself assured to do upon remand), FERC issued an official "Notice of Petition" soliciting comments, protests, and motions to intervene in response to Constitution's Petition.³⁶ Concerned that FERC appeared to have ignored the Court's mandate and was proceeding in excess of its jurisdiction, the New York State Office of the Attorney General, on behalf of the Department, sent a letter to FERC requesting that, consistent with this Court's January 2022 mandate, it dismiss the administrative proceedings by January 23, 2026.³⁷ On that date, FERC issued its Order on Remand, concluding that Constitution appropriately filed its Petition on the existing dockets (albeit, according to FERC, on a new sub-docket) and that FERC possessed discretion to review Constitution's Petition on those dockets, notwithstanding the Second Circuit's mandate.³⁸

II. STATEMENT OF ISSUES

1. In failing to dismiss Constitution's Petition and issuing the Order on Remand, FERC erred by violating the mandate rule, which prohibits re-litigation of issues decided by an appellate court. *Brown v. City of Syracuse*, 673 F.3d 141, 147 (2d Cir. 2012); *accord In re Coudert Brothers LLP*, 809 F.3d 94, 99 (2d Cir. 2015); *Yick Man Mui v. United States*, 614 F.3d 50, 54 (2d Cir. 2010).

³⁵ See Petition of Constitution Pipeline Co., LLC for Reissuance of Certificate and Reaffirmance of Waiver Determination, Lusignan Dec. (Dec. 19, 2025).

³⁶ See Notice of Petition.

³⁷ See Letter from Letitia James to Robert Solomon (Jan. 13, 2026).

³⁸ Order on Remand, at 4-5.

III. ARGUMENT

1. FERC's Order on Remand Violates the Mandate Rule.

FERC, by concluding it could consider Constitution's Petition for "reissuance" and "reaffirmance" of the orders vacated by the Second Circuit, is acting in contravention of the Second Circuit's mandate and in excess of its jurisdiction. The Second Circuit's mandate prevents Constitution from reviving its pipeline project in reliance on the 2014 certificate order and the 2019 waiver order. Constitution's Petition seeks just such a revival of the project through "reissuance" of the order granting the certificate and "reaffirmance" of the waiver order.

Federal courts have "consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court."³⁹ This rule "is equally applicable to the duty of an administrative agency . . . to comply with the mandate issued by a reviewing court."⁴⁰ The mandate rule prevents re-litigation "not only of matters expressly decided by the appellate court, but also precludes re-litigation of issues impliedly resolved by the appellate court's mandate."⁴¹ Thus, a lower court or administrative agency may not take action that violates "either the express terms or the spirit of the mandate."⁴²

The parties' submissions to the Second Circuit following Constitution's supposed "cancellation" of the pipeline project and the Court's subsequent granting of Stop the Pipeline's motion to vacate the challenged orders make clear that the Court's mandate was intended to

³⁹ *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

⁴⁰ *In re. Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) (applying rule to constrain authority of federal Trademark Trial and Appeal Board on remand); *accord Office of Consumer Counsel, State of Ohio v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) (same as to FERC); *Silverman v. N.L.R.B.*, 543 F.2d 428, 430 (2d Cir. 1976) (same as to National Labor Relations Board); *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25, 38 (1904) (a court's mandate is "a final and indisputable basis of action" between the litigant and the agency).

⁴¹ *Brown v. City of Syracuse*, 673 F.3d 141, 147 (2d Cir. 2012); *accord In re Coudert Brothers LLP*, 809 F.3d 94, 99 (2d Cir. 2015); *Yick Man Mui v. United States*, 614 F.3d 50, 54 (2d Cir. 2010).

⁴² *In re Ivan F. Boesky Securities Litig.*, 957 F.2d 65, 69 (2d Cir. 1992); *accord Puricelli v. Argentina*, 797 F.3d 213, 218 (2d Cir. 2015); *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001).

prevent Constitution from relying on the challenged orders in the future to “revive” said project. FERC moved to dismiss those proceedings as moot, representing that they “relate to Commission orders concerning the defunct Constitution pipeline project . . . [and b]ecause the pipeline developer has cancelled the project, and because the Commission’s authorization for the pipeline lapsed on December 2, 2020, all pending appeals arising from Commission orders addressing the Constitution pipeline project are moot.”⁴³ As previously noted, the Department and other petitioners did not oppose FERC’s motion to dismiss,⁴⁴ with Petitioner Stop the Pipeline presciently predicting that Constitution would someday seek to revive the pipeline project in reliance on the orders.⁴⁵

In response to the parties’ concerns that the project could someday be revived, the Second Circuit ordered further briefing on issues directly relevant to the parties’ concerns, including pointedly asking FERC whether it believed that “any disposition other than vacatur is possible” and asking Constitution whether “the project can be revived under the authority of the current underlying orders.”⁴⁶ All petitioners asked the Court to vacate the orders, expressing concern that otherwise the project might later be revived.⁴⁷ Constitution itself, while assuring the Court that “Constitution cannot revive its pipeline project” under FERC’s prior authorizations, also asked the Court to vacate the orders to avoid possible future litigation.⁴⁸ Even FERC “agree[d] that vacatur of the (now lapsed) certificate order” was “appropriate,” but asked the Court to “remand to FERC

⁴³ See Mot. to Dismiss, 2d Cir. No. 19-4338, Doc.#111 (Jan. 25, 2021); Mot. to Dismiss, 2d Cir. No. 16-345, Doc.#414 (Jan. 26, 2021).

⁴⁴ See Case No. 19-4338, Doc.#120, at 4 (Feb. 1, 2021); *Id.*, Doc.#128, at 16 (Feb. 4, 2021).

⁴⁵ See *id.* Doc.#126.

⁴⁶ Order, Case. No. 19-4338, Doc.#146 (2d Cir. April 26, 2021).

⁴⁷ See Department Letter Br., Case No. 19-4338, Doc#149, at 11-12; Catskill Mountainkeeper Letter Br., Case No. 19-4338, Doc#151, at 1; Stop the Pipeline Letter Br., Case No. 19-4338, Doc#150, at 4-5.

⁴⁸ See Case No. 16-345, Doc#468, at 2 (Nov. 12, 2021).

for that purpose.”⁴⁹ FERC opposed vacatur of the waiver order, but asked the Court to remand the matter to the agency “for appropriate action,” after which FERC “would determine whether vacatur, or termination of the agency proceedings without vacatur, is appropriate.”⁵⁰

Ultimately, the Court vacated the orders itself and remanded to FERC with the instruction to “dismiss the agency proceedings.”⁵¹ The Court cited caselaw stating that the voluntary cessation of an unlawful activity (such as Constitution’s decision to abandon the pipeline project) only moots an appeal if “events have completely and irrevocably eradicated the effects of the alleged violation.”⁵² And the Court found “vacatur appropriate” because the challenged orders were “moot for a reason that deprives the agency action of all operative effect.”⁵³ In light of the parties’ briefing, the Second Circuit’s clear mandate is that Constitution’s pipeline project cannot be revived in reliance of the 2014 certificate order and the 2019 waiver order—and that any effect of the 2019 waiver order had been irrevocably eradicated. Indeed, if Constitution could revive the pipeline project in reliance of those orders (as it seeks to do here), the Second Circuit litigation would not have been moot because the FERC orders (1) would still have had operative effect that could adversely affect the parties’ rights, and (2) could not have been said to have been eradicated at all, let alone irrevocably so, as required for a holding of mootness. The Department would have taken a different position before the Court with respect to FERC’s motion to dismiss.

Any further action on Constitution’s Petition—except dismissal—is foreclosed by the Second Circuit’s mandate.⁵⁴ Because the only proper result—dismissal of the Petition—is

⁴⁹ FERC Letter Br., Case No. 19-4338, Doc.#148, at 2 (May 17, 2021).

⁵⁰ *Id.*; *accord id.* at 3.

⁵¹ Mandate, at 1-2.

⁵² Mandate at 2, quoting *Lamar Advert. Of Penn, LLC v. Town of Orchard Park, NY*, 356 F.3d 365, 375 (2d Cir. 2004).

⁵³ Mandate at 2, quoting *Radiofone, Inc. v. Fed. Comm’n Comm’n*, 759 F.2d 936, 940-41 (D.C. Cir. 1985).

⁵⁴ See *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) (where Court ordered FERC to vacate portions of order, FERC lacked authority to “reconsider and reinstate” the order); *Stamper v. Baskerville*, 724 F.2d

“preordained” by the Second Circuit’s 2022 mandate, FERC must order that dismissal now, rather than requiring the Department and the other parties to engage in yet another round of wasteful administrative review over Constitution’s Petition.⁵⁵ Indeed, the U.S. Supreme Court explained in *General Atomic Co. v. Felter* that a litigant who has obtained a judgment in its favor “after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment.”⁵⁶

Accordingly, FERC must grant rehearing on the Order on Remand and dismiss Constitution’s Petition. If Constitution continues to pursue its pipeline project, the relief the Department requests would be without prejudice to Constitution submitting a new application for a certificate of public convenience and necessity pursuant to Natural Gas Act § 7, and a new application for water-quality certification pursuant to Clean Water Act § 401.

IV. CONCLUSION

For the foregoing reasons, the Commission must grant this Request for Rehearing and dismiss the Petition in conformity with the directives of the Second Circuit.

Dated: Albany, New York
February 20, 2026

Respectfully submitted,



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1106, 1108 (4th Cir. 1984) (an order remanding for dismissal of proceeding forecloses “any action by the lower court other than immediate and complete dismissal”).

⁵⁵ See *Ramon-Sepulveda*, 824 F.2d at 751.

⁵⁶ 436 U.S. 493, 397 (1978).

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