UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC Iroquois Gas Transmission System, L.P.	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
OF STOP THE PIPELINE

Pursuant to Section 717r(a) of the Natural Gas Act (NGA),[1] and Rule 713 of the Federal Energy Regulatory Commission ("FERC" or the "Commission") Rules of Practice and Procedure,[2] Stop the Pipeline ("STP") hereby requests rehearing of the Commission's January 23, 2026 Order on Remand ("Remand Order").[3] STP seeks rehearing and rescission of the portions of the Remand Order[4] where the Commission states that FERC will continue to review the December 19, 2025 Petition ("2025 Petition")[5] filed by the Constitution Pipeline Company,

[1] 15 U.S.C. § 717r(a) (2024).

[2] 18 C.F.R. § 385.713 (2025).

[3] *Constitution Pipeline Co., LLC,* 194 FERC ¶ 61,064 (2026) ("Remand Order").

[4] Remand Order at P 10 ("The 2025 Petition is currently pending, and the Commission is not in any way pre-judging the merits of the 2025 Petition in this order"); Remand Order at P 13 ("In any case, nothing in our enabling statutes, our rules, our precedent or the Second Circuit's mandate bars parties from making filings on 'dismissed,' 'terminated,' or 'defunct' dockets. Nor is there any authority preventing the Commission from taking action on such filings").

[5] *Constitution Pipeline Co., LLC*, Docket Nos. CP13-499-006 & CP18-5-005, Petition for Reissuance of Certificate Authority and Reaffirmance of Waiver Determination (Dec. 19, 2025), Accession No. 20251219-5626 ("2025 Petition").

LLC ("Company") without "pre-judging [its] merits[.]"[6] As explained below, this course of action is contrary to law,[7] in violation of the November 18, 2021 Order ("Vacatur Order")[8] issued by the United States Court of Appeals for the Second Circuit ("Second Circuit"), and a Due Process violation.[9] As such, rather than continuing to review the faulty 2025 Petition based on now dismissed prior proceedings and vacated Orders, FERC should reject the 2025 Petition and order the Company to submit a new, complete application for a certificate of public convenience and necessity ("Certificate") as required by the NGA.

I. STATEMENT OF RELEVANT FACTS

The Company filed an application on June 13, 2013 for a Certificate to construct a 124-mile-long pipeline in Pennsylvania and New York ("Application").[10] Approximately 100 miles of the proposed pipeline would be located in New York State.[11] The Iroquois Gas Transmission System, L.P. ("Iroquois") filed a concurrent application with the Commission to connect the pipeline to two existing interstate gas pipelines in Wright, New York, where the proposed pipeline would terminate.[12] The Commission granted a Certificate to the Company and Iroquois

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[6] Remand Order at PP 10, 11.

[7] 15 U.S.C. §§ 717f(d), 717r(b) (2024); 18 C.F.R. §§ 157.5 – 157.14 (2025); 5 U.S.C. § 706 (2024).

[8] *Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir. Nov. 18, 2021), 16-361 ECF No. 409; *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Nov. 18, 2021), 20-158 ECF No. 159. ("Vacatur Order").

[9] 5 U.S.C. § 706 (2024); U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[10] *Constitution Pipeline Company, LLC,* Docket Nos. CP13-499-000, *et al*. Application for Certificate of Public Convenience and Necessity (June 13, 2013) Accession No. 20130613-5078 ("Application"). Constitution's 2013 application was assigned docket number CP13-499.

[11] *Id.*

[12] *Iroquois Gas Transmission System, L.P.*, Docket Nos. CP13-502, *et al.* Application for Certificate of Public Convenience and Necessity (June 13, 2013) Accession No. 20130613-5142. Iroquois' proposed interconnection was assigned docket number CP13-502.

on December 2, 2014 ("Certificate Order").[13] STP requested rehearing and after waiting a year for the Commission to issue an order on rehearing, filed a Petition for Review in the Second Circuit.[14] The issues raised were fully briefed by October 21, 2016, but oral arguments were never held.[15] Many of them remain relevant to the 2025 Petition (and are hereby incorporated by reference) because the Second Circuit vacated the Certificate and Waiver Orders on the assumption that the cases were moot.[16]

The Company first applied for a Clean Water Act Section 401 water quality certification ("WQC") from the New York State Department of Environmental Quality (the "Department" or "NYSDEC") on August 22, 2013.[17] On April 22, 2016, NYSDEC denied the Company's application without prejudice.[18] Rather than curing the deficiencies within its application, the Company petitioned the Second Circuit for judicial review.[19] The Second Circuit held that NYSDEC had the right to deny the Company's application.[20] In its Petition to the Second

[13] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014), *reh'g denied*, 154 FERC ¶ 61,046 (2016), *vacated sub nom. New York State Dep't of Env't. Conservation v. FERC*, No. 19-4338 (2d Cir. Nov. 18, 2021) ("Certificate Order").

[14] *Constitution Pipeline Co., LLC*, Docket No. CP13-499-001, Stop the Pipeline's Notice of Petition for Review (Feb. 05, 2016), Accession No. 20160205-5057.

[15] *See Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir.), 16-361 ECF Nos. 171, 172, 177, 179, 219-352.

[16] *See* Vacatur Order.

[17] 2025 Petition at 8. The Department issued a Notice of Incomplete Application on September 12, 2013, in response to the Company's first application; the Company then withdrew and resubmitted its WQC application in both 2014 and 2015. *Id.*

[18] *Constitution Pipeline Co., LLC*, Docket Nos. CP18-5 *et al.* & CP13-499 *et al.,* NYSDEC Letter Denying Section 401 Certification at Ex. B, (Jan. 28, 2026) Accession No. 20260128-5062.

[19] *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 87 (2d Cir. 2017), *reh'g denied, cert. denied*, 138 S. Ct. 1697 (2018).

[20] *Id.* at 91, 103. ("Constitution persistently refused to provide information as to possible alternative routes . . . or site-by-site information as to the feasibility of trenchless crossing methods for streams less than 30 feet wide -- *i.e*., for the vast majority of the 251 New York waterbodies to be crossed by its pipeline -- and that it provided geotechnical data for only two of the waterbodies.").

Circuit, the Company also claimed NYSDEC had waived its right to deny the WQC.[21] STP intervened and argued that the Court did not have the requisite jurisdiction to hear the issue of the waiver.[22] The Second Circuit agreed, dismissing the waiver claim for lack of jurisdiction and stating that "[s]uch a failure-to-act claim is one over which the District of Columbia Circuit would have 'exclusive' jurisdiction, 15 U.S.C § 717r(d)(2)."[23]

The Company ignored the Second Circuit's holding and, less than two months later, filed a petition with the Commission requesting a declaratory order that that NYSDEC had waived its right to deny the WQC.[24] ("2017 Petition") The Commission denied the petition on January 11, 2018 ("Waiver Order I"), and subsequently denied the Company's request for a rehearing on July 19, 2018 ("Rehearing Order I").[25]

The Company petitioned the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") for review of Waiver Order I and Rehearing Order I on September 14, 2018.[26] On October 22, 2018, the Commission moved to place the case in abeyance pending the outcome of *Hoopa Valley Tribe v. FERC* ("*Hoopa Valley*"),[27] a case that involved the re-

[21] *Id.* at 91.

[22] *See id.* at 90, 98.

[23] *Id.* at 100, 103.

[24] *Constitution Pipeline Co, LLC,* Docket No. CP18-5-000, Petition for Declaratory Order (Oct. 11, 2017), Accession No. 20171011-5210 ("2017 Petition").

[25] *Constitution Pipeline Co., LLC,* 162 FERC ¶ 61,014 (2018) ("Waiver Order I"); *see also Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (2018) ("Rehearing Order I"). The Commission's Orders were subsequently vacated. *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014), *reh'g denied*, 154 FERC ¶ 61,046 (2016), *vacated sub nom. New York State Dep't of Env't. Conservation v. FERC*, No. 19-4338 (2d Cir. Nov. 18, 2021).

[26] *Constitution Pipeline Co., LLC v. FERC*, Petition for Review, No. 18-1251 (D.C. Cir. Sept. 14, 2018).

[27] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).

licensing of hydroelectric facilities under the Federal Power Act.[28] The D.C. Circuit granted the motion on November 5, 2018.[29] It remanded the case to FERC on February 28, 2019, after *Hoopa Valley* was decided.[30]

The Commission requested additional briefing and then issued an order declaring that the Department had waived its right to deny the 401 WQC ("Waiver Order II").[31] In its request for rehearing, STP objected to the Commission's (1) broad interpretation of Hoopa Valley; (2) sudden and inequitable reversal of its long-held policy that allowed the withdrawal and resubmission of a water quality certification; and (3) retroactive application of its broad interpretation of Hoopa Valley to a case where it had already been held that the Company persistently failed to provide the required information to NYSDEC.[32] STP also argued that FERC lacked jurisdiction to issue the declaratory order because the Second Circuit had already held that the D.C. Circuit has exclusive jurisdiction over the Company's "failure-to-act claim."[33] FERC denied STP's request for rehearing on December 12, 2019 ("Rehearing Order II").[34] STP petitioned the Second Circuit for review of Waiver Order II and Rehearing Order II on January 10, 2020, and its petition was subsequently consolidated.[35]

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[28] *Constitution Pipeline Co., LLC v. FERC*, Mot. to Hold Case in Abeyance, No. 18-1251 (D.C. Cir. Oct. 22, 2018), ECF No. 1756389-2.

[29] *Constitution Pipeline Co., LLC v. FERC*, Order Granting Mot. to Hold Case in Abeyance, No. 18-1251 (D.C. Cir. Nov. 5, 2018), ECF. No. 1758585.

[30] *Constitution Pipeline Co., LLC v. FERC*, No. 18-1251 (D.C. Cir. Feb. 28, 2018), ECF No. 1775259.

[31] *Constitution Pipeline Co., LLC*, 168 FERC ¶ 61,129 at P 1 (2019) ("Waiver Order II").

[32] *Constitution Pipeline Co., LLC*, Docket No. CP18-5, Stop the Pipeline's Request for Rehearing (Sept. 27, 2019), Accession No. 20190927-5141.

[33] *Id.*

[34] *Constitution Pipeline Co., LLC*, 169 FERC ¶ 61,199 at P 3 (2019) ("Rehearing Order II").

[35] *N.Y. State Dep't of Envtl. Conservation v. Fed. Energy Regul. Comm'n*, Nos. 19-4338, 20-158, and 20-208.

On February 24, 2020, the Company publicly announced that it no longer intended to pursue the Constitution Pipeline project ("Project").[36] On April 13, 2020, the Company sent a letter to the Department advising: "because of our decision not to proceed with the Project, Constitution will not act on FERC's waiver determination."[37] On November 24, 2020, the Company again confirmed its position that it had "determined not to move forward with th[e] Project," in the status report with the Commission.[38] The construction deadline passed on December 2, 2020 and as a result, the Certificate Order expired and Commission's authorization of the project lapsed.[39]

Consequently, FERC moved to dismiss all the pending cases in the Second Circuit concerning the Certificate and Waiver Orders.[40] STP filed two case-specific cross motions for dismissal and vacatur.[41] (Ex. A; Ex. B). The Second Circuit granted FERC's motions to dismiss for reasons of mootness and also granted STP's motions for vacatur.[42]

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[36] *See* Remand Order at P 6.

[37] *See* Mot. to Dismiss at 3*, Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir. Jan. 26, 2021), 16-361 ECF No. 352; *see also* Mot. to Dismiss at 3, *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Jan. 25, 2021), 20-158 ECF No. 107.

[38] *Constitution Pipeline Co., LLC*, Docket Nos. CP13-499-000, CP13-502-000 & CP18-5-000, Project Status Update and Final Monitoring Report (Nov. 24, 2020), Accession No. 20201124-5181 ("Project Status Update").

[39] *See Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081 at P 24 (2018); *see also* Remand Order at PP 7–8.

[40] Mot. to Dismiss*, Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir. Jan. 26, 2021), 16-361 ECF No. 352; Mot. to Dismiss, *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Jan. 25, 2021), 20-158 ECF No. 107

[41] Stop the Pipeline's Opposition to Resp't [FERC's] Mot. to Dismiss for Mootness and in Support of Stop the Pipeline's Mot. for Vacatur of the Orders, *Catskill Mountainkeeper, Inc., et al., v. Fed Energy Regul. Comm'n*, 16-345 (2d. Cir. Feb. 5, 2021), 16-361 ECF No. 357 (attached as Exhibit A); *see also* Stop the Pipeline's Opposition to Resp't [FERC's] Mot. to Dismiss for Mootness and in Support of Stop the Pipeline's Mot. For Vacatur of the Orders, *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Feb. 4, 2021), 20-158, ECF No. 122 (attached as Exhibit B).

[42] *See* Vacatur Order.

On December 19, 2025, the Company filed a Petition purporting to seek "Reissuance of Certificate and Reaffirmance of Waiver Determination."[43] Shortly thereafter, NYSDEC, STP, and others submitted letters to FERC requesting correction of what was presumed to be a ministerial error, namely allowing the Company to file its 2025 Petition, and further urged the Commission to dismiss the proceedings consistent with the Second Circuit's vacatur and dismissal instructions.[44]

On January 23, 2026, FERC issued the Remand Order dismissing the agency proceedings that were the subject of the Second Circuit's mandate.[45] After acknowledging the Second Circuit's vacatur of the Certificate and Waiver Orders, as well as its remand instructions, the Commission stated "[f]or clarity and avoidance of doubt, we now confirm that the proceedings referenced in the caption of this order are dismissed."[46] However, in the same Remand Order, it noted that "[t]he 2025 Petition is currently pending, and the Commission is not in any way pre-judging the merits of the 2025 Petition in this order."[47] The Commission confirmed that the Company's 2025 Petition was noticed on a new subdocket of the original application and claimed that "our consideration of Constitution's 2025 petition is unaffected by docket numbering."[48] Moreover, the Commission found that "nothing in our enabling statutes, our rules,

[43] 2025 Petition at 1.

[44] *Constitution Pipeline Co., LLC*, Docket Nos. CP13-499-000, CP13-502-000 & CP18-5-004, Request of Office of the New York State Attorney General (Jan. 13, 2026) Accession No. 20260114-4000 ("NY OAG Letter"); *Constitution Pipeline Co., LLC*, Docket Nos. CP13-499-000, CP13-499-006, CP13-502-000, CP18-5-000 & CP18-5-004, Comments of Stop the Pipeline (Jan. 15, 2026) Accession No. 20260115-5008 ("STP Letter"); *Constitution Pipeline Co., LLC*, Docket Nos. CP13-499-000, CP13-502-000 & CP18-5-004, Comments of Catskill Mountainkeeper, Inc. et al. (Jan. 16, 2026) Accession No. 20260116-5126 ("Catskill Letter").

[45] Remand Order at P 11, ordering sentence on page 5.

[46] *Id*.

[47] *Id.* at P 10.

[48] *Id.* at P 12.

our precedent, or the Second Circuit's mandate bars parties from making filings on 'dismissed,' 'terminated,' or 'defunct' dockets. Nor is there any authority preventing the Commission from taking action on such filings."[49] On January 29, 2026, STP filed its protest of the Company's 2025 Petition.[50]

II. STATEMENT OF ISSUES

Question 1: Whether the Commission is violating the Second Circuit's November 18, 2021 Vacatur Order and acting in excess of its statutory authority[51] by continuing to consider the Company's 2025 Petition after dismissing the proceedings and acknowledging the Court's vacatur of the Certificate and Waiver Orders.

Answer 1: Yes. The 2025 Petition asks the Commission to reissue the vacated Certificate Order and reaffirm the vacated Waiver Order by relying on papers submitted as part of the 2013 application for a certificate of public convenience and necessity, and the 2016 petition for a declaratory order. Since those proceedings have now been dismissed and the Certificate and Waiver Orders vacated, the 2025 Petition should be rejected outright. The Commission is violating the Second Circuit's Vacatur Order and acting in excess of its statutory authority by concluding that "[t]he 2025 Petition is currently pending, and the Commission is not in any way pre-judging the merits of the 2025 Petition.…" Precedent: *Rekstad v. First Bank Sys.,* 238 F.3d 1259 (10th Cir. 2001); *Cf. Mullen v. Norfolk*, No. 2:14-CV-00917, 2015 WL 3457493 (W.D. Pa.

[49] *Id.* at P 13.

[50] *Constitution Pipeline Co., LLC*, Docket Nos. CP18-5-004 & CP13-499-006, Protest and Comments of Stop the Pipeline (Jan. 29, 2026) Accession No. 20260129-5455 ("Protest"); *see also Constitution Pipeline Co., LLC*, Docket Nos. CP18-5-004 & CP13-499-006, Mot. to Dismiss and Protest of Catskill Mountainkeeper et al. (Jan. 29, 2026) Accession No. 20260129-5417; *see also Constitution Pipeline Co., LLC*, Docket Nos. CP18-5-000 *et al.* & CP13-499-000 *et al*., Notice of Intervention, Mot. to Dismiss, Protest, and Answer of New York State Department of Environmental Conservation (Jan. 28, 2026) Accession No. 20260128-5062. These protests are hereby incorporated by reference.

[51] 15 U.S.C. §§ 717f(d), 717r(b) (2024); 5 U.S.C. § 706 (2024).

May 29, 2015); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1129–30 (D.C. Cir. 2024); *A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961); *Bragger v. Trinity Capital Enter. Corp.*, 30 F.3d 14, 17 (2d Cir. 1994); *Waterkeepers Chesapeake v. FERC*, 56 F.4th 45, 50 (D.C. Cir. 2022).

Question 2: Whether, by continuing to consider the 2025 Petition as it proposes, the Commission is violating the procedural and substantive due process rights of residents and landowners along the pipeline's route by considering the 2025 Petition and failing to: (1) provide adequate notice; (2) follow the requirements of the Natural Gas Act; and (3) comply with its own regulations.[52]

Answer 2: Yes. By using an expedited and unauthorized process, the Commission is failing to: (1) provide adequate notice; (2) follow the requirements of the Natural Gas Act; and (3) comply with its own regulations, thereby depriving landowners and other stakeholders of their due process rights. Precedent: *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Liquid Energy Pipeline Ass'n v. FERC*, 109 F.4th 543 (D.C. Cir. Jul. 26, 2024); *PG&E Gas Transmission v. FERC*, 315 F.3d 383, 390 (D.C. Cir. Jan. 21, 2003); *Nat'l Env't Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014); *United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999); *Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004); *California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023); *Sierra Club v. Trump*, 977 F.3d 853, 864–65 (9th Cir. 2020), *vacated on other grounds*; *Biden v. Sierra Club*, 142 S. Ct.56 (2021); *see also Ctr. For Biological Diversity v. Trump*, 453 F. Supp. 3d 11 (D.C. 2020).

[52] 15 U.S.C. §§ 717f(d), 717r(b) (2024); 18 C.F.R. §§ 157.5 – 157.14 (2025); 5 U.S.C. § 706 (2024); U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

III. ARGUMENT

1. The Commission's Dismissal of the Proceedings

FERC's dismissal of the prior proceedings was legally required, but its Remand Order did not go far enough to comply with the law or with the Second Circuit's Vacatur Order.

A. *The Commission failed to recognize the procedural posture of this case.*

After the Company decided to abandon the Project,[53] FERC moved to dismiss the Petitions for Review, saying the lack of any live controversy deprived the Second Circuit of jurisdiction to adjudicate the issues on appeal.[54] Relying on representations that the Project would not be built,[55] the Second Circuit dismissed the cases as moot.[56] The Second Circuit also granted STP's motions for vacatur and instructed FERC "to dismiss the agency proceedings."[57] Despite the Second Circuit's clear directive, FERC took no further steps to dismiss the proceedings or to affirm the Second Circuit's vacatur of the disputed Certificate and Waiver Orders until January 23, 2026, when FERC issued its Remand Order.[58] FERC's failure to timely comply with the Second Circuit's instructions to dismiss the underlying proceedings in these

[53] Project Status Update at 1.

[54] Mot. to Dismiss at 5, *Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir. Jan. 26, 2021), 16-361 ECF No. 352; Mot. to Dismiss at 5, *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Jan. 25, 2021), 20-158 ECF No. 107.

[55] *Id*.; Project Status Update at 1.

[56] Vacatur Order.

[57] *Id.*

[58] Remand Order at P 11 ("For clarity and avoidance of doubt, we now confirm that the proceedings referenced in the caption of this order are dismissed."). FERC issued its January 23, 2026, Order on Remand in response to parties' letters challenging: (1) FERC's ministerial failure to dismiss the underlying proceedings; (2) the procedural validity of noticing the Company's Petition on a new subdocket in light of the Second Circuit's order; and (3) FERC's failure to reject the Company's procedurally defective Petition. *See* NY OAG Letter; *see* STP Letter; *see* Catskill Letter.

cases is not typical; it has acted promptly in others.[59] It appears that the failure to timely dismiss the 2013 Application and the 2017 Petition allowed the Company to file the procedurally improper "new" Petition on December 19, 2025.[60] Despite the fact that the Commission had been ordered to dismiss the proceedings and that the Second Circuit had vacated the Certificate and Waiver Orders, the 2025 Petition purports to incorporate all the prior submissions to FERC and purports to effectively "restart" the 2013 Application.[61] It also asks the Commission to re-affirm the vacated Waiver Order, even though those proceedings no longer exist from a legal standpoint. The Remand Order fails to recognize these legal defects.

In its response to letters submitted by the NYS Office of the Attorney General, STP, and others pointing out that FERC had failed to comply, the Commission stated in its Remand Order that "[f]or clarity and avoidance of doubt, we now confirm that the proceedings referenced in the caption of this order are dismissed."[62] However, it concurrently indicated that it will continue to consider the 2025 Petition without prejudice, noting "[t]he 2025 Petition is currently pending, and the Commission is not in any way pre-judging the merits of the 2025 Petition in this order" and that "our consideration of [the Company's] 2025 petition is unaffected by docket numbering."[63] FERC also formally acknowledged the 2025 Petition on January 8, 2026, when it

[59] *Compare* Remand Order at PP 9, 11 (formally dismissing the administrative proceedings over four years and two months after issuance of the Second Circuit's order) *with Mojave Pipeline Co*., 78 FERC ¶ 61,163 (1997) (formally dismissing the administrative proceedings less than three months after the Ninth Circuit dismissed the appeals as moot, granted the motion for vacatur, and instructed FERC to dismiss the administrative proceeding.)

[60] 2025 Petition at 11, 37 ("following the court order, the Commission took no additional action with respect to the 401 Waiver Order.")

[61] 2025 Petition at 3.

[62] Remand Order at P 11. The proceedings "referenced in the caption of this Order" include docket numbers: CP13-499-000; CP13-499-001; CP13-502-000; CP13-502-001; CP18-5-000; CP18-5-001; CP18-5-002; CP18-5-003.

[63] Remand Order at PP 10, 12.

noticed it and established a deadline of January 29, 2026 for interventions and protests.[64] Taken together, these actions reflect that FERC believes it may consider the merits of the 2025 Petition, which seeks to reissue and reaffirm vacated orders under proceedings that have purportedly been dismissed.

The Remand Order improperly adopts this legally impermissible procedure. FERC cannot affirmatively dismiss the proceedings but continue to entertain the 2025 Petition based on the very proceedings it has dismissed; the two positions are irreconcilable. Even if placed in a new subdocket, the 2025 Petition is still improper. FERC's Order has muddied the dockets and produced a record lacking clarity and coherence. The Commission's Remand Order did not cure the aforementioned procedural errors. Nor does it adequately recognize the procedural posture of this case for the parties. Therefore, the 2025 Petition must be rejected and a new application filed, just like every other application FERC considers for a certificate of public convenience and necessity.[65]

B *The Commission's conduct is inconsistent with its purported dismissal of the proceedings.*

FERC's Remand Order does not comport with long-standing precedent concerning the dismissal of proceedings on remand. Dismissal, as a general matter, is the "termination of an action, claim, or charge without further hearing…."[66] The FERC Glossary further clarifies that "[t]he Commission can dismiss a proceeding or issue a partial dismissal through a Commission

[64] Constitution Pipeline Company, LLC; Notice of Petition and Establishing Intervention Deadline, 91 Fed. Reg. 1311 (Jan. 13, 2026); *see also Constitution Pipeline Co., LLC,* Docket Nos. CP13-499-006 & CP18-5-004, Notice of Petition and Establishing Intervention Deadline (Jan. 8, 2026), Accession No. 20260108-3075.

[65] 15 U.S.C. § 717f(d) (2024); 18 C.F.R. §§ 157.6, 157.8, 157.13 (2025).

[66] *Dismissal*, Black's Law Dictionary (12th ed. 2024).

order. If a proceeding is dismissed without prejudice, the applicant may make a revised filing for the case."[67] Given that the Certificate and Waiver Orders have now been formally vacated and the prior proceeding dismissed, the Company's only legally cognizable path forward is to file a new application for a Certificate of Public Convenience and Necessity.[68]

The fact that the underlying orders were vacated by the Second Circuit bolsters this conclusion. Dismissal is appropriate when an appellate court has vacated the underlying order, and a vacated order must be treated as if it never existed. As FERC noted in *LSP Transmission Holdings II, LLC v. Midcontinent Indep. Sys. Operator, Inc*, where the Seventh Circuit vacated a Preliminary Injunction and remanded the case back to the District Court:

> The Commission has also dismissed as moot proceedings in which a court has vacated the authority that was the basis for the proceeding and in which issues have been resolved. We agree with [the respondent] that, in light of the Seventh Circuit's finding, the Complaint should be dismissed as moot because vacating a judicial decision means the decision never existed, and thus the Preliminary Injunction, which is at the heart of the main argument in the Complaint, never existed.[69]

Dismissal on remand is a disposal of the case and a termination of the proceedings.[70] The Second Circuit's mandate was clear in instructing FERC to dismiss the agency proceedings and the

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[67] *FERC Glossary*, FERC (Aug. 31, 2020), https://www.ferc.gov/industries-data/resources/public-reference-room/ferc-glossary.

[68] Neither FERC's regulations nor the Natural Gas Act support a mechanism whereby an applicant may resurrect an application after the prior orders were vacated and the proceedings dismissed. While Rule 716 allows for the Commission to reopen a proceeding, it is limited to reopening the evidentiary record in matters set for a hearing. See 18 C.F.R. §385.716 (2025).

[69] *LSP Transmission Holdings II, LLC v. Midcontinent Indep. Sys. Operator, Inc.*, 191 FERC ¶ 61,222 at P 56.

[70] *Rekstad v. First Bank Sys.,* 238 F.3d 1259 (10th Cir. 2001) (finding a remand final when a district court "essentially instructs the agency to rule in favor of the [one party]"). Courts have also distinguished a dismissal from an administrative closing. Indeed, a dismissal "plainly dispose[s] of the entire case on the merits and left no part of it pending before the court." *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 86 (2000). Administrative closings, in contrast, do not end the proceeding, but are used to "prune…overgrown dockets" and are "particularly useful in circumstances in which a case, though not

Commission's Remand Order likewise purports to dismiss the underlying proceedings. Thus, the 2026 Remand Order can only be understood as effectuating a dismissal in its ordinary legal sense.[71]

Contrary to this, the Commission here seems to be proceeding not only as though the prior proceedings are no longer moot, but without "resuming" where the prior proceedings left off – with the issues raised and yet to be decided by the Second Circuit Court of Appeals. It is entirely improper for FERC to treat the new 2025 Petition as merely a petition to reissue and reaffirm the underlying orders as opposed to showing "that the proceeding is no longer moot" and, if so, resolving the disputed issues that faced that prior proceedings.[72] Even this path, however, would not be permissible, for the very reason that the prior proceedings have now been dismissed and FERC has nothing to "reissue" or "reaffirm."

C. *FERC has exceeded its authority on remand*

The Natural Gas Act specifically contemplates judicial review of the Commission's orders under Section 19(b) of the Act.[73] The reviewing court has power "to affirm, modify, or set aside such order [of the Commission] in whole or in part."[74] The Second Circuit exercised its appellate authority by vacating the Certificate and Waiver Orders and by directing FERC to

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dead, is likely to remain moribund for an appreciable period of time." *Freeman v. Pittsburgh Glass Works, LLC*, 709 F.3d 240, 246 (3d Cir. 2013) (internal quotation marks and quotations omitted).

[71] *Cf. Mullen v. Norfolk*, No. 2:14-CV-00917, 2015 WL 3457493 (W.D. Pa. May 29, 2015) ("there is no basis for the Court to reinterpret an administrative action of the Secretary expressly designated as a final decision to be something else; speculation is not among the relevant considerations. The Final Decision and Order says nothing of an 'administrative closing.' It also does not mention that its dismissal was a routine and non-substantive closing of the administrative proceeding. Rather, the ARB's Final Decision and Order expressly recognizes the Secretary's delegation of authority….the Court will not second-guess the Secretary's designation of its own order[.]").

[72] *Cobb*, 12 FERC ¶ 61,136.

[73] Natural Gas Act, 15 U.S.C. § 717r(b) (2024).

[74] *Id*.

dismiss, that is to "set aside," the prior proceeding. An administrative agency is obliged to follow a circuit court's remand orders.[75] Federal courts have made clear that a lower court, or agency, is expected to adhere to the appellate court's mandate.[76] "[A]ny action by the lower court other than immediate and complete dismissal [would have been] by definition inconsistent with—and therefore a violation of—the order [to dismiss]."[77] Where the instructions to the lower court – or, here, the agency – are clear and direct, appellate courts have concluded that the mandate must be followed as directed.[78] "Deviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review."[79] Additionally, where a tribunal misconstrues or ignores an appellate mandate on remand, "the mandate may be enforced by a new appeal or by mandamus to enforce a ministerial duty."[80]

Separately, any reliance or deference to the vacated orders and their supporting materials, even if under the guise of a new review, is highly prejudicial and wholly inappropriate under these circumstances. The Natural Gas Act grants FERC relatively broad authority to approve the application of natural gas projects, provided it is "consistent with the public interest" and further permits the Commission "from time to time, after opportunity for hearing, and for good cause

[75] *See e.g.*, *Am. Clean Power Ass'n v. FERC*, 54 F.4th 722 (D.C. Cir. 2022), (where the court considers whether FERC complied with the court's instructions on remand); *see also Deerfield v. F.C.C.*, 992 F.2d 420, 428 (2d. Cir. 1993).

[76] *See Invention Submission Corp. v. Dudas*, 413 F.3d 411 (4th Cir. 2005). "Compliance with an order to relinquish jurisdiction necessarily precludes the lower court from taking any further action other than dismissal, for to do so would involve retaining jurisdiction." *Id.* (internal quotations omitted).

[77] *Stemper v. Baskerville,* 724 F.2d 1106, 1108 (4th Cir. 1984).

[78] *Id.*

[79] *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989) (first citing *Hooper v. Heckler*, 752 F.2d 83, 88 (4th Cir. 1985); then citing *Mefford v. Gardener*, 383 F.2d 748, 758–759 (6th Cir. 1967)).

[80] *Morris v. Sec. & Exch. Comm'n*, 116 F.2d 896, 898 (2d Cir. 1941).

shown, make such supplemental order in the premises as it may find necessary or appropriate."[81] However, in this case, the Company not only missed the extended in-service deadline in December 2020 for a certificate originally issued in 2014 — causing the Commission's authorization to lapse[82] — but the Certificate Order was subsequently vacated in 2021 and dismissed in 2026.[83] There is no longer an active Certificate Order on which the Commission can make a supplemental determination.[84] The Company's 2025 Petition must be rejected, and the Commission's January 23, 2026 Order fails to do that.

D. *The Commission cannot reissue or reaffirm vacated orders*

STP opposed the Commission's 2020 Motion to Dismiss because it believed that the Company was being disingenuous about its intentions and that the Commission had not met the high standard needed to establish mootness.[85] A defendant has "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur[.]."[86] STP also sought vacatur[87] to prevent precisely what has happened here — with the Company first feigning abandonment of its Project so the Commission could evade judicial review, only to revive the Project a few years later through a simple petition.[88] The Commission's Remand Order does nothing to remedy the situation that STP sought to avoid and

[81] Natural Gas Act, 15 U.S.C. § 717b(a) (2024).

[82] *See* Constitution *Pipeline Co., LLC,* 165 FERC ¶ 61,081 at P 24 (2018); *see also* Remand Order at P 7.

[83] Remand Order at PP 9, 11.

[84] See *supra* discussion on definition of dismissal.

[85] *See* Ex. A; *see also* Ex. B.

[86] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 190 (2000).

[87] *Vacate,* Black's Law Dictionary (12th ed. 2024) ("[t]o nullify or cancel; to make void; invalidate")

[88] Ex. A.

the Second Circuit recognized and was addressing in its Vacatur Order. Fortunately, it can be set aside as contrary to the substantive holdings in the Vacatur Order.

The Second Circuit's Vacatur Order nullified the Commission's Certificate and Waiver Orders; thus, they no longer exist or have any legal effect.[89] While the Company likes to characterize the Vacatur and Remand Orders as merely "procedural,"[90] that point of view is contradicted by the facts. On November 3, 2021, the Second Circuit issued a docket order stating that the "[m]otions to di[s]miss and to vacate filed in the above-referenced case have been added as a submitted case to the **substantive motions calendar** for Tuesday, November 16, 2021."[91] (Ex. C; Ex. D). Thus, it was a three-judge panel that decided the motions as a substantive resolution of the issues, rather than a single judge issuing a procedural, non-dispositive ruling.[92]

Vacatur is an equitable remedy used to ensure that unreviewed matters cannot collaterally effect other matters, which is why its synonyms are "to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside."[93] Thus, the Company's attempt to merely petition the Commission to reaffirm such orders

[89] *See generally United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

[90] *See* 2025 Petition at 11, 37; *see also* Peter Mwaniki, *Constitution Pipeline Petition Still Pending as FERC Closes Old Case Files*, Constructionreview (Feb. 2, 2026), https://constructionreviewonline.com/constitution-pipeline-petition-still-pending-as-ferc-closes-old-case-files/ ("The administrative move, the spokesperson explained, 'simply closes out older case files and clarifies procedural matters related to docket practices.'").

[91] *Catskill Mountainkeeper, Inc., et al., v. Fed. Energy Regul. Comm'n*, 16-345 (2d. Cir. Nov. 3, 2021), 16-361, ECF No. 394 (attached as Exhibit C); *N.Y. State Dep't of Env't Conservation, et al. v. Fed. Energy Regul. Comm'n*, 19-4338 (2d. Cir. Nov. 3, 2021), 20-158, ECF No. 152 (attached as Exhibit D) (emphasis added).

[92] Ex. C; Ex. D.

[93] 91 C.J.S. *Vacate* (1955).

contradicts the very reason vacatur exists as a remedy, i.e., to "return the [C]ompany to the same position it was in before it initiated these proceedings several years ago."[94]

The Commission cannot legally reissue or reaffirm any of the past Orders because after being vacated, those orders simply do not exist as a legal matter. In the context of administrative proceedings, vacatur resets the clock and prevents a party from unfairly relying on orders that became unreviewable through happenstance.[95] The D.C. Circuit recently addressed such a situation. When a natural gas company abandoned its project due to untenable market conditions before the circuit court could rule – rendering the issues on appeal moot – the court clarified: "as a sophisticated party, [the company] surely appreciates that vacatur of the Commission's favorable orders would return the company to the same position it was in before it initiated these proceedings several years ago."[96] The Court concluded that vacatur of FERC's orders would "further the public interest by precluding any potential reliance on the challenged orders we lack authority to review."[97] Because the orders have been vacated and cannot be relied upon anymore, the Commission cannot revive, reaffirm, revisit or renew the proceedings used for the issuance of the Certificate or Waiver Orders because those prior orders are nullities and of no legal effect.

The Commission stated in its Remand Order that it is not "pre-judging the merits of the 2025 Petition in [its] order."[98] However, by even considering the 2025 Petition, FERC is

[94] *Pub. Citizen, Inc. v. FERC*, 92 F.4th 1124, 1129–30 (D.C. Cir. 2024).

[95] *See A. L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 329 (1961).

[96] *Pub. Citizen, Inc.*, 92 F.4th at 1129–30.

[97] *Id*. at 1131; *see also Sands v. Nat'l Lab. Rels. Bd.*, 825 F.3d 778, 786 (D.C. Cir. 2016) ("vacatur would serve the public interest by furthering the traditional purpose of the doctrine: clearing the path for future relitigation of the issues."); *see generally Camreta v. Greene, 563 U.S. 692 (2011)*

[98] Remand Order at P 10.

violating the Vacatur Order, as that implies the vacated orders still have some legal effect.[99] In *Bragger v. Trinity Capital Enter. Corp.*, the Second Circuit held that the "general practice" of appellate courts is to vacate an "unreviewed judgment."[100] Importantly, *Bragger* recognizes vacatur as an appropriate remedy when appellate review of a civil case is mooted, and highlights the policy rationale behind the remedy's existence: "by eliminating the judgment that has become moot the rights of all the parties are preserved."[101] In *Lamar Advert. of Penn, LLC v. Town of Orchard Park, New York*, mootness was appropriate as the "allegedly illegal conduct" was voluntarily ceased, and it was "demonstrate[d] that (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."[102] The Second Circuit applied these cases in its Vacatur Order after requesting supplemental briefings in order to clarify the facts and overcome STP's objections to FERC's Motion to Dismiss. In dismissing the cases as moot, the Second Circuit determined that, because the Company was abandoning the project, there would be no chance of this "violation" recurring and that the Company's decision not to pursue the project had already "eradicated the effects" stemming from the project. Given this reasoning, it is illogical to presume that the Commission may at a later date utilize documents in dismissed

[99] *See LSP Transmission Holdings II*, 191 FERC ¶ 61,222 at P 56 ("Commission has also dismissed as moot proceedings in which a court has vacated the authority that was the basis for the proceeding and in which issues have been resolved. We agree with [Respondent] that, in light of the Seventh Circuit's finding, the Complaint should be dismissed as moot because vacating a judicial decision means the decision never existed, and thus the Preliminary Injunction, which is at the heart of the main argument in the Complaint, never existed.").

[100] *Bragger v. Trinity Capital Enter. Corp.,* 30 F.3d 14, 17 (2d Cir. 1994).

[101] *Id*. (Citing *Munsingwear, Inc.*, 340 U.S. at 40).

[102] *Lamar Advert. of Penn, LLC v. Town of Orchard Park, New York*, 356 F.3d 365, 375 (2d Cir. 2004) (emphasis added).

proceedings, as well as the vacated orders that were being challenged, by overlaying a Petition on top of what had been nullified.[103]

In other words, FERC's consideration of the 2025 Petition to reissue the Certificate Order and reaffirm the Waiver Order is a violation of the Second Circuit's Mandate. While FERC may have "broad discretion to manage its dockets,"[104] the Commission does not have the authority to "preserve[] the underlying reasoning of its vacated order as valid precedent."[105] In effect, FERC may not reaffirm an order vacated by the Second Circuit, after relying on documents in dismissed proceedings. Instead, it must respect the scope of the mandate; only issues not addressed by the mandate may be considered.[106] Vacatur of the Commission's Orders requires the licensing process to restart, returning the Company to their starting position.[107]

2. The Commission Is Violating Citizens' Rights to Due Process

To ensure due process, FERC must follow and enforce the requirements of the Natural Gas Act ("NGA"), its own regulations, and the Second Circuit's Vacatur Order. By accepting, noticing, and considering the 2025 Petition, FERC is violating all three and therefore also violating the procedural and substantive due process rights of landowners and other community members and stakeholders. This is particularly problematic for potentially affected landowners

[103] Remand Order at P 13.

[104] *Id.*

[105] *Reich v. Contractors Welding of W. New York, Inc.*, 996 F.2d 1409, 1412–13 (2d Cir. 1993).

[106] 18B Fed. Prac. & Proc. Juris. § 4478.3 (3d ed.).

[107] *Pub. Citizen, Inc.*, 92 F.4th at 1130; *see also Waterkeepers Chesapeake v. FERC*, 56 F.4th 45, 50 (D.C. Cir. 2022) ("Vacating… will allow completion of the administrative and judicial review that was interrupted," allowing the state to remain the "prime bulwark in the effort to abate water pollution." (internal citation omitted)).

who do not have easements on their land because they are entitled to Constitutional due process protections.[108]

The NGA states that an "Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require."[109] The 2025 Petition does not follow the Commission's detailed regulations, as required under 15 U.S.C. § 717f(d).[110] Instead, the Company is requesting that the prior and now dismissed application and the 2017 Petition for a Declaratory Order be relied on to "reissue" the Vacated Certificate Order and reaffirm the Vacated Waiver Order.[111] "Unless otherwise stated in this Petition, all information submitted in Constitution's June 13, 2013, Certificate Application remains correct. Constitution incorporates by reference the exhibits from the original Certificate Application for the Project, the entire record of the Project in Docket No. CP13-499-000, and the waiver determination in Docket No. CP18-5-000."[112] As noted *supra*, in Section III.1., the docket containing the 2013 application has been dismissed and can no longer be used in this manner. Manipulating administrative proceedings in this fashion is prejudicial to the parties and in derogation of due process.

[108] U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

[109] 15 U.S.C. § 717f(d) (2024).

[110] *See* 18 C.F.R. §§ 157.5 – 157.14 (2025). Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment.

[111] 2025 Petition at 3

[112] *Id*.

Even if this were a proper procedure, there are still substantial due process violations. For example:

1. Some landowners did not receive written notice until after the January 29, 2026 deadline.
2. The package sent to landowners included a list of nine libraries where the Notice of Petition can be reviewed. To STP's knowledge, only one of the libraries retained material from the Company's 2013 application and FERC's environmental review. These documents include tens of thousands of pages and take up over six feet of shelf space. Even if the material had been at all the libraries, no one could possibly review all of it and submit substantive comments by January 29, 2026.[113]
3. Many new landowners and stakeholders have no idea where the pipeline would be located because there are no maps available at a scale to reveal its position or that include parcel numbers and lot lines.
4. Almost none of the approximately 600 stakeholders who were notified of the project when the Company applied over 12 years ago, were notified of the 2025 Petition.[114]
5. An application for the Wright Interconnect Project has not been docketed.[115] This is a violation of 18 C.F.R. § 157.13(c), which states that "When applications are interdependent, they shall be filed concurrently." FERC, in turn, has violated its own regulations by accepting the 2025 Petition. "When an application considered alone is

[113] The Company may have just sent USB thumb drives to the libraries. However, this does not solve the problem as not everyone can use a computer, there is no indication of what the files are, no list of the file names, no index, and no large-scale legible maps have been printed out. In addition, these files were dismissed in the Remand Order.

[114] 2025 Petition, List of Attachments, 42; Stakeholder List, Accession No. 20120430-5571.

[115] *Id*. at n.4 ("Iroquois has indicated that it will soon file a separate petition for reissuance of the certificate approving the Wright Interconnect Project.").

incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed."[116]

6. A comprehensive table of contents was not included with the 2025 Petition, so the public does not know what documents are still applicable or where they are located.[117]
7. By placing the 2025 Petition within the same docket as the 2013 Application, which has been dismissed, it is not clear what documents will make up the record for judicial review.[118]

In addition to its mandatory obligation to comply with the Vacatur Order, FERC must also comply with its own regulations or risk having any future orders vacated under the Administrative Procedure Act.[119] The Company is hoping that the President's Executive Orders

[116] 18 C.F.R. § 157.13(c) (2025).

[117] 18 C.F.R. § 157.6(b)(6) (2025). ("A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations.")

[118] 15 U.S.C. § 717r(b) (2024). ("A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28[.]").

[119] 5 U.S.C. § 706 (2024); *see generally Liquid Energy Pipeline Ass'n v. FERC*, 109 F.4th 543 (D.C. Cir. Jul. 26, 2024) (The court vacated a rehearing order for failing to comply with notice-and-comment requirements, per the Administrative Procedure Act.); *see also PG&E Gas Transmission v. FERC*, 315 F.3d 383, 390 (D.C. Cir. Jan. 21, 2003) (The court vacated FERC's order due to its "failure to come to terms with its own precedent reflects the absence of a reasoned decisionmaking [sic] process." Utilizing orders that lack precedential effect would also likely fit these criteria.); *Nat'l Env't Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) ("Thus, an agency action may be set aside as arbitrary and capricious if the agency fails to 'comply with its own regulations'") (quoting *Environmentel, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011); *see also United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999) ("an agency's failure to afford an individual procedural safeguards required under its own regulations may result in the invalidation of the ultimate administrative determination."); *see also Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) (clarifying that an agency is bound by its own regulations, particularly where procedural errors are deemed harmful) (citing Service v. Dulles, 345 U.S. 363, 388 (1957)).

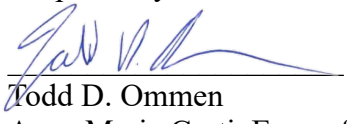
will allow all of these transgressions.[120] However, they will not absolve the Commission of its obligations. "[A]n executive order is not 'law' within the meaning of the Constitution…." and cannot enlarge the powers of executive agencies beyond their statutory bounds.[121] Nor do the President's Executive Orders serve as a legitimate basis to circumvent the Second Circuit's vacatur and instructions to dismiss.

There is a simple solution to the myriad problems facing the Project – FERC must reject the 2025 Petition. "The Director of the Office of Energy Projects or the Director of the Office of Energy Market Regulation may also reject an application after it has been noticed, at any time, if it is determined that such application does not conform to the requirements of this part."[122]

IV. CONCLUSION

For the foregoing reasons, Stop the Pipeline respectfully requests that the Commission grant its request for rehearing and rescission of the portions of the Remand Order that allow the 2025 Petition to proceed. Since the Certificate and Waiver Orders have been vacated and the proceedings dismissed, the 2025 Petition should be rejected. If the Company wishes to proceed with the Project, it must file a new application.

Respectfully submitted,



Todd D. Ommen
Anne Marie Garti, Esq., of counsel

[120] 2025 Petition at 3, n.8, citing *Declaring a National Energy Emergency*, Exec. Order No. 14,156 § 3(b), 90 Fed. Reg. 8433, 8434 (Jan 29, 2025) and *Unleashing American Energy*, Executive Order No. 14,154 § 5(d), 90 Fed. Reg. 8353, 8355-56 (Jan. 29, 2025).

[121] *California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023); *Sierra Club v. Trump*, 977 F.3d 853, 864–65 (9th Cir. 2020), *vacated on other grounds*; *Biden v. Sierra Club*, 142 S. Ct. 56 (2021); *see also Ctr. For Biological Diversity v. Trump*, 453 F. Supp. 3d 11 (D.C. 2020).

[122] 18 C.F.R. § 157.8(c) (2025).

Exhibit A

Document Accession #: 20260223-5140 Filed Date: 02/23/2026

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-345 (Lead), 16-361 (consolidated) Caption [use short title]

Motion for: additional relief under FRAP 27(a)(3)(B)

Set forth below precise, complete statement of relief sought:

Vacatur of the three Orders under review if case against the Federal Energy Regulatory Commission is moot.

Catskill Mountainkeeper, et al. v. FERC

MOVING PARTY: Stop the Pipeline **OPPOSING PARTY:** Federal Energy Regulatory Commission

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Anne Marie Garti **OPPOSING ATTORNEY:** Susanna Y. Chu

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Court- Judge/ Agency appealed from: Federal Energy Regulatory Commission

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Anne Marie Garti **Date:** Feb. 5, 2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINKEEPER, INC.; CLEAN AIR COUNCIL; DELAWARE-OTSEGO AUDUBON SOCIETY, INC.; RIVERKEEPER, INC.; AND SIERRA CLUB Petitioners, STOP THE PIPELINE, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent, CONSTITUTION PIPELINE CO., LLC; IROQUOIS GAS TRANSMISSION SYSTEM, L.P.; NATURAL GAS SUPPLY ASSOCIATION Intervenors.	Case Nos. 16-345 (Lead) 16-361 (Consolidated)

STOP THE PIPELINE'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS AND IN SUPPORT OF STOP THE PIPELINE'S MOTION FOR VACATUR OF THE ORDERS

Pursuant to Rule 27(a)(3)(B) of the Federal Rules of Appellate Procedure, Petitioner Stop the Pipeline ("STP") is requesting additional relief, vacatur of the orders under review if the Court decides the cases are moot. *See* Section III *infra*.

I. STOP THE PIPELINE'S PETITION IS NOT MOOT

The Commission fails to meet the high standard needed to establish mootness. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (A defendant has "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur[.]"). While such a determination requires a fact specific analysis, the Commission neglected to show any meaningful parallels between the facts presented in the cases it cites with those that are currently under review. For example, in *Delaware Riverkeeper*, the project was constructed, site stabilization completed, and "[t]ermination was 'legally completed[.]'" *Del. Riverkeeper Network v. N.Y. State Dep't of Envt'l Conservation*, 788 F. App'x 65, 66 (2d Cir. 2019) (summary order). That is not the case here because the project has not been constructed and the Certificate and Waiver Orders have not been vacated. Garti Aff. ¶ 8. More importantly, the Commission fails to note that there are exceptions to the mootness doctrine. *Comer v. Cisneros*, 37 F.3d 775, 798 (2d Cir. 1994) ("The mootness doctrine is riddled with exceptions, however. Among the exceptions pertinent to this case are the voluntary cessation doctrine ... and the

capable of repetition doctrine[.]") (internal citations omitted). Both apply to STP's Petition.

Under the voluntary cessation doctrine, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968). "It is incumbent upon the defendant … who is seeking dismissal to meet the 'heavy' burden of satisfying this test." *Ahrens v. Bowen*, 852 F.2d 49, 53 (2d Cir. 1988) (internal citation omitted). Contrary to the Commission's conclusory statements, that has not happened here.

The Commission fails to consider these exceptions to mootness because, once again, it wishes to evade judicial review of the orders being challenged.[1] It now claims that the Certificate of Public Convenience and Necessity, *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014) ("Certificate Order"), has "lapsed," Resp't's Br. 1, 4-5, without mentioning that Constitution can move to revive it. FERC's "voluntary statement of cessation" is based on its speculative interpretation of Constitution's plans, while ignoring other possibilities. According to FERC's regulations, a member of FERC's staff can grant a motion to

[1] *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (Dec. 2, 2014) ("Certificate Order"); Order Granting Rehearing for Further Reconsideration (Jan. 27, 2015) ("Tolling Order"); *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,046 (Jan. 28, 2016) ("Rehearing Order"). Collectively, the three orders under review are referred to as the Certificate Orders.

Constitution to extend the construction deadline "at any time," thereby reviving the project. *See* 18 C.F.R. §§ 375.308(w)(4), 385.212(a)(1). This is true even if the construction deadline has passed. *Id.* § 385.2008(b). There is nothing in FERC's regulations or case law that forbids a retroactive extension of a construction deadline under the Natural Gas Act. That is why FERC failed to cite a single case to support its position that if the Certificate Order has lapsed, it cannot be revived. "[W]e have only appellee[']s own statement that [the Certificate Order has lapsed]. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellee[']s shoes." *Concentrated Phosphate*, 393 U.S. at 203. Therefore, "interim [] events have [not] *completely and irrevocably eradicated the effects of the alleged violation*." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc.*, 191 F.3d 198, 202 (2d Cir. 1999) (emphasis added).

In addition, "[a] case becomes moot when 'intervening events make it impossible to grant the prevailing party effective relief.'" *Lemon v. Geren*, 514 F.3d 1312, 1316 (D.C. Cir. 2008) (internal citations omitted). Here, the Certificate Orders remain valid and can be vacated on the merits. Since members of STP continue to be injured by the Certificate Orders and can be granted effective relief, STP's case is not moot. However, if the case is dismissed and the project is revived in the future, STP will no longer be able to challenge the Certificate Orders. 15

U.S.C. § 717r (b) (stating that a petition must be filed in the appropriate Circuit Court of Appeals "within sixty days after the order of the Commission upon the application for rehearing[.]").

Finally, as discussed in Section I.D. *infra*, this case is an exception to the mootness rule because it is capable of repetition, yet evading review. *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). *See also Comer*, 37 F.3d at 800.

A. The Certificate Order Can Be Revived

A certificate of public convenience and necessity remains valid until it is vacated. While the Commission claims that its authorization for the pipeline project has lapsed, the passage of the construction deadline does not mean the Certificate Order has expired, or is void. Instead, the passage of the construction deadline is simply an unfulfilled condition, just like Constitution's noncompliance with various environmental conditions listed in the Appendix.

> (E) The certificate authority issued in Ordering Paragraphs (A) and (D) shall be conditioned on the following:
> (1) Applicant's completion of the authorized construction of the proposed facilities and making them available for service within 24 months from the date of this order, pursuant to section 157.20(b) of the Commissions regulations; . . .
> (3) Applicant's compliance with the environmental conditions listed in the appendix to this order.

Certificate Order, Ordering Para. E., ¶ 46. In addition, the lapse of an order does not make an appeal moot. *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) ("Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn."). *See also Natural Res. Def. Council, Inc. v. E.P.A.*, 595 F.Supp. 1255, 1263 (S.D.N.Y. 1984) (same).

The Commission's statement that the Certificate Order has lapsed does not mean it cannot be revived. *See* 18 C.F.R. § 385.2008(b). In addition, its position is not supported by the orders it has issued in other cases. For example, if Constitution had truly given up on this pipeline project, it would have asked FERC to vacate the Certificate Order, just as it asked the New York State Department of Environmental Conservation ("Department") to terminate its applications and permits. Resp't's Br. 3, Att. A, A-023. Garti Aff. ¶ 8. Other holders of certificates, like Arlington, have successfully taken this step. "Arlington filed a request to vacate the certificate authorizations granted in the May 2014 Order. Arlington states that it never commenced construction of the Gallery 2 Project, and it no longer intends to do so." *Arlington Storage Company, LLC*, 161 FERC ¶ 61,290, P 3 (2017). The Commission promptly vacated Arlington's certificate. *Id.* P 4. Nor has the Commission made any move to vacate the Certificate Order on its own, a power it has asserted in other dockets. *See Tallulah Gas Storage, LLC*, 156 FERC ¶ 61,141

(2016). "[However], the question of the Commission's authority to revoke or modify a certificate once issued is not free from doubt." *Trunkline LNG Company, et al*., 22 FERC ¶ 61,245, 61,442 (1983). Given this uncertainty, the cases are not moot.

The Commission also ignores its own regulations, which state that a member of FERC's staff can grant a motion to Constitution to extend the construction deadline "at any time," thereby reviving the project. *See* 18 C.F.R. §§ 375.308(w)(4), 385.212(a)(1). Such extensions are regularly granted. For example, Magnum was granted a certificate on March 18, 2011, *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 (2011), which was extended on November 17, 2016. *Magnum Gas Storage, LLC*, 157 FERC ¶ 61,114 (2016). On August 17, 2020, Magnum requested a four-and-a-half-year extension, which was granted by a member of FERC's staff on September 15, 2020. FERC, Letter Order Granting Extension, 2, Sept. 15, 2020.[2] The last sentence of the Letter Order states, "This action is taken pursuant to authority delegated by the Commission in 18 C.F.R. § 375.308(w)(4)." *Id*. Construction must now be completed by May 17, 2025, which is fourteen years after the certificate was issued. *Id.* Nothing in the Natural Gas Act precludes another extension.

[2] Available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20200915-3030.

The Commission has failed to cite any authority that would stop Constitution, or a successor in interest, from making a similar request. One of the reasons Magnum gave for requesting the extension was "market conditions." Constitution also used "market conditions" as a reason for not proceeding and could easily claim that those conditions have changed again. In this volatile world, geo-political events change quickly and could alter the purported need for such a pipeline, or Constitution could have a buyer ready to assume its rights waiting in the wings. If this were to occur, Constitution, or its successors in interest, would be able to construct the pipeline project without FERC's Certificate Orders ever being reviewed. Thus, the Commission has not "met [its] 'formidable burden' of showing that it is 'absolutely clear' that the [pipeline] will never be [constructed]." *Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016).

B. The Eminent Domain Cases Are Still Active and Constitution Can Try to Sell its Easements to Another Entity

The Commission states that Constitution has resolved its eminent domain litigation, Resp't's Br. 4, but the attachment it cites does not support that claim. *Id*., Att. B, A-037. In fact, at least thirteen cases are still active in the Northern District of New York ("N.D.N.Y."), Garti Aff. ¶ 3, and possibly many more because sixty-five active cases are listed in Constitution's motion. Resp't's Br.3, Att. A, A-020-21. In addition, Constitution's motion to the N.D.N.Y. contradicts the Commission's Motion to Dismiss because Constitution only sought to dissolve the

injunction that granted it access. Resp't's Br. Att. A, A-004-5. Condemnation for interstate gas pipelines in federal district courts involves two steps: (1) an order granting the pipeline company the right to take the property; and (2) an injunction granting immediate access to it. *See East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 831 (4th Cir. 2004) ("[W]e hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction."). Constitution acquired the substantive right to condemn in early 2015. Pet'r's Br. 8, 10, Oct. 17, 2016, ECF No. 222. On April 17, 2020, it asked the N.D.N.Y. to dissolve the injunctions that granted it access, but not the orders that granted it the right to take the properties. Resp't's Br. Att. A, A-004 ("The injunction granted by the Possession Order is hereby dissolved[.]"). In other words, since Constitution did not ask the N.D.N.Y. to void the order that granted it the substantive right to condemn, its intent was to retain the right of possession. That intent undermines the Commission's Motion to Dismiss.

The Commission also ignores the fact that well over six hundred property owners have signed easement agreements with Constitution.[3] This means that

[3] The 124-mile-long project would affect 707 distinct parcels of land. FERC, Final Environmental Impact Statement, ES-1, ES-3, Oct. 24, 2014, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20141024-4001. As

Constitution holds deeded easements for approximately ninety-five percent of the pipeline route and can try to transfer those rights to another corporation. Garti Aff. ¶¶ 6, 7. Constitution's successor in interest could then ask FERC to extend the construction deadline in the still valid Certificate Order, and a member of FERC's staff could grant such a motion at any time. 18 C.F.R. §§ 375.308(w)(4), 385.212(a)(1). If these Petitions are dismissed without vacatur of the Waiver Orders, that staff member could also grant a Notice to Proceed with Construction without a 401 water quality certification.

C. There Is Still a Live Controversy

The three intertwined issues STP raised in its Petition for Review included: 1) whether the record included substantial evidence of need for the project; 2) whether it was proper for the Commission to grant Constitution the right of eminent domain before the Department had granted Constitution a 401 water quality certification; and 3) whether FERC's Tolling Order improperly denied judicial review. Pet'r's Br. 1-2, 6-7, 12-53, Oct. 17, 2016, ECF No. 222. Those issues are still very much alive and will remain so even after all of the condemnation cases are dismissed. *Id*. 9-11. "[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely,

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of April 17, 2020, only sixty-five had not settled in New York State. Resp't's Br. 3, Att. A, A-020-21.

if a government action is found to be impermissible-for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process-that is the end of the inquiry. No amount of compensation can authorize such action." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 543 (2005).

This project continues to injure STP's members. At least three of the Defendants whose condemnation cases are still active in the N.D.N.Y. had retired and were about to build a new home on land targeted by Constitution in the spring of 2012. Garti Aff. ¶ 3. All three had to put their home-building plans on hold. *Id*. Att. A. William and Christine Roche planned to invest their life savings in a wind and solar powered home that would have been within yards of thirty-inch-diameter gas pipeline that could incinerate them. Roche, Motion to Intervene, July 15, 2013, FERC Accession No. 20130716-5016.[4] About a mile away, the pipeline was routed to pass through the building site of Robert and Anne Stack, who had just retired and moved east from Nevada. Pet'r's Br. Addendum B, A-78-A-85. It obstructed the only access they have to the town road, making their property unusable. Robert Stack, Motion to Intervene, July 15, 2013, FERC Accession No. 20130715-5022.[5] In the third case, the route FERC approved for the pipeline bisected the rectangular

[4] See Garti Aff. Att. A, or available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20130716-5016.

[5] See Garti Aff. Att. A, or available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20130715-5022 .

parcel of land so that no house could ever be built on it. Harju, Motion to Intervene, July 16, 2013, FERC Accession No. 20130716-5171.[6] Nine years have now passed. While such a delay might be overcome at a younger age, it can be an insurmountable obstacle when someone has retired, especially if their health is deteriorating. There is simply no compensation for the loss of their dreams. The years they expected to live on their land can never be returned to them. *Lingle*, 544 U.S. at 543. However, the Court can ensure that this never happens again, at least to these Defendants.

Landowners who settled with Constitution also have an ongoing injury as the title to their land is now clouded with a right of way that is currently held by Constitution, who can try to sell it to another entity. Garti Aff. ¶¶ 6, 7. If there is no public convenience and necessity, then the easements obtained under the authority of the conditional Certificate Order should be rescinded. That is why STP asked this Court to void those easements if the Certificate Orders are vacated. Pet'r's Br. 9-11, Oct. 17, 2016, ECF No. 222.

STP made vigorous efforts to help these landowners after Constitution filed its Complaints in Condemnation. For example, STP filed a Petition for a Writ of Mandamus challenging the Commission's use of Tolling Orders in hopes of clearing the title to its members' land. *In re Stop the Pipeline*, Case No. 15-926,

[6] Available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20130716-5171.

Pet'r's Pet. 15-21, March 27, 2015, ECF No. 1-2. The Petition was denied. *Id.*, Order, April 21, 2015, ECF No. 52. After FERC issued the Rehearing Order, STP Petitioned for Review in Case No. 16-361 and filed its final briefs on October 17, 2016. However, oral arguments were never held, even though STP submitted four letters requesting a hearing. *See* STP Letters, Feb. 8, 2018, April 30, 2018, May 7, 2018, March 11, 2019, ECF Nos. 290, 298, 304, 333. Since the Petitioner did not cause the delays in this appeal, and its members have ongoing injuries, it respectfully asks the Court to decide the important issues it raised.

After its Petition for a Writ of Mandamus was denied, STP raised the issue of whether the Commission can use Tolling Orders to delay judicial review in its brief. Pet'r's Br. 23-40, Oct. 17, 2016, ECF No. 222. After filing the Opening Brief, counsel for STP shared it with counsel for petitioners challenging the Atlantic Sunrise project. Garti Aff. ¶ 10. Using STP's arguments,[7] those petitioners ultimately convinced the District of Columbia Circuit to reconsider a decades-old precedent that allowed the Commission to keep landowners out of court through a "Kafkaesque regime." *Allegheny Defense Project v. FERC*, 932 F.3d 940, 948

[7] *Compare In re Stop the Pipeline*, Case No. 15-926, Pet'r's Pet. 15-21, March 27, 2015, ECF No. 1, and *Catskill Mountainkeeper, et al. v. FERC*, Case No. 16-361, STP's Final Br. 23-40, Oct. 17, 2016, ECF No. 222 with *Allegheny Defense Project, et al. v. FERC*, D.C. Cir. Case No. 17-1095, Pet'rs' Final Br. 46-51, July 6, 2018, ECF No. 1738859, Pet'rs' Reply Br. on Reh'g en banc, 15-21, March 2, 2020, ECF No. 1831294.

(D.C. Cir. 2019) (Millet, concurring in the judgment) *review en banc granted*, 943 F.3d 496 (Dec. 5, 2019). Their efforts were successful; the Commission can no longer use Tolling Orders to block judicial review. *Allegheny Defense Project v. FERC*, 964 F3d 1 (D.C. Cir. 2020). Now that new precedent has been set, STP respectfully asks this Court to deny the Commission's Motion to Dismiss so that *Allegheny* can be extended to this circuit.

STP also claims that the Certificate Order, a license that certifies the project fulfills a public need and grants Constitution the right of eminent domain, 15 U.S.C. §§ 717f(c), (h), is not based on substantial evidence. Pet'r's Br. 40-53. Oct. 17, 2016, ECF No. 222. Constitution's recent decision to abandon the project proves STP right.

> [A] certificate shall be issued ... if it is found that *the applicant is able and willing properly to do the acts and to perform the service proposed* ... and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity*; otherwise such application shall be denied.

15 U.S.C. § 717f(e) (emphasis added). Constitution's decision not to move forward with the project is an admission by the applicant that it is not "able and willing" to fulfill the terms of the certificate. In addition, since Constitution has now proved that the "project is [not] required by the present or future public convenience and necessity[,]" the Certificate Order is invalid and should be vacated on the merits.

Finally, none of the many legal challenges involving this pipeline project would have been necessary if the Commission had simply waited for the Department to issue (or deny) a 401 water quality certification, as 33 U.S.C. § 1341(a)(1) requires. Pet'r's Br. 16-23, Oct. 17, 2016, ECF No. 222. STP respectfully asks the Court to issue a decision on this important matter.

D. This Case Is Capable of Repetition, So It Should Not Evade Review

As argued in the preceding sections, "[t]he [FERC] defendants, as the parties who voluntarily [claim] [] the allegedly illegal conduct [has ceased], bear the very heavy burden of demonstrating [] with assurance that there is no reasonable expectation that the conduct will recur…. [They] do not meet their heavy burden. The [FERC] defendants have not even met the burden of showing that the allegedly illegal conduct has ceased." *Comer*, 37 F.3d at 800 (internal citations omitted). "Even assuming the defendants had ceased the allegedly illegal conduct, we will not dismiss the claims as moot if the harm is 'capable of repetition, yet evading review.'" *Id.* (citing *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

In this case, STP claims that the Commission's Certificate Orders violated the law by 1) blocking STP from judicial review (via the Tolling Order); 2) not being based on substantial evidence; and 3) issuing the Certificate Order before

Constitution obtained a 401 water quality certification. As argued in the preceding section, I.C., these issues are still alive. However, even if they were not, the injuries suffered by STP and its members are capable of repetition, yet evading review.

Williams, the majority investor in Constitution, estimated that $354 million has been spent on the project. Resp't's Br. Att. A, A-027. Those sunk costs purchased a license from the Commission that does not expire, a Waiver Order that would allow Constitution to construct the project without a 401 water quality certification, a final environmental impact statement for the entire 124-mile long pipeline, and easements for about ninety-five percent of the pipeline route.

While Constitution was pursuing these licenses, Tennessee Gas Pipeline ("Tennessee") proposed a parallel pipeline – the Northeast Energy Direct Project ("NED"). It terminated that project in April 2016, within two days of the Department's denial of Constitution's application for a 401 water quality certification. Pet'r's Br. 10-11, Oct. 17, 2016, ECF No. 222. Garti Aff. ¶ 9. It is possible that Williams has struck a deal with Tennessee, or another entity, to sell its assets in Constitution, including the Certificate and Waiver Orders and easements. That would enable Williams to recoup its costs and Tennessee to pursue a project it dropped when it saw that Constitution could not obtain a water quality certification from the Department. If Tennessee decided to revive NED,

either by purchasing Constitution's rights or on its own, many of the same landowners would be affected and the issues that have evaded review in this case, would recur. *Id.* Thus, the Commission's Motion to Dismiss should be denied.

II. THE CERTIFICATE ORDERS MUST BE VACATED IF THE PETITIONS ARE DEEMED MOOT

If the Court decides that Constitution has no plans to revive the project, then the Certificate Orders should be vacated.

> When circumstances beyond an appellant's control render moot a question decided and appealed from, a federal appellate court will generally vacate the decision below.… The rationale is that a judgment from which litigants have the right of appeal should not be accorded preclusive effect when events beyond their control prevent them from exercising that right.
>
> This interest is especially pronounced when actions of winning litigants serve to deny their adversaries the opportunity to appeal. Under these circumstances it may amount to an abuse of discretion not to vacate the lower court order. Were it otherwise, appellees could deliberately moot cases on appeal, thereby shielding erroneous decisions from reversal.

Penguin Books USA Inc. v. Walsh, 929 F.2d 69, 73 (2d Cir. 1991) (internal citations omitted).

In *Tennessee*, the D.C. Circuit grappled with the question of whether an order that might act as a declaratory order by establishing precedent, can be dismissed as moot. *Tennessee Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d

1373,1381-83 (D.C. Cir. 1979). It found Tennessee's curtailment plan too fact specific to be used without alteration, so it appeared the case was moot. *Id.* at 1381. However, FERC created uncertainty by arguing that its orders should not be vacated so they could be used as precedent. *Id.* at 1381, n. 40. To resolve the situation, the D.C. Circuit turned to *Mechling Barge Lines v. United States*, 368 U.S. 324 (1961), where the Court extended its holding in *United States v. Munsingwear, Inc*., 430 U.S. 36 (1950) to include unreviewed administrative orders. *Id.* at 1382.

> We follow the course set out in Munsingwear and Mechling and, accordingly, vacate the order which we decline to review. A different result likely would affect petitioners harshly. . . . [W]e set aside the Commission's orders to assure they do not collaterally affect other matters[.]

Id. at 1383. Applying that solution to this case would protect STP from external events, whether caused by "happenstance" or the Commission's desire to evade judicial review. *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993).

III. CONCLUSION

STP believes the Court has two options: 1) deny the motion and schedule oral arguments on the merits because STP's case is not moot; or 2) vacate the Certificate Orders and dismiss the cases as moot.

February 5, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that the foregoing Response in Opposition to Respondent's Motion to Dismiss and in Support of Stop the Pipeline's Motion for Vacatur of the Orders complies with the type-volume limitation of Rule 27(d)(2)(A) as it contains 4,143 words, excluding the parts of the brief exempted by Rules 27(d)(2) and 32(f). I further certify that it complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) as this paper was prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

February 5, 2021

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CATSKILL MOUNTAINKEEPER, INC.; CLEAN AIR COUNCIL; DELAWARE-OTSEGO AUDUBON SOCIETY, INC.; RIVERKEEPER, INC.; AND SIERRA CLUB Petitioners, STOP THE PIPELINE, Petitioner, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent, CONSTITUTION PIPELINE CO., LLC; IROQUOIS GAS TRANSMISSION SYSTEM, L.P.; NATURAL GAS SUPPLY ASSOCIATION Intervenors.	Case Nos. 16-345 (Lead) 16-361 (Consolidated)

AFFIRMATION OF ANNE MARIE GARTI
IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS
AND IN SUPPORT OF STOP THE PIPELINE'S
MOTION FOR VACATUR OF THE ORDERS

Anne Marie Garti declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney admitted to practice law in the United States Court of Appeals for the Second Circuit and represent the Petitioner, Stop the Pipeline, with co-counsel Todd D. Ommen, in Case Nos. 16-361 and 20-158.

2. I have been actively involved with Constitution Pipeline Company, LLC's ("Constitution's") pipeline project since the spring of 2012 and know many of the details related to its regulatory review.

3. I represent thirteen landowners in Constitution's condemnation cases in the Northern District of New York ("N.D.N.Y."), all of which are still active. My clients include William and Christine Roche, Robert and Anne Stack, and Barbara Harju, all of whom had to give up their plans to build their retirement homes in 2012 when they learned that Constitution's proposed route for its thirty-inch-diameter interstate gas pipeline would pass right through, or near the site of, their dream homes. See Attachment A for their motions to intervene in FERC Docket CP13-499.

4. I opposed Constitution's Motion, which is attached to the Federal Energy Regulatory Commission's ("FERC's") Motion to Dismiss as Attachment

A, A-001-A-036, because it did not ask the N.D.N.Y. to vacate the orders granting Constitution the right to take the Landowners' property.

5. Constitution's Proposed Order, FERC Br., Att. A., A-004-5, was rejected by the N.D.N.Y.

6. I have reviewed many of the easements recorded in the Offices of the County Clerks in New York State. As of September 17, 2020, Constitution had acquired Rights of Way on approximately ninety-five percent of the 124-mile pipeline route through stipulated agreements.

7. Constitution retains the right to build a pipeline on the Rights of Way it has acquired through stipulated agreements, and can try to transfer those rights to another entity without the Landowners' permission.

8. I am notified of all filings in the FERC dockets related to this pipeline project and Constitution has not asked FERC to terminate or vacate its Certificate or Waiver Orders.

9. Tennessee Gas Pipeline proposed a parallel pipeline – the Northeast Energy Direct Project ("NED") – in 2015. It terminated NED in April 2016, within two days of the New York State Department of Environmental Conservation's denial of Constitution's application for a 401 water quality certification.

10. On July 13, 2016, I shared STP's Brief with counsel for the Petitioners in the Atlantic Sunrise Project after filing it in the docket for this case. Pet'r's Opening Brief, July 12, 2016, ECF No. 135.

Dated: February 5, 2021

Respectfully submitted,

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Attachment A

Motions to Intervene by Landowners

July 2013

Submission Description: (doc-less) Motion to Intervene of William J. and Christine C Roche under CP13-499-000.

Submission Date: 7/15/2013 9:34:04 PM

Filed Date: 7/16/2013 8:30:00 AM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party	Signer (Representative)
Other Contact (Principal)	
Individual	rochefamily2013@aol.com

Basis for Intervening:

We are owners of 127 acres in Davenport, New York. If approved, the Constitution Pipeline will destroy our long dreamed of, hard earned, and much loved property. This is property to which we escape to enjoy privacy, fresh air, fresh water and the beauty and serenity of nature. Property where we marvel over and give thanks for all of Godâ€™s little creatures and wonders of nature. We have invested our hearts, years of hard work and our lifeâ€™s savings in this property. For a private corporation to be able to take and profit from United States citizens against their will is unfathomable.

This is property where we intended to build a solar home and hobby farm. The proposed route of this pipeline is yards from our home site and feet from our newly constructed barn. It will result in the removal of the trees that provide our privacy. It will cut straight through our only field. This is a field that weâ€™ve spent hundreds of hours clearing with our own hands to situate our planned windmill, raise our own animals and grow and harvest our own organic fruits and vegetables. The route will pass near our pond (which is fed by natural springs) and through our wetlands. Finally, it will pass under White Hill Road and through our forest on the other side of the road. We are incredibly saddened at the prospect of losing our dream.

We fear the devaluation of our property and the loss of dollars we have invested. We question our ability to obtain a mortgage and insurance on this property. We fear for the quality of our drinking water and pond water, the quality of our air, damage to our pond and its damn and damage to our wetlands. We are concerned about soil erosion and the wild life and vegetation. We are worried about the increased liability we will be subjected to. We anticipate increased trespassing due to the clearing of such a wide corridor.

We fear for our physical safety and for the safety of our community. Our homestead, those of our adjoining neighbors, and the Nature Conservatory would be incinerated in the event of an explosion. So too would be a major communications line which runs over our property. This line services numerous radio stations, phone carriers and all 911 providers in Delaware and Otsego Counties.

Certainly, more compressor stations will be needed to operate this pipeline. We are concerned about the hazards, air quality issues, noise levels and visual assaults that accompany these compressor stations. We realize that this pipeline creates the infrastructure for future fracking and fear the industrialization of our rural communities. We fear for the character of our communities, for tourism, for agriculture, for the environment and for the health and well-being of all that inhabits this earth. This is an under-regulated industry with a horrible safety record.

Branding this 30 inch intrusion as "The Constitution Pipeline" is insulting to all hard working American families. It is quite unconstitutional to take private property without just compensation and without justification for public need. We believe that this pipeline will eventually be used to transport gas to other countries.

We will not be deceived by the Constitution Pipeline Companyâ€™s bribes ("grants") to win support or their promises to be "good neighbors". We base our beliefs on their poor safety record, dishonesty and pompous arrogance towards landowners from whom they intend to steal. They have earned that reputation and we will not blindly ignore it. We refuse to grant Constitution Pipeline Co, LLC access to our property for the purpose of surveying. We

refuse to partner with them by signing an easement. We will not subject ourselves to additional liability or to additional pipelines or other utilities. We will not willingly be sacrificed for their economic benefit. We will not willingly give up control of our property or give away our right to enjoy and use our land (while still having to pay taxes on it) in the manner we had intended. We will continue our responsibility to be good stewards of this great land. We will force Constitution Pipeline Co, LLC to take us to court for the purpose of taking our property by eminent domain against our will.

Stating all of our concerns is an overwhelming task. They are numerous and vast. We reserve our right to add concerns as we become aware and able to articulate them. We encourage FERC to provide a full cumulative impact analysis for this project.

Since no one else can represent our myriad of interests in this issue, we are filing this motion to intervene.

Signed, William and Christine Roche

Submission Description: (doc-less) Motion to Intervene of Robert Stack under CP13-499-000.

Submission Date: 7/13/2013 10:40:42 AM

Filed Date: 7/15/2013 8:30:00 AM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party	Signer (Representative)
Other Contact (Principal)	
Individual	renobob2@yahoo.com

Basis for Intervening:
I am a resident of Davenport, NY in Delaware County. My property is scheduled to have the Constitution Pipeline (FERC Docket CP13-499) run through the property exactly where my wife and I had planned to build a home. Since the pipeline is "open-access," it will encourage industrial development, including natural gas extraction, which will drastically alter the rural character of the community where I have planned to live. As no one else can represent my interests in this matter, I am filing this motion to intervene.
My specific concerns are as follows:

First, the proposed route runs the pipeline right through my property (NY-DE-30.000), and moreover, through the only place on my property suitable for building a home. My wife and I had planned to build a home on this site after I retired in August 2012. This pipeline as proposed would use up the only part of the property that has suitable road frontage. If the construction goes as planned, the rest of the property would become landlocked, with no access to Coe Hill Road, and therefore rendered useless for building a home.

My second concern is that, even if a suitable building site were to be made available somehow, the fact remains that we would not want to live adjacent to a large high-pressure gas pipeline. The gas industry cites endless statistics about the safety record of these pipelines, but the fact remains that these pipelines sometimes do fail, property is destroyed and lives are lost. We donâ€™t wish to become statistics so that Cabot-Williams can make a profit.

These two points taken together mean that the pipeline would take away from us not just the value of the acreage needed for the right-of-way, but would render our entire 97-acre parcel value-less and useless for the purposes for which we bought it 8 years ago.

The third point I wish to make is that this right-of-way will leave a 110-foot wide swath of bare ground through my property and through adjacent properties, much of which is now covered with trees. Again, we do not wish to live in sight of such destruction of the beautiful forests in this area.

This land has far more intrinsic value to us than would be reflected in any market-value assessment. This means that we are not swayed by offers of â€œfair market valueâ€ for just the right-of-way acreage and the timber that must be cut. The complete loss of the use of the land due to the pipeline would constitute a â€œtakingâ€ of the entire property, not just the right-of-way portion.

Next, I question whether this pipeline needs to be built at all. Powers of â€œeminent domainâ€ can be invoked by Cabot-Williams once FERC approves the pipeline. However, the intent (if not the practice) of eminent domain is to take private property so it can be used for the common good, such as schools, parks, or highway expansion. I see no benefit accruing to landowners, towns, or counties from this pipeline. In effect, this â€œtakingâ€ of our land only benefits Cabot Williams. It enables them to earn millions of dollars in gas transportation revenues at the expense of the landowners.

Submission Description: (doc-less) Motion to Intervene of Barbara F Harju under CP13-499-000.

Submission Date: 7/16/2013 3:30:00 PM

Filed Date: 7/16/2013 3:30:00 PM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party Other Contact (Principal)	Signer (Representative)
Individual	joeswoods@aol.com

Basis for Intervening:

I am a landowner in the town of Summit, Schoharie County, N.Y. I own 6.3 acres of property on fertile farm land located on a knoll with a beautiful & unobstructed 50-mile easterly view of the mountains and countryside, with the intention of building a home & garden upon retirement. I am now retired and have learned to my horror & disbelief that a gas pipeline has been proposed to go through my property & basically splits my property in half, ending any chance of my building or doing anything! I also learned from Constitution Pipeline (CP) that the original proposed location of the pipeline & easement on my land has been changed and is now fully across my land rendering it useless, uninsurable and hard to finance due to the proposed pipeline TIMEBOMB! How is this allowed to happen? I worked all my life and looked forward to retirement. Now this CP comes along and is proposing a 30-inch gas pipeline with a 100-foot easement across my land. As a result, I will lose certain uses of my land & still have to pay full taxes on the property and have a TIMEBOMB sitting in my front yard. Plus the value of the property will decrease drastically. Who in their right mind would purchase it? This pipeline destroys a community, dreams and everything it touches. This is all for commercial benefit & to encourage fracking throughout NY State. I have denied CP access to my property from Day 1, & the only way CP can get my land is by Eminent Domain! And if it goes that way, I hope more than a revolution begins! I thought I was living in the USA - not in a Third World country with no rights. This situation is a total disgrace for every citizen in America and should not be allowed to take place. As no one else can represent my interests in this matter, I am filing this motion to intervene.

CERTIFICATE OF SERVICE

Pursuant to Local Rule 25.1(h)(2), I certify that on February 5, 2021, I electronically filed the foregoing Response in Opposition to Respondent's Motion to Dismiss and in Support of Petitioner's Motion for Vacatur of the Orders and the Affirmation of Anne Marie Garti in Support of Stop the Pipeline's Response in Opposition to Respondent's Motion to Dismiss and in Support of Petitioner's Motion for Vacatur of the Orders with the Clerk of the Court by using the appellate CM/ECF System, which served copies on all ECF-registered counsel.

Dated: February 5, 2021

Respectfully submitted,

/s/ Anne Marie Garti
ANNE MARIE GARTI
D.C. Circuit Bar No. 60401
PO Box 15
Bronx, New York 10471
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Counsel for Petitioner Stop the Pipeline

Exhibit B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 19-4338, 20-158, 20-208 Caption [use short title] NYS Dep't of Envt'l Conservation, et al. v. FERC

Motion for: Dismissal for lack of subject-matter jurisdiction or for additional relief under FRAP 27(a)(3)(B)

Set forth below precise, complete statement of relief sought:

Vacatur of the two Waiver Orders under review based on the Federal Energy Regulatory Commission's lack of jurisdiction to issue them. Alternatively, vacatur of the two Waiver Orders if the cases are found moot.

MOVING PARTY: Stop the Pipeline **OPPOSING PARTY:** Federal Energy Regulatory Commission

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Anne Marie Garti **OPPOSING ATTORNEY:** Susanna Y. Chu

[name of attorney, with firm, address, phone number and e-mail]

PO Box 15, Bronx, NY 10471

718 601-9618 annemarie@garti.net

888 First Ave. N.E., Washington, D.C. 20426

202 502-8464 susanna.chu@ferc.gov

Court- Judge/ Agency appealed from: Federal Energy Regulatory Commission

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Anne Marie Garti **Date:** Feb. 4, 2021 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Petitioner, STOP THE PIPELINE, Petitioner, CATSKILL MOUNTAINKEEPER, INC. RIVERKEEPER, INC., SIERRA CLUB, AND WATERKEEPER ALLIANCE, INC., Petitioners, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	Case Nos. 19-4338 (Lead) 20-158, 20-208 (Consolidated)

STOP THE PIPELINE'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS AND IN SUPPORT OF STOP THE PIPELINE'S MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION AND FOR VACATUR OF THE ORDERS

Pursuant to Rule 27(a)(3)(B) of the Federal Rules of Appellate Procedure, Petitioner Stop the Pipeline ("STP") is requesting additional relief – vacatur of the orders under review if the Court decides the cases are moot. *See* Section III *infra*.

Prior to deciding whether these Petitions for Review are moot, this Court should review the law of the case to determine whether it has subject-matter jurisdiction. *See Sinochem Int'l Co., Ltd. v. Malaysia Int'l Shipping Corp.,* 549 U.S. 422, 436 (2007). A review of statutory jurisdiction includes the question of whether the lower court or, in this case, administrative agency, had jurisdiction to issue its decision. If the Federal Energy Regulatory Commission ("FERC" or "Commission") lacked jurisdiction to issue the Waiver Orders, then they are null and should be vacated.

> "'[E]very federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it…. 'And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'"

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998) (internal citations omitted. Brackets in original).

This Court has already held that the District of Columbia Circuit ("D.C. Circuit") has *exclusive* jurisdiction of a failure-to-act claim. *Constitution Pipeline Co., LLC v. N.Y. State Dep't of Envtl. Conservation*, 868 F.3d 87, 99-100 (2d Cir. 2017), *reh'g denied, cert. denied*, 138 S.Ct. 1697 (2018). Ignoring the Court's

Order, Constitution Pipeline Company, LLC ("Constitution") brought the issue to FERC. The Commission also defied the Court by assuming jurisdiction and issuing a series of orders.[1] In the two Waiver Orders that are under review, FERC declares that the New York State Department of Environmental Conservation ("Department" or "NYSDEC") waived its rights under Section 401 of the Clean Water Act, 33 U.S.C § 1341, by failing to act in a timely manner. However, under the law of the case, the D.C. Circuit has exclusive jurisdiction to decide this issue. Therefore, the Commission's Waiver Orders must be vacated for lack of subject-matter jurisdiction. Only then should the Petitions for Review be dismissed.

ARGUMENT

I. FERC VIOLATED THE LAW OF THE CASE BY ASSUMING JURISDICTION AFTER THIS COURT HELD THAT THE DISTRICT OF COLUMBIA CIRCUIT HAS EXCLUSIVE JURISDICTION FOR A FAILURE-TO-ACT CLAIM.

A. This Court Has Already Held that the District of Columbia Circuit Has Exclusive Jurisdiction for a Failure-to-Act Claim

[1] *Constitution Pipeline Co., LLC*, 162 FERC ¶ 61,014 (Jan. 11, 2018) ("Waiver Order I"); *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029 (July 19, 2018) ("Rehearing Order I"); *Order on Voluntary Remand*, 168 FERC ¶ 61,129, P 1 (Aug. 28, 2019) ("Waiver Order II"); *Order Denying Rehearing and Stay*, 169 FERC ¶ 61,199 (Dec. 12, 2019) ("Rehearing Order II"). The Petitioners and Respondent refer to Waiver Order II and Rehearing Order II as the "Waiver Orders," as they are the orders under review. Resp't's Br. 2.

In *Constitution*, the Court held that 15 U.S.C. § 717r(d)(2) "encompass[es] not only an alleged failure to act but also an allegation that a failure to act within a mandated time period should be treated as a failure to act." *Constitution*, 868 F.3d at 99. This statutory interpretation was reached after the jurisdictional issue had been fully briefed and a supplemental case from the D.C. Circuit filed.[2] The Court concluded, "Such a failure-to-act claim is one over which the D.C. Circuit would have 'exclusive' jurisdiction, 15 U.S.C. § 717r(d)(2)." *Id*. at 100. Ignoring the holding, Constitution filed a Petition for a Declaratory Order regarding the failure-to-act claim with FERC.[3] The Commission did not consider itself bound by this Court's decision. Instead, it assumed jurisdiction and issued a series of four orders.[4] In its third order, Waiver Order II, it found the Department waived its right to deny Constitution's application for a water quality certification. Thus it violated the law of the case. "When a[n appellate] court, as part of its judgment, decides an

[2] *Constitution,* Case No. 16-1568, Constitution Br., 1-2, 26-36, Oct. 17, 2016, ECF No. 171 (Issue one is devoted to whether NYSDEC waived its rights under Section 401 of the Clean Water Act, 33 U.S.C. § 1341.); STP Br., 1, 11-20, Oct. 17, 2016, ECF No. 175; NYSDEC Br., 2, 4, 29, 32-43, Oct. 17, 2016, ECF No. 170; Catskill Mountainkeeper Br., 1-2, 11-12, 14-24, Oct. 17, 2016, ECF No. 173; Constitution Reply Br., 6-13, Oct. 17, 2016, ECF No. 172; NYSDEC, FRAP 28(j) Letter, June 23, 2017, ECF No. 227; Constitution, FRAP 28(j) Letter, June 28, 2017, ECF No. 230; Catskill Mountainkeeper, FRAP 28(j) Letter, June 29, 2017, ECF No. 233; STP, FRAP 28(j) Letter, July 5, 2017, ECF No. 236.

[3] Constitution, Petition for Declaratory Order, Oct. 11, 2017, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20171011-5210.

[4] *See* note 1.

issue that overlaps with part of the [Commission's] analysis, the [Commission should] give[] preclusive effect to the court's judgment." *B&B Hardware Inc. v. Hargis Indus.*, 575 U.S. 138, 152 (2015).

The Commission's Waiver Orders address the same issues as those raised by Constitution in its 2016 petition for review: whether the Department failed to act in a reasonable period of time and thereby waived its right to deny its application for a 401 water quality certification. *Constitution*, 868 F.3d at 98-100. The jurisdictional issue was raised and fully briefed.[5] Before it was decided, the Department informed the Court that the D.C. Circuit had dismissed a waiver petition because Millennium Pipeline Company, LLC ("Millennium") lacked standing.[6] Constitution agreed that Millennium's petition was dismissed because it did not have standing.[7] However, it also argued that it could initiate parallel proceedings with FERC regarding waiver. *Id*. After considering all the briefs and letters regarding waiver, the Court held that the D.C. Circuit would have exclusive jurisdiction over both agency delay and a failure-to-act claim. *Constitution*, 868 F.3d at 99-100.

[5] *See* note 2.
[6] *Constitution,* Case No. 16-1568, NYSDEC, FRAP 28(j) Letter, June 23, 2017, ECF No. 227.
[7] *Constitution,* Case No. 16-1568, Constitution, FRAP 28(j) Letter, June 28, 2017, ECF No. 230.

Constitution did not petition this Court for rehearing on the jurisdictional issue.[8] Nor did the Supreme Court of the United States overturn the Court's jurisdictional holding in *Constitution*. Therefore, this Court's interpretation of 15 U.S.C. § 717r(d)(2) is the law of the Circuit and binds the Commission. *Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) ("An agency is bound to follow the law of the Circuit."). "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Neal v. United States*, 516 U.S. 284, 295 (1996) (internal citations omitted). *See also LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) ("One three-judge panel [] does not have the authority to overrule another three-judge panel of the court.").

B. The Commission Failed to Follow the Law of the Case

Despite the unequivocal holding by this Court that the D.C. Circuit had exclusive jurisdiction, the Commission nevertheless asserted jurisdiction over the same issue. "The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority…. These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies." *Cleveland v. Fed. Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977). In *Ithaca College*, this Court

[8] *Id.*, Constitution, Petition for Rehearing, Sept. 1, 2017, ECF No. 251.

emphasized that it does not acquiesce in an agency's refusal to follow its orders. *Ithaca College*, 623 F.2d at 228.

1. Procedural Background

On October 11, 2017, Constitution "petition[ed] the Commission for a declaratory order finding that the [Department] failed to act within a reasonable period of time on Constitution's Clean Water Act Section 401 application, and that such failure to act constitutes a waiver of the Section 401 water quality certification…."[9] In other words, less than two months after this Court held that the D.C. Circuit would have exclusive jurisdiction over a failure-to-act claim, Constitution brought that claim to the Commission. STP objected to the Commission's jurisdiction.[10] However, instead of following this Court's order, the Commission relied on its interpretations of decisions issued by the D.C. Circuit.[11] Waiver Order I, 164 FERC ¶ 61,029, P 12.[12] Since the Commission held the Department did not waive its rights, *id*. P 1, STP was not "aggrieved by the order" and could not request rehearing. 15 U.S.C. § 717r(a). However, Constitution did

[9] Constitution, Petition for Declaratory Order, 1, Oct. 11, 2017, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20171011-5210.

[10] STP, Answer in Opposition to Petition, 1-5, Nov. 9, 2017, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20171109-5084.

[11] See Section I.B.2. *infra* for a discussion of this case.

[12] The Commission uses ¶ to indicate a page in an order and P to indicate a numbered paragraph.

request rehearing, which was denied. *See* Rehearing Order I, 164 FERC ¶ 61,029. Constitution petitioned the D.C. Circuit for review of Waiver Order I and Rehearing Order I on September 14, 2018.[13] The case was put in abeyance and remanded to the Commission,[14] after *Hoopa Valley* was issued. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *cert. denied* 140 S. Ct. 650 (Dec. 9, 2019). STP again objected to the Commission's jurisdiction after the Commission requested additional briefing.[15] In Waiver Order II, the Commission again violated this Court's prior holding regarding the D.C. Circuit's exclusive jurisdiction by assuming jurisdiction. Waiver Order II, 168 FERC ¶ 61,129, PP 1, 14-15. STP requested rehearing and argued, for the third time, that the Commission lacked jurisdiction to issue the Order.[16] The Commission denied rehearing, claiming this Court did not address the issue of jurisdiction. Rehearing Order II, 169 FERC ¶ 61,199, P 9.

2. The Commission Erred by Relying on *Millennium*

[13] *Constitution Pipeline Co., LLC v. FERC*, D.C. Cir. Case No. 18-1251, Petition for Review, Sept. 14, 2018, ECF No. 1750882. STP, Motion to Intervene, Oct. 12, 2018, ECF No. 1755137.

[14] *Id*., Abeyance Order, Nov. 5, 2018, ECF No. 1758585; Remand Order, Feb. 28, 2019, ECF No. 1775259.

[15] STP, Supplemental Opposition, 18-20, April 1, 2019, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20190401-5607.

[16] STP, Request for Rehearing, 4-9, Sept. 27, 2019, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20190927-5141.

The Commission chose to ignore this Court's holding so it could follow *Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017). However, it lacks the authority to act as the Supreme Court. 15 U.S.C. § 717r(b) ("The judgment and decree of the court … shall be final, subject to review by the Supreme Court of the United States…."). In addition, *Millennium* can be distinguished because there the Department had not yet acted on the application for the water quality certification. *Millennium*, 860 F.3d at 698. The D.C. Circuit held that Millennium lacked standing to bring the case because the Department had not yet issued a decision, so it had not suffered an injury. *Id*. 699-70. "So what can Millennium do in the face of the Department's *continued inaction*? Millennium can go directly to FERC and present evidence of the Department's waiver." *Id*. 701 (emphasis added). The Commission acknowledged on multiple occasions that Millennium lacked standing. *See, e.g*., Waiver Order I, 164 FERC ¶ 61,029, P 12, n.23; *Millennium Pipeline Co., LLC,* 160 FERC ¶ 61,065, n.8 (2017). This Court also noted that Millennium's petition was dismissed because it lacked standing. *See N.Y. State Dep't of Envtl. Conservation v. FERC*, 884 F.3d 450, 453-54 (2d Cir. 2018). However, that is not the situation here because the Department denied Constitution's application for a water quality certification before Constitution sought judicial review. Waiver Order II, 168 FERC ¶ 61,129, PP 6-7. Therefore, unlike Millennium, Constitution had standing to bring its petition to the D.C.

Circuit. The Commission attempts to expand the holding in *Millennium* to include situations where the Department has acted. *Id*. PP 14-15.[17] It relies on dicta to reach this conclusion and uses it to justify its assumption of jurisdiction. Rehearing Order II, 169 FERC ¶ 61,199, P 8. However, the D.C. Circuit could not have ruled on a situation where the Department had already denied the water quality certification because those facts were not before it.

While it may be true that "[o]nce the Clean Water Act's requirements have been waived, the Act falls out of the equation[,]" *Millennium*, 860 F.3d at 700, the question here is who decides if those requirements have been waived. This Court has already made that determination in this case and the Commission is bound to follow it, even if it prefers decisions from another circuit. Attempting to sidestep that obligation, FERC claims "there was no reason for the [Second Circuit] to address the question whether Constitution must proceed directly to the D.C. Circuit[.]" Rehearing Order II, 169 FERC ¶ 61,199, P 9. This is clear error because, after full briefing,[18] this Court expressly held that 15 U.S.C. § 717r(d)(2) included a waiver claim. *Constitution*, 868 F.3d at 99 ("We regard subsection (2) titled 'Agency delay' as encompassing not only 'an alleged failure to act' but also an allegation that a failure to act within a mandated time period should be treated

[17] In Rehearing Order II, n.21, the Commission corrected its mischaracterization of STP's argument.

[18] *See* note 2.

as a failure to act."). Since subsection (2) already grants exclusive jurisdiction to the D.C. Circuit for agency delay, the Court extended that exclusive jurisdiction to include Constitution's waiver claim. *Id*. 100. However, the Commission would be bound even if the jurisdictional decision had only been implied. *See Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939) ("[T]he 'law of the case' … applies to everything decided, either expressly or by necessary implication.").

Since this Court has already held that the D.C. Circuit has exclusive jurisdiction to make such a determination, "the [Commission] cannot, as it did here, choose to ignore the [Second Circuit's] decision as if it had no force or effect. Absent reversal, that decision is the law which the [Commission] must follow." *Ithaca College*, 623 F.2d at 228. Therefore, the Commission's Waiver Orders must be vacated for lack of subject-matter jurisdiction.

II. THESE CASES ARE NOT MOOT

Because the Commission never had jurisdiction to decide any of the Waiver Orders after this Court's original holding, the Court need not reach the issue of mootness. However, assuming, *arguendo*, that the Court reaches the issue of mootness, the Commission fails to meet the high standard needed to establish it. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (A defendant has "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected

to recur[.]"). While such a determination requires a fact specific analysis, the Commission neglected to show any meaningful parallels between the facts presented in the cases it cites with those that are currently under review. For example, in *Delaware Riverkeeper*, the project was constructed, site stabilization completed, and "[t]ermination was 'legally completed[.]'" *Del. Riverkeeper Network v. N.Y. State Dep't of Envt'l Conservation*, 788 F. App'x 65, 66 (2d Cir. 2019) (summary order). That is not the case here because the project has not been constructed and the Certificate and Waiver Orders have not been vacated. Garti Aff. ¶ 8.

The Commission failed to note that a different test applies when voluntary actions by a defendant lead to an appearance of mootness, but those actions can be reversed at a later date. *United States v. Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968) ("A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."). "It is incumbent upon the defendant … who is seeking dismissal to meet the 'heavy' burden of satisfying this test." *Ahrens v. Bowen*, 852 F.2d 49, 53 (2d Cir. 1988) (internal citation omitted). Contrary to the Commission's conclusory statements, that has not happened here.

The Commission claims the Certificate of Public Convenience and Necessity, *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 (2014)

("Certificate Order"), has "lapsed," Resp't's Br. 1, 4-5, without mentioning that Constitution can move to revive it. FERC's "voluntary statement of cessation" is based on its speculative interpretation of Constitution's plans, while ignoring other possibilities. It is being made so the Commission can evade judicial review of its orders. It also contradicts FERC's regulations, which state a member of FERC's staff can grant a motion to Constitution to extend the construction deadline "at any time," thereby reviving the project. *See* 18 C.F.R. §§ 375.308(w)(4), 385.212(a)(1). This is true even if the construction deadline has passed. *Id.* § 385.2008(b). There is nothing in FERC's regulations or case law that forbids a retroactive extension of a construction deadline under the Natural Gas Act. That is why FERC failed to cite a single case to support its position that if the Certificate Order has lapsed, it cannot be revived. "[W]e have only appellee[']s own statement that [the Certificate Order has lapsed]. Such a statement, standing alone, cannot suffice to satisfy the heavy burden of persuasion which we have held rests upon those in appellee[']s shoes." *Concentrated Phosphate*, 393 U.S. at 203.

Ironically, the Commission already admitted that what it is claiming now could be reversed. "[C]ounsel for FERC has indicated that it is not possible to commit the agency to any specific action with respect to a hypothetical future motion." Department, Motion for Abeyance, 10, Dec. 30, 2020, ECF No. 102-2. Therefore, "interim [] events have [not] *completely and irrevocably eradicated the*

effects of the alleged violation." *Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc*., 191 F.3d 198, 202 (2d Cir. 1999) (emphasis added).

In addition, "[a] case becomes moot when 'intervening events make it impossible to grant the prevailing party effective relief.'" *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (internal citations omitted). Here, the Waiver Orders remain valid and can be vacated on the merits. Since the Petitioners continue to be injured by the Waiver Orders and can be granted effective relief, their cases are not moot. However, if the cases are dismissed and the project is revived in the future, the Petitioners will no longer be able to challenge the Waiver Orders. 15 U.S.C. § 717r (b) (stating that a petition must be filed in the appropriate Circuit Court of Appeals "within sixty days after the order of the Commission upon the application for rehearing[.]"). If the project were revived, Constitution could construct the pipeline on land owned by members of STP without the Department's review. On the other hand, if the Court decides that Constitution has no plans to revive the project, then the Waiver Orders should be vacated. *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991) ("When circumstances beyond an appellant's control render moot a question decided and appealed from, a federal appellate court will generally vacate the decision below,").

A. The Certificate Order Can Be Revived

A certificate of public convenience and necessity remains valid until it is vacated. While the Commission claims that its authorization for the pipeline project has lapsed, the passage of the construction deadline does not mean the Certificate Order has expired, or is void. Instead, the passage of the construction deadline is simply an unfulfilled condition, just like Constitution's noncompliance with various environmental conditions listed in the Appendix.

> (E) The certificate authority issued in Ordering Paragraphs (A) and (D) shall be conditioned on the following:
> (1) Applicant's completion of the authorized construction of the proposed facilities and making them available for service within 24 months from the date of this order, pursuant to section 157.20(b) of the Commissions regulations; . . .
> (3) Applicant's compliance with the environmental conditions listed in the appendix to this order.

Certificate Order, Ordering Para. E., ¶ 46. In addition, the lapse of an order does not make an appeal moot. *Nader v. Volpe*, 475 F.2d 916, 917 (D.C. Cir. 1973) ("Where a court is asked to adjudicate the legality of an agency order, it is not compelled to dismiss the case as moot whenever the order expires or is withdrawn."). *See also Natural Res. Def. Council, Inc. v. E.P.A.*, 595 F.Supp. 1255, 1263 (S.D.N.Y. 1984) (same).

The Commission's statement that the Certificate Order has lapsed does not mean it cannot be revived. *See* 18 C.F.R. § 385.2008(b). In addition, its position is not supported by the facts it points to as evidence or by the orders it has issued in other cases. For example, if Constitution had truly given up on this pipeline project, it would have asked FERC to vacate the Certificate Order, just as it asked the Department to terminate its applications and permits. Resp't's Br. 3, Att. A, A-023. Garti Aff. ¶ 8. Other holders of certificates, like Arlington, have successfully taken this step. "Arlington filed a request to vacate the certificate authorizations granted in the May 2014 Order. Arlington states that it never commenced construction of the Gallery 2 Project, and it no longer intends to do so." *Arlington Storage Company, LLC*, 161 FERC ¶ 61,290, P 3 (2017). The Commission vacated Arlington's certificate. *Id.* P 4. Nor has the Commission made any move to vacate the Certificate Order on its own, a power it has asserted in other dockets. *See Tallulah Gas Storage, LLC*, 156 FERC ¶ 61,141 (2016). "[However], the question of the Commission's authority to revoke or modify a certificate once issued is not free from doubt." *Trunkline LNG Company, et al*., 22 FERC ¶ 61,245, 61,442 (1983). Given this uncertainty, the cases are not moot.

The Commission also ignores its own regulations, which state that a member of FERC's staff can grant a motion to Constitution to extend the construction deadline "at any time," thereby reviving the project. *See* 18 C.F.R. §§

375.308(w)(4), 385.212(a)(1). Such extensions are regularly granted. For example, Magnum was granted a certificate on March 18, 2011, *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197 (2011), which was extended on November 17, 2016. *Magnum Gas Storage, LLC*, 157 FERC ¶ 61,114 (2016). On August 17, 2020, Magnum requested a four-and-a-half-year extension, which was granted by a member of FERC's staff on September 15, 2020. FERC, Letter Order Granting Extension, 2, Sept. 15, 2020.[19] The last sentence states, "This action is taken pursuant to authority delegated by the Commission in 18 C.F.R. § 375.308(w)(4)." *Id.* Construction must now be completed by May 17, 2025. *Id.* Nothing in the Natural Gas Act precludes another extension.

The Commission has failed to cite any authority that would stop Constitution, or a successor in interest, from making a similar request. One of the reasons Magnum gave for requesting the extension was "market conditions." Constitution also used "market conditions" as a reason for not proceeding and could easily claim that those conditions have changed again. In this volatile world, geo-political events change quickly and could alter the purported need for such a pipeline, or Constitution could have a buyer ready to assume its rights waiting in the wings. If this were to occur, Constitution, or its successors in interest, would be able to construct the pipeline project without FERC's Waiver Orders ever being

[19] Available at http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20200915-3030.

reviewed, and without a 401 water quality certification from the Department. Thus, the Commission has not "met [its] 'formidable burden' of showing that it is 'absolutely clear' that the [pipeline] will never be [constructed]." *Mhany Mgmt. v. Cty. of Nassau*, 819 F.3d 581, 604 (2d Cir. 2016).

B. The Eminent Domain Cases Are Still Active and Constitution Can Try to Sell its Easements to Another Entity

The Commission states that Constitution has resolved its eminent domain litigation, Resp't's Br. 4, but the attachment it cites does not support that claim. *Id*., Att. B, A-037. In fact, at least thirteen cases are still active in the Northern District of New York ("N.D.N.Y."), Garti Aff., ¶ 3, and possibly many more because sixty-five active cases are listed in Constitution's motion. Resp't's Br.3, Att. A, A-020-21. In addition, Constitution's motion to the N.D.N.Y. contradicts the Commission's Motion to Dismiss because Constitution only sought to dissolve the injunction that granted it access. Resp't's Br., Att. A, A-004-5. Condemnation for interstate gas pipelines in federal district courts involves two steps: (1) an order granting the pipeline company the right to take the property; and (2) an injunction granting immediate access to it. *See East Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808, 831 (4th Cir. 2004) ("[W]e hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may use its equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction."). Constitution acquired the substantive

right to condemn in early 2015. Pet'r's Br. 8, 10, Oct. 17, 2016, ECF No. 222. On April 17, 2020, Constitution asked the N.D.N.Y. to dissolve the injunctions that granted it access, but not the orders that granted it the right to take the properties. Resp't's Br., Att. A, A-004 ("The injunction granted by the Possession Order is hereby dissolved[.]"). In other words, since Constitution did not ask the N.D.N.Y. to void the order that granted it the substantive right to condemn, its intent was to retain the right of possession. That intent undermines the Commission's Motion to Dismiss.

The Commission also ignores the fact that well over six hundred property owners have signed easement agreements with Constitution.[20] This means that Constitution holds deeded easements for approximately ninety-five percent of the pipeline route and can try to transfer its rights to another corporation. Garti Aff. ¶¶ 6, 7. Constitution's successor in interest could then ask FERC to extend the construction deadline in the still valid Certificate Order, and a member of FERC's staff could grant such a motion at any time. 18 C.F.R. §§ 375.308(w)(4), 385.212(a)(1). If these Petitions are dismissed without vacatur of the Waiver

[20] The 124-mile-long project would affect 707 distinct parcels of land. FERC, Final Environmental Impact Statement, ES-1, ES-3, Oct. 24, 2014, http://elibrary.FERC.gov/idmws/file_list.asp?accession_num=20141024-4001. As of April 17, 2020, only sixty-five had not settled in New York State. Resp't's Br.3, Att. A, A-020-21.

Orders, that staff member could also grant a Notice to Proceed with Construction without a 401 water quality certification from the Department.

C. As a Declaratory Order, Waiver Order II Is Not Moot

Petitioners in these consolidated cases challenged the validity of the Waiver Orders, but those orders are barely mentioned in the Commission's Motion to Dismiss. This omission is significant. If these cases are dismissed as moot, the Petitioners would never be able to challenge them, but the Commission would forever be able to use them as precedent against Petitioners and future parties. This is fundamentally unfair. *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73-4 (2d Cir. 1991). Under strict guidelines for judicial review, 15 U.S.C. §§ 717r(a), (b), "aggrieved" parties must request rehearing within thirty days of a final order and petition for judicial review within sixty days of the order on rehearing. *Id.* These jurisdictional requirements cannot be waived. That means these cases are the only opportunity for judicial review of these declaratory orders. Since the Waiver Orders set binding precedent, they are not moot.

III. THE WAIVER ORDERS MUST BE VACATED IF THE PETITIONS ARE DEEMED MOOT

The Commission should not be allowed to shield its Waiver Orders from judicial review by having the cases dismissed as moot.

> When circumstances beyond an appellant's control render moot a question decided and appealed from, a

> federal appellate court will generally vacate the decision below.… The rationale is that a judgment from which litigants have the right of appeal should not be accorded preclusive effect when events beyond their control prevent them from exercising that right.
>
> This interest is especially pronounced when actions of winning litigants serve to deny their adversaries the opportunity to appeal. Under these circumstances it may amount to an abuse of discretion not to vacate the lower court order. Were it otherwise, appellees could deliberately moot cases on appeal, thereby shielding erroneous decisions from reversal.

Penguin Books, 929 F.2d at 73 (internal citations omitted).

In *Tennessee*, the D.C. Circuit grappled with the question of whether a declaratory order, or an order that would act as a declaratory order by establishing precedent, can be dismissed as moot. *Tennessee Gas Pipeline Co. v. Fed. Power Comm'n*, 606 F.2d 1373,1381-83 (D.C. Cir. 1979). Here, it is uncontroverted that Waiver Order II is a declaratory order and, as such, is still an "operative order." *Id.* at 1381. Therefore it is highly questionable whether these cases have been rendered moot by Constitution's actions. To paraphrase the Commission's position in *Tennessee* and apply them to the facts here, "[Constitution's certificate authority] 'remains on file with the Commission; and absent an order striking it down it may be invoked by [Constitution] in the future,' and that [Constitution] will be free at some future date to begin [constructing the pipeline] anew[.]" *Id.* at 1382.

The D.C. Circuit found Tennessee's curtailment plan too fact specific to be used without alteration, so it appeared the case was moot. *Id.* at 1381. However, FERC created uncertainty by arguing that its orders should not be vacated so they could be used as precedent. *Id.* at 1381, n. 40. To resolve the situation, the D.C. Circuit turned to *Mechling Barge Lines v. United States*, 368 U.S. 324 (1961), where the Court extended its holding in *United States v. Munsingwear, Inc*., 430 U.S. 36 (1950) to include unreviewed administrative orders. *Tennessee*, 606 F.2d at 1382.

> We follow the course set out in Munsingwear and Mechling and, accordingly, vacate the order which we decline to review. A different result likely would affect petitioners harshly. . . . [W]e set aside the Commission's orders to assure they do not collaterally affect other matters[.]"

Id. at 1383. Applying that solution to these cases would protect the Petitioners from external events, whether caused by "happenstance" or the Commission's desire to evade judicial review. *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381, 383 (2d Cir. 1993).

IV. Conclusion

STP believes the Court has three options: 1) vacate the Waiver Orders prior to dismissal for lack of subject-matter jurisdiction; 2) deny the motions and order

briefing on the merits because the cases are not moot; or 3) vacate the Waiver Orders and dismiss the cases as moot.

February 4, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that the foregoing Response in Opposition to Respondent's Motion to Dismiss and in Support of Stop the Pipeline's Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Motion for Vacatur of the Orders complies with the type-volume limitation of Rule 27(d)(2)(A) as it contains 5,145 words, excluding the parts of the brief exempted by Rules 27(d)(2) and 32(f). I further certify that it complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) as this paper was prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

February 4, 2021

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Counsel for Petitioner
Stop the Pipeline

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, Petitioner, STOP THE PIPELINE, Petitioner, CATSKILL MOUNTAINKEEPER, INC. RIVERKEEPER, INC., SIERRA CLUB, AND WATERKEEPER ALLIANCE, INC., Petitioners, v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent.	Case No. 19-4338 (Lead) 20-158, 20-208 (Consolidated)

AFFIRMATION OF ANNE MARIE GARTI
IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS FOR MOOTNESS
AND IN SUPPORT OF
STOP THE PIPELINE'S MOTION TO DISMISS
FOR LACK OF SUBJECT-MATTER JURISDICTION
AND FOR VACATUR OF THE ORDERS

Anne Marie Garti declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am an attorney admitted to practice law in the United States Court of Appeals for the Second Circuit ("Second Circuit") and represent the Petitioner, Stop the Pipeline, with co-counsel Todd D. Ommen, in Case Nos. 16-361 and 20-158.
2. I have been actively involved with Constitution Pipeline Company's ("Constitution's") pipeline project since the spring of 2012 and know many of the details related to its regulatory review.
3. I represent thirteen landowners in Constitution's condemnation cases in the Northern District of New York ("N.D.N.Y."), all of which are still active.
4. I opposed Constitution's Motion, which is attached to the Federal Energy Regulatory Commission's ("FERC's") Motion to Dismiss as Attachment A, because it did not ask the District Court to vacate the orders granting Constitution the right to take the Landowners' property.
5. Constitution's Proposed Order, Resp't's Br., Att. A., A-004-5, was rejected by the N.D.N.Y.
6. I have reviewed many of the easements recorded in the Offices of the County Clerks in New York State. As of September 17, 2020,

Constitution had acquired Rights of Way on approximately ninety-five percent of the 124-mile pipeline route through stipulated agreements.

7. Constitution retains the right to build a pipeline on the Rights of Way it has acquired through stipulated agreements, and can transfer those rights to another entity without the Landowners' permission.

8. I am notified of all filings in the FERC dockets related to this pipeline project and Constitution has not asked FERC to terminate or vacate its Certificate or Waiver Orders.

Dated: February 4, 2021

Respectfully submitted,

/S/ ANNE MARIE GARTI
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Counsel for Petitioner
Stop the Pipeline

Attachment A

Motions to Intervene by Landowners

July 2013

Submission Description: (doc-less) Motion to Intervene of William J. and Christine C Roche under CP13-499-000.

Submission Date: 7/15/2013 9:34:04 PM

Filed Date: 7/16/2013 8:30:00 AM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party	Signer (Representative)
Other Contact (Principal)	
Individual	rochefamily2013@aol.com

Basis for Intervening:

We are owners of 127 acres in Davenport, New York. If approved, the Constitution Pipeline will destroy our long dreamed of, hard earned, and much loved property. This is property to which we escape to enjoy privacy, fresh air, fresh water and the beauty and serenity of nature. Property where we marvel over and give thanks for all of Godâ€™s little creatures and wonders of nature. We have invested our hearts, years of hard work and our lifeâ€™s savings in this property. For a private corporation to be able to take and profit from United States citizens against their will is unfathomable.

This is property where we intended to build a solar home and hobby farm. The proposed route of this pipeline is yards from our home site and feet from our newly constructed barn. It will result in the removal of the trees that provide our privacy. It will cut straight through our only field. This is a field that weâ€™ve spent hundreds of hours clearing with our own hands to situate our planned windmill, raise our own animals and grow and harvest our own organic fruits and vegetables. The route will pass near our pond (which is fed by natural springs) and through our wetlands. Finally, it will pass under White Hill Road and through our forest on the other side of the road. We are incredibly saddened at the prospect of losing our dream.

We fear the devaluation of our property and the loss of dollars we have invested. We question our ability to obtain a mortgage and insurance on this property. We fear for the quality of our drinking water and pond water, the quality of our air, damage to our pond and its damn and damage to our wetlands. We are concerned about soil erosion and the wild life and vegetation. We are worried about the increased liability we will be subjected to. We anticipate increased trespassing due to the clearing of such a wide corridor.

We fear for our physical safety and for the safety of our community. Our homestead, those of our adjoining neighbors, and the Nature Conservatory would be incinerated in the event of an explosion. So too would be a major communications line which runs over our property. This line services numerous radio stations, phone carriers and all 911 providers in Delaware and Otsego Counties.

Certainly, more compressor stations will be needed to operate this pipeline. We are concerned about the hazards, air quality issues, noise levels and visual assaults that accompany these compressor stations. We realize that this pipeline creates the infrastructure for future fracking and fear the industrialization of our rural communities. We fear for the character of our communities, for tourism, for agriculture, for the environment and for the health and well-being of all that inhabits this earth. This is an under-regulated industry with a horrible safety record.

Branding this 30 inch intrusion as "The Constitution Pipeline" is insulting to all hard working American families. It is quite unconstitutional to take private property without just compensation and without justification for public need. We believe that this pipeline will eventually be used to transport gas to other countries.

We will not be deceived by the Constitution Pipeline Companyâ€™s bribes ("grants") to win support or their promises to be "good neighbors". We base our beliefs on their poor safety record, dishonesty and pompous arrogance towards landowners from whom they intend to steal. They have earned that reputation and we will not blindly ignore it. We refuse to grant Constitution Pipeline Co, LLC access to our property for the purpose of surveying. We

refuse to partner with them by signing an easement. We will not subject ourselves to additional liability or to additional pipelines or other utilities. We will not willingly be sacrificed for their economic benefit. We will not willingly give up control of our property or give away our right to enjoy and use our land (while still having to pay taxes on it) in the manner we had intended. We will continue our responsibility to be good stewards of this great land. We will force Constitution Pipeline Co, LLC to take us to court for the purpose of taking our property by eminent domain against our will.

Stating all of our concerns is an overwhelming task. They are numerous and vast. We reserve our right to add concerns as we become aware and able to articulate them. We encourage FERC to provide a full cumulative impact analysis for this project.

Since no one else can represent our myriad of interests in this issue, we are filing this motion to intervene.

Signed, William and Christine Roche

Submission Description: (doc-less) Motion to Intervene of Robert Stack under CP13-499-000.

Submission Date: 7/13/2013 10:40:42 AM

Filed Date: 7/15/2013 8:30:00 AM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party	Signer (Representative)
Other Contact (Principal)	
Individual	renobob2@yahoo.com

Basis for Intervening:
I am a resident of Davenport, NY in Delaware County. My property is scheduled to have the Constitution Pipeline (FERC Docket CP13-499) run through the property exactly where my wife and I had planned to build a home. Since the pipeline is "open-access," it will encourage industrial development, including natural gas extraction, which will drastically alter the rural character of the community where I have planned to live. As no one else can represent my interests in this matter, I am filing this motion to intervene.
My specific concerns are as follows:

First, the proposed route runs the pipeline right through my property (NY-DE-30.000), and moreover, through the only place on my property suitable for building a home. My wife and I had planned to build a home on this site after I retired in August 2012. This pipeline as proposed would use up the only part of the property that has suitable road frontage. If the construction goes as planned, the rest of the property would become landlocked, with no access to Coe Hill Road, and therefore rendered useless for building a home.

My second concern is that, even if a suitable building site were to be made available somehow, the fact remains that we would not want to live adjacent to a large high-pressure gas pipeline. The gas industry cites endless statistics about the safety record of these pipelines, but the fact remains that these pipelines sometimes do fail, property is destroyed and lives are lost. We donâ€™t wish to become statistics so that Cabot-Williams can make a profit.

These two points taken together mean that the pipeline would take away from us not just the value of the acreage needed for the right-of-way, but would render our entire 97-acre parcel value-less and useless for the purposes for which we bought it 8 years ago.

The third point I wish to make is that this right-of-way will leave a 110-foot wide swath of bare ground through my property and through adjacent properties, much of which is now covered with trees. Again, we do not wish to live in sight of such destruction of the beautiful forests in this area.

This land has far more intrinsic value to us than would be reflected in any market-value assessment. This means that we are not swayed by offers of â€œfair market valueâ€ for just the right-of-way acreage and the timber that must be cut. The complete loss of the use of the land due to the pipeline would constitute a â€œtakingâ€ of the entire property, not just the right-of-way portion.

Next, I question whether this pipeline needs to be built at all. Powers of â€œeminent domainâ€ can be invoked by Cabot-Williams once FERC approves the pipeline. However, the intent (if not the practice) of eminent domain is to take private property so it can be used for the common good, such as schools, parks, or highway expansion. I see no benefit accruing to landowners, towns, or counties from this pipeline. In effect, this â€œtakingâ€ of our land only benefits Cabot Williams. It enables them to earn millions of dollars in gas transportation revenues at the expense of the landowners.

Submission Description: (doc-less) Motion to Intervene of Barbara F Harju under CP13-499-000.

Submission Date: 7/16/2013 3:30:00 PM

Filed Date: 7/16/2013 3:30:00 PM

Dockets

CP13-499-000	Application for a Certificate of Public Convenience and Necessity authorizing the construction and operation of the Constitution Pipeline

Filing Party/Contacts:

Filing Party Other Contact (Principal)	Signer (Representative)
Individual	joeswoods@aol.com

Basis for Intervening:

I am a landowner in the town of Summit, Schoharie County, N.Y. I own 6.3 acres of property on fertile farm land located on a knoll with a beautiful & unobstructed 50-mile easterly view of the mountains and countryside, with the intention of building a home & garden upon retirement. I am now retired and have learned to my horror & disbelief that a gas pipeline has been proposed to go through my property & basically splits my property in half, ending any chance of my building or doing anything! I also learned from Constitution Pipeline (CP) that the original proposed location of the pipeline & easement on my land has been changed and is now fully across my land rendering it useless, uninsurable and hard to finance due to the proposed pipeline TIMEBOMB! How is this allowed to happen? I worked all my life and looked forward to retirement. Now this CP comes along and is proposing a 30-inch gas pipeline with a 100-foot easement across my land. As a result, I will lose certain uses of my land & still have to pay full taxes on the property and have a TIMEBOMB sitting in my front yard. Plus the value of the property will decrease drastically. Who in their right mind would purchase it? This pipeline destroys a community, dreams and everything it touches. This is all for commercial benefit & to encourage fracking throughout NY State. I have denied CP access to my property from Day 1, & the only way CP can get my land is by Eminent Domain! And if it goes that way, I hope more than a revolution begins! I thought I was living in the USA - not in a Third World country with no rights. This situation is a total disgrace for every citizen in America and should not be allowed to take place. As no one else can represent my interests in this matter, I am filing this motion to intervene.

CERTIFICATE OF SERVICE

Pursuant to Local Rule 25.1(h)(2), I certify that on February 4, 2021, I electronically filed the foregoing Response in Opposition to Respondent's Motion to Dismiss and in Support of Stop the Pipeline's Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Motion for Vacatur of the Orders and Affirmation of Anne Marie Garti in Support of Stop the Pipeline's Response in Opposition to Respondent's Motion to Dismiss and in Support of Stop the Pipeline's Motion to Dismiss for Lack of Subject-Matter Jurisdiction and Motion for Vacatur of the Orders with the Clerk of the Court by using the appellate CM/ECF System, which served copies on all ECF-registered counsel.

Dated: February 4, 2021

Respectfully submitted,

/s/ Anne Marie Garti
ANNE MARIE GARTI
D.C. Circuit Bar No. 60401
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Counsel for Petitioner Stop the Pipeline

Exhibit C

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: November 03, 2021
Docket #: 19-4338ag
Short Title: New York State Department of E v. Federal Energy Regulatory Comm

Agency #: CP18-5-000
Agency: Federal Energy Regulatory CommissionAgency #: CP18-5-001
Agency: Federal Energy Regulatory CommissionAgency #: CP18-5-002
Agency: Federal Energy Regulatory CommissionAgency #: CP18-5-003
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Agency: Federal Energy Regulatory CommissionAgency #: CP18-5-002
Agency: Federal Energy Regulatory CommissionAgency #: CP18-5-003
Agency: Federal Energy Regulatory Commission

NOTICE OF MOTION PLACED ON THE CALENDAR

Motions to dimiss and to vacate filed in the above-referenced case have been added as a submitted case to the substantive motions calendar for Tuesday, November 16, 2021.

Inquiries regarding this case may be directed to 212-857-8595.

Exhibit D

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

DEBRA ANN LIVINGSTON
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: November 03, 2021
Docket #: 19-4338ag
Short Title: New York State Department of E v. Federal Energy Regulatory Comm

Agency #: CP18-5-000
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Document Content(s)