RECORD NO. 18-1218

ORAL ARGUMENT SCHEDULED FOR APRIL 5, 2019

In The

United States Court of Appeals

For The District of Columbia Circuit

LORI BIRCKHEAD; LANE BRODY, Individually and as CEO of Walden's Puddle, a Wildlife Rehabilitation and Education Center; JIM WRIGHT; MIKE YOUNGER,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

TENNESSEE GAS PIPELINE COMPANY, LLC,

Intervenor for Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FINAL REPLY BRIEF OF PETITIONERS

Carolyn Elefant
LAW OFFICES OF CAROLYN ELEFANT
1440 G Street N.W., Eighth Floor
Washington, DC 20005
(202) 297-6100

Counsel for Petitioners

March 4, 2019

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATUTES AND REGULATIONS 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. SEVERAL OF INTERVENOR TENNESSEE'S ARGUMENTS MUST BE REJECTED AS IMPROPER POST HOC RATIONALIZATIONS AND OUTSIDE THE SCOPE OF THE COMMISSION'S BRIEF 3

II. NEITHER THE COMMISSION NOR TENNESSEE CAN SHOW THAT THE COMMISSION'S APPROVAL OF COMPRESSOR STATION SITE 563 IS A RATIONAL CHOICE BASED ON THE FACTS FOUND 6

A. Site C1 Had Significant Environmental Advantages and Is Compatible With the Applicant's Project Goals 6

B. Neither the Commission Nor Tennessee Demonstrate That Reliance on Site Control Is Rational 9

III. THE COMMISSION AND TENNESSEE RESPONSES REINFORCE THE INADEQUATE REVIEW OF THE SMALLER COMPRESSOR ALTERNATIVE 13

A. Alternative of Downsized Compressor At Site C1 13

B. Smaller Compressor Station at Existing Site 15

IV. THE COMMISSION FAILURE TO EVALUATE UPSTREAM AND DOWNSTREAM CLIMATE CHANGE IMPACTS VIOLATES THIS COURT'S RULING IN *SIERRA CLUB v. FERC* 17

A. Sierra Club Holds That Downstream Emissions From Gas Pipeline Projects Are Reasonably Foreseeable Indirect Impacts of the Commission's Approval of the Project 17

B. The Commission Erred By Failing to Consider Upstream Impacts 21

CONCLUSION 22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

TABLE OF AUTHORITIES

Page(s)

CASES

Citizens Against Burlington, Inc. v. Busey,
938 F.2d 190 (D.C. Cir. 1991).....8, 9

City of Grapevine v. Dept. of Transp,
17 F.3d 1502 (D.C. Cir. 1994).....8, 9

Friends of Capital Crescent Trail v. Fed. Transit Admin.,
877 F.3d 1051 (D.C. Cir. 2017).....18

Maine Public Utils. Comm'n. v. FERC,
625 F.3d 754 (D.C. Cir. 2010).....4

Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,
463 U.S. 29 (1983).....4

Mountain Valley Pipeline,
163 FERC ¶ 61,197 (2017).....20

Myersville Citizens for Rural Community v. FERC,
783 F.3d 1301 (2015) 15

National Audubon Society v. Department of Navy,
422 F.3d 174 (4th Cir. 2005) 7, 12

**Oregon Nat. Desert v. Bureau of Land*,
625 F.3d 1092 (9th Cir. 2008) 14

Sierra Club v. EPA,
884 F.3d 1185 (D.C. Cir 2018).....7

**Sierra Club v. FERC*,
867 F.3d 1357 (D.C. Cir. 2017).....2, 15, 16, 17, 19

U.S. Sugar Corp. v. EPA,
830 F.3d 579 (2018) 7

Util. Air Regulatory Grp. v. EPA,
573 U.S. 302 (2014).....7

**Westar Energy, Inc. v. Federal Energy Regulatory Commission*,
473 F.3d 1239 (D.C. Cir. 2007).....4, 11

West Deptford Energy, LLC v. Federal Energy Regulatory Commission,
766 F.3d 10 (D.C. Cir. 2014).....4, 11

STATUTE

15 U.S.C. § 717r(a) 15

REGULATION

18 C.F.R. § 380.113 15

OTHER AUTHORITIES

Appalachian Voices v. FERC, Docket 17-1271, Oral Argument at
https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/D2DE0449B4
6E114E852583900059E5DC/$file/17-1271.mp3 18

Certificate of New Interstate Natural Gas Pipeline Facilities,
88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further clarified,
92 FERC ¶ 61,094 (2000) 8

Seeking Alpha at https://seekingalpha.com/article/3745146-broad-run-
expansion-brings-record-marcellus-utica-production (December 2015) 19

STATUTES AND REGULATIONS

All pertinent statutes and regulations are contained in the Opening Brief.

SUMMARY OF ARGUMENT

Both the Federal Energy Regulatory Commission (Commission) nor Tennessee Gas Pipeline LLC (Tennessee) miss the mark in their respective responses to the Petitioner Citizens' challenges to the Commission certificate order approving the Broad Run Project, including Tennessee's preferred site for the 60,000 hp Compressor Station 563 in Joelton, Tennessee. Among other things, the Commission and Tennessee raise new arguments not previously presented in the Commission certificate order, fail to address various points raised by the Citizens or misread key precedent. In short, neither the Commission's nor Tennessee's defenses can rescue the Commission's order from the Citizens' challenges under the National Environmental Policy Act (NEPA) and the Natural Gas Act.

At the outset, before reaching the merits, this Court must reject several of Tennessee' assertions as improper *post hoc* rationalizations for the Commission's decision. These points include Tennessee's new technical explanation for the sizing of Compressor Station 563, its claim that a reduced compressor at Site C1 is infeasibility of Site C1 and others that the Commission did not rely on to reach its decision and as such, cannot now be deployed to bolster the Commission's order.

Moving on to the merits, the Citizens accept the Commission's version of the facts set out in its brief -- but even so, the Citizen's opening argument that the Commission violated NEPA and acted irrationally by rejecting of Site C1 due to the lack of site control remains intact. Substantial evidence shows that Site C1 is environmentally and operationally superior to the Station 563 location - which the Commission would have determined had it not improperly trivialized the beneficial effects that would result from slashing emissions by forty percent by locating a smaller project on Site C1. In addition, neither the Commission nor Tennessee can demonstrate that the Commission's preference for avoiding eminent domain was a valid metric for site selection during NEPA review when the Commission had already concluded that eminent domain impacts were trivial under the Certificate Policy Statement.

Next, the Commission and Tennessee bypass the Citizen's argument that the Commission failed to evaluate the alternative of a smaller compressor station at Site C1. Instead, the Commission leaps past NEPA, effectively contending no harm no foul: that even if the Commission had analyzed a reduced-size compressor option at Site C1, the Station 563 site would have won out anyway.

Finally, the Commission and Tennessee misapprehend this Court's precedent in *Sierra Club v. FERC*, contending that the case is limited to its facts

and only applies in cases where the destination of the gas is known right down to the actual power plant - which is not true here. But *Sierra Club* has far broader scope than credited by either the Commission or Tennessee - and indeed, the Respondents' interpretation of *Sierra Club* finds no support in subsequent rulings that have applied the case and moreover, leaves enormous an regulatory gap that will accelerate climate change damage.

As the Citizens stated at the outset, even though a gas compressor station must be built somewhere, somewhere should not mean anywhere the applicant wants. For the reasons set forth in Citizens' Opening Brief and this Reply, this Court must find that (1) the Commission's approval of the Station 563 site and(2) refusal to consider the upstream or downstream emissions that flow from combustion of the 200,000 dt/day of gas transported by the project violate NEPA and the Natural Gas Act and accordingly, vacate the orders.

ARGUMENT

I. SEVERAL OF INTERVENOR TENNESSEE'S ARGUMENTS MUST BE REJECTED AS IMPROPER POST HOC RATIONALIZATIONS AND OUTSIDE THE SCOPE OF THE COMMISSION'S BRIEF

In its response, Tennessee Gas offers multiple grounds for affirming the Commission's decision that the Commission itself never relied on. For example, whereas the Commission rejected an analysis by Dr. William Robertson, a

consultant to the Citizens and found that the project was properly sized based on staff's hydraulic models, (Rehearing Order, at P. 14, JA 671), Tennessee Gas introduces a second rationale, contending that ambient temperatures at the project site necessitated larger sized turbines since turbine horsepower decreases with increased temperatures.[1] Tennessee Br. at 20-21. Next, Tennessee disputes Dr. Robertson's findings that compressor station at Site C1 could be reduced in size by forty percent while still serving the project's objectives (Tennessee Br. 21-22), even though the Commission "accept[ed] the Intervenors' assertion that the size of the compressor could have been decreased if Site C1 had been selected." Rehearing Order at P. 26, JA 675. Third, Tennessee asserts that the Commission properly rejected Site C1 because the proposed site was not feasible due to the owner's refusal to sell (Tennessee Br. 26) even though neither the Environmental Assessment (EA) nor the Commission ever determined that Site C1 was infeasible. Finally, Tennessee references two FERC Guidance Manuals - one from 2002, and one from 2017 - as proof of the Commission's "stated" preference for avoiding

[1] Dr. Robertson's analysis included an efficiency correction to account for temperature and other effects. JA 529-530. Tennessee invokes a much larger correction to account for consistent temperatures above 100° F. Based on Nashville climate data between 1981 and 2010, only on one day a year on average is this threshold exceeded

eminent domain (Tennessee Br. at 27-28). Yet neither sources was listed in the EA (EA, Appendix D, JA 405) or discussed in the Commission orders.

This Court must reject Tennessee Gas' above arguments because they are improper post hoc rationalizations. [A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983) (emphasis added). This Court does not consider new arguments crafted by counsel to justify the agency's action. *See Westar Energy, Inc. v. Federal Energy Regulatory Commission*, 473 F.3d 1239 (D.C. Cir. 2007)(declining new rationalization by Commission counsel to defend order), *West Deptford Energy, LLC v. Federal Energy Regulatory Commission*, 766 F.3d 10, 25 (D.C. Cir. 2014), *citing Maine Public Utils. Comm'n. v. FERC*, 625 F.3d 754, 759 (D.C. Cir. 2010)("we need not—and indeed cannot—consider "appellate counsel's *post hoc* rationalizations" for Commission action.")

As already described, Tennessee's arguments offer up new justifications or additional technical analysis to shore up the Commission's approval of Tennessee's preferred site for Compressor 563. For example, Tennessee's belated claim that the compressor station located at Site C1, if downsized, would no longer serve the project's objective of transporting 200,000 dt/day introduces an entirely

new basis for rejecting Site C1 -- and one that the Commission itself never relied on, having "assumed the feasibility of site C1." Comm. Br. at 24. Similarly, Tennessee's contention that site C1 was not feasible due to the owner's unwillingness to sell is not only inaccurate (since a project sponsor may invoke eminent domain authority under the Natural Gas Act) but is also very different rationale for rejecting the site than that offered by the Commission - *i.e.*, to avoid eminent domain. Understandably, as the project sponsor, Tennessee would prefer to erase any suggestion that Site C1 is environmentally and operationally preferable to its favored Station 563 site. But Tennessee cannot put words in the Commission's mouth and serve up rationalizations that the Commission itself never supplied. Accordingly, this Court must reject Tennessee Gas' arguments described above.

II. NEITHER THE COMMISSION NOR TENNESSEE CAN SHOW THAT THE COMMISSION'S APPROVAL OF COMPRESSOR STATION SITE 563 IS A RATIONAL CHOICE BASED ON THE FACTS FOUND

A. Site C1 Had Significant Environmental Advantages and Is Compatible With the Applicant's Project Goals

Neither the Commission nor Tennessee satisfactorily demonstrate a rational connection between the facts found by the Commission and its choice of the site for Compressor Station 563 and that is required for reasoned decision-making.

Even accepting the Commission's version of the project's impacts,[2] Site C1 remains the superior option for the reasons detailed in the Citizens' opening brief at 20-23: fewer residences are located in close proximity, minimal destruction of prime farmland compared to 23.6 acres for the existing site (which according to the EA at 30, JA 247 is a permanent impact), and a 40 percent reduction in emissions which could avoid classification of the project as a "major source." The Commission, however, insists that no significant environmental benefits will flow from a smaller compressor station at Site C1 because as the Commission explains, avoiding major source designation is a trivial matter (Comm. Br. at 24, citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014)) -- a characterization at odds with this Court's precedent that describes "major sources" as "voluminous polluters," (*Sierra Club v. EPA*, 884 F.3d 1185 at 1187 (D.C. Cir 2018) subject to

[2] Some of the factual discrepancies between the Citizens' brief and the Commission derive from the spread of information across various filings instead of being located and referenced in the EA. In an effort to clarify, the data in the Table in the Citizens' Opening Brief at 20 comes directly from Table 3-4 in the EA, JA 345-346 unless otherwise indicated in a footnote. The 33.8 acres of forest listed as an impact of Site C1 is included in the EA Table but was later corrected in the Commission Order. *See* Commission Br. at 19-20 citing record where tree count was changed. In addition, based on the EA Commission and Tennessee Gas are wrong that only a fence will cross a stream at Compressor Site 563 (Comm. Br. at 21, Tennessee Br. at 31-32). The EA states that "Tennessee will cross one ephemeral/intermittent stream with pipe to connect the new compressor station 563 with Tennessee's existing pipeline system." EA at 42-43, JA 259-260. But again, for purposes of this argument, we accept the Commission's factual findings.

"stringent restrictions." *U.S. Sugar Corp. v. EPA*, 830 F.3d 579 at 594 (D.C. Cir. 2018). Moreover, the Commission's claim that slashing emissions by 40 percent for a project that exceeds major source thresholds is "insignificant" cannot be reconciled with the Commission's failure to conduct a more detailed analysis. *See National Audubon Society v. Department of Navy*, 422 F.3d 174, 188 (4th Cir. 2005) (questioning that the Navy's characterization of project impact on geese and swans as "minor" when Navy failed to conduct a more detailed analysis). *See also* Part III.A (describing Commission's failure to fully consider resulting effect of reducing compressor station on all of environmental impacts at Site C1).

Not only does the Commission discount the superiority of Site C1, but it also justifies its selection of Compressor Station 563 as consistent with the applicant's preferences, which according to the Commission is an acceptable practice sanctioned by cases like *City of Grapevine v. Dept. of Transp*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (quoting *Citizens Against Burlington*, 938 F.2d 190 (D.C. Cir. 1991) -- which are also distinguishable from these facts. In *City of Grapevine*, the court found that the Federal Aviation Administration did not violate NEPA when it failed to consider the alternative of constructing additional runway facilities outside of the Dallas/Fort Worth Airport because this option did not advance the project sponsor's goal of meeting increased travel demand at that airport. *See also*

Citizens Against Burlington (finding that agency not required to consider cargo hubs in other cities when project sponsor seeks to develop hub in Toledo). By contrast, the reduced size compressor station at Site C1 station serves Tennessee's project objective of delivering 200,000 dt/day of gas as well - and indeed, more efficiently than Site 563 and therefore, is compatible with Tennessee's project objectives. *See* Commission Rehearing Order at P. 26, JA 675 (accepting Citizens' claims that smaller station at Site C1 is feasible). In short, the Commission would have honored Tennessee's preferences even if it had chosen Site C1 -- and for that reason, neither *Grapevine* nor *Burlington* support the Commission's decision to reject Site C1 in favor of the Station 563 site.

B. Neither the Commission Nor Tennessee Demonstrate That Reliance on Site Control Is Rational

The Commission and Tennessee Gas cannot surmount the Citizens' argument that the Commission's reliance on site control to choose between sites is arbitrary and capricious. First, the Respondents declare that avoidance of eminent domain is a valid factor in site selection under the Commission's Certificate Policy Statement.[3] Comm. Br. at 27, Tennessee Br. at 26-27. But the Citizens never

[3] Certificate of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

disputed that point. To the contrary, the Citizens acknowledged that the Commission's Policy Statement *requires* the Commission to consider avoidance of eminent domain as part of its Section 7 analysis of project benefits and adverse impacts which precedes NEPA review, and that applying this balancing, the Commission concluded that use of eminent domain would have only minimal impacts on landowners. Citizens' Opening Br. 25-26. Having found that use of eminent domain for the Broad Run Project would inflict few impacts, the Commission acted irrationally by then elevating the minute impacts of eminent domain into a factor of grave consequence that dictated site selection under NEPA. Neither the Commission nor Tennessee Gas responded to the Citizens' argument with a rational explanation as to why avoidance of minimal eminent domain impacts should govern site selection, or why the Commission's practice of balancing eminent domain impacts during the Section 7 analysis and again during NEPA did not result in effectively double-counting the impacts of eminent domain and exaggerating their import. For this reason, the Court should find the Commission's reliance on avoidance of eminent domain impacts irrational.

In addition to the Commission's purported preference for avoiding eminent domain (which again, was already taken into account during the Section 7 balancing analysis), the Commission and Tennessee offer a second ground for use

of site control as a determinative factor: to accommodate the *applicant's* desire to avoid use of eminent domain. *See* Commission Br. 27, Tennessee Br. 28-29 citing Tennessee Alternatives Analysis in Resource Report 10, JA 126. But the Commission's order never mentioned Tennessee's desire to avoid eminent domain as a basis for selecting Tennessee's favored site (*See* Rehearing Order at P. 25 and n. 47, JA 675 (explaining that eminent domain avoidance is relevant factor in site selection in light of Commission policies). Thus, the Commission cannot now introduce these new arguments to support its order. *Westar Energy, Inc.* 473 F.3d 1239 (declining new rationalization by Commission counsel to defend order); *accord West Deptford Energy, LLC.*, 766 F.3d at 25.

In any event, it is not surprising that Tennessee ranks the avoidance of eminent domain as a meaningful metric for grading alternatives in Resource Report 10 submitted in November 2015. JA 126 After all, why would Tennessee want to acquire another site whether through voluntary negotiation or eminent domain when it had already purchased the Station 563 site for $1.4 million a year prior in December 2014? According substantial weight to an applicant's preference for a site that it purchased immediately before filing its application renders the NEPA alternatives analysis a hollow exercise because approval of the site purchased by the applicant is then effectively a *fait accompli*. For that reason, reliance on the

applicant's desire to avoid eminent domain as grounds for site selection does not constitute rational decision-making.

Finally, the Commission argues that Tennessee's acquisition of the property was not an irretrievable commitment of resources because the transfer itself had no environmental impacts, and did not limit the Commission's choice of alternatives. Comm. Br. 28 *citing National Audubon Society v. Department of Navy*, 422 F.3d 174, 202 (4th Cir. 2005). *National Audubon* is distinguishable. There, the Navy had focused its project development efforts on an alternative known as Site C which the Navy intended to purchase. Project opponents argued that the Navy's purchase of the property would violate NEPA by foreclosing consideration of project alternatives. The Fourth Circuit disagreed. Though the court remarked that a property sale in and of itself does not cause environmental harm, it also also assured that the Navy's purchase of land at Site C from willing sellers would not turn its ultimate decision about site selection into a foregone conclusion because the Navy would not be able to acquire all the property needed at Site C without exercising its eminent domain powers. For that reason, the imminent property transfer in *National Audubon* did not foreclose consideration of other sites because the Navy was likely to be more open to other options since it had no vested interest

in Site C. By contrast, in this case, Tennessee locked up site ownership before filing the application.

In theory, site acquisition does not necessarily represent an irretrievable commitment of resources, as a practice matter, once an applicant purchases a site, the deck is stacked and the outcome predetermined. Between the Commission's policy of avoiding eminent domain and its inclination to honor the applicant's preference to avoid eminent domain, there is no conceivable set of facts by which any alternative other than the applicant's favored option may gain approval. As a result, for all intents and purposes, once an applicant acquires a site before filing an application, NEPA is reduced to a paper exercise because no alternative other than the applicant's purchased site will ever win.

III. THE COMMISSION AND TENNESSEE RESPONSES REINFORCE THE INADEQUATE REVIEW OF THE SMALLER COMPRESSOR ALTERNATIVE

A. Alternative of Downsized Compressor At Site C1

The Commission's failure to evaluate the specific alternative of a smaller sized compressor station at Site C1 violated NEPA's requirement to consider a range of option and not just different versions of same compressor, different location. Citizens' Brief 29-31. The Commission never responded to this

argument, instead leaping past its NEPA obligations and defending its ultimate choice of the Station 563 site.

The Commission may believe that going through the motions of NEPA to analyze a reduced compressor at Site C1 would be futile, but the record shows otherwise. Had the EA (or even the Certificate Order that followed) contained a robust alternatives analysis of a smaller compressor option, multiple benefits would have emerged. No only would a smaller facility reduce emissions, but it might also minimize the amount of steep-sloped terrain needed for construction or the number of trees to be cleared. The Commission --- by defending the outcome only misunderstands the point of NEPA. NEPA is not a paper exercise. A rigorous analysis of a range of alternatives may "point in new directions" and lead the agency to "decide to make different choices." *Oregon Nat. Desert v. Bureau of Land*, 625 F.3d 1092, 1125 (9th Cir. 2008) (vacating BLM EIS that excluded review of viable project alternatives).

Perhaps concerned that Commission did not offer a reason for its failure to evaluate the Site C1 smaller compressor station alternative, Tennessee offers its own theory instead. Tennessee contends that NEPA only requires evaluation of "feasible" alternatives and a smaller compressor at Site C1 was not feasible because it would not serve project objectives and the owner was unwilling to sell.

Tennessee Br. 21-22. As already discussed, this Court must reject these arguments as improper post hoc justifications for the Commission's action. And in any event, Tennessee's claims are wrong. Even if the owner refused to sell Site C1 (and again, there is no evidence as to the amount Tennessee offered), Tennessee may invoke the power of eminent domain to acquire it, thus making the site a feasible option. As to Tennessee's claim that a smaller sized compressor at Site C1 would not serve the project purpose, Tennessee says that Dr. Robertson's claim that moving the compressor location station to a midway point to reduce its size is "unsubstantiated." Not so. Eventhis Court recognizes that the location of a compressor station is a key factor that may impact its size. *See Myersville Citizens for Rural Community v. FERC*, 783 F.3d 1301, 1311 (2015) (describing that different location may explain 2000 hp size difference in project alternatives).

To sum, neither the Commission nor Tennessee can justify the Commission's failure to evaluate the smaller compressor station option at Site C1 in violation of NEPA. As such the Commission order must be vacated and remanded.

B. Smaller Compressor Station at Existing Site

Significantly, the EA did not review the alternative of the smaller sized compressor station at the existing site proposed by Dr. Robertson. *See* Robertson

Comments June 6 and 26, 2016, JA 451, 454. Nor did the Commission Certificate Order address Dr. Robertson's analysis. *See* Certificate Order at P. 16, JA 462. (finding that compressor is properly sized but not addressing Robertson engineering analysis). It was not until the rehearing order -- which was issued more than two years after the EA that the Commission finally discussed Dr. Robertson's original analysis as well as his additional arguments based on confidential information that was not timely provided and affirmed its original decision. For the reasons already discussed in the Citizens' opening brief at 35-36, the Commission's hasty, last-minute analysis of the smaller-sized compressor alternative is inadequate to satisfy NEPA. For this reason, the Commission order must be remanded.

---

[4] Both the Commission and Tennessee argue that this Court is barred from reviewing Dr. Robertson's analysis that he prepared with confidential information because it was not timely submitted to the Commission 30 days after rehearing. But under Section 717r(a), But as Citizens explained, they reserved the right to update the rehearing request after Dr. Robertson received the information (Citizens' Rehearing Request, JA 20). Dr. Robertson submitted his analysis on behalf of the Citizens' (JA 721) out of time because it took nine months for the Commission to provide the information to him. Moreover, as a consultant to the Citizens, Dr. Robertson was not an "intervenor" who could avail himself of the procedures for obtaining information under 18 C.F.R. § 380.113 as the Commission and Tennessee claim. In any event, the Commission's and Tennessee's protests prove the Citizens' point: had the Commission discharged its obligation to rigorously review alternatives such as a smaller compressor station at the existing site, it would have analyzed all of this information and addressed Dr. Robertson's concern in an on the record review.

IV. THE COMMISSION FAILURE TO EVALUATE UPSTREAM AND DOWNSTREAM CLIMATE CHANGE IMPACTS VIOLATES THIS COURT'S RULING IN *SIERRA CLUB v. FERC*

A. Sierra Club Holds That Downstream Emissions From Gas Pipeline Projects Are Reasonably Foreseeable Indirect Impacts of the Commission's Approval of the Project

In *Sierra Club v. FERC*, 867 F.3d 1357 this Court held that a pipeline project's downstream carbon emissions resulting from combustion of the gas transported are reasonably foreseeable, indirect effects of the Commission's approval a project and therefore, must be considered and quantified by the Commission under NEPA and the Natural Gas Act. But the Commission and Tennessee argue that the Commission was exempt from the obligation to review the downstream impacts of the Broad Run Project because *Sierra Club*'s mandate is limited to its specific facts and only applies to projects in which the destination of the gas is known (Commission Br. 35-36, Tennessee Br. 38). The Commission and Tennessee are mistaken.

First, there is nothing in *Sierra Club* to suggest that the Court found that downstream emissions were reasonably foreseeable impacts because it was known that the gas would flow to power plants in Florida where it would be consumed. To the contrary, *Sierra Club* acknowledged that there were many "uncertain

variables, including the operating decisions of individual plants and the demand for electricity." *Sierra Club*, 867 F.3d at 1374. Even so, this Court recognized that the information on the amount of gas that the pipeline would transport was sufficiently definite to allow the to estimate gas emissions. *Id*.

The Commission has as much information here as was available to it in *Sierra Club*. The Commission knows that the project will transport 200,000 dt/day of gas to the Southeast where logically, it will be consumed. Although as in *Sierra Club*, there may be variables regarding the types of power plants that will consume the gas or overall demand, this Court nevertheless held that the Commission could reasonably rely on the contractual amount of gas to be delivered to estimate greenhouse gas emissions. And indeed, concurring Commissioner LaFleur did just that, utilizing a methodology developed by the Environmental Protection Agency (EPA) to estimate the downstream GHG emissions from the project based on tn assumption that all of the gas transported by the project is eventually combusted. LaFleur Concurrence, JA 704-705.

That knowledge of the amount of gas is sufficient to allow for assessment and quantification of downstream impacts was acknowledged by this Court in *Friends of Capital Crescent Trail v. Fed. Transit Admin*., 877 F.3d 1051 (D.C. Cir. 2017) --- a case also cited by the Commission. Responding to a challenge by

project opponents that the agency failed to quantify the indirect effects of a proposed subway line on property values, this Court found that quantification, under these facts, "not feasible" as it had been in *Sierra Club* because "local land use planning documents are inherently less concrete than numerical estimates based on pipeline capacity and contractual usage commitments." Although as the Commission points out (Brief at 36), *Capital Crescent Trail* mentions that the pipeline in *Sierra Club* would transport gas to power plants, it did so for the purpose of providing descriptive context. In *Capital Crescent Trail*, the operative facts for evaluating downstream emission are the pipeline's capacity and amount of gas to be transported, and not the destination of the gas or method of consumption.

The Commission's and Tennessee's insistence that foreseeability of indirect impacts depends upon a known destination of the gas is at odds with numerous cases that the Citizens cited (Opening Br. 37) which uniformly hold that downstream emissions from combustion of various types of fuels - coal, natural gas or oil - are a reasonably foreseeable indirect impact of extraction of these fuels. The Commission half-heartedly attempts to distinguish these cases, claiming that they differ because they involve extraction rather than transportation of gas. But this is a distinction without a difference because as with the gas from this project, the precise destination of the resources extracted from federal leases also unknown.

Moreover, whereas the products in at least some of the extraction cases were delivered nationally, here, the gas will be transported to the Southeast.

More significantly, not only is the Commission's refusal to consider under NEPA the downstream emissions resulting from combustion of project gas unless the destination is known is wrong, this practice will rip open a regulatory gap as large as the hole in the ozone. As this Court is aware from recent oral arguments in *Appalachian Voices v. FERC*, Docket 17-1271,[5] the Commission takes the position that it is not required to look behind precedent agreements for pipeline capacity to determine where the gas is going as part of its analysis of project need. *See also Mountain Valley Pipeline*, 163 FERC ¶ 61,197 (2017) at P. 36, P. 42 and n. 734 (affirming that the Commission does not look behind contract agreements for destination of gas which is "highly speculative"). Should the Commission's *laissez-faire* approach be affirmed, nearly every pipeline project approved by the Commission would escape NEPA review of downstream impacts because the project sponsors could simply bury the destination of the gas and identity of end users in the terms of a confidential precedent agreement or, more likely, continue to justify projects with pronouncements of intent to sell the gas to the amorphous

[5] Oral Argument online at https://www.cadc.uscourts.gov/recordings/recordings2018.nsf/D2DE0449B46E114E852583900059E5DC/$file/17-1271.mp3.

"market." In turn, the lack of NEPA review of pipeline project emissions will set in motion irreparable environmental damage and interfere with states' ability to achieve their own climate change goals. *See* State Amicus Brief in Support of Petitioners at 4-5 (Dec. 3, 2018), filed in *Otsego2000 v. FERC*, Docket No. 18-1188 (describing how Commission practice of ignoring indirect effect of reasonably foreseeable upstream and downstream emissions from projects interferes with state efforts to combat climate change). For these reasons, this Court must vacate the Commission's order and require it to assess and evaluate climate change impacts.

B. The Commission Erred By Failing to Consider Upstream Impacts

As the Citizens argued in the opening brief, the reasoning in *Sabal Trail* applies with equal force to upstream impacts of induced production which likewise are indirect effects of the Commission's approval of the project. Here, the effects of increased production are not difficult to discern because as Citizens argued, Antero is the sole project shipper, and project need was justified to enable Antero to ship gas produced at Marcellus and Utica Shale. And in fact, like clockwork, once the Broad Run Expansion Project was in service, "Marcellus and Utica shales' combined outputs hit a new record as the Tennessee Gas Pipeline's Broad

Run expansion took gas to the Gulf. *See* Seeking Alpha (December 2015).[6]

Therefore, for the same reasons articulated in *Sierra Club* , the Commission must also evaluate a project's upstream impacts on induced production which are reasonably foreseeable impacts of project approval.

CONCLUSION

Wherefore, for the foregoing reasons, the Citizens' reiterate their request for the relief from their opening brief.

Respectfully submitted,

/s/ Carolyn Elefant
Carolyn Elefant
LAW OFFICES OF CAROLYN ELEFANT
1440 G Street N.W., Eighth Floor
Washington, DC 20005
(202) 297-6100

Counsel for Petitioners

March 4, 2019

[6] Online at https://seekingalpha.com/article/3745146-broad-run-expansion-brings-record-marcellus-utica-production

CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):
   [X] this brief contains [*4,843*] words.
   [ ] this brief uses a monospaced type and contains [*state the number of*] lines of text.

2. This brief document complies with the typeface and type style requirements because:
   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*
   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: March 4, 2019

/s/ Carolyn Elefant
Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 4th day of March 2019, I caused this Final Reply Brief of Petitioners to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Scott R. Ediger
Elizabeth E. Rylander
Robert H. Solomon
FEDERAL ENERGY REGULATORY COMMISSION (FERC)
OFFICE OF GENERAL COUNSEL
888 First Street, NE
Washington, DC 20426
(785) 218-6412

Counsel for Respondent

Brian D. O'Neill
Michael R. Pincus
VAN NESS FELDMAN, LLP
1050 Thomas Jefferson Street, NW, Suite 700
Washington, DC 20007
(202) 298-1983

Intervenor for Respondent

/s/ Carolyn Elefant
Counsel for Petitioners