

D.C. Circuit's Atlantic Sunrise stay creates uncertainty for pipeline developers

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Late yesterday, the United States Court of Appeals for the District of Columbia Circuit issued an administrative stay of the Federal Energy Regulatory Commission's (FERC) approval of Transcontinental Gas Pipe Line Company, LLC's (Transco) Atlantic Sunrise Project (Project). The one-paragraph order states that the stay is intended to give the court sufficient opportunity to consider an emergency motion for stay filed on October 30, 2017, by several environmental groups. The order disclaims that it is a ruling on the merits of the motion, but the court's action is an unexpected development, and raises significant questions regarding its impact on the Project itself, and on future projects.

Transco's Atlantic Sunrise Project is a US\$2.65 billion, 1.7 billion cubic feet per day project, involving the construction of almost 200 miles of pipeline and related facilities in Pennsylvania, as well as the modification of existing facilities in other states, to connect production in Pennsylvania to markets in the Mid-Atlantic and southeastern states. FERC approved the Project on February 3, 2017, and denied a request for stay of its certificate order on August 31; however, rehearing of the certificate order is still pending. Transco began construction on the Project facilities on March 16, and has obtained several notices to proceed from FERC over the past several months.

Although rehearing is still pending before FERC, environmental groups appealed to the D.C. Circuit on March 23. The October 30 emergency motion for stay requested that the court stay the certificate order and enjoin the continuing construction of the project pending resolution of their appeal. The environmental groups claim that FERC's evaluation of downstream greenhouse gas (GHG) emissions fails to meet the demands of the court's recent decision in *Sierra Club v. FERC*, 867 F.3d 1357 (2017), and further allege that FERC failed to adequately address impacts associated with shale gas drilling that would purportedly result from the Project. The groups attached statements from nine members (all located in Pennsylvania) who assert that they face imminent irreparable harm from further Project construction.

The court's action is surprising: in the past six years, courts – including the D.C. Circuit – had consistently denied all 15 emergency requests for stays of FERC certificate orders. The court's order specifically states that it is not a ruling on the merits of the motion for stay, but the very absence of any substantive analysis raises significant uncertainty with respect to D.C. Circuit review of other appeals of FERC certificate orders, particularly those that may be subject to challenge based on the Sierra Club ruling regarding GHG impact analysis.

Transco has already filed a request for clarification of the impact of the court's action. It notes that it has already completed some facilities and placed them into service, and that a stay of the certificate order could require taking completed facilities out of service, which could have significant adverse impacts on Transco, its customers, and the environment. In addition, some of the facilities constructed pursuant to the certificate order are integrated with pre-existing facilities, and these Project facilities cannot be shut down without shutting down the pre-existing facilities. Transco also has requested clarification as to whether the order enjoins all new construction, or merely construction in Pennsylvania (the location of the environmental group members who allege irreparable harm).

The court's response to Transco's request will be much-anticipated by the pipeline industry.

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