United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17-1271 **September Term, 2018**

FILED ON: FEBRUARY 19, 2019

APPALACHIAN VOICES, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

BOLD ALLIANCE, ET AL.,
INTERVENORS

Consolidated with 18-1002, 18-1175, 18-1177, 18-1186, 18-1216, 18-1223

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: TATEL and KATSAS, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

J U D G M E N T

This case was considered on the record from the Federal Energy Regulatory Commission (FERC), and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined they do not warrant a published opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petitions for review be denied.

Petitioners Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, and others challenge FERC's October 2017 issuance, under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c)(1)(A), of a "certificate of public convenience and necessity" to Mountain Valley Pipeline, LLC ("Mountain Valley") for the construction and operation of a new natural gas pipeline. The proposed pipeline ("the Project"), which would extend 300 miles from Wetzel County, West Virginia, into Pittsylvania County, Virginia, and require the construction of three new compressor stations, is designed to transport up to two million dekatherms (approximately two billion cubic feet) of natural gas per day. Petitioners raise sixteen different challenges to FERC's environmental assessment of the Project and subsequent issuance of the certificate

authorizing Mountain Valley to construct and operate the pipeline subject to several conditions described in the Certificate Order, *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) ("Certificate Order"). None of the challenges succeeds.

Notwithstanding petitioners' argument to the contrary, FERC's conclusion that there is a market need for the Project was reasonable and supported by substantial evidence, in the form of long-term precedent agreements for 100 percent of the Project's capacity. *See Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (explaining that an applicant can make a showing of market need "by presenting evidence of preconstruction contracts for gas transportation service" (internal quotation marks omitted)). The fact that Mountain Valley's precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; the Certificate Order reasonably explained that "[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor." Certificate Order ¶ 45. FERC's approval of Mountain Valley's requested fourteen percent return on equity was reasonably based on the specific character of the Project and Mountain Valley's status as a new market entrant, and the remainder of its public convenience and necessity determination was likewise reasoned and supported by substantial evidence in the record.

Petitioners' Natural Gas Act, Takings Clause, and due process challenges to Mountain Valley's exercise of eminent domain authority also fail. FERC's issuance of the certificate of public convenience and necessity, upon which Mountain Valley's eminent domain authority ultimately relies, did not hinge, as petitioners claim, on the Bureau of Land Management's and the United States Forest Service's respective decisions to grant the company a right of way through federal land and amend the Jefferson National Forest Land Resource Management Plan to accommodate the right of way. Accordingly, the Fourth Circuit's 2018 opinion vacating those decisions, *see Sierra Club, Inc. v. United States Forest Service*, 897 F.3d 582 (4th Cir.), *rehearing granted in part,* 739 F. App'x 185 (4th Cir. 2018), has no bearing on the validity of Mountain Valley's certificate under the Natural Gas Act. Petitioners' next argument—that FERC violated the Act by issuing the certificate subject to conditions precedent—lacks merit because section 717f(e) expressly provides that FERC "shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Equally unavailing is the contention that Mountain Valley's lack of certain required permits undermines FERC's conclusion that Mountain Valley is "able and willing," *id.*, both to construct the pipeline and to comply with the requirements of the Act. Petitioners cite no authority for the proposition that an applicant must obtain all other relevant permits before FERC issues a Certificate Order, and, as the agency explained in the Rehearing Order, "Mountain Valley's acceptance of the certificate demonstrates the willingness to perform such acts in accordance with the conditions set out in the certificate." *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, ¶ 62 (2018).

Contrary to petitioners' argument, Mountain Valley's exercise of eminent domain authority for purposes of this project poses no Takings Clause problems from either a "public use" or "just compensation" perspective. *See* U.S. Const. amend. V (prohibiting the taking of private property "for public use, without just compensation"). FERC's rational public convenience and necessity determination satisfies the Fifth Amendment's "public use"

requirement. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("[B]ecause, in issuing the certificate to Southern, the Commission has explicitly declared that the North Alabama Pipeline will serve the public convenience and necessity, we hold that the takings complained of served a public purpose."). The eminent domain power conferred to Mountain Valley under the Natural Gas Act, 15 U.S.C. § 717f(h), requires the company to go through the "usual" condemnation process, which calls for "an order of condemnation and a trial determining just compensation" prior to the taking of private property. *Transwestern Pipeline Co. v. 17.19 Acres of Property Located in Maricopa County*, 550 F.3d 770, 774 (9th Cir. 2008). Our jurisdiction in this case is limited to review of "order[s] issued by the Commission," 15 U.S.C. § 717r(b), and under this statutory scheme, the obligation to guarantee Mountain Valley's ability to pay just compensation for any future takings under the Act does not belong to FERC.

Mountain Valley's use of its eminent domain powers is also consistent with the Fifth Amendment due process clause because "[i]f and when" the company acquires a right of way through any petitioner's land, "the landowner will be entitled to just compensation, as established in a hearing that itself affords due process." *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018). "Due process requires no more in the context of takings where . . . there is no right to a pre-deprivation hearing." *Id.* at 111.

Petitioners additionally contend that FERC failed to adequately consider the climate change impacts of downstream greenhouse gas emissions resulting from combustion of gas transported by the new pipeline. Petitioners claim that FERC erred in concluding that such emissions are not reasonably foreseeable indirect effects of the Project. We need not consider that argument, however, because even if petitioners are correct, FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes. *See Sierra Club*, 867 F.3d at 1375 ("FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so."). Not only do petitioners offer no alternative to the Social Cost of Carbon tool for assessing the incremental climate change impacts of downstream greenhouse gas emissions, but their opening brief also fails to address several of the reasons FERC gave for rejecting the Social Cost of Carbon tool. *See Fox v. Government of the District of Columbia*, 794 F.3d 25, 29 (D.C. Cir. 2015) ("[An] argument first appearing in a reply brief is forfeited.") (citing *American Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008)). In the absence of any explanation as to how FERC should have considered adverse impacts from downstream greenhouse gas emissions in its public interest determination under the Natural Gas Act using something other than the Social Cost of Carbon, we have no basis for saying that FERC's treatment of the issue in the Certificate Order was inadequate, unreasonable, or otherwise contrary to NEPA or the Natural Gas Act.

Petitioners' remaining NEPA challenges also fail. Having carefully considered petitioners' objections to FERC's environmental impact analysis, we conclude that the agency adequately considered and disclosed erosion and sedimentation impacts on aquatic resources, impacts on groundwater in karst terrain, and impacts on Peters Mountain residents' cultural attachment to the land, and appropriately evaluated reasonable alternatives to the Project. *See*

Final Environmental Impact Statement 4-136–4-147 (erosion and sedimentation), Joint Appendix ("J.A.") 840–51; *id.* 4-58–4-63, 4-105–4-106 (karst terrain), J.A. 812–17, 828–29; *id.* 4-470–4-477 (cultural attachment), J.A. 905–12; *id.* 3-4–3-32 (alternatives), J.A. 790–811.

Petitioners' challenges brought under the National Historic Preservation Act (NHPA) likewise lack merit. FERC did not violate the NHPA by issuing the Certificate Order subject to the condition that it would complete the NHPA section 106 consultation process prior to construction. *See City of Grapevine v. Department of Transportation*, 17 F.3d 1502, 1509 (D.C. Cir. 1994) (concluding that the FAA did not violate the NHPA by approving a runway construction project before completion of the section 106 process where approval "was expressly conditioned upon completion of [that] process"). Nor did the agency violate the NHPA by failing to consider the potential adverse effects of a second pipeline on "historic properties within the area of potential effects," 36 C.F.R. § 800.5(a), because even if Mountain Valley's contract offers to landowners stipulate that the contract covers rights of way for two pipelines, the Project itself entails construction of a single pipeline. We lack jurisdiction to review the challenges related to lack of participation of certain Tribal Historic Preservation Officers in the section 106 process because the Officers themselves were not parties to the proceeding below: FERC denied their untimely motions to intervene and they did not seek rehearing of those denials. *See* 15 U.S.C. § 717r(b) ("Any *party* to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order . . . ." (emphasis added)). Although petitioners contend that other parties to the proceeding raised the issue of the Tribal Officers' participation, they did so only by seeking rehearing of an April 2018 letter from FERC to the Tribal Officers explaining that the agency was not required to restart the section 106 consultation process to include the Tribal Officers' belated input. Petitioners' Reply Br. 41. The agency denied rehearing because the April 2018 letter was not a reviewable final agency decision or order that "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process." *Mountain Valley Pipeline*, 164 FERC ¶ 61,086, ¶ 15 (2018) (internal quotation marks omitted); *see also Bennett v. Spear*, 520 U.S. 154, 178 (1997) (a final agency action is one "by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotation marks omitted)). Petitioners did not seek review of that denial.

Additionally, petitioners have not established that FERC violated any cognizable rights related to their participation as consulting parties in the section 106 process or their intervention in the proceedings. To the extent that any of the non-Tribal Historic Preservation Officer petitioners claim FERC's refusal to grant them consulting party status violated the NHPA or due process, that claim fails because there is no indication that the NHPA regulation in question—which provides only that certain individuals or entities "may" participate in the section 106 process as consulting parties, 36 C.F.R. § 800.2(c)(5)—creates a property interest or other "legitimate claim of entitlement." *Griffith v. Federal Labor Relations Authority*, 842 F.2d 487, 495 (D.C. Cir. 1988) (internal quotation marks omitted). As for petitioners' right of intervention, although FERC concedes that a staff member erroneously advised some individuals that they could not be both an intervenor in the proceedings and a section 106 consulting party, petitioners identify no stakeholder whose motion to intervene was denied on the ground that it was already a section 106 consulting party, and petitioners' opening brief fails to identify anyone who was otherwise adversely affected by the erroneous advice.

We have considered petitioners' remaining arguments and found them without merit.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk