ORAL ARGUMENT NOT YET SCHEDULED

Case No. 20-1206 (Consolidated with 20-1338 and 20-1339)

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DELAWARE RIVERKEEPER NETWORK, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Review of Orders of the
Federal Energy Regulatory Commission,
169 FERC ¶ 61,220 (Dec. 20, 2019),
and 171 FERC ¶ 61,049 (Apr. 17, 2020).

PETITIONERS' JOINT REPLY BRIEF

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GLOSSARY

Adelphia	Adelphia Gateway, LLC
Riverkeeper	Delaware Riverkeeper Network and Maya van Rossum, the Delaware Riverkeeper
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEMA	Federal Emergency Management Agency
FERC	Federal Energy Regulatory Commission
McCarthys	Sheila McCarthy and Daniel McCarthy
NEPA	National Environmental Policy Act
Pipeline Safety Administration	Pipeline and Hazardous Materials Safety Administration
Quakertown Site	Proposed Quakertown Compressor Station Site,1145 Rich Hill Road, Quakertown, PA 18951
Salford Alternative	Proposed Alternative Salford Compressor Site, 55 Cressman Road, Salford, PA 18969
Township	West Rockhill Township

UPDATED STATEMENT OF THE CASE

Petitioners hereby refer to and reincorporate the Statement of the Case included in their Joint Opening Brief, adding the following information. On December 7, 2020, three days after Petitioners filed their Joint Opening Brief, Respondents Adelphia Gateway, LLC, filed a Prior Notice of Blanket Certificate Activity notifying FERC of its intent to "install and operate an electric motor-driven 3,000-horsepower compressor unit at its Marcus Hook Compressor Station in Delaware County, Pennsylvania." Prior Notice of Blanket Certificate Activity, Adelphia Gateway, LLC, Accession No. 20201207-5201, FERC Docket No. CP21-14-000 (Dec. 7, 2020).

This project is "designed to increase the discharge pressure and reduce the gas heat temperature level at the outlet of the Marcus Hook Compressor Station to provide firm service to a new shipper" and will increase the certificated capacity of the Project by 16,500 Dekatherms per day. FERC issued an Environmental Assessment Report on February 9, 2021, concluding that approval of the electric compressor station would not constitute a major federal action significantly affecting the quality of the human environment. *See* Environmental Assessment Report,

Adelphia Gateway, LLC, Accession No. 20210209-3004, FERC Docket No. CP21-14-000 (Feb. 9, 2021).

Riverkeeper moved to intervene in that proceeding and protested, requesting that Adelphia's request be processed as a separate application under Section 7 of the Natural Gas Act. *See* Protest to Proposed Blanket Certificate Activity & Motion to Intervene, Adelphia Gateway, LLC, Accession No. 20210216-5327, FERC Docket No. CP21-14-000 (Feb. 16, 2021).

ARGUMENT

I. Riverkeeper's Reply

A. FERC's Natural Gas Act analysis was flawed because it relied on a distorted evaluation of the Project's public benefits and failed to accurately account for the Project's full array of adverse environmental effects.

Contrary to Respondents' assertions, Petitioners do not challenge the notion that precedent agreements are valid evidence of demand, but rather challenge FERC's unquestioning acceptance of precedent agreements and treatment of those agreements as determinative without considering the other factors the Certificate Policy was crafted to include, where the record contains information bearing on those additional factors. Petitioners further object to FERC's treatment of market need as

an overwhelming public benefit that dwarfs all adverse effects of the Project, thus elevating a pipeline company's "business decision" to a federal edict. *See Twp. of Bordentown v. F.E.R.C.*, 903 F.3d 234, 262 (3d Cir. 2018) ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists."). FERC's analysis of the Project conflates market need with public need. This court need only read the discussion of public benefit on pages 25 to 26 of FERC's Certificate Policy to understand why total reliance on precedent agreements falls far short of the public-interest-focused inquiry originally envisioned in 1999. *See* Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61227, at 25–26 (1999), *clarified* 90 FERC ¶ 61128 (2000), *further clarified* 92 FERC ¶ 61094 (2000) (hereinafter, "Certificate Policy").

Furthermore, FERC's explanation that it performs the balancing test and decides whether a pipeline is required by the public convenience and necessity *before* engaging in a NEPA review should be reason enough to vacate and remand the Certificate Order. *See* FERC Br. at 29. FERC essentially admits that the substantive decision under the Natural Gas Act is made before it takes a "hard look" at the environmental effects of

a project as required by NEPA. *See Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 176 (D.C. Cir. 2019) (quoting *Gov't of Province of Manitoba v. Zinke*, 849 F.3d 1111, 1115 (D.C. Cir. 2017)). FERC alleges that its environmental review merely "affirms" the conclusion of its balancing test. *See* FERC Br. at 29–30.

This runs counter to FERC's own Certificate Policy, which expressly provides for the consideration of environmental effects in reaching the ultimate determination that a project is required by the public convenience and necessity by stating that "[t]he balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns *will continue to be taken into account in the environmental analysis*." Certificate Policy at 27. In its February 9, 2000 order clarifying its policy, FERC responded to the concerns of stakeholders that the NEPA process would not occur until after the balancing test had already taken place. *See* Certificate Policy, *clarified*, at 18–19. At that time, FERC emphasized that environmental and economic review of a project would proceed concurrently. *See id.*

Accordingly, because FERC's NEPA analysis was deficient, its conclusion that the adverse effects of the Project were outweighed by its public benefits is arbitrary and capricious. This Court has recently recognized that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about *prospective* environmental harms and potential mitigating measures." *Standing Rock Sioux Tribe v. United States Army Corps of Eng'rs*, 985 F.3d 1032, 1052 (D.C. Cir. 2021) (alteration in original) (quoting *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018)). Thus, "where an EIS was required but not prepared, courts should harbor substantial doubt that 'the agency chose correctly' regarding the *substantive* action at issue . . . ." *Id.* (quoting *Oglala Sioux Tribe*, 896 F.3d at 538). That is especially true here, where FERC's Certificate Policy explicitly requires it to consider environmental effects in its balancing of public benefits and adverse effects.

B. FERC's failure to acknowledge the full scope of the Project's effects resulted in an erroneous Finding of No Significant Impact.

FERC's preparation of an EA and its conclusion that the Project would have no significant impact is based on a failure to consider all

direct, indirect, and cumulative impacts in answering the "prefatory inquiry" into whether the Project is a major Federal action. *See* FERC Br. at 34.

1. *Respondents' reliance on Birckhead v. FERC, 925 F.3d 518 (D.C. Cir. 2019) to claim that FERC need not consider upstream effects of the Project is misplaced.*

Respondents rely on *Birckhead v. F.E.R.C.*, 925 F.3d 518 (D.C. Cir. 2019), for the proposition that if the specific source of gas is unknown, then increased production of natural gas is not reasonably foreseeable and FERC is absolved of NEPA's requirement to consider upstream production as an indirect effect of increased pipeline capacity. *See* FERC Br. at 37–39; Adelphia Br. at 12–16. In *Birckhead*, however, this Court reached the conclusion that it was "left with no basis for concluding that [FERC] acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production" because petitioners in that case failed to claim that FERC was required to seek additional information about induced natural gas production. *See Birckhead*, 925 F.3d at 518.

Here, however, Riverkeeper explicitly argued that "FERC arbitrarily limits the scope of its review by failing to require the

disclosure of the readily available, and reasonable and attainable, analyses, projections and assumptions that would inform the agency of the scope and extent of the foreseeable induced natural gas production . . . .” R830 at 20; *see also* R937 at 79, and that if the record is incomplete as to this reasonably foreseeable effect, NEPA regulations instruct FERC how to address missing information. *See* Pet'rs' Br. at 24–25.[1] Accordingly, this case is distinguishable from *Birckhead* in that the issue of whether FERC sought adequate information to inform its conclusion that upstream production was not “reasonably foreseeable” is squarely before this Court.

2. *Respondents' arguments regarding downstream greenhouse gas impacts of the Project is based on an artificially constrained interpretation of FERC's ability to estimate the end use of natural gas to be delivered.*

Respondents again rely on *Birckhead* to argue that downstream emissions are only reasonably foreseeable if the destination and end-use of the gas transported by a pipeline project are known and, to obtain that

[1] The table provided by Riverkeeper in its February 5, 2019 comment depicts the active, proposed and reported natural gas wells in Pennsylvania—an example of a data source that FERC should use in determining how certification of the Project affects upstream natural gas production. R830 at Att. 2.

knowledge, FERC is merely required to ask the applicant whether it can identify any specific end users. If the applicant cannot, then FERC need not concern itself with downstream greenhouse gas emissions. Respondents are incorrect on both points.

FERC fails to address Riverkeeper's argument that downstream greenhouse gas emissions could be estimated based on information provided in Adelphia's application, as well as data showing that the vast majority of all natural gas consumed in the United States is combusted. *See* Br. at 29–30. FERC ignores this straightforward means of measuring greenhouse gases, instead refuting an argument not raised by Riverkeeper—that emissions from downstream gas combustion are categorically reasonably foreseeable in every case. *See* FERC Br. at 41. This Court has already rejected that argument in *Birckhead*, and Riverkeeper does not seek to revive it.

To the contrary, all pipeline projects must be analyzed on a case-by-case basis—for example, where a project would deliver natural gas as feedstock for the manufacture of chemical products, that gas would not be combusted and it would be inappropriate for FERC to analyze the downstream impacts of that project as greenhouse gas emissions

resulting from combustion. *See Birckhead*, 925 F.3d at 519. But, as here, where natural gas "would be transported to the downstream interstate natural gas pipeline grid" and "there are *no specifically identified* end users or customers," it is reasonably foreseeable that a certain percentage will be combusted based on industry statistics. *See* R932 (Glick, Comm'r, dissenting at P 7) (emphasis added).

Thus, while the identification of specific end users of natural gas transported by a pipeline project will certainly allow for a more accurate estimation of downstream greenhouse gas emissions—by either eliminating a certain volume of gas from consideration due to a non-combustion use or by definitively recognizing that a certain volume of gas will be combusted—the lack of such information does not prevent FERC from using other information to estimate the reasonably foreseeable amount of natural gas that will be combusted. *See Sierra Club v. F.E.R.C.*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("NEPA analysis necessarily involves some 'reasonable forecasting,' and . . . agencies may sometimes need to make educated assumptions about an uncertain future.").

On remand, this Court should instruct FERC to reasonably estimate the amount of natural gas delivered by the Project that will be combusted, including the new information provided by Adelphia regarding its new agreement with South Jersey Gas Company. *See* Adelphia Gateway, LLC Response to February 18 Data Request, Accession No. 20210226-5383, FERC Docket No. CP21-14-000 (Feb. 26, 2021).

3. FERC's reasons for not utilizing the Social Cost of Carbon as a means of evaluating the significance of greenhouse gas emissions are arbitrary and capricious in light of the flexible framework that NEPA provides for evaluating an action's effects on the human environment.

FERC's response brief argues that it had no reliable means of measuring the greenhouse gas emissions' incremental contribution to global climate change—sidestepping Riverkeeper's broader argument that FERC was required to measure the *significance* of the Project's greenhouse gas emissions. *See* FERC Br. at 48. Adelphia responds that FERC did measure the significance of greenhouse gas emissions, but then backtracks, arguing that FERC only needed to *discuss* significance. *See* Adelphia Br. at 26–27.

Riverkeeper does not argue that the only means of measuring climate change impacts is by monetizing them, however, the Social Cost of Carbon is currently one of the best tools to measure those impacts on the human environment, which is what NEPA requires. Contrary to Adelphia's assertion, a mere comparison of the Project's greenhouse gas emissions to total greenhouse gas emissions in the nation or Pennsylvania, combined with a discussion of climate change generally, fails to address the significance of FERC's decision in the face of this existential threat.

Adelphia complains that Riverkeeper is "attempting to transform a FERC certificate proceeding involving comparatively modest infrastructure authorizations . . . into a referendum on global climate change." Adelphia Br. at 27. While Riverkeeper wishes it weren't so, the severity and imminence of climate change's threat to the human environment, the government's lack of motivation, and industry's profit-induced inertia has ratcheted up the significance of each decision to allow an increase in greenhouse gas emissions.

Riverkeeper does *not* argue that a cost-benefit analysis is required—only that FERC must recognize the *cost of the environmental*

impact as an economic effect of the Project. Pet'rs' Br. at 35–36; *see also* 40 C.F.R. § 1508.8 (2019) *and Columbia Basin Land Prot. Ass'n v. Schelsinger*, 643 F.2d 585, 594 (9th Cir. 1981). Although acknowledgement of this economic cost must factor into FERC's balancing analysis under its Certificate Policy, *see supra* at 4, this does not transform the NEPA document into a regulatory cost-benefit analysis. *Cf.* Exec. Order. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

Adelphia's desire for a business-as-usual approach further emphasizes why the Social Cost of Carbon is a useful measure of the impacts of greenhouse gas emissions. The report provided to FERC by Riverkeeper calculated that, at the very least, economic losses from the additional greenhouse gas emissions of the Project over its lifetime would total approximately $309 million, and at the very most, $39.5 billion. R830, Att. 1 at 7.[2] Numbers such as these put into perspective the true significance of FERC's choice to increase greenhouse gas emissions.

As President Biden recently recognized in Executive Order 13990, "[i]t is essential that agencies capture the full costs of greenhouse gas

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[2] The analysis provided by Riverkeeper included calculations under two separate guidance documents, with differing discount rates. R830, Att. 1 at 7.

emissions as accurately as possible, including by taking global damages into account. Doing so facilitates sound decision-making, recognizes the breadth of climate impacts, and supports the international leadership of the United States on climate issues." Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021). Accordingly, on February 26, 2021, the Interagency Working Group on Social Cost of Greenhouse Gases released interim estimates for the social cost of carbon, methane, and nitrous oxide. *See* Interagency Working Grp. on Social Cost of Greenhouse Gases, U.S. Gov't, Technical Support Document: Social Cost of Carbon, Methane, & Nitrous Oxide Interim Estimates under Exec. Order 13990 (Feb. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf. On remand, FERC should consider this interim guidance in calculating the social cost of the Project's greenhouse gas emissions.

4. *Although the record supports a finding that the Project and the PennEast Pipeline meet the regulatory definition of "connected actions," this Court could also find that the projects are cumulative and/or similar actions—all three types of actions are required to be considered together in a single EIS.*

As Riverkeeper highlighted in its request for rehearing, FERC received Adelphia's application shortly before reaching its decision on the PennEast pipeline, and that it did not evaluate the projects together because to do so would have delayed approval of the PennEast pipeline—a project that has not been built to this date. R937 at 28. Similarly, FERC received PennEast's application to amend its certificate during the rehearing process for Adelphia, but did not factor the new interconnection into its analysis.

In FERC's eyes, these projects are like ships passing in the night, rather than physically connected pipelines with shared ownership interests coming on line at nearly the same time. Riverkeeper believes there is sufficient information before FERC for it to determine that the projects are "connected actions," but even if they fall short of that definition, they are cumulative actions which have "cumulatively significant impacts and should therefore be discussed in the same impact statement," and/or similar actions, which include not only proposals, but

also "reasonably foreseeable" actions that "have similarities that provide a basis for evaluating their environmental consequences together, such as *common timing or geography*." 40 C.F.R. § 1508.25(a) (2019). While there was enough information before FERC during rehearing to decide that the projects should be considered together in a single NEPA analysis, at the very least, they should be considered together on remand from this Court.

C. The appropriate remedy for a violation of NEPA under the Administrative Procedure Act and this Court's case law is to set aside—or vacate—FERC's FONSI and Certificate Order.

Respondent-Intervenor Adelphia asks this Court to deny vacatur, if it decides to remand the decision to FERC. This Court recently reaffirmed that "[t]he ordinary practice . . . is to vacate unlawful agency action" including agency actions taken in violation of NEPA. *Standing Rock Sioux Tribe*, 985 F.3d at 1050–51 (quoting *United Steel v. Mine Safety & Health Admin.*, 925 F.3d 1279, 1987 (D.C. Cir. 2019)). While vacatur is the presumptive remedy, a court may choose to exercise its discretion to "leave agency action in place while the decision is remanded for further explanation." *Id.* at 1051 (citing *Advocates for Hwy & Auto*

Safety v. Fed. Motor Carrier Safety Admin., 429 F.3d 1136, 1151 (D.C. Cir. 2005)).

The factors governing the courts discretion are set out in *Allied-Signal, Inc. v. United States Nuclear Regulatory Commission*: (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (2) "the disruptive consequences of an interim change that may itself be changed." 988 F.2d 146, 150–51 (D.C. Cir. 1993) (quoting *International Union, UMW v. FMSHA*, 920 F.2d 960, 966–67 (D.C. Cir. 1990)).

Adelphia argues that the relief of vacatur sought by Petitioners is inappropriate in this case because: (1) FERC will likely be able to remedy its procedurally deficient analysis on remand while still reaching the same substantive outcome; and (2) vacatur would be severely disruptive to Adelphia. Adelphia Br. at 47–49. Petitioners disagree on both counts.

First, the discrepancies in FERC's NEPA and NGA analysis are serious enough that FERC may well have reached a different conclusion had it complied with the law. On remand, "the question is whether the [agency] is likely to justify its issuance of a FONSI and refusal to prepare an EIS." *Standing Rock*, 985 F.3d at 1051–52. A ruling from this Court

that FERC's FONSI was in error and that it was required to prepare an EIS completely eliminates the possibility that FERC would issue another FONSI. Furthermore, it is quite possible that FERC could conclude, given the magnitude of the Project's adverse environmental effects, that the Natural Gas Act's balancing test tipped in favor of denying a certificate under Section 7. Even if this Court remands for FERC to re-analyze the direct, indirect, and cumulative effects of the Project without requiring an EIS, and even if FERC concludes that the Project should still be certificated on remand, it may also realize that the Quakertown Site was inappropriate, and that the Salford Alternative is where Adelphia should construct its compressor station. This Court should not "subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later," and should vacate FERC's findings here. *Id.* at 1052.

Second, vacatur would not have severe disruptive consequences because it would merely preserve the status quo pending reconsideration of Adelphia's application. Adelphia argues that most of its pipeline is

already in service,[3] but this was true even before it applied for a Section 7 certificate from FERC, and presumably would remain true pending reconsideration of that application. Unlike the pipeline at issue in *Standing Rock Sioux Tribe*, Petitioners are not requesting a complete shut down of an operating pipeline, they are only seeking the vacatur of a certificate authorizing additional construction and substantial changes to Adelphia's pipeline. Accordingly, disruption would be minimal during the pendency of the remand.

II. Township's Reply

A. Introduction

While unconventional, the Township believes it will assist this Honorable Court more deeply appreciate the deeply held concerns of the Township, if we open this Reply Brief with a brief discussion of what this appeal is not about. While the Township may disagree with Adelphia's preferred route for its proposed interstate pipeline and its assessment regarding the need for the energy it will transport, it fully recognizes that

[3] "That disruption would be particularly severe here, given that the Project in significant part merely continues pre-existing service to pre-existing customers on a pre-existing pipeline that has been in-service delivering natural gas for over 25 years." Adelphia's Br. at 48.

the United States Congress declared those decisions ultimately rest with FERC. The Township is not asserting any "veto" power over FERC's exercise of its duties. Further, the Township is not saying that its own local zoning and land development regulations by themselves preclude this project. Finally, the Township acknowledges that NEPA is an information gathering and assessment process which does not mandate a particular substantive outcome.

The core concerns of the Township which led to its whole-hearted participation in the FERC proceeding, it filing an Application for Rehearing with FERC when its concerns were not addressed, and now this appeal to this Court fall into four categories:

1. FERC cannot lawfully allow a public utility, in the interest of economy or convenience, to ignore or minimize safety concerns.
2. FERC cannot casually dismiss published recommendations of its own and closely related federal agencies, because they are not statutory or regulatory, as being irrelevant to its obligations and decision making. It must address them and either conform to them or provide sufficient reason for one and

all to understand why they are not relevant or appropriate to the particular circumstances of the application.

3. FERC must explain, whether pursuant to NEPA or to its substantive duties, why it may or must ignore apparent safety related limitations based entirely upon its discretion when making a route selection or other size and location determinations related to needed appurtenant facilities. No EA or EIS based on such a faulty factual assessment can be considered adequate or complete. Pursuant to this logic, FERC's Finding of No Significant Impact must be voided and FERC must be directed to prepare a full EIS.

4. FERC must assess when considering applications and making possible land acquisition assessments and determinations associated with the potential impacts of proposed routes upon neighbor landowners (indirect taking) if those potential impacts can effectively restrict otherwise lawful neighboring uses essentially resulting in a *de facto* taking or expropriation of private property without compensation and disregard a

municipality's legitimate land use planning and associated regulatory obligations.

Since FERC failed to meet these obligations, its December 20, 2019 Order in Docket Numbers CP18-46-000, CP18-46-001, and CP18-46-002 must be vacated and remanded for the preparation of a full EIS, after which a new decision based upon that further NEPA review and substantive assessment can be made. Or, if this Court determines that FERC's December 20, 2019 Order should not be vacated in its entirety, that decision should be remanded to FERC with instructions directing it, for purposes of reconsideration, to include a detailed discussion and review of the Township's land use regulatory and site size concerns for all appurtenant facilities needed to insure both the safety and the avoidance of real nuisance impacts for all neighboring uses and land owners.

Respectfully, if this Court remands this matter to FERC without Vacatur, it should consider advising Adelphia that if it proceeds to construct the current system approved by FERC, it is doing so at its own risk as this Court's Order requires FERC to prepare a full EIS and to

consider and, as appropriate, to adopt such alternative route and facility size and locations as might flow from the reconsideration.

B. Argument

The Township first raised questions regarding the safety of the proposed repurposed system and placed into the record documents reflecting the Township's continuing concerns for citizen safety and, very importantly, how it could or would manage its duties for future land use decisions and actions allowing or restricting future land use decisions by adjacent private property owners in the Township with its detailed April 30, 2019 (filed May 1, 2019) submission to the record. R890. Please see page 94 of R890 where residential rear yard setbacks from 30' to 50' are contemplated. In order to elaborate upon and make more specific its safety concerns, it then retained a specialized environmental consultant, RT Environmental Services, Inc., whose September 5, 2019 report was submitted to the Record by Township counsel on September 10, 2019. R920. When FERC, in its December 20, 2019 Order Issuing Certificates to Adelphia, provided no effective or meaningful responses to these earlier expressed concerns, the Township filed its Application for Rehearing. R939.

While the Township continues to demand FERC and the Pipeline Safety Administration take all appropriate steps to ensure the safety of all Township residents and invitees who live, work or recreate along the pipeline right-of-way, the focus of its Application and this appeal is the inappropriately small and inherently unsafe Quakertown Site of 1.5 acres, and FERC's unwillingness to either enlarge that site or to evaluate other potential sites that could be enlarged or already had sufficient acreage for purposes of ensuring community safety and allowing adjacent land use to proceed. The Township believes all the analysis and relevant documents needed for the above considerations are primarily found in Record Items Number 920 and 939, otherwise identified as the RT report and the Township's Application for Rehearing.

RT's September 5, 2019 report documented several of the unsafe aspects of this postage stamp sized site and pointedly asked why a neighboring 41 (perhaps up to 43) acre site, also owned by Adelphia, was not selected by FERC as the appropriate site. The five attachments to the Township's Application for Rehearing explore in detail how FERC, but also FEMA and the U.S. Department of Transportation's Pipeline Safety Administration clearly believe natural gas compressor stations

should be located on sites ranging from 10 to 40 acres, and also continued to document the inherent community risks associated with selecting the small Quakertown Site instead of either requiring further land acquisition at that site or compelling consideration of large alternative sites. Interestingly, these guidance documents do not indicate what considerations are relevant to selecting the needed site size within the suggested range. To the extent these "elements" exist, they too should have been discussed by FERC in both the EA and its Final Order. We do know that both FERC and the Pipeline Safety Administration are well aware of 49 C.F.R. § 192.163, "Compressor Stations: Designs and construction" which states:

> (a) *Location of compressor building.* . . . . each main compressor building of a compressor station must be located on property under the control of the operators. It must be far enough away from adjacent property, not under control of the operator, to minimize the possibility of fire being communicated to the compressor building from structures on adjacent property. There must be enough open space round the main compressor building to allow the free movement of fire-fighting equipment."

RT Drawing 1 of Attachment B Drawing clearly establishes the absence of open space to allow for the free movement of fire-fighting

equipment and clearly shows that neighboring uses could be occurring within 30' of the planned compressor building at the proposed Quakertown site. The RT report further identifies the Salford Alternative as having 43 acres including high tension electric transmission lines which would presumably make electric compression at this site feasible. In addition, the Township on page 2 of its Application for Rehearing clearly identified two government pamphlets, one from FERC and the other from FEMA and the Pipeline Safety Administration as referencing normal compressor station sizes ranging from either 10 or 15 to 40 acres. R939, Att. 1 at p. 9, Att. 2 at p. 21. We do know, for example, that the 2010 San Bruno, California pipeline rupture and explosion damaged or destroyed home in an approximate 40 acre reach of the rupture when the area is calculated on the scaled drawing. R939, Attachment 2 at p. 37. Yet the Order Denying Rehearing and Stay is essentially silent on all these points. It purports to answer this issue in Paragraphs 57–60, yet none of their answers are responsive to the Township's expressed concerns.

FERC states that it responded to these issues in its Order and the EA, but provides no references. There is no direct reference to these site

size recommendations in the Order and all the statements regarding safety design (see for example paragraphs 142–45) are conclusory and do not declare how the project design meets these standards. The discussion of the Salford Alternative does not acknowledge its large overall size and assumes any new compressor station would be located on the same or immediately adjacent to the existing re-heat station which is adjacent to the property line, *see* R 939, Att. 3 drawing Salford Site, and not positioned so as to be isolated from neighboring uses.

The Order itself, it on page 17, paragraph 43 accepts the EA and concludes:

> ". . . the project will not have a significant environmental impact. Therefore, we grant the requested authorizations subject to conditions discussed below."

Those discussions all assert that various reviews or procedural activities have been undertaken, but are not evaluative of any of the substantive issues of concern to various commentators. After being denied rehearing on April 17, 2020, the Township filed this appeal.

The Township's Brief for Respondent raises all of these issues; however, in response, neither FERC nor Adelphia have added any references or analyses that would serve to support or explain the Order.

In fact, our search reveals only inaccurate comments seeking to disparage or minimize the Petitioners' arguments.

The Brief for Respondent FERC and the Answering Brief for Respondent-Intervenor Adelphia contain no new or modified analysis that would serve to support the decision. In fact, Adelphia along with FERC try to obfuscate the clearly deceptive discussion of the Salford Alternative by (1) continuing to avoid addressing its true size and seek instead to speak only of the building size and immediately involved adjacent acreage, (2) by suggesting the two government and one Pipeline Safety Trust pamphlets contain essentially only recommendations that can be ignored, and (3) indicating that the Township seeks to preempt FERC's statutory authority when it in fact is essentially begging FERC and the Pipeline Safety Administration to declare and publish a route and facility decision that gives the public confidence that they in conducting their normal lives and utilizing their property are safe.

The absurdity of selecting the postage stamp size site and asserting its merits and suitability is made all the more outrageous when the applicant and FERC both dismiss the Salford Alternative—a site that will be part of Adelphia's acquisition and is approximately 41 (to 43) acres

in size is on the route of the pipeline and also has electric utility access on the very site. The RT report clearly identifies and discusses why the proposed Quakertown site is too small. FERC asserts Petitioners have "forfeited" this argument for failure to identify a "disconnect between the Commission's choice of the Quakertown Site and any particular piece of record evidence." FERC Br. at 31. The RT report and the reference to two additional government pamphlets describing basic "norms" expected for compressor stations certainly "connect" the Township's expressed concerns to record materials.

While Adelphia and FERC both reject this Salford Alternative saying, in part and without analysis, that it would require more compression, have greater air emissions, and is not suitable for the utilization of electric compressors, it is important to note that following both the Order and this appeal, Adelphia has indicated, *sua sponte,* (FERC Docket No. CP21-14-000 and the FERC Environmental Assessment Report both referenced in the Updated Statement of the Case), that it will add 3,000 horsepower of electric compression at the Marcus Hook Compressor Station without any apparent need to modify its existing Pennsylvania Air Plan Approval for the planned natural gas

driven compressors already approved for the Marcus Hook site, identical in size and nature to those proposed for the Quakertown Site. Thus, it would seem perfectly possible that Adelphia could have used the same combination of natural gas and electric powered compressors at the Salford Alternative if it was concerned about the total volume of air emissions without having to modify the substantive terms of its existing Air Plan Approval issued for the Quakertown Site except to change the location of the proposed use!

While all of Petitioners' concerns should have been evaluated during the NEPA process, the failure to consider these concerns also results in an arbitrary and capricious substantive decision. While agency officials entrusted with a decision are afforded some discretion, their analysis and decision must be based on fact; a valid decision cannot be simply whimsical as is this decision.

The final concern of FERC and Adelphia appears to be that the Township is seeking to preempt FERC's Congressionally imposed duties, and asserts that argument is barred for two reasons—(1) it cannot succeed as a matter of law and (2) is precluded due to a lack of timely reservation. FERC is in error on both concerns. The Township

acknowledges FERC's right to reasonably select routes and determine the need for and location of related facilities, but FERC cannot do so in a manner which adversely and wrongfully impacts neighboring uses. The Township has made its concern for this project's neighbors the central point of all its comments. The 10th Amendment to the U.S. Constitution clearly preserves the right of states to protect the public safety, health and welfare, and allows states and their governmental entities the right to demand that federal agencies not intrude upon those duties and rights.

In this case, the Township simply seeks assurance, on the basis of accurate and complete analysis, that the neighbors to this Project can continue their lives and activities without interruption, undue interference or limitations, or the threat of injury. FERC can ignore local zoning when choosing a route and siting appurtenant facilities, but it cannot, in the interest of cost or mere convenience to the applicant, disadvantage and disinherit neighboring landowners whose separate, but adjacent, properties are rendered far less useful and valuable. This record and FERC's Order do not respect and protect the constitutionally protected obligations of state and local government to protect their citizens.

C. Conclusion

This Court should conclude that (1) FERC's December 20, 2019 Order Issuing Certificates and its April 17, 2020 Order Denying Rehearing and Stay are void, and (2) FERC, if Adelphia does not withdraw its Application for this project, must conduct a proper NEPA analysis subject to the direction of this Court and to make a lawful, substantive determination regarding the merits of Adelphia's Application.

III. McCarthys' Reply

A. By reviewing challenges related to the selection of the absurdly small Quakertown Site, FERC and Adelphia have waived any objection to the form of the McCarthys' petition for review. The gross unsuitability of the Quakertown Site was raised by the McCarthys and the Township throughout the FERC proceedings and undeniably was addressed in the McCarthys' petition for review.

FERC and Adelphia argue that any claims raised by the McCarthys have been waived because their petition for review was in the wrong form. *See* R936 and R940. FERC's claim elevates form over substance and only serves to emphasize FERC's fundamental industry bias. FERC and Adelphia have been aware from the start of the FERC proceedings that the McCarthys and the Township object to the selection of the miniscule

Quakertown Site. FERC is also well aware of all of the attendant and subsidiary issues presented by a tiny compressor site (noise, glare, air pollution, vibration, fire and explosion hazard). None of this is new or novel. The central purpose of the pleading rules is to advise FERC what issues are being raised. In this case, FERC well knows what issues were raised, so strict compliance with the rules is functionally meaningless. The McCarthys were participating *pro se* at the time: the odds are heavily stacked against them in these proceedings, and they were forced to navigate alone, confused by the rules and outmatched by federal and private adversaries. FERC blithely says "rules is rules!" FERC Br. at 67. This is hyper-technical, fundamentally unfair and shameful treatment. Then, hypocritically arguing out of the other side of its mouth, FERC also states that it reviewed the McCarthys' major issues anyway! How then can FERC argue that the McCarthys' claims have been waived?

B. FERC's "hard look" was in reality a "blank stare" because FERC never thoroughly and systematically evaluated the diminutive Quakertown Site against other alternative sites, and never explained or revealed the manner and method whereby FERC asserted it balanced the advantages and disadvantages of the Quakertown Site against any alternative sites.

FERC asserts over and over that it took a "hard look" at the Quakertown Site. FERC Br. at 62, 67. FERC's own public propaganda

literature says compressor sites should be large—10 to 40 acres! See FERC Br. at 71 n. 5. See also R939, Att. 1 at 9. It is obvious why this is so: the nuisance and hazard effects of these facilities are ameliorated (but not eliminated) by large sites. Small sites exacerbate and magnify all of these known problems. FERC's justification for approving a minute site boils down to this: use of the alternative Salford Site would generate more air emissions. FERC Br. at 72, 74. That's it: no analysis, no systematic and careful evaluation and comparison of the candidate sites. But look, Adelphia recently sought to add an electric-powered compressor to the Marcus Hook Compressor Site, without an apparent change to its Pennsylvania Department of Environmental Protection issued air quality plan approval—the same thing surely could be done at the Salford Alternative. *See* Prior Notice of Blanket Certificate Activity, Adelphia Gateway, LLC, Accession No. 20201207-5201, FERC Docket No. CP21-14-000 (Dec. 7, 2020); and Notice of Request under Blanket Authorization, Accession No. 20201216-3080, FERC Docket No. CP21-14-000 (Dec. 16, 2020). An extremely critical concern of the McCarthys is the lack of current, relevant scientific data from FERC in response to technical, in depth research studies presented by the McCarthys on

issues such as noise and airborne emission distributions. This information cannot be ignored or casually dismissed, as FERC has done, when the health and safety of not only the McCarthys but heavily populated surrounding communities is involved. The McCarthys cannot imagine any Adelphia or FERC executive who would tolerate the proposed compressor station in their backyard, less than 500 feet from their house. In reality, FERC's "hard look" was a blank stare. An authentic "hard look" means that the agency must evaluate an issue very carefully and systematically to find out what is wrong, or to find a better way of dealing with the problem. Furthermore, FERC never explained in adequate detail how and precisely in what manner it "balanced" the advantages and disadvantage of alternative sites. FERC simply saying we "balanced" does not cut it. *See* FERC Br. at 27.

Put aside all the legal posturing: the use of the Quakertown Site threatens the McCarthys' health, safety and welfare. Riverkeeper, the Township, and the McCarthys have raised sufficient and alarming concerns to warrant the preparation of a full EIS, and this Court should order it be done.

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioners' Joint Opening Brief, FERC's finding of no significant impact and finding that the Project is required by the public convenience and necessity lacked substantial evidence, were arbitrary and capricious, and should be vacated and remanded pursuant to the Natural Gas Act, 15 U.S.C. § 717r(b), and the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Dated: March 16, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in this Court's order of November 19, 2020, because this brief contains 6653 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. Rule 32(e)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface in 14-point font, using Microsoft Word 2019.

Dated: March 16, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2021, I electronically filed the foregoing Petitioners' Reply Brief with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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