

ORAL ARGUMENT NOT YET SCHEDULED
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Catskill Mountainkeeper, Inc.,)	
Clean Air Council, Delaware-Otsego)	
Audubon Society, Inc., Riverkeeper, Inc.,)	
and Sierra Club)	
)	
Petitioners,)	Case. No. 16-345
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

Stop the Pipeline)	
)	
Petitioner,)	Case. No. 16-361
)	
v.)	
)	
Federal Energy Regulatory Commission,)	
)	
Respondent.)	

**MOTION OF NATURAL GAS SUPPLY ASSOCIATION
FOR LEAVE TO INTERVENE**

Pursuant to Rule 15(d) of the Federal Rules of Appellate Procedure, the Natural Gas Supply Association (“NGSA”) moves to intervene in the above-captioned consolidated proceeding, which seeks review of two orders of the Federal Energy Regulatory Commission (“FERC”) conditionally authorizing the construction and

operation of a natural gas pipeline. Counsel for FERC and for each of the intervenors have advised that none of these parties oppose this motion. Counsel for Petitioners Catskill Mountainkeeper, Inc., Clean Air Council, Delaware-Otsego Audubon Society, Inc., Riverkeeper, Inc., and Sierra Club has advised that its clients are concerned that NGSA's intervention might adversely affect the briefing schedule or burden them with the need to respond to additional material. NGSA commits to work within any briefing schedule and limits agreeable to the parties and the Court. Counsel for Petitioner Stop the Pipeline has advised that its client opposes this motion, but would not oppose NGSA filing as an amicus curiae. Counsel for Petitioner Stop the Pipeline also has advised that its client has not yet decided whether it will file a formal opposition to this motion.

NGSA is a national trade association that represents natural gas market participants that produce and market natural gas. Founded in 1965, NGSA and its members support the development of natural gas pipeline infrastructure to ensure that consumers around the United States have reliable access to natural gas. Each year NGSA's member companies supply trillions of cubic feet of natural gas to electrical power plants, local gas utilities, and industrial gas users.

NGSA's members' strong interests in the authorization of pipeline infrastructure on which its members depend on for marketing natural gas cannot be represented by the other parties in the proceeding, and otherwise meets the

standard for intervention, as explained below. On March 7, 2016, this Court consolidated the above-captioned appeals into a single proceeding.

BACKGROUND

On February 5, 2016, Catskill Mountainkeeper, Inc., Clean Air Council, Delaware-Otsego Audubon Society, Inc., Riverkeeper, Inc., and Sierra Club, and separately, Stop the Pipeline (collectively, “Petitioners”) petitioned this Court for review of FERC’s December 2, 2014 order conditionally authorizing Constitution Pipeline Company, LLC and Iroquois Gas Transmission System, L.P. to site, construct, and operate the Constitution Pipeline Project, a 124-mile pipeline extended from Susquehanna County, Pennsylvania, to Schoharie County, New York, and the Wright Interconnection Project located in Schoharie County, New York.¹ Petitioners also petition this Court for review of FERC’s January 28, 2016 order denying Petitioners’ request for rehearing of the Commission’s December 2014 order authorizing the Projects.²

In denying Petitioners’ requests for rehearing of the December 2 Order, FERC concluded that it complied with section 7(e) of the Natural Gas Act and the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 *et seq.*

¹ “Order Issuing Certificates and Approving Abandonment,” 149 FERC ¶ 61,199, entered in FERC Docket Nos. CP13-499-000 and CP13-502-000 (Dec. 2, 2014).

² “Order Denying Rehearing and Approving Variance,” 154 FERC ¶ 61,046, entered in FERC Docket Nos. CP13-499-001 and CP13-502-001.

(2006), (i) by finding that the Constitution Pipeline is required by the public convenience and necessity; (ii) by determining that federal law did not mandate preparation of a Supplemental Environmental Impact Statement or a Programmatic Environmental Impact Statement; (iii) by issuing an order conditioned on the completion of additional consultations, environmental studies, or federal authorizations; (iv) by concluding that the environmental analysis of the projects did not improperly segment the Commission's analysis of the Constitution Pipeline Project and the Wright Interconnection Project from other infrastructure projects; (v) by adequately considering alternatives to the projects; and (vi) by addressing direct, indirect, and cumulative effects of the projects, including potential impacts from alleged induced natural gas production and from consumption of natural gas transported by the projects.

DISCUSSION

NGSA seeks intervention to oppose Petitioners' attempts to improperly expand the scope of NEPA and to protect its members' critical economic and contractual interests in the Constitution Pipeline and Wright Interconnection Project. NGSA strongly supports safe and environmentally responsible development of natural gas transportation infrastructure. However, Petitioners improperly seek to require FERC, in its NEPA analysis of the natural gas

infrastructure projects that are located downstream of natural gas production and gathering, to use unreliable and unverifiable information that merely assumes a connection between natural gas production activity and the Constitution Pipeline and Wright Interconnect Project. Neither the Natural Gas Act nor NEPA require such unreasonable and unwieldy analysis.

I. Governing Standard

Under Fed. R. App. P. 15(d), a motion to intervene “must be filed within 30 days after the petition for review is filed” and should make “a concise statement of the interest of the moving party and the grounds for intervention.” When analyzing the merits of a movant’s motion to intervene, this Court considers four factors: (1) timeliness of the request to intervene; (2) the movant’s interest in the action; (3) a demonstration that the movant’s interest may be impaired by the outcome of the proceeding; and (4) a showing that the movant’s interest is not protected adequately by the parties to the proceeding. *Floyd v. City of New York*, 770 F. 3d 1051, 1057 (2d Cir. 2014) (quoting *R Best Produce, Inc. v. Shuman-Rabin Marketing Corp.*, 467 F.3d 238, 240 (2d Cir. 2006)). All four of this Court’s enumerated factors require granting NGSA’s Motion for Leave to Intervene in this proceeding.

II. NGSAs Members Have an Interest Relating to the Subject of the Action and the Disposition of this Proceeding Will Affect that Interest.

NGSA's interests in this proceeding are at least two-fold. First, one of the shippers on the Constitution Pipeline, SWN Energy Services Company, LLC (f/k/a Southwestern Energy Services Company) ("Southwestern"), is a member of NGSA. Southwestern has contracted with Constitution Pipeline for firm transportation capacity rights on Constitution Pipeline totaling 150,000 dekatherms per day, representing approximately 23% of Constitution Pipeline's full design capacity.³ Any action by this Court that modifies or overturns FERC's authorization of the Constitution Pipeline will have a material effect on Southwestern's commercial interests.⁴

Second, NGSA's full membership has vital interests in protecting the integrity of the NEPA review process given that as producers, NGSA's members rely on available pipeline capacity to deliver natural gas to market. Petitioner Sierra Club is engaged in a nationwide campaign against natural gas that it has

³ "Order Issuing Certificates and Approving Abandonment," 149 FERC ¶ 61,199 at P. 8.

⁴ See *Hunt v. Washington State Apple Commission*, 432 U.S. 333, 343 (1977) (recognizing that an association has standing to advance the interests of its members).

branded “Beyond Natural Gas.”⁵ As the name suggests, Sierra Club’s focus is on delaying the delivery of natural gas and natural gas infrastructure, including natural gas pipelines – despite centuries of safe and reliable use of natural gas and its continued need to serve the public interest. NGSA’s membership includes participants in the natural gas industry that could be adversely impacted by Sierra Club’s arguments. Therefore, this Court should permit NGSA’s intervention in this proceeding to protect its members’ interest where, as here, NGSA meets the other elements of the test for intervention.⁶

III. NGSA’s Member Interests Are Not Adequately Represented By Any Existing Party.

No other party adequately represents NGSA’s interests in this case. FERC can be expected to focus its attention on the specific circumstances surrounding its consideration of the Constitution Pipeline and Wright Interconnection Project applications. No other party represents shippers or producers, like NGSA’s members, who rely on natural gas infrastructure to move their product to market and thus have a significant economic interest at stake. Nor does any party share NGSA’s direct interest addressing the broad, industry-wide, challenges Petitioners,

⁵ See Sierra Club website at <http://content.sierraclub.org/naturalgas/> (last reviewed Mar. 1, 2016).

⁶ See, e.g., *Conservation Law Foundation v. Mosbacher*, 966 F.2d 39, 41 (1st Cir. 1992) (members of the regulated industry that are directly affected by agency action have a significant, protectable interest that supports intervention).

especially the Sierra Club, have made to the use of natural gas and fossil fuels generally. It is therefore critical that NGSA be permitted to make its own arguments, as may be necessary, and not be left to hope that FERC, or some other party, makes all the points that NGSA would have made if it were a party to the appeal.

The matters at issue in this consolidated proceeding also extend beyond FERC's actions in this particular proceeding. Petitioners seek to use this proceeding to further their nationwide campaign against the use of natural gas. Sierra Club has protested numerous natural gas infrastructure projects pending before FERC, including a large number of natural gas pipeline projects and nearly every liquefied natural gas export project. Sierra Club has advanced nearly identical arguments regarding alleged environmental impacts of "induced production" in all such proceedings. More broadly, the outcome of this case may affect FERC's review of other natural gas infrastructure projects, as well as related judicial analyses, because Petitioner's claims raise questions related to the scope of the agency's NEPA review. Thus, this appeal may have precedential effect on NGSA's members in all pending and future natural gas infrastructure proceedings.

The burden of establishing inadequacy of representation is "minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). An applicant need not demonstrate a certainty that the existing parties will

inadequately represent its interests, only that such representation “may be” inadequate. *Id.* This Court has cautioned that intervention should be permitted unless the interests of existing parties are “so similar to those of [the movant] that adequacy of representation [is] assured.” *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 132-33 (2d Cir. 2001). Other courts have long and uniformly held that private economic interests such as those of NGSAs and its members cannot be adequately represented by an agency which is charged to consider much broader interests. *See, e.g., Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 736 (D.C. Cir. 2003) (“we have often concluded that governmental entities do not adequately represent the interests of aspiring intervenors”) (citing *Dimond v. District of Columbia*, 792 F.2d 179, 192 (D.C.Cir.1986)); *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 973-74 (3d Cir. 1998) (federal government agency and private businesses seeking to intervene had “interests inextricably intertwined with, but distinct from” each other and thus the government’s representation of private interests would be inadequate); and *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994) (intervention by private industry group in suit against government appropriate because “[t]he government must represent the broad public interest, not just the [concerns of the industry group].”).

IV. NGSAs Motion for Leave to Intervene Is Timely.

There is no risk that NGSAs intervention in this proceeding will delay or prejudice the rights of Petitioners or Respondent or delay these proceedings.

Under Fed. R. App. 15(d), a notice of intervention is due within 30 days of the filing of a Notice of Appeal or Petition for Review, or March 7, 2016. This motion satisfies the 30-day deadline. A scheduling order has yet to issue, so there is also no delay to the schedule in this case, and NGSAs commits to work within any briefing schedule and limits agreed by the parties and/or adopted by the Court.

CONCLUSION

For the foregoing reasons, NGSAs has a substantial interest in participating in this proceeding that cannot be adequately represented by any other party. NGSAs Motion for Leave to Intervene should be granted.

Respectfully submitted,

/s/

John Longstreth
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006
(202) 778-9000
John.Longstreth@klgates.com

*Counsel for Natural Gas Supply
Association*

March 7, 2016

**CORPORATE DISCLOSURE STATEMENT OF
NATURAL GAS SUPPLY ASSOCIATION**

Pursuant to Federal Rule of Appellate Procedure 26.1, the Natural Gas Supply Association (“NGSA”) states that it is a not-for-profit trade association based in Washington, D.C., charged with promoting the interests of its members in the United States. NGSA is not a publicly held corporation, has no parent companies, and no companies have a ten percent or greater ownership interest in NGSA.

Respectfully submitted,

/s/ _____
John Longstreth
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006
(202) 778-9000
John.Longstreth@klgates.com

*Counsel for Natural Gas Supply
Association*

March 7, 2016

CERTIFICATE OF SERVICE

I certify that on March 7, 2016, the foregoing Motion for Leave to Intervene of Natural Gas Supply Association was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

Respectfully submitted,

/s/

John Longstreth
K&L Gates LLP
1601 K Street, NW
Washington, D.C. 20006
(202) 778-9000
John.Longstreth@klgates.com

*Counsel for Natural Gas Supply
Association*

March 7, 2016