

156 FERC ¶ 61,160  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Florida Southeast Connection, LLC  
Transcontinental Gas Pipe Line Company, LLC  
Sabal Trail Transmission, LLC

Docket Nos. CP14-554-001  
CP15-16-001  
CP15-17-001

ORDER ON REHEARING

(Issued September 7, 2016)

**I. Background**

1. On February 2, 2016,<sup>1</sup> the Commission granted three requested authorizations under section 7 of the Natural Gas Act (NGA), subject to condition: (1) Florida Southeast Connection, LLC's (Florida Southeast) request to construct and operate the Florida Southeast Connection Project (Florida Southeast Project);<sup>2</sup> (2) Transcontinental Gas Pipe Line Company, LLC's (Transco) request to construct and operate the Hillabee Expansion Project<sup>3</sup> and abandon the capacity on the Hillabee Expansion Project by lease to Sabal Trail Transmission, LLC (Sabal Trail); and (3) Sabal Trail's request for a

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<sup>1</sup> *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 (2016) (February 2 Order).

<sup>2</sup> The Florida Southeast Project consists of a new 126-mile long natural gas pipeline and related facilities.

<sup>3</sup> The Hillabee Expansion Project will include approximately 43.5 miles of pipeline looping facilities and 88,500 horsepower of compression at one new and three existing compressor stations in Alabama.

certificate of public convenience and necessity to construct and operate the Sabal Trail Project and to lease capacity from Transco.<sup>4</sup>

2. G.B.A. Associates, LLC and K. Gregory Isaacs<sup>5</sup> (collectively, G.B.A. Associates), Florida Southeast, Transco, and Sabal Trail filed requests for rehearing and/or clarification of the February 2 Order. Blue Ridge Environmental Defense League (Blue Ridge) filed a request for rehearing and rescission of the February 2 Order.<sup>6</sup> Kiokee-Flint Group, Sierra Club, Flint Riverkeeper, and Chattahoochee Riverkeeper (collectively, Kiokee-Flint) filed a request for rehearing, rescission of certificates, and a request to stay the project.<sup>7</sup> In this order, we grant, in part, and deny, in part, the requests for rehearing and clarification.

## **II. Procedural Issues**

3. On March 18, 2016, Sabal Trail also filed a motion for leave to answer and answer the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure<sup>8</sup> prohibits answers to a request for rehearing. Accordingly, we reject Sabal Trail's answer.

## **III. Discussion**

### **A. Certificate Policy Statement and Evidence of Need**

4. G.B.A. Associates argues that the Commission failed to demonstrate that the Sabal Trail Project is warranted by the public convenience and necessity because the record

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<sup>4</sup> The Sabal Trail Project will include approximately 515 miles of new pipeline, six compressor stations, and six meter stations in Alabama, Georgia, and Florida.

<sup>5</sup> We note attorneys for Mr. Isaacs have spelled his name two alternative ways (Issacs and Isaccs). *See* Isaacs March 2, 2016 Rehearing Request at 1 (Isaacs Rehearing Request). This order continues the spelling from the February 2 Order. *See* February 2 Order, 154 FERC ¶ 61,080 at P 57 and n.19.

<sup>6</sup> Blue Ridge March 1, 2016 Rehearing Request (Blue Ridge Rehearing Request).

<sup>7</sup> Kiokee-Flint March 3, 2016 Rehearing Request (Kiokee-Flint Rehearing Request). In a March 30, 2016 Order, the Commission denied Kiokee-Flint's request to stay the project. *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,264 (2016).

<sup>8</sup> 18 C.F.R. § 385.713(d)(1) (2015).

purportedly lacks substantial evidence demonstrating a need for the pipeline and because the pipeline is redundant as it largely parallels existing pipelines.<sup>9</sup>

5. We affirm our finding in the February 2 Order that there is a public need for the Sabal Trail Project.<sup>10</sup> Under the Certificate Policy Statement, the Commission will consider all evidence submitted by the applicant reflecting on the need for the project, including, but not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.<sup>11</sup> The Commission has found that long-term commitments serve as “significant evidence of demand for the project.”<sup>12</sup> In the instant case, Florida Power & Light Company (Florida Power & Light) and Duke Energy Florida Inc. (Duke Energy Florida) entered into long-term commitments for 93 percent of proposed capacity of the Sabal Trail pipeline.<sup>13</sup> The Florida Power & Light contract arose from an involved process initiated by the Florida Public Service Commission to accommodate Florida’s long-term natural gas needs, thus further demonstrating the public need for the Sabal Trail Project.<sup>14</sup>

6. The Sabal Trail Project will also bring benefits to other pipelines and their customers. Specifically, the Sabal Trail Project will have the ability to deliver gas to existing pipeline systems in the event of a supply or facility disruption, and its existence will enhance market competition.<sup>15</sup> In addition, Sabal Trail has taken steps to reduce any adverse impacts to landowners. These steps include the adoption of several route

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<sup>9</sup> G.B.A. Associates March 1, 2016 Rehearing Request at 8-9 (G.B.A. Associates Rehearing Request); Isaacs Rehearing Request at 8-9.

<sup>10</sup> February 2 Order, 154 FERC ¶ 61,080 at PP 87-88.

<sup>11</sup> *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999) *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (*Certificate Policy Statement*). *See also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012) (The Certificate Policy Statement’s balancing of adverse impacts and public benefits is an economic, not environmental analysis).

<sup>12</sup> *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,748.

<sup>13</sup> February 2 Order, 154 FERC ¶ 61,080 at PP 87-88.

<sup>14</sup> *Id.* P 10 and n.6.

<sup>15</sup> *Id.* P 69.

variations, including one that closely follows property lines and minimizes impacts affecting the landowners' future development opportunities.

7. On balance, the need for and benefits derived from the Sabal Trail Project outweigh the adverse impacts on landowners. As such, we affirm the February 2 Order's conclusion that public need for the Sabal Trail Project has been demonstrated.

**B. Sabal Trail's Lease of Capacity on Transco's System**

8. Transco and Sabal Trail entered into a Capacity Lease Agreement providing for the lessor, Transco, to construct and operate the Hillabee Expansion Project facilities and to abandon the incremental capacity by lease to lessee Sabal Trail. The February 2 Order found that provisions that restrict shippers' interconnections in the Capacity Lease Agreement conflict with the Commission's interconnection policies.<sup>16</sup> Accordingly, the Commission required revisions to section 2.2(a) of the Capacity Lease Agreement to eliminate restrictions to Sabal Trail's shippers' ability to access secondary receipt and delivery points on the Transco mainline and to backhaul or reverse flow from east to west on the Transco system.<sup>17</sup>

9. Transco asserts that the Commission erred by only considering the provision's anticompetitive impact rather than balancing any anticompetitive impact against the recognized benefits of the Capacity Lease Agreement. Transco and Sabal Trail emphasize that the lease benefits both Sabal Trail and its customers by providing them with direct access to the liquid trading hub on the Transco system without the cost or environmental impact associated with constructing duplicative greenfield pipeline facilities. Transco states that section 2.2(a) of the Capacity Lease Agreement is a critical component of the bargain between Transco and Sabal Trail, and that the limited access to receipt and delivery points, and backhaul or reverse flow reflects the lower lease charge compared to the Hillabee Expansion Project's annual cost of service. Transco and Sabal

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<sup>16</sup> *Id.* P 100.

<sup>17</sup> On rehearing, Sabal Trail states that it and Transco have revised the Capacity Lease Agreement according to the February 2 Order's directive; however, Sabal Trail seeks rehearing to the extent the Commission intended to modify the point-to-point nature of the lease or to allow flows under the agreement to or from points not specified in the agreement or in a direction of flow inconsistent with the flow dictated by the receipt and delivery points specified in the agreement. Sabal Trail March 3, 2016 Rehearing Request at 6 (Sabal Trail Rehearing Request).

Trail stress that the Capacity Lease Agreement transfers a property interest, and does not provide transportation service.<sup>18</sup>

10. Transco and Sabal Trail<sup>19</sup> point out that the Commission has previously encouraged leases,<sup>20</sup> and the required modification of section 2.2(a) of the Capacity Lease Agreement undermines that policy. Transco states that the lease is a balanced agreement, negotiated at arm's length, and that without the section 2.2(a) protections, it and other interstate pipelines might be unwilling to grant competitors lease terms that similarly provide substantial benefits. While the lease would preclude Sabal Trail from unilaterally adding new receipt points or delivery points, Sabal Trail's customers could still request a new interconnection with Transco pursuant to Transco's tariff.<sup>21</sup>

11. We grant rehearing on this matter and will rescind our directive to reform the Capacity Lease Agreement by removing language that prevents lessee Sabal Trail and its customers from (1) using any receipt or delivery point other than the three receipt points and one delivery point designated in the Capacity Lease Agreement; or (2) having rights to backhaul or reverse flow gas from east to west on the Transco mainline.

12. As noted by Transco and Sabal Trail, the Commission historically views lease arrangements differently from transportation services under rate contracts. Under a lease agreement, the lessee pipeline acquires a property interest in the capacity of the lessor's pipeline, and the lessee therefore generally needs certificate authorization under section 7(c) of the Natural Gas Act (NGA) to lease the capacity. Once acquired, the lessee "owns" the capacity that is subject to the lessee's tariff.<sup>22</sup> The Commission has approved leases if they satisfy the *Islander East* test,<sup>23</sup> which reviews whether: (1) there are benefits for using a lease arrangement; (2) the lease payments are less than or equal to the lessor's firm transportation rates for comparable service over the term of the lease on

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<sup>18</sup> Transco March 2, 2016 Rehearing Request at 8 (Transco Rehearing Request); Sabal Trail Rehearing Request at 7-8, 11.

<sup>19</sup> Transco Rehearing Request at 7; Sabal Trail Rehearing Request at 9.

<sup>20</sup> *See, e.g., Empire Pipeline, Inc.*, 150 FERC ¶ 61,181 (2015).

<sup>21</sup> Transco Rehearing Request at 15; Sabal Trail Rehearing Request at 9.

<sup>22</sup> *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001).

<sup>23</sup> *See Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276 (2002) (*Islander East*).

a net present value basis; and (3) the lease arrangement would have an undue adverse effect on existing customers.<sup>24</sup>

13. In applying the *Islander East* test, the February 2 Order noted the benefits derived from the lease arrangement and observed the lease payment is less than Transco's maximum recourse rate had Transco proposed the facilities for service under its own tariff.<sup>25</sup> Thus, the remaining, relevant question is whether the Capacity Lease Agreement would have an undue adverse effect on existing customers.

14. None of Sabal Trail's foundation customers and none of Transco's existing customers protested the arrangement, and there is thus no indication that the lease harms existing customers. The lease allows Sabal Trail to offer efficient, seamless transportation service to its foundation customers without resorting to greenfield construction, which would result in substantially more environmental consequences and the exercise of eminent domain. Accordingly, the Commission grants rehearing, and finds that the Capacity Lease Agreement does not require modification with regard to secondary receipt and delivery points, and reverse or backhaul service. Section 2.2(a) of the Capacity Lease Agreement as proposed in the applications is thus approved.

### **C. Rates – Sabal Trail Project**

#### **1. ROE and Hypothetical Capital Structure**

15. In the February 2 Order, the Commission approved Sabal Trail's proposed 14 percent return on equity (ROE), but required Sabal Trail to modify its 60 percent equity/40 percent debt capital structure to include at least 50 percent debt.<sup>26</sup> On rehearing, Kiokee-Flint asserts that the Commission erred by: (1) failing to reduce Sabal Trail's 14 percent ROE after finding it excessive; (2) allowing Sabal Trail to retain its 14 percent ROE by adopting a hypothetical capital structure in contravention of Commission precedent favoring use of a company's actual capital structure; and (3) not considering the impacts of requiring Sabal Trail to apply an alternative capital structure

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<sup>24</sup> *Id.* P 69. The Commission explained in *Midcontinent Express Pipeline LLC*, 134 FERC ¶ 61,155, at P 13, *reh'g denied*, 136 FERC ¶ 61,222 (2011), that the third prong of *Islander East* is a "relative, rather than absolute, standard," meaning "the Commission will consider whether . . . the impact would outweigh the positive benefits identified in the first prong of the test."

<sup>25</sup> February 2 Order, 154 FERC ¶ 61,080 at PP 96-97.

<sup>26</sup> *Id.* P 118.

on Sabal Trail's ability to finance the project or on the overall public convenience and necessity of the project.<sup>27</sup>

16. Under section 19(a) of the NGA,<sup>28</sup> only a party that has been aggrieved by a Commission order may file a request for rehearing or a petition for judicial review. A party is aggrieved if it can show that it has both constitutional and prudential standing to challenge a Commission order.<sup>29</sup> Specifically, a party must demonstrate that:

(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual and imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.<sup>30</sup>

17. Kiokee-Flint has not shown that it is aggrieved by the ROE and hypothetical capital structure adopted in this case. Kiokee-Flint is neither a ratepayer nor an investor in the new pipeline. Thus, it is difficult to see how Kiokee-Flint could have suffered an "injury in fact" related to the ROE or capital structure that would be redressed by a favorable decision here. The Supreme Court has stated, "a plaintiff must demonstrate standing for each claim he seeks to press"<sup>31</sup> and that with respect to each asserted claim, "[a] plaintiff must always have suffered 'a distinct and palpable injury to himself.'"<sup>32</sup> Kiokee-Flint has not made such a demonstration here. Nevertheless, we address the merits of Kiokee-Flint's claims below.

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<sup>27</sup> Kiokee-Flint Rehearing Request at 6.

<sup>28</sup> 15 U.S.C. § 717r (2012).

<sup>29</sup> See *Green Island Power Authority v. FERC*, 577 F.3d 148, 158 (2d Cir. 2009) (construing substantially similar provision of the FPA, 16 U.S.C. § 825l (2012)).

<sup>30</sup> *Id.* at 159 (citing *Pac. Capital Bank, N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008)).

<sup>31</sup> *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006).

<sup>32</sup> *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)); see also *Mahon v. Ticor Title Insurance Co.*, 683 F.3d 59, 64 (2d Cir. 2012).

18. First, we note that the Commission never found the 14 percent ROE to be “excessive,” as Kiokee-Flint suggests.<sup>33</sup> Rather, the Commission found that the “combined return on equity and capital structure proposal . . . does not reflect current Commission policy,”<sup>34</sup> and thus, approved a 14 percent ROE, while requiring Sabal Trail to design its cost-based rates on a capital structure that includes at least 50 percent debt.<sup>35</sup> This directive is consistent with Commission precedent involving new pipelines.<sup>36</sup> Kiokee-Flint has provided no support to demonstrate that a 14 percent ROE is “excessive” or that the Commission should depart from its precedent.

19. Kiokee-Flint cites *Missouri Interstate Gas, LLC*<sup>37</sup> and *Pine Needle LNG Company, LLC*<sup>38</sup> for the proposition that the Commission has “routinely trimmed” pipeline ROEs that overcompensated the company for minimal risk at the expense of ratepayers. *Missouri Interstate* involved the acquisition of an existing facility, a former oil pipeline that Missouri Interstate proposed to convert to natural gas service, and required minimal construction.<sup>39</sup> *Pine Needle LNG* involved applicants’ proposal to construct an LNG storage facility.<sup>40</sup> Here, by contrast, the Commission is faced with a completely different situation: the construction of an entirely new greenfield pipeline.

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<sup>33</sup> Kiokee-Flint Rehearing Request at 14.

<sup>34</sup> February 2 Order, 154 FERC ¶ 61,080 at P 117.

<sup>35</sup> *Id.* P 118.

<sup>36</sup> *Bison Pipeline LLC*, 131 FERC ¶ 61,013, at P 24 (2010) (*Bison*), *vacated in part on other grounds*, 149 FERC ¶ 61,243 (2014); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 27 (2008) (*MarkWest*).

<sup>37</sup> 100 FERC ¶ 61,312 (2002) (*Missouri Interstate*).

<sup>38</sup> 77 FERC ¶ 61,229 (1996) (*Pine Needle LNG*).

<sup>39</sup> *Missouri Interstate*, 100 FERC ¶ 61,312 at PP 1, 16.

<sup>40</sup> *Pine Needle LNG*, 77 FERC ¶ 61,229 at 61,915.

20. Kiokee-Flint's references to *ETC Tiger Pipeline, LLC*<sup>41</sup> and other cases<sup>42</sup> to demonstrate that the Commission "chops" excess ROEs outright instead of modifying the capital structure are also unpersuasive. In *ETC Tiger*, the applicant initially proposed a 15 percent ROE and a capital structure of 50 percent equity/50 percent debt. In line with precedent, the Commission reduced the ROE to 14 percent and approved the capital structure of 50 percent equity/50 percent debt, noting that "ETC Tiger has not provided sufficient justification to support a higher return on equity than the Commission has recently approved for new pipeline companies."<sup>43</sup> Similarly, the Commission reduced the ROE from 15 percent to 14 percent in *Gateway Pipeline Co.*, finding a 14 percent ROE "to be reasonable based on the risks of the project, and to be in tune with prevailing returns in the marketplace."<sup>44</sup> These outcomes demonstrate the Commission's consistent approach for setting ROEs in new pipeline proceedings.

21. Moreover, in contrast to Kiokee-Flint's claims, *MarkWest*, in which the Commission approved a greenfield pipeline's proposed 14 percent ROE but rejected its capital structure of 60 percent equity/40 percent debt in favor of a 50 percent equity/50 percent debt capital structure,<sup>45</sup> is entirely on point. The outcome in *MarkWest* is both consistent with this case and other cases involving greenfield pipelines.<sup>46</sup>

22. Next, Kiokee-Flint argues that the Commission should not have adopted a hypothetical capital structure of 50 percent equity/50 percent debt because the Commission disfavors hypothetical capital structures.<sup>47</sup> While it is true the Commission

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<sup>41</sup> 131 FERC ¶ 61,010 (2010) (*ETC Tiger*).

<sup>42</sup> Kiokee-Flint Rehearing Request at 14-15 (citing *Williams Natural Gas Co.*, 77 FERC ¶ 61,277 (1996); *Panhandle Eastern Pipe Line Co.*, 71 FERC ¶ 61,228 (1995); *Gateway Pipeline Co.*, 55 FERC ¶ 61,488 (1991)).

<sup>43</sup> *ETC Tiger*, 131 FERC ¶ 61,010 at P 26.

<sup>44</sup> 55 FERC ¶ 61,488 at 62,678. Kiokee-Flint's reference to *Williams Natural Gas Co.*, 77 FERC ¶ 61,277, and *Panhandle Eastern Pipe Line Co.*, 71 FERC ¶ 61,228, are also inapposite given that these cases were NGA section 4 rate cases rather than NGA section 7 certificate proceedings.

<sup>45</sup> 125 FERC ¶ 61,165 at P 27.

<sup>46</sup> *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 (2014) (*Sierrita*); *ETC Tiger*, 131 FERC ¶ 61,010 at PP 25-26; *MarkWest*, 125 FERC ¶ 61,165 at PP 26-27.

<sup>47</sup> Kiokee-Flint Rehearing Request at 15-17.

may prefer to use an actual capital structure when it is available, in this case, no such actual capital structure was available given Sabal Trail's status as a new pipeline. In such circumstances, it is entirely appropriate for the Commission to rely on a hypothetical capital structure.<sup>48</sup> We also note that each of the cases Kiokee-Flint relies on to support its proposition that "fictitious capital structures are disfavored" involve NGA section 4 rate cases<sup>49</sup> rather than NGA section 7 certificate applications for new pipelines, and thus, are inapposite.

23. We also reject Kiokee-Flint's argument that the capital structure imposed by the Commission reflects neither the capital structure of Sabal Trail's parent pipelines nor other new pipelines.<sup>50</sup> As we have noted previously, the Commission's decision mirrors other recent cases in which a 50 percent equity/50 percent debt capital structure is imposed for new pipelines.<sup>51</sup> Moreover, the evidence Kiokee-Flint presents on Sabal Trail's parent pipelines is introduced for the first time on rehearing.<sup>52</sup> As we have stated previously, "the Commission does not generally consider new evidence on rehearing, as we cannot resolve issues finally and with any efficiency if parties attempt to have us chase a moving target."<sup>53</sup>

24. We reject Kiokee-Flint's claim that the Commission failed to consider the impacts of requiring Sabal Trail to apply an alternative capital structure on Sabal Trail's ability to

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<sup>48</sup> See *e.g.*, *Kinetica Deepwater Express, LLC*, 155 FERC ¶ 61,183, at P 13 (2016) ("As a practical and procedural matter, the difference between the approval of NGA section 7 initial rates and the setting of rates in subsequent NGA section 4 proceedings is that initial rates are based on estimates of costs and revenues, whereas in a NGA

section 4 rate proceeding the rates are based on actual operating history and actual costs").

<sup>49</sup> Kiokee-Flint Rehearing Request at 15-16 (citing *Michigan Gas Storage Co.*, 87 FERC ¶ 61,038 (1999); *Transcontinental Gas Pipe Line Corp.*, 84 FERC ¶ 61,084, *reh'g denied*, 85 FERC ¶ 61,323 (1998); *N. Carolina Utilities Comm'n v. FERC*, 42 F.3d 659 (D.C. Cir. 1994)).

<sup>50</sup> Kiokee-Flint Rehearing Request at 16-18.

<sup>51</sup> *MarkWest*, 125 FERC ¶ 61,165 at P 27.

<sup>52</sup> Kiokee-Flint Rehearing Request at 16-17.

<sup>53</sup> *Ocean State Power II*, 69 FERC ¶ 61,146, at 61,548 and n.65 (1994). See also *Kinetica Deepwater Express, LLC*, 155 FERC ¶ 61,183 at P 22.

finance the project.<sup>54</sup> Sabal Trail accepted the certificate of public convenience and necessity issued in the February 2 Order, including the Commission's alternative capital structure, in a filing dated March 2, 2016.<sup>55</sup> Presumably Sabal Trail is in the best position to know whether it will be able to finance the project given the conditions imposed in the certificate.

25. Moreover, we disagree with Kiokee-Flint that the Commission's modification of Sabal Trail's capital structure may not go far enough to protect ratepayer interests consistent with the public convenience and necessity standard.<sup>56</sup> As stated above, in prior cases, the Commission has allowed a 14 percent ROE for greenfield pipeline projects based on a capital structure that contains no more than 50 percent equity. Because Sabal Trail is a new entity, the hypothetical capital structure imposed by the Commission (which will result in lower rates than Sabal Trail's initial proposal) is an estimate used for ratemaking purposes, similar to the other cost items used in determining the pipeline's initial cost of service and rates. Employing this capital structure helps ensure that the rates meet the public convenience and necessity standard. In addition, as required by the February 2 Order, Sabal Trail must file a cost and revenue study after the first three years of operation showing the project's actual costs and revenues, thereby giving shippers, other interested entities, and the Commission an opportunity to determine if the pipeline's existing rates are just and reasonable.

## 2. Enhanced Maximum Daily Receipt Obligation

26. Sabal Trail claims that the February 2 Order erred by rejecting its Enhanced Maximum Daily Receipt Obligation (Enhanced MDRO) right for shippers that executed precedent agreements on or before July 8, 2013, without providing sufficient support.<sup>57</sup>

27. Enhanced MDRO is defined at GT&C section 1, Definitions as: "The greatest number of Dekatherms that Transporter is obligated to receive on a Priority Class One basis for or on behalf of Shipper on any Day at the applicable Primary Receipt Point(s)." Enhanced MDRO provides Sabal Trail's two foundation shippers, Florida Power & Light

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<sup>54</sup> Kiokee-Flint Rehearing Request at 18.

<sup>55</sup> Sabal Trail, Certificate Acceptance, Docket No. CP15-17-000 (filed Mar. 2, 2016).

<sup>56</sup> Kiokee-Flint Rehearing Request at 19.

<sup>57</sup> Sabal Trail Rehearing Request at 14-16 (citing February 2 Order, 154 FERC ¶ 61,080 at PP 141-142).

and Duke Energy Florida, with the flexibility of using any of the three receipt points located in the vicinity of Transco Station 85.

28. Sabal Trail seeks clarification that, with the additional explanation provided in its rehearing request, the proposed Enhanced MDRO can remain in effect. Alternatively, Sabal Trail requests rehearing of the Commission's decision to reject the Enhanced MDRO provision.<sup>58</sup> Sabal Trail explains that Florida Power & Light and Duke Energy Florida made commitments to long-term service in advance of Sabal Trail's commencement date. As noted above, both Florida Power & Light and Duke Energy Florida have primary firm rights at each of the receipt points on Sabal Trail located in the vicinity of Transco Station 85.<sup>59</sup> Sabal Trail explains that allowing a foundation shipper the additional flexibility to use any such receipt point up to its Maximum Daily Quantity (MDQ) will not impact primary receipt point capacity availability for other shippers on the system.<sup>60</sup> Sabal Trail argues that Florida Power & Light and Duke Energy Florida provided the early commitments necessary for the sponsors of Sabal Trail to proceed with development of the project and that the Commission has recognized it is not unduly discriminatory for a pipeline to grant foundation shippers rights that it does not grant to future shippers.<sup>61</sup>

29. In the February 2 Order, the Commission stated that Sabal Trail had not sufficiently explained what Enhanced MDRO is or how it will impact other shippers, and thus, the Commission rejected section 4.1(b) of its firm transportation schedule (Rate Schedule FTS) as unsupported.<sup>62</sup> With the additional explanation provided in its rehearing request, we find that Sabal Trail has sufficiently supported its Enhanced MDRO provision. Further, we note that our acceptance of Rate Schedule FTS section 4.1(b) does not waive the requirement at section 284.7(a)(3) of the Commission's regulations that firm service cannot be "subject to a prior claim by another customer or another class of service;"<sup>63</sup> thus, Sabal Trail cannot contract with additional shippers for

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<sup>58</sup> Sabal Trail Rehearing Request at 14-16.

<sup>59</sup> *Id.* at 15.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 15-16 (citing *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,161, at P 37 (2012); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 (2006); *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224 (2009); *Gulf Crossing Pipeline Co. LLC*, 123 FERC ¶ 61,100 (2008)).

<sup>62</sup> February 2 Order, 154 FERC ¶ 61,080 at P 142.

<sup>63</sup> 18 C.F.R. § 284.7(a)(3) (2015).

the capacity subject to the MDRO. Accordingly, we grant rehearing, and accept Rate Schedule FTS section 4.1(b), as proposed.

### 3. Usage-2 Rates

30. Sabal Trail proposed Usage-2 charges for FTS and interruptible transportation service (ITS) daily deliveries that are above the lower of two circumstances:

(1) 110 percent of scheduled quantities or (2) MDQ in effect under that agreement for the day.

#### a. 110 Percent of Scheduled Quantities

31. In the February 2 Order, the Commission found that the first proposed circumstance is applicable to services provided in excess of scheduled quantities, which the Commission normally treats as scheduling penalties.<sup>64</sup> On rehearing, Sabal Trail argues that, if a shipper takes delivery of a quantity of natural gas that exceeds the shipper's scheduled quantity by more than 110 percent, then the shipper has received unauthorized and unscheduled service and Sabal Trail is entitled to be compensated for the service it has provided.<sup>65</sup> By charging the Usage-2 charge for this service, Sabal Trail states that it is simply being compensated for providing the applicable transportation service.

32. We deny Sabal Trail's request for rehearing. As noted in the February 2 Order, services provided in excess of scheduled quantities are normally treated as scheduling penalties.<sup>66</sup> This result prevents double recovery because Sabal Trail will be compensated for its fixed costs through its approved reservation charge and its variable costs through its approved usage charge. Sabal Trail should not be permitted to recoup funds above those costs.

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<sup>64</sup> February 2 Order, 154 FERC ¶ 61,080 at P 125.

<sup>65</sup> Sabal Trail Rehearing Request at 17.

<sup>66</sup> *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, at 31,307, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

**b. MDQ**

33. In the February 2 Order, the Commission found that service in excess of MDQ is indistinguishable from a traditional authorized overrun service and that the interruptible rate should be charged for that service.<sup>67</sup> On rehearing, Sabal Trail explains that it did not propose an authorized overrun service, which “allows the shipper to *schedule* quantities for delivery on the pipeline in excess of the shipper’s MDQ.”<sup>68</sup> Such a service, explains Sabal Trail, is not offered under its tariff. Sabal Trail argues that the Usage-2 Rates are necessary to ensure that Sabal Trail has a rate to charge for service that was not scheduled, but nevertheless was provided by Sabal Trail.

34. The Commission denies Sabal Trail’s request for rehearing. The Commission agrees with Sabal Trail that it deserves compensation for transportation service in excess of MDQ – whether scheduled or not. Shippers have not contracted for this capacity and are not paying a reservation charge for such service. The Commission explicitly permitted Sabal Trail to recover the equivalent of the interruptible service rate for such service.<sup>69</sup> Sabal Trail claims that it is not offering an authorized overrun service, arguing that “an authorized overrun service is a service that some pipelines provide to shippers that allows the shippers to schedule quantities for delivery on the pipeline in excess of the shipper’s MDQ.” However, Sabal Trail’s proposed tariff explicitly addresses service in excess of MDQ by providing for the application of Usage-2 charges for that service.<sup>70</sup> Thus, there is no distinction between Sabal Trail’s proposed service and authorized overrun service. While the Commission has allowed pipelines to charge a rate for unauthorized overrun service that includes a penalty premium, that rate is not appropriate given how Sabal Trail’s Usage-2 rate is applied. The new ITS rate imposed by the Commission, which will be used in place of the proposed Usage-2 charge, compensates Sabal Trail for both fixed and variable costs for the volumes transported above the shipper’s MDQ. In light of this compensation, there will be no cost under-recovery, as Sabal Trail suggests. The Commission also notes that this service above MDQ assists

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<sup>67</sup> February 2 Order, 154 FERC ¶ 61,080 at P 126.

<sup>68</sup> Sabal Trail Rehearing Request at 18 (emphasis added).

<sup>69</sup> February 2 Order, 154 FERC ¶ 61,080 at P 127 (“Because an authorized overrun service is an interruptible service, it is appropriate for Sabal Trail to charge authorized overrun service the interruptible transportation rate.”).

<sup>70</sup> Sabal Trail’s proposed Rate Schedules FTS and ITS, sections 3.1(b) and 3.2, respectively.

Sabal Trail in satisfying its obligation under Order No. 637 to provide imbalance management services.<sup>71</sup>

#### 4. Interruptible Rates

35. Sabal Trail proposed Usage-1 and Usage-2 rates for ITS, as well as a daily Usage Rate for park and loan (PAL) service equal to a 100 percent load factor daily derivative of the 6 percent maximum hourly flow rate (MHFR) Rate Schedule FTS reservation rate. Sabal Trail's 6 percent MHFR Rate Schedule FTS rate is for a premium service that permits only firm transportation shippers, not interruptible shippers, to receive up to 6 percent of their MDQ in a single hour. Sabal Trail proposed a premium rate for this premium FTS service, which reflects the dedication of additional capacity and costs to provide that service. In the February 2 Order, the Commission required Sabal Trail to re-examine the interruptible services it wishes to offer, finding that it is not appropriate for Sabal Trail to charge ITS or PALS interruptible shippers a premium-based rate if Sabal Trail does not propose to offer those customers premium hourly service.<sup>72</sup> The Commission stated that if Sabal Trail does not intend to provide interruptible service with the same enhanced hourly delivery rights as provided for Rate Schedule FTS service, then Sabal Trail is directed to recalculate the fixed cost component of the interruptible rate to reflect the non-premium nature of the service.<sup>73</sup>

36. Sabal Trail requests that the Commission clarify that Sabal Trail's proposed interruptible rates are acceptable without changes to Sabal Trail's *pro forma* tariff, or in the alternative, requests rehearing.<sup>74</sup> Sabal Trail explains that section 37.1 of the proposed GT&C permits Sabal Trail to provide its ITS and PALS shippers with service that is more flexible than uniform hourly services if system conditions permit.<sup>75</sup> Sabal

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<sup>71</sup> Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,310 (“The other actions the Commission is taking in this rule will also help shippers avoid imbalances and penalties, and reduce the need for [Operational Flow Orders]. For example, shippers will have an alternative means of acquiring capacity during peak periods, other than overrunning their contract entitlements and incurring unauthorized overrun penalties, now that the Commission is removing the price cap from released capacity.”).

<sup>72</sup> February 2 Order, 154 FERC ¶ 61,080 at P 122.

<sup>73</sup> *Id.*

<sup>74</sup> Sabal Trail Rehearing Request at 12-14.

<sup>75</sup> *Id.* at 12. Sabal Trail states that the Sabal Trail system is designed to support service to electric generators, which do not typically take deliveries at a uniform hourly rate. Sabal Trail states that, consequently, to serve electric generation load, Sabal Trail (*continued ...*)

Trail states that the proposed interruptible rates also provide additional scheduling flexibility for these interruptible shippers. Thus, Sabal Trail requests that the Commission clarify that Sabal Trail's proposal to derive the ITS and PALS rates using the 6 percent MHFR FTS rate is acceptable without changes to Sabal Trail's *pro forma* tariff.

37. We deny Sabal Trail's requests for clarification and rehearing. Sabal Trail has not proposed or included tariff language providing a description of how this premium service will operate in the context of interruptible service and its obligations thereunder. A premium service like the one proposed by Sabal Trail would require tariff language providing for Sabal Trail's premium IT service obligations, including, but not limited to metering, pre-determination allocation provisions, and billing. Rate Schedule-ITS contains no such language.

## 5. Penalties

38. The February 2 Order found that penalties were being credited to all shippers, not just non-offending shippers and that crediting offending shippers with penalty revenues is inconsistent with Commission policy.<sup>76</sup> Sabal Trail seeks clarification that its tariff, which credits positive net cash-out amounts and revenues associated with trespass gas and conversion of gas to all shippers through its system balancing adjustment (SBA) mechanism, rather than crediting only non-offending shippers, is permissible.<sup>77</sup> Sabal Trail reasons that it would be impractical to distinguish between offending and non-offending shippers. Sabal Trail explains that its proposal to credit cash-out revenues is common practice<sup>78</sup> and is consistent with Commission policy.<sup>79</sup> Sabal Trail reassures the Commission that it satisfies the threshold obligation not to retain the penalties,<sup>80</sup> but

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can, and expects that it will, provide service under Rate Schedule ITS and PALS at an hourly rate of flow greater than the uniform hourly rate of flow.

<sup>76</sup> February 2 Order, 154 FERC ¶ 61,080 at PP 156-57.

<sup>77</sup> Sabal Trail Rehearing Request at 3, 20-23.

<sup>78</sup> *Id.* at 21 and n.37.

<sup>79</sup> *Id.* at 20.

<sup>80</sup> *Id.* at 21 (“To the extent that cash-out amounts are penalties as the February 2 Order suggests, Sabal Trail satisfies the threshold obligation that pipelines have with respect to such penalties—Sabal Trail will not retain any positive net cash-out amounts and will credit those revenues to its shippers.”).

states that “[i]f there is a negative net cash-out amount, i.e., a due-shipper cash-out, then the identity of any non-offending shippers is irrelevant and Sabal Trail’s use of the SBA mechanism for returning positive net cash-out amounts to its shippers allows a netting of the negative cash-out amounts.”<sup>81</sup> Sabal Trail explains that gas imbalances on its system are intertwined with fuel provided by shippers for system operations.<sup>82</sup>

39. Commission policy requires all penalties to be credited to non-offending shippers.<sup>83</sup> Sabal Trail does not dispute that imbalance charges are penalties. Section 284.12(b)(2)(v) of the Commission’s regulations,<sup>84</sup> Order No. 637, and subsequent Commission precedent stand for the principle that offending shippers should not benefit from the penalty credits. Sabal Trail’s statement that the identity of the non-offending shippers is irrelevant in the case of a negative net cash-out amount is incorrect. To the extent that an offending shipper benefits from a return of penalty credits – even if the net amount in the account is negative – the principle that offending shippers should not benefit from penalty credits is violated. This undermines the purpose of penalties, which is to inhibit bad actions. Finally, Sabal Trail’s impracticality argument is not credible. Order No. 637 recognized that it may be difficult for some pipelines to develop or implement a penalty revenue crediting mechanism that only credits non-offending shippers.<sup>85</sup> However, Sabal Trail has only two shippers. Therefore, it will not be difficult for Sabal Trail to credit only non-offending shippers.

#### **D. Rates – Florida Southeast Project**

40. Florida Southeast requests clarification or, in the alternative, rehearing of the Commission’s denial of Florida Southeast’s request that the Commission find that certain provisions in its precedent agreement providing the Florida Southeast Project foundation shipper Florida Power & Light with most-favored nation status, a unilateral extension

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<sup>81</sup> *Id.* at 21.

<sup>82</sup> *Id.* at 22.

<sup>83</sup> Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,315 (“Ideally, penalty revenues should be credited only to non-offending shippers so that offending shippers are not able to recoup the penalties they have paid, and thus, shippers are given a positive incentive to avoid incurring penalties.”); *Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at P 83 (2014) (*Corpus Christi*) (“Thus, consistent with our regulations, we will require Chenier Pipeline to credit all penalty revenues to all non-offending shippers.”).

<sup>84</sup> 18 C.F.R. § 284.12(b)(2)(v) (2015).

<sup>85</sup> Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,315.

right for up to three five-year terms, and the ability to request future expansions, are allowable.<sup>86</sup> Florida Southeast states that the Commission did not issue a predetermination on these provisions because “Florida Southeast did not identify these rights as non-conforming provisions nor provide public versions of the transportation agreements as requested by the Commission.”<sup>87</sup> However, Florida Southeast asserts that it identified these rights in its application, filed the precedent agreement with its application, and re-filed the precedent agreement publicly on November 9, 2015. Thus, Florida Southeast reiterates its request for a predetermination on the permissibility of Florida Southeast Project foundation shipper with most-favored nation status, a unilateral extension right for up to three five-year terms, and the ability to request future expansions.<sup>88</sup>

41. While Florida Southeast states that these rights are “not non-conforming provisions in the transportation agreement” and “are in the precedent agreement alone,” we disagree. These provisions would survive the precedent agreement and should be included as non-conforming provisions in the shipper’s service agreement. Florida Southeast must identify and disclose such provisions when it files its non-conforming service agreement, as discussed below.

42. We grant rehearing and make a predetermination that the non-conforming provisions in Florida Southeast’s precedent agreement are permissible. In response to an October 7, 2014 data request, Florida Southeast failed to list the provisions as non-conforming or file redline/strikeout versions of the precedent agreement. However, on November 9, 2015, in response to comments on the draft EIS, Florida Southeast filed a clean, public version of the precedent agreement, including the non-conforming

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<sup>86</sup> Florida Southeast March 3, 2016 Rehearing Request at 2, 6-8 (Florida Southeast Rehearing Request). Section 4.4 gives Florida Power & Light most-favored nation status, including the right to any rate that may be offered to another shipper more favorable than the rate Florida Power & Light is paying; section 5 contains a provision where Florida Power & Light has the right, but not the obligation, to request up to two expansions of the Florida Southeast system; and section 4.1.3 allows for three unilateral and automatic five-year extensions of the service agreement.

<sup>87</sup> Florida Southeast Rehearing Request at 6 (citing February 2 Order, 154 FERC ¶ 61,080 at P 224).

<sup>88</sup> *Id.* at 7.

provisions.<sup>89</sup> We will consider this agreement to be part of the record and will provide rulings on the non-conforming provisions below.

43. In *Columbia Gas Transmission Corp.*, the Commission clarified that a material deviation is any provision in a service agreement that (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.<sup>90</sup> However, not all material deviations are impermissible. As explained in *Columbia*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.<sup>91</sup>

44. The Commission finds that the non-conforming provisions in the shipper's service agreement constitute material deviations from Florida Southeast's *pro forma* agreement. However, in other proceedings, the Commission has found that non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure, and to provide the needed security to ensure the viability of a project.<sup>92</sup> We find that the first two non-conforming provisions identified by Florida Southeast, a most-favored nation clause and a unilateral extension right for up to three five-year terms, are permissible because they do not present a risk of undue discrimination, do not adversely affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.<sup>93</sup>

45. We find the non-conforming provision that provides foundation shipper Florida Power & Light the right, but not the obligation, to request up to two expansions of the

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<sup>89</sup> Florida Southeast, Response to Comments on the draft EIS, at Attachment 1 (filed Nov. 9, 2015). We note that the public filing omitted the form of negotiated rate agreement that contains the provisions at issue.

<sup>90</sup> *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*); *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,022 (2001) (*ANR*).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., *Tennessee Gas Pipeline Co., L.L.C.*, 144 FERC ¶ 61,219, at P 32 (2013) and *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 82 (2008).

<sup>93</sup> See, e.g., *Gulf South Pipeline, LP*, 115 FERC ¶ 61,123 (2006) and *Gulf South Pipeline Co., LP*, 98 FERC ¶ 61,318, at P 4 (2002); see also *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272 at P 23.

Florida Southeast system, permissible with the acknowledgement that any request to expand the system must be made pursuant to Florida Southeast's tariff and a nondiscriminatory, nonpreferential open season process.<sup>94</sup> Under these circumstances, we find that this provision does not present a risk of undue discrimination, adversely affect the operational conditions of providing service, or result in any customer receiving a different quality of service.

46. When Florida Southeast files its non-conforming service agreement, we will require Florida Southeast to identify and disclose all non-conforming provisions or agreements affecting the substantive rights of the parties under the tariff or service agreement.<sup>95</sup> This required disclosure includes any such transportation provision or agreement detailed in a precedent agreement that survives the execution of the service agreement.

47. At least 30 days, but not more than 60 days, before providing service to any project shipper under a non-conforming agreement, Florida Southeast must file an executed copy of the non-conforming agreement disclosing and reflecting all non-conforming language as part of Florida Southeast's tariff and a tariff record identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations.<sup>96</sup> In addition, the Commission emphasizes that the above determination relates only to those items specifically referenced above and not to the entirety of the precedent agreement or the language contained in the precedent agreement.

#### **E. Other Clarifications**

48. Transco requests that the Commission clarify that the requirement for Transco to separately account for Hillabee Expansion Project fuel costs in its fuel tracker filings is unnecessary, given the February 2 Order's predetermination that Transco may roll-in fuel

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<sup>94</sup> See, e.g., *Sierrita*, 147 FERC ¶ 61,192 at P 104; *Bison*, 131 FERC ¶ 61,013 at P 57.

<sup>95</sup> A Commission ruling on non-conforming provisions in a certificate proceeding does not waive any future review of such provisions when the executed copy of the non-conforming agreement(s) and a tariff record identifying the agreement(s) as non-conforming are filed with the Commission, consistent with section 154.112 of the Commission's regulations. See, e.g., *Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160, at P 44 & n.33 (2015).

<sup>96</sup> 18 C.F.R. § 154.112 (2015).

costs of the Hillabee Expansion Project into its existing fuel retention tracker mechanism.<sup>97</sup>

49. The Commission does not grant Transco its desired clarification and will still require Transco to separately account for and report the Hillabee Expansion fuel costs in its fuel tracker filings. Rate design does not determine how costs should be accounted for. Although the Commission granted Transco a *predetermination* of rolled-in rate treatment to recover its jurisdictional and non-jurisdictional Hillabee Expansion Project costs, the Commission still requires separately tracked fuel costs in order to get an accurate account of the Hillabee Expansion Project fuel costs before finally determining whether the fuel costs truly result in an overall decrease.<sup>98</sup> Without a breakout of these fuel costs, the Commission would have no way to make a final ruling. Finally, granting a predetermination of rolled-in rate treatment on the condition that the pipeline separately account for fuel costs is consistent with past cases.<sup>99</sup>

50. Transco seeks clarification that the February 2 Order requires only Phase I of the Hillabee Expansion Project to be in service within 24 months.<sup>100</sup> Transco explains that requiring the entire Hillabee Expansion Project to be completed within 24 months is inconsistent with the February 2 Order's recognition that Hillabee Expansion Phases II and III are planned to be placed in service on May 1, 2020, and May 1, 2021, respectively. The Commission clarifies that Phase I facilities of the Hillabee Expansion Project will be placed into service within 24 months of the date of the February 2 Order, while Phases II and Phase III are expected to be placed in service on the dates Transco proposed.

51. Florida Southeast seeks clarification that its precedent agreement with Florida Power & Light contains a binding commitment to increase capacity, not an option to increase capacity.<sup>101</sup> The Commission clarifies that the precedent agreement in question

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<sup>97</sup> Transco Rehearing Request at 16-17 (citing February 2 Order, 154 FERC ¶ 61,080 at PP 64, 102-103).

<sup>98</sup> *See* February 2 Order, 154 FERC ¶ 61,080 at P 103 (granting a “finding supporting a presumption of rolled-in rate treatment . . . , absent a material change in circumstances”).

<sup>99</sup> *See* *Cheyenne Plains Gas Pipeline Co., LLC*, 121 FERC ¶ 61,273, at P 44 (2007); *Dominion Cove Point LNG, LP*, 115 FERC ¶ 61,337, at P 121 (2006).

<sup>100</sup> Transco Rehearing Request at 17.

<sup>101</sup> Florida Southeast Rehearing Request at 3, 9.

contains a binding, not optional, commitment for Florida Power & Light to increase its contracted capacity to 600,000 dekatherms per day.<sup>102</sup>

**F. Environmental Issues**

**1. National Environmental Policy Act (NEPA) Review**

**a. Magnolia Extension**

52. Kiokee-Flint argues that the Commission violated NEPA by improperly segmenting the environmental review of the Sabal Trail Project from that of the Magnolia Extension.<sup>103</sup> Kiokee-Flint explains that the Sabal Trail Project will rely upon Marcellus shale gas, and that the Magnolia Extension will bring Marcellus shale gas to the Sabal Trail pipeline.<sup>104</sup> In addition, Kiokee-Flint claims that the cumulative environmental impacts of the two projects must be considered as part of the NEPA review because the projects will have cumulative environmental impacts in the same area.<sup>105</sup>

53. NEPA does not require review of the Magnolia Extension as a connected action. NEPA requires agencies to prepare an environmental document only for proposals that significantly affect the quality of the human environment.<sup>106</sup> A “[p]roposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing

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<sup>102</sup> See Florida Southeast Application at 7 (filed Sept. 26, 2014); Florida Southeast, Response to Comments on the draft EIS, at Attachment 1, section 4.1.1 (filed Nov. 9, 2015).

<sup>103</sup> Kiokee-Flint Rehearing Request at 6. According to its website, the Magnolia Extension is intended to be a 45 mile-long extension of the existing Magnolia intrastate natural gas pipeline, transporting up to 500,000 dekatherms per day to a major interstate pipeline. Service is anticipated to commence in 2019. See <http://www.americanmidstream.com/investor-relations/press-releases/press-release-details/2016/American-Midstream-Announces-Open-Season-to-Extend-the-Existing-Magnolia-Intrastate-Pipeline/default.aspx>.

<sup>104</sup> *Id.* at 33.

<sup>105</sup> *Id.* at 33-34.

<sup>106</sup> 40 C.F.R. § 1502.3 (2015). See also *Kleppe v. Sierra Club*, 427 U.S. 390 (1976).

that goal and the effects can be meaningfully evaluated.”<sup>107</sup> The Commission has previously found that a proposal exists only when an application is filed with the Commission.<sup>108</sup> Courts have confirmed that the Commission need not analyze potential projects for which the project proponent has not yet filed an application.<sup>109</sup>

54. A certificate application for the Magnolia Extension has yet to be filed with the Commission. Therefore, the Commission had no basis to evaluate the Magnolia Extension in the context of the Sabal Trail proceeding.

55. Neither does NEPA require evaluation of the Magnolia Extension in the cumulative effects analysis for Sabal Trail. A cumulative impact must be “reasonably foreseeable” to be required for inclusion within the scope of a NEPA analysis.<sup>110</sup> Here, Kiokee-Flint merely points to a news article appended to its rehearing request which announced a Magnolia Extension open season. But that open season was set to commence in February 2016, nearly two years after the Sabal Trail application was filed with the Commission in November 2014, and two months after the final EIS was issued in December 2015. It is speculative at this juncture as to whether the Magnolia Extension will materialize as a proposal before the Commission. Consequently, we find the final EIS was not flawed because it lacked consideration of the Magnolia Extension in its cumulative effect analysis.

**b. Direct Effects/Sinkholes/Karst Geology**

56. Kiokee-Flint argues that the Commission summarily dismissed the concerns regarding the potential health and safety risks posed by karst features near the project.<sup>111</sup>

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<sup>107</sup> 40 C.F.R. § 1508.23 (2015).

<sup>108</sup> See *Transcontinental Gas Pipe Line Co., LLC*, 154 FERC ¶ 61,166, at P 20 n.30 (2016); *Algonquin Gas Transmission, LLC*, 150 FERC ¶ 61,163, at P 110 (2015); *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244, at P 252 (2014) (*Dominion Cove*).

<sup>109</sup> *Minisink Residents for Env'tl. Pres. And Safety v. FERC*, 762 F.3d 97 113 & n.11 (D.C. Cir. 2014). See also *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 146 (“... an EIS need not be prepared simply because a project is *contemplated*, but only when the project is *proposed*”) (emphasis in original); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1318 (D.C. Cir. 2014) (“NEPA, of course, does not require agencies to commence NEPA reviews of projects not actually proposed.”).

<sup>110</sup> 40 C.F.R. § 1508.25 (2015).

<sup>111</sup> Kiokee-Flint Rehearing Request at 30.

According to Kiokee-Flint, few existing and potential sinkholes have been studied by geophysical and geotechnical investigations, and thus Sabal Trail's sinkhole risk assessment lacks a scientific basis and fails to meet the "hard look" standard required under NEPA.<sup>112</sup> Kiokee-Flint contends that the Commission should hire an independent qualified geologist to properly investigate the karst features along the pipeline's route.<sup>113</sup> We disagree.

57. The final EIS provided an extensive analysis of the various karst features along the proposed route and concluded that those risk features pose an insignificant risk to the project as modified.<sup>114</sup> Specifically, the final EIS found that "the studies and plans prepared by Sabal Trail . . . adequately characterize and address karst conditions in the area."<sup>115</sup> As described by Sabal Trail, the "[a]reas selected for evaluation were the areas believed to have the highest potential for occurrence of sinkhole development or the potentially greatest negative impact to the pipeline or surrounding area. Geophysical [sic] and geotechnical testing was done at the compressor and metering stations, major HDD crossings, and selected and representative areas of interest deemed to require further investigation."<sup>116</sup> Moreover, the final EIS found that the pipeline "would be installed using shallow trench techniques that are unlikely to trigger more distant karst activity."<sup>117</sup> The final EIS discusses staff's consultation with state geologic officials in Florida and Georgia to further understand karst conditions and risks specific to the project.<sup>118</sup>

58. The final EIS also described Sabal Trail's project-specific plans to mitigate possible risks posed by karst features encountered during construction and other measures to avoid and reduce the potential for karst features to form near the Sabal Trail Project,<sup>119</sup> such as limiting the disturbance to 6 to 8 feet below ground surface.<sup>120</sup> The

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<sup>112</sup> *Id.* at 30-31.

<sup>113</sup> *Id.* at 31.

<sup>114</sup> Final EIS at O-266.

<sup>115</sup> *Id.* at 3-13.

<sup>116</sup> Sabal Trail, Response to Comments on the draft EIS, at 16 (filed Nov. 9, 2015).

<sup>117</sup> *Id.* at 3-13.

<sup>118</sup> *Id.* at O-267.

<sup>119</sup> *Id.* at O-266.

final EIS also noted that Sabal Trail will monitor and address subsidence during operation of the facilities, further reducing karst risk<sup>121</sup> and that Sabal Trail will inspect and conduct maintenance and internal inspections in accordance with U.S. Department of Transportation and Pipeline Hazardous Materials and Safety Administration (PHMSA) requirements in addition to visually monitoring the rights-of-way.<sup>122</sup>

59. Based on this review, we find Commission staff properly assessed the karst features affected by the project and do not find a need for further geologic assessments along the pipeline route.

**c. Indirect Effects**

**i. Induced Upstream Production**

60. Kiokee-Flint asserts that the Commission should have included the “reasonably foreseeable” environmental impacts of gas production induced by the project in its NEPA review.<sup>123</sup> Specifically, Kiokee-Flint contends that the exclusion of an analysis of the project’s impact on natural gas production does not satisfy the “hard look” standard<sup>124</sup> and needs record evidence. Moreover, Kiokee-Flint states that the Commission’s failure to evaluate the environmental and health impacts of extracting and producing fracked natural gas is arbitrary and capricious.<sup>125</sup>

61. CEQ’s regulations direct federal agencies to examine the direct,<sup>126</sup> indirect,<sup>127</sup> and cumulative impacts<sup>128</sup> of proposed actions. As we have previously concluded in natural

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<sup>120</sup> *Id.* at 3-10 to 3-13, ES-4.

<sup>121</sup> *Id.* at O-266.

<sup>122</sup> *Id.* at O-13.

<sup>123</sup> Kiokee-Flint Rehearing Request at 35 (citing 40 C.F.R. § 1508.8(b)).

<sup>124</sup> *Id.* at 38.

<sup>125</sup> *Id.* at 41.

<sup>126</sup> 40 C.F.R. § 1508.8(a) (2015).

<sup>127</sup> 40 C.F.R. § 1508.8(b) (2015).

<sup>128</sup> 40 C.F.R. § 1508.7 (2015).

gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.<sup>129</sup> Even if there were a causal relationship between the proposed project and upstream development, there is insufficient information in this case to meaningfully evaluate these impacts.<sup>130</sup> As such, the February 2 Order properly excluded a review of the project's impact on the natural gas production in the Marcellus region.

**ii. Downstream Effects**

62. Kiokee-Flint asserts the Commission erred by not properly evaluating the downstream natural gas usage as an indirect effect of the Sabal Trail Project in the Commission's environmental review.<sup>131</sup>

63. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from end use emissions from natural gas consumption are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.<sup>132</sup> Even if there were a

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<sup>129</sup> See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 Fed. Appx. 472, 474-75 (2012) (unpublished opinion). *Columbia Gas Transmission, LLC*, 153 FERC ¶ 61,064, at PP 26-29 (2015) (*Columbia Gas*) (finding that Commission approval of a pipeline project will not induce further gas production, nor is the scope of any increased production reasonably foreseeable); *Texas Gas Transmission, LLC*, 153 FERC ¶ 61,323 at P 62 (2015); *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015); *Sabine Pass Liquefaction Expansion, LLC*, 151 FERC ¶ 61,253, at P 21 (2015); *Dominion Transmission, Inc.*, 153 FERC ¶ 61,203, at PP 20-29 (2015) (finding the future development of upstream production from an LNG export facility as speculative and not reasonably foreseeable).

<sup>130</sup> Final EIS at 1-11.

<sup>131</sup> Kiokee-Flint Rehearing Request at 6.

<sup>132</sup> *Sabine Pass Liquefaction Expansion LLC*, 151 FERC ¶ 61,253 at P 37. See generally *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. July 15, 2016) (finding the Commission was not required under NEPA to consider indirect effects of increased natural gas exports through the Cove Point facility).  
(continued ...)

causal relationship between the proposed project and end use emissions, there is insufficient information in this case to meaningfully evaluate these impacts.<sup>133</sup>

(a) **Air Quality Induced by Additional Power Plant Generation**

64. Kiokee-Flint contends that the Commission provided no data or analysis to support its finding that, “other notable and reasonably foreseeable stationary source projects in the region would either result in notable emissions reductions, insignificant emission increases, or be required to comply with applicable air quality regulations.”<sup>134</sup> Specifically, Kiokee-Flint argues that the Commission did not support its conclusion that “the most notable of these would be the net emissions reductions for all pollutants except for volatile organic compounds (VOCs) and greenhouse gases (GHGs) at the [Duke Energy Florida] Citrus Plant.”<sup>135</sup>

65. Further, Kiokee-Flint states that the Commission acted arbitrarily and capriciously by failing to calculate the impact from burning the remaining natural gas that will not be burned at the Duke Energy Florida Citrus County plant. Kiokee-Flint argues that the precise location and quantity of gas to be burned are known based upon precedent agreements with shippers, and the effects of burning that quantity of gas can be measured.<sup>136</sup> Kiokee-Flint contends that, if the Commission can determine the net reduction of emissions at the Duke Energy Florida Citrus Plant, the Commission can calculate downstream impacts caused by burning gas. Kiokee-Flint asserts that the Commission’s minimal inquiry into the project’s air impacts fails the “hard look” standard.<sup>137</sup>

66. We disagree that our air quality impact analysis was deficient. Section 3.12 of the final EIS comprehensively considered the air quality monitoring analysis for the Sabal Trail Project.<sup>138</sup> This review includes air quality screening and analysis for each

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<sup>133</sup> Final EIS at 3-297.

<sup>134</sup> Kiokee-Flint Rehearing Request at 37.

<sup>135</sup> *Id.* at 37.

<sup>136</sup> *Id.* at 6-7.

<sup>137</sup> *Id.* at 38.

<sup>138</sup> Final EIS at 3-233 to 3-260.

compressor station. Moreover, contrary to Kiokee-Flint's contentions, the final EIS explained that the net emission reductions (except for VOCs and GHGs) at the Duke Energy Florida Citrus Plant were "based on past actual emissions from the coal units versus future projected emissions of the new equipment (which [Duke Energy Florida] estimates based on continuous operation – 8,760 hours per year – for the new natural gas combustion turbines)." <sup>139</sup> The final EIS also noted that the U.S. Department of Energy's National Energy Technology Laboratory's May 29, 2014 report, *Life Cycle Analysis of Natural Gas Extraction and Power Generation* concludes that the total lifecycle of GHG emissions from electric production using natural gas is lower than that of electricity from coal. <sup>140</sup>

**(b) GHGs and Climate Change Impacts**

67. Kiokee-Flint argues that the February 2 Order failed to properly evaluate the project's impact on climate, <sup>141</sup> particularly the effect of GHGs. <sup>142</sup>

68. Kiokee-Flint contends that the Commission erred in dismissing concerns about GHG emissions from other sources that would not have a GHG offset from retired coal generating units because those sources would require state and federal air permits. <sup>143</sup> Kiokee-Flint attests that simply because the plants must obtain air emission permits does not mean those emissions would have "no significant effect on human health or the environment," <sup>144</sup> but rather, the air emission permits only demonstrate that a plant has met a "minimum condition." <sup>145</sup> Kiokee-Flint explains that other federal agencies consider GHG emissions from alternative sources and the U.S. Environmental Protection Agency (EPA) has recommended tools to evaluate such emissions. <sup>146</sup>

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<sup>139</sup> *Id.* at 3-295.

<sup>140</sup> *Id.* at 3-297 to 3-298.

<sup>141</sup> Kiokee-Flint Rehearing Request at 7.

<sup>142</sup> *Id.* at 42.

<sup>143</sup> *Id.* at 42-43.

<sup>144</sup> *Id.* at 44-45.

<sup>145</sup> *Id.* at 45.

<sup>146</sup> *Id.* at 42-44.

69. We disagree with Kiokee-Flint's contention that we improperly dismissed concerns regarding the Project's impact on climate. As the final EIS concluded, "NEPA does not . . . require us to engage in speculative analyses or provide information that will not meaningfully inform the decision-making process. Even if we were to find sufficient causal relationship between the proposed project and upstream development or downstream end-use, it would still be difficult to meaningfully consider these impacts, primarily because emission estimates would be largely influenced by assumptions rather than direct parameters about the project."<sup>147</sup>

70. We further find it is appropriate for the Commission to rely upon state and local permits as mitigation tools because an applicant must meet certain threshold quality standards before a permit is issued. The permitting body is in the best position to receive all relevant information related to the permit. Consequently, we find the Commission did not err.

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<sup>147</sup> Final EIS at 3-297.

## 2. Environmental Justice<sup>148</sup>

71. Blue Ridge and Kiokee-Flint contend that the Commission erred in determining the project would not result in a disproportionate impact on environmental justice communities.<sup>149</sup>

### a. Air Quality in Environmental Justice Communities

72. Kiokee-Flint also argues that there are several significant adverse effects the project would have on environmental justice communities, including disproportionate adverse human health impacts.<sup>150</sup> Kiokee-Flint contends that the Commission's dismissal of the health effects because the project will meet all federal regulatory standards and thresholds for air quality is ill-founded because it is based on the premise that air pollution is not a concern as long as there is not a National Ambient Air Quality Standards (NAAQS) violation.<sup>151</sup> Kiokee-Flint claims that the Commission cannot rely on the regulatory efforts by the EPA and Georgia Environmental Protection Division to review and assess the environmental and human health impacts of the Albany Compressor Station.<sup>152</sup> Kiokee-Flint emphasizes that its air pollution modeling demonstrates the current pollution exceeds NAAQS, and that the Albany Compressor Station would further exacerbate NAAQS thresholds.<sup>153</sup>

73. We disagree with Kiokee-Flint's characterization of the final EIS' ambient air quality review. As discussed in the final EIS, the state and local air quality agencies may make their own air quality laws, but they must be at least as stringent as NAAQS.<sup>154</sup> It is

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<sup>148</sup> The EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." See <https://www.epa.gov/environmentaljustice>.

<sup>149</sup> Blue Ridge Rehearing Request at 3, 15-19; Kiokee-Flint Rehearing Request at 6, 19-31.

<sup>150</sup> Kiokee-Flint Rehearing Request at 24.

<sup>151</sup> *Id.* at 25.

<sup>152</sup> *Id.* at 26.

<sup>153</sup> *Id.* at 26-27.

<sup>154</sup> Final EIS at 3-234.

therefore reasonable for the Commission to rely upon the NAAQS regulations to ensure the project's emissions are lawful. As a result of permitting regulations and mitigation measures, the final EIS found that impacts on environmental justice communities would be reduced to "less than significant" levels within the legally allowable standards.<sup>155</sup> Our air modeling analysis also shows that potential emissions from new and modified compressor stations are not likely to cause or significantly contribute to an exceedance of the NO<sub>2</sub> NAAQS.<sup>156</sup> We further note that it is appropriate for agencies to "fulfill [their] obligations under NEPA to conduct an independent evaluation of environmental impacts by reviewing and relying on the information, data, and conclusions supplied by other federal or state agencies."<sup>157</sup> Consequently, we find no error in our ambient air quality analysis.

**b. Location of Environmental Justice Communities**

74. Kiokee-Flint contends that the final EIS found that 83.7 percent of the project will cross or be within one mile of environmental justice populations and it is therefore unreasonable to conclude the project will not disproportionately affect them.<sup>158</sup> A determination of no impact on environmental justice communities is incorrect, asserts Kiokee-Flint, because it is based upon the notion the Albany Compressor Station will be located a mile from the nearest environmental justice tract and the census tract does not account for where people actually live.<sup>159</sup> Kiokee-Flint argues that the Commission ignored data which show that while the property for the compressor station is technically in a non-environmental justice tract, the actual location of the station would be in an environmental justice community on the northern periphery of the identified tract.<sup>160</sup> Therefore, the project would disproportionately affect environmental justice communities.

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<sup>155</sup> *Id.* at O-288.

<sup>156</sup> February 2 Order, 154 FERC ¶ 61,080 at P 263.

<sup>157</sup> *Stop The Pipeline v. White*, 233 F. Supp. 2d 957, 968 (S.D. Ohio 2002) ("NEPA in fact encourages lead agencies to obtain comments from other agencies with relevant expertise."). *See also Save the Bay, Inc. v. United States Corps of Engineers*, 610 F.2d 322, 325–26 (5th Cir. 1980).

<sup>158</sup> Kiokee-Flint Rehearing Request at 22.

<sup>159</sup> *Id.* at 25.

<sup>160</sup> *Id.* at 28.

75. Kiokee-Flint misunderstands how the Commission determines whether a project disproportionately impacts environmental justice populations. The final EIS does not deny that environmental justice populations will be affected by the project.<sup>161</sup> Rather, it states that the environmental justice population impact would be reduced to less than significant. The Commission typically follows the three-step EPA guidance<sup>162</sup> in making its environmental justice impact assessment. First, Commission staff identifies minority and low-income populations. Next, Commission staff determines if the impacts are high and adverse. Finally, Commission staff determines if the impacts fall disproportionately on environmental justice populations.<sup>163</sup> In the current instance, staff identified the environmental justice populations using the U.S. Bureau of Statistic's census tract data, which EPA guidance finds to be an acceptable source,<sup>164</sup> and which has previously been used to identify environmental justice populations.<sup>165</sup> We therefore reject Kiokee-Flint's assertion that we did not rely on the appropriate population data in identifying environmental justice populations. Next, the final EIS concluded there was not a high and adverse impact on environmental justice populations because of the avoidance,<sup>166</sup> minimization, and mitigation measures adopted by Sabal Trail or included in the final EIS's recommendations.<sup>167</sup> Among other things, the final EIS found that groundwater quality, property values, and other environmental resources would not be significantly affected.<sup>168</sup> The final EIS also found that potential impacts on water resources, land use, socioeconomics, and air quality and noise would be equally experienced by environmental justice populations as non-environmental justice populations.<sup>169</sup> Finally, in assessing whether there is a disproportionate impact, the final EIS compared the

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<sup>161</sup> Final EIS at O-288.

<sup>162</sup> *Id.* at 3-215.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 3-216 (citing EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA's Environmental Analyses* (1998)).

<sup>165</sup> *Dominion Cove*, 148 FERC ¶ 61,244 at P 148.

<sup>166</sup> For example, the areas which were not collocated were instead routed to minimize impacts on environmental justice communities. *See* Final EIS at 3-218, ES-7.

<sup>167</sup> Final EIS at O-287.

<sup>168</sup> *Id.* at O-166.

<sup>169</sup> Final EIS at 3-216.

percentage of environmental justice populations that would be affected by the project as proposed compared to the percentage of environmental justice populations that would be affected by the land-based major route alternatives.<sup>170</sup> The analysis found the route alternative would affect a similar percentage of environmental justice populations as the proposed route. Consequently, we find the final EIS fully and appropriately analyzed the environmental justice implications pertinent to this project.

### **3. Pipeline Integrity and Public Safety**

76. G.B.A. Associates argues that the Commission erred in failing to consider the Sabal Trail Project's potential safety hazards.<sup>171</sup> Specifically, they state the concerns of collocating pipes, crossing existing pipes, and damaging existing pipes were not adequately addressed.<sup>172</sup> Moreover, G.B.A. Associates raises concerns that the pipeline crossings, which were not addressed by the time the certificate was issued, will simply be handled on good faith by Sabal Trail.<sup>173</sup>

77. Contrary to G.B.A. Associates' assertions, the Commission sufficiently considered the safety concerns raised regarding pipeline crossings. Overall, the Commission found that the mainline crossings were "necessary to minimize impacts on residences, cultural resources, and other environmental resources and to address construction constraints (e.g., steep side slopes)."<sup>174</sup> Moreover, the final EIS explains that "[t]he crossing of utility lines is a common industry practice,"<sup>175</sup> and the February 2 Order states that "collocating natural gas transmission facilities is common and encouraged for a variety of reasons, including minimization of environmental impacts."<sup>176</sup> Nevertheless, mitigation techniques were implemented to reduce the impacts on existing rights-of-ways and pipelines.<sup>177</sup>

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<sup>170</sup> *Id.* at 3-216.

<sup>171</sup> G.B.A. Associates Rehearing Request at 7-8; Isaacs Rehearing Request at 7-8.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> Final EIS at 3-282 to 3-283.

<sup>175</sup> *Id.* at O-257.

<sup>176</sup> February 2 Order, 154 FERC ¶ 61,080 at P 269.

<sup>177</sup> Final EIS at 3-282.

78. The Commission did not “simply take [Sabal Trail’s] word for it,” that the remaining pipeline crossings will be adequately addressed, as G.B.A. Associates contends.<sup>178</sup> Rather, active construction of the crossovers will be monitored in accordance with the Commission’s construction compliance protocols in place for the project, and ongoing operations of the pipeline will be monitored and regulated by PHMSA.<sup>179</sup> Accordingly, the Commission finds that it adequately considered potential safety hazards.

#### 4. Clean Water Act and Clean Air Act Conditional Permitting

79. Blue Ridge and Kiokee-Flint argue that the Commission erred in approving the Sabal Trail Project before receiving relevant permits.<sup>180</sup> Kiokee-Flint contends that the Clean Water Act (CWA) requires “states to provide water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters”<sup>181</sup> and that no exception for a conditional license or permit is included in the CWA.<sup>182</sup> Kiokee-Flint maintains that the Commission should rescind the certificates until Sabal Trail has received the required CWA Section 401 water quality certifications.<sup>183</sup>

80. The February 2 Order complies with the CWA and the Clean Air Act (CAA). The Commission routinely issues certificates for natural gas pipeline projects subject to the federal permitting requirements of the CWA and CAA,<sup>184</sup> which has been upheld by the

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<sup>178</sup> G.B.A. Associates Rehearing Request at 7-8; Isaacs Rehearing Request at 7-8.

<sup>179</sup> February 2 Order, 154 FERC ¶ 61,080 at PP 269-270; Final EIS at ES-5.

<sup>180</sup> Blue Ridge Rehearing Request at 3-4, 26; Kiokee-Flint Rehearing Request at 5.

<sup>181</sup> Kiokee-Flint Rehearing Request at 7-8 (citing *PUD No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 707 (1994)). See also, *City of Tacoma, Wash. v. FERC*, 460 F.3d 53, 67-68 (D.C. Cir. 2006); *Keating v. FERC*, 927 F.2d 616, 619 (D.C. Cir. 1991); *City of Fredericksburg, VA v. FERC*, 876 F.2d 1109, 1111 (4th Cir. 1989).

<sup>182</sup> Kiokee-Flint Rehearing Request at 9.

<sup>183</sup> *Id.* at 5-6.

<sup>184</sup> See, e.g., *Transcontinental Gas Pipe Line Co., LLC*, 154 FERC ¶ 61,166 at P 43; *Bradwood Landing LLC*, 126 FERC ¶ 61,035, at P 35 (2009) (citing *Crown Landing LLC*, 117 FERC ¶ 61,209, at PP 18-21 (2006)).

D.C. Circuit.<sup>185</sup> We have done so because, in spite of the best efforts of those involved, it may be impossible for an applicant to obtain all approvals necessary to construct and operate a project in advance of the Commission's issuance of its certificate without unduly delaying the project. Moreover, it may be difficult, or impossible, for companies to gain access to property to complete studies which might be required before receipt of those authorizations without the ability to exercise the right of eminent domain afforded by the issuance of a certificate.<sup>186</sup> Section 7(e) of the NGA vests the Commission with broad power to attach to any certificate of public convenience and necessity "such reasonable terms and conditions" as it deems appropriate.<sup>187</sup> Therefore, the Commission has frequently issued NGA certificates conditioned on the certificate holder subsequently obtaining necessary permits under other federal laws.

81. We also find no merit in the claim that the February 2 Order limits a state's authority to issue state water quality certificates. Kiokee-Flint contends that the provision in the February 2 Order that requires state and local permits to be consistent with the February 2 Order limits states' ability to place more stringent conditions in any 401 water certification that are contained in the Order.<sup>188</sup> However, nothing in the February 2 Order limits state agencies from imposing conditions pursuant to their authority to issue water quality certifications. Nor does anything in the February 2 Order require states to otherwise accept applications that would otherwise be deficient. In fact,

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<sup>185</sup> *Myersville Citizens for a Rural Community, Inc.*, 783 F.3d 1301 (D.C. Circuit 2015) (finding the Commission did not violate the NGA or the Clean Air Act by conditioning its approval of new compressor station on the review process required by the Clean Air Act); *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502 (D.C. Cir. 1994) (finding that the U.S. Department of Transportation had not violated the National Historic Preservation Act by conditioning its approval of a new airport runway on the review process required by that federal statute).

<sup>186</sup> *AES Sparrows Point LNG, LLC*, 129 FERC ¶ 61,245, at P 12 (2009).

<sup>187</sup> 15 U.S.C. § 717f (e) (2012). *See also Iroquois Gas Transmission System, L.P.*, 52 FERC ¶ 61,091, at 61,402 n.195 (1990) ("The Commission has a longstanding practice of issuing certificates conditioned on the completion of environmental work or the adherence by the applicants to environmental conditions") (citing *Texas Eastern Transmission Corp.*, 47 FERC ¶ 61,341 (1989); *CNG Transmission Corp.*, 51 FERC ¶ 61,267 (1990); *Columbia Gas Transmission Corp.*, 48 FERC ¶ 61,050 (1989)).

<sup>188</sup> Kiokee-Flint Rehearing Request at 10.

the Order itself requires compliance with the relevant state water agencies before the commencement of construction.<sup>189</sup>

## **5. Other Environmental Issues**

82. We dismiss Blue Ridge's arguments that the February 2 Order did not address the Safe Drinking Water Act and the Resource Conservation Water Act because the arguments were raised for the first time on rehearing.<sup>190</sup> The Commission looks with disfavor on parties raising issues on rehearing that should have been raised earlier.<sup>191</sup> Absent good cause, not present here, we will not consider Blue Ridge's argument. All other environmental claims raised in the rehearing requests were sufficiently addressed in the February 2 Order.

### **G. Other Issues**

#### **1. Sunshine Act**

83. G.B.A. Associates claims that the Commission violated the Sunshine Act by issuing the February 2 Order notationally, rather than during the February 2016 Commission open meeting.<sup>192</sup>

84. The Sunshine Act does not require an agency to hold a meeting to conduct business.<sup>193</sup> The Act only requires that if a meeting is held, it must be open to the

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<sup>189</sup> February 2 Order, 154 FERC ¶ 61,080 at P 293.

<sup>190</sup> "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Public Citizen*, 541 U.S. at 764 (citing *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978)).

<sup>191</sup> *Baltimore Gas & Electric Company*, 91 FERC ¶ 61,270, at 61,922 (2000) ("we look with disfavor on parties raising on rehearing issues that should have been raised earlier. Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision.").

<sup>192</sup> G.B.A. Associates Rehearing Request at 5-6; Isaacs Rehearing Request at 5-6.

<sup>193</sup> *AMREP Corp. v. F.T.C.*, 768 F.2d 1171, 1178 (10th Cir. 1985) ("The Sunshine Act mandates only that, when an agency holds meetings, they must be open to the public. It does not require agencies to hold meetings, and it permits them to continue to do business by sequential or notational written voting.").

public.<sup>194</sup> An agency is otherwise permitted to conduct its business outside of publicly held meetings. Indeed, in *Communications Systems, Inc. v. Federal Communications Commission*,<sup>195</sup> the D.C. Circuit held that an agency does not violate the Sunshine Act by employing the notational process. Consequently, in the current instance, we find no violation of the Sunshine Act and dismiss G.B.A. Associates' claims.

## 2. Eminent Domain

85. Blue Ridge argues that the Commission's February 2 Order violates Georgia law.<sup>196</sup> Specifically, Blue Ridge claims that Sabal Trail is not a natural gas company under the NGA because it has not yet constructed its pipeline and therefore does not have federal eminent domain authority. Moreover, Blue Ridge claims that Sabal Trail would not qualify for eminent domain authority under Georgia state law O.C.G.A. 22-3-88 because it will be an interstate, not intrastate, pipeline.<sup>197</sup> Therefore, Blue Ridge concludes that Sabal Trail, in invoking eminent domain, will violate Georgia law.

86. The NGA confers plenary jurisdiction to the Commission over the "transportation of natural gas in interstate commerce," the "sale in interstate commerce of natural gas for resale," and "natural-gas companies engaged in such transportation or sale."<sup>198</sup> Because the proposed facilities will be constructed and operated to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities is subject to the requirements of section 7 of the NGA.<sup>199</sup> In the instant case, the completed Sabal Trail Pipeline Project will be under the Commission's jurisdiction, and therefore its construction is subject to NGA requirements.

87. Here, Sabal Trail has received a certificate of public convenience and necessity under the NGA to construct and operate the project.<sup>200</sup> The certificate confers the rights

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<sup>194</sup> *Railroad Commission of Texas v. United States*, 765 F.2d 221 (D.C. Cir. 1985); *Guadalupe-Blanco River Authority*, 42 FERC ¶ 61,079 (1988).

<sup>195</sup> 595 F.2d 797, 798–801 (D.C. Cir. 1978).

<sup>196</sup> Blue Ridge Rehearing Request at 3, 19-25.

<sup>197</sup> *Id.* at 3, 19-25.

<sup>198</sup> 15 U.S.C. § 717(b) (2012).

<sup>199</sup> See *Texas E. Transmission Corp.*, 76 FERC ¶ 61,178, at 61,989 (1996); *Columbia Gas Transmission Corp.*, 73 FERC ¶ 61,274, at 61,750-51 (1995).

of eminent domain to the holder of the certificate if that party cannot acquire the easement by an agreement with the landowner.<sup>201</sup>

88. Blue Ridge claims that Sabal Trail could not exercise the federal power of eminent domain because it conflicts with state law. But the NGA and the Commission's regulations implementing that statute generally preempt state and local law that conflict with federal regulation, or would unreasonably delay the construction and operation of facilities approved by the Commission.<sup>202</sup> The Commission, however, encourages applicants to cooperate with state and local agencies regarding the location of pipeline facilities, environmental mitigation measures, and construction procedures.

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<sup>200</sup> February 2 Order, 154 FERC ¶ 61,080.

<sup>201</sup> 15 U.S.C. § 717f (h) (2012).

<sup>202</sup> See *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of N.Y.*, 894 F.2d 571, 575-79 (2d Cir. 1990); *Pub. Utilities Comm'n of Cal. v. FERC*, 900 F.2d 269 (D.C. Cir. 1990). See also *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, PP 31-36 (2016).

The Commission orders:

The requests for rehearing and clarification are hereby denied, in part, and granted, in part, in accordance with the discussion above.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.