UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Constitution Pipeline Company, LLC	)	Docket No. CP18-5-000

SUPPLEMENTAL RESPONSIVE PLEADING OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION OPPOSING PETITION FOR DECLATORY ORDER

Pursuant to Rules 211 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC")[1] and the "Notice Affording the Parties an Opportunity to File Pleadings" issued by FERC on March 11, 2019,[2] the New York State Department of Environmental Conservation (the "Department") hereby files this responsive pleading in further opposition to the Petition for a Declaratory Order ("Petition") submitted by Constitution Pipeline Company, LLC ("Constitution"). The Department's arguments are fully set forth in its "Supplemental Answer and Protest" dated April 1, 2019 ("Department's Supplemental Pleading"), and its "Notice of Intervention, Protest, and Answer in Opposition to Petition for Declaratory Order," dated November 9, 2017.

The Department submits this responsive pleading to clarify several misleading or incorrect statements contained in the "Supplemental Pleading of Constitution Pipeline Company, LLC on the Significance of the *Hoopa Valley* Decision," dated April 1, 2019 ("Constitution's Supplemental Pleading").

[1] 18 C.F.R. §§ 385.211, 385.213.

[2] Notice Affording the Parties an Opportunity to File Pleadings, *Constitution Pipeline Company, LLC*, Docket Nos. CP18-5-000, CP18-5-001 (Mar. 11, 2019).

First, Constitution selectively quotes the D.C. Circuit's decision in *Hoopa Valley Tribe v. FERC*[3] to suggest that the Court's decision was broader than it was. The "single issue" resolved by the D.C. Circuit in *Hoopa Valley* was "whether a state waives its Section 401 authority when, *pursuant to an agreement between the state and applicant*, an applicant repeatedly withdraws-and-resubmits its request for water quality certification over a period of time greater than one year."[4] Constitution uses ellipses to omit the italicized portion of the quote.[5] But in *Hoopa Valley*, the existence of a written agreement (or scheme) between the applicant and the reviewing states to indefinitely delay the applicant's section 401 request was essential to the Court's decision.[6] No such agreement or scheme existed here. Instead, Constitution twice voluntarily submitted new requests for a water quality certification in response to representations from the Department that failure to do so would likely have resulted in denial of its then-pending applications.[7]

Second, Constitution is wrong in claiming that its withdrawals of the water quality certification applications on May 9, 2014 and April 27, 2015 did not also constitute "new request[s]" for certification under *Hoopa Valley* "because the resubmitted application consisted of exactly what was currently pending before [the Department]."[8] In *Hoopa Valley*, the applicant "never intended" to make a new request and the states had no intention to actively review the

[3] 913 F.3d 1099 (D.C. Cir. 2019)

[4] 913 F.3d at 1103 (emphasis added).

[5] Constitution's Supplemental Pleading, at 7.

[6] *See* 913 F.3d at 1100-01 ("the issue in this case is whether states waive Section 401 authority by deferring review and *agreeing with a licensee* to treat repeatedly withdrawn and resubmitted water quality certification requests as new requests" [emphasis added]; *id.* at 1105 ("There is no legal basis for recognition of an exception for an individual request made pursuant to a *coordinated withdrawal-and-resubmission scheme*" [emphasis added]); *see also id.* at 1103-05 (referring the "scheme" between states and applicant five separate times).

[7] *See* Department's Supplemental Pleading, at 24-25.

[8] Constitution's Supplemental Pleading, at 10.

moribund application.[9] Here, in contrast, Constitution twice voluntarily withdrew its applications and submitted new requests in response to the Department's representations that failure to do so would likely have resulted in the applications being denied.[10] In other words, with each withdrawal Constitution was also making a new request for a section 401 certification, and the Department undertook to review that request actively.[11] Indeed, as part of such ongoing and active review, the Department initiated a new public comment period in response to Constitution's new April 27, 2015 request.[12]

Moreover, as a factual matter, Constitution is wrong in suggesting that the Department reviewed the same application materials from August 2013 to April 2016.[13] FERC has previously rejected as "not accurate" Constitution's suggestion that the Department "reviewed a static collection of information" during the relevant period.[14] To the contrary, Constitution provided voluminous materials relevant to the Department's review both before and after the May 9, 2014 and April 27, 2015 request letters, including revised Joint Applications and attachments, supplemental studies and materials, details regarding stream crossing techniques and third-party monitoring plans, and proposed responses to the 15,000 public comments received by the Department.[15] Indeed, Constitution submitted a new version of a Joint Application in September

[9] 913 F.3d at 1104.

[10] *See* Department's Supplemental Pleading, at 26.

[11] *See id.* at 11-17 (describing the Department's active review of each of Constitutions water quality certification requests).

[12] *See id.* at 14 and 26.

[13] Constitution's Supplemental Pleading, at 10-11.

[14] Order on Petition for Declaratory Order, *Constitution Pipeline Company, LLC*, Docket No. CP18-5-000, 162 FERC ¶ 61,014, at ¶23 (Jan. 11, 2018).

[15] *See* Department's Supplemental Pleading, at 11-17.

2015.[16] This active and ongoing process of administrative review shows that the Department was not exploiting the withdrawal and resubmittal process to perennially "defer review" of Constitution's section 401 application, as was the case in *Hoopa Valley*.[17]

Third, Constitution's Supplemental Pleading ignores the Second Circuit's decision in *NYSDEC v. FERC*, which held that in cases where the Department needs more time to review a request for a Section 401 certification, it can "request that the applicant withdraw and resubmit the application."[18] The broad interpretation of *Hoopa Valley* urged by Constitution would create an unnecessary conflict between the D.C. Circuit and the Second Circuit.[19] Instead, FERC should interpret *Hoopa Valley* as limited to the unusual facts of that case, thus avoiding a circuit conflict.

Finally, Constitution's request for expeditious action on this remand is disingenuous.[20] In the three years since the Department denied Constitution's request for a section 401 certification, Constitution has failed to make any attempt to remedy the shortcomings in its application and re-apply for a water quality certification. If Constitution wished to move the certification process forward, it could have made further attempts to provide the missing information identified by the Department in the denial letter. Indeed, the Department specifically invited Constitution to address these deficiencies through a new water quality certification application, but Constitution has yet to do so.[21]

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[16] *Id.* at 16-17.

[17] 913 F.3d at 1100.

[18] 884 F.3d 450, 456 (2d Cir. 2018).

[19] *See* 913 F.3d at 1105 (noting that agency concerns motivating decision in *NYSDEC v. FERC* were not implicated in *Hoopa Valley*, where applicant's request was "complete and ready for review for more than a decade.").

[20] Constitution's Supplemental Pleading, at 12.

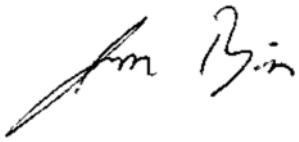
[21] Department's Supplemental Pleading, at 18.

Conclusion

Constitution's arguments notwithstanding, the D.C. Circuit's decision in *Hoopa Valley* does not require FERC to depart from its prior holdings that the Department did not waive its authority to issue, condition, or deny a section 401 certification.

Dated: May 1, 2019
Albany, NY

Respectfully submitted,



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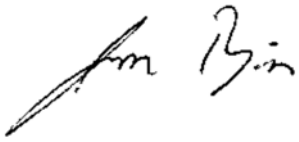
CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2019, I filed the foregoing document with the Secretary of the Federal Energy Regulatory Commission ("FERC") via FERC's online E-Filing system, which in turn effected service upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Albany, NY this 1st day of May, 2019.



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