

**BEFORE THE UNITED STATES
FEDERAL ENERGY REGULATORY COMMISSION**

Mountain Valley Pipeline

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CP16-10

**REQUEST FOR REHEARING OF NOTICE TO PROCEED BY BOLD ALLIANCE AND
BOLD EDUCATIONAL FUND**

Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §385.713, the Bold Alliance and Bold Educational Fund (collectively, Bold) seek rehearing of the past nine letter rulings dated January 21 and 29 and February 8,9,12,13,14,15 and 16 issued by Paul Friedman, Environmental Project Manager, granting the Mountain Valley Pipeline’s (MVP) requests for notice to proceed with construction of certain segments of the pipeline. First, Mr. Friedman lacked authority to grant MVP’s notice to proceed. The Commission Certificate Order charges only the Director of the Office of Energy Projects (OEP) or the Director’s designee to respond to requests for a notice to proceed, and as a project manager, Mr. Friedman does not qualify as a Director’s designee (*i.e.*, a deputy or division head) to whom the Director could lawfully delegate authority to act under 18 C.F.R. §375.308(b). Second, allowing MVP to proceed with construction while requests for rehearing and a stay (including Bold’s request), petitions for review of the Certificate Order and challenges to MVP’s Condemnation Complaint are pending before the Commission and federal courts deprives Bold and other parties of their due process rights by either mooted some of their claims while foreclosing relief as a practical matter on others. For these reasons, the Commission must grant Bold’s rehearing request, vacate the letter rulings allowing MVP to proceed and prohibit any tree-removal or ground-breaking activity until all pending claims are resolved.

BACKGROUND

The Bold Alliance and Bold Educational Fund is an association of individuals, not-for-profit environmental organizations and landowner rights groups based in states across the U.S. with more than 92,000 supporters. Bold seeks to protect landowners' private property rights from eminent domain abuse by energy infrastructure projects, and advocates for clean energy, water and environmental protection. Bold is an intervenor in this proceeding.

On October 13, 2017, the Commission issued a Certificate Order to MVP to construct and operate the Mountain Valley Pipeline, a 303 mile pipeline that will run through West Virginia and Virginia. *Mountain Valley Pipeline*, Order Granting Certificate, 161 FERC ¶ 61,043 (2017). Commissioner LaFleur dissented from her two colleagues who voted in favor to the project. LaFleur explained that she could not support the project due to the pipeline's questionable need (LaFleur noted that only 13 percent of the project capacity has a known end user), considerable environmental impacts and "possible superior alternatives" such as a single combined MVP/ACP pipeline.

As relevant here, the Certificate obligates MVP to comply with numerous conditions prior to commencing construction of the project. *See* MVP Certificate, Appendix C (enumerating pre-construction conditions). The Certificate provides that:

The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the order...

Certificate Order, Appendix C, Condition No. 2. Under Condition No. 9, Mountain Valley and Equitrans must "receive written authorization from the Director of OEP before commencing construction of any project facilities." Similarly, under numerous other conditions, the Director

of OEP must approve MVP's submissions or plans prior to authorizing commencement of construction. *See, e.g.*, Conditions No. 16-18, 23, 30, etc...

The Commission's Certificate Order set in motion several judicial proceedings -- many of which are still pending. Two weeks after the Certificate Order issued, MVP initiated condemnation actions in three federal district courts.¹ In the condemnation case in the Western District of Virginia, Judge Dillon ruled that MVP may not gain immediate access to several hundred parcels (many of which are owned by Bold's individual members) until MVP completes appraisals which as of this date, remain ongoing.²

On November 13, 2017, Bold along with several environmental organizations, timely filed a joint petition for rehearing and a stay of the Commission's certificate order. The Commission has not yet ruled on either the stay request or the rehearing petition.

There is other pending litigation as well. Several environmental groups have already filed actions in the D.C. Circuit challenging the Certificate Order (*see Appalachian Voices et. al. v. FERC*, Docket 17-1271 (D.C. Cir. 2017), while others have challenged related project permits.³ Bold Alliance is also awaiting a ruling on its constitutional and statutory challenge to the

¹ *See Mountain Valley Pipeline v. An Easement to Construct, Operate and Maintain An Easement*, Case No. 7:17-cv-00492 (W.D. Va. 2017), *Mountain Valley Pipeline, LLC, v. Simmons*, — F. Supp. 3d —, No. 1:17CV211, 2018 WL 701297 (N.D.W. Va. 2018) and *MVP v. Mc Million et. al*, CA 2:17-04214 (S.D. W. Va. 2017).

² *See Judge Puts A Pause on Eminent Domain*, online at http://www.roanoke.com/business/federal-judge-puts-a-pause-on-mountain-valley-pipeline-construction/article_3a20e2a9-eb01-5f25-9314-056ca6d82078.html

³ *See Lawsuit Filed Over Mountain Valley Pipeline (re: Corps permit)*, online at <http://wvmetronews.com/2018/02/14/new-lawsuit-filed-over-mountain-valley-pipeline/>; also https://www.wvgazettemail.com/news/special_reports/marcellus/mountain-valley-pipeline-approval-faces-new-federal-court-challenge/article_c52c8f9e-158e-5197-bd07-8f86a190afa6.html (describing challenge to SEction 401 certificateion)

Commission's pipeline program, which is pending in federal district court for the District of Columbia. *See Bold Alliance et. al. v. FERC et. al.*, Docket No. 17-cv-1822 (D.D.C. 2017).

Notwithstanding all of these pending challenges and its inability to gain possession of hundreds of parcels, beginning in January 2018, MVP began seeking notices to proceed with tree-felling and construction for the MVP pipeline. Since January 21, 2018, MVP has requested nine separate notices to proceed, all of which were granted by letter issued by Paul Friedman, the Environmental Project Manager.⁴ Several Virginia counties opposed a grant of the notice to proceed, arguing that MVP had failed to comply with the conditions and that the Commission had failed to rule on the pending rehearing and stay requests. But the letter orders neither mention these requests nor address these concerns.

Because Mr. Friedman lacks authority to issue notices to proceed and because allowing construction to proceed may foreclose relief on pending claims, Bold Alliance now seeks rehearing. Section 375.301(a) of the Commission's regulations authorize appeals of staff actions under 18 C.F.R. §1902, which has since been combined with Rule 713 governing rehearing requests.

ARGUMENT

I. THE NOTICES TO PROCEED ARE VOID BECAUSE THE ENVIRONMENTAL PROJECT MANAGER LACKS LAWFUL DELEGATED AUTHORITY TO GRANT NOTICES TO PROCEED.

Condition 2 of the Certificate delegates to the Director of OEP or the Director's designee, the authority to "address any requests for approvals or authorizations necessary to carry out the conditions of the order..." Most of the other pre-construction conditions of the Certificate

⁴ *See Letters Granting Notice to Proceed dated January 21 and 29, 2018 and February 8,9,12,13,14,15 and 16, 2018.*

expressly provide that only the Director of OEP may approve MVP's submissions or act on a request for authorization to commence construction. *See e.g.*, Condition No. 9 (requiring MVP to "receive written authorization from the Director of OEP before commencing construction of any project facilities"), *generally* all other pre-construction conditions.

Although arguably, the certificate allows the Director of OEP to sub-delegate all of its obligations to a "designee," the Commission's regulations do not permit the Director to sub-delegate its delegated authority to anyone. Instead, Section 375.301(b) states that:

Where the Commission, in delegating functions to specified Commission officials, permits an official to further delegate those functions to a designee of such official, ***designee shall mean the deputy of such official, the head of a division, or a comparable official*** as designated by the official to whom the direct delegation is made.

18 C.F.R. §375.301(b)(emphasis added).

Paul Friedman is not a designee to whom the Director could lawfully delegate authority to act on requests for notices to proceed. Friedman's signature block on his letters identifies him as an environmental project manager, a position which is not even listed on FERC's organizational chart, which includes deputy directors and branch chiefs. *See* Organizational Chart, online at <https://www.ferc.gov/about/offices/oeo/org-oeo.asp>. Thus, he could not be appropriately categorized as a "comparable official" to the Director of OEP to whom the direct delegation was made. Because Friedman is not a "designee" to whom the Director could delegate authority, the letter orders granting MVP's request to commence construction are null and void and MVP should not be allowed to proceed.

II. GRANTING A NOTICE TO PROCEED WHILE CHALLENGES TO THE PROJECT REMAIN PENDING VIOLATES PARTIES' DUE PROCESS RIGHTS.

Parties to the Commission proceeding have a due process right to have their challenges to the certificate order and MVP's taking of landowner property addressed by the Commission or adjudicated in the appropriate judicial forum. By granting MVP's notice to proceed, the Commission has effectively mooted Bold's request for a stay. Moreover, once MVP begins construction along its preferred route, any relief - such as consideration or implementation of the single MVP/ACP pipeline route endorsed by Commissioner LaFleur's - is effectively foreclosed. And even though the Commission has stated on previous occasions that if a court were to vacate its certificate order, it could require a pipeline to decommission and remove the project, the resulting environmental harm associated with constructing and then deconstructing a project is irreparable and can never be fully remediated.

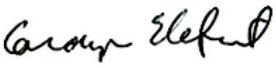
The grant of the notice to proceed has also caused confusion to landowners. MVP has not yet gained possession of many parcels and cannot commence construction on parcels that it has not yet acquired. Yet many landowners do not realize that MVP cannot go forward, and are under the impression that the letter order granting the notice to proceed also allows MVP access to the property when it does not. Because of all of these outstanding challenges that have yet to be addressed, the Commission should rescind staff's grant of a notice to proceed and refrain from allowing any construction until the pending challenges have been resolved.

CONCLUSION

WHEREFORE, for the foregoing reasons, Bold respectfully requests that the Commission vacate or rescind the notices to proceed issued for the project.

Respectfully submitted,

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