

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

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ATLANTIC COAST PIPELINE, LLC,	)	)	
	)	)	
Petitioner,	)	)	
	)	)	
v.	)	)	
	)	)	No. 18-1224 (consolidated
FEDERAL ENERGY REGULATORY	)	)	with No. 18-1280)
COMMISSION,	)	)	
	)	)	
Respondent,	)	)	
	)	)	
APPALACHIAN VOICES, <i>et al.</i> ,	)	)	
	)	)	
Intervenors.	)	)	
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**MOTION TO TRANSFER  
OF APPALACHIAN VOICES, CHESAPEAKE BAY FOUNDATION, INC.,  
CHESAPEAKE CLIMATE ACTION NETWORK, COWPASTURE RIVER  
PRESERVATION ASSOCIATION, FRIENDS OF BUCKINGHAM,  
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, PIEDMONT  
ENVIRONMENTAL COUNCIL, SHENANDOAH VALLEY  
BATTLEFIELDS FOUNDATION, SHENANDOAH VALLEY NETWORK,  
SIERRA CLUB, SOUND RIVERS, INC., VIRGINIA WILDERNESS  
COMMITTEE, WILD VIRGINIA, INC., AND WINYAH RIVERS  
FOUNDATION**

Under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), two courts of appeals have jurisdiction to hear petitions for review of the Federal Energy Regulatory Commission’s (“FERC’s”) orders authorizing construction and operation of the Atlantic Coast Pipeline (“ACP”). One is this Court. The other is

the court of appeals in which the applicant natural gas company, Atlantic Coast Pipeline, LLC (“Atlantic”), has its principal place of business: the Fourth Circuit.

In addition to the above-captioned consolidated petitions for review filed by Atlantic and the North Carolina Utilities Commission (“NCUC”) in this Court, six petitions for review of FERC’s orders authorizing the ACP have been filed in the Fourth Circuit, including the petition filed by the organizations submitting this motion to transfer (“Conservation Groups”).

Now that FERC has filed a certified index of the record in this Court, the six petitions will be transferred to this Court by operation of the first sentence of 28 U.S.C. § 2112(a)(5):

All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed.

Conservation Groups anticipate that those six petitions will then be consolidated in this Court with the above-captioned proceedings.

With this motion, Conservation Groups seek a transfer of all petitions for review of FERC’s ACP orders to the Fourth Circuit pursuant to the second sentence of 28 U.S.C. § 2112(a)(5): “For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.”

The Fourth Circuit is presently hearing *five* separate challenges to other

agency decisions authorizing this same project, and has previously decided two more. By statute, the Fourth Circuit is the exclusive forum for each of those proceedings. 15 U.S.C. § 717r(d)(1). Those cases substantially overlap with the proceedings reviewing FERC's orders. Transferring review of FERC's orders to a court already familiar with the underlying controversy would promote judicial economy and eliminate the risk of two federal circuit courts reaching inconsistent decisions on the same factual and legal issues for the same project. A transfer would best serve the convenience of the parties to these proceedings, and would discourage the type of forum-shopping attempted by Atlantic in filing a baseless petition in this Court.

Further, judicial review of FERC's ACP orders implicates parties, issues, and profound impacts that are local to states within the Fourth Circuit. The proposed pipeline would traverse more than 600 miles of land and waterways located exclusively in West Virginia, Virginia, and North Carolina. Construction of the pipeline has already resulted in condemnation of landowners' private property, clearing of forest land, and digging of trenches—all within the Fourth Circuit's borders. Accordingly, the proceedings reviewing FERC's ACP orders merit transfer to the Fourth Circuit.

Counsel for Conservation Groups have consulted with counsel for each of the parties to the proceedings reviewing FERC's orders. All petitioners except for

Atlantic and NCUC support the motion and agree that the Fourth Circuit is the appropriate forum for these proceedings. Atlantic and NCUC intend to oppose the motion, and FERC takes no position.

## PROCEDURAL BACKGROUND

### A. FERC Proceedings

In September 2015, Atlantic applied to FERC for authorization to construct and operate the ACP, a proposed 604-mile gas transmission line located exclusively within West Virginia, Virginia, and North Carolina. *See Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at ¶ 1 (2017) (“Certificate Order”) (Ex. 1, Decl. of Mark Sabath (“Sabath Decl.”), Attach. A). Conservation Groups intervened in the proceedings and submitted extensive comments to FERC that highlighted significant issues for FERC to weigh in considering Atlantic’s application. In October 2017, FERC issued an order under Section 7(c) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717f(c), granting a certificate of public convenience and necessity that authorized Atlantic to construct and operate the ACP. *Id.*

Conservation Groups filed with FERC a timely request for rehearing on November 13, 2017, contending that FERC issued the Certificate Order in violation of the NGA, the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. § 551 *et*

*seq.*; wrongly excluded relevant evidence from its review; and improperly denied Conservation Groups' request for an evidentiary hearing. Req. for Reh'g & Rescission of Certificates & Mot. for Stay of Shenandoah Valley Network et al., Dkt. Nos. CP15-554-000 *et seq.*, CP15-555-000 *et seq.* (Nov. 13, 2017) (FERC eLibrary No. 20171113-5367) ("Conservation Groups Reh'g Req.") (Sabath Decl., Attach. B). Atlantic, which obtained the authorization it sought, nevertheless filed with FERC its own request for clarification or rehearing on November 9, 2017. Req. of Atlantic Coast Pipeline, LLC for Clarification or Reh'g, Dkt. Nos. CP15-554-000 *et seq.* (Nov. 9, 2017) (FERC eLibrary No. 20171109-5167) ("Atlantic Clarification Req.") (Sabath Decl., Attach. C).

On August 10, 2018, FERC issued an order that "rejected, dismissed, denied, or granted" the requests for rehearing, including denial of Conservation Groups' request. *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at ¶ 5 & p. 150 (2018) ("Order on Reh'g") (Sabath Decl., Attach. D). The one request that FERC granted was Atlantic's. *Id.* at 150.

## **B. Judicial proceedings**

On August 16, 2018, pursuant to Section 19(b) of the NGA, 15 U.S.C. § 717r(b), Conservation Groups filed a petition for review of the Certificate Order

and Order on Rehearing (collectively, “FERC Orders”) in the Fourth Circuit<sup>1</sup>—the same circuit already hearing challenges to five agency authorizations for the ACP. Pet. for Review, *Appalachian Voices v. FERC*, No. 18-1956. On August 20, 2018, notwithstanding the fact that it received the clarification it sought from FERC in its request for clarification or rehearing, Atlantic filed its own petition for review of the Orders in this Court. Pet. for Review (Dkt. 1746905, No. 18-1224).

FERC, citing 28 U.S.C. § 2112(a)(1), subsequently filed a notice of multicircuit petitions for review with the Judicial Panel on Multidistrict Litigation (“JPML”), which randomly selected the Fourth Circuit for consolidation of the two petitions. Consolidation Order (Dkt. 4), *In re: FERC*, MCP No. 153 (J.P.M.L. Aug. 29, 2018) (Sabath Decl., Attach. F). On Atlantic’s motion for reconsideration, the JPML struck FERC’s notice of multicircuit petitions and vacated its consolidation order, holding that only Atlantic’s petition for review met the statutory requirements to trigger a multicircuit lottery under 28 U.S.C.

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<sup>1</sup> Pursuant to Section 19(b) of the NGA, review of an order by FERC issuing a certificate of public convenience and necessity is available in the court of appeals for “any circuit in which the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia.” 15 U.S.C. § 717r(b). Atlantic’s principal place of business is in Richmond, Virginia. Abbreviated Appl. of Atlantic Coast Pipeline, LLC for a Certificate of Public Convenience & Necessity & Blanket Certificates at 4, *Atlantic Coast Pipeline, LLC*, Dkt. No. CP15-554-000 (Sept. 18, 2015) (FERC eLibrary No. 20150918-5212) (“Atlantic Appl.”) (Sabath Decl., Attach. E).

§ 2112(a). Order Striking Notice of Multicircuit Pets. for Review & Vacating Consolidation Order (Dkt. 12), *In re: FERC*, MCP No. 153 (J.P.M.L. Oct. 3, 2018) (Sabath Decl., Attach. G). Subsequently, six additional petitions for review of the FERC Orders were filed within the NGA's 60-day period: five in the Fourth Circuit,<sup>2</sup> and one in this Court.<sup>3</sup>

Now that FERC has filed a certified index to the record in this Court (Dkt. 1754387, No. 18-1224), and unopposed motions to transfer the six Fourth Circuit petitions to this Court as required by the first sentence of 28 U.S.C. § 2112(a)(5), *see* Unopposed Mot. for Transfer (Dkt. 43), *Appalachian Voices v. FERC*, No. 18-1956 (Sabath Decl., Attach. H), Conservation Groups anticipate that all petitions will shortly be filed here. With this motion, Conservation Groups seek transfer of the consolidated proceedings to the Fourth Circuit pursuant to the second sentence of 28 U.S.C. § 2112(a)(5).<sup>4</sup>

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<sup>2</sup> *Fairway Woods Homeowners Condo. Ass'n v. FERC*, No. 18-2173; *Friends of Wintergreen, Inc. v. FERC*, No. 18-2176; *Wintergreen Prop. Owners Ass'n, Inc. v. FERC*, No. 18-2177; *Friends of Nelson v. FERC*, No. 18-2181; *Bold Alliance v. FERC*, No. 18-2185.

<sup>3</sup> *N.C. Utils. Comm'n v. FERC*, No. 18-1280.

<sup>4</sup> Circuit Rule 27(g)(1) provides that motions for transfer “must be filed within 45 days of the docketing of the case in this court, unless, for good cause shown, the court grants leave for a later filing.” Case No. 18-1224 (Atlantic's petition) was docketed on August 20, 2018; Case No. 18-1280 (NCUC's petition) was docketed on October 5, 2018; and the two cases were consolidated on October 11, 2018. Conservation Groups submit that this motion is timely, being filed within days of the actions that necessitate it: (1) the JPML's vacatur of its prior consolidation

## LEGAL STANDARD

28 U.S.C. § 2112(a) “is a mechanical device to determine which court will determine venue, not which court will ultimately hear the case.” *Liquor Salesmen’s Union Local 2 v. NLRB*, 664 F.2d 1200, 1205 (D.C. Cir. 1981); accord *Superior Indus. Int’l, Inc. v. NLRB*, 865 F.2d 1, 2 (1st Cir. 1988). Pursuant to 28 U.S.C. § 2112(a)(5), the Court has discretion to transfer petitions for review of an agency order to another court of appeals “[f]or the convenience of the parties in the interest of justice.” In applying this standard, this Court has considered

the location of counsel, location of the parties, whether the impact of the litigation is local to one region, whether one circuit is more familiar with the same parties and issues or related issues than other courts, the caseloads of the respective courts, and whether there is but one truly aggrieved party.

*Liquor Salesmen’s Union*, 664 F.2d at 1205; *Oil, Chem. & Atomic Workers Local Union No. 6-418 v. NLRB*, 694 F.2d 1289, 1300 (D.C. Cir. 1982). In particular, “one factor that has considerable weight in the guidance of judicial discretion is the desirability of transfer to a circuit whose judges are familiar with the background of the controversy through review of the same or related proceedings.” *Eastern Air Lines, Inc. v. Civil Aeronautics Bd.*, 354 F.2d 507, 510 (D.C. Cir. 1965). And

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order transferring Case No. 18-1224 to the Fourth Circuit on October 3, 2018; (2) the Court’s granting of Conservation Groups’ motion to intervene on October 5, 2018; and (3) FERC’s filing of the certified index to the record on October 9, 2018. Nevertheless, to the extent the Court disagrees, Conservation Groups respectfully request leave of Court for a later filing for the reasons set forth herein.



when “the underlying controversy is peculiarly connected with a particular locale,” review in that circuit is preferred. *Am. Pub. Gas Ass’n v. Fed. Power Comm’n*, 555 F.2d 852, 858 n.5 (D.C. Cir. 1976).

Apart from 28 U.S.C. § 2112(a)(5), courts of appeals also have inherent authority to transfer proceedings to another court of appeals “in the interest of justice and sound judicial administration.” *Eastern Air Lines*, 354 F.2d at 510. “The criteria used in evaluating the propriety of the transfer are largely the same” under the court’s inherent power as under 28 U.S.C. § 2112(a)(5). *Liquor Salesmen’s Union*, 664 F.2d at 1205 n.4.

## ARGUMENT

Taken individually, each of the factors identified in *Liquor Salesmen’s Union*—(1) the court’s familiarity with the parties and issues, (2) the local impact of the litigation, (3) the location of the parties and counsel, and (4) the aggrievement of the parties—weighs in favor of litigation in the Fourth Circuit.<sup>5</sup> Together, they present a compelling case for transfer.

### **I. Transfer is warranted because the Fourth Circuit has heard, and is currently hearing, closely related challenges to agency approvals of this same project.**

When evaluating “whether one circuit is more familiar with the same parties

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<sup>5</sup> Conservation Groups presume that “the caseloads of the respective courts,” *Liquor Salesmen’s Union*, 664 F.2d at 1205, do not weigh heavily in favor of either this Court or the Fourth Circuit.

and issues or related issues than other courts,” *Liquor Salesmen’s Union*, 664 F.2d at 1205, this Court has recognized that the interests of sound judicial administration are furthered by transferring a case to a court that is hearing, or that has previously ruled on, a related case. *See Mun. Distribs. Grp. v. Fed. Power Comm’n*, 459 F.2d 1367, 1368 (D.C. Cir. 1972); *Eastern Air Lines*, 354 F.2d at 510. Permitting the same court to resolve related proceedings arising from the same controversy avoids the duplication of judicial resources and the possibility of inconsistent results. *See Pueblo v. Nat’l Indian Gaming Comm’n*, 731 F. Supp. 2d 36, 41 (D.D.C. 2010) (finding such considerations to be most important factor in granting transfer under 28 U.S.C. § 1404(a)).

The Fourth Circuit is intimately familiar with the underlying controversy in this case. That court presently has before it petitions for review of *five* separate ACP permits: (1) an incidental take statement from the U.S. Fish and Wildlife Service (“FWS”), authorizing the ACP to “take” five threatened or endangered species, *Def’s. of Wildlife v. U.S. Dep’t of the Interior*, No. 18-2090 (4th Cir. filed Sept. 19, 2018); (2) a right-of-way permit from the National Park Service (“NPS”), authorizing construction of the ACP across the Blue Ridge Parkway, *Sierra Club v. U.S. Dep’t of the Interior*, No. 18-2095 (4th Cir. filed Sept. 19, 2018); (3) a special use permit from the U.S. Forest Service, authorizing construction of the ACP through two national forests, *Cowpasture River Pres. Ass’n v. Forest Serv.*, No.

18-1144 (4th Cir. argued Sept. 28, 2018); (4) a certification from two Virginia state agencies under Section 401 of the Clean Water Act that the ACP project would comply with Virginia water quality standards, *Appalachian Voices v. State Water Control Bd.*, Nos. 18-1077, 18-1079 (4th Cir. argued Sept. 28, 2018); and (5) the application by the U.S. Army Corps of Engineers of a nationwide permit under Section 404 of the Clean Water Act, authorizing the discharge of dredged and fill material from the construction of the ACP into waters of the United States, *Sierra Club v. U.S. Army Corps of Eng'rs*, No. 18-1743 (4th Cir. filed July 3, 2018). The Fourth Circuit has also recently heard and decided petitions for review of two prior permits for the ACP issued by FWS and NPS. *Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260 (4th Cir. 2018) (vacating original FWS incidental take statement and NPS right-of-way permit as arbitrary and capricious).

The overlap between Conservation Groups' proceeding, *Appalachian Voices v. FERC*, and the pending Fourth Circuit proceedings concerning related ACP permits is substantial. Many of the petitioners in *Appalachian Voices v. FERC* are petitioners in the related Fourth Circuit proceedings;<sup>6</sup> Atlantic, a petitioner here, has also intervened in all five related proceedings. Review of the FERC Orders

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<sup>6</sup> Of the fourteen petitioners in *Appalachian Voices v. FERC*, two are petitioners in No. 18-2090, two are petitioners in No. 18-2095, seven are petitioners in No. 18-1144, eleven are petitioners in Nos. 18-1077 and 18-1079, and three are petitioners in No. 18-1743.

will also share a common, and complex, universe of facts with the related Fourth Circuit proceedings concerning the effects of the ACP on natural resources, including rivers, streams, wetlands, protected species, national forests, and national parkland; the adequacy of agencies' alternatives analyses; and the lawfulness of the pipeline's proposed route.

The connection between Conservation Groups' petition and *Cowpasture River Preservation Association* is even more pronounced, due to a document fundamental to both proceedings: FERC's Final Environmental Impact Statement. *See* Final Environmental Impact Statement for the Atlantic Coast Pipeline and Supply Header Project under CP-15-554-000 *et al.* (July 21, 2017) (FERC eLibrary No. 20170721-4000) ("Final EIS").<sup>7</sup> Central to the resolution of *Cowpasture River Preservation Association*, as in *Appalachian Voices v. FERC*, is the question whether FERC's Final EIS, adopted by the Forest Service as its own document to satisfy its independent obligations under NEPA, took the requisite hard look at alternative routes for the pipeline, landslide hazards, and the risk of water quality impacts from sedimentation resulting from pipeline construction on steep slopes. *See* Pet. Br. (Dkt. 69) at 49-59; Resp. Br. (Dkt. 75) at 40-47; Intervenor's Br. (Dkt.

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<sup>7</sup> The Final EIS is available at <http://www.ferc.gov/industries/gas/enviro/eis/2017/07-21-17-FEIS.asp>. All excerpts cited in this motion are included in Attachment I to the Declaration of Mark Sabath.

78) at 38-57, *Cowpasture River Pres. Ass'n*, No. 18-1144 (Sabath Decl., Attachs. J-L).

Similarly, the Fourth Circuit will determine in *Defenders of Wildlife* whether FWS erred by authorizing a level of take for endangered species that jeopardizes the survival and recovery of those species. FERC relied on that determination and is subject to independent review as to whether its “reliance was arbitrary and capricious,” a determination that “overlap[s] to some extent” with review of the FWS decision. *City of Tacoma v. FERC*, 460 F.3d 53, 75 (D.C. Cir. 2006).

These questions will be among the central issues in these proceedings as well. Permitting two separate courts of appeals to render potentially conflicting decisions on the same issues and documents “makes little sense either in terms of judicial consistency or economy.” *Va. Elec. & Power Co. v. EPA*, 655 F.2d 534, 536 n.2 (4th Cir. 1981). Two cases squarely implicating the same portions of the same agency decision document should be heard by the same court.<sup>8</sup>

In sum, the Fourth Circuit’s familiarity with the parties, operative documents, and complex universe of facts weighs heavily in favor of transfer.

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<sup>8</sup> Atlantic has acknowledged that *Cowpasture River Preservation Association* implicates the same decision document as do many of the FERC petitions, arguing that “the sufficiency of FERC’s EIS and underlying NEPA analysis [in *Cowpasture River Preservation Association*] . . . is inseparable from the proceeding before FERC.” Intervenor’s Br. (Dkt. 78) at 10, *Cowpasture River Pres. Ass'n*, No. 18-1144.

**II. Transfer is warranted because the impact of the FERC Orders is local to states within the Fourth Circuit.**

When “the underlying controversy is peculiarly connected with a particular locale,” review in that circuit is preferred. *Am. Pub. Gas Ass’n*, 555 F.2d at 858 n.5; cf. *Bergmann v. U.S. Dep’t of Transp.*, 710 F. Supp. 2d 65, 75 (D.D.C. 2010) (recognizing stronger interest in having petition decided in forum where road project would be built than in District of Columbia).<sup>9</sup> The FERC Orders authorize the construction and operation of a pipeline that would pass through West Virginia, Virginia, and North Carolina—all located within the Fourth Circuit—and would concentrate virtually all of its economic and environmental impacts on the residents and resources of these three states. Therefore, the impact of this litigation is indisputably “local to one region,” *Liquor Salesmen’s Union*, 664 F.2d at 1205, weighing sharply in favor of transfer to the Fourth Circuit.

The on-the-ground effects of construction of the proposed pipeline, acutely confined to these states, are substantial. Atlantic proposes to build 288 miles of new pipeline in Virginia, 232 miles in North Carolina, and 84 miles in West Virginia, crossing waterways more than 1,500 times. Final EIS at 2-4, 4-100;

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<sup>9</sup> The court in *Bergmann* granted a motion to transfer under 28 U.S.C. § 1404(a), which governs transfers of cases between district courts. This Court has relied on case law construing the “virtually identical language of 28 U.S.C. § 1404(a)” for support in interpreting 28 U.S.C. § 2112(a). *Indus. Union Dep’t, AFL-CIO v. Bingham*, 570 F.2d 965, 972 (D.C. Cir. 1977).

Certificate Order ¶ 216. Atlantic also proposes to build new compressor stations in each of the three states. Certificate Order ¶ 8. To construct the pipeline, Atlantic intends to clear trees and vegetation from 10,971 acres, Final EIS at 2-17, including more than 6,000 acres of mature forest, *id.* at 4-153; to blast and flatten mountain ridges, *id.* at 4-38, 4-44; and to dig or blast the pipeline trench, typically to a depth of eight feet. *Id.* at 2-34. These efforts are already under way. *See* Weekly Status Report: 9/15/2018 – 9/21/2018, Dkt. Nos. CP15-554-000 & CP15-554-001 (Sept. 28, 2018) (FERC eLibrary No. 20180928-5205); Weekly Status Report: 9/22/2018 – 9/28/2018, Dkt. Nos. CP15-554-000 & CP15-554-001 (Oct. 5, 2018) (FERC eLibrary No. 20181005-5129) (Sabath Decl., Attachs. M, N).

The ACP would also cross 577 miles of private property, Final EIS at 4-415, affecting almost 3,000 individual landowners. John Murawski, *Atlantic Coast Pipeline to Take Landowners to Court to Clear Way for 600-Mile Project*, News & Observer (Raleigh, N.C.) (Nov. 16, 2017), <http://tinyurl.com/y8up2ews> (Sabath Decl., Attach. O). Atlantic is actively pursuing eminent domain proceedings against landowners in the region. *See* Sabath Decl., Attach. P (CM-ECF reports of 223 condemnation actions filed by Atlantic since December 2017). Further, if the ACP is constructed, the risks of potential pipeline failures—from gas leaks to explosions—will be borne entirely by residents in the region.

The potential effects of the ACP extend beyond on-the-ground effects to

encompass economic impacts. These economic impacts would likewise be local in nature. Atlantic, which is predominantly owned by Dominion Energy, Inc.

(“Dominion”) and Duke Energy Corporation (“Duke Energy”), has entered into precedent agreements with affiliated Dominion and Duke Energy utilities operating in Virginia and North Carolina. Certificate Order ¶¶ 5, 9.<sup>10</sup> As a result, Dominion and Duke Energy utility customers in Virginia and North Carolina are expected to bear the costs of the ACP project in the form of higher rates on their electric bills.

*See, e.g., In re: Va. Elec. & Power Co.’s Integrated Res. Plan filing pursuant to Va. Code § 56-597 et seq.*, No. PUR-2018-00065, Direct Testimony of Gregory M. Lander at 2, 3, 36-38, 48-49 (Va. State Corp. Comm’n Aug. 10, 2018), <http://www.scc.virginia.gov/docketsearch/DOCS/3n5k01!.PDF> (Sabath Decl., Attach. Q) (calculating that ACP will increase costs for Dominion’s Virginia customers by \$2.5 to \$3 billion over 20 years).

The concentration of the potential impacts of the ACP on West Virginia, Virginia, and North Carolina have prompted an outpouring of local opposition to the project and extensive press coverage in the region. *See, e.g.,* Kate Mishkin et al., *Regulators Change the Rules to Ease Pipeline Approval*, *Gazette-Mail* (Charleston, W. Va.) (Aug. 10, 2018), <http://tinyurl.com/ycltskqp> (Sabath Decl.,

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<sup>10</sup> FERC’s Certificate Order refers to Dominion Energy, Inc. by its prior name, Dominion Resources, Inc. *See id.*



Attach. R); Craig Jarvis, *Atlantic Coast Pipeline Opponents Say State Ignored Minorities' Civil Rights*, News & Observer (Raleigh, N.C.) (May 15, 2018), <http://tinyurl.com/y7za3w2j> (Sabath Decl., Attach. S).

In sum, the direct physical, environmental, and economic impacts of FERC's decision to authorize construction of the ACP will be felt acutely and exclusively within the borders of the Fourth Circuit. Based on the markedly local nature of this controversy, transfer is appropriate.

**III. Transfer is warranted because the location of the parties and counsel favor review in the Fourth Circuit.**

In interpreting the statute's focus on "the convenience of the parties," this Court has considered both the "location of the parties" and the "location of counsel." *Liquor Salesmen's Union*, 664 F.2d at 1205. The Second Circuit has held that under § 2112(a), "[c]onsiderations of convenience center around the physical location of the parties," *ITT World Commc'ns, Inc. v. FCC*, 621 F.2d 1201, 1208 (2d Cir. 1980), while the Third Circuit has opined that "[t]he only significant convenience factor which affects petitioners seeking review of rulemaking on an agency record is the convenience of counsel who will brief and argue the petitions." *United Steelworkers of Am., AFL-CIO CLC v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).

The Fourth Circuit is plainly the more convenient forum for the parties to the eight petitions for review of the FERC Orders. Conservation Groups comprise 14

local or regional organizations predominantly based in Virginia or North Carolina. The petitioners in each of the other proceedings—Atlantic, NCUC, Fairway Woods Homeowners Condominium Association (“FWHCA”), Friends of Wintergreen, Inc. (“FOW”), Wintergreen Property Owners Association, Inc. (“WPOA”), Friends of Nelson, and a majority of the petitioners in *Bold Alliance v. FERC*—are also based in Virginia or North Carolina. Not only does Atlantic have its principal place of business in Richmond, Atlantic Appl. at 4, but Atlantic has already appeared, or is appearing, in the two concluded and five pending cases in the Fourth Circuit concerning the proposed pipeline.

The only parties located outside the Fourth Circuit are FERC, which takes no position here with respect to forum, Sabath Decl. ¶ 21, and certain *Bold Alliance v. FERC* petitioners, who support transfer. Therefore, the location of the parties heavily favors review in the Fourth Circuit.

The location of counsel does not change the analysis, as counsel in this case are divided among three circuits. Counsel for Conservation Groups, Friends of Nelson, and FWHCA are in Virginia, West Virginia, and Maryland—entirely within the Fourth Circuit. Counsel for Atlantic, NCUC, FOW, and WPOA are in Washington, D.C. Counsel for Bold Alliance is in Texas. (Counsel for FERC, in Washington, D.C., takes no position as to forum. *Id.*)

Accordingly, review in the Fourth Circuit best serves “the convenience of

the parties.” 28 U.S.C. § 2112(a)(5).

**IV. Transfer is warranted because Atlantic is not a truly aggrieved party.**

Where multiple potential forums exist for judicial review of agency orders, this Court has recognized that “a party’s selection of forum is [not] necessarily controlling if it has received substantially all the relief contemplated, and any shortfall is inconsequential.” *UAW v. NLRB*, 373 F.2d 671, 674 (D.C. Cir. 1967). The Court has looked unfavorably on parties filing specious petitions for review as a means of forum-shopping, cautioning that parties “should not search out a remedy to request from the [agency] in an effort to choose a forum of review.” *Liquor Salesmen’s Union*, 664 F.2d at 1209. Accordingly, in deciding whether to transfer a case pursuant to 28 U.S.C. § 2112(a)(5), this Court has considered “whether there is but one truly aggrieved party.” *Id.*; *see also ITT*, 621 F.2d at 1208 (“It is a well recognized principle that the interests of justice favor placing the adjudication in the forum chosen by the party that is significantly aggrieved by the agency decision.”). The Court need not look further than the FERC Orders and Atlantic’s Request for Rehearing to recognize that Atlantic is not truly aggrieved.

In order “to be ‘genuinely aggrieved’ by a decision of the [agency], such aggrievement must result from a significant part of the [agency’s] action.” *Id.* *Liquor Salesmen’s Union* involved a union’s petition for review of a National Labor Relations Board order finding that employers had engaged in unfair labor

practices and granting the union all its requested relief except for the “special or extraordinary” relief of attorney’s fees, *id.* at 1203, 1207. The employer intervened and moved for transfer to the Second Circuit, where the union, employer, and counsel were located and where the alleged unfair labor practices took place. *Id.* at 1203. The Court granted the transfer, finding the union’s petition for review to be “so ‘inherently implausible or insubstantial’ that it should not be determinative of the forum for review.” *Id.* at 1208.

So too here. Whereas Conservation Groups are plainly aggrieved by the FERC Orders,<sup>11</sup> Atlantic received the relief it sought from FERC: authorization to construct and operate the ACP and approval of its requested rate of return. Certificate Order at 129-31. Even the sole issue presented in Atlantic’s petition for review—whether FERC imposed a reasonable condition on Atlantic’s calculation of its Allowance for Funds Used During Construction (“AFUDC”) rate, *see* Nonbinding Statement of Issues to Be Raised at 1, Dkt. 1752071, No. 18-1224 (“Statement of Issues”)—has already been resolved in the manner requested by Atlantic.

AFUDC is “a component part of the cost of constructing a project,”

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<sup>11</sup> Conservation Groups requested rehearing, an evidentiary hearing, compliant NEPA and public and convenience and necessity analyses, and a stay and subsequent rescission of the Certificate Order. Conservation Groups Reh’g Req. at 207. FERC dismissed or denied each request, as it did for all parties—except Atlantic. Order on Reh’g at 150.

Certificate Order ¶ 187; the AFUDC rate “represents the net cost for the period of construction of borrowed funds used for construction purposes and a reasonable rate of return on other funds.” *Southern Nat. Gas Co.*, 130 FERC ¶ 61,193, at ¶ 30 (2010). Atlantic and FERC agree that, during the construction period, pipeline projects cannot recover a return that exceeds the rate FERC allows during operations. Atlantic Clarification Req. at 11, 15. In its clarification request, Atlantic asked FERC to *clarify* whether Atlantic’s AFUDC rate could exceed the allowed return for certain months if it used offsetting lower rates during other months. *Id.* at 14-15.<sup>12</sup> Atlantic specifically requested rehearing *only if* FERC required the AFUDC rate not to exceed the FERC-allowed overall rate during each individual month of construction, rather than for the construction period as a whole. *Id.* at 11.

In its Order on Rehearing, FERC made clear that it did not require such monthly compliance. While FERC reaffirmed that the AFUDC rate must not exceed the allowed overall rate during any period for which AFUDC is calculated, it also granted Atlantic the flexibility to perform that calculation over whatever period it chooses (“on a monthly, quarterly, or semi-annual basis”). Order on

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<sup>12</sup> In its request to FERC, Atlantic also sought rehearing or clarification of FERC’s rejection of Atlantic’s proposed “pack account” provisions. Order on Reh’g ¶¶ 75-79. FERC denied Atlantic’s request for rehearing as to Atlantic’s original proposed “pack accounts,” but granted Atlantic’s alternative request. *Id.* ¶ 79. Atlantic is not seeking judicial review of this issue. Statement of Issues at 1.

Reh’g ¶ 83. In other words, FERC granted Atlantic the flexibility to maximize its interests within the confines of the formula for the overall rate of return, so long as Atlantic’s period of calculation—which FERC has left to Atlantic to select—results in a return that does not exceed the allowed overall rate. Because FERC “clarif[ied] that there is no such month-to-month requirement,” Atlantic Clarification Req. at 11, Atlantic received its requested relief. And because the clarification FERC provided mooted Atlantic’s alternative request for rehearing on the AFUDC issue, FERC issued no order granting or denying rehearing on this issue. *Compare* Order on Reh’g ¶¶ 80-83 with ¶¶ 77-79 (denying in part and granting in part Atlantic’s request for rehearing as to “pack account” issue, which Atlantic is not challenging here).

Even if Atlantic has an outstanding objection, its choice of forum is not controlling, because “it has received substantially all the relief contemplated, and any shortfall is inconsequential.” *UAW*, 373 F.2d at 674. Under similar circumstances, the Second Circuit denied a motion to transfer filed by a party that “was primarily a beneficiary of the [Federal Communications] Commission’s order,” objecting to only a single requirement in the order, and instead retained the forum chosen by the “parties most clearly aggrieved by the Commission’s decision.” *ITT*, 621 F.2d at 1208. This Court should likewise reject Atlantic’s attempt to determine the forum for review of the FERC Orders by manufacturing

an objection that is at best inconsequential, and at worst nonexistent.

### CONCLUSION

For the foregoing reasons, this Court should transfer the consolidated petitions for review the FERC Orders to the Fourth Circuit.

Respectfully submitted,

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Dated: October 15, 2018

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I hereby certify that on October 15, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit through this Court's CM/ECF system, which will serve a copy on all registered users.

/s/ Mark Sabath

Mark Sabath

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