ORAL ARGUMENT HAS NOT BEEN SCHEDULED

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 18-1224, *et al.* (consolidated)

ATLANTIC COAST PIPELINE, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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June 18, 2019

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties

The parties and intervenors before this Court and before the Federal Energy Regulatory Commission in the underlying agency docket are as stated in the Petitioners' Opening Briefs.

B. Rulings Under Review

1. *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) ("Certificate Order"), R. 13,700, JA ___-___; and

2. *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) ("Rehearing Order"), R. 14,312, JA ___-___.

C. Related Cases

This proceeding consolidates eight petitions for review of the Commission's Certificate Order and Rehearing Order authorizing the Atlantic Coast Pipeline. Two petitions were filed in this Court: *Atlantic Coast Pipeline, LLC v. FERC*, No. 18-1224, and *North Carolina Utilities Commission v. FERC*, No. 18-1280. Six were initially filed in the U.S. Court of Appeals for the Fourth Circuit: *Appalachian Voices, et al. v. FERC*, 4th Cir. No. 18-1956; *Fairway Woods Homeowners Condominium Association v. FERC*, 4th Cir. No. 18-2173; *Friends of Wintergreen, Inc. v. FERC*, 4th Cir. No. 18-2176; *Wintergreen Property Owners Association, Inc. v. FERC*, 4th Cir. No. 18-2177; *Friends of Nelson v. FERC*, 4th Cir. No. 18-2181; and *Bold Alliance, et al. v. FERC*, 4th Cir. No. 18-2185.

After issuance of an order by the Judicial Panel on Multidistrict Litigation concerning the application of 28 U.S.C. § 2112(a), *In re FERC*, 341 F. Supp. 3d 1378 (J.P.M.L. Oct. 3, 2018), the Fourth Circuit petitions were transferred to this Court and consolidated with Nos. 18-1224 and 18-1280 as: *Appalachian Voices, et al. v. FERC*, No. 18-1308, *Fairway Woods Homeowners Condominium Association v. FERC*, No. 18-1309, *Friends of Wintergreen, Inc. v. FERC*, No. 18-1310, *Wintergreen Property Owners Association, Inc. v. FERC*, No. 18-1311, *Friends of Nelson v. FERC*, No. 18-1312, and *Bold Alliance, et al. v. FERC*, No. 18-1313.

While requests for rehearing of the Certificate Order were still pending before the Commission, Appalachian Voices and others filed a petition for review of the Certificate Order in the Fourth Circuit, and moved for a stay of the Certificate Order pending review. *Appalachian Voices, et al. v. FERC*, 4th Cir. No. 18-1114. Appalachian Voices and others separately filed a petition for a writ staying the Certificate Order under the All Writs Act, 28 U.S.C. § 1651(a). *Appalachian Voices, et al. v. FERC*, 4th Cir. No. 18-1271. On March 21, 2018, the Fourth Circuit dismissed Appalachian Voices' petition for review of the Certificate Order for lack of jurisdiction, and also denied the motion for stay and petition for writ of mandamus.

Also while requests for rehearing of the Certificate Order were pending before the Commission, Bold Alliance and others filed a complaint in the U.S.

District Court for the District of Columbia, asserting various constitutional and statutory challenges concerning both the Atlantic Coast Pipeline project and the Mountain Valley Pipeline project. The district court dismissed the complaint for lack of subject matter jurisdiction. *Bold Alliance, et al. v. FERC*, No. 17-1822, 2018 WL 4681004 (D.D.C. Sept. 28, 2018), *on appeal*, D.C. Cir. No. 18-5322 (in abeyance, pending resolution of *Bold Alliance v. FERC*, D.C. Cir. No. 18-1313 (Atlantic Coast Pipeline), and *Bold Alliance v. FERC*, D.C. Cir. No. 18-1216 (Mountain Valley Pipeline)).

In addition, cases involving challenges to other federal and state governmental agency decisions concerning the Atlantic Coast Pipeline project—but not the Commission's issuance of a certificate of public convenience and necessity under the Natural Gas Act, 15 U.S.C. § 717f(c)—are pending before, or have been recently resolved by, the Fourth Circuit:

- *Appalachian Voices, et al. v. State Water Control Board, et al.*, 4th Cir. Nos. 18-1077 and 18-1079 (Virginia water quality certification);
- *De Luca v. North Carolina Department of Environmental Quality*, 4th Cir. No. 18-1336 (North Carolina water quality certification and air quality permit);
- *Sierra Club, et al. v. U.S. Army Corps of Engineers, et al.*, 4th Cir. Nos. 18-1743 and 18-2273 (Army Corps of Engineers authorization);
- *Cowpasture River Preservation Association, et al. v. Forest Service, et al.*, 4th Cir. No. 18-1144 (Forest Service authorizations);
- *Sierra Club, et al. v. National Park Service, et al.*, 4th Cir. Nos. 18-1082 and 18-1083 (National Park Service and Fish and Wildlife Service authorizations);

- *Defenders of Wildlife, et al. v. U.S. Fish and Wildlife Service, et al.*, 4th Cir. No. 18-2090 (Fish and Wildlife Service authorizations); and
- *Sierra Club, et al. v. U.S. Department of Interior, et al.*, 4th Cir. No. 18-2095 (National Park Service authorizations).

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

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COURT CASES

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* Cases chiefly relied upon are marked with an asterisk.

ADMINISTRATIVE CASES

STATUTES

REGULATIONS

MISCELLANEOUS

GLOSSARY

Atlantic or Atlantic Coast	Atlantic Coast Pipeline, LLC, proponent of the Atlantic Coast Project; Petitioner in No. 18-1224 (with respect to construction allowance accounting issue) and Intervenor in Support of Respondent in other dockets
Atlantic Coast Project	Atlantic's proposed 600-mile pipeline project, conditionally authorized by the Commission in the orders on review
Atlantic Sunrise Project	Transcontinental Pipeline's Atlantic Sunrise project
Atlantic Br.	Brief for Petitioner Atlantic Coast Pipeline, LLC
Baum Br.	Brief of Intervenors Lora Baum and Victor Baum
Baums	Intervenors Lora Baum and Victor Baum
Certificate Order	*Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017), R. 13,700, JA ___-___
Certificate Policy Statement	*Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000)
Commission or FERC	Federal Energy Regulatory Commission
Conservation Br.	Opening Brief of the Conservation Petitioners
Conservation Petitioners	Petitioners Appalachian Voices, Chesapeake Bay Foundation, Inc., Chesapeake Climate Action Network, Cowpasture River Preservation Association, Friends of Buckingham, Friends of Nelson, Highlanders for Responsible Development, Piedmont Environmental Council, Shenandoah Valley Battlefields Foundation,

	Shenandoah Valley Network, Sierra Club, Inc., Sound Rivers, Inc., Virginia Wilderness Committee, Wild Virginia, Inc., Winyah Rivers Foundation, Bold Alliance, Bold Education Fund, Nelson County Creekside, LLC, Rockfish Valley Investments, Rockfish Valley Foundation, and Wintergreen Country Store Land Trust
Construction allowance	Allowance for Funds Used During Construction
Dominion	Dominion Transmission, Inc., proponent of the Supply Header Project
Earth Ethics	Amici Curiae Center for Earth Ethics, Kairos Center for Religions, Rights, and Social Justice, Natural Resources Defense Council, North Carolina Poor People's Campaign, Repairers of the Breach, Satchidananda Ashram – Yogaville, Inc., Union Grove Missionary Baptist Church, Virginia Interfaith Power & Light, Virginia State Conference NAACP, and We Act for Environmental Justice in Support of Conservation Petitioners
Earth Ethics Amic. Br.	Amici Curiae Brief of Center for Earth Ethics
Environmental Statement or EIS	Final Environmental Impact Statement for the Atlantic Coast Project, R. 13,372 (unless otherwise specified, references are to the Final Environmental Impact Statement)
Karst Mitigation Plan	Atlantic's Karst Terrain Assessment, Construction, Monitoring and Mitigation Plan
Mountain Valley	The Mountain Valley Pipeline Project, a major project conditionally authorized by the Commission on the same day as the Project here, and the subject of *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019)

Policy Integrity	Amicus Curiae Institute for Policy Integrity at New York University School of Law
Policy Integrity Amicus Br.	Amicus Brief of the Institute for Policy Integrity at New York University School of Law
N.C. Comm'n Br.	Brief of Petitioner North Carolina Utilities Commission
NEPA	National Environmental Policy Act
North Carolina Commission	Petitioner North Carolina Utilities Commission
Pipeline or Project	Collectively, the Atlantic Coast Project and the Supply Header Project
Pipeline Safety Administration	Department of Transportation Pipeline and Hazardous Materials Safety Administration
Rehearing Order	*Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018), R. 14,312, JA ___-___
Staunton/Nelson Amic. Br.	Amici Curiae Brief of the City of Staunton and Nelson County, Virginia
Supply Header Project	Dominion Transmission, Inc.'s Supply Header Project, designed to deliver natural gas from supply areas on the Dominion system to the Atlantic Coast Pipeline; conditionally authorized by the Commission in the orders on review
Wintergreen	Petitioners Wintergreen Property Owners Association, Friends of Wintergreen, Inc., and the Fairway Woods Homeowners Condominium Association
Wintergreen Br.	Wintergreen Opening Brief

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ON PETITIONS FOR REVIEW OF ORDERS OF THE
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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

This case concerns certificates of "public convenience and necessity" issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") under the Natural Gas Act, 15 U.S.C. § 717f(c), conditionally authorizing the Atlantic Coast Pipeline Project. The certificate issued to Atlantic Coast Pipeline, LLC ("Atlantic" or "Atlantic Coast") conditionally authorizes it to construct and operate a new, approximately 600-mile interstate natural gas pipeline, and related facilities, extending from West Virginia to the eastern portions of Virginia and North Carolina.

The certificate issued to Dominion Transmission, Inc. ("Dominion") authorizes the related Supply Header Project ("Supply Header Project"), which comprises approximately 38 miles of new pipeline facilities and modifications to existing Dominion facilities in Pennsylvania and West Virginia. The Supply Header Project is designed to deliver natural gas from supply areas on the Dominion system to the Atlantic Coast Pipeline.

Over the course of an extensive three-year regulatory review process culminating in a rehearing order issued in August 2018, the Commission carefully weighed the evidence of public benefits against the potential adverse economic and environmental effects of authorizing the Atlantic Coast Pipeline and related Supply Header Project (together, the "Project"). Although the Commission found that the Project may result in some adverse environmental impacts, the Commission ultimately concluded that the Project, if constructed and operated in accordance with federal standards and specific environmental, safety, and regulatory conditions imposed by the Commission, will serve the public interest.

Petitioners' four opening briefs, and a separate intervenor brief, challenge the Commission's conditional authorization, raising the following issues:

(1) Whether the Commission reasonably found the Project to be required by the "public convenience and necessity," under the Natural Gas Act, 15 U.S.C § 717f, based on its assessment of market need;

(2) Whether the Commission reasonably analyzed environmental issues (project alternatives, potential impacts on resources, impacts on environmental justice communities, and greenhouse gas emissions), consistent with the requirements of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq*. ("NEPA") and relevant law;

(3) Whether the Commission appropriately addressed eminent domain issues;

(4) Whether Intervenors Lora and Victor Baum received adequate notice, consistent with due process, that they must intervene as parties in the FERC proceeding to be able to seek judicial review under the Natural Gas Act, 15 U.S.C. § 717r(a)-(b);

(5) Assuming the North Carolina Utilities Commission has standing, whether the Commission reasonably established initial recourse rates for Atlantic and Dominion under the Natural Gas Act, 15 U.S.C § 717f; and

(6) Whether the Commission reasonably rejected Atlantic's proposed accounting treatment of certain construction financing costs.

JURISDICTIONAL STATEMENT

The Court generally has jurisdiction over these petitions under the Natural Gas Act, 15 U.S.C. § 717r(a)-(b).

However, as discussed in Argument section V, Intervenors Lora Baum and Victor Baum did not participate in the FERC proceeding, and thus lack statutory standing to seek judicial review of the challenged orders. The Court may review the Baums' claim that they had a "reasonable ground" for failing to participate in the agency proceeding under 15 U.S.C. § 717r(b).

Also, as discussed in Argument section VI, Petitioner North Carolina Utilities Commission ("North Carolina Commission") has not established its standing to seek review of the rate issues raised in its petition.

Moreover, as discussed below, certain amici briefs raise issues not raised by petitioners, or not raised to the Commission on rehearing. Such arguments are not properly before the Court.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are in the separate Addendum.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Natural Gas Act

The Natural Gas Act is designed "'to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.'" *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce.

15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a certificate of "public convenience and necessity" under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c).

Under Natural Gas Act section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the proposed construction and operation of the pipeline facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). The Act empowers the Commission to "attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

B. The National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers NEPA. *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co.*

v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983).

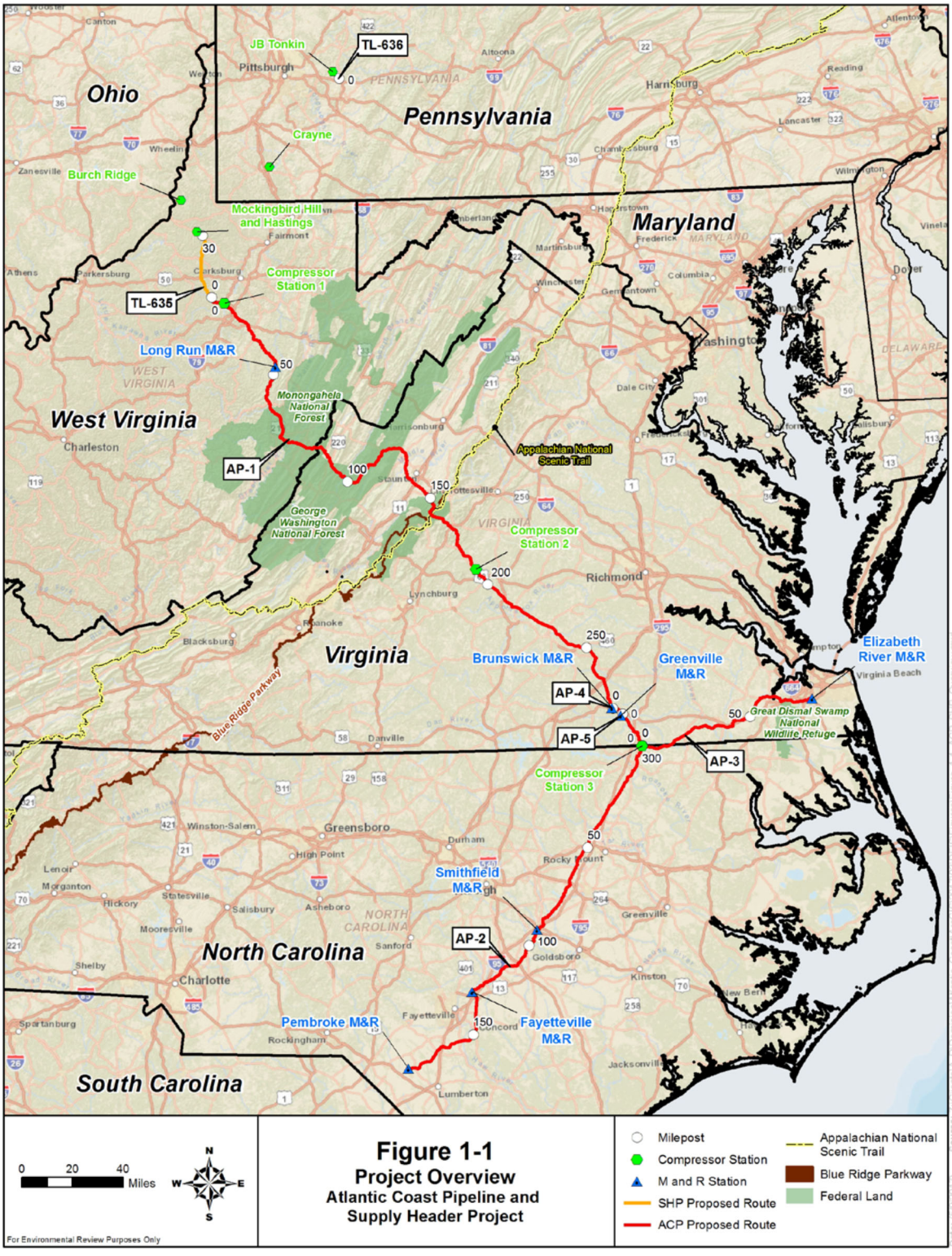
NEPA's implementing regulations require agencies to consider the environmental effects of a proposed action by preparing either an Environmental Assessment, if supported by a finding of no significant impact, or a more comprehensive Environmental Impact Statement. *See* 40 C.F.R. § 1501.4.

II. FACTUAL BACKGROUND

A. The Commission's Environmental Review

The Atlantic Coast Pipeline is designed to transport up to 1.5 million dekatherms[1] per day of natural gas to customers in Virginia and North Carolina. Order Issuing Certificates, *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, P 1 (2017) ("Certificate Order"), R. 13,700, JA ___. The Supply Header Project is designed to provide natural gas from Dominion's system to the Atlantic Coast Pipeline. *Id.* P 2, JA ___. Atlantic has entered into long-term contracts with end users for 96 percent of the pipeline's capacity. *Id.* P 55, JA ___. The following map shows the route of the combined Project:

[1] One dekatherm is roughly equivalent to 1,000 cubic feet of gas. *Consol. Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1541 n.3 (D.C. Cir. 1985). For perspective, 100,000 dekatherms/day fuels 500 megawatts ("MW") of electric generation. *See, e.g.*, *Gulf South Pipeline Co., LP*, 166 FERC ¶ 61,089, P 2 (2019). Thus, if Atlantic's gas were used exclusively to generate electricity, it would support 7,500 MW/day—roughly one quarter of the 33,036 MW peak demand in North Carolina. *See* https://www.eia.gov/electricity/state/northcarolina/.



Final Environmental Impact Statement, R. 13,372, at 1-4, JA ___.

The Commission's pre-filing review of the Project commenced in November 2014. Subsequently, Commission staff issued a notice of intent to prepare an environmental impact statement; the notice was published in the Federal Register in March 2015. Certificate Order P 190, JA ___. The notice was mailed to over 6,000 entities, including federal, state, and local government representatives and agencies, elected officials, regional environmental groups and non-governmental organizations, Native American tribes, potentially affected property owners, and local libraries and newspapers. *Id*. The notice invited written comments on environmental issues and listed the date and location of ten public meetings in the Project area. *Id*. In response, the Commission received approximately 5,600 written, and 330 oral, comments. *Id.* PP 190, 192, JA ___, ___.

Atlantic and Dominion filed their formal applications for certificates of public convenience and necessity in September 2015. *Id.* P 193, JA ___. Subsequently, Atlantic made various modifications to the proposed pipeline route; affected landowners received notice of the modifications. *Id.* PP 194-95, JA ___.

In December 2016, Commission staff issued a draft Environmental Impact Statement addressing issues raised up until that point. *Id.* P 197, JA ___. Notice of the availability of the draft Environmental Impact Statement was published in the Federal Register, and the draft was sent to over 9,000 entities. *Id*. Commission staff held ten public sessions in February and March 2017 in the Project areas,

taking comments from over 600 people. *Id.* The Commission received over 1,600 written comments during the public comment period on the draft Environmental Impact Statement. *Id.*

Commission staff issued the final Environmental Impact Statement ("Environmental Statement" or "EIS") in July 2017, addressing all comments received on the draft Environmental Statement. *Id.* P 198, JA ____. Like the draft Environmental Statement, notice of the final Environmental Statement was published in the Federal Register, and the document was widely distributed. *Id*.

The final Environmental Statement addressed numerous issues, such as: geology, including karst terrain and potential for landslides or earthquakes; water resources, including wells, streams, and wetlands; forested habitat; wildlife and threatened, endangered, and other special status species; land use, recreational areas, and visual resources; socioeconomic issues such as environmental justice communities, property values, tourism, and housing; cultural resources; air quality; noise; safety; cumulative impacts; and pipeline alternatives. *Id.* P 199, JA ___. The final Environmental Statement concluded that most environmental impacts resulting from construction and operation of the Project would be temporary or short-term, but impacts to certain resources would be adverse and significant. *Id.* Measures recommended by Commission staff would mitigate and reduce the level of environmental impacts. *Id.*

B. The Certificate Order

On October 13, 2017, the Commission issued conditional certificates of public convenience and necessity to Atlantic and Dominion. Certificate Order P 4, JA ___ (one Commissioner dissenting on certain issues). Applying and balancing the criteria set forth in its Certificate Policy Statement,[2] the Commission concluded that the Project would provide "benefits . . . to the market [that] outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities." *Id.* PP 4, JA ___, 25-75, JA ___-___.

The Commission concluded that Atlantic had sufficiently demonstrated market demand, based on long-term contracts for 96 percent of the new pipeline's capacity, and explained why it found unpersuasive arguments that the Project was not needed. *Id.* PP 54-63, JA ___. Further, based on an extensive examination of Project alternatives and environmental impacts during the lengthy administrative review process, the Commission concluded that the Project, if constructed and operated as described in the Environmental Statement, was an environmentally

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[2] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128 (2000), *further clarified*, 92 FERC ¶ 61,094 (2000) ("Policy Statement"). The Commission recently issued a Notice of Inquiry regarding potential revisions to its approach under the currently effective Certificate Policy Statement. *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018).

acceptable action. *Id*. P 325, JA ___. With appropriate environmental conditions and mitigation measures, the Commission determined that the Project satisfied the Natural Gas Act's "public convenience and necessity" standard. *Id*. Among other things, the Commission also addressed eminent domain and Project safety issues. *E.g.*, *id.* PP 76-81, JA ___-___, PP 275-78, JA ___-___.

In addition, the Commission approved, consistent with established FERC precedent, a 14 percent return on equity for Atlantic, *id.* PP 97-104, JA___-___, and a 13.7 percent rate of return for the Supply Header Project's initial recourse rates, *id.* PP 106-14, JA ___-___. The Commission also disapproved, as inconsistent with precedent, Atlantic's proposed accounting treatment for construction financing costs. *Id.* PP 187-88, JA ___-___.

C. The Rehearing Order

In the Rehearing Order, the Commission denied or dismissed requests for rehearing with respect to all issues relevant here. *See* Order on Rehearing, *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100, P 5 (2018) ("Rehearing Order") (one Commissioner dissenting), R. 14,312, JA ___-___. In particular, the Commission rejected arguments faulting the Commission's findings concerning: market need for the Project, *id.* PP 40-63, JA ___-___; project alternatives, *id.* PP 116-60, JA ___-___; project impacts, *id.* PP 168-320, JA ___-___; eminent domain issues,

id. PP 84-89, JA ___-___; initial rate issues, *id.* PP 64-74, JA ___-___; and construction allowance issues, *id.* PP 80-83, JA ___-___.

SUMMARY OF ARGUMENT

The FERC certificate orders on review conditionally authorized construction and operation of the Atlantic Coast and Supply Header projects, natural gas pipelines designed to deliver significant quantities of natural gas to homes and businesses in Virginia and North Carolina. The Commission's determination that the combined Project furthers the "public convenience and necessity" resulted from an extensive, three-year agency review process.

This process entailed extensive consultation with multiple federal and state governmental agencies, thousands of filings by numerous groups and individuals before the agency, and a comprehensive Environmental Impact Statement prepared by FERC staff, in coordination with other government agencies. On the basis of this extensive record, the Commission balanced numerous environmental and public interest considerations, and reasonably concluded that the Project—if constructed and operated consistent with federal safety standards and specific mitigation measures imposed by the agency—was an environmentally acceptable action. The Commission's determinations are consistent with its obligations under the Natural Gas Act, the National Environmental Policy Act, and the Administrative Procedure Act, and should be upheld:

Argument section I sets out the relevant standard of review.

Argument section II explains (in response to Conservation Petitioners' arguments) that the Commission reasonably determined that long-term contracts for 96 percent of Project capacity provided substantial evidence of market need, notwithstanding that 5 of the 6 contracts were with pipeline affiliates. As this Court has found, affiliates would not enter into long-term binding contracts without a legitimate business need for the capacity.

Argument section III explains (in response to arguments by Conservation Petitioners, Wintergreen, and Amici Policy Integrity, Staunton/Nelson, and Earth Ethics) that the Commission reasonably found that the Project was environmentally acceptable. In particular, the Commission thoroughly considered and addressed:

(A) *Project alternatives* (responding to Conservation Petitioners and Wintergreen): The Commission performed an extensive alternatives analysis, and reasonably concluded that proposed system and route alternatives were not viable and/or not environmentally preferable over the pipeline as proposed. The Commission also evaluated alternative routes that would avoid the Monongahela and George Washington National Forests, and reasonably concluded that the alternatives would

lengthen the pipeline route, had not been shown to be environmentally preferable, and failed to satisfy Project needs;

(B) *Potential impacts on resources*: The orders on review appropriately addressed the Project's potential resource impacts: (1) Contrary to Conservation Petitioners' argument, as this Court has found, a Fourth Circuit decision vacating Forest Service permits based upon the analysis of sedimentation impacts in national forests does not affect the validity of the Commission's certificate orders, which do not authorize construction in national forests; (2) Contrary to Conservation Petitioners' argument, the Commission thoroughly considered potential impacts on karst terrain, and reasonably found that mitigation measures adequately addressed such impacts; (3) Amicus City of Staunton may not raise an issue not presented by petitioners, but in any event, its arguments regarding potential impacts on Gardner Spring from construction in karst terrain are without merit; (4) Although Wintergreen and Amicus Nelson County are barred from raising the issue, the challenged orders reasonably addressed landslide risks as a result of construction on steep slopes; and (5) the safety concerns raised by Wintergreen were thoroughly addressed in the challenged orders;

(C) *Environmental justice communities* (responding to Conservation Petitioners and Amici Earth Ethics, *et al*.): The Commission identified minority environmental justice communities based on a methodology that has been upheld by this Court, and reasonably relied on Environmental Protection Agency standards to determine that such communities would not experience disproportionately high and adverse air quality impacts; and

(D) *Greenhouse gas emissions* (responding to Conservation Petitioners and Amicus Policy Integrity): In analyzing greenhouse gas emissions, the Commission quantified direct and indirect greenhouse gas impacts from construction and operation of the Project, quantified the upper bound limits of greenhouse gas emissions that may result from downstream combustion of Project-transported gas, and discussed potential climate change impacts. The Commission also fully explained why it declined to use the social cost of carbon tool to monetize impacts from greenhouse gas emissions. The Commission's analysis fully satisfied NEPA and is consistent with this Court's precedents.

Argument section IV explains (in response to Conservation Petitioners' arguments) that the Commission appropriately addressed eminent domain concerns. The Natural Gas Act grants a certificate holder the right to exercise

eminent domain; eminent domain actions proceed in federal district courts or state courts, and are outside the scope of the Commission's authority.

Argument section V explains (in response to Petitioner-Intervenors the Baums) that Lora and Victor Baum's due process claim is meritless: they were repeatedly advised that they needed to intervene in the Commission proceeding if they wanted to seek judicial review of the Commission's orders, but did not do so.

Argument section VI explains (in response to North Carolina Commission's arguments) that the North Carolina Commission has not satisfied any of the three prongs necessary to establish standing. In any event, the challenged orders appropriately set initial tariff recourse rates for both Atlantic and Dominion.

Finally, *Argument section VII* explains (in response to Atlantic's petition) that the Commission reasonably rejected, as inconsistent with Commission precedent, Atlantic's proposal to initially over-accrue construction allowance funds, and later balance out such over-accruals.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power*

Supply Ass'n, 136 S. Ct. 760, 782 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted). Because the grant or denial of a Natural Gas Act section 7 certificate is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id*.

The arbitrary and capricious standard also applies to NEPA challenges. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

This Court evaluates agency compliance with NEPA under a "rule of reason" standard, and has consistently declined to "flyspeck" the Commission's environmental analysis. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). *See also Myersville*, 783 F.3d at 1322-23; *Minisink Residents for*

Envtl. Pres. & Safety v. FERC, 762 F.3d 97, 112 (D.C. Cir. 2014). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. THE COMMISSION REASONABLY FOUND THE ATLANTIC PROJECT REQUIRED IN THE "PUBLIC CONVENIENCE AND NECESSITY"

Natural Gas Act section 7(e) grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *see FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission is "vested with wide discretion to balance competing equities against the backdrop of the public interest").

The Commission evaluates proposals to certificate new pipeline construction under its Certificate Policy Statement. Certificate Order P 25, JA ___. The Policy Statement establishes criteria for determining whether a proposed project is needed and whether it will serve the public interest. *Id*. Before the Policy Statement, a new pipeline proponent was required to have contractual commitments for at least

25 percent of the proposed project's capacity to demonstrate need. *Id*. P 54 n.83, JA ___ (citing Certificate Policy Statement at 61,743). But the bright-line 25 percent test failed to account for other public benefits a project might provide. *Id*. (citing Policy Statement at 61,747). Thus, the Commission established a revised policy allowing applicants to rely on a variety of relevant factors to demonstrate need, including precedent agreements, demand projections, potential consumer cost savings, or a comparison of projected demand and current capacity serving the market. *Id*. Although precedent agreements are no longer required, the Policy Statement made clear that they remain significant evidence of project need. *Id*.

A. The Commission Reasonably Found Market Need for Atlantic Based on Precedent Agreements

The Commission found that Atlantic benefits the public by developing gas infrastructure to ensure future domestic energy supplies by connecting sources of natural gas to markets in Virginia and North Carolina. Certificate Order P 55, JA ___; Rehearing Order P 44, JA ___. *See* Policy Statement at 61,748 (evidence of public benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives"). Conservation Petitioners do not challenge these public benefit findings.

However, Conservation Petitioners challenge the Commission's

determination that Atlantic's long-term (20-year) precedent agreements with six shippers (five of which are Atlantic affiliates) for 96 percent of its proposed capacity demonstrate that additional gas will be needed in the markets served by Atlantic. Certificate Order PP 55, 59, JA ___, ___. Conservation Petitioners claim—erroneously—that this Court has not considered the issue. Conservation Br. 12 & n.1. But this Court recently affirmed the Commission's reliance on affiliate precedent agreements to demonstrate need in *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (unpublished). Like this case, *Appalachian Voices* involved a new pipeline company's construction of a major new pipeline. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), *on reh'g*, 163 FERC ¶ 61,197 (2018). In that case, the Commission found market need based upon affiliate precedent agreements for 100 percent of the pipeline's capacity. *Mountain Valley*, 161 FERC ¶ 61,043, P 41.

On appeal of those orders—as here—petitioners challenged the Commission's reliance on affiliate precedent agreements. *See* Pet. Br. 21-30, No. 17-1271. This Court rejected those arguments, finding that "FERC's conclusion that there is a market need for the Project was reasonable and supported by substantial evidence, in the form of long-term precedent agreements for 100 percent of the Project's capacity." *Appalachian Voices*, 2019 WL 847199, at *1.

"The fact that Mountain Valley's precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; the Certificate Order reasonably explained that '[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.'" *Id.* (quoting *Mountain Valley*, 161 FERC ¶ 61,043, P 45).

The Court should likewise uphold the Commission's finding that precedent agreements for 96 percent of Atlantic capacity provided substantial evidence of need for the project. Rehearing Order P 43, JA ___; Certificate Order PP 55-56, JA ___-__. As in *Appalachian Voices*, the Commission found here that "[a] shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor." Rehearing Order P 42, JA ___. Accordingly, "as long as precedent agreements are long-term and binding," the Commission does not distinguish between precedent agreements with affiliates and non-affiliates. Rehearing Order P 41, JA ___ (quoting *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 P 57 (2002)); *see, e.g*, *Twp. of Bordentown v. FERC*, 903 F.3d 234, 262 (3d Cir. 2018) ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective

market demand for the additional gas, no rational company would spend money to secure the excess capacity.").

Contrary to Conservation Petitioners' suggestion (Conservation Br. 14), the precedent agreements here were binding. Certificate Order P 9, JA ___. Further, Atlantic affirmed that it executed binding final contracts for service at the levels provided for in the precedent agreements. Rehearing Order P 44, JA ___ (citing Atlantic's Supplemental Information and Limited Notice to Proceed, R. 13,871, at 2, JA ___, and Certificate Order P 55 & Ordering Paragraph (K), JA ___, ___). "As confirmed by the execution of the service contracts, the shippers on the [Atlantic] Project—who will supply gas to end users and electric generators—determined that natural gas will be needed and the [Atlantic] Project is the preferred means of obtaining that gas." *Id.*; *see also* Certificate Order P 55, JA ___.

Conservation Petitioners assert that the precedent agreements are suspect because the affiliated shippers are electric utilities and gas distribution companies that can pass costs through to their captive customers under inadequate state review. Conservation Br. 14-17. But the Commission rejected the argument that state regulators cannot effectively review the expenditures of utilities they regulate. Certificate Order P 60, JA ___. The utilities' state regulators review the prudence of their contracts with Atlantic before the costs can be recovered in the utilities'

retail rates. Rehearing Order P 48, JA ___; Certificate Order P 60, JA ___; *see, e.g.*, *Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78, 83-84 (D.C. Cir. 1987) (approval of rates in FERC certificate proceeding does not foreclose later state commission prudence review). Any Commission attempt to look behind the precedent agreements in this proceeding might infringe on state regulators' roles in determining the prudence of their regulated utilities' expenditures. Certificate Order P 60, JA ___; Rehearing Order P 48, JA ___.

Before the Certificate Order issued, the North Carolina Utilities Commission ("North Carolina Commission") already had approved the precedent agreements between Atlantic and three shippers. Certificate Order P 60, JA ___. Issues relating to the other shippers' ability to recover costs associated with their Atlantic contracts will be determined by the relevant state commission. *Id*. If Atlantic is constructed before state approval of such contracts, Atlantic would be at risk for not being able to recover some of its costs, as it is at risk for costs associated with any unsubscribed capacity. *Id*.; Rehearing Order P 72, JA ___.

B. Conservation Petitioners' Other Evidence Does Not Undermine Reliance on the Precedent Agreements

The projections of regional supply and demand cited by Conservation Petitioners (Conservation Br. 17-20) do not undermine the market need finding based on Atlantic's precedent agreements. First, as this Court has recognized, nothing in the Commission's Policy Statement "'requires, rather than permits, the

Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.'" *Myersville*, 783 F.3d at 1311 (quoting *Minisink*, 762 F.3d at 111 n.10); *see Birckhead v. FERC*, -- F.3d ---, 2019 WL 2344836 (D.C. Cir. June 4, 2019) (per curiam) ("We have repeatedly held that a project applicant may demonstrate market need by presenting evidence of preconstruction contracts for gas transportation service.") (internal quotation omitted); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (affirming market need finding based on pre-construction contracts for 93 percent of project capacity); *Bordentown*, 903 F.3d at 263 ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville*, 783 F.3d at 1311); Certificate Order P 54, JA ___; Rehearing Order P 41, JA ___. While the Policy Statement broadened the types of evidence an applicant may submit to show a project's public benefits (*see* Conservation Br. 17-18), it did not compel any additional showing beyond precedent agreements. Rehearing Order PP 41, 46, JA ___, ___; Certificate Order P 55 & n.88, JA ___. Rather, the Policy Statement permits applicants to provide other evidence of public benefit to support an application in the absence of, or in addition to, precedent agreements. Rehearing Order P 41, JA ___. Thus, this Court has affirmed Commission orders finding unpersuasive a market study offered to contradict market need evidenced by

precedent agreements. *See Myersville*, 783 F.3d at 1311.

Conservation Petitioners rely (Conservation Br. 18) upon various entities' natural gas demand projections extending to 2034. But as the Commission found, long-term projections of future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and state and federal legislative and regulatory decisions. Rehearing Order P 54, JA ___. And, the Commission noted, the record also contained evidence of growing demand for natural gas pipeline transportation capacity. Rehearing Order P 54, JA ___ (citing Atlantic's Application Resource Report 5, R. 3,532 at 5-35 to 5-37, JA ___-___, and the ICF International and Chmura Economics Reports, Resource Report 5 Appendices 5D, JA ___-__, and 5E, JA ___-__). Given market uncertainty, the Commission reasonably concluded that Atlantic's precedent agreements—reflecting actual demand—were better evidence of need in Atlantic's market than the theoretical projections in Conservation Petitioners' studies. Certificate Order P 56, JA ___; Rehearing Order P 54, JA ___.

The Commission similarly reasonably rejected the argument (Conservation Br. 19), based on a 2016 study by Synapse Energy Economics, that existing pipeline capacity was sufficient to meet regional demand. The Commission found the 2016 Synapse study unpersuasive, because it relied on the unlikely assumption

that all gas is flowed by primary customers along contracted paths, and thus failed to consider the use of regional pipeline capacity by shippers outside the region through interruptible service or capacity release. Rehearing Order P 56, JA ___ (citing *Mountain Valley*, 163 FERC ¶ 61,197, P 47). Conservation Petitioners failed to acknowledge, let alone address, this finding in their opening brief, and therefore any objection to it is waived. *See, e.g.*, *CC1 Ltd. P'ship v. NLRB*, 898 F.3d 26, 35 (D.C. Cir. 2018); *Power Co. of Am., L.P. v. FERC*, 245 F.3d 839, 845 (D.C. Cir. 2001).

Moreover, the Environmental Statement evaluated the potential for existing capacity on other pipelines to serve as an alternative to Atlantic, and concluded that existing pipelines do not have the capacity to transport the required volumes of gas. Rehearing Order P 55, JA ___ (citing Certificate Order P 57, JA ___, and EIS 5-38, JA ___). The Commission's consideration of alternatives, including the use of existing capacity, is discussed more fully immediately below.

III. THE COMMISSION'S ENVIRONMENTAL REVIEW SATISFIED THE REQUIREMENTS OF NEPA AND RELEVANT LAW

A. The Commission Reasonably Considered Alternatives

The National Environmental Policy Act requires agencies to take a "hard look" at reasonable alternatives to a proposed action. *E.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). The Commission took the requisite hard look

here. *See Birckhead*, 2019 WL 2344836, at *1 ("[T]he discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice . . . .") (quoting *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) (applying standard to Environmental Impact Statement)).

The Commission weighed the relative environmental impacts of the Project as proposed and numerous alternatives, and concluded that none of the alternatives at issue represented a feasible, environmentally advantageous action. *See Birckhead*, 2019 WL 2344836, at *2 (finding that Commission's analysis of potential alternative compressor station sites, based on its "overall assessment of . . . various factors," satisfied NEPA) (internal quotation marks omitted). In particular, the Commission analyzed a "no action" alternative, existing and proposed system alternatives, 27 major route alternatives, national forest and other route alternatives, route variations, and aboveground facility location alternatives. EIS 3-1 to 3-60, 5-38 to 5-39, JA ____-__, ____-__; Rehearing Order PP 122-60, JA ____-__; Certificate Order PP 69, 314-22, JA ____, ____-__.

Conservation Petitioners and Wintergreen challenge just a few aspects of this extensive alternatives analysis. Conservation Br. 20-27; Wintergreen Br. 21-28. These challenges have no merit.

1. The Commission Appropriately Evaluated Other System Alternatives

a. The Transcontinental Pipeline System Alternative

Conservation Petitioners assert that the Commission did not evaluate the Transcontinental Pipeline ("Transco") Atlantic Sunrise project as an alternative to Atlantic Coast. Conservation Br. 23-25. But the record establishes otherwise.

In response to the claim that the then-recently approved Transco Atlantic Sunrise project could serve as an alternative to Atlantic Coast, the Commission explained that: the Transco alternative was infeasible, since Transco's system did not have sufficient capacity to serve Atlantic Coast's customers; the environmental impacts associated with that alternative would likely be similar to the proposed Project's impacts, because extensive new pipeline construction and compressor station modifications would be required to serve Atlantic Coast customers; and the necessary modifications could not occur within the proposed Project's timeframe. Rehearing Order PP 126-30, JA ____-__ (citing EIS 3-4 to 3-5, JA ____-__); EIS 3-4 to 3-5, JA ___-__; *see also* EIS Z-4286, JA ____ (explaining that "Atlantic Sunrise is too far away to serve as a reasonable alternative").

Conservation Petitioners argue that the Final Environmental Impact Statement "underreported" Transco's system capacity as 11 billion cubic feet per day when its actual capacity was higher. Conservation Br. 21-23 (citing EIS 3-4, JA ____). Conservation Petitioners did not raise that argument to the Commission

in their requests for rehearing. *See* Rehearing Requests, R. 13,761, 13,768-13,772, 13,774, JA ____-__. In fact, one of the Conservation Petitioner rehearing requests stated that, "[a]s the final [Environmental Impact Statement] acknowledges, the Transco system can move 11 [billion cubic feet per day] . . . ." R. 13,771, Shenandoah Valley Network, *et al.*, Rehearing Request at 54, JA ____. So Conservation Petitioners' "underreporting" contention was not preserved for appeal. *See* 15 U.S.C. § 717r(b); *Myersville*, 783 F.3d at 1310 (citing 15 U.S.C. § 717r(b) ("No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so.")).

In any event, as just discussed, insufficient capacity was only one of the bases on which the Commission found Transco's system was not a viable alternative. Conservation Petitioners' opening brief does not mention or challenge the other bases, so any challenge to them is waived. *See*, *e.g.*, *CC1 Ltd. P'ship*, 898 F.3d at 35; *Power Co. of Am.*, 245 F.3d at 845; *see also*, *e.g.*, *Pierce v. SEC*, 786 F.3d 1027, 1034-35 (D.C. Cir. 2015); *Nat'l Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006).

b. The Columbia System's WB XPress Project Alternative

The Commission determined that Columbia Gas Transmission, LLC's ("Columbia") proposed WB XPress project was not a viable alternative because:

(1) its receipt and delivery points did not align with the Project's, and aligning those points would require significant modifications that would cause similar or greater environmental impacts; and (2) it would not have enough capacity to deliver both its and the Project's contracted-for volumes of gas. EIS 3-5 to 3-6, JA ____-__; Rehearing Order P 129, JA ___-__.

Conservation Petitioners' opening brief does not mention or challenge the misalignment of receipt and delivery points basis, so any challenge to it is waived. *See*, *e.g.*, *CC1 Ltd. P'ship*, 898 F.3d at 35; *Power Co. of Am.*, 245 F.3d at 845. Accordingly, the Court need not review the Commission's other, alternative rationale for that finding—that the WB XPress project had insufficient capacity. *See*, *e.g.*, *Pierce*, 786 F.3d at 1034-35; *Nat'l Fuel Gas Supply*, 468 F.3d at 839.

Nonetheless, as the Commission explained, the WB XPress project's 1.3 billion cubic feet per day capacity would not be able to deliver the combined 2.74 billion cubic feet per day of natural gas contracted-for on Atlantic and WB XPress. EIS 3-6, JA ____; *see also* Conservation Br. 24 (noting that WB XPress' and Atlantic's contracted-for volumes are 1.3 and 1.44 billion cubic feet per day, respectively).

Conservation Petitioners speculate that WB XPress' producer-customers (and the producer/marketer-customers of another system alternative, Mountain Valley, discussed immediately below) may have contracted-for capacity available

to serve Atlantic's customers. Conservation Br. 24; *see also Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,200, PP 9, 25, 26 (2017) (noting that Columbia executed precedent agreements with a large local distribution company (which would either locally distribute the gas or use it to generate electricity) and two producers for the full transportation capacity created by the project). But this partial alternative is speculative and would not in any event meet the Project's goals. Rehearing Order P 130, JA ____; *see also City of Alexandria, Va. v. Slater*, 198 F.3d 862, 869 (D.C. Cir. 1999) (in the context of a discrete project within the jurisdiction of one federal agency, "it is simply a *non sequitur* to call a proposal that does not offer a complete solution to the problem a reasonable alternative;" "a reasonable alternative is defined by reference to a project's objectives") (internal quotation omitted).

c. The Mountain Valley Alternative

The Commission evaluated two Mountain Valley alternatives: (1) collocating Atlantic and Mountain Valley, i.e., relocating Atlantic along Mountain Valley's route, with additional pipeline to meet Atlantic's delivery requirements; and (2) merging Atlantic and Mountain Valley, i.e., transporting Atlantic's and Mountain Valley's volumes together in a single pipeline along Mountain Valley's route. EIS 3-6 to 3-11, JA ____-__; Certificate Order PP 315-19, JA ____-__; Rehearing Order PP 132-42, JA ____-__. Petitioners do not

challenge the Commission's determination that collocating Atlantic with Mountain Valley was infeasible due to narrow ridgelines in West Virginia. *See* EIS 3-10 to 3-11, JA ____-__; Certificate Order P 316, JA ____; Rehearing Order P 133, JA ____.

Wintergreen does challenge the Commission's conclusion that merging Atlantic and Mountain Valley into one system would be infeasible and not preferable, whether a single 42-inch or 48-inch diameter pipeline was used to transport the projects' volumes. Wintergreen Br. 25-27. EIS 3-6 to 3-9, JA ____-__; Certificate Order PP 315-19, JA ____-__; Rehearing Order PP 134-42, JA ____-__. Using 42-inch diameter pipe would require the pipeline to operate at a higher operating pressure than proposed, which would restrict Atlantic's operational flexibility to accommodate customers' flow rate variations and line pack,[3] and could foreclose future expansions, which Atlantic is contractually-bound to undertake if its shippers ask it to do so. EIS 2-57, 3-8 to 3-9, JA ____, ____-__; Certificate Order P 317, JA ____; Rehearing Order P 134 & n. 357, JA ____; R. 4,604, Atlantic Resource Report 10, Alternatives Excerpts at 10-24, JA ____, *cited at* EIS 3-8 n.1, JA ____. And if thicker-walled pipe or higher-grade

[3] When compressed, more natural gas can temporarily be "packed" into a pipeline. *See* R. 4604, Atlantic Resource Report 10, Alternatives Excerpts at 10-24 n.14, JA ____, *cited at* EIS 3-8 n.1, JA ____.

steel were used to withstand the higher pipeline pressure, the pipeline would be less elastic and substantially heavier, requiring larger construction equipment to install, increasing the complexity of welding, and potentially increasing the construction period and damage to public roads. EIS 3-8 to 3-9, JA ___-___ (citing Atlantic Resource Report 10, Alternatives Excerpts at 10-25, JA ____); Certificate Order P 317, JA ____; Rehearing Order P 135, JA ____ (citing R. 3,532, Atlantic Resource Report 10, Alternatives at 10-40, JA ____).

Using atypical 48-inch diameter pipe would cause similar construction challenges due to its heavy weight and reduced elasticity/flexibility: construction in steep terrain would be more difficult and welding would be more complex. EIS 3-9, JA ___; Rehearing Order P 135, JA ___; Certificate Order P 317, JA ___. In addition, the larger pipe would require increased construction workspace and rights-of-way, greater trench excavations, and at least 30 percent more soil displacement. EIS 3-9, JA ___; Rehearing Order P 135, JA ___; Certificate Order P 317, JA ___; R. 4,604, Atlantic Resource Report 10 Alternatives Excerpts at 10-26, JA ___.

In addition, the merged system alternative would require substantial additional compression, causing greater air emissions and noise. EIS 3-9, JA ____; Rehearing Order PP 136, 138, JA ____-__. And the time needed to plan and design the merged alternatives would significantly delay delivery of the gas the

Atlantic and Mountain Valley projects will provide. EIS 3-9, JA ____; Rehearing Order PP 136-37, JA ____-__.

While merging the pipelines would provide some environmental advantages (*see* Wintergreen Br. 25), the Commission reasonably found, after considering environmental factors, technical feasibility, and ability to meet the Project's operational needs and timelines, that this alternative would not meet the Project's purpose and need and was not preferable to the proposed Project. EIS 3-9, JA ____; Rehearing Order PP 134, 136, 141, JA ____-__; Certificate Order P 317, JA ____. NEPA does not mandate a particular substantive result; it simply requires an agency to take a hard, informed look at environmental consequences, as the Commission did here. *See Sierra Club v. DOE*, 867 F.3d 189, 196 (D.C. Cir. 2017); *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 394 (D.C. Cir. 2017). And the Commission has broad discretion in balancing competing interests. *See*, *e.g.*, *Minisink*, 762 F.3d at 111. "Even if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative." *Myersville*, 783 F.3d at 1324; *see also Envtl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 532 (D.C. Cir. 1993) ("After weighing environmental considerations, an agency decisionmaker remains free to subordinate the environmental concerns revealed in the EIS to other policy concerns.").

Thus, while Wintergreen contends otherwise, Wintergreen Br. 25-26, the Commission appropriately considered the fact that the merged alternative would significantly delay the needed natural gas transportation service Atlantic and Mountain Valley would provide. *See* EIS 3-9, JA ____; Rehearing Order PP 136-37, JA ____-__); *see also*, *e.g.*, *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 226-28 (1980) (finding NEPA's alternatives analysis requirements satisfied where agency rejected alternatives because project would be unacceptably delayed).

Moreover, the Commission did not define the Project goals too narrowly by considering whether the merged systems alternative would allow Atlantic's capacity to be expanded in the future. *See* Wintergreen Br. 26-27. Atlantic's agreements with the shippers here require Atlantic to seek to expand its capacity if the shippers ask Atlantic to do so. EIS 2-57, 3-8 to 3-9, JA ____, ____-__; Certificate Order P 317, JA ____; Rehearing Order P 134 & n. 357, JA ____; R. 4,604, Atlantic Resource Report 10, Alternatives Excerpts at 10-24, JA ____, *cited at* EIS 3-8 n.1, JA ____. Wintergreen recognizes, at pages 26-27 of its brief, that the Commission appropriately may give substantial weight to the project proponent's needs, preferences, and goals. Rehearing Order P 139, JA ____; *see also City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (an agency's "consideration of alternatives may accord substantial weight to

the preferences of the applicant and/or sponsor in the siting and design of the project") (internal quotation omitted); *Citizens Against Burlington*, 938 F.2d at 196-99 ("the agency should take into account the needs and goals of the parties involved in the application;" "Congress did expect agencies to consider an applicant's wants").

Wintergreen also claims that the Commission should not have considered whether the merged systems alternative (and the South of Highway 664 alternative, discussed in Argument section III.A.2.a) would provide a "significant environmental advantage" over the Project. Wintergreen Br. 22-25. But again, in doing so the Commission simply accorded weight to the project proponent's preferences which, as just discussed, it appropriately may do. *See* Rehearing Order P 139, JA ___.

Next, Wintergreen asserts that the Commission ignored that "utilizing a 48-inch diameter pipeline would allow for future expansion." Wintergreen Br. 26 (purportedly quoting EIS 3-9, JA ____). But the Environmental Statement did not state that using a 48-inch diameter pipe "would" allow for future expansion; it stated only that it "may allow for future expansion of the system." EIS 3-9, JA ____. And as the Commission pointed out, its concern with this alternative was not based only on potential future expansibility but also on other factors, including necessary operational flexibility and timing. Rehearing Order PP 136, 139, 141,

JA ____-__; Certificate Order P 317, JA ____. (Wintergreen did not challenge the necessary operational flexibility basis on rehearing (*see* R. 13,761 & 13,773, JA ____-__, ____-__), and does not challenge it in its opening brief on appeal.)

2. The Commission Appropriately Evaluated Route Alternatives

a. The South of Highway 664 Route Alternative

Wintergreen claims that the South of Highway 664 route alternative was environmentally superior to the proposed route. Wintergreen Br. 24. But after noting Wintergreen's comments and considering the record evidence, the Commission reasonably found otherwise. Rehearing Order PP 150-56, JA ____-__; EIS 3-33 to 3-35, 4-384, 4-584 to 4-587, Z-1076 to Z-1077, JA ____-__, ____, ____-__, ____-__.

As the Commission explained, this alternative route would merely transfer construction constraints and visual impacts from one location to another, while increasing the length of the project route (the alternative route is 8.6 miles long; the corresponding Project segment is 7.7 miles long). Rehearing Order P 153, JA ____; EIS 3-33 to 3-35, JA ____-__. The alternative would have similar visual impacts alongside slopes and ridgelines as the proposed Project and would expose additional motorists and tourists along Highway 664, a state-designated scenic byway (as part of the Nelson Scenic Route), to permanent visual impacts. Rehearing Order P 153, JA ____; EIS 3-35, 4-384, JA ____, ____. In addition, the

alternative would not reduce side slope and steep terrain construction. Rehearing Order P 154, JA ____ (citing R. 3,532, Atlantic Application, Resource Report 1, App. 1A, JA ____).

The Commission further found that, while the South of Highway 664 alternative would increase the distance of the horizontal directional drilling entry workspace from the Wintergreen gate by 1,400 feet, it would not, as Wintergreen asserts (Wintergreen Br. 24), provide a significant safety advantage. EIS 3-30, 3-35, 4-577 to 4-590, 5-35 to 5-36, JA ____, ____, ____-__, ____-__; Certificate Order PP 275-77, JA ____; Rehearing Order PP 152, 195, 197, JA ____, ____, ____. As discussed in section III.B.5 below, the Project would be constructed and operated in accordance with federal regulatory requirements and additional safety measures imposed by the Commission, so the Project would present only a slight increase in risk to the nearby public. *See* EIS 3-30, 3-35, 4-577 to 4-585, 5-35 to 5-36, JA ____, ____, ____-__, ____-___; Certificate Order PP 275-77, JA ____; Rehearing Order PP 152, 195, 197, JA ____, ____, ____.

b. The Lyndhurst to Farmville Route Alternative

The Commission also reasonably found that the Lyndhurst to Farmville route alternative was not preferable. EIS 3-29 to 3-31, JA ____-__; Certificate Order PP 321-22, JA ____-__; Rehearing Order P 158, JA ____. Under this alternative, the Pipeline would cross the Blue Ridge Parkway and the Appalachian

National Scenic Trail ("Appalachian Trail") at Rockfish Gap. But as the Commission explained, this alternative route might be infeasible because the necessary trenchless horizontal directional drilling would be constrained by steep topography and existing structures, roads, and limited workspace, and this alternative would have more negative impacts on the Blue Ridge Parkway and the Appalachian Trail than the Project as proposed.[4] EIS 3-30 to 3-31, JA ____-__ (describing FERC Staff's evaluation of Rockfish Gap conditions); Certificate Order P 321, JA ____; Rehearing Order P 158, JA ____; *see also* Certificate Order P 249, JA ____; Rehearing Order PP 141, 222, JA ____, ____.

Wintergreen did not rebut the bases for this finding either on rehearing before the Commission (*see* Rehearing Order P 158, JA ____) or in its opening brief. Instead, Wintergreen simply notes that the Lyndhurst to Farmville alternative "would reduce the length of the trenchless crossing," Wintergreen Br. 28, which does not address the specific horizontal directional drilling constraints the Commission found Rockfish Gap would present.

[4] To avoid potentially significant impacts to the Appalachian Trail and Blue Ridge Parkway's visual and recreational qualities, the Pipeline needed to cross them without excavating an open trench. Rehearing Order P 158, JA ___ (citing EIS 3-21, 4-396, 4-460 to 4-463, 4-475 to 4-479, JA ____, ____, ____-__, ____-__). Trenchless construction involves installing pipeline beneath roads and other sensitive features by drilling or tunneling under the feature without excavating an open trench. EIS 2-40, JA ____.

Moreover, while this alternative, as proposed, would substantially increase collocation with existing road and utility rights-of-way, the proposed alternative route would have to be modified because residential and commercial development in Lyndhurst and along the Interstate 64 corridor would prevent installation of a 42-inch diameter pipeline, so the collocation advantage would be reduced. EIS 3-30 to 3-31, JA ____-__; Certificate Order P 322, JA ____.

c. Alternatives that Would Avoid the Monongahela and George Washington National Forests

The Commission evaluated two alternative routes that would avoid the Monongahela and George Washington National Forests—one to the south of the forests and one to the north—and found that neither was environmentally preferable. EIS 1-9, 3-19, JA ____, ____; Rehearing Order P 146, JA ___-__; R. 4,604, Application Resource Report 10 at 10-62 to 10-70, JA ____-__.

The alternatives would increase the pipeline route by 43 miles (southern route) and 15 miles (northern route). EIS 3-19, JA ____; Rehearing Order P 146, JA ___. Shorter pipeline routes, like the proposed route, generally have fewer environmental impacts and are environmentally preferable to longer routes. EIS 3-19, JA ____; Rehearing Order P 146, JA ___. And nothing in the record suggested that the proposed shorter route through the national forests would have sufficiently greater impacts on sensitive resources to justify approving a longer route. EIS 3-19, JA ____; Rehearing Order P 146, JA ___; *see also* EIS 3-19, JA ____

(explaining that the northern route would cross similar mountain terrain and many of the same forest habitats and waterbodies as the proposed route); Rehearing Order P 146, JA ___ (same). Moreover, because of the linear nature of the pipeline corridor and the national forests' boundaries, neither route would enable Atlantic to meet all of its contracted-for receipt/delivery points without a longer reroute or the addition of a new lateral pipeline. EIS 1-9, JA ____; Application Resource Report 10 at 10-67, 10-68, 10-70, JA ____, ____, ____.

Conservation Petitioners assert that the Commission needed to consider the nature of the resources the Project would impact in the Monongahela and George Washington National Forests. Conservation Br. 25-27. As the record shows, the Commission did so.

The Environmental Statement extensively discussed the Project's environmental impacts in these national forests on geology, soils, water resources, vegetation, wildlife, fisheries and aquatic resources, special status species, land use, special interest areas, visual resources, and cultural resources.[5] Much of that

[5] *See*, *e.g.*, EIS: 4-36 to 4-47, JA ____-__ (geology); 4-69 to 4-75, JA ____-__ (soils); 4-99 to 4-100, 4-125, 4-127 to 4-130, 4-140 to 4-141, JA ____-__, ____, ____-__, ____-__ (water resources); 4-160 to 4-170, JA ____-__ (vegetation); 4-187 to 4-189, 4-204 to 4-208, JA ____-__, ____-__ (wildlife); 4-215 to 4-216, 4-231, 4-240 to 4-244, JA ____-__, ____-__ (fisheries and aquatic resources); 4-259, 4-261, 4-266 to 4-270, 4-277 to 4-278, 4-278 to 4-280, 4-283, 4-286, 4-289, 4-292 to 4-293, 4-301, 4-303, 4-313 to 4-315, 4-323 to 4-331, JA ____, ____, ____-__, ____-__, ____-__, ____, ____, ____, ____-__, ____, ____, ____-__, ____-__

discussion was included in response to comments on the draft Environmental Statement. *See* EIS 1-1, JA ____ (explaining that the vertical line in the margin of the final Environmental Statement identifies new or modified text that differs materially from corresponding text in the draft). And the final Environmental Statement considered and responded to the information provided in the Conservation Petitioners' comments on the draft Environmental Statement (*see* Conservation Br. 26).[6] The Commission's orders also further discussed the Project's environmental impacts on the national forests. *See*, *e.g.*, Certificate Order PP 231, 237, 249-50, JA ____, ____, ____-__; Rehearing Order PP 220-21, 224, 227, 243, 245, JA ____-__, ____, ____, ____, ____.

Despite Conservation Petitioners' claim to the contrary (Conservation Br. 25), the Commission's regulations at 18 C.F.R. §§ 380.15(e)(2) and (3) were

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(special status species); 4-390, 4-396, 4-423 to 4-475, JA ____, ____, ____-__ (land use, special interest areas, and visual resources), and 4-541 to 4-544, JA ____-__ (cultural resources); *see also* EIS ES-3, ES-5 to ES-11, 1-8 to 1-9, 2-18, 2-30 to 2-31, 3-52, JA ____, ____-__, ____-__, ____, ____-__, ____.

[6] *See* EIS Z-5, Z-492, Z-822 to Z-824, Z-829 to Z-830, Z-838, Z-1036, Z-1039, Z-1042 to Z-1043, Z-1356, Z-1370, Z-1379, Z-1390 to Z-1392, Z-1398 to Z-1399, Z-2255, Z-2309 to Z-2310, JA ____, ____, ____-__, ____-__, ____, ____, ____, ____-__, ____, ____, ____, ____-__, ____-__, ____, ____-__ (collectively citing to EIS 2-28, 4-152 to 4-156, 4-160 to 4-167, 4-170 to 4-331, 4-343 to 4-369, 4-382 to 4-411, 4-414 to 4-481, 4-566 to 4-576, 4-463 to 4-475, JA ____, ____-__, ____-__, ____-__, ____-__, ____-__, ____-__, ____-__, ____-__, ____-__; and generally citing to the discussion of impacts on forest resources throughout EIS section 4, JA ____-__, and the alternative routes considered in EIS section 3, JA ____-__).

satisfied here. Rehearing Order P 219, JA ____. As the Commission explained, the Project proponents collocated the pipeline facilities within existing rights-of-way where possible. *Id.* And, after considering the environmental impacts of routing the Project through the national forests, the Commission found the alternative routes were not preferable. *Id.*

Conservation Petitioners note that the Commission accepted a national forest route variation that added 31.8 miles to the pipeline route. Conservation Br. 26 n.11. But in doing so the Commission explained that, while this route variation was longer and thus inherently might have more generalized environmental impacts than the original route (e.g., forest clearing, waterbody crossings, karst topography, steep slope construction, private landowners affected, and air emissions, among other factors), the Forest Service had already told Atlantic that it would not adopt the original route because of impacts on highly sensitive resources (the Cheat, Back Allegheny, and Shenandoah Mountains, and Cow Know salamander habitat), and because it was inconsistent with Forest Plan direction. EIS 3-19 to 3-21, JA ____-__.

B. The Commission's Determinations on Resource Impacts Were Reasonable

1. Sedimentation Impacts in National Forests

Conservation Petitioners challenge the Commission's certificate orders based upon the Environmental Statement's analysis of sedimentation impacts in

the national forests, in light of the Fourth Circuit's decision in *Cowpasture River Preservation Association v. U.S. Forest Service*, 911 F.3d 150, 176-79 (4th Cir. 2018) (vacating certain Forest Service permits authorizing pipeline construction in the national forests). Conservation Br. 28-29. *Cowpasture* does not supply a basis for overturning the FERC certificate orders at issue here.

Because Atlantic is an interstate gas pipeline, FERC is the lead agency for preparation of the Environmental Statement. *See* 15 U.S.C. § 717n(b)(1); *Sierra Club, Inc. v. U.S. Forest Service*, 897 F.3d 582, 588 (4th Cir.), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018). In issuing its own jurisdictional permits, the Forest Service, as a cooperating agency, may adopt the Commission's Environmental Statement, but only if it undertakes an independent review of the Statement and determines that its comments have been satisfied. *Sierra Club*, 897 F.3d at 590 (citing 40 C.F.R. § 1506.3(c)).

In *Cowpasture*, the Fourth Circuit found that the Forest Service failed to resolve concerns that the agency had expressed regarding Atlantic's Soil Erosion and Sedimentation Modeling Report, which addressed sedimentation impacts in the national forests. *See, e.g.*, *Cowpasture*, 911 F.3d at 176; *see also* EIS 4-128 to 4-129, 4-240, JA ___-__, ___ (discussing Forest Service concerns). The Fourth Circuit vacated and remanded the Forest Service permits, requiring on remand that the Forest Service either explain how its concerns were satisfied or conduct any

necessary supplemental environmental analysis. *Cowpasture*, 911 F.3d at 176, 179.

Cowpasture does not support reversal of the FERC certificate orders challenged here. This Court recently recognized in *Appalachian Voices* (on review of the Commission's Mountain Valley pipeline orders) that vacatur of a Forest Service permit based upon, in part, that agency's NEPA analysis of sedimentation impacts, "had no bearing on the validity of [a FERC] certificate under the Natural Gas Act." 2019 WL 847199, at *1 (Commission's certificate "did not hinge" on the Forest Service permit that was vacated in *Sierra Club*, 897 F.3d at 596).

As in *Appalachian Voices*, the FERC certificate here did not authorize construction in the national forests. Rather, the certificate was conditioned upon Atlantic receiving necessary permits from the Forest Service for the portion of the proposed pipeline crossing the national forests. *See* Environmental Condition 10, JA ___ (requiring receipt of all applicable federal authorizations prior to commencing construction). This Court has repeatedly recognized that the Commission may issue certificates conditioned upon subsequent receipt of other governmental agency permits necessary to pipeline construction. *See* Rehearing Order P 92, JA ___ (citing, *e.g.*, *Del. Riverkeeper*, 857 F.3d at 397-99 (certificate

conditioned on receipt of Clean Water Act permit)); *see also, e.g.*, *Myersville*, 783 F.3d at 1319 (certificate conditioned on receipt of Clean Air Act permit).

Indeed, the Fourth Circuit in *Cowpasture*, 911 F.3d at 160, exercised exclusive jurisdiction over the Forest Service's permits under section 19(d)(1) of the Natural Gas Act, 15 U.S.C. § 717r(d)(1), which provides for exclusive appellate jurisdiction over permitting decisions by agencies other than the Commission in the circuit in which the natural gas facility is to be constructed. *See Sierra Club*, 897 F.3d at 589.

Accordingly, review of the Forest Service's permit to construct pipeline facilities in the national forest—including the adequacy of the environmental analysis underlying that permit—properly proceeded in the Fourth Circuit, and may not be re-litigated here.[7] *See, e.g.*, *City of Rochester v. Bond*, 603 F.2d 927, 937 (D.C. Cir. 1979) ("all issues concerning the lawfulness of an order subject to statutory review must be raised in the statutory proceeding," including NEPA challenges); *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) ("Because the Natural Gas Act places export decisions squarely and exclusively within the

[7] Indeed, all petitioners in the *Cowpasture* appeal are also Conservation Petitioners here. *See* 911 F.3d at 150 (listing petitioners Cowpasture River Preservation Association, Highlanders for Development, Shenandoah Valley Battlefields Foundation, Shenandoah Valley Network, Sierra Club, Virginia Wilderness Committee, and Wild Virginia, Inc.).

Department of Energy's wheelhouse, any such challenges to the environmental analysis of the export activities themselves must be raised in a petition for review from the Department's decision to authorize exports").

2. Karst Terrain

Karst features, such as sinkholes, caves, and caverns, form as a result of the long-term action of groundwater on subsurface soluble carbonate rocks (e.g., limestone and dolostone). Certificate Order P 205, JA ___. Atlantic crosses 71 miles of karst terrain in West Virginia and Virginia. *Id*. While Conservation Petitioners allege that the Commission ignored potential impacts of the Atlantic project on karst terrain (Conservation Br. 30), the Commission to the contrary thoroughly considered potential karst impacts. *See* Certificate Order PP 205-206, 214-15, JA ___-__, ___-__; Rehearing Order PP 249-57, JA ___-__; EIS at ES-4, 4-7 to 4-22, 4-95 to 4-97, 4-176 to 4-178, JA ___, ___-__,___ -__, ___-__.

a. Identification of Karst Features

Conservation Petitioners assert that the Commission failed to adequately identify karst features and systems. Conservation Br. 30. They are wrong. In developing plans to avoid, minimize, and mitigate karst impacts, Atlantic consulted with applicable state and local governmental agencies and conducted extensive analyses of geologic conditions in the project area. Rehearing Order P 253, JA ___ (citing Environmental Statement at ES-4, JA ___); *see also* Certificate Order

P 205, JA ___, and EIS 4-10, JA ___ (noting that Atlantic engaged engineering firm to conduct desktop data review and field survey to identify karst features near proposed pipeline).

Based upon the data review and field surveys, as well as reports and correspondence from stakeholders, the Environmental Statement identified karst conditions along the pipeline route. The Commission also imposed additional measures concerning karst identification. Certificate Order P 206, JA ___. Environmental Condition 26, JA ___, required Atlantic to use subsurface analysis and Light Imaging, Detection, and Ranging data[8] to construct digital terrain models. Rehearing Order P 251, JA ___; Certificate Order P 206, JA ___. Environmental Condition 26 also required that Atlantic complete a Fracture and Dye Trace study[9] to further identify karst features along the project route and to characterize groundwater flow conditions from construction workspaces. Rehearing Order PP 251-52, JA ___-__; Certificate Order P 206, JA ___. In

[8] Light Imaging, Detection, and Ranging, or LiDAR, is a remote sensing method used to examine the surface of the Earth, often used to develop 3-dimensional images or maps of Earth features. Certificate Order n.294, JA ___.

[9] Dye tracing studies encompass a wide variety of techniques that can be used to track or model groundwater flow. In groundwater karst systems, it can be effective in determining connectivity of underground systems or pathways of groundwater flow. Certificate Order n.295, JA ___.

addition, an Atlantic karst specialist would inspect the right-of-way and document any suspected karst features prior to construction. EIS 4-18, JA ___.

While the results of the Fracture and Dye Trace study were not available at the time of the Environmental Statement (Conservation Br. 30), this does not mean that the Environmental Statement was insufficient. Rehearing Order P 253, JA ___. Atlantic had already conducted extensive analyses of geological conditions. *Id*. Atlantic further was required to submit the Fracture and Dye Trace study before commencing construction, and the Commission examined the results of that study in the Rehearing Order. *Id*. Thus, as the Commission found, the Environmental Statement sufficiently identified potential issues resulting from construction in karst terrain; the additional study offered further and more site-specific detail of features located on the pipeline route. *Id*. P 254, JA ___.

Also, recognizing that subsurface karst features, such as caves and sinkholes, can exist without any surface expression, the Commission noted that Atlantic will perform a special study using electrical resistivity imaging to detect subsurface features prior to construction. Rehearing Order P 256, JA ___ (citing EIS 4-18, JA ___). The Commission found this process sufficient to ensure that karst features along the pipeline route would be properly identified, surveyed, mapped, and subsequently addressed consistent with Atlantic's *Karst Terrain Assessment, Construction, Monitoring and Mitigation Plan* ("*Karst Mitigation Plan*"). *Id*.

b. Mitigation of Karst Impacts

Conservation Petitioners argue that the Commission failed to assure adequate mitigation of karst impacts. Conservation Br. 30. As the Commission found, however, Atlantic's *Karst Mitigation Plan* includes best management practices that will minimize impacts to the karst environment. Rehearing Order P 250, JA ___ (listing best practices); Certificate Order P 206, JA ___ (agreeing with Virginia Department of Conservation and Recreation that "strict adherence to the *Karst Mitigation Plan* is essential to minimizing impacts on sensitive karst areas); *see also* EIS 4-17 to 4-20, JA ___-__ (listing measures identified in the *Karst Mitigation Plan*).

In addition, Environmental Condition 29 required Atlantic to revise its *Karst Mitigation Plan* to include post-construction monitoring using Light Imaging, Detection, and Ranging data to ensure pipeline integrity and safety in karst areas. Rehearing Order P 251, JA ___; Certificate Order P 206, JA ___. Environmental Conditions 62 through 64 required Atlantic to complete further studies and to minimize impacts on site-specific karst features, to coordinate with the Virginia Department of Conservation and Recreation, and to adhere to the Virginia Cave Board's karst assessments. Rehearing Order P 251, JA ___; Certificate Order P 206, JA ___. During construction, Atlantic will employ a karst specialist to

monitor karst features identified along the right-of-way and assess potential impacts and whether mitigation measures would be required. EIS 4-18, JA ___.

Accordingly, the Commission reasonably concluded that the *Karst Mitigation Plan*, along with the Commission's additional required measures, would sufficiently mitigate karst impacts. Certificate Order P 206, JA ___. As noted in the Environmental Statement, the Virginia Department of Conservation and Recreation and the Virginia Cave Board endorsed the *Karst Mitigation Plan* and indicated that the included measures would reduce the potential risk posed to karst resources. *Id*. (citing EIS 4-177, JA ___).

The Commission further rejected arguments (Conservation Br. 30) that the Commission failed to protect groundwater supplies in karst regions. Rehearing Order P 257, JA ___. To minimize impacts on wells, springs, and karst-related groundwater, Atlantic will implement the erosion control measures in its *Karst Mitigation Plan*, as well as the measures in the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan*. Certificate Order P 214, JA ___. Atlantic was required to file field surveys for wells and springs within 150 feet of construction workspace and within 500 feet of construction workspace in karst terrain prior to construction. Rehearing Order P 257, JA ___ (citing Certificate Order PP 213-15, JA ___-__; EIS 4-80, JA ___).

Additionally, Environmental Condition 68, JA ___, requires that Atlantic offer post-construction testing of water supplies to all landowners within 150 feet of construction workspace (500 feet in karst terrain). Certificate Order P 215, JA ___. Environmental Condition 9, JA ___, requires Atlantic to develop a complaint resolution procedure. Certificate Order P 215, JA ___. Where project-related construction damages the quantity or quality of water supplies, Atlantic will compensate the landowner for damages, repair or replace the water systems to pre-construction conditions and provide temporary sources of water. *Id*.

3. Gardner Spring

Amicus City of Staunton asserts that the Commission failed adequately to analyze the risk of contamination to Gardner Spring due to construction in the surrounding karst terrain. Amicus Brief of City of Staunton and Nelson County (Staunton/Nelson Amic. Br.) 17-18, 23-24. Petitioners did not raise this issue, and, accordingly, it should not be considered by the Court. *See, e.g.*, *EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) ("amici's identification of additional possible environmental impacts they claim were not adequately considered by the Commission are not properly before the court").

In any event, Staunton's arguments are without merit. As discussed above, the Commission reasonably concluded that Atlantic adequately had identified and had plans to mitigate project impacts on karst terrain, including impacts on

groundwater and springs. *See* Argument section III.B.2.b. That the Environmental Statement did not individually discuss Gardner Creek (Staunton/Nelson Amic. Br. 23-24), does not make the Environmental Statement deficient. The Environmental Statement identified baseline conditions for all relevant resources. Rehearing Order P 107, JA ___. "Practicalities" require the issuance of orders before completion of certain reports and studies for a large project such as this. *Id*. It is reasonable for the Environmental Statement to deal with sensitive locations in a general way, leaving specifics of certain resources for later exploration. *Id*. Accordingly, post-certification studies—such as the 2018 Fracture and Dye Trace study—may properly be used to develop site-specific mitigation measures. *Id*. The Commission must assure that the certificate holder will undertake appropriate mitigation measures to address impacts that are identified during construction. *Id*. Here, the Commission fully complied with its NEPA obligations with respect both to the identification of and mitigation of impacts to karst features and to the pre-construction identification and post-construction monitoring of potentially affected groundwater, including springs. *See* Argument section III.B.2.b.

4. Landslide Concerns

Wintergreen and Amicus Nelson County (the Wintergreen Resort is located in Nelson County, Virginia) challenge the Commission's assessment of landslide risks from construction on steep slopes. Wintergreen Br. 16-19; Staunton/Nelson

Amic. Br. 25-26. However, neither may seek review on this issue. Before the agency, Wintergreen did not seek rehearing concerning the Commission's assessment of landslide risks. *See* R. ___, JA ___-___; R. ___, JA ___-___. Although the Commission addressed certain arguments concerning landslide risks in the challenged orders, Wintergreen "cannot preserve an objection indirectly." *Office of Consumers Counsel v. FERC*, 914 F.2d 290, 295 (D.C. Cir. 1990); *see also Ameren Servs. Co. v. FERC*, 893 F.3d 786, 793 (D.C. Cir. 2018) (parties seeking judicial review of Commission orders "must first petition for rehearing of those orders and must themselves raise in that petition all of the objections urged on appeal") (internal quotation marks and citation omitted). And Nelson County, as an amicus, may not put the issue before the Court. *See EarthReports*, 828 F.3d at 959.

In any event, the challenged orders adequately analyzed landslide risks in Nelson County. *See* Rehearing Order PP 182-83, JA ___-__ (rejecting Friends of Nelson arguments that the Environmental Statement inadequately evaluated risks in Nelson County). The Commission recognized that the Atlantic pipeline route would cross some areas with steep slopes and high susceptibility to landslides, Certificate Order P 203, JA ___, including Nelson County. EIS 4-27, 4-30, JA ___, ___. Atlantic used a Geohazard Analysis Program, which included aerial photographs, Light Imaging, Detection, and Ranging imagery, and aerial and

ground reconnaissance (EIS 4-27, JA ___), to identify areas along the Atlantic mainline that may be susceptible to landslides and routed the pipeline to avoid such areas where possible. Rehearing Order P 186, JA ___ (citing EIS 4-28, JA ___). The Commission found those measures reasonable. *Id*.

To minimize impacts from construction over steep terrain, Atlantic committed to use a *Best in Class Steep Slope Management Program* with specialized techniques when constructing on steep slopes. Certificate Order PP 203-204, JA ___; Rehearing Order P 224, JA ___; EIS 4-29, JA ___. Atlantic also would implement the *Slip Avoidance, Identification, Prevention and Remediation – Policy and Procedure* to avoid, minimize, and mitigate potential landslide issues in slip prone areas prior to, during, and after construction. Certificate Order P 203, JA ___; Rehearing Order P 224, JA ___. Atlantic also adopted the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan*, which contains specific erosion control measures. Rehearing Order PP 224, 226, JA ___, ___. Further, the Commission required that Atlantic provide all geotechnical studies and mitigation regarding steep slopes pursuant to Environmental Condition 51 prior to proceeding with project construction. *Id.* P 187, JA ___. The Commission found that these requirements would avoid or minimize impacts to soils located on steep slopes and on streams located on or

below these slopes. Rehearing Order P 224, JA ___ (citing Certificate Order P 204, JA ___; EIS 5-1, JA ___).

The Commission rejected arguments (*see* Staunton/Nelson Amic. Br. 25-26) that the required mitigation measures had not been shown to be effective. Rehearing Order PP 189, 228, JA ___, ___. Mitigation measures are sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as when they are mandatory conditions. *Id*. (citing *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997); *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993)); *see also Bordentown*, 903 F.3d at 259 (upholding FERC mitigation measures based, in part, on agency oversight and reporting requirements).

The Commission's *Upland Erosion Plan* and procedures were developed in consultation with multiple state agencies and updated based on 25 years of Commission staff field experience. Rehearing Order P 228, JA ___. The *Steep Slope Management Program* was developed based on results of the Geohazard Analysis Program, which identified steep slopes along the project route, and utilized mitigation measures from an industry-developed mitigation methodology. *Id*. (citing EIS 4-28 to 4-29, JA ___-__).

Further, during construction and restoration, Atlantic must employ environmental inspectors to ensure compliance with the construction standards and other certificate conditions. *Id*. (citing EIS 2-51 to 2-53, JA ___-__) (describing roles and responsibilities of environmental inspectors). FERC staff also will conduct periodic compliance inspections. *Id*. (citing EIS 2-53, JA ___) (discussing the Commission's compliance monitoring program). Atlantic also will employ a third-party contractor as a compliance monitor that will provide daily reports to FERC staff on compliance issues. EIS 2-53, JA ___.

Because mitigation measures are mandatory and a program exists to monitor and enforce those measures, the adequacy of those measures is supported by substantial evidence. Rehearing Order P 228, JA ___ (citing *Nat'l Audubon Soc'y*, 132 F.3d at 17). Additional information gathering and refinement of mitigation plans occurring during the post-certificate, pre-construction period is not essential to the certificate issuance decision, but rather will enable the certificate holder to better develop and implement the required mitigation plans. *Id*. P 185, JA ___.

On brief, Wintergreen claims that Atlantic failed to prepare a "site-specific stabilization design" in response to its request. Wintergreen Br. 19 (citing Rehearing Order P 194, JA ___). However, the Rehearing Order does not indicate that Wintergreen (which did not seek rehearing on landslide risks) made any such request. (Paragraph 194 of the Rehearing Order refers to Commission staff's

response to comments concerning landslide risks by William Limpert, a Bath County landowner, in which Commission staff noted that Atlantic and Dominion will implement "site-specific measures, where warranted, to address land movement, surface erosion, backfill erosion, general soil stability when backfilling the trench, and restoring the rights-of-way in steep slope areas." JA ___.)

Finally, Wintergreen errs in relying on *Cowpasture*, 911 F.3d at 174, as a basis for challenging the Commission's landslide risk assessment. *See* Wintergreen Br. 18-19. As discussed in section III.B.1 above, the Fourth Circuit's recent decision in *Cowpasture* does not supply a basis for overturning the Commission's determinations here. *Cowpasture* concerned the Forest Service's authorization of pipeline construction in national forests, where the Forest Service expressed the view that site-specific stabilization plans were necessary for certain locations to evaluate landslide risks relevant to its decision, but nevertheless authorized construction without such plans. 911 F.3d at 173-76. As discussed previously, the Commission's certificate did not authorize construction in national forests, and indeed, was conditioned upon Atlantic receiving necessary permits from the Forest Service for national forest crossings.

5. Safety Concerns Raised by Wintergreen

Wintergreen contends that the Commission failed to adequately address safety risks related to potential pipeline emergencies, especially near the single

access road leading to the Wintergreen Resort community. Wintergreen Br. 6-8, 19-20. But the Commission was sensitive to Wintergreen's safety concerns and took the required "hard look" at pipeline safety issues. *See Sierra Club*, 867 F.3d at 1376 (NEPA satisfied where Commission recognized and discussed pipeline risks); *City of Boston*, 897 F.3d at 254 (Commission must assess safety concerns in determining whether a project is in the "public interest" under the Natural Gas Act). After careful assessment, the Commission reasonably concluded, based on applicable federal regulatory requirements and site-specific safety measures it imposed, that the pipeline could be operated safely near the Wintergreen Resort area, with "only a slight increase in risk to the nearby public," Certificate Order P 277, JA ___; *see also* Rehearing Order PP 195-97, JA ___-___; EIS 4-586, JA ___.

Contrary to Wintergreen's contention (Wintergreen Br. 18), the Commission did not rely merely on "generic statistics on the frequency of pipeline explosions" in concluding that the pipeline could be sited safely in the vicinity of the Wintergreen Resort. Rather, the Environmental Statement extensively discussed the application of regulations issued by the Department of Transportation Pipeline and Hazardous Materials Safety Administration ("Pipeline Safety Administration"), i.e., federal standards established to "ensure the safe transportation of natural gas and other hazardous materials by pipeline." EIS 4-

578 to 4-585, JA ___-___. Atlantic will be "designed, constructed, operated, and maintained" consistent with these federal standards. *Id.* at 4-578, JA ___. In accordance with these regulations, the pipeline will be regularly inspected, with physical inspections of the pipeline corridor, valves and compressor engines, and fly-over inspections of the right-of-way as required. *Id.* at 4-584, JA ___.

Moreover, Atlantic will implement safety measures beyond those required by federal regulation, including installing special "cathodic protection" along the entire length of new pipeline to prevent pipeline corrosion, and conducting "24 hours a day, 7 days a week" systems monitoring through "sophisticated computer and telecommunications equipment" capable of "detect[ing] pressure drops along the pipelines and stop[ping] the flow of gas to the problem area by isolating sections along the pipe." *Id.*

In addition, the Environmental Statement addressed emergency response preparations relating to Wintergreen's single access road. EIS 4-584 to 4-585, JA ___-__; *see also id.* at 4-583, JA ___ (describing emergency plans mandated by the Pipeline Safety Administration). Consistent with Pipeline Safety Administration requirements, and in coordination with local emergency response providers, Atlantic must prepare operational emergency response plans to address "incident evacuation requirements." *Id.* at 4-585, JA ___. In the event of an emergency, Atlantic would coordinate with landowners and local emergency

response services to implement the emergency response plans. *Id.* And in a situation where ingress and egress may be adversely affected, Atlantic would implement "temporary measures . . . to ensure continued ingress and egress for landowners." *Id.*

The Environmental Statement noted that Atlantic was "currently meeting with local emergency planning committees" (including fire departments, police departments, and public officials) to develop the emergency response plans, and would provide additional information to those committees in support of the plans prior to completion of pipeline construction. *Id.* at 4-584, JA ___. In addition, Atlantic will maintain ongoing communications with fire, police, and public officials regarding pipeline safety issues. *Id.* at 4-585, JA ___.

The Commission reasonably incorporated these measures into its safety assessment. *See EarthReports*, 828 F.3d at 958-59 (upholding Commission's public safety determination concerning natural gas facility, based in part on operator's "compliance with relevant federal, state, and local requirements" and "future coordination" with federal and local agencies). Contrary to Wintergreen's argument (Wintergreen Br. 20), the actual plans did not need to be submitted prior to the Commission's authorization. *See id.; see also Murray Energy Corp.*, 629 F.3d 231, 240 (D.C. Cir. 2011) ("FERC's repeated declarations that [the pipeline] must comply with [Pipeline Safety Administration] requirements indicate that

FERC took seriously—and addressed—the need for post-construction mitigation measures."); *see also Town of Weymouth, Mass. v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018) (unpublished) (upholding Commission's reliance on pipelines' commitments to comply with federal safety regulations).

C. The Commission Reasonably Assessed the Project's Effects on Minority Environmental Justice Communities

Executive Order No. 12,898 requires designated federal agencies to "identify[] and address[], as appropriate, any disproportionately high and adverse human health or environmental effects of [the agencies'] programs, policies, and activities on minority populations and low-income populations." Executive Order No. 12,898, § 1-101, 59 Fed. Reg. 7629 (Feb. 11, 1994); *see also Sierra Club*, 867 F.3d 1368-79. The Commission is not one of the federal agencies subject to the Executive Order. Executive Order No. 12,898, §§ 1-102, 6-604. However, explaining that it takes environmental justice issues "very seriously," the Commission addressed whether minority and low-income populations would experience disproportionately high and adverse impacts from the Project. Certificate Order PP 253-57, JA ___-___; Rehearing Order PP 301-16, JA ___-___; *see also* EIS 4-511 to 4-515, JA ___-___. The Commission's voluntary environmental justice analysis is subject to "arbitrary and capricious" review under the Administrative Procedure Act. *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

The Commission observed that the "primary adverse impacts" on environmental justice communities would be "temporary increases in dust, noise, and traffic from project construction," and such impacts "would occur along the entire pipeline route and in areas with a variety of socioeconomic background[s]." Certificate Order P 255, JA ___. The Commission recognized, however, that African American populations near the Project could experience disproportionate health impacts due to higher rates of asthma within the overall African American community. Rehearing Order PP 312-13, JA ___-___; EIS 4-514, JA ___.

But the Commission concluded that the Project "will not result in disproportionately high and adverse impacts on environmental justice populations as a result of air quality impacts, including impacts associated with the proposed [Buckingham County compressor station]." Rehearing Order P 313, JA ___. In light of mitigation measures, health impacts related to construction dust would be "temporary, localized, and minor." *Id.*; EIS 4-514, JA ___ (describing measures to control fugitive dust). Health impacts related to compressor station emissions would be "moderate," because emissions would remain within regulatory levels set by the Environmental Protection Agency. Rehearing Order P 313, JA ___.

Conservation Petitioners, supported by Amici Earth Ethics, *et al*. ("Earth Ethics"), contend that the Commission's methodology for identifying minority

populations—which relies on U.S. Census Bureau census tract data[10]—failed to identify certain minority populations in the Project vicinity. Conservation Br. 31-34; Earth Ethics Amic. Br. 12. They also challenge the Commission's finding that identified minority populations would not suffer disproportionately high and adverse impacts from compressor station emissions. Conservation Br. 35; Earth Ethics Amic. Br. 18-27. These objections lack merit.

1. The Commission Reasonably Identified and Addressed Potential Impacts on Minority Environmental Justice Communities

According to Conservation Petitioners, the Commission's use of census tract data—rather than more localized demographic data—resulted in Union Hill, an 80 percent African American/biracial neighborhood in Buckingham County, Virginia, not being designated as a minority environmental justice community. Conservation Br. 31-32. This Court recently rejected a substantially similar objection to the Commission's environmental justice analysis as one that "elevates form over substance." *See Sierra Club*, 867 F.3d at 1370 (rejecting argument that Commission's reliance on census tract data resulted in a "100 [percent] African

[10] "Census tracts are small, relatively permanent statistical subdivisions of a county" with a minimum population of 1,200 and a maximum population of 8,000 (4,000 inhabitants, on average). Census Tracts, Geographic Products Branch, U.S. Census Bureau, *available at* https://www2.census.gov/geo/pdfs/education/CensusTracts.pdf.

American census block" within a larger census tract not being designated as an environmental justice community).

As in *Sierra Club*, although the Commission did not specifically designate Union Hill as an environmental justice community, the Commission nevertheless recognized African American communities near the proposed Buckingham County compressor station—including Union Hill—and analyzed potential health impacts on those communities. *See, e.g.*, Rehearing Order P 304, JA ___ (Commission staff directed Atlantic to re-examine properties near the Buckingham County compressor station in light of letters and comments regarding the Union Hill and Union Grove neighborhoods); Certificate Order PP 255-57, JA ___-___ (Environmental Statement analyzed potential impacts of Buckingham County compressor station on African American communities, even though none of the three census tracts within one mile of the compressor station was designated as a minority environmental justice population); *see also* EIS Z-741, JA ___ (FERC staff comments on letter from churches in Union Hill and Union Grove).[11]

[11] Contrary to Conservation Petitioners' suggestion (Conservation Br. 31-32), the Commission did not reject Midland Road as an alternative site for the Buckingham County compressor station based on any conclusion that Union Hill is not a minority environmental justice population. The Commission reasonably rejected Midland Road as an alternative location because, while the environmental impacts of the Buckingham County site and the alternative Midland Road site are "similar," the Midland Road site "would require additional pipeline and would increase the construction footprint" of the pipeline. EIS 3-58 to 3-59, JA ___-___.

Likewise, although certain American Indian populations in North Carolina may not have met the threshold test for a minority environmental justice population, the Commission addressed concerns regarding American Indian tribes. Rehearing Order PP 203, 205, JA ___, ___.

Conservation Petitioners also argue that the Commission unreasonably compared census tract data to county data for minority populations, while comparing census tract data to state-wide data for low-income populations. Conservation Br. 34. But the Commission does not rely on a single comparison test to identify minority environmental justice populations. For low-income populations, the Commission employed a straightforward comparison between the percentage of persons living in poverty in a given census tract versus the state in which the tract is located. EIS 4-512, JA ___. However, the Commission identified a racial or ethnic minority population when *either* (1) the percentage of minorities in a census tract is "meaningfully greater" (i.e., at least 10 percentage points more, EIS 4-512, JA ____) than in the county in which the census tract is located, or (2) the total minority population in a given census tract is more than 50 percent of the census tract's population. EIS 4-512, JA ___, and App. U, JA ___-___ (setting out racial and economic characteristics of the 136 census tracts within one-mile radius of the Project).

This two-pronged approach provides an additional safeguard over the single-prong test for low-income populations. *See* Rehearing Order P 306, JA ___. In any event, the Commission's minority environmental justice analysis is consistent with *Sierra Club*, 867 F.3d at 1368-71, and agency precedent. *See, e.g.*, *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244, P 149 (2014) (comparing census tract demographics to county demographics); *Dominion Energy Cove Point LNG, LP*, 162 FERC ¶ 61,056, P 98 (2018) (addressing project-related impacts where percentage of minorities in a certain census tract was "meaningfully greater" than the county-wide percentage). Neither Environmental Protection Agency guidance nor *Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 541 (8th Cir. 2003) (cited at Conservation Br. 34), compels a different conclusion. Indeed, Environmental Protection Agency guidance confirms that the Commission appropriately compared the minority population in a census tract to the minority population at the county level, i.e., the next larger geographic area. *See* EPA, Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses, § 2.1.1, *available at* https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf ("[A] simple demographic comparison to the next larger geographic area or political jurisdiction should be presented to place population characteristics in context . . . .") (cited at Rehearing Order P 306 & n.856, JA ___).

Earth Ethics argues that certain changes to the Commission's methodology would have produced a "more rigorous environmental justice analysis." *E.g.*, Earth Ethics Am. Br. 4, 12. Earth Ethics contends, for example, that the Commission should have weighted census tracts by population size to account for differences in population (*id.* at 4, 12), and also faults the Commission for defining the "meaningfully greater" threshold for identifying minority populations in some cases as "ten percentage points" and in other cases as "ten percent" (*id.* at 10 & n.4). These arguments were not raised by petitioners, and, thus, are not properly before the Court. *See, e.g.*, *EarthReports*, 828 F.3d at 959. Nor were these arguments raised to the Commission on rehearing, and thus, they are also barred under 15 U.S.C. § 717r(b). In any case, as discussed above, the Commission's approach was reasonable, even if it differed from what petitioners and amici would have preferred. *See Sierra Club*, 867 F.3d at 1370.

2. The Commission Reasonably Found that Environmental Justice Communities Would Not Experience Disproportionately High or Adverse Impacts from the Project

Conservation Petitioners challenge the Commission's reliance on the Environmental Protection Agency's National Ambient Air Quality Standards in concluding that the Project will not have disproportionately high and adverse air quality impacts on minority environmental justice populations. Conservation Br. 35 (citing EIS 4-514, JA ___). According to Conservation Petitioners, "whether a

polluting facility meets permitting requirements is distinct from whether it has a disproportionately high and adverse effect on environmental justice populations." Conservation Br. 35.

But this Court has found that the Commission may rely on the EPA's national ambient air quality standards "as a standard of comparison for air-quality impacts." *Sierra Club*, 867 F.3d at 1370 n.7; *see also City of Boston*, 897 F.3d at 255 (agency may reasonably rely on expertise of another federal agency). The Environmental Protection Agency established these standards to protect human health and public welfare, including sensitive subpopulations (e.g., asthmatics, children, and the elderly). Rehearing Order PP 313-14, JA ___-___. Moreover, as the Commission noted, Virginia and North Carolina have adopted these national standards. *Id.* P 314, JA ___.

The Commission took seriously concerns regarding potential health impacts on minority and low-income communities. *See Sierra Club*, 867 F.3d at 1368-71. Because the Commission reasonably—and voluntarily—considered the environmental justice issues raised by the Project, the Commission's analysis should be upheld.

D. The Commission Reasonably Assessed Downstream Greenhouse Gas Emissions

1. The Commission's Analysis of Downstream Indirect Impacts Fully Complied with NEPA

The Commission took the same approach here in analyzing the Project's greenhouse gas impacts, including emissions and climate change impacts associated with downstream combustion of Project-transported gas, as that recently upheld by this Court in *Appalachian Voices*, 2019 WL 847199, at *2: (1) the Commission quantified the direct and indirect greenhouse gas impacts from construction and operation of the Project (Rehearing Order P 261 & n.715, JA ___; EIS 4-556 to 4-559, JA ___-___); (2) quantified the upper bound limits of greenhouse gas emissions that may result from downstream combustion of gas transported over the Project (Rehearing Order P 263, JA ___; Certificate Order PP 296-98, JA ___-___; EIS 4-618 to 4-622, JA ___-___); and (3) discussed potential climate change impacts associated with Project emissions (Rehearing Order PP 269-75, JA ___-___; EIS 4-618 to 4-622, JA ___-___).

Unlike petitioners in *Appalachian Voices* (*see* 2019 WL 847199, at *2), Conservation Petitioners' opening brief does not challenge the Commission's finding that, in this case, an estimate of downstream consumption-related emissions is not required by NEPA, because downstream emissions are not causally connected to the Project, and thus, do not constitute indirect effects of the

Project. *See* Certificate Order P 304, JA ___ (citing EIS 4-620, JA ___); Rehearing Order P 263 n.719, JA ___ (citing *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, PP 41-44 (2018), *pet. for review dismissed for lack of jurisdiction sub nom. Otsego 2000 v. FERC*, No. 18-1188, 2019 WL 2157894 (D.C. Cir. May 9, 2019) (unpublished)). Because Conservation Petitioners do not challenge the Commission's finding on indirect effects, any objection is waived. *See*, *e.g.*, *CC1 Ltd. P'ship*, 898 F.3d at 35; *Power Co. of Am.*, 245 F.3d at 845.

Even if Petitioners had not waived this argument, the Court need not consider causation and reasonable foreseeability issues because here, as in *Appalachian Voices*, the Commission provided an upper bound estimate of the greenhouse gas emissions that could result from end-use combustion of the Project's maximum capacity (approximately 30 million metric tons per year of carbon dioxide equivalent). Certificate Order P 298, JA ___; Rehearing Order P 280, JA ___; EIS 4-621, JA ___; *see* also *Appalachian Voices*, 2019 WL 847199, at *2 (Court "need not consider" argument concerning causation and reasonable foreseeability, "because even if petitioners are correct, FERC provided an estimate of the upper bound of emissions resulting from end-use combustion").

This upper bound estimate was conservative, as it did not account for Project gas displacing other fuels, such as coal, which is "widely used" in the Project region. Certificate Order P 298, JA ___; EIS 4-620, JA ___. Moreover,

approximately 79 percent of the Project's capacity would be used as fuel to generate electricity, and "[b]ecause natural gas emits less [carbon dioxide] compared to other fuel sources (*e.g.*, fuel oil or coal), it is anticipated that the eventual consumption of the distributed gas to converted power plants would reduce current [greenhouse gas] emissions, thereby potentially offsetting some regional [carbon dioxide] emissions." EIS 4-621, JA ___.

As in *Appalachian Voices*, to provide additional context, the Commission examined regional and national greenhouse gas emissions and determined that combustion of all the gas transported by the Project would, at most, increase greenhouse gas emissions regionally by 5.2 percent, and nationally by 0.56 percent. Certificate Order P 305, JA ___; EIS 4-620, JA ___; *see also Sierra Club*, 867 F.3d at 1374 ("Quantification would permit the agency to compare" project emissions to "total emissions from the state or the region, or to regional or national emissions-control goals"); *Weymouth*, 2018 WL 6921213, at *2 (affirming Commission's consideration of greenhouse gas emissions because it quantified those emissions and compared them to regional climate change goals). Moreover, the Environmental Statement qualitatively described how greenhouse gases occur in the atmosphere, their connection to climate change, and potential cumulative impacts of climate change in Project areas. *See* EIS 4-618 to 4-620, JA ___-___; *see also* Certificate Order P 306, JA ___ ("acknowledg[ing] that [Project]

emissions would increase the atmospheric concentration of [greenhouse gases], in combination with past and future emissions from all other sources, and contribute incrementally to climate change").

Also, as in *Appalachian Voices*, the Commission concluded that it could not determine whether the Project's contribution to climate change would be significant in the NEPA context. Rehearing Order PP 278-81, JA ___-__; *see also* EIS 4-620, JA ___ (explaining that there is "no scientifically-accepted methodology available to correlate specific amounts of [greenhouse gas] emissions to discrete changes in average temperature rise, annual precipitation fluctuations, surface water temperature changes, or other physical effects on the environment"); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (rejecting challenge to environmental impact statement that did not specify global impacts that would result from additional emissions).

2. The Commission Reasonably Declined to Use the Social Cost of Carbon Tool to Monetize Impacts from Greenhouse Gas Emissions

The Commission reasonably explained why it declined to use the Social Cost of Carbon tool to assess the significance of impacts associated with the Project's estimated greenhouse gas emissions. *See* Conservation Br. 38-41.

The Social Cost of Carbon tool seeks to estimate the monetized climate change damage associated with an incremental increase in carbon dioxide

emissions in a given year. Rehearing Order P 277 & n.753, JA ___ (citing *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233 (2018), *reh'g denied*, 164 FERC ¶ 61,099 (2018)). It can be thought of as the cost today of future climate change damage, represented as a series of annual costs per metric ton of emissions discounted to a present-day value. *Fla. Se.*, 162 FERC ¶ 61,233, P 30. Although recognizing that this tool was available, the Commission determined that it would not meaningfully inform the Commission's project-level NEPA review for three reasons: (1) as the Environmental Protection Agency has explained, no consensus exists on the appropriate discount rate to use for analyses spanning multiple generations, so results may vary significantly, projecting widely different present day costs;[12] (2) the tool does not measure a project's actual incremental impacts on the environment; and (3) there are no established criteria identifying the monetized values that should be considered significant for NEPA purposes. Certificate Order P 307, JA ___; Rehearing Order PP 276-81, JA ___-___.

These are the same reasons the Commission gave in declining to use the Social Cost of Carbon tool in *Appalachian Voices*, and on remand from this

[12] For example, footnote 9 of the amicus brief for Institute for Policy Integrity at New York University School of Law ("Policy Integrity Amic. Br.") sets out a range of values for Project emissions ranging from $12 per ton to $123 per ton. Applying this range to the upper bound estimate of 30 million tons of downstream emissions from project-transported gas results in a range of cumulative damages from $360 million to $3.69 billion.

Court's 2017 *Sierra Club* decision. *See Mountain Valley*, 163 FERC ¶ 61,197, PP 275-97; Rehearing Order P 277 & n.753, JA___ (citing *Fla. Se.*, 162 FERC ¶ 61,233 PP 30-51). As the Court explained in upholding the Commission's determination in *Appalachian Voices*, the Commission "gave several reasons why it believed . . . the Social Cost of Carbon tool is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes." *Appalachian Voices*, 2019 WL 847199, at *2. The Court upheld this same rationale in *EarthReports*, 828 F.3d at 956.

Conservation Petitioners point to two cases faulting agencies for failing to use the Social Cost of Carbon to value carbon emissions. Conservation Br. 39; *see also* Policy Integrity Amic. Br. 17-18, 26. As the Commission explained in *Florida Southeast*, 164 FERC ¶ 61,099, P 32, these inapposite cases addressed situations in which the agency monetized one side of a cost-benefit analysis without monetizing the off-setting effects of carbon emissions. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198-1201 (9th Cir. 2008) (agency monetized the costs of regulation establishing higher vehicle fuel-efficiency standards but not the off-setting benefits of carbon emission reductions); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1191 (D. Colo. 2014) (agency monetized benefits of proposed

mining exploration on federal land but not the off-setting costs of increased carbon emissions). While both cases acknowledged that the Social Cost of Carbon tool may result in a range of values, both courts ultimately found that—where an agency's determination is based on a monetized cost-benefit analysis—the agency is arbitrary and capricious in effectively assigning zero value to carbon emissions by failing to monetize them. *Ctr. For Biological Diversity*, 538 F.3d at 1200; *High Country*, 52 F. Supp. 3d at 1192.

In contrast, in determining whether a project is required in the public convenience and necessity, qualitative determinations are paramount, and the Commission does not employ a monetized cost benefit analysis. Rehearing Order P 281, JA ___; *Fla. Se.*, 164 FERC ¶ 61,099, P 32. The public convenience and necessity determination is based on "technical competence, financing, rates, market demand, gas supply, environmental impact, long-term feasibility, and other issues concerning a proposed project." *Fla. Se.*, 164 FERC ¶ 61,099, n.97. NEPA does not require that the Commission conduct a cost-benefit analysis, and in fact, Council on Environmental Quality regulations provide that such an analysis should not be conducted when there are important qualitative considerations. Rehearing Order P 281, JA ___ (citing 40 C.F.R. § 1502.23). In these circumstances, a monetized cost-benefit analysis under NEPA, particularly using the Social Cost of

Carbon, is inappropriate. *Fla. Se.*, 164 FERC ¶ 61,099, P 32; *see also Fla. Se.*, 162 FERC ¶ 61,233, PP 39-44.

Moreover, in this proceeding, the Environmental Protection Agency confirmed that the Social Cost of Carbon tool, which "no longer represents government policy," was developed to assist in the monetary cost-benefit analysis of rulemakings, and "was not designed for, and may not be appropriate for, analysis of project-level decision-making." Rehearing Order P 277, JA ___ (quoting Letter from Brittany Bolen, Associate Administrator, EPA Office of Policy, to FERC, FERC Dkt. No. PL18-1 (July 25, 2018) (noting that February 2010 Social Cost of Carbon estimates and documents developed by interagency working group have been withdrawn under Executive Order No. 13,783 (Mar. 28, 2017)).

Outside the context of a cost-benefit analysis, the Commission reasonably found that calculating the Social Cost of Carbon would not aid Commission decision-making or provide useful public information as there is no applicable standard of significance either for a given volume of greenhouse gas emissions or a given level or range of monetized damages under the Social Cost of Carbon tool. Rehearing Order PP 278-79, JA ___-__ (no standard established by international or federal policy, or recognized scientific body) (citing *Fla. Se.*, 162 FERC ¶ 61,233, P 26). Conservation Petitioners do not contest this point, but contend nonetheless

that FERC should have employed its "professional judgment" to make its own qualitative significance determination. Conservation Br. 40; s*ee also* Policy Integrity Amic. Br. 27. The Commission, however, reasonably concluded that, in the absence of a scientific or policy-based standard, it had no basis on which to make such a significance determination. Rehearing Order PP 278-79, JA ___-__; *see also Fla. Se.*, 162 FERC ¶ 61,233, P 51 (rejecting argument that, in the absence of established significance criteria, agencies are required by NEPA to assess significance on their own).

As in *Appalachian Voices* and *EarthReports*, Conservation Petitioners and Amicus Policy Integrity fail to provide an alternative methodology, apart from the unsupported Social Cost of Carbon tool, to assess the significance of greenhouse gas emissions. Accordingly, the Commission's reasonable conclusion should be affirmed. *See Appalachian Voices*, 2019 WL 847199, at *2 ("In the absence of any explanation as to how FERC should have considered adverse impacts from downstream greenhouse gas emissions . . . using something other than the Social Cost of Carbon, we have no basis for saying that FERC's treatment of the issue . . . was inadequate, unreasonable, or otherwise contrary to NEPA or the Natural Gas Act."); *EarthReports*, 828 F.3d at 956 ("Although petitioners take a different position [on the Commission's substantive reasons for not using the Social Cost of Carbon tool], they identify no [other] method . . . that the Commission could have

used. Hence, petitioners provide no reason to doubt the reasonableness of the Commission's conclusion.").

IV. THE COMMISSION APPROPRIATELY ADDRESSED EMINENT DOMAIN ISSUES

Natural Gas Act section 7(h), 15 U.S.C. § 717f(h), provides the holder of a FERC-issued certificate of public convenience and necessity the authority to obtain property needed to construct or operate the project through eminent domain. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) ("Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain.") (citing 15 U.S.C. § 717f(h)). Conservation Petitioners contend, nonetheless, that Atlantic could not properly exercise eminent domain here. None of the arguments in support of this contention has merit.

A. Eminent Domain May Proceed on the Basis of a FERC Certificate, Regardless of the Status of Other Required Governmental Permits

Conservation Petitioners argue that Atlantic may not exercise eminent domain because the Commission's public convenience and necessity finding was conditioned on Atlantic obtaining necessary permits from other governmental agencies, and certain of those permits have been vacated or stayed. Conservation Br. 41-45 (citing 15 U.S.C. § 717f(e), (h)). Conservation Petitioners' argument lacks any support in the Natural Gas Act or relevant precedent.

As Conservation Petitioners recognize (Conservation Br. 44), the Commission will not authorize the pipelines to commence construction until they receive all necessary permits. *See* Certificate Order App. A, Condition 10, JA ____) ("Atlantic and [Dominion] must receive written authorization from the Director of [the Office of Energy Projects at FERC] **before commencing construction of any project facilities**," based on documentation that all permits required by federal law have been obtained). *See also*, *e.g.*, R. 13,847, 13,875, 13,882, 13,910, 13,931, 13,943, 14,099, JA ____-__, ____-__, ____-__, ____-__, ____-__, ____-__, ____-__ (Commission orders authorizing specific construction after confirming that necessary authorizations were obtained).

However, a certificate holder's right to exercise eminent domain springs directly from the Natural Gas Act, 15 U.S.C. § 717f(h), and is outside the scope of the Commission's authority. *See Midcoast*, 198 F.3d at 973 ("Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain. The Commission does not have the discretion to deny a certificate holder the power of eminent domain.") (citing 15 U.S.C. § 717f(h)); *see also Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 628 (4th Cir. 2018), *cert. denied sub nom. Berkley v. FERC*, 139 S. Ct. 941 (2019) (under 15 U.S.C. § 717f(h), a FERC certificate "automatically transfers the power of eminent domain to the [c]ertificate holder," who "can then initiate

condemnation proceedings in the appropriate . . . court;" "FERC does not have discretion to withhold eminent domain power") (citing *Midcoast*, 198 F.3d at 973); *Adorers of the Blood of Christ v. FERC*, 897 F.3d 187, 194 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1169 (2019) ("Once FERC has issued a certificate to a developer, the certificate holder has the ability to acquire 'the necessary right-of-way to construct, operate and maintain a pipeline or pipelines' from unwilling landowners by eminent domain.") (quoting 15 U.S.C. § 717f(h)); *see also* Certificate Order P 77, JA ____ (once a natural gas company obtains a certificate of public convenience and necessity it may exercise eminent domain); Rehearing Order PP 94-95, JA ____-__ (explaining that a certificate holder may need to access property in order to gather information necessary to obtain authorizations).

B. The Public Convenience and Necessity Finding Satisfies the Takings Clause's Public Use Requirement

Conservation Petitioners further claim that eminent domain could not be exercised because, without all necessary permits, Atlantic lacks a public use. Conservation Br. 43. But as this Court has found, the Commission's public convenience and necessity finding under the Natural Gas Act satisfies the Takings Clause's public use requirement. *Appalachian Voices v. FERC*, 2019 WL 847199, at *2 (citing *Midcoast*, 198 F.3d at 973); *see also* Certificate Order PP 78-79, JA ___-__ (same).

In the Natural Gas Act, Congress declared that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public is in the public interest. Certificate Order P 79, JA ____ (citing 15 U.S.C. § 717(a)). A certificate holder is authorized, pursuant to Natural Gas Act section 7(h), 15 U.S.C. § 717f(h), to acquire property necessary to construct the certificated facilities by exercising eminent domain. *Id.* PP 77-78, JA ____-__; Rehearing Order P 86, JA ____. Neither Congress nor any court has indicated that anything beyond the Commission's public convenience and necessity finding is necessary to trigger eminent domain rights. Certificate Order P 78, JA ____; *see also*, *e.g.*, *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018) ("Once FERC issues a certificate of public convenience and necessity, the pipeline company may acquire the necessary rights-of-way through eminent domain."); *Bordentown*, 903 F.3d at 265 (15 U.S.C. § 717f(h) "affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to 'acquire [the right of way] by contract'") (alteration by court)).

C. Courts, Not the Commission, Have Jurisdiction to Address Just Compensation Matters

Conservation Petitioners also contend that the Commission should have determined whether Atlantic would be able to pay just compensation in an eminent domain proceeding. Conservation Br. 45-48. But as this Court has found, courts,

not the Commission, have jurisdiction regarding eminent domain matters, including just compensation issues. *Appalachian Voices*, 2019 WL 847199, at *2; *see also* 15 U.S.C. § 717f(h) (a certificate holder may exercise "the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts"); Certificate Order P 78, JA ____; Rehearing Order PP 86, 88-89, JA ____-__; *Atlantic Coast Pipeline, LLC v. 5.63 Acres*, No. 6:17-cv-84, 2018 WL 1097051, *18 (W.D. Va. Feb. 28, 2018) (finding just compensation assured because, pending completion of just compensation proceeding, Atlantic will make a deposit equal to each property's appraised value and post a bond equal to three times that amount); *Atlantic Coast Pipeline, LLC v. 0.25 Acres*, No. 2:18-cv-3, 2018 WL 1369933, *6 (E.D.N.C. Mar. 16, 2018) (finding just compensation assured because, pending completion of just compensation proceeding, Atlantic will make a deposit equal to three times each property's appraised value and post a bond equal to two times each property's appraised value). Any complaints Conservation Petitioners have regarding the courts' actions on eminent domain matters (Conservation Br. 46-48) are properly raised in appeals of those actions, not on review of the Commission's orders.

D. Under the Natural Gas Act, Eminent Domain May Proceed Before Commission Rehearing and Judicial Review

Conservation Petitioners further assert that they were denied due process because eminent domain actions commenced before Commission rehearing and

this Court's review of their claims. Conservation Br. 48-50. But Congress designed the Natural Gas Act to produce that outcome. *See Del. Riverkeeper*, 895 F.3d at 110 ("Once FERC issues a certificate of public convenience and necessity, the pipeline company may acquire the necessary rights-of-way through eminent domain."); *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 516 (N.D. W. Va. 2018) (Natural Gas Act "allows natural-gas companies to exercise the power of eminent domain upon receipt of a Certificate rather than after the Certificate has been subject to judicial review"), *aff'd sub nom. Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197 (4th Cir. 2019), *reh'g denied* (Mar. 5, 2019). The Natural Gas Act provides the holder of a certificate of public convenience and necessity eminent domain authority (15 U.S.C. § 717f(h)), and provides that neither the filing of an application nor a petition for judicial review stays the effectiveness of the Commission's order, unless the Commission or court directs otherwise (15 U.S.C. § 717r(c)). *See*, *e.g.*, *Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969) ("The Natural Gas Act provides that orders of the Commission shall not be stayed pending appeal unless the reviewing court grants a stay."); *Mountain Valley*, 915 F.3d at 210 (neither filing of an application for rehearing nor commencement of judicial proceedings stays a FERC order).

As this Court has determined, a pipeline's use of eminent domain is "consistent with the Fifth Amendment due process clause because '[i]f and when'

the company acquires a right of way through any petitioner's land, 'the landowner will be entitled to just compensation, as established in a hearing that itself affords due process.'" *Appalachian Voices*, 2019 WL 847199, at *2 (quoting *Del. Riverkeeper*, 895 F.3d at 110). "Due process requires no more in the context of takings where, despite [Conservation Petitioners'] suggestion to the contrary, there is no right to a pre-deprivation hearing." *Del. Riverkeeper*, 895 F.3d at 111 (citing *Bailey v. Anderson*, 326 U.S. 203, 205 (1945) ("it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owner have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land taken"), and *Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006) (under "a century of precedent," "procedural due process is satisfied so long as private property owners may pursue meaningful postdeprivation procedures to recover just compensation")); *see also Appalachian Voices*, 2019 WL 847199, at *2 (same).

V. THE BAUMS WERE REPEATEDLY ADVISED OF THE NEED TO INTERVENE IF THEY WANTED TO CHALLENGE THE COMMISSION'S ORDERS

On March 14, 2016, Atlantic amended its application to incorporate certain route variations that were adopted to minimize environmental impacts and address stakeholder concerns. The revised route now crosses property owned by Lora and

Victor Baum in Bath County, Virginia. The Baums acknowledge that they received notice of the Project and materials that repeatedly advised that intervention was a necessary precondition to judicial review. *See* Baum Br. 6. The Baums nonetheless claim that their purported confusion about the need to, and timing of, intervention demonstrates that the Commission violated their due process rights. They are mistaken.

The purpose of the Due Process Clause's notice requirement "is to 'inform the recipient that the matter in which his protected interests are at stake is pending.'" *Moreau v. FERC*, 982 F.2d 556, 569 (D.C. Cir. 1993) (quoting *Mullane v. Cent. Hanover Trust Co*., 339 U.S. 306, 314 (1950)) (internal brackets omitted). According to the Baums, the necessary notice "need be no more than a few simple, declarative sentences prominently displayed." Baum Br. 5; *see also Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956) ("[N]otice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests."). Here, the Baums were informed, multiple times, of the need to intervene in the Commission proceeding in order to preserve their ability to seek agency rehearing and judicial review of any Commission order.

A. The Baums Had Actual Notice that They Needed to Intervene to Seek Judicial Review

1. In March 2016, the Baums Were Notified of the Need to Intervene to Challenge the Commission's Orders

Consistent with the Commission's regulations, 18 C.F.R. § 157.6(d), Atlantic formally advised the Baums that their land would be affected by the Project's new route in letters dated March 23 and March 25, 2016. *See* Victor C. Baum Declaration ("V. Baum Decl.") ¶¶ 15, 23; Lora Baum Declaration ("L. Baum Decl.") ¶¶ 15, 23.[13] The materials accompanying those letters explicitly advised that the Baums needed to intervene in the Commission proceeding if they wished to challenge any Commission order.

For instance, the March 23, 2016 letter included the Commission's October 2015 notice of Atlantic's original Project application, which explained that "any person wishing to obtain legal status by becoming a party to the proceedings for this project" must file a motion to intervene with the Commission, and warned that "[o]nly parties to the proceeding can ask for court review of Commission orders in the proceeding." *See* Notice of Application, R. 3,777 at 2, 3, JA ____, ___ (also attached as Exhibit 3 to Baums' Brief (Add. 109-12)); V. Baum Decl. ¶ 15; L. Baum Decl. ¶ 15. While the notice stated that interested parties need not

[13] The Baums' declarations are attached as Exhibits 1 (Add. 83-99) and 2 (Add. 101-08) to their Brief.

intervene to file comments regarding the Project, it specified that "the filing of a comment alone will not serve to make the filer a party to the proceeding," and that "non-party commenters . . . will not have the right to seek court review of the Commission's final order." Notice of Application at 3, JA ____.

The March 25, 2016 letter included a copy of the Commission's March 22, 2016 notice of Atlantic's amended application. *See* Notice of Amendment to Application, R. 5,250, JA ___-__ (also attached to Baums' Brief at Exhibit 4); V. Baum Decl. ¶ 25; L. Baum Decl. ¶ 25. That notice repeated the admonitions in the October 2015 notice regarding the need to intervene to challenge the Commission's orders and established April 12, 2016 as the deadline for motions to intervene. *See* Notice of Amendment at 2, 3, JA ____; V. Baum Decl. ¶ 25; L. Baum Decl. ¶ 25.

The Baums acknowledge that, in March 2016, they also received both a Landowner Rights summary prepared by Atlantic (which stated that an interested party "must be an intervener" in order to seek judicial review of the Commission's decision), and FERC's Landowner Brochure, which explained that "[a]s an intervenor," a landowner will be able to "be heard by the courts if you choose to appeal the Commission's final ruling." V. Baum Decl. ¶¶ 19-20; L. Baum Decl.

¶¶ 19-20; Landowner Brochure at 6.[14] The Landowner Brochure directed landowners to the Commission's website for instructions on how to intervene. *See* Landowner Brochure at 6. In addition to providing instructions regarding the mechanics of intervention, that section of the Commission's website also explained that "intervenors . . . have the right to request rehearing of Commission orders and seek relief of final agency actions in the U.S. Circuit Courts of Appeal." *See* https://www.ferc.gov/resources/guides/how-to/intervene.asp (last updated July 9, 2014).

The Landowner Brochure further explained that, while motions to intervene are typically due within 21 days of notice of a project application, "the Commission may accept late intervention if good reasons are given." Landowner Brochure at 7. The Commission informed landowners that they should contact FERC's Office of External Affairs if they had "any further questions about the procedures involved," and provided the phone number to that office. *Id*. at 5.

2. In December 2016, the Baums Were Again Notified of the Need to Intervene to Challenge the Commission's Orders.

In December 2016, the Commission published its draft Environmental Statement for the Project. A copy of the document was sent to the Baums. *See*

[14] A copy of the Landowner Brochure, which was last updated in August 2015, is available at https:www.ferc.gov/resources/guides/gas/gas.pdf.

Draft EIS, Appendix A, A-41 (distribution list), R. 7,571, JA ___. In the accompanying cover letter, the Commission advised that "[a]ny person seeking to become a party to the proceeding must file a motion to intervene." *Id*. at 4, JA ____. The Commission once again cautioned that "[o]nly intervenors have the right to seek rehearing of the Commission's decision." *Id*. The Commission warned interested parties—in bold print—that "[s]imply filing environmental comments will not give you intervenor status." *Id*.

C. None of the Baums' Excuses for Failing to Intervene Demonstrates that They Were Not Afforded Due Process

The Baums present several excuses for failing to intervene in the Commission proceeding. None establishes that they were not afforded due process.

First, the Baums assert that none of the materials they received "adequately notified them that if they did not intervene in the FERC action, they would not be able to seek any meaningful administrative or judicial review." Baum Br. 6. As just discussed, that contention is flatly contradicted by the record.

Second, the Baums claim that they "believed that their rights would be preserved so long as they submitted some comments in the FERC proceeding." Baum Br. 2. But any such belief was unreasonable: the Baums were expressly advised that "the filing of a comment alone will not serve to make the filer a party to the proceeding" and that "non-party commenters . . . will not have the right to

seek court review of the Commission's final order." Notice of Application at 3, JA ___; *see also* Draft EIS 4 ("[s]imply filing environmental comments will not give you intervenor status"), JA ___.

Third, the Baums make much of the fact that the initial deadline for interventions expired in October 2015, before they received notice of the Project. *See* Baum Br. 6. But when Atlantic revised the pipeline route, the Commission established a new deadline for interventions—April 12, 2016. The Baums knew of this new deadline more than two weeks before it expired. *See* V. Baum Decl. ¶ 26; L. Baum Decl. ¶ 26. And they were again invited to intervene in December 2016, when the draft Environmental Statement issued. *See* Draft EIS 4, JA ___. Moreover, the Baums had been advised that the Commission may allow interested parties to intervene after the deadline. *See* Landowner Brochure at 7; *see also* Certificate Order P 19 (granting late interventions), JA ___.

Fourth, the Baums contend that they were confused by purportedly "conflicting" instructions on how to intervene. Baum Br. 6. But numerous individuals managed to navigate the Commission's instructions and successfully intervened in the proceeding. *See* Certificate Order P 19, JA ___. And as the Commission noted, its Office of External Affairs was available to answer any intervention questions the Baums might have had. *See* Landowner Brochure at 5, 7. In any event, "[a] misapprehension by a litigant of the steps which its best

interests require . . . is not grounds for [court] interference as a denial of constitutional rights." *Market St. Ry. Co. v. R.R. Comm'n*, 324 U.S. 548, 559 (1945).

VI. THE CHALLENGED ORDERS APPROPRIATELY SET INITIAL RECOURSE RATES

North Carolina Commission supports certification of the Project; its challenges relate only to the rates for service on them. Br. 2, 15-26. But North Carolina Commission has not established that it has standing to raise these challenges which, in any event, have no merit.

A. Natural Gas Act Section 7 Initial Rates

Unlike rates set under Natural Gas Act sections 4 or 5, 15 U.S.C. §§ 717c, 717d (discussed immediately below), which must be found to be "just and reasonable," rates set in a section 7 certificate application proceeding need only be in the "public interest." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068 (D.C. Cir. 2003) (citing *Atlantic Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)). The "'public interest' standard of [Natural Gas Act] § 7 is less exacting than the 'just and reasonable' requirement of § 4." *Id.* at 1070 (citing *Atlantic Refining*, 360 U.S. at 390-91). The initial tariff rates set in section 7 certificate proceedings "offer a temporary mechanism to protect the public interest until the regular rate setting provisions of the [Natural Gas Act (sections 4 and 5, 15 U.S.C.

§§ 717c, 717d)] come into play." *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation omitted).

Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c and 717d, come into play after certificated projects are already moving natural gas in interstate commerce. *FPC v. Hunt*, 376 U.S. 515, 525 (1964). Under section 4, pipelines propose new rates and have the burden to show that those proposed rates are just and reasonable. *See*, *e.g.*, *Transcon. Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 918 (D.C. Cir. 2008). Under section 5, the Commission, upon its own initiative or complaint by others, may change a pipeline's existing rates if the proponent establishes that the pipeline's existing rates are not just and reasonable and the new proposed rates are just and reasonable. *See*, *e.g.*, *id.* at 918, 920-21.

B. The Commission's Negotiated Rates Policy

Originally, the Commission set pipeline rates based only on traditional cost-of-service ratemaking. In 1996, however, the Commission issued a policy statement,[15] which it modified in 2003,[16] permitting the use of alternative

[15] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 (1996), *clarified*, 74 FERC ¶ 61,194 (1996), *on reh'g*, 75 FERC ¶ 61,024 (1996) ("1996 Policy Statement").

[16] *Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003) ("2003 Policy Modification"), *on reh'g*, 114 FERC ¶ 61,042 (2006) ("2003 Policy Modification Rehearing Order").

ratemaking methods, including negotiated rates. The Commission determined that a pipeline could negotiate rates with shippers that vary from its otherwise applicable cost-of-service tariff if the shippers have the option to take service at the tariff's traditional cost-of-service "recourse" rate. 2003 Policy Modification, 104 FERC ¶ 61,134, P 2; 1996 Policy Statement, 74 FERC at pp. 61,224, 61,240. The option to take service under the tariff's recourse rate rather than under a negotiated rate prevents pipelines from exercising market power in negotiating a rate. 2003 Policy Modification, 104 FERC ¶ 61,134 P 2; 1996 Policy Statement, 74 FERC at p. 61,240. *See also* N.C. Comm'n Br. 17-18 ("FERC protects shippers from [pipeline market power] by requiring pipelines to 'permit shippers to opt for use of the traditional cost-of-service "recourse rates" in the pipeline's tariffs, instead of requiring them to negotiate rates for any particular service.'") (quoting *N. Nat. Gas Co.*, 105 FERC ¶ 61,299, P 3 (2003)).

The Commission requires pipelines to file negotiated rates for Commission approval. 2003 Policy Modification, 104 FERC ¶ 61,134, PP 25-27, 32. Negotiated rate filings are noticed for public comment, and "all interested parties [have] an opportunity to raise whatever concerns they have with the agreement." 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042, P 10.

C. North Carolina Commission Has Not Established Its Standing

Under the Natural Gas Act, 15 U.S.C. § 717r(b), only parties aggrieved by a Commission order may obtain judicial review of that order. *PNGTS Shippers' Grp. v. FERC*, 592 F.3d 132, 136 (D.C. Cir. 2010). Additionally, to obtain judicial review, a party—even a state party—must meet constitutional standing requirements by establishing: (1) that it has suffered an injury in fact, (2) that is fairly traceable to the challenged agency action, and (3) that likely will be redressed by a favorable decision. *Kan. Corp. Comm'n v. FERC*, 881 F.3d 924, 929 (D.C. Cir. 2018); *see also Va. House of Delegates v. Bethune-Hill*, -- S. Ct. ---, 2019 WL 2493922, at *3 (June 17, 2019).

An "injury in fact" is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011). Traceability requires "a causal connection between the injury and the agency action complained of . . . ." *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 368 (D.C. Cir. 2013). And the redressability prong "examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the [petitioner or intervenor]." *Orangeburg v. FERC*, 862 F.3d 1071, 1083 (D.C. Cir. 2017).

North Carolina Commission bases its standing on the negotiated rates that North Carolina utilities ultimately will pay for Project service and that will be passed on to North Carolina consumers. N.C. Comm'n Br. 2, 13-14. North Carolina Commission claims that the challenged orders harm its interests because the Commission certificated the Project without ensuring that the recourse rates checked pipeline market power during rate negotiations. N.C. Comm'n Br. 14-15. North Carolina Commission further claims that "a favorable decision here—i.e., remanding to FERC with direction to ensure negotiated rates were not tainted by pipeline market power—will redress [North Carolina Commission]'s harm." N.C. Comm'n Br. 15; *see also id.* at 2, 8 (acknowledging that all service on the Project is contracted for at negotiated rates).

But Atlantic and Dominion did not ask the Commission to approve, and the challenged orders did not approve, any negotiated rates for service on the projects. Rather, Atlantic and Dominion "must file for separate Commission authorization of the negotiated rates, prior to commencing service." R. 3,532, Atlantic Application at 31, JA ____; R. 3,535, Supply Header Project Application at 17, JA ____. This is because, "'[i]n certificate proceedings, the Commission establishes initial recourse rates but does not make determinations regarding specific negotiated rates for proposed services.'" R. 4,182, N.C. Comm'n Comments at 5-6, JA ____-__ (quoting *MoGas Pipeline, LLC*, 124 FERC

¶ 61,287, P 51 (2008); citing *Centerpoint Energy*, 109 FERC ¶ 61,007, P 19 (2004)); Atlantic Application at 31, JA ____ (same); Supply Header Application at 17, JA ____ (same).

Thus, the challenged orders noted that Atlantic and Dominion proposed to provide service to their shippers at negotiated rates, and directed them to file either the negotiated rate agreements or tariff sheets setting forth their essential terms at least 30 days, but not more than 60 days, before their proposed effective dates. Certificate Order P 115, JA ____; *see also* 18 C.F.R. § 154.112(b) (agreements "that deviate in any material aspect from the form of service agreement must be filed" with the Commission and "referenced in the open access transmission tariff"). The Commission cited to its 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042, which (at P 10) states that negotiated rate filings will be noticed for public comment, and that all interested parties will have an opportunity to raise whatever concerns they have regarding the agreement. Certificate Order n.171, JA ____.

The negotiated rates have not been filed with the Commission, since it is not yet 30 to 60 days before their proposed effective dates. When that time comes and Atlantic and Dominion file the negotiated rates, interested parties will have an opportunity to challenge those rates. 2003 Policy Modification Rehearing Order, 114 FERC ¶ 61,042, P 10, *cited in* Certificate Order n.171, JA ____. Each pipeline

company has "acknowledge[d] that it may be at risk for any revenue shortfall associated with the negotiated rate agreement that may be identified in a subsequent proceeding, to the extent consistent with applicable Commission policies at that time." Atlantic Application at 31, JA ____; Supply Header Application at 17, JA ____.

Since the challenged orders did not approve any negotiated rates, North Carolina Commission has not shown that it has suffered an injury in fact within its sphere of interest—the rates paid by North Carolina public utilities and their North Carolina customers. *See*, *e.g.*, *Ala. Mun. Distribs. Grp. v. FERC*, 312 F.3d 470, 473 (D.C. Cir. 2002) (no injury in fact where FERC orders had not "resolve[d] or even tackle[d]" the challenged rate, which would be addressed in a separate proceeding). Likewise, any purported injury is not fairly traceable to the challenged orders and would not likely be redressed by a favorable decision. North Carolina Commission has not satisfied any of the requirements to establish its standing to raise the claims here; its petition for review should be dismissed.[17]

[17] In anticipation that North Carolina Commission might assert in its reply brief that states are entitled to special solicitude in the standing analysis, the Commission notes that "[t]his special solicitude does not eliminate the state petitioner's obligation to establish a concrete injury, as [*Mass. v. EPA*, 549 U.S. 497, 521 (2007)] amply indicates." *Del. Dep't of Nat. Res. & Envtl. Control v. FERC*, 558 F.3d 575, 579 n.6 (D.C. Cir. 2009). *See also Kan. Corp. Comm'n*, 881 F.3d at 929 (finding that state agency did "not have standing because it lacks the necessary injury in fact").

The circumstances here are not like those underlying the Court's standing determination in *Sierra Club*, 867 F.3d at 1366 n.3. There, the Court found that Sierra Club could challenge the Commission's initial rate methodology because it had established that the Commission's orders caused it an environmental injury in fact, which the Court said would be redressed if it agreed with Sierra Club's initial rates claim and set aside the certificate. *Id.*; *see also id.* at 1376-79 (finding no merit in Sierra Club's initial rates claim). Here, by contrast, North Carolina Commission has not established that the challenged orders have caused it any injury in fact. It has not separately argued any other issue or claimed any other injury, environmental or otherwise. So North Carolina Commission does not have standing to raise any challenge to the Commission's orders.

D. The Commission Reasonably Approved Atlantic's Return on Equity

The challenged orders reasonably approved Atlantic's proposed initial recourse rates, which were based on a return on equity of 14 percent. Certificate Order PP 102, 104-05, JA ___, ___-__; Rehearing Order PP 64-74, JA ___-__. As the Commission explained, Atlantic is a new pipeline company, without an existing rate of return upon which it can develop its rates, and it faces great risks in

constructing and operating this new pipeline system. Rehearing Order P 69, JA ____.

North Carolina Commission acknowledges that its challenge here "addresses the same 14% return on equity" challenged in *Appalachian Voices*, 2019 WL 847199, regarding the Mountain Valley pipeline. N.C. Comm'n Jan. 18, 2019 Motion to Sever and Hold in Abeyance at 2, 4, 7. In *Appalachian Voices*, this Court affirmed the Commission's approval of Mountain Valley's requested 14 percent return on equity, finding that it "was reasonably based on the specific character of the Project and Mountain Valley's status as a new market entrant." 2019 WL 847199, at *1. The same is true here. Atlantic, like Mountain Valley, is a major pipeline project being constructed by a new natural gas company. And as in *Appalachian Voices*, the Commission's approval of Atlantic's return on equity is not based on "mere citation" to prior cases (N.C. Commission Br. 22), but on the high business risks that similarly-situated new pipeline companies face in constructing major new pipeline systems. Certificate Order P 102, JA ___; Rehearing Order PP 66, 68, JA ___-___; *See Appalachian Voices*, 2019 WL 847199, at *1.

North Carolina Commission asserts that the challenged orders are contrary to precedent that requires returns on equity to be based on current capital market conditions, N.C. Comm'n Br. 18 n.84, and to three cases setting returns on equity

between 10.55% and 11.55%. *Id*. 21 & n.95 (citing its Protest, R. 4,181 at 7, JA ___); *see also id.* 21-24. But none of the cited precedent involved the circumstances here—setting initial recourse rates in a Natural Gas Act section 7 certificate proceeding, and the Commission's discretion in those proceedings to protect the public interest while preventing the delays that can accompany full evidentiary rate proceedings.[18] Further, the Commission found the cited returns on equity in *Portland*, *El Paso* and *Kern River* to be inapposite as to both Atlantic and Dominion; those cases involved returns on equity for established pipelines rather than new pipeline companies like Atlantic (*see* Certificate Order P 98, JA ___; Rehearing Order P 72, JA ___), and, as North Carolina Commission acknowledged, the returns on equity established in those proceedings are not comparable to the challenged overall pre-tax return approved for Dominion in this proceeding (*see* Certificate Order P 108, JA ___).

[18] North Carolina Commission cited to: *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (involving a Natural Gas Act section 5 proceeding); *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679 (1923) (involving state agency rate setting); *El Paso Nat. Gas Co.*, 145 FERC ¶ 61,040 (2013) (involving a Natural Gas Act section 4 proceeding); *Kern River Gas Transmission Co.*, 142 FERC ¶ 61,132 P 6 (2013) (involving a Natural Gas Act section 4 proceeding); *Portland Nat. Gas Transmission Sys.*, 134 FERC ¶ 61,129 P 1 (2011), *on reh'g*, 142 FERC ¶ 61,198 (2013), *on reh'g*, 150 FERC ¶ 61,106 (2015) (involving a Natural Gas Act section 4 proceeding). N.C. Comm'n Br. 18, 21 & n.95 (citing its Protest, R. 4181 at 7, JA ___).

As a new pipeline company, Atlantic's proposed initial rates are based on its estimated costs and revenues, unsupported by any operating history. *Id*. PP 66, 73, JA ___, ___. In these circumstances, the Commission generally accepts the pipeline's estimated cost components if, as here, they are reasonable and consistent with Commission policy. *Id*. P 66, JA ___. Conducting a discounted cash flow analysis hearing (requiring testimony and analysis regarding proxy group composition, growth rates, and Atlantic's risk position within the resulting zone of reasonableness) to calculate a project-specific return based on such estimates would not be an effective way to determine the appropriate return on equity; attempting to do so would unnecessarily delay this needed Project. *Id*. P 73, JA ___.

Instead, because Atlantic's actual costs may turn out to be higher or lower than the estimates, discounted cash flow analysis review appropriately occurs after the pipeline has an operating history. *Id*. To ensure this review, the Commission required Atlantic to file a cost and revenue study at the end of its first three years of actual operation. Certificate Order PP 103, 105, JA ___. The three-year report will allow the Commission and the public to review the estimates underlying Atlantic's initial rates, to determine whether Atlantic is over-recovering its cost of service and whether the Commission should establish just and reasonable rates under NGA section 5, 15 U.S.C. § 717d. *Id*. P 103, JA ___. Alternatively,

Atlantic may elect to make an earlier NGA section 4, 15 U.S.C. § 717c, filing to revise its initial rates. *Id*. The public would have an opportunity at that time to review Atlantic's return on equity and other cost of service components and raise any concerns. *Id*. Accordingly, the Commission reasonably exercised its discretion in concluding that Atlantic's initial temporary rates will "'ensure that the consuming public may be protected'" until just and reasonable rates can be determined under sections 4 and 5 of the Natural Gas Act. *Id*. (quoting *Atl. Ref.*, 360 U.S. at 392); Rehearing Order P 73, JA ___.

North Carolina Commission suggests that Atlantic's initial recourse rates, approved in the Certificate Order, failed to sufficiently check pipeline market power when the precedent agreements were negotiated. N.C. Comm'n Br. 19-20. But all Atlantic customers were given the choice of paying the recourse rates to be established by the Commission or agreeing instead to negotiated rates. *See* Atlantic Application, R. 3,532 at 31 and Exhibit I at 3, JA ___, ___; Rehearing Order P 23 & n.47, JA ___ (the Commission relied on Atlantic's disclosures in its application concerning the precedent agreements). And the contracting shippers acknowledged that they knew the negotiated rates might be higher or lower than the recourse rate. Atlantic Application Exhibit I at 3, JA ___. All of the contracting shippers chose negotiated rates. Atlantic Application at 31, JA ___.

Those negotiated rates were lower than Atlantic's proposed initial base recourse rates. *Id*.

Providing shippers the option to take recourse rather than negotiated rates satisfies Commission policy. *See, e.g., Transcon. Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, P 38 (2017) (cited at Rehearing Order P 73, JA ___) (the Commission's negotiated rate policy requires that shippers have the option of choosing a cost-based recourse rate); *Transcon. Gas Pipe Line Co., LLC*, 164 FERC ¶ 61,112, P 14 (2018) (providing the option to choose the initial recourse rate that would be set in the section 7 certificate proceeding provides a check on pipeline market power because project shippers know they have the option to take service under the tariff recourse rate). *Cf. Iberdrola Renewables, Inc. v. FERC*, 597 F.3d 1299, 1301 (D.C. Cir. 2010) (FERC's negotiated rate policy "reflects FERC's assumption that sophisticated parties will bargain for rates that are just and reasonable").

E. The Challenged Orders Appropriately Set the Supply Header Project's Initial Recourse Rates

The Commission appropriately set the Supply Header Project's initial tariff recourse rates here. They comply with the Commission's section 7 certificate initial recourse rates policy, since they were designed using the approved rate of return (13.7 percent) from Dominion's most recent general Natural Gas Act section 4 rate case in which a return was specified. Certificate Order PP 110, 112,

JA ____-__. The negotiated rates policy was satisfied as well, since Atlantic, the Supply Header Project's shipper, had the option to instead take capacity at the tariff recourse rate. *See* Supply Header Project Application at 16, JA ____; Certificate Order P 15, JA ____. North Carolina Commission does not contest that Atlantic had this option.

North Carolina Commission asserts that FERC's primary obligation under the Natural Gas Act is consumer protection, and that FERC did not adequately consider consumer protection in applying its policies here. N.C. Comm'n Br. 16-26. In fact, however, the Commission's primary obligation under the Natural Gas Act is to "encourag[e] the orderly development of plentiful supplies of . . . natural gas at reasonable prices." *Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70) (omission by Court). As this Court has explained, "implicit in th[e] consumer protection mandate [of Natural Gas Act §§ 4 and 7(e)] is a duty to assure that consumers . . . have continuous access to needed supplies of natural gas. This duty arises because [n]o single factor in the Commission's duty to protect the public can be more important to the public than the continuity of service provided." *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1144 (D.C. Cir. 1996) (internal quotation omitted; bracketed alterations by Court); *see also Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) ("the public interest that the Commission must protect always includes the interest of consumers in having

access to an adequate supply of gas at a reasonable price"). To accomplish this, the Commission may in setting rates consider non-cost factors, including the need for project capacity, as well as cost factors. *Pub. Utils. Comm'n v. FERC*, 367 F.3d 925, 929 (D.C. Cir. 2004) (citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 791 (1968)).

Accordingly, the Commission appropriately considered the fact that it would be difficult, if not impossible, to timely complete a discounted cash flow analysis hearing (requiring testimony and analysis regarding proxy group composition, growth rates, and Dominion's risk position within the resulting zone of reasonableness) in this section 7 certificate proceeding, and that attempting to do so would unnecessarily delay the needed project capacity here.[19] Certificate Order PP 101, 111, JA ____, ____. As the Commission explained, applying its initial recourse rates policy here was a proper exercise of the Commission's discretion to protect the public interest while preventing delays that can accompany full evidentiary hearings. Certificate Order PP 101, 111, JA ____, ____; *see also Consol. Edison Co., Inc. v. FERC*, 315 F.3d 316, 325 (D.C. Cir. 2003) (FERC

[19] *See*, *e.g.*, *Boston Edison Co. v. FERC*, 885 F.2d 962, 965 (1st Cir. 1989) (Breyer, J.) (explaining the complicated discounted cash flow method of establishing cost-based rates).

appropriately may consider administrative convenience and efficiency in determining whether to apply policy in Natural Gas Act proceeding).[20]

The necessary check on potential market power was provided here. *See* N.C. Comm'n Br. 19-20. Atlantic knew, when it chose to take service on the Supply Header Project under negotiated rates, that it could opt instead to take service under Dominion's tariff recourse rates, which initially would be set in this Natural Gas Act section 7 certificate proceeding and could then be subject to justness and reasonableness review under Natural Gas Act sections 4 or 5, 15 U.S.C. §§ 717c, 717d. Certificate Order PP 101, 111, JA ____, ____; *see also Mo. Pub. Serv. Comm'n*, 601 F.3d at 583 (initial section 7 certificate tariff rates temporarily protect the public interest until the regular (just and reasonable) rate setting provisions of Natural Gas Act sections 4 and 5, 15 U.S.C. §§ 717c, 717d, come into play).

North Carolina Commission asserts that the Commission cannot rely on *Atlantic Refining*, 360 U.S. 378, because it issued before the Commission

[20] If North Carolina Commission's repeated references to "just and reasonable" rates (N.C. Comm'n Br. 16, 17, 18) are intended to assert that the initial rates set here needed to be "just and reasonable," that assertion would be mistaken. As already discussed, rates set under Natural Gas Act section 7 need only be found to be in the "public interest," which is a lesser standard than "just and reasonable." *Atlantic Ref.*, 360 U.S. at 390-91; *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1068.

permitted negotiated rates. N.C. Comm'n Br. 25-26. But as this Court has explained, those affected by negotiated rates "are not left without redress if they think the rate has become unjust over time. They can always challenge an established rate under section 5 of the [Natural Gas Act, 15 U.S.C. § 717d] on the ground that the rate is unjust, unreasonable, unduly discriminatory, or preferential." *Iberdrola Renewables*, 597 F.3d at 1301. Thus, North Carolina Commission will have an opportunity to challenge any negotiated rates the Commission accepts that affect rates paid by consumers in North Carolina under Natural Gas Act section 5.

North Carolina Commission also argues, for the first time, that the Commission could have used means other than a full discounted cash flow analysis to determine a rate of return here, as it purportedly did in a 2018 notice of proposed rulemaking, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 162 FERC ¶ 61,226 (2018) ("Notice"). N.C. Comm'n Br. 26. But that Notice did not determine rates of return; it proposed a procedure to obtain informational filings to allow the Commission and interested parties to decide whether to initiate Natural Gas Act section 5 proceedings to decrease pipelines' rates in light of recent income tax law and policy changes.

Notice, 162 FERC ¶ 61,226, PP 1-3, 32-34.[21] North Carolina Commission does not explain how a procedure like that proposed in the Notice could have been used to set initial recourse rates here.

VII. THE COMMISSION REASONABLY REJECTED ATLANTIC'S UNJUSTIFIED APPROACH TO ACCOUNTING FOR ITS CONSTRUCTION FINANCING COSTS

While the accounting and rate concepts underlying Atlantic's petition are complex, the issue presented is simple. Atlantic seeks advantageous accounting treatment that is inconsistent with Commission precedent. The Commission reasonably rejected Atlantic's proposal, and its decision should be upheld.

A. Background: Construction Allowance for Costs of Financing Pipeline Construction

Natural gas companies are permitted to recover through rates certain pipeline construction costs, including financing costs. A FERC mechanism (referred to here as a "construction allowance," and in the challenged orders and Atlantic's brief as Allowance for Funds Used During Construction, or AFUDC) enables pipelines to record and, ultimately, recover: (1) interest on debt used to finance construction, and (2) a reasonable return to investors for equity invested in pipeline construction. *See generally Mid-Tex Elec. Co-op., Inc. v. FERC*, 822 F.2d

[21] The Commission has since issued a final rule on this matter, *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate*, 164 FERC ¶ 61,031 (2018).

1123, 1125 (D.C. Cir. 1987) (explaining construction allowance in electric utility context). Under this mechanism, the company records its construction financing costs while the pipeline is under construction. When the pipeline goes into service, the pipeline is permitted to recover these accumulated costs through rates over the useful life of the pipeline. *See id.*

FERC maintains a formula for calculating the maximum construction allowance that a company may recover. Certificate Order P 187, JA ___ (citing Gas Plant Instruction 3(17), 18 C.F.R. pt. 201). However, because the formula relies on historical costs of equity and debt, which a new company does not have, the Commission requires a new pipeline's rate of return on construction financing costs to "mirror" its overall rate of return on total pipeline operations, i.e., the overall rate of return underlying the new pipeline's recourse rate. *See Gulfstream Nat. Gas Sys., LLC v. FERC*, 38 F. App'x 24, 25 (D.C. Cir. 2002); Certificate Order P 188, JA ___. This reflects the policy goal of the Commission's construction allowance rules: "to permit a company to achieve a rate of return on its total utility operations, including its construction[] program, at approximately the rate which would be allowed in a rate case." *Gulfstream*, 38 F. App'x at 25.

A new pipeline's overall rate of return underlying its recourse rate is the weighted average of the rates of return on the debt and equity invested in the pipeline. *See* Certificate Order PP 187-88, JA ___-___; *Port Arthur LNG, L.P.*,

115 FERC ¶ 61,344, P 30 (2006). For Atlantic, the Commission approved a structure of 50 percent debt at a cost of 6.8 percent, and 50 percent equity at a 14 percent rate of return. Rehearing Order P 83, JA ___. As explained in section VI.D above, under Commission precedent, a 14 percent return on equity for new pipelines is warranted only if the equity component of the pipeline's capitalization is not more than 50 percent, because equity financing is more costly than debt financing, and therefore more costly to ratepayers. *See* Rehearing Order P 66, JA ___ (citing cases); *Mountain Valley*, 161 FERC ¶ 61,043, P 80 & n.102, *aff'd Appalachian Voices v. FERC*, 2019 WL 847199, at *1 (same); *see also Sierra Club*, 867 F.3d at 1376-77 ("[A]ll else being equal, the more a pipeline's financing takes the form of equity, the greater the total amount the pipeline will pay its investors, and the higher its rates will be.").

Here, averaging the 14 percent rate of return on equity and 6.8 percent rate on debt produces an overall rate of return of 10.4 percent underlying Atlantic's recourse rate.

B. The Commission Reasonably Rejected Atlantic's Proposed Approach to Accounting for Construction Financing Costs

Notwithstanding the 10.4 percent cap on its overall rate of return, Atlantic proposed to "frontload" construction with 100 percent equity financing for the pre-certification period at a 14 percent return on equity rate, far in excess of the cap. Atlantic Br. 7; Certificate Order P 187, JA ___. Atlantic claims that these early-

stage "overages" would be "balanced out" in later months, when less-expensive debt financing would be phased in. Atlantic Br. 6. Atlantic also states that the end result—if measured across the entire construction period—would remain within FERC's 10.4 percent cap. *Id*.

The Commission rejected Atlantic's proposed treatment of construction allowance funds, since it would over-accrue those funds in early stages of construction.[22] Certificate Order PP 187-88, JA ___-___. As the Commission explained, "[a] basic tenet of the Commission's [construction allowance] rules is the allowance should compensate a company for capital committed to construction projects at a rate that could be earned on operating assets." Rehearing Order P 82, JA ___. Atlantic failed to demonstrate why it would be reasonable for it to earn a higher rate of return during portions of construction than the Commission would authorize it to earn on an operating asset. *Id*. Accordingly, the Commission required Atlantic to use the combined construction allowance rate of 10.4 percent

[22] It is not clear when Atlantic intends to phase in debt financing (at a less expensive rate of 6.8 percent). The Certificate Order noted that Atlantic proposed all-equity financing for the March 2015 – August 2016 period. Certificate Order P 187, JA ___. The Rehearing Order noted that "Atlantic indicates that it intends to subsequently obtain debt financing for its construction and, by the in-service date of its project, to achieve the 50/50 percent debt/equity capital structure authorized by the Commission." Rehearing Order P 82, JA ___.

for each period in which the allowance is calculated, whether the actual calculation is computed on a monthly, quarterly or semi-annual basis. *Id*. P 83, JA ___.

Atlantic's arguments that the Commission's decision is not supported by FERC precedent and policy, and would prevent Atlantic from recovering "tens of millions of dollars" of its financing costs "over the life of the [pipeline]" (Atlantic Br. 9-20), are unavailing. Contrary to Atlantic's arguments, the Commission's determination was fully explained and justified based on agency precedent.

For example, in *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070, P 71 (2005), *cited in* Rehearing Order P 83 n.212, JA ____, the Commission explained that its precedent requires that "the equity portion percentage of the [construction allowance] rate capitalized not exceed the equity percentage of its capitalization structure." So, here, if the equity portion of a pipeline's capitalization structure cannot exceed 50 percent, then the equity portion of the construction allowance rate likewise cannot exceed 50 percent for construction allowance calculation purposes. Rehearing Order P 83, JA ___ (debt and equity components are "considered separately" for construction allowance purposes, such that "the equity component included in the [construction allowance] rate is capped at 50 percent of the approved recourse rate for equity, and the debt rate is similarly capped, for the entire construction period").

Similarly, *Gulfstream Natural Gas System, LLC,* 94 FERC ¶ 61,185 (2001), *aff'd* 38 F. App'x 24 (D.C. Cir. 2002), rejected a pipeline company's proposal to use 100 percent equity to calculate its construction allowance, based on a proposed phase-in of debt financing. 94 FERC ¶ 61,185, at pp. 61,636-61,638. The Commission required the pipeline to base its construction allowance calculation on a 70/30 debt/equity ratio, consistent with its operating capital structure. *Id.* In upholding the Commission's decision, the Court explained that the goal of requiring the construction rate of return to "mirror" the overall rate of return is to "permit a company to achieve a rate of return on its utility operations, including its construction[] program, at approximately the rate which would be allowed in a rate case," but *not* "to reflect the actual costs incurred in financing construction." 38 F. App'x at 25. In short, "[a]llowance for construction costs, like allowance for other costs, is not intended to let a company recoup its actual costs, no matter how high they may be." *Id.*

Here, as in *Gulfstream*, "FERC has done the same thing to [Atlantic] that it did to . . . all the other new pipeline companies—i.e., require the [c]ompany to use the same debt/equity structure for [construction allowance purposes] that it used for other funds, regardless whether that structure was actually used to finance the construction." *Id.* at 26. "There is no inconsistency, nor is the decision of the

[Commission] arbitrary and capricious in any way . . . ." *Id*.; *see also Buccaneer Gas Pipeline Co.,* 91 FERC ¶ 61,117 at 61,446-48 (2000) (same).

The Commission therefore reasonably found that Atlantic may not apply its 14 percent return on equity, which was granted on the basis of a 50 percent equity and 50 percent debt capital structure, to a 100 percent equity capital structure for any phase of construction financing. Despite Atlantic's assurances that such "overages" eventually will be "balanced out" by debt financing, the Commission reasonably found that such overages should not be accrued in the first place. The Commission's determination is consistent with Court and agency precedent, and should be respected. *See Elec. Power Supply Ass'n*, 136 S. Ct. at 784 (where "disputed question . . . involves both technical understanding and policy judgment," a court's "important but limited role is to ensure that the Commission engaged in reasoned decisionmaking;" "not our job" to render judgment on rate issue "on which reasonable minds can differ"); *Birckhead*, 2019 WL 2344836, at *2 ("declin[ing] . . . to second-guess the Commission's informed conclusion on [a] highly technical point").

CONCLUSION

The petitions for review should be dismissed or denied and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) and this Court's March 13, 2019 order providing that Respondent's brief not exceed 26,000 words, because this brief contains 25,471 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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