ORAL ARGUMENT NOT YET SCHEDULED

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

Case Nos. 18-1224, 18-1280, 18-1308, 18-1309, 18-1310, 18-1311, 18-1312 and 18-1313 (Consolidated)

ATLANTIC COAST PIPELINE, LLC,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

REPLY BRIEF OF PETITIONER NORTH CAROLINA UTILITIES COMMISSION

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Glossary of Abbreviated Terms

Abbreviation	Full Term
ACP	Atlantic Coast Pipeline, LLC
ACP Application	The Application that Atlantic Coast Pipeline, *LLC*, filed under Section 7 of the Natural Gas Act on September 18, 2015 in Docket No. CP15-554 before the Federal Energy Regulatory Commission seeking a certificate to construct and operate a new pipeline
Alternative Rates Policy Statement	*Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services*, 74 FERC ¶ 61,076, p. 61,240 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).
Certificate Order	*Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017).
DTI	Dominion Energy Transmission, Inc.
FERC	Federal Energy Regulatory Commission
IB	Initial Brief
JA	Joint Appendix
Negotiated Rate Policy Statement	*Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134, P 4 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).
NCUC	North Carolina Utilities Commission
NCUC CP15-554 Rehearing	North Carolina Utilities Commission's November 13, 2017 Request for Rehearing in Docket No. CP15-554
NCUC CP15-555 Rehearing	North Carolina Utilities Commission's November 13, 2017 Request for Rehearing in Docket No. CP15-555
NGA	Natural Gas Act

Abbreviation	Full Term
p.	Citation to "page(s)" in Federal Energy Regulatory Commission orders
P	Citation to "paragraphs" in Federal Energy Regulatory Commission orders
Policy Statements	Collectively, the Federal Energy Regulatory Commission's Alternative Rates Policy Statement and Negotiated Rate Policy Statement
R.	Citations to the Certified Index of the Record filed in Case No. 18-1224
Rehearing Order	*Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018).

Petitioner, North Carolina Utilities Commission ("NCUC"), responds to Initial Briefs ("IB") by Respondent, Federal Energy Regulatory Commission ("FERC") and Intervenors supporting FERC, Atlantic Coast Pipeline, LLC ("ACP"), Dominion Energy Transmission, Inc. ("DTI"), and Independent Oil & Gas Association of West Virginia, Inc.

STATUTES AND REGULATIONS

See addendum to NCUC's Initial Brief.

SUMMARY OF THE ARGUMENT

The challenged orders[1] are arbitrary and capricious because FERC relied on binding precedent agreements to certificate new pipelines without ensuring, as required by FERC's Alternative[2] and Negotiated Rates[3] Policy Statements ("Policy Statements"), that ACP/DTI lacked market power when negotiating those

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[1] R.13700, *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) ("Certificate Order"), [JA ____]; R.14312; *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) ("Rehearing Order"), [JA ____].

[2] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services*, 74 FERC ¶ 61,076, p. 61,240 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) ("Alternative Rates Policy Statement").

[3] *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134, P 4 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006) ("Negotiated Rate Policy Statement").

agreements. Instead, FERC approved recourse rates developed using "stagnant" and "outmoded" returns, misrepresented precedent,[4] and accepted ACP's use of a 14% return that was "derived from another case and another pipeline."[5] Failing to analyze or protect against market power harms NCUC's interests in rates paid for service on facilities marketed to North Carolinians and constructed and operated within North Carolina. The Court should remand with direction to comply with FERC's Policy Statements.

ARGUMENT

I. NCUC Established Standing.

NCUC demonstrated concrete injury-in-fact, traceable to the challenged orders, and that is redressable by a favorable decision.[6] If pipelines can exercise market power, negotiated rates will be excessive.[7] Injury-in-fact results from FERC's reliance on binding precedent agreements (which the binding, final contracts succeeded) to certificate new pipelines that will be constructed and operated in North Carolina and that were marketed to North Carolinians because FERC failed to follow its own precedents and ensure the prerequisite to negotiating

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4 *See* R.14312, Rehearing Order, P 66 n.166 (claiming *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) affirms its conclusion in relevant part), [JA ____].

5 *Sierra Club*, 867 F.3d at 1378. FERC ignores this portion of *Sierra Club*.

6 NCUC IB, 12-15.

7 Negotiated Rate Policy Statement, P 17 (citation omitted).

precedent agreements—*i.e.*, making valid recourse rates available to shippers—was satisfied when ACP/DTI negotiated those agreements. Harm from FERC's arbitrary action is traceable to the challenged orders because they certificated the facilities in question. The harm is redressable by remanding with direction to ensure, as required by FERC's Policy Statements, that pipeline market power did not taint the negotiated rate agreements. FERC and Intervenors do not rebut NCUC's demonstration of standing.

A. NCUC is Harmed by FERC's Refusal to Perform *Any* Analysis of Pipeline Market Power.

NCUC's sphere of interest includes rates North Carolina gas and electric utilities pay to interstate pipelines because those costs are passed onto North Carolinians.[8] Certificates for facilities constructed and operated in North Carolina must only be issued when required by the public interest.[9] Below, NCUC explained that, under FERC's Policy Statements, stagnant and outmoded recourse rates do not serve as the requisite check on pipeline market power. NCUC protested ACP's/DTI's use of stale and outmoded returns to calculate recourse rates. FERC did not perform *any* analysis to support a finding that ACP's/DTI's recourse rates satisfy the Policy Statements. This appeal addresses that error.

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8 NCUC IB, 13.

9 15 U.S.C. § 717f.

On brief, FERC admits that appropriate recourse rates are necessary to check pipeline market power when ACP/DTI negotiated the precedent agreements and recognizes that NCUC protested the recourse rates approved below.[10] Yet, FERC disclaims any nexus between NCUC's claimed harm and the challenged orders. FERC's position is nonsensical given its reliance on the binding precedent agreements and subsequent negotiated rate agreements to find need for the projects and issue certificates.[11] The Court should not allow FERC's refusal to consider its Policy Statements and protect North Carolina ratepayers from market power to insulate the challenged orders from meaningful review.[12]

Citing a website that discusses factors affecting gas *commodity* prices, Intervenors claim that North Carolinians' rates "are derived from a combination of market forces and utility costs subject to NCUC oversight."[13] This case involves FERC-approved *transportation* rates, which the Commerce Clause requires NCUC to pass-through[14] when establishing cost-of-service rates for service by NCUC-

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10 FERC IB, 99-09.

11 *Id*., 22.

12 *See ANR Pipeline Co. v. FERC*, 863 F.2d 959, 962 (D.C. Cir. 1985) ("[F]lawed agency action cannot be shielded by imposing burden of proof on a party challenging action.") (citation omitted).

13 Intervenors' IB, 29.

14 *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

regulated utilities, including ACP shippers.[15] Intervenors' claim that ACP is the only DTI customer ignores that ACP divides its DTI entitlements among its shippers in proportion to their contractual rights. ACP's General Terms & Conditions Tariff Section 29 requires ACP shippers to "pay all applicable DTI rates and charges."[16]

Intervenors also twist NCUC's claim that FERC cannot assume away market power.[17] Congress enacted the Natural Gas Act ("NGA") to protect ratepayers from pipeline market power.[18] FERC's Policy Statements serve that function by requiring pipelines to make valid recourse rates available as a precondition to entering into negotiated agreements. Intervenors have it backwards. *FERC* assumed away market power by refusing to analyze the recourse rates.[19] FERC's refusal to perform *any* market-power analysis creates a substantial probability that pipeline market power tainted the negotiated rate agreements.[20]

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15 R.3533, ACP Application, 7, [JA ____].

16 *Id*., 23, 20, [JA ____, ____].

17 Intervenors' IB, 29.

18 *Atl. Ref. Co. v. Pub. Serv. Comm'n on N.Y.*, 360 U.S. 378, 388 (1959).

19 FERC "cannot merely assume that competition will ensure just and reasonable prices." Alternative Rates Policy Statement, p. 61,396 (citing *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1502 (D.C. Cir. 1984)).

20 *See La. Envtl. Action Network v. EPA*, 172 F.3d 65, 68 (D.C. Cir. 1999) (petitioner need only show a substantial probability of harm).

B. NCUC's Harm is Traceable to the Challenged Orders Because They Relied on the Negotiated Rate Agreements to Find Need Under NGA Section 7.

Despite admitting that the "precedent agreements here were binding,"[21] FERC claims NCUC's harm "is not fairly traceable to the challenged orders" because the challenged orders did not approve the negotiated rates.[22] FERC should not be allowed to have it both ways, *i.e.*, relying on the existence of those agreements to make public-interest determinations and issue certificates and then claiming the agreements are not traceable to the certificate orders. Furthermore, if the challenged orders satisfied the Policy Statements, as FERC now claims on brief,[23] NCUC's arguments to the contrary are necessarily traceable to those orders.

C. NCUC's Harm is Redressable By Remanding with Direction to Ensure Recourse Rates Checked Pipeline Market Power.

FERC's redressability argument appears tied to its argument, rebutted above, that harm is not traceable to the challenged orders because they did not approve the negotiated rates.[24] FERC misses the relationship between its failure to check pipeline market power by ensuring ACP/DTI made available valid recourse rates and its reliance on binding precedent agreements and subsequent negotiated rate

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21 FERC IB, 22.

22 *Id*., 98.

23 *See id*., 107 ("The necessary check on market power was provided here."). NCUC rebuts this new claim below.

24 *Id*., 98.

agreements to make public-interest findings and certificate facilities in North Carolina that were marketed to North Carolinians.[25]

FERC also claims NCUC failed to establish redressability because ACP/DTI must file the negotiated rate agreements, or tariff sheets detailing their essential terms, before their proposed effective date. "[A]ll interested parties will have an opportunity to raise whatever concerns they have regarding the agreement" at that time.[26] The challenged orders did not rely on that *post-hoc* argument or direct NCUC to challenge the negotiated rate agreements in future proceedings. They simply directed ACP/DTI to file the agreements. Advancing arguments on brief that were not relied upon below is inappropriate.[27] Moreover, the appropriate time to evaluate compliance with the Policy Statements is in the certificate proceedings where FERC relied on the existence of those agreements to make public-interest determinations and issue certificates.[28]

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[25] *See Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1077 ("Section 7 imposes a duty on FERC to determine for itself whether the rates it approves are in the public interest.").

[26] FERC IB, 97 (citing R.13700, Certificate Order, n.171, [JA ____]).

[27] *Kisor v. Wilkie*, 2019 U.S. LEXIS 4397, *31 n.6.

[28] "[T]he § 4 proceeding will simply set just and reasonable rates prospectively. It will not address the validity of the initial rates approved in the § 7 proceeding that are at issue in this case." *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 588 (D.C. Cir. 2010).

Strangely, FERC's new argument would leave NCUC without redress. FERC does not, because it cannot, explain how the public interest is advanced by waiting until after FERC certificates billions of dollars of facilities and the facilities are constructed to address whether pipeline market power tainted the binding agreements FERC relied on to find need for the projects. That is precisely why FERC's Policy Statements require that valid recourse rates check pipeline market power when shippers are negotiating binding precedent agreements.

D. NCUC is Entitled to Special Solicitude.

States rely on the federal government to protect their quasi-sovereign and *parens patriae* interests in matters of interstate commerce.[29] Therefore states, unlike private litigants, are entitled to "special solicitude" in courts' standing analyses.[30] FERC summarily dismisses the notion that the Court should afford North Carolina special solicitude.[31] That claim conflicts with *Massachusetts* and should be rejected.

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[29] "[R]egulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Given the implications of interstate commerce, NCUC's interests include protecting its sovereign territory and *parens patriae* interests regarding ratepayers to whom service was marketed. N.C. GEN. STAT. §§ 62-2, 62-32, 62-48(a), 62-36.01, 62-133.4. "[T]his Court has directed that FERC consider the role of state regulators in protecting the ultimate consumer." *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d at 1076-77.

[30] *Massachusetts v. EPA*, 549 U.S. 497, 518-20 (2007).

[31] FERC IB, 98 n.17.

Special solicitude is particularly important where states have concomitant procedural challenge rights. "The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[32] NGA section 19(b) recognizes state commissions as parties that may obtain judicial review when aggrieved by FERC orders.[33] This procedural challenge right is significant. Accordingly, should the Court find NCUC failed to establish standing under the traditional test (a finding that would not be supportable), the Court should afford NCUC special solicitude and reach the merits.

II. ARGUMENT

A. Availability of Future Recourse Rates Does Not Satisfy FERC's Policy Statements.

FERC's Policy Statements protect against pipeline market power by allowing pipelines to negotiate rates only when they offer a valid recourse-rate alternative. On brief, FERC argues that pipeline market power is checked where customers can choose to pay recourse rates established in the future.[34] In addition to contravening the Policy Statements, FERC's argument is improper because FERC did not rely on

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32 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

33 15 U.S.C. § 717r(b).

34 FERC IB, 103, 107.

it below.[35] Rather, FERC claimed discretion to approve initial rates that will "hold the line" until just and reasonable rates are established.[36] Any discretion FERC has is bounded by its consumer-protection obligations. FERC does not have discretion to do what it did here and find that pipeline market power was checked by the mere possibility that, at some future time, some recourse rate would be established using some return. FERC cannot "abandon its regulatory function . . . under the guise of unreviewable agency inaction."[37]

B. Review in Future NGA Section 4 or 5 Proceedings Does Not Protect Against Market Power at the Relevant Time.

On rehearing, NCUC explained that deferring review of market power to future rate proceedings is inadequate because negotiated rates are set for the contract's term and not revisited in subsequent rate cases.[38] Flaunting its obligation

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[35] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself.") (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[36] R.13700, Certificate Order, n.148, P 111, [JA ____, ____]; R.14312, Rehearing Order, P 73 (re: ACP, no discussion re: DTI), [JA ____].

[37] *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730 (7th Cir. 1986).

[38] R.13766, NCUC CP15-554 Rehearing, 15-16, [JA ____-____]; R.13765 NCUC CP15-555 Rehearing, 13-14; [JA ____-____].

to respond meaningfully,[39] FERC wholly ignored NCUC's arguments as to DTI and failed to squarely address ACP's market power. Those failures constitute error.[40]

Despite purporting to analyze market power in the certificate proceedings,[41] FERC takes the internally inconsistent position that there was no need to check pipeline market power below because negotiated rates will be reviewed when filed for inclusion in ACP's/DTI's tariffs or can be changed in future proceedings.[42] FERC's new argument improperly revises its Policy Statements on brief by replacing the requirement that valid recourse rates be made available as a precondition to negotiating rates with the mere possibility that, at some future time, some recourse rate would be established using some return.[43]

Moreover, FERC's purported remedy is illusory. "Changes to a pipeline's recourse rates occurring under NGA sections 4 and 5 do not affect a customer's negotiated rate, because that rate is negotiated as an alternative to the customer

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39 "An agency's failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious." *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

40 *Md. People's Counsel v. FERC*, 761 F.2d 768, 778 (D.C. Cir. 1985) (citation omitted).

41 FERC IB, 107.

42 *Id*., 97-98, 102-03, 108.

43 *Kisor v. Wilkie*, 2019 U.S. LEXIS 4397, *31 n.6.

taking service under the recourse rate."[44] This Court's admonition that "a § 5 proceeding is not an adequate substitute for due consideration of an application for a § 7 certificate"[45] undermines FERC's reliance on future section 5 proceedings. "[T]he inordinate delay [in] processing . . . § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7."[46] Further, FERC's action in *Transcontinental Gas Pipeline Company, LLC*, 164 FERC ¶ 61,112, P 14 (2018) (cited in FERC IB, 104), demonstrates no meaningful review of pipeline market power will occur when the agreements are filed for inclusion in ACP's/DIT's tariffs. FERC should not be allowed to avoid review here by identifying illusory relief.

C. FERC's Red-Herring Arguments Do Not Justify Its Failure to Protect Consumers from Market Power.

Arguing that consumer protection is not the NGA's principal focus, FERC claims the need to ensure adequate gas supplies militates against reviewing returns in certificate proceedings because it would delay the proceedings.[47] FERC's interpretation of the NGA's principal focus contravenes decades of opinions

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44 *Interstate and Intrastate Natural Gas Pipelines, Rate Changes Relating to Fed. Income Tax Rate*, 164 FERC ¶ 61,031, P 14 (2018).

45 *Md. People's Counsel*, 761 F.2d at 778 (citing *Atl. Ref.*, 860 U.S. at 392).

46 *Atl. Ref.*, 360 U.S. at 391.

47 FERC IB, 101-06.

identifying consumer protection as the NGA's "major purpose" and "primary aim."[48] FERC's primary consumer-protection obligations should not yield to purported interests of expediency. While Section 7 review can be less rigorous than Section 4 review, "both the Supreme Court and this circuit have made clear that [FERC] has a duty to use its § 7 power to protect consumers."[49] FERC satisfies that duty by applying the Policy Statements, which it refused to do below.

FERC also accuses NCUC of "argu[ing], for the first time, that [FERC] could have used means other than a full discounted cash flow analysis to determine a rate or return here."[50] That accusation is belied by FERC's recognition below of NCUC's argument that FERC should have performed a DCF analysis "or performed other analyses based on current market data."[51] Moreover, ACP/DTI, not the NCUC, had the burden to prove by substantial evidence that they complied with FERC's Policy Statements.[52] Once NCUC raised ACP's/DTI's non-compliance as

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48 *See, e.g.*, *NAACP v. FPC*, 425 U.S. 662 n.5 (1976); *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990) (citing *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944)).

49 *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1070.

50 FERC IB, 108.

51 R.14312, Rehearing Order, P 73, [JA ____].

52 Alternative Rates Policy Statement, p. 61,240.

a material issue of fact, FERC was obligated to address the issue.[53] FERC's refusal to do so, and ACP's/DTI's failures to support their applications with substantial evidence, cannot be the basis to affirm the challenged orders. Otherwise, the burden of proof would improperly shift to NCUC.[54]

CONCLUSION

Wherefore, the Court should remand with direction that the Federal Energy Regulatory Commission comply with its Policy Statements.

Dated: July 10, 2019

Respectfully submitted,

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53 *See PPL Wallingford*, 419 F.3d at 1198. "Even unquantified factors, however, cannot be dismissed without further inquiry where their impact is both evident and massively significant." *Md. People's Counsel*, 761 F.2d at 776.

54 *See ANR Pipeline*, 863 F.2d at 962 (citation omitted).

CERTIFICATE OF COMPLIANCE

Per the Court's March 13, 2019 order, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headings, footnotes, and quotations contain 2,941 words of the 10,900 words allotted to Petitioners other than Atlantic Coast Pipeline, LLC, as counted by the "Word Count" feature of Microsoft Word 2010, the program with which this brief was prepared. This word count excludes: (1) the cover page; (2) certificates; (3) the table of contents; (4) the table of authorities; (5) the glossary of abbreviated terms; (6) the signature block; and (7) the certificate of service.

Dated: July 10, 2019

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CERTIFICATE OF SERVICE

Pursuant to Rule 25(d) of the Federal Rules of Appellate Procedures and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this 10th day of July 2019, served the foregoing Final Initial Brief of Petitioner, North Carolina Utilities Commission, by first class mail, postage prepaid or electronic mail through the Court's CM/ECF system upon the parties to the proceeding below as listed in the Service Preference Report.

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Current Associated Cases: 18-1310 Friends of Wintergreen Inc. v. FERC, 18-1313 Bold Alliance et al v. FERC, 18-1312 Friends of Nelson v. FERC, 18-1280 North Carolina Utilities Commi v. FERC, 18-1309 Fairway Woods Homeowners Condo v. FERC, 18-1311 Wintergreen Property Owners v. FERC, 18-1308 Appalachian Voices et al v. FERC

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