ORAL ARGUMENT NOT YET SCHEDULED

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

IN THE

United States Court of Appeals for the District of Columbia Circuit

ATLANTIC COAST PIPELINE, LLC, *et al.*,

Petitioners,

LORA BAUM and VICTOR BAUM,

Intervenors.

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ATLANTIC COAST PIPELINE, LLC, *et al.*,

Intervenors.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

BRIEF FOR INTERVENORS ATLANTIC COAST PIPELINE, LLC, DOMINION ENERGY TRANSMISSION, INC., AND INDEPENDENT OIL & GAS ASSOCIATION OF WEST VIRGINIA, INC.

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES

1. The parties to the proceeding are listed in the Petitioners' opening briefs, except for The City of Staunton and Nelson County, Virginia; The Institute for Policy Integrity at New York University School of Law; 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, who have filed briefs as *amici curiae*.

2. Intervenor Atlantic Coast Pipeline, LLC is the sponsor of a new pipeline system designed to provide up to provide up to 1.5 million dekatherms per day of firm transportation service to the Southeast United States. The following are parent companies, subsidiaries, affiliates, or companies which own at least a 10% interest in Atlantic Coast Pipeline, LLC which have any outstanding securities in the hands of the public: Dominion Atlantic Coast Pipeline, LLC, a subsidiary of Dominion Energy, Inc. (48 percent); Duke Energy ACP, LLC, a subsidiary of Duke Energy Corporation (40 percent). The remaining interests are held by: Piedmont ACP Company, LLC, a subsidiary of

Duke Energy Corporation (7 percent); Maple Enterprise Holdings, Inc., a subsidiary of the Southern Company (5 percent).

3. Intervenor Dominion Energy Transmission, Inc. is a natural-gas company engaged in the business of storing and transporting natural gas in interstate commerce for customers principally located in the Northeast and Mid-Atlantic markets. It is a wholly owned subsidiary of Dominion Energy Gas Holdings, LLC. Dominion Energy Gas Holdings, LLC is a wholly owned subsidiary of Dominion Energy, Inc.

4. Intervenor Independent Oil & Gas Association of West Virginia, Inc. (IOGA) is an association of independent producers and other oil and gas-related companies doing business in the State of West Virginia. No company has a 10 percent or greater interest in IOGA and no company controls IOGA directly or indirectly through intermediaries.

B. RULINGS UNDER REVIEW

The rulings under review are listed in Petitioners' opening brief.

C. RELATED CASES

Appalachian Voices v. FERC, No. 17-1271 (D.C. Cir.) involved some similar issues as this case. On February 19, 2019, the court entered a per curiam judgment denying the petitions for review. *Appalachian Voices v. FERC*, No. 18-1114 (4th Cir.) challenged FERC's certificate order in this case, but was dismissed for lack of

jurisdiction. And *In re Appalachian Voices*, No. 18-1271 (4th Cir.) sought an All Writs Act stay pending judicial review of FERC's certificate order at issue in this case, but the petition was denied.

Petitioners maintain that this case is also related to *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir.) (regarding the Transcontinental Atlantic Sunrise Project), *Friends of Buckingham v. State Air Pollution Control Board*, No. 19-1152 (4th Cir.) (concerning development of Atlantic Coast Pipeline's compressor station near Union Hill), and *Bold Alliance v. FERC*, No. 18-5322 (D.C. Cir.) (regarding the ability of landowners who did not intervene before the Commission to intervene in judicial proceedings).

Finally, the Commission's brief outlines a series of cases either pending in, or recently resolved by, the Fourth Circuit. These cases concern challenges to certain permits and authorizations for the Atlantic Coast Pipeline issued by other federal and state agencies. FERC Br. iii-iv.

/s/ Catherine E. Stetson
Catherine E. Stetson

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GLOSSARY

ACP	Atlantic Coast Pipeline
Atlantic	Atlantic Coast Pipeline, LLC
AV	Appalachian Voices
Certificate Order	*Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (Oct. 13, 2017)
DETI	Dominion Energy Transmission, Inc.
FEIS	Final Environmental Impact Statement
FERC or the Commission	Federal Energy Regulatory Commission
NCUC	The North Carolina Utilities Commission
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
Rehearing Order	*Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (Aug. 10, 2018)
Wintergreen	Wintergreen Property Owners Association

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JURISDICTIONAL STATEMENT

This Court lacks jurisdiction to resolve some of Petitioners' contentions because Petitioners either did not raise them on rehearing before the Federal Energy Regulatory Commission or lack standing to assert them. *See Tennessee Gas Pipeline Co.* v. *FERC*, 871 F.2d 1099, 1107 (D.C. Cir. 1989) (failure to raise

on rehearing); *see also North Carolina Utils. Comm'n v. FERC*, 761 F. App'x 9, 10 (D.C. Cir. 2019) (*NCUC*) (per curiam) (lack of standing).

STATEMENT OF THE CASE

Natural gas is displacing coal as the dominant source of electricity generation across the Nation. *See* U.S. Energy Information Administration, *Annual Energy Outlook 2019*, at 62 (Jan. 24, 2019).[1] To help satisfy this growing demand, Atlantic Coast Pipeline, LLC (Atlantic) sought to construct and operate the Atlantic Coast Pipeline (ACP)—a new interstate pipeline and associated facilities—extending from the production region in Harrison County, West Virginia to eastern Virginia and North Carolina. JA__ [Certificate Order P 1]. The ACP will provide up to 1.5 million dekatherms per day of natural-gas transportation service. Atlantic has entered into precedent agreements with customers for substantially all of that capacity.[2] JA__, __ [*Id.* PP 2, 50]. Dominion Energy Transmission, Inc. (DETI) simultaneously sought through its Supply Header Project to expand its system to transport gas supplies to the ACP. JA__ [*Id.* P 13]. The Supply Header Project will consist of roughly 35 miles of

[1] *Available at* https://bit.ly/2RdIJ4T.

[2] "A precedent agreement is a long-term contract subscribing to expanded natural gas capacity." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1310 (D.C. Cir. 2015).

pipeline, as well as four compressor units, and will provide just over 1.5 million dekatherms per day of natural-gas transportation service to the ACP. JA__ [*Id*.].

Atlantic and DETI filed applications with FERC in September 2015 for approval of these projects. JA__ [FEIS ES-1]. The Natural Gas Act (NGA) designates FERC as the "lead agency" for "purposes of complying with" the National Environmental Policy Act (NEPA). 15 U.S.C. § 717n(b). FERC therefore took the lead in reviewing the environmental impacts of the proposals, with various other agencies cooperating in that review. JA__ [FEIS ES-1]. The Commission devoted more than two years to preparing a Final Environmental Impact Statement (FEIS) of nearly 900 pages evaluating the projects' impacts. JA__-__ [*Id*. at ES-2 to ES-3].

After considering the FEIS and associated comments, as well as all the factors bearing on the "public convenience and necessity," the Commission granted Atlantic and DETI certificates to build and operate the ACP and Supply Header Project, respectively. JA__ [Certificate Order, Ordering Paragraphs (A)-(B)]. The Commission concluded that "the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions." JA__ [*Id*. P 325]. Several parties sought rehearing, but the Commission denied these requests. JA__-__ [Rehearing Order].

The ACP and the Supply Header Project attracted objections from several corners. Conservation groups led by Appalachian Voices (AV) argued that the ACP was not supported by market demand. The Commission responded by pointing to the six end-use customers who had already subscribed to nearly all of the ACP's firm transportation capacity—concrete evidence of market need. *See* JA__ [Certificate Order P 55]; JA__ [Rehearing Order P 43].

Appalachian Voices and other organizations led by the Wintergreen Property Owners Association (Wintergreen) further protested the Commission's NEPA analysis. They claimed that the FEIS did not sufficiently consider all alternatives; did not adequately evaluate impacts to aquatic resources in karst terrain; did not adequately weigh environmental-justice concerns; did not properly consider downstream greenhouse-gas emissions; and did not properly analyze the safety risks to nearby residents. The Commission addressed each one of these comments at length in its Certificate Order and (to the extent the arguments were raised again and preserved) on rehearing. JA__-__ [Certificate Order PP 190-326]; JA__-__ [Rehearing Order PP 105-320].

Appalachian Voices also challenged the Commission's decision to extend to Atlantic eminent-domain authority for the approved pipeline route. But FERC explained that it "does not confer eminent domain powers"—the Natural Gas Act does—and therefore does not have discretion to withhold eminent-domain

authority from a certificate holder. JA__ [Certificate Order P 66]; JA__ [Rehearing Order P 86].

Finally, the North Carolina Utilities Commission (NCUC) complained about the Commission's approval of Atlantic and DETI's rates of return on equity. But FERC explained that each rate reflected the business risks faced by each company, and each was a valid exercise of its Section 7 Natural Gas Act discretion. JA__-__, __-__ [Certificate Order P 97-104, 106-114]; JA__-__ [Rehearing Order PP 64-74].

These petitions for review followed.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addendum to the Commission's brief.

SUMMARY OF ARGUMENT

I. The Commission's conclusion that there is demonstrated market demand for the ACP is supported by substantial evidence. Six shippers have subscribed to over 90% of the ACP's capacity in long-term precedent agreements. Under established Commission and D.C. Circuit precedent, executed long-term precedent agreements are conclusive evidence of market demand. Appalachian Voices' arguments to the contrary are not supported by case law or Commission precedent.

II. Petitioners' NEPA claims are similarly insubstantial. Appalachian Voices forfeited its argument that the Commission did not consider certain alternative routes by not raising it on rehearing. As for the alternatives that *were* argued and preserved, the Commission considered each of the proposed alternatives and gave rational reasons for not adopting them. It also adequately considered the effects of the ACP on karst terrain, analyzed environmental-justice issues, complied with this Court's precedent in its evaluation of greenhouse-gas emissions, and reasonably weighed residents' safety concerns. *Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018), which faulted the Forest Service for issuing a particular permit without critically assessing the Commission's EIS, does not support a different result.

III. The Commission did not violate the Constitution or the Natural Gas Act in approving the ACP. The certificate order granted Atlantic eminent-domain authority by operation of law. Neither the Takings Clause nor the Due Process Clause are offended by granting a pipeline eminent-domain authority.

IV. NCUC does not have standing to complain about how FERC approved Atlantic and DETI's rates of return on equity. Its complaint hinges entirely on a non-existent injury that cannot be traced back to FERC's approval. And NCUC's claims fail on the merits anyway. The Commission has discretion under Section 7 of the NGA to approve initial rates that "hold the line" until "just and reasonable"

rates are determined under Sections 4 and 5. The Commission properly exercised this discretion by considering the risks each project would face and applying its longstanding policy in light of those risks.

STANDARD OF REVIEW

For properly preserved arguments, this Court will "set aside a decision of the FERC only if it is arbitrary and capricious or otherwise contrary to law." *Transmission Agency of N. Cal. v. FERC*, 495 F.3d 663, 671 (D.C. Cir. 2007) (citation omitted). Under that standard, this Court will uphold the Commission's factual findings if they are supported by substantial evidence, and gives an "extreme degree of deference" to FERC's evaluation of "scientific data within its technical expertise." *National Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (citation omitted).

ARGUMENT

Petitioners' three briefs cover more than 20 issues in roughly 20,000 words. FERC has addressed them in detail. FERC Br. 18-108. We write to underscore the flaws in certain of Petitioners' arguments.

I. THE COMMISSION'S MARKET-NEED CONCLUSION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

"[I]f an applicant has entered into contracts or precedent agreements for the [project's] capacity," those agreements "constitute significant evidence of demand for the project." *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88

FERC ¶ 61,227, 61,748 (1999); *see also Certification of New Interstate Nat. Gas Pipeline Facilities*, 163 FERC ¶ 61,042 at P 35 (2018).

For good reason. There is no better evidence of market demand for a service than binding commitments to purchase the service once it becomes available. FERC has accordingly long recognized long-term precedent agreements as conclusive evidence of need for a project. *See, e.g.*, *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, 61,316 (1998). This Court, too, has affirmed that precedent agreements "always will be important evidence of demand for a project." *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) (citation omitted). Indeed, this Court has found market need when 93% of a pipeline's capacity was subscribed to through binding precedent agreements, roughly the subscribed percentage here. *Compare Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*), *with* JA __ [Rehearing Order P 43].

Appalachian Voices nevertheless contends that the precedent agreements here do not reflect market need because they are between Atlantic and its affiliates. AV Br. 12-14. But this Court has already held that "[t]he fact that [a pipeline]'s precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious." *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019)

(*Mountain Valley*) (per curiam). Appalachian Voices next cautions that "Atlantic 'remains at risk' for" "terminated contracts." AV Br. 14 (citation omitted). But the risk of breach is present in every contract, and it has nothing to do with market demand.

Appalachian Voices also contends that FERC's market-need inquiry was improper because several subscribed shippers are state-regulated utilities, which (purportedly) "need not determine that there is demand" for capacity, as long as they can reasonably bill for it. *Id.* at 15. But the Commission does "not look behind precedent or service agreements to make judgments about the needs of individual shippers." JA__ [Certificate Order P 54]; *see also Certification of New Interstate Nat. Gas Pipeline Facilities*, 163 FERC ¶ 61,042 at P 35.

Appalachian Voices' final argument (Br. 17)—that FERC should have reviewed evidence beyond the precedent agreements—fails for similar reasons. Nothing in the *Certificates Policy Statement* or the precedent interpreting it "suggest[s] that it 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." *Minisink*, 762 F.3d at 111 n.10; *accord Myersville Citizens*, 783 F.3d at 1311. Precedent agreements remain the gold standard for proving market need.

II. THE COMMISSION'S ENVIRONMENTAL IMPACT STATEMENT COMPLIED WITH NEPA AND THE NGA.

A. Appalachian Voices Forfeited Its Argument That FERC Arbitrarily Rejected Certain System Alternatives.

NEPA requires that the Commission consider potential alternatives to the proposed project. 40 C.F.R. § 1502.14. Appalachian Voices argues that FERC should have considered whether the need served by the ACP could have been met by other pipelines. AV Br. 22-25. It contends that FERC erred in concluding that the Transco pipeline "would require capacity upgrades to accommodate the Project's contract capacity" (*id*. at 22) and that FERC failed to consider the Atlantic Sunrise pipeline as an alternative (*id*. at 23-24).

According to Appalachian Voices, the Commission dismissed the Transco alternative based on now-defunct data showing that Transco "has a peak design capacity of almost 11 Bcf/d of natural gas" and would thus "require capacity upgrades to accommodate the [ACP]'s contract capacity." *Id*. at 22 (citation omitted). But whatever Transco's current capacity, Appalachian Voices did not take issue with FERC's calculation in any of its rehearing petitions. In fact, it *accepted* FERC's calculation. JA__ [AV Rehearing Pet. 54]. Appalachian Voices cannot challenge a figure it adopted before FERC: The NGA requires that parties "rais[e] the very objection urged on appeal" before FERC on rehearing in order for

this Court to have jurisdiction to review the objection. *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985).

Appalachian Voices likewise failed to raise on rehearing its argument that FERC failed to consider Transco's Atlantic Sunrise pipeline as an alternative. AV Br. 24. It instead pointed to Atlantic Sunrise as evidence that there was no "market support" for the ACP, JA__-__ [AV Rehearing Pet. 25-27], or that the "impacts on natural resources can be cumulatively significant," JA__ [Friends of Nelson Rehearing Pet. 7]. Those peripheral comments on the Atlantic Sunrise project are not "the very objection[s] [now] urged on appeal." *ASARCO*, 777 F.2d at 774.

B. Petitioners Misapprehend This Court's Review Under NEPA.

NEPA is an "information-forcing" tool; it "directs agencies only to look hard at the environmental effects of their decisions, and not to take one type of action or another." *Sabal Trail*, 867 F.3d at 1367 (citation omitted). So long as an agency "look[s] hard at the factors relevant" to its analysis, this Court generally defers to the Commission's decision. *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir. 2016) (citation omitted and alteration in original). That principle alone resolves most of Petitioners' NEPA claims.

1. FERC Took A "Hard Look" At System Alternatives and Alternative Routes.

Appalachian Voices argues that FERC inadequately considered the WB XPress Project and the Mountain Valley Pipeline as alternatives. AV Br. 23-25.

Wintergreen, for its part, argues that FERC applied an improper standard and considered improper factors in evaluating the Merged Systems alternative, and the South of Highway 664 and Lyndhurst-to-Farmville alternative routes. Wintergreen Br. 21-28.

But this Court has explained that "[w]hen an agency is asked to sanction a specific plan . . . the agency should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). FERC thus properly rejected the WB XPress Project and the Mountain Valley Pipeline alternatives because neither met Atlantic's needs. "The WB XPress Project does not align with the delivery and receipt points of ACP" and the Mountain Valley Pipeline "would need to be expanded to . . . reach ACP delivery points." JA__ [FEIS 3-6]. Appalachian Voices itself admits that both alternatives would leave a third of Atlantic's shippers with no access to their contracted natural gas. *See* AV Br. 24. Moreover, neither alternative would have the capacity to serve *both* their customers *and* Atlantic's. JA__ [FEIS 3-6].

Wintergreen, meanwhile, contends that FERC rejected the South of Highway 664 alternative route and Merged Systems alternative under an improper "significant environmental advantage" standard. Wintergreen Br. 22-25. But because NEPA does not require agencies to "take one type of action or another,"

Sabal Trail, 867 F.3d at 1367 (citation omitted), it cannot set a standard by which FERC decides what to do about the impacts it finds, *see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989) (noting that NEPA imposes no "substantive, result-based standards"). And FERC has long used the "significant environmental advantage" standard to guide its substantive policy decisions. *See, e.g.*, *Maritimes & Ne. Pipeline, L.L.C.*, 80 FERC ¶ 61,136, 61,484 (1997); *Southern Nat. Gas Co.*, 55 FERC ¶ 61,212, 61,709 (1991).

In any event, FERC rejected the South of Highway 664 alternative because it would move the pipeline by only 1,400 feet without "reduc[ing] the amount of side slope and steep terrain construction." JA__-__ [Rehearing Order PP 153-154]. And the Commission rejected the Merged Systems alternative because it would hinder "Atlantic's ability to provide flexibility for customers[ ]," "increase construction complexity in steep terrain," and result in additional "air emissions and noise." JA__-__ [*Id*. PP 134-136]. While some of these considerations implicate "facilitating future expansion shippers might someday seek" (Wintergreen Br. 26), the Commission can, and "should," consider "the needs and goals of the parties involved in the application." *Busey*, 938 F.2d at 196.

The Commission rejected the Lyndhurst-to-Farmville alternative for similar reasons. After conducting an in-person survey of Rockfish Gap—through which Atlantic would have to tunnel—FERC found that the route "would be constrained

by steep topography, structures, roads, bridges, a railroad tunnel, and limited locations for workspace." JA__ [FEIS 3-30]. This analysis, contrary to Wintergreen's claims (Br. 27-28), is cited in the same sentence as FERC's conclusion that the alternative route is "likely impractical." JA__ [FEIS 3-31]. And it is reasonable.

2. The Commission Adequately Considered Aquatic Impacts In Karst Terrain.

The Commission considered, at length, the impacts to water resources in karst terrain. *See* JA__-__ [*Id.* at 4-7 to 4-18]. It also "considered the historic and recent landslide incidences in the immediate project area." JA__ [Rehearing Order P 194]; *see also* JA__-__ [FEIS Volume IV – Part 9 of 11, Z-2983]. But the Commission concluded that detailed mitigation measures (JA__-__ [FEIS 4-18 to 4-22) and Atlantic's adherence to multiple conditions of the certificate (JA__-__, __, __-__, __ [Certificate Order, Conditions No. 26-29, 52, 62-64, 66]) would minimize the pipeline's effects on karst features. Appalachian Voices contends this plan is "yet-to-be-drafted." AV Br. 30. Not so. The plan is Appendix I of the FEIS. JA__-__ [FEIS App. I]. And the plan is dynamic: Atlantic must "revise its *Karst Mitigation Plan* to include post-construction monitoring using" light detection and ranging data. JA__ [Certificate Order P 206].

Moreover, FERC concluded that "compliance with U.S. Department of Transportation regulations" would adequately "minimize the risk of damage to the

pipeline"—and thereby impacts on karst areas—"in the event of landslides." JA__ [Rehearing Order P 194]. That makes sense. The Department of Transportation is "more directly responsible and more competent" to judge questions of pipeline safety. *City of Boston Delegation v. FERC*, 897 F.3d 241, 255 (D.C. Cir. 2018) (citation omitted). It was thus reasonable for FERC to rely on Atlantic's compliance with that agency's regulations when assessing the pipeline's safety. *See Murray Energy Corp. v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011). The Commission was also well within its authority to allow the ACP to proceed based on Atlantic's dynamic mitigation plan, because NEPA "does not require agencies to discuss any particular mitigation plans that they might put in place." *Busey*, 938 F.2d at 206.

Nor did the Commission inadequately map karst systems. AV Br. 30. Atlantic mapped as much of the affected karst as it could. *See* JA__-__ [FEIS 4-10 to 4-11]. But landowners prevented access to much of the proposed route. JA__ [*Id*. at 4-11]. To account for this handicap, FERC directed Atlantic to conduct dye tracing before construction.[3] JA__ [*Id*. at 4-12]; JA__ [Certificate Order, Condition No. 26]. Atlantic is then required to update its mitigation plan in light of

[3] Dye tracing is "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." JA__ [Certificate Order P 206 n. 295].

this analysis—which then must be approved by the Commission—before beginning construction. JA__-__, __ [Certificate Order, Condition Nos. 29, 54]. This process of research, review, and approval is a reasonable solution.

3. The Commission Considered Environmental-Justice Impacts.

Appalachian Voices argues that FERC erred by using census-tract data instead of a more granular anthropological study to identify minority environmental-justice populations—an error it says was "compounded" when FERC used the county, rather than the State, as a comparison group. *See* AV Br. 31-32, 34; *see also* JA__ [FEIS 4-512].

Appalachian Voices' arguments run headlong into both EPA guidance and this Court's precedent. EPA permits agencies to use "a neighborhood census tract" as an appropriate unit of geographic analysis. EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* § 2.1.1 (Apr. 1998).[4] This Court's recent opinion in *Sabal Trail* affirmed the Commission's use of census-tract data, dismissing as "elevat[ing] form over substance" the argument that FERC was obligated to use more granular data. 867 F.3d at 1370. The Court also found no issue there with FERC's comparisons with county demographics. *Id.* at 1370-71. Sensibly so: The "choice among

[4] *Available at* https://bit.ly/2MR9BuL.

reasonable analytical methodologies is entitled to deference" in environmental-justice analyses. *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004). Indeed, an agency need not even "formally label" each environmental-justice community as long as it "recognizes and discusses" the project's impact on those areas. *Sabal Trail*, 867 F.3d at 1370.

The Commission did that here. Appalachian Voices' argument hinges on FERC's purported blind reliance on emissions not exceeding federal national ambient air quality standards. AV Br. 35. But the standards are set where they are—"not lower or higher than is necessary"— to "protect the public health with an adequate margin of safety." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475-476 (2001).

FERC also went beyond reliance on federal air-quality standards. It noted the increased levels of emissions associated with compressor stations and recognized that some cancer-related compounds and chemicals with documented health effects may be present in the air near compressor stations. JA__ [FEIS 4-514]. It observed that African-American populations, some of which are located near the compressor stations, have greater rates of lung cancer and asthma than the general population. JA__-__ [*Id.* at 4-513 to 4-514]. And it modeled "a site-specific set of worst-case meteorological conditions" at the sites of each proposed compressor station. JA__ [*Id*. at 4-560]. Those models showed that any emissions

increases were modest and well within air-quality limits. JA__ [*Id.* at 4-561 tbl. 4.11.1-11]. FERC also explained that mitigation measures would reduce some of the effects of these increased emissions. JA__ [*Id*. at 4-514]. The Commission accordingly concluded that these areas would not experience disproportionately high or adverse health impacts. JA__-__ [*Id.* at 4-514 to 4-515]. FERC's assessment was reasonable. *See Union Neighbors United*, 831 F.3d at 575.

4. The Commission's Greenhouse-Gas Emissions Analysis Was Sufficient.

The Commission estimated the "upper-bound" of greenhouse-gas emissions from the ACP (JA__, __, __ [FEIS 4-548 tbl. 4.11.1-2; 4-557 tbl. 4.11.1-5; 4-559 tbls. 4.11.1-7, 4.11.1-8, 4.11.1-9]); discussed the general effects of greenhouse-gas emissions on climate change (JA__-__ [*id*. at 4-618 to 4-622]); considered the effects these emissions would have on different regions (JA__ [*id*. at 4-620]); and explained why it could not use the Social Cost of Carbon tool to assess the significance of the incremental impacts of the ACP on the environment. (JA__-__ [Certificate Order P 307]; JA__ [Rehearing Order P 279]). Contending that this is not enough, Appalachian Voices argues that FERC was further required to assess and discuss the *incremental* effects of this project on climate change. AV Br. 37.

But FERC has explained that that cannot be done. And that explanation suffices. In the greenhouse-gas context, "FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot

do so." *Sabal Trail*, 867 F.3d at 1375. The Court has explained in applying that rule that "an estimate of the upper bound of emissions resulting from end-use combustion," paired with "reasons why [FERC] believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts," is "all that is required for NEPA purposes." *Mountain Valley*, 2019 WL 847199, at *2.

The Commission did exactly that here. FERC forecast the upper bound of greenhouse-gas emissions from the ACP, assuming that every cubic foot of gas transported would be burned and would not offset dirtier fuels or other sources of natural gas. JA__, __, __ [FEIS 4-548, 4-557, 4-559]. The Commission then discussed the general effects of greenhouse-gas emissions on climate change. JA__-__ [*Id*. at 4-618 to 4-622]. But FERC concluded that it could not "determine the projects' incremental physical impacts on the environment caused by climate change" because it could not "determine whether the projects' contribution to cumulative impacts on climate change would be significant." JA__ [*Id*. at 4-620]. The Commission instead considered the emissions' effects on different regions. JA__ [*Id*.].

The Commission then explained that Appalachian Voices' preferred Social Cost of Carbon tool can result in "significant variation in output" due to the lack of a "consensus . . . on the appropriate . . . rate to use for analyses spanning multiple

generations." JA__-__ [Certificate Order P 307] (citation omitted). The Social Cost of Carbon also "does not measure the actual incremental impacts of a project on the environment" and lacks "established criteria identifying the monetized values that are to be considered significant for NEPA reviews." JA__ [*Id.*]. The rehearing order underscored those observations with a letter from the Environmental Protection Agency explaining that the tool "was not designed for, and may not be appropriate for, analysis of project-level decision-making." JA__ [Rehearing Order P 277] (citation omitted).

Appalachian Voices fails to respond to these shortcomings or offer an alternative methodology. These failures are fatal to its arguments, and not for the first time. *See Mountain Valley*, 2019 WL 847199, at *2; *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016).

5. The Commission Did Not Arbitrarily Dismiss Wintergreen's Safety Concerns.

Wintergreen's arguments that the Commission cavalierly ignored its residents' safety also miss the mark. Wintergreen Br. 19-20. After reviewing historical pipeline-accident data, FERC recognized that "operation of the project would represent . . . a slight increase in risk to the nearby public." JA__-__ [FEIS 4-586 to 4-590]. But FERC found that several factors allayed that risk, including that the ACP would be constructed in accordance with Department of

Transportation safety standards. JA__ [*Id*. at 4-578]. It was reasonable for the Commission to rely on that compliance. *See supra* p. 15.

The Commission recognized that the DOT regulations were not specifically tailored to pipelines running over karst terrain. JA__ [FEIS 4-21]. But FERC reasonably found that Atlantic's karst mitigation strategy adequately ensured the public's safety. JA__-__ [*Id*. at 4-21 to 4-22]; *see also Murray Energy*, 629 F.3d at 240-241 (holding that FERC can rely on "post-construction mitigation measures" when evaluating pipeline safety).

The Commission also adequately responded to Wintergreen's comments. JA__ [FEIS 4-585]. FERC explained that Atlantic is required to coordinate with local emergency-response providers and implement its local emergency-response plan in the event of an emergency. JA__-__ [Rehearing Order P 152]. That satisfies NEPA. *See EarthReports*, 828 F.3d at 959 (recognizing that "coordination with . . . local authorities" is a "reasonable component" of a safety analysis).

C. *Cowpasture* Is Inapposite.

Appalachian Voices and Wintergreen root the remainder of their NEPA arguments in *Cowpasture*. AV Br. 25-29; Wintergreen Br. 18-19. But *Cowpasture* has little to say about this case.

Cowpasture held that the Forest Service had violated NEPA by uncritically adopting the ACP FEIS—despite having previously questioned certain aspects of the draft EIS—in issuing a Special Use Permit allowing the ACP to cross Forest Service land. 911 F.3d at 179. Before the EIS was finalized, for example, the Forest Service had requested that Atlantic provide it with "ten site-specific stabilization designs for selected areas of challenging terrain." *Id*. at 156. Atlantic provided two. *Id*. at 156-157. The Forest Service later informed Atlantic "that it would not require the remaining eight site-specific stabilization designs before authorizing the project" without acknowledging this change in position. *Id*. at 158-159. The Forest Service also commented on the Commission's draft EIS, requesting that FERC consider off-forest alternative routes. *Id*. at 157-158. But then the Forest Service reversed course and "released its draft [Record of Decision] proposing to adopt the FEIS[ ] [and] grant the" permit the same day the Commission released an FEIS that did not, in the Fourth Circuit's view, adequately respond to the Forest Service's comments. *Id*. at 159.

The Fourth Circuit opined that the Forest Service had an "obligation to 'independent[ly] review' the EIS and ensure its comments and suggestions to the [Commission] were satisfied before adopting it." *Id.* at 170-171 (quoting 40 C.F.R. § 1506.3(c)). The court concluded that because the Forest Service had initially—and "strenuously"—"objected to the lack of non-national forest route

alternatives in the" draft environmental impact statement, it was arbitrary and capricious for the Service "to reverse[ ] course and adopt[ ] the FEIS even though the analysis of non-national forest alternatives was unchanged from the" draft. *Id*. at 171. Put another way, given the Forest Service's adoption of an EIS it previously had questioned, the court could not "conclude that the Forest Service undertook an independent review and determined that its comments and concerns were satisfied" when it "dropped its demand" for additional studies. *Id.* at 173 (citation omitted).

The Fourth Circuit similarly found that that the Forest Service had abandoned without explanation other "serious concerns" the Service had previously expressed regarding landslide risks, erosion, water quality, and mitigation techniques when it adopted the Commission's FEIS. *Id*. at 174. The court accordingly vacated the Special Use Permit the Forest Service had granted and remanded to the Forest Service for additional proceedings.

Petitioners' reliance on *Cowpasture* is misplaced. Because a Forest Service permit was at issue, *Cowpasture*'s holding targets the Forest Service's supposed abdication of its responsibility to follow through on the questions and concerns it had raised during the EIS process. *Id*. at 158-159, 171-179. What the Fourth Circuit did *not* do is what *this Court* is called upon to do: Assess the *Commission's* NEPA analysis and its defense of that analysis. And a different

result is warranted here, not least because the Commission—unlike the Forest Service—did not reverse itself.

First, the Commission did not "summarily dismiss[ ] off-forest alternatives," as Appalachian Voices claims. AV Br. 26. The FEIS includes a detailed analysis of the pipeline's forest impacts. *See* FERC Br. 41-43. And after all of this analysis, FERC did not "identif[y] or receive[ ] any information that suggests the shorter pipeline route though the National Forests has significantly greater impacts on sensitive resources than the [off-forest] alternative," which would add 43 miles to the route. JA__ [FEIS 3-19]. For that reason, the Commission rejected the off-forest alternative routes. That is all NEPA requires. *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 836 (D.C. Cir. 1972) ("[T]he discussion of environmental effects of alternatives need not be exhaustive. What is required is information sufficient to permit a reasoned choice of alternatives so far as environmental aspects are concerned.").

Second, FERC ensured sediment protection through compliance with other agencies' permitting processes. The Commission recognized that Atlantic's "erosion control and rehabilitation measures" in its construction, operation, and maintenance plan would have to satisfy the Forest Service's "Forest Plan Standards." JA__ [FEIS 4-129]. But that is not all. The Commission also explained that Atlantic is required to "implement erosion controls as dictated by"

the EPA's "construction stormwater permits and" the Army Corps of Engineers' Clean Water Act permits. *See* JA__ [*id.*]; JA__ [Rehearing Order P 221]. The Commission was well within its rights to defer to these subject-matter experts. *See EarthReports*, 828 F.3d at 957.

Third, the Commission adequately considered the risk of a landslide near the Wintergreen community. (The Court also need not reach this question, since Wintergreen has forfeited this argument by failing to raise it on rehearing. *See supra* pp. 10-11.) The Commission explained that Atlantic had already identified landslide-susceptible areas and was conducting further analysis to ascertain whether any more existed. JA__-__ [FEIS 4-27 to 4-28]. FERC also approved Atlantic's mitigation strategy, which includes avoiding "slip-prone areas," "buttressing slopes," "benching and re-grading," and constructing "retaining structures." JA__-__ [*Id*. at 4-28 to 4-29]. Finally, the Commission mandated that Atlantic provide "all outstanding geotechnical studies," as well as "any mitigations proposed following" these studies *before* commencing construction. JA__ [*Id*. 4-30]. Whatever the Fourth Circuit's view of the *Forest Service's* assessment, *the Commission* adequately addressed landside risks.

III. ATLANTIC'S EMINENT-DOMAIN AUTHORITY DOES NOT VIOLATE THE NATURAL GAS ACT OR THE CONSTITUTION.

As its last salvo, Appalachian Voices offers a cluster of eminent-domain arguments. It argues, for one, that the Fourth Circuit's vacatur of permits issued by

other federal agencies strips Atlantic of its eminent-domain authority under the NGA. AV Br. 41-44. Appalachian Voices is wrong. Just as in *Mountain Valley*, "FERC's issuance of the certificate of public convenience and necessity . . . did not hinge, as petitioners claim, on" permits and authorizations issued by other federal agencies. 2019 WL 847199, at *1. The Fourth Circuit's opinion vacating those permits simply "has no bearing on the validity of" Atlantic's certificate. *Id*.

Appalachian Voices next argues that FERC's issuance of a certificate without first determining Atlantic's "amenability to suit" and ability to pay just compensation violates the Takings Clause and the Natural Gas Act. AV Br. 45-46. But this Court held in *Mountain Valley* that the Commission does not have "the obligation to guarantee" a pipeline's "ability to pay just compensation for any future takings under the" Natural Gas Act. 2019 WL 847199, at *2; *see also* JA__ [Rehearing Order P 85].

Petitioners further theorize that granting Atlantic eminent-domain *authority* violates due process because certain *uses of that authority* might violate due process. AV Br. 48-50. Appalachian Voices' argument amounts to nothing more than an improper collateral attack on individual eminent-domain proceedings. *See, e.g., Atlantic Coast Pipeline, LLC v. 5.63 Acres, More or Less, in Buckingham Cty.*, No. 6:17-cv-84, 2018 WL 1097051 (W.D. Va. Feb. 28, 2018). If Atlantic's use of eminent domain in a particular circumstance violates the Takings Clause,

the forum to address that is the trial-court condemnation proceedings, not the FERC certificate proceedings. "The Commission does not have the discretion to deny a certificate holder the power of eminent domain." *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000). The particulars of the condemnation proceedings are to be left to the trial courts that hear them.

IV. NCUC HAS NO STANDING, AND EVEN IF IT DID, THE RECOURSE RATES ARE NOT ARBITRARY AND CAPRICIOUS.

Finally, NCUC complains of Atlantic and DETI's Commission-approved rates. Pipelines can either charge shippers negotiated rates or FERC-approved "recourse rates." *Alternatives to Traditional Cost–of–Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076, 61,241 (1996). The recourse rate is based on "(1) the pipeline's cost of doing business; (2) the 'rate base,' . . . and (3) a rate of return." *Sabal Trail*, 867 F.3d at 1376 (citation omitted). The rate of return "has two main components[:]" a return on equity and interest on debt. *Id.*

NCUC argues that the Commission's approval for use in the recourse rates of a 14% rate of return on equity for the ACP and a 13.7% rate of return on equity for the Supply Header Project was unreasonable and unduly inflated the companies' recourse rates. NCUC Br. 21-23. But NCUC does not have standing to bring this challenge. And even if NCUC did, the Commission reasonably approved the recourse rates as consistent with the "public convenience and necessity." 15 U.S.C. § 717f(c).

A. NCUC Has Not Proved An Injury Caused By The Commission.

Article III's foundational standing requirements are well known. NCUC fails all of them. NCUC has not proved an injury in fact. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). NCUC alleges that the Commission's failure to adequately review Atlantic's recourse rates will lead to higher rates for North Carolina residents. NCUC Br. 14-15. This ratepayer injury is purely "conjectural." *Lujan*, 504 U.S. at 560 (citation omitted). NCUC cannot identify a single North Carolina ratepayer that will pay a higher rate due to Atlantic or DETI's FERC-approved initial recourse rate. *See NCUC*, 761 F. App'x at 11 (NCUC failed to establish injury-in-fact where it had not "shown that any end-users in" North Carolina "will pay higher rates as a result of the project."). DETI's Supply Header Project feeds directly into the ACP; its only customer is Atlantic. JA__ [Rehearing Order P 7]; JA__ [Certificate Order P 2]. Most of the ACP capacity is already subscribed, JA__ [Rehearing Order P 43], and Atlantic will "provide service to [its] shippers under negotiated rate agreements." JA__ [Certificate Order P 115]. Unless the remaining ACP capacity is subscribed to at a recourse rate by a shipper regulated by NCUC, no North Carolina shipper—and thereby no ratepayer—will pay either pipeline's recourse rate.

Nor has NCUC established that the negotiated rates between Atlantic and the North Carolina shippers are any higher because of the recourse rates. According to

NCUC, without a suitable "recourse" to "serve[ ] as the requisite check on pipeline market power[,] . . . there is *simply no basis to assume* pipeline market power did not taint" the negotiations. NCUC Br. 19-20 (emphasis added). But Article III's concrete-injury requirement cannot rest on an assumption, much less a negative implication *from* an assumption. *See Utility Workers Union of Am. Local 464 v. FERC*, 896 F.3d 573, 578 (D.C. Cir. 2018).

Moreover, NCUC cannot show that any of its claimed injuries were caused by Atlantic and DETI's challenged recourse rates. To establish causation, NCUC would have to present "evidence of a substantial probability that" the approved recourse rates led to higher energy payments for North Carolina residents. *Id.* at 577. But even if NCUC is right about the first step in its chain of causation (that a higher recourse rate inflated the negotiated rates), it had not proved the second (that the inflated negotiated rate was passed along to consumers). NCUC instead asserts that this Court should *assume* that "North Carolina ratepayers" are "responsible for excessive rates passed through by" the North Carolina shippers. NCUC Br. 20.

But the rates North Carolina residents pay are derived from a combination of market forces and utility costs subject to NCUC oversight. *See Frequently Asked Questions: What are the major factors affecting natural gas prices?*, U.S. Energy

Information Administration (June 4, 2019);[5] N.C. Gen. Stat. § 62-131. Absent evidence that inflated recourse rates proceed, lock-step, from FERC to the consumer, NCUC cannot prove causation. And for the same reason, NCUC cannot establish redressability.

B. Even If NCUC Had Standing, The Commission Acted Reasonably When Setting The Rates Of Return For The Projects.

NCUC's arguments fare no better on the merits. FERC supposedly approved Atlantic and DETI's rates under a flawed "hold the line" rationale without looking to individualized evidence. NCUC Br. 21-26. NCUC further contends that FERC did not respond to its comments on Atlantic and DETI's recourse rates. *Id*. at 19-21.

NCUC misunderstands FERC's certificate-issuing authority. To protect the public while "just and reasonable" rates under NGA Sections 4 and 5 are hammered out, Section 7 authorizes the Commission to issue a certificate establishing initial rates based on the "public convenience and necessity." *Atlantic Ref. Co. v. Public Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 389 (1959). Section 7 procedures accordingly "act to hold the line awaiting adjudication of a just and reasonable rate." *Id*. at 392.

[5] *Available at* https://bit.ly/2XlJq3i.

Thus, as FERC explained, the manner in which it established Atlantic and DETI's rates of return on equity "is an appropriate exercise of its discretion . . . to approve initial rates that will 'hold the line.' " JA__ [Certificate Order P 111]; *see also* JA__ [Rehearing Order P 73]. FERC first allowed Atlantic, as a new pipeline facing "higher business risks than existing pipelines proposing incremental expansion projects[,]" to recoup a 14% return on equity. JA__ [Certificate Order P 102]. While FERC's 14%-return-on-equity policy for pipelines with capital structure like Atlantic's is longstanding, *see* JA__ [*Id.* P 100 n.146] (collecting cases), the Commission's *application* of this policy to Atlantic was "not merely 'reflexive.' " JA__ [*Id*. P 102]. Instead, it was a "response to the risk Atlantic faces as a new market entrant." JA__ [*Id*.]. The Commission also responded to NCUC's comments, most of which NCUC just repeats on appeal. *Compare* NCUC Br. 19-26, *with* JA__-__ [Rehearing Order PP 65-73].

FERC repeated this exercise for DETI. DETI's Supply Header Project is an "expansion capacity" project, so the Commission applied its policy of "using the rate of return from its most recent general rate case approved by the Commission under Section 4 of the NGA in which a specified rate of return was used to calculate the rates." JA__-__ [Certificate Order P 110]. The easiest way to "hold the line" pending a new Section 4-approved rate is to use the most recent Section 4-approved rate. This policy, too, is longstanding. JA__-__ [*Id*. P 110 n.163]

(collecting cases). And while FERC may not have responded to NCUC's reiterated contentions in the rehearing order, it responded to the same arguments in the certificate order. JA__-__ [*Id.* PP 107-111]; *cf. Interstate Nat. Gas Ass'n of Am. v. FERC*, 494 F.3d 1092, 1096 (D.C. Cir. 2007) ("[T]he APA requirement of agency responsiveness to comments is subject to the common-sense rule that a response be necessary.") (citation omitted).

V. THE PROPER REMEDY FOR ANY ERROR IS REMAND, NOT VACATUR.

All of the challenges to FERC's Certificate Order and Rehearing Order fall short of merit. But if this Court disagrees with any aspect of FERC's Certificate Order or Rehearing Order, it should remand to the Commission rather than vacate the certificate.[6] *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993). Petitioners' arguments are almost all directed to the Commission's *analysis* of the projects. Those foot faults, if there are any, are fixable through further explanation on remand.

[6] As of this brief, Atlantic and DETI have voluntarily halted construction in light of the ongoing litigation and other agency proceedings. JA__-__ [June 21, 2019 Status Report]. A remand would allow Atlantic and DETI to resume construction when appropriate.

CONCLUSION

For the foregoing reasons and those in the Commission's brief, the non-Atlantic petitions for review should be dismissed in part and otherwise denied.

Respectfully submitted,

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I certify that on June 26, 2019, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

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